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Bruce Babbitt's Use of Governmental Dispute Resolution: A Mid-Term Report Card

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Bruce Babbitt's Use of Governmental Dispute Resolution: A Mid-Term Report Card

*Tom Melling**

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I. INTRODUCTION

[T]he Clinton Administration faces the toughest test of its approach to reconciling conservation and economic development. What started as a search for consensus could end in the traditional fashion, with deeply divided partisans seeking outright victory in court—casting doubt on whether the Administration's consensus-building approach to managing natural resources can succeed.¹

President Bill Clinton swept into Washington promising change and an end to gridlock. His motto is “collaboration, not confrontation,” and his modus operandi is the town hall meeting.² Implicit in his approach is a belief that government can facilitate consensus-building and conflict resolution.³ Following his election, he selected Bruce Babbitt, a former Arizona governor and respected consensus-builder on western issues,⁴ to head the previously “environmentally challenged” Interior Department.⁵ But at the mid-point of the Clinton presidency, Babbitt and the Clinton Administration have had few successes. In Florida, Babbitt's year-long effort working with sugar growers to develop water-quality controls to protect the Florida everglades has not yet produced an out-of-court settlement.⁶ After President Clinton's well-publicized timber summit in Portland, Oregon,⁷ his timber plan still faces possible legal challenges from both loggers and environmentalists.⁸ And western livestock interests, angry at Babbitt's efforts to reform grazing policies, have organized the second coming of the Sagebrush Rebellion.⁹

1. John H. Cushman Jr., *Owl Issue Tests Reliance on Consensus in Environmentalism*, N.Y. TIMES, Mar. 6, 1994, at 28.

2. *Id.*

3. See generally Richard M. Weintraub, *Clinton's Airline Activism: White House Seeks Role in Disputes*, WASH. POST, Nov. 24, 1993, at D1.

4. See *Secretary Babbitt; Winning Them Over*, ARIZONA REPUBLIC, Jan. 27, 1993 at A12 (claiming Babbitt brought consensus-building “to a new level” in Arizona). For a description of then Governor Babbitt's role in developing a consensus solution to groundwater reform, see Desmond D. Connall, Jr., *A History of the Arizona Groundwater Management Act*, 1982 ARIZ. ST. L.J. 313.

5. See Ed Marston, *Can Bruce Babbitt make Interior hum?*, HIGH COUNTRY NEWS, Jan. 25, 1993 at 1, 1 (describing “12 years of bottled up demand for change”).

6. Cushman, *supra* note 1, at 28.

7. Tom Kenworthy, *The Owl and the Lumberjack: Can Clinton Break the Logjam?* *Oregon Conference Tests Ability to Reconcile Economic, Ecological Needs*, WASH. POST, Apr. 2, 1993, at A4.

8. See Cushman, *supra* note 1, at 28.

9. See Tom Kenworthy, *The Lord of the Land; Bruce Babbitt Rode Out of The Mythical Old West. Now He's Loading Up For a Showdown With It*, WASH. POST, Jan. 23, 1994, at F1.

This article uses dispute resolution theory to analyze Secretary Bruce Babbitt's efforts to develop consensus about western resource policy.¹⁰ Part II describes the characteristics of a successful dispute resolution process. Part III applies this framework to two case studies of Babbitt's efforts. The first case study involves a conflict in Alaska between financially beleaguered fishermen and oil companies whom the fishermen blame for their hardships. Babbitt, taking the role of mediator, helped the disputing parties end a showdown in the Valdez Narrows. This case study illustrates the types of situations that are amenable to resolution through consensus. The second case study chronicles Babbitt's efforts to enact grazing reform on federal lands. Again using the framework of part II, this article explains the reasons for his difficulties.

After analyzing why Babbitt's efforts have been relatively unsuccessful, part IV considers whether consensus is an appropriate goal for environmental policy. This section concludes that consensus should only be sought when it is likely to produce mutual gain for all parties—particularly disputes that do not involve parties' fundamental values. More important, if a government seeks to develop consensus among conflicting groups, it must make its dispute resolution process voluntary.

II. CHARACTERISTICS OF A SUCCESSFUL DISPUTE RESOLUTION PROCESS

President Clinton's goal of maintaining environmental quality while preserving jobs reflects a larger movement in American society away from confrontation toward consensus-building.¹¹ As Americans

The Sagebrush Rebellion was an effort in the early 1980s to privatize federal lands or alternatively to give state title to federal lands. Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective on the Sagebrush Rebellion*, 12 ENVTL. L. 847, 848 (1982). Although characterized as the second coming of the Sagebrush Rebellion, the two movements are different. The Sagebrush Rebellion was an offensive maneuver to take control of federal lands; the current effort is a defensive movement to protect existing government programs and subsidies. Unfortunately, some Westerners may believe defensive action includes violence. See Steve Yozwiak, *Ranchers: Grazing Plan Could Spark Range War: Cattlemen Suspicious of New Rules, Fees*, ARIZ. REP., Aug. 7, 1994 at A1, A10 (describing Catron County's resolution calling for all residents to maintain firearms in response to Babbitt's proposals).

10. Almost all dispute resolution literature concerns private means to resolve conflict, such as using a mediator or arbitrator. See generally JOHN S. MURRAY, ALAN SCOTT RAU, & EDWARD F. SHERMAN, PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS (1989). The notion that government itself can facilitate dispute resolution has received less study. For a description of how government can be an effective mediator for conflicting interest groups, see Tom Melling, *Dispute Resolution Within Legislative Institutions*, 46 STAN. L. REV. 1677, 1700-03 (1994).

11. DOUGLAS AMY, THE POLITICS OF ENVIRONMENTAL MEDIATION 10-12 (1986); Bernie Jones, *A Comparison of Consensus and Voting in Public Decision Making*, 10 NEGOTIATION J. 161, 161 & n.1 (1994).

search for collaborative solutions to their disputes, scholars and academics have written extensively about the processes that are most likely to produce consensus. Indeed, a large body of literature specifically discusses environmental dispute resolution.¹² Although this literature contains some variations, general agreement exists about the attributes of a successful dispute resolution process.¹³ This section outlines four attributes—voluntariness, participation, identification of interests, and the development of options—and discusses why they are needed to build a consensus.

Before describing these four attributes, however, it is important to understand the advantages to a cooperative resolution of conflict, that have made dispute resolution increasingly popular. At the heart of dispute resolution research lies the following question: Why does conflict persist when disputing parties could make themselves better off by cooperating?¹⁴ Often disputing parties overlook or never have an opportunity to discover joint gains. In fact, there are many building blocks that can produce joint gains. For example, parties may have shared interests.¹⁵ Parties can also

12. See, e.g., LAWRENCE BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION (1984); JANE MCCARTHY & ALICE SHORETT, NEGOTIATING SETTLEMENT, A GUIDE TO ENVIRONMENTAL MEDIATION (1984); SCOTT MERNITZ, MEDIATION OF ENVIRONMENTAL DISPUTES: A SOURCEBOOK (1980); ALLAN R. TALBOT, SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION (1983); Barbara H. Kelly, *Alternative Dispute Resolution of Environmental Insurance Coverage Claims*, 691 PLI/COMM 511 (1994); Edward J. Costello, Jr., *Alternative Dispute Resolution in California: An Overview*, 504 PLI/LIT 221 (1994); Stephen Crable, *ADR: A Solution for Environmental Disputes, Mediation*, 48 MAR. ARB. J. 24 (1993); Eric R. Max, *Confidentiality in Environmental Mediation*, 2 N.Y.U. ENVTL. L.J. 210 (1993); Melanie J. Rowland, *Bargaining for Life: Protecting Biodiversity through Mediated Agreements*, 22 ENVTL. L. 503 (1992).

13. See Bryan M. Johnston & Paul J. Krupin, *The 1989 Pacific Northwest Timber Compromise: An Environmental Dispute Resolution Case Study of a Successful Battle That May Have Lost the War*, 27 WILLAMETTE L. REV. 613, 624-25 (1991). Some dispute resolution scholars prescribe a long list of specific requirements needed for a successful dispute resolution process. For example Lawrence Susskind has a list of nine required steps, such as setting a timeline for the process, jointly weighing judgments about costs and benefits, and ensuring the legality and financial feasibility of bargains. Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 14 (1981). This paper takes the position that a dispute resolution process can be more flexible than the one Susskind prescribes, but the four characteristics discussed in this section ordinarily must be satisfied. At a minimum, all the parties must agree on the process to be used. Jones, *supra* note 11, at 168.

14. See Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 238 (1993). The labor strike between Easter Airlines and its Union, Texaco's battle with Pennzoil over Getty Oil, and Art Buchwald's lawsuit against Paramount Pictures over the movie "Coming to America" are a few prominent examples where alternative action would have benefited both parties. *Id.* at 236-38.

15. DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 106-111 (1986). In many situations,

create value from differences.¹⁶ Differences in valuation create the opportunity for joint gains from trade. Differences in probability assessment can be the basis for contingency agreements. And differences in risk aversion can lead to risk-sharing schemes.

Because parties often fail to realize joint gains, dispute resolution scholars try to identify barriers that prevent parties from using these building blocks—that is, barriers that prevent the cooperative resolution of conflict.¹⁷ There are many types of barriers, including strategic, psychological, and institutional barriers.¹⁸ Strategic barriers arise when individual parties, acting in their rational self interest, achieve outcomes that are collectively deficient. Relevant to this article is a strategic barrier known as the negotiator's dilemma.¹⁹ In a negotiation, each side confronts a tension: A party can try to create value by honestly communicating interests and exploring possible joint gains, or a party can try to claim value by concealing her true interests, making threats, taking positions, and misleading other parties. Revealing true preferences and interests, however, can make one vulnerable to claiming tactics. Thus, it appears rational for a negotiator to deceive, mislead, and conceal. But when both sides use claiming tactics, joint gains are often left on the table. Also relevant to this article are psychological barriers that impede rationale cooperation.²⁰ For example, environmentalists and ranchers have been disputing for decades, and both may

parties do not realize that they have shared interests. *Id.* at 107. Parties may also be able to create joint gains from economies of scale. *Id.* at 111-12.

16. *Id.* at 92-105. The international law of the sea treaty is an example of how parties can dovetail differences. *Id.* at 102-104.

17. The Stanford Center on Conflict and Negotiation has helped develop the concept of barriers as a useful framework to study conflict and the resolution of conflict. Robert H. Mnookin & Lee Ross, Introduction, in *BARRIERS TO THE NEGOTIATED RESOLUTION OF CONFLICT* (Kenneth Arrow et al., eds., Norton Press, 1995) (manuscript at 5).

18. *Id.* It is also important to understand what is *not* a barrier to the cooperative resolution of conflict. If a party's best alternative is unilateral action rather than negotiation (or another form of dispute resolution), this may be a "barrier" to negotiation, but it is not a "barrier to the cooperative resolution of conflict." On the other hand, parties often mistakenly believe that the best alternative is unilateral action. LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING DISPUTES* 27 (1987). This is a barrier to the cooperative resolution of conflict. For further discussion on this distinction, see Melling, *supra* note 10, at 1680 n. 20.

19. LAX & SEBENIUS, *supra* note 15, at 29-45. The negotiator's dilemma is modeled after the more famous prisoner's dilemma. See, e.g., ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 7-11 (1984). The dominant strategy is to "defect" rather than "cooperate," but when both defect, each receives a suboptimal result. Lax and Sebenius also suggest ways to manage the negotiator's dilemma. LAX & SEBENIUS, *supra* note 15, at 154-82.

20. See generally Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 *NEGOTIATION J.* 389 (describing loss aversion, reactive devaluation, and other psychological phenomena).

feel more comfortable with conflict than with a cooperative style where both sides work together to find cooperative gains.²¹

Having identified various barriers, it is possible to recommend negotiating styles and processes that help parties overcome these types of barriers and engender a cooperative negotiating atmosphere.²² In fact, most of the popular dispute resolution literature is devoted to recommending styles and processes.²³ The rest of this part describes four attributes of a dispute resolution process that help disputing parties identify cooperative solutions which leave both parties better off than unilateral action.

A. Voluntary Process

The most important attribute of a process designed to produce consensus is voluntariness.²⁴ Voluntariness means that parties are free to participate or withdraw from a process.²⁵ Voluntariness ensures that parties will engage in a process openly rather than defensively:

21. Michael Riley, *Babbitt gambled, got conflict*, CASPER STAR-TRIBUNE, May 18, 1994 at A1, A10. See also Todd B. Carver & Albert R. Vondra, *Alternative Dispute Resolution: Why it doesn't work and why it does*, HARVARD BUSINESS REVIEW, May-June 1994, 120, 123 (describing how competitive approaches to dispute resolution are ingrained in corporate culture); Jones, *supra* note 11, at 163 (citing M. Avery, B. Auvine, B. Streibel, and L. Weiss, *Building United Judgement—A Handbook for Consensus Decisionmaking* (1981)). Clinton exacerbated ranchers' distrust and antagonism towards grazing reform when he unilaterally tried to raise grazing fees in the 1993 budget bill. Jill Lawrence, *War on the West*, THE SHERIDAN PRESS, June 7, 1994 at B1. From a strategic perspective, it was a poor decision. *Id.* The negotiator's dilemma suggests that the most effective strategy for achieving joint gains is TIT-for-TAT, which requires a friendly or cooperative first move. LAX & SEBENIUS, *supra* note 15, at 158-60.

22. See, e.g., Mnookin, *supra* note 14, at 248-49 (describing how mediators can help overcome strategic, principal/agent, cognitive, and reactive devaluation barriers); Melling, *supra* note 10, at 1682-1709 (describing barriers in legislative institutions and ways to overcome the barriers).

23. LAX & SEBENIUS, *supra* note 15, at 112-14. Some of the popular literature includes: THOMAS E. CROWLEY, *SETTLE IT OUT OF COURT: HOW TO RESOLVE BUSINESS AND PERSONAL DISPUTES USING MEDIATION, ARBITRATION, AND NEGOTIATION* (1994); ROGER FISHER & SCOTT BROWN, *GETTING TOGETHER: BUILDING A RELATIONSHIP THAT GETS TO YES* (1988); ROGER FISHER, ELIZABETH KOPELMAN, ANDREA KUPFER SCHNEIDER, *BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT* (1994); ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 62-79 (1981); WILLIAM URY, *GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE* (1991); WILLIAM L. URY, JEANNE M. BRETT, STEPHEN B. GOLDBERG, *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS* (1988).

24. See generally SUSAN L. CARPENTER & W.J. KENNEDY, *MANAGING PUBLIC DISPUTES* (1988).

25. Jones, *supra* note 11, at 168.

Making a unilateral decision and then informing a group (whose members are already irritated about some public policy matter) that they will work for consensus probably does little to predispose people to be agreeable. It would be better to convey to the group a sense of the alternative approaches available for decision making given the specific situation (e.g. type of issue, time constraints, numbers of stakeholders, etc.), and then have the group come to a decision about which path to pursue.²⁶

In addition, voluntariness means that the interested parties, not outsiders, must set the agenda.²⁷ Each side must have the autonomy to pursue alternatives that are in their self-interest—alternatives that they can genuinely support. If a dispute resolution process is not voluntary, conflict will very likely continue.²⁸

The 1989 Pacific Northwest “timber compromise” demonstrates how a lack of voluntariness will destroy attempts to develop a consensus. For many years environmentalists had been battling the Forest Service and timber interests over logging policies in the old growth forests of the Pacific Northwest.²⁹ Beginning in the late 1980s, environmentalists won a series of court cases against the Forest Service for its “deliberate and systematic refusal” to protect the threatened Northern Spotted Owl.³⁰ These judicial opinions forced the Forest Service and BLM to reduce the number of scheduled and approved timber sales.³¹ The reduced cuts threatened thousands of timber jobs and timber harvest revenues for rural

26. *Id.* at 168-69.

27. *Id.*

28. See Jonathan Brock, *Mandated Mediation*, 2 VILL. ENVTL. L.J. 57 (1991). Brock argues that it is difficult to successfully institutionalize dispute settlement mechanisms that rely on negotiated settlements between conflicting interests. Instead, he suggests it is better to find other means to make dispute resolution processes more easily available and to create a greater understanding and acceptance of dispute resolution processes in public policy arenas.

29. See CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST*, 156-67 (1992).

30. *Seattle Audubon Society v. Evans*, 771 F. Supp. 1081, 1089 (W.D. Wash. 1991). Some of the important timber cases include *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988) (holding that the Fish and Wildlife Service acted arbitrarily in denying the petition to list the spotted owl); *Seattle Audubon Society v. Robertson*, 914 F.2d 1311 (9th Cir. 1990) (upholding preliminary injunction of timber sales); and *Seattle Audubon Society v. Evans*, 771 F. Supp. 1081, 1091 (W.D. Wash. 1991) (finding that the Forest Service violated the National Forest Management Act), *aff'd* 952 F.2d 297 (9th Cir. 1991). For an academic description of the court cases, see Michael Blumm, *Ancient Forests, Spotted Owls, and Modern Public Land Law*, 18 B.C. ENVTL. AFF. L. REV. 605 (1991).

31. Johnston & Krupin, *supra* note 13, at 621 & n.41.

communities.³² Consequently, Oregon's political delegation organized a "timber summit" to bring environmentalists and timber interests together to resolve the timber conflict. The summit was billed as a "mediation-like, non-litigious dispute resolution process."³³ In fact, Oregon's politicians had a much different plan. After both environmentalists and timber lobbyists made their opening statements, Oregon's politicians announced that they had hammered out a "compromise" proposal, which they intended to attach to an upcoming appropriations bill.³⁴ The summit proposal surprised both timber interests and environmentalists. Although the timber interests wanted more time to study the proposal, they gave their reluctant support.³⁵ Environmentalists refused to endorse the "compromise." They contended that the "compromise" cleared the way for continued logging without solving the underlying problems of forest management and spotted owl protection.³⁶ This disingenuous dispute resolution process never had a chance to develop a consensus—or even a "compromise"—because it violated the requirements of voluntariness. First, environmentalists never had an opportunity to withdraw before the "compromise" was announced. Second, timber interests and environmentalists never had an opportunity to structure the agenda. Furthermore, the Timber Summit failed to produce a consensus because the parties were excluded from the decision making process, the second attribute that is described below.

B. Participation By Interested Parties

In order to develop consensus, interested parties must have an opportunity to partake in the process that creates the consensus.³⁷ If a party is excluded from a process, any proclaimed resolution almost certainly

32. *Id.* at 615.

33. *Id.* at 615.

34. *Id.* at 631-32 & n.87. The "compromise" became section 318 of The Interior and Related Agencies, Appropriation Act for Fiscal Year 1990, Pub. L. No. 101-121, 103 Stat. 701, 745-750 (1989). This appropriations bill amendment is known as the "Hatfield rider." See Linda M. Boldwan, *Comment: The Hatfield Riders: Eliminating the Role of Courts in Environmental Decision Making*, 20 ENVTL. L. 329 (1990). Although the "compromise" was clearly a sham, the Supreme Court may have considered it important in *Robertson v. Seattle Audubon Society*, 112 S. Ct. 1407, 1408 (1992) (referring to the "Northwest Timber Compromise" and holding that the "rider" amendment was valid). Although the "Hatfield rider" appeared to be a loss for the environmentalists, the timber-harvesting injunctions ultimately were not affected. See WILKINSON, *supra* note 29, at 335, endnote 86.

35. Johnston & Krupin, *supra* note 13, at 615, 632. Timber interests were "curiously silent during the period after the signing of the bill by the President." *Id.* at 637.

36. See *id.* at 632-636 (describing how the environmentalists were "outraged and incensed by the proposal").

37. Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L. J. 1, 44 (1982).

will not satisfy their interests.³⁸ For example, at the Northwest Timber Summit, environmentalists never had a chance to participate in the negotiations that produced the "compromise."³⁹ They had no stake in the final result and consequently not only refused to support it, but also fought it in the courts.⁴⁰

The requirement that all groups must have an opportunity to participate in the process, however, can cause complications. If a large number of parties are involved, collaborative dispute resolution becomes infinitely more complicated and often fails.⁴¹ For example, agency rulemaking by mediation may not be appropriate for disputes concerning more than fifteen groups.⁴² A related problem arises with the selection of appropriate representatives for large decentralized groups. Members of a large group may have differing viewpoints that cannot be expressed by a single voice or representative. If a group does not have a binding process to select a representative, various factions may not consent to the final outcome.⁴³

C. Identification of Interests

"Identify interests, not positions." This well-known aphorism was penned by Roger Fisher and William Ury.⁴⁴ When parties engage in positional bargaining, they often fail to hear and understand the interests of the other parties, which can create a misunderstanding about the conflict's real issues. Moreover, "positions beget counterpositions," and this type of exchange ultimately leads to compromises that may not satisfy the parties' underlying interests.⁴⁵ Focusing on interests rather than positions helps

38. Even if a proclaimed resolution did satisfy a party's interest, they may reject it because of the "reactive devaluation" barrier. See *infra* text accompanying notes 49-50.

39. Johnston & Krupin, *supra* note 13, at 630-32. Timber interests were also excluded from the negotiations, but they chose to grudgingly accept the proposal. See *supra* note 35.

40. See Johnston & Krupin, *supra* note 13, at 638-40.

41. See HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 257, 273 (1982); Note, *Rehinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871, 1878 (1981). When disputes involve many parties, complicated procedural rules are generally needed to maintain order. RAIFFA, *supra* note 41, at 299.

42. See Harter, *supra* note 37, at 47 (suggesting that agency rulemaking through mediation, should be limited to disputes involving 15 or less groups). On the other hand, EPA's experience with mediating superfund disputes suggests that "the number of parties involved in a Superfund mediation does not appear to correlate with the success or failure of mediation to produce a final settlement agreement." Lynn Peterson, *The Promise of Mediated Settlements of Environmental Disputes: The Experience of EPA Region V*, 17 COLUM. J. ENVTL. L. 327, 375-76 (1992).

43. See Lawrence Bacow & Michael Wheeler, *Binding Parties to Agreements in Environmental Disputes*, 2 VILL. ENVT. L.J. 99 (1991).

44. FISHER & URY, *supra* note 23, at 62-79.

45. FISHER & BROWN, *supra* note 23, at 144.

reduce claiming tactics that create the negotiator's dilemma.⁴⁶ Although an important and seemingly obvious characteristic of dispute resolution efforts, attention to interests can be forgotten or ignored. For example, in the dispute over grazing reform discussed in the next section, many national environmental organizations pressed the position of raising grazing fees rather than their interest in better range management.⁴⁷ In fact, environmentalists and ranchers do share a common interest in better range management, but this position-taking created confrontation rather than an open discussion of common interests.⁴⁸

D. Development of Possible Solutions and Options

One of the barriers to successful resolution of conflict is a psychological phenomena known as reactive devaluation.⁴⁹ When a concession or proposal is made by a perceived adversary, the person considering the concession or proposal is likely to value it less favorably simply because it is coming from his perceived adversary. Moreover, a compromise is rated less highly after it has been suggested by the other side than before it is proposed.⁵⁰ Consequently, most scholars believe that an important part of any dispute resolution process is the neutral development of possible solutions and options.⁵¹ This is accomplished by collaborative brainstorming. To help prevent the problem of reactive devaluation, scholars urge that the brainstorming should place in an atmosphere without evaluation, which can lead to criticism and defensive reactions. In addition to solving the problems associated with reactive devaluation, the development of options often fosters creative new solutions. By working together, adversaries can discover unforeseen ways to resolve a conflict that satisfy their respective interests.⁵²

46. See *supra* text accompanying note 19.

47. Most local environmental groups did emphasize their core interest in the health of the range. See, e.g., "[a]s we have stated in other forums, we believe [grazing] fees are the least important factor in the rangeland reform package. The economics of ranching is much less important than the ecology of ranching." Letter from June Rain, Executive Director, *Wyoming Wildlife Federation* 4, to Jim Baca, Director, *Bureau of Land Management* (Sept. 13, 1993) (on file with the *Land & Water Law Review*).

48. See *infra* note 106.

49. Ross & Stillinger, *supra* note 20, at 400.

50. *Id.*

51. See SUSAN M. LEESON & BRYAN M. JOHNSTON, *ENDING IT: DISPUTE RESOLUTION IN AMERICA* (1988).

52. See FISHER & URY, *supra* note 23, at 62-79. For an example of how environmentalists and water users worked together to craft new solutions to water conflicts, see Tom Melling, *The CUP Holds the Solution: Utah's Hybrid Alternative to Water Markets*, 13 J. ENERGY, NAT. RESOURCES, & ENVTL. L. 159, 202-205 (1993).

III. TWO CASE STUDIES OF SECRETARY BABBITT'S EFFORTS

The preceding section described how voluntariness, participation, identification of interests, and the development of options are fundamental characteristics of a successful dispute resolution process. This section, applying the above characteristics, analyzes Secretary Babbitt's efforts to develop consensus about environmental policy. It draws from two contrasting case studies. The first concerns a dispute that arose in Alaska between local fishermen and oil companies. Here the process satisfied all of the attributes, and Babbitt was able to successfully resolve the dispute. The second case study examines his repeated efforts to reform grazing policies on federal land. Babbitt has struggled primarily because his processes have lacked the characteristics needed for a successful dispute resolution process.

A. Case Study #1: Babbitt Mediates Alaska Fishermen's Battle With Oil Companies

On March 24, 1989, the Exxon Valdez oil tanker ran aground on Bly Reef, contaminating one of the country's most sensitive ecosystems with approximately eleven million gallons of crude oil.⁵³ The spill, the largest in the history of the United States, devastated wildlife in the Prince William Sound, and scientists may not know the full effect of the damage for many years.⁵⁴ In the wake of the spill, Exxon pleaded guilty to four misdemeanors under three federal environmental laws, and settled a civil suit with the federal government for \$900 million.⁵⁵ Although the image of oil covered otters has receded from the public's mind, for the seine fishermen who make their living in the Prince William Sound, the fight against Exxon has grown more desperate. During the past three years, pink salmon runs have collapsed, and many fishermen face bankruptcy. They may ultimately win their private claims against Exxon, but their cases have not been finally resolved.⁵⁶ In August of 1993, their

53. See generally Hodgson, *Alaska's Big Spill—Can the Wilderness Heal?*, NAT'L GEOGRAPHIC, Jan. 1990, at 5.

54. *Id.* at 26.

55. *Federal Judge Accepts \$1 Billion Settlement, Ends Two-year Litigation in Exxon Oil Spill*, BNA, ENV. REPORTER, Oct. 11, 1991, Vol. 22 No. 24, at 1533. The three environmental laws were the Clean Water Act, 33 U.S.C. §§ 1251 to 1387 (1988), the Refuse Act, 33 U.S.C. § 407 (1988), and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 to 715 (1988). *Id.* As part of the guilty plea, Exxon was assessed criminal fines and restitution of \$250 million, but the Justice Department said it agreed to "remit" to Exxon \$125 million in recognition of the money already "voluntarily spent by Exxon to address the consequences of the spill." *Id.*

56. The fishermen have won some early rounds in their litigation. In August, a federal jury awarded over \$286.7 million to commercial fishermen for compensatory damages. 24

struggle against Exxon erupted into a face-to-face showdown with the oil companies in the Valdez Narrows. This section describes the events that led to the showdown, and how Bruce Babbitt, acting as a mediator, was able to resolve the situation.

Dismal pink salmon harvests in the years following the oil spill have mired the seine fishermen in a deep recession. Pink salmon runs historically produced approximately 20 million fish annually, but the expected catch for 1993 was less than 5 million.⁵⁷ In monetary terms the 1993 harvest was expected to be worth less than \$2.5 million, down from an average of more than \$30 million in the late 1980s.⁵⁸ In 1992, the harvest was less than 10 million pink salmon.⁵⁹ And while the 1991 harvest was listed at 37 million, on paper one of the largest in history, the harvest was largely wasted due to a chemical deformity that disrupted the harvest and processing.⁶⁰ Consequently, hundreds of Prince William Sound fishermen now face bankruptcy and the loss of their livelihoods.⁶¹ They are at the mercy of banks and lending agencies who hold mortgage notes on their fishing boats.⁶² A "position

ENVTL. L. REP. 10335 (1994) (citing *In re Exxon Valdez*, No. A89-00995-CV (HRH) (D. Alaska Aug. 11, 1994)). In September, the jury awarded \$5 billion in punitive damages. Thomas S. Mulligan & Michael Parrish, *Exxon Ordered to Pay \$5 Billion for Oil Spill*, L.A. TIMES, September 17, 1994, at A1. The fishermen have also suffered some defeats: the district court dismissed the fishermen's claims based on decreased salmon prices and the decreased value of their fishing permits and vessels and dismissed the claims by local fishing businesses because they failed to show a connection between physical damage from the oil spill and economic losses. 24 ENVTL. L. REP. 10335 (1994) (citing *In re the Exxon Valdez*, No. A89-00995-CV (HRH) (D. Alaska Mar. 23, 1994)).

57. Hal Bernton & Lisa Scagliotti, *Sound salmon run crashes*, ANCHORAGE DAILY NEWS, Aug. 18, 1993, at A1.

58. *Id.*

59. Brian Bue, Stephen Fried, Samuel Sharr & Mark Willette, *Pinks in Peril: Declining Wild Stocks in Prince William Sound*, ALASKA'S WILDLIFE, Jan./Feb. 1993, at 34, 35.

60. Tony Bickert, *Protest shuts port, may be repeated*, VALDEZ VANGUARD, Aug. 26, 1993, at 1, 8. Because of the chemical deformity, the pink salmon began their spawning runs late and strayed from natal streams. Scientists believe this behavior was probably caused by "oil-related damage to olfactory tissue, imprinting mechanism or confusion of chemical cues." Dr. Riki Ott & Prof. Rick Steiner, *Background Information Concerning the Long-Term Impacts of the Exxon Valdez Oil Spill on Prince William Sound Fisheries*, Sept. 21, 1993 (paper on file with author). Because the fish were three weeks late when they finally found their way, their meat had spoiled and fisherman could not profit from the run. Bickert, *supra* note 60, at 8.

61. The poor fishing affected the local economy because "there's no money in town, so nobody's buying." See Bernton & Scagliotti, *supra* note 57, at A1, A8. In addition, the seine fishermen were suffering from failed herring runs. Ellen Lockyer, *Pink Jitters in PWS*, ALASKA FISHERMAN'S J., Sept. 1993, at 11.

62. Hall Bernton, *Another Depressing Run in Prince William Sound Has Fishermen Sinking*, WASH. POST, Oct. 28, 1993, at A3. Some financial problems were caused when fisherman chartered boats to Exxon during the oil spill cleanup and used the money to buy expensive new boats as part of a tax shelter. Now those fishermen are squeezed between

statement” at a community meeting on August 17, 1993 expressed their emotions:

We are stunned and angry as we now shoulder the third successive run failure of pink salmon to the Sound. We are still reeling from the failure of herring to return to the Sound this spring. Prince William Sound is sick and as a consequence our families, our way of life, and communities are in serious jeopardy.⁶³

The fishermen blamed the Exxon Valdez spill for the Sound's ailing pink salmon runs.⁶⁴ Exxon contended that the spill had “no measurable short- or long-term impact on the Sound pink salmon population” and that Exxon has “no intentions” to respond to the fishermen's demands.⁶⁵ Finally, faced with Exxon's stonewalling and exasperated with the fishing returns,⁶⁶ the fishermen decided to organize a protest to bring attention to

big boat payments and low fish harvests. Others bought fishing permits during the late 1980s when permits cost about \$280,000. Today the value of an Alaska fishing permit has plummeted to about \$60,000. *Id.*

63. Position Statement/Fisherman's Meeting of 8/17/93 (on file with author).

64. In spite of the precipitous drop in pink salmon runs, scientists have struggled to identify a link between the oil spill and the poor runs. See Bue et al., *supra* note 59, at 35.

65. Bickert, *supra* note 60, at 8. Exxon repeatedly argues that the pink salmon runs were not affected by the oil spill, pointing to the high harvests in 1990 and 1991, which totaled 44 million and 37 million. These harvest numbers, however, are deceptive. Elevated ocean temperatures and abundant food in 1989 and 1990 led to large adult runs in 1990 and 1991. Nevertheless, the 1990 record harvest was 20-25% lower than expected because of the oil spill. Ott & Steiner, *supra* note 60; see also Bue et al., *supra* note 59, at 35. Exxon also contends that since 80% of pink salmon are hatchery fish, which were unaffected by the spill, “[t]he oil spill could not account for these low returns.” Bickert, *supra* note 59; see also Ellen Lockyer, *Seiners Shut the Valve in Valdez*, ALASKA FISHERMAN'S J., Oct 1993, at 16, 31. This argument is flawed in several respects as well. First, the hatchery fish swam through the spill area during migration. Bickert, *supra* note 60, at 8. Second, pink salmon have a two year life cycle. Fish caught in the 1992 harvest, which was less than 30% of normal, migrated through the oil in 1989. Ott & Steiner, *supra* note 60. Finally, Exxon argues that both ocean temperatures and food abundance were low during the 1991 year. While scientists agree that these would affect harvest levels, unfavorable natural conditions do not account for the extremely low harvests in 1992 and 1993. Bue et al., *supra* note 59, at 35.

Exxon also argues that it has voluntarily addressed the fishermen's legitimate claims, and any additional compensation will have to be obtained through the court system. Lockyer, *supra* note 65, at 31. Exxon had paid a total of \$300 million to fishermen for damages and has paid another \$80 million to charter boats and operators during the clean-up. Bickert, *supra* note 60, at 8.

66. A press release by the fishermen described the frustrations that led to their blockade of the Valdez narrows:

This year, due to unprecedented low fish returns, [Prince William Sound] fishermen were confined to fishing areas that look like postage stamps. Today's demonstration was conceived 3 days ago, while frustrated fishermen repeatedly waited in 6 hour lines for a 30 minute turn to catch a bag of fish worth less than the fuel they burned to catch them.

Press Release by Prince William Sound Fishermen, Aug. 20, 1993 (on file with author).

their plight.⁶⁷ By blockading the Valdez Narrows, a skinny passageway through which tankers must pass to reach the oil terminal at the end of the trans-Alaska pipeline, the fishermen hoped to obtain three objectives. First, they wanted the federal government and Alaska to offer financial assistance to help carry them through this difficult situation. Second, they wanted assurances that some of the money from the Exxon settlement fund will be used to study the damaged pink salmon runs and begin meaningful restoration.⁶⁸ And third, they wanted Exxon to “genuinely undertake to address their legal responsibilities to the fishermen and communities they have injured.”⁶⁹

On August 20, 1993, approximately eighty-seven boats, many of them carrying signs that read “No more Exxon lies,” strung across the Narrows. Their target was an Exxon tanker, the Baton Rouge. The fishermen planned to break up the blockade when the tanker approached, then escort the tanker into Port Valdez. But the Baton Rouge had been forewarned and failed to make its scheduled run into port. After learning that Exxon had delayed passage of the Baton Rouge, the fisherman decided to expand the protest to block all tankers. What started as a symbolic protest had turned into a white-knuckle standoff. The next day British Petroleum tried to send through its tanker, the Atigun Pass. After coming within five miles of the phalanx of fishing ships, the tanker turned around.

By Saturday afternoon, the situation was nearing a critical stage at the Valdez Marine Terminal. Three tankers waited in the Prince William Sound, and three more were scheduled to arrive on Sunday. The oil storage tanks, which were nearing capacity, could only hold a couple of days of oil supplied by the trans-Alaskan pipeline.⁷⁰ Had they filled, Alyeska would have been forced to shut down the pipeline, which has not been attempted since the pipeline was constructed. Given the seriousness of the situation, representatives of the fishermen met with representatives of Arco and British Petroleum, as well as with Governor Hickel of Alaska. Exxon officials refused to participate in the negotiations. The meeting at the city council chambers ended in a shouting match with the fishermen still demanding that they meet with Exxon.⁷¹

67. My description of the showdown, unless otherwise stated, comes from Bickert, *supra* note 60, and Lockyer, *supra* note 65, at 16.

68. A recent Government Accounting Office (GAO) report found that most of the settlement money spent had either gone to reimbursing state and federal agencies for clean-up costs or administrative costs. See GAO, *Natural Resources Restoration: Use of Exxon Valdez Oil Spill Settlement Funds*, Aug. 20, 1993, at 3; see also Pamela A. Miller, *Mis-spending Oil-Spill Money in Alaska*, N.Y. TIMES, Aug. 24, 1993, at A15.

69. Position Statement/Fishermen's Meeting of 8/17/93 (on file with author).

70. Bickert, *supra* note 60, at 8.

71. The information about the meetings with ARCO and British Petroleum repre-

After receiving an urgent call from Governor Hickel, Babbitt flew on Sunday morning to mediate the dispute. Babbitt immediately kicked the press out of the meetings, ending the posturing by the fishermen and oil company representatives. After meeting first with the fishermen and learning of their plight and demands, Babbitt then met separately with the Alaskan officials and oil company representatives. Although Exxon still refused to come to the bargaining table, by Sunday afternoon Babbitt helped the fishermen and other parties resolve the standoff. The fishermen agreed to lift the blockade. In return Governor Hickel pledged to look for ways to obtain financial aid for the fishermen. Both Governor Hickel and Babbitt promised to "urge federal and state trustees who oversee the \$900 million civil spill settlement fund to buy more land to protect salmon-spawning streams in Prince William Sound and to aid local hatcheries." And Babbitt vowed to press Exxon to meet with the fishermen about their pending lawsuits.⁷²

By helping the parties end the blockade, Bruce Babbitt made both parties better off.⁷³ Babbitt succeeded because the process satisfied the four attributes described in Part I. Unlike the grazing controversy, however, Babbitt was not the architect of the process. Instead, he was an outsider thrown into the role of mediator. First, voluntariness was satisfied because the parties were free to participate or leave, and set their own agenda. Although the parties pressured each other into negotiation, Babbitt himself did not use the government's leverage and influence to coerce negotiation or a "consensus." Second, nobody was excluded from the process who wanted to participate. Fortunately, the parties who did participate found a way to end the blockade. Finally, by kicking out the press, the participating parties were able to discuss interests and develop options that satisfied their respective needs.

sentatives came from an interview with a fisherman who participated in the protest and negotiations, Wash. D.C. (Mar. 15, 1994).

72. *Fishermen to Lift Oil Blockade*, N.Y. TIMES, Aug. 23, 1993, at B7.

73. Both the oil companies and the fishermen gained by ending the blockade. The oil companies who negotiated with the fishermen gained because had the fishermen continued the blockade much longer, Aleyeska would have been forced to shut down the pipeline. See Bickert, *supra* note 60, at 8. Although Exxon refused to negotiate or recognize the fishermen's claims, the fishermen achieved their other goals—promises from state and federal officials to help alleviate their financial crisis and to improve fishing runs. See *supra* text accompanying note 68. In addition, ending the blockade probably spared the fishermen up to \$25,000 in fines and up to six years in prison. Lockyer, *supra* note 65, at 19. Although the Coast Guard threatened to charge the fishermen with violating 10 civil and criminal laws, see letter from United States Coast Guard to Jim Gray, Sept. 8, 1993 (on file with author), the Coast Guard decided to avoid the spectacle of "74 people turn[ing] themselves in to be put in jail in front of national television." *Blockade fishermen may face fines from Coast Guard*, ANCHORAGE DAILY NEWS, Sept. 30, 1993, at E1 (statement by Jim Gray, a Cordova seine fisherman).

On the other hand, Babbitt obviously did not resolve the larger dispute between the fishermen and Exxon concerning the health of the Sound and whether Exxon should take responsibility for any damage. This, however, was not the result of a faulty process. Exxon simply decided that litigation rather than negotiation was their best alternative.⁷⁴

B. Case Study #2: Babbitt's Attempt to Implement Grazing Reform

This case study describes a controversy between western ranchers and environmentalists. Although both ranchers and environmentalists believe that there are problems with the current grazing rules, Secretary Babbitt has not found much common ground. Unlike the dispute in Alaska, both sides are skeptical of Babbitt's plan calling for local ranchers and environmentalists to reach a consensus on how to manage grazing. Consensus has been elusive partly because the legions of ranchers and numerous environmental groups do not each speak with one voice.⁷⁵ Moreover, there is not a mechanism to create representation for the various interests. Consequently, it is difficult if not impossible to establish a process in which all the affected interests participate and control the outcome. Nevertheless, Babbitt's failure to achieve consensus stems primarily from the use of a flawed dispute resolution process.⁷⁶

74. In other words, Exxon believed its Best Alternative to Negotiated Action was unilateral action (i.e., refusing to negotiate). For an explanation of BATNA, see *infra* note 156. Although Exxon's decision prevented all the parties from negotiating, their action is not a "barrier to cooperative dispute resolution" as defined in this article. See *supra* note 18.

75. See *infra* note 47; see also BACOW & WHEELER, *supra* note 12; SUSSKIND & CRUIKSHANK, *supra* note 18, at 101-04 (commenting on the difficulty of finding a representative who has the authority to bind the group for which he speaks); see also Mnookin & Ross, *supra* note 17 (manuscript at 33) (describing the institutional barrier created when an interest groups which stands to lose a great deal of money has a conflict with a group who faces less tangible, non-monetary gains and losses).

76. Some environmentalists believe that Babbitt has failed because he raised expectations and anxieties by initially setting "sky-high" goals. Joan Hamilton, *Babbitt's Retreat*, SIERRA, July/August 1994, at 53, 76. Other environmentalists contend that Babbitt has failed because he has tried to achieve reform without alienating any ranchers or other opponents of reform. *Id.* at 75. Others blame President Clinton for Babbitt's troubles, or at least hold the President partly responsible. *Id.* at 57 ("Without the President solidly behind him, the noble knight of the environmental movement started to look more like a political pawn"; also quoting President Clinton telling Babbitt not "to take any actions that will change [the politics in Montana]."); see also Chip Brown, *Bruce Babbitt, Alone in the Wilderness*, OUTSIDE, Oct. 1994, at 65, 70, 71; Timothy Egan, *Interior Secretary Endures Storms From All Directions*, N.Y. TIMES, Aug. 28, 1994, at Sec. 4, Page 3 (describing how Babbitt "has had little, if any, help from President Clinton").

1. The sources of controversy: the condition of Western rangelands and the control of grazing management.

Environmentalists believe that Western ranchers should take better care of Western rangelands. Although the cattle industry contributes jobs, a supply of meat, and other products to our society, environmentalists assert that excessive grazing has caused severe environmental damage.⁷⁷ They contend that grazing has caused desertification on as much as ten percent of western lands,⁷⁸ and that cows have trampled native vegetation, causing erosion and filling streams with sediment.⁷⁹ Ranchers reply that the damage to Western rangelands is less than environmentalists claim, and that they are in better shape now than in the past.⁸⁰

Environmental degradation from grazing became a *casus belli* for environmentalists during the Sagebrush rebellion and the James Watt era in the Interior Department.⁸¹ Although the Sagebrush rebellion failed to achieve its primary goal, private ownership of federal lands,⁸² ranchers dominated the BLM and influenced its management of grazing on federal lands.⁸³ For example, ranchers sit on "grazing advisory boards" which

77. U.S. ENVIRONMENTAL PROTECTION AGENCY, LIVESTOCK GRAZING ON WESTERN RIPARIAN AREAS 5-6 (1990); D. FERGUSON & N. FERGUSON, SACRED COWS AT THE PUBLIC TROUGH, CH. 16 (1983); COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, ENVIRONMENTAL QUALITY 182 (1970); Wuerthner, *Public Lands Grazing: What Benefits at What Costs?*, WESTERN WILDLANDS, Fall 1989, at 24.

In addition to the environmental degradation caused by trampling and erosion, Western agriculture uses an enormous amount of irrigation water for cow pasture and winter feed. See CHARLES F. WILKINSON, THE EAGLE BIRD: MAPPING A NEW WEST 148-49 (1992); Mark Reisner, *The Emerald Desert*, GREENPEACE, July/August 1989, at 6. The National Wildlife Federation alleges that grazing has put 76 species in danger of extinction and harms an additional 270 species. Steve Yozwiak, *Report: Wildlife at Risk—'Abusive' Grazing Threatens 76 Species*, ARIZONA REPUBLIC, June 6, 1994, at B1.

78. Desertification is defined as the loss of topsoil due to erosion and wind, salinization of surface water, and loss of native vegetation. WILKINSON, *supra* note 29, at 80.

79. For a specific example of how erosion caused by poor grazing management filled up an entire reservoir with a million tons of sediment, see *id.*, at 75-80 (discussing the Severance Reservoir in Oregon).

80. See e.g., Bill Laycock, *Proposal Based on Faulty Assumptions*, WESTERN BEEF PRODUCER, Oct. 2, 1993, at 53 ("current ecological research indicates that most Western rangelands have improved from their deteriorated condition at the turn of the century to a current 'stable state' . . .").

81. George Cameron Coggins & Doris K. Nagel, *'Nothing Beside Remains: The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473 (1990).

82. State of Nevada *ex rel.* Nevada State Board of Agriculture v. United States, 512 F. Supp. 166 (D.Nev. 1981), *aff'd on other grounds*, 699 F.2d 486 (9th Cir. 1983).

83. WILKINSON, *supra* note 29, at 100.

review applications and set local grazing standards for federal lands.⁸⁴ To no avail, the environmentalists denounced the boards as “a classic case of the fox guarding the chicken coop: ranchers deciding how to develop federal lands for ranching.”⁸⁵ In addition, the BLM limited public participation in permit renewal decisions.⁸⁶

While ranchers used the BLM to advance their interests, conflict with environmentalists intensified. Ignored and spurned by the Reagan administration’s policies, environmentalists resorted to the courts to advance their interests. They found it difficult, however, to legally challenge the BLM’s hands-off approach because there was no legal claim under the three relevant statutes, the Federal Land Policy and Management Act,⁸⁷ the Taylor Grazing Act,⁸⁸ and the Public Rangeland Improvement Act.⁸⁹ The courts ruled that judges would not be a “range-master” and left grazing conflict to the BLM and to political battles.⁹⁰

As the anti-environmental momentum of the Reagan era wound down, environmentalists turned to Congress to combat what they perceived to be abusive grazing practices. Ironically, the conservative economic philosophies of the 1980s gave environmentalists a weapon: Ranchers receive a large subsidy from arguably low grazing fees. Federal agencies charge \$1.97 for grazing permits, and equivalent permit on private lands would cost roughly \$8.70.⁹¹ This subsidy, environmentalists argued,

84. The grazing advisory boards were created by the Taylor Grazing Act, 43 U.S.C. § 3150-1 (1988). They were reauthorized by the Federal Land Policy and Management Act in 43 U.S.C. § 1753 (1988).

85. Melissa Healy, *Big Hike in Federal Grazing Fees Proposed by Babbitt*, L.A. TIMES, Aug. 10, 1993, at A1.

86. Joseph M. Feller, *Grazing Management on the Public Lands: Opening the Process to Public Participation*, 26 LAND & WATER L. REV. 571, 582-86 (1991).

87. Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-84 (1988).

88. Taylor Grazing Act, 43 U.S.C. §§ 315-315(r) (1988).

89. Public Rangelands Improvement Act of 1978, 43 U.S.C. §§ 1901-08 (1988).

90. NRDC II v. Hodel, 624 F. Supp. 1045, 1062 (D. Nev. 1985), *aff'd*, 819 F.2d 927 (9th Cir. 1987). Although the environmentalists won an important case in *NRDC v. Morton*, 388 F. Supp. 829 (D.D.C. 1974), there has been little grazing litigation. Recently, however, environmentalists have brought lawsuits to tighten federal government oversight of grazing. Michael Riley, *Courts become weapon for change*, CASPER STAR-TRIBUNE, June 28, 1994, at A1, A8. An Interior Department judge has ruled that the BLM must remove all cows from Wash Comb in Southern Utah until the BLM completes an environmental impact statement and explicitly decides that grazing in those canyons is in the public interest. *Id.* Feller v. Bureau of Land Management, 128 IBLA 231, 232 (1994). Although environmentalists are bringing similar actions in other states, the BLM has not changed its grazing policies outside of the Wash Comb allotment. Michael Riley, *Impact in Wyoming may be some time in coming*, CASPER STAR-TRIBUNE, June 28, 1994, at A1, A8.

91. See, e.g., *Congress Threatens to Cut “Cowboy Welfare.”* DENVER POST, July 7, 1991, at A12, A13. For a listing of private grazing land lease rates in every state, see 58 Fed Reg. 14315, Mar. 25, 1994. Federal grazing fees are also considerable lower than

distorts the marketplace and causes unnecessary environmental destruction. With the national debt shooting past one trillion dollars, environmentalists galvanized support and stung ranchers with the charge of "cow-boy welfare."⁹² Although the environmentalists were able to generate significant national support for a change in the operation of federal grazing lands, ranchers still swayed the hearts and minds of Western senators. Several times the House of Representatives passed legislation increasing grazing fees, but each time the Senate blocked the reform effort.⁹³

Ranchers vehemently fought efforts to raise grazing fees because many small family ranching operations are barely economically viable. Any hike in grazing prices, they contended, would force many ranches out of business and even change the culture of the American West.⁹⁴ Ranchers also fought any attempt to reduce the amount of grazing allowed per permit because it would affect the value of their ranches. Federal grazing permits are usually sold with the ranch land, and ranches are typically valued on the Animal Unit Months (AUMs), not acreage.⁹⁵ If

state fees. *Id.* The history of low grazing fees is recounted in George Cameron Coggins & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 62-64, 71-75 (1982). Ranchers argue that grazing fees should be lower than fees associated with private lands because private lands are usually more fertile, Jill Lawrence, *War on the West*, THE SHERIDAN PRESS, June 7, 1994, at B1; and that there are "non-fee costs" of grazing on public lands, Katherine Walsh, *Wyoming student talks about rangeland reforms with President Clinton*, THE WYOMING EAGLE, Mar. 23, 1994, at 5. Non-fee costs associated with public land grazing include: fencing, roads, water development, and other improvements; higher livestock moving, herding, and veterinary fees and costs; more lost animals; grazing association fees; administrative costs associated with interactions with federal bureaucracies. L. ALLEN TORELL ET AL., THE VALUE OF PUBLIC LAND FORAGE AND THE IMPLICATIONS FOR GRAZING FEE POLICY (New Mexico State University College of Agriculture and Home Economics, Bulletin 767, Dec. 1993).

92. Melissa Healy, *Way Cleared for Interior to Raise Grazing Fees*, L.A. TIMES, Nov. 10, 1993, at A23.

93. WILKINSON, *supra* note 29, at 100-01.

94. Frank Clifford, *Ecologists and Ranchers Try to Mend Fences*, L.A. TIMES, Sept. 6 1993, at A1. A New Mexico study found that most public-land ranchers earn under \$20,000 annually. *Id.* See also Michael Riley, *UW Study: Grazing Fee hike would hurt Wyo ranches*, CASPER STAR-TRIBUNE, Apr. 3, 1994, at A10. *But see id.* (citing research effort by professors from several Western universities that found the market value is 1.5 to 2.5 times the value of grazing fees); *id.* at A10 (citing BLM study showing hike in grazing fees would cut ranching profits by less than 15%); Michael Riley, *UW: Economic impacts of graze plan minimal*, CASPER STAR-TRIBUNE, July 15, 1994, at A1 (finding that Babbitt's grazing fee increase would decrease economic activity of the ranching industry by less than 2 percent).

95. See PHILIP O. FOSS, POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN (1960). An animal unit month, or AUM, is the equivalent of one cow with a calf grazing for a month—about 800 pounds of grass. Mitchel P. McClaran, *Livestock in Wilderness: A Review and Forecast*, 20 ENVTL. L. 857, 859 (1990) (citing BUREAU OF LAND MANAGEMENT, U.S. DEPT. OF INTERIOR, PUBLIC LAND STATISTICS 24-27 (1988)).

AUMs are reduced, it will proportionately reduce the value of a ranch, which also affects ranchers' ability to get loans from banks.⁹⁶

After several years of range wars, the election of a Democratic administration portended a break in the stalemate. Environmentalists saw their opportunity to finally take the management of public lands out of the grip of special interests. Ranchers tightened their saddle, preparing for what they believed to be another challenge to their way of life.

The first attempt to reform grazing policies by the Clinton Administration was a strategy of direct confrontation. As part of his budget proposal to Congress early in 1993, President Clinton swung his budget ax at long-established subsidies for natural resource extraction on federal lands.⁹⁷ One target was grazing fees, where Clinton proposed raising the price for an AUM from \$1.86 to 4.26.⁹⁸ This strategy seemed particularly ripe given the mood of the country and politicians. Congress was finally ready to take deficit reduction seriously, and it appeared that even special interests would have to contribute their share.⁹⁹ Environmentalists were particularly hopeful because they had long believed the best way to dilute the power of influential lobbyists was to package reforms into an enormous budget bill.¹⁰⁰

Hope for a quick strike at grazing reform was short-lived. President Clinton's budget proposal, facing unanimous opposition from congressional Republicans and well as criticism from moderate Democrats, nearly collapsed. The press raised the political stakes by predicting a doomed Clinton Administration if the budget package failed.¹⁰¹ With Clinton in desperate need of votes, several western Democratic senators took advantage of the President's weak bargaining position and demanded that

96. Coggins & Lindberg-Johnson, *supra* note 91, at 74; Michael Riley, *Ranchers: Range reforms too extreme, economically harmful*, CASPER STAR-TRIBUNE, May 18, 1994, at A1, A10.

97. The President's proposal would have produced savings of over \$1 billion by raising the federal royalty charged for mineral extraction, phasing out below-cost timber sales, and increasing public land grazing fees paid by cattle ranchers. See Michael Weisskopf & Ann Devroy, *Clinton Bows to Westerners on Higher Fees*, WASH. POST, Mar. 31, 1993, at A1.

98. This was still considerably lower than the cost of grazing cows on private land, approximately \$8 to \$12 per AUM. See John Balzar, *Babbitt Resumes Work on Grazing Policy Reform*, L.A. TIMES, May 1, 1993, at A4.

99. See *Clinton's News Conference*, N.Y. TIMES, June 18, 1993, at 18.

100. Weisskopf & Devroy, *supra* note 97, at A1. Babbitt changed the process by first holding hearings and then publishing a proposed rule in the Federal Register. Congress tried to enact Babbitt's proposal, but could not overcome a filibuster in the Senate. See *infra* note 112.

101. See generally Richard L. Berke, *Looking for Alliance, Clinton Courts the Congress Nonstop*, N.Y. TIMES, Mar. 8, 1993, at 1.

Clinton drop the higher fees.¹⁰² To the dismay of environmentalists, Clinton hastily agreed to their demand,¹⁰³ and four months later Congress passed the modified budget without a single vote to spare.¹⁰⁴

2. A semi-flawed process, little consensus.

After President Clinton backed away from a budget battle over higher grazing fees, newly appointed Secretary Babbitt announced a "change in process."¹⁰⁵ Babbitt would still seek to raise grazing fees; but rather than force a confrontation in Congress, he would hold hearings to search for a "reasonable consensus" between ranchers and environmentalists.¹⁰⁶ A seasoned politician, son of a cattleman, and experienced consensus-builder,¹⁰⁷ Babbitt was an ideal candidate to try to achieve consensus about grazing reform. He vowed "to change the tone of the debate from the 'range wars' of recent years to what he called 'a good solid consensus about how all of us live in this extraordinary land of the West.'"¹⁰⁸ He repeatedly stressed that full public participation was the way to develop a "shared vision of the land on a local level."¹⁰⁹

After several months of round-table hearings,¹¹⁰ Babbitt announced his new proposal for grazing reform.¹¹¹ The centerpiece was a

102. The western senators, led by Senator Baucus of Montana, publicly denied that they had in fact traded their vote on the budget package in exchange for a removal of the higher fees. Weisskopf & Devroy, *supra* note 97.

103. Representative George Miller, chairman of the House Natural Resources Committee, blasted Clinton for "absolutely spoonfeeding the special interests." *Id.* Jay Hair, president of the National Wildlife Federation, said their romance with President Clinton had turned into "date rape." Timothy Egan, *Clinton Under Crossfire at Logging Conference*, N.Y. TIMES, Apr. 3, 1993, at 6.

104. As it turned out, President Clinton needed every vote: Vice President Gore had to cast the tie-breaking vote in the Senate. *Votes in Congress*, N.Y. TIMES, Aug. 8, 1993, at 42.

105. Weisskopf & Devroy, *supra* note 97, at A1. Babbitt changed the process by first holding hearings and then publishing a proposed rule in the Federal Register. Congress tried to enact Babbitt's proposal, but could not overcome a Senate filibuster. *See infra* note 112.

106. Tom Kenworthy, *Stepping Carefully into Public Land Grazing: Babbitt Using Hearings to Seek 'Reasonable Consensus' Between Cattlemen, Environmentalists*, WASH. POST, May 2, 1993, at A8; Ed Marston, *Focus on the land, not the money*, HIGH COUNTRY NEWS, Aug. 23, 1993, at 15.

107. *See supra* note 4.

108. John Christensen, *Bruce Babbitt on Western land use: 1993 is the "year of decision"*, HIGH COUNTRY NEWS, May 17, 1993, at 8. *See also* Bruce Babbitt, *Remarks to the Society of Range Management*, 29 LAND & WATER L. REV. 399, 400, 405 (1994).

109. *Id.*

110. Kenworthy, *supra* note 9, at F1.

111. 58 Fed. Reg. 43208, Aug. 13, 1993; *see also* Melissa Healy, *Big Hike in Federal Grazing Fees Proposed by Babbitt*, L.A. TIMES, Aug. 10, 1993, at A1; Tom Kenworthy, *U.S. to Tighten Grazing Rules, Increase Fees on Public Lands*, WASH. POST, Aug. 10, 1993, at A1.

hike in grazing fees from \$1.86 to \$3.96, phased in over three years. In addition, Babbitt proposed eliminating the BLM's "grazing advisory boards" and replacing them with "resource advisory councils" composed of ranchers, wildlife managers, fisheries experts, environmentalists and local business owners; making the renewal of grazing permits contingent on a rancher's record of environmental stewardship; and reclaiming federal control over any new water rights. Although Babbitt's proposal easily passed in the House of Representatives, a majority of western senators again stymied the grazing reform proposal in the Senate.¹¹²

The round table hearings, like the 1989 Pacific Northwest timber summit,¹¹³ failed to achieve consensus because, although the parties could express their views, they did not have control over the final outcome. Without voluntariness, the parties perceived the process as adversarial. This led to political posturing rather than a search for common interests and possible solutions.¹¹⁴ Nor did the hearings contain any real opportunity for a collaborative search for creative options. They were primarily composed of testimony by academics and personal testimonials by ranchers.¹¹⁵ The participants characterized them as political "talk shows" that had little substance.¹¹⁶ Babbitt's own state-

112. By a wide margin of 59-40, the Senate passed an amendment to the Interior appropriations bill, which barred the Interior Department from spending money to implement the proposed policy for one year. 139 CONG. REC. S11692-02, Sept. 14, 1993; see also Tom Kenworthy, *Babbitt's Grazing Fee Increase Unsaddled by Westerners' Rider*, WASH. POST, Sept. 15, 1993, at A16. Because the House and Senate appropriation bills differed, the issue went to a conference committee, where House and Senate negotiators agreed to lower the grazing fee increase to \$3.45 per AUM. 139 CONG. REC. H8052, Oct. 15, 1993; see also Melissa Healy, *Lawmakers OK Plan to Double U.S. Grazing Fees*, L.A. TIMES, Oct. 15, 1993, at A3. Ranching interests denounced the conference committee's compromise, claiming it will "devastate tens of thousands of ranch families who have for over a century provided stewardship on the public land and food and fiber for this nation." *Id.* Once the conference committee's compromise bill came to the floor of the Senate, it died in a filibuster organized by Senator Pete V. Domenici (R-N.M.). The Senate vote was 54-44, six votes short of the necessary two-thirds majority needed to break a filibuster. 139 CONG. REC. S14583-03, Oct. 28, 1993; see also Tom Kenworthy & Eric Pianin, *Showdown on Grazing Fees: Babbitt Acts After Filibuster Vote Fails*, WASH. POST, Oct. 29, 1993, at A1.

113. See *supra* text accompanying notes 29-36.

114. The lack of voluntariness and posturing was reflected in the comments of Lee Oteni, assistant New Mexico state land commissioner: "If all the hearings have been as terrible as this one, getting rid of the polarity will be hard. What I heard was people trying to posture, on both sides." Christensen, *supra* note 108, at 9. Thus these hearings did not resemble a dispute resolution process. Instead, they turned into an adversarial process where the parties advocated "extreme positions before a decisionmaker." Harter, *supra* note 37, at 29.

115. Kenworthy, *supra* note 106, at A8.

116. Balzar, *supra* note 98, at A4.

ments reflected a strategy designed to overcome opposition rather than one designed to help the parties find consensus.¹¹⁷

Although his process failed to achieve consensus, Babbitt's objective probably was not consensus. He was a believer in the "New West" theory, the idea that ranching, mining, and other extractive industries no longer dominate western politics, and that urbanites who recreate on public lands and enjoy their scenic beauty would make it easier to achieve environmental reforms.¹¹⁸ Using round-table hearings, Babbitt hoped to pacify the ranching community by allowing them to express their views. Instead it triggered a firestorm of protest, not only from ranchers but from other industry users of the public land as well.¹¹⁹ After this phase of grazing reform ended in legislative defeat, Babbitt stated, "I thought this time it might be easier to get things done. The Western press, the economic community, a lot of people seemed to be in favor of it. But obviously that was not entirely the case."¹²⁰

After this legislative defeat, Babbitt vowed to implement his grazing reform proposal administratively.¹²¹ Democratic Western governors and senators, however, were mounting pressure on President Clinton to slow Babbitt's aggressive grazing reform efforts.¹²² They argued that Babbitt was jeopardizing Clinton's fortunes in states like Nevada, Montana, New Mexico, and Colorado, where Clinton won narrow victories in traditional Republican strongholds.¹²³ Moreover, conservative Westerners have labeled Babbitt a liberal James Watt,

117. Babbitt pronounced, "I'm going to be back in Montana talking until everyone's so tired of talking that they have nothing left to say." *Id.* This is similar to a political strategy made famous by Senator Muskie—the last one sitting at the table wins the political fight. CHRISTOPHER MATHEWS, *HARDBALL: HOW POLITICS IS PLAYED—TOLD BY ONE WHO KNOWS THE GAME* 134 (1986).

118. Governor Bruce Babbitt, *Foreward*, in WILKINSON, *supra* note 77, at ix; see also Frank Clifford, *Maverick Babbitt Mending Fences on Range Reform*, L.A. TIMES, Dec. 25, 1993, at A1. Charles Wilkinson is the source of the "New West" theory. See WILKINSON, *supra* note 29; WILKINSON, *supra* note 77.

119. Kenworthy, *supra* note 9, at F1.

120. *Id.*

121. Kenworthy & Pianin, *supra* note 112, at A1. The administration has the authority to unilaterally raise grazing fees, but in order to do so, it must proceed through a lengthy rule-making process. An administrative approach also is vulnerable to future legal battles in the courts. See Melissa Healy, *Way Cleared for Interior to Raise Grazing Fees*, L.A. TIMES, SOUTHLAND EDITION, Nov. 10, 1993, at A23.

122. Kenworthy, *supra* note 9, at F1; see also John Balzar, *Babbitt Resumes Work on Grazing Policy Reform*, L.A. TIMES, May 1, 1993, at A4 ("the President instructed him to devise a plan that is especially sensitive to family ranchers").

123. Clinton won those four states by less than a total of 140,000 votes. Tom Kenworthy, *Western States Get Mixed Environmental Signals From Interior*, WASH. POST, Feb. 18, 1994, at A19.

fomenting a serious counterattack reminiscent of the Sagebrush Rebellion of the early 1980s.¹²⁴

Consequently, when Governor Roy Romer of Colorado organized a closed-door meeting for Babbitt with a small group of environmentalists and ranchers who claimed they could solve his grazing reform problems, Babbitt offered to scrap his reform proposal,¹²⁵ and begin a new process in which consensus was the genuine goal.¹²⁶ Instead of seeking to achieve consensus among Washington interest groups, Babbitt sought consensus at the local level—"consensus on the ground."¹²⁷ The small cadre of environmentalists and ranchers, who had years of experience working together in Gunnison, Colorado, convinced Babbitt that grazing reform could be better accomplished through a consensus at the community level rather than imposing national standards.¹²⁸ Babbitt agreed to use the Colorado experience as a model,¹²⁹ hold another series of round-table hearings to

124. See Frank Clifford, *Maverick Babbitt Mending Fences on Range Reform*, L.A. TIMES, Dec. 25, 1993, at A1; Kenworthy, *supra* note 9. Attacks by Republican politicians have been the most vitriolic. See *Clinton's War on the West*, May 26, 1994 at 1-3 (Issue Brief by House Republican Conference) (on file with author); *Wyo GOP candidates push 'war' campaign*, CASPER STAR TRIBUNE, May 26, 1994, Jill Lawrence, *War on the West*, THE SHERIDAN PRESS, June 7, 1994 at B1. For a response, see John Lawrence, *There's no 'war on the West'*, DENVER POST, July 2, 1994, at 7B.

125. Steve Hinchman, *Babbitt seeks local approach to grazing reform*, HIGH COUNTRY NEWS, Nov. 29, 1993, at 3. Babbitt met nine different times with Colorado ranchers, environmentalists, and other state and local officials. He conducted similar follow up meetings in Idaho, Oregon, Nevada, Arizona, Utah, New Mexico, and Wyoming. 58 Fed. Reg. 14315 (1994).

126. Babbitt stated that "his earlier push to impose sweeping reforms from Washington was a mistake. . . ." Elliot Diringler, *New Babbitt Plan On Grazing Rules Ranchers, environmentalists would work out standards together*, S.F. CHRON., Mar. 18, 1994, at A3. In addition, Babbitt's seriousness about consensus building was evinced by his ousting of BLM director Jim Baca, a favorite of national environmental organizations. Baca's "in-your-face" style conflicted too much with Babbitt's efforts to work with Western governors and ranching interests. According to Babbitt, they had "different approaches to management style and consensus building." Melissa Healy, *BLM Director Steps Down After Disputes With Western Officials*, L.A. TIMES, Feb. 4, 1994, at A15.

127. Steve Hinchman, *Ranchers' clout drives grazing reform in new directions*, HIGH COUNTRY NEWS, Jan. 24, 1994, at 1, 11 (statement by Stephanie Hanna, spokeswoman of Interior Department).

128. Babbitt, *supra* note 108, at 402. Babbitt believes the Gunnison model is taking root in many parts of the West, including the Trout Creek Mountain working group in eastern Oregon, the Owl Mountain CRM in Colorado, and the Sun Ranch CRM in Wyoming. *Id.* at 401.

129. The Colorado Rangeland Reform Working Group identified seven goals:

- (1) Healthy and sustainable rangeland ecosystems, (2) healthy, sustainable and diverse economies and communities (3) accountability of management and users of public lands to broad public goals, (4) efficient and effective management of our public lands, (5) fostering mutual respect among public land users, (6) encouraging the retention of private land open space, and (7) ensuring public lands are managed to comply with federal laws.

58 Fed. Reg. 14317 (1994). To implement these goals, the Working Group recommended increasing public participation in decisionmaking. Their "Multiple Resource Advisory Councils" became the centerpiece for the Babbitt's Rangeland Reform '94 proposal. *Id.*

discuss the Colorado model, and implement the model at the national level.¹³⁰

On March 18, 1994, after several months of hearings, Babbitt unveiled the product of his meetings.¹³¹ As promised the proposal would move grazing decisions away from Washington and back to the local level. It would do away with grazing advisory boards, which were dominated by ranchers, and would replace them with "multiple resource advisory councils" for each BLM district. The councils would be composed of fifteen members: five environmentalists, five state or local officials or users of public lands, and five representatives of local commodity interests, such as grazing, mining, or timber. As Babbitt said introducing the proposal, "Our focus is on shifting more management decisions closer to the land. Those closest to the land—those who live on the land—are in the best position to care for it."¹³² The councils would be instructed to work together and would play a key role in the development of local grazing standards—such as how many cattle would be allowed on a grazing allotment. They also would have the authority to appeal directly to the Secretary of the Interior if the BLM managers do not accept their recommendations.¹³³

Babbitt's proposal was criticized by both ranching and environmental interests: Ranchers contend that the plan still does not have enough flexibility at the local level, which could squeeze more ranchers off the land; environmentalists counter that the proposal gives too much control to ranchers.¹³⁴ Moreover, environmentalists argued that what worked well in a small Colorado community may not work well across the West.¹³⁵ Although this proposal

130. Hinchman, *supra* note 127, at 11. Babbitt may be willing to modify the Range Reform '94 proposal. He is considering a "Wyoming model" sponsored by Governor Sullivan. See Kerry Drake, *Panel Unveils Wyo Range Plan*, CASPER STAR-TRIBUNE, Aug. 3, 1994, at A1; Michael Riley, *Ranchers Tell Wallop Range Reform Woes*, CASPER STAR-TRIBUNE, July 16, 1994, at A1. Babbitt is also working with Utah's political leaders on alterations. *Babbitt flexible on range reform*. THE DENVER POST, July 12, 1994, at 1B.

131. 58 Fed. Reg. 14314 (1994). For a description of Babbitt's proposal, see John H. Cushman, Jr., *Administration Offers Plan To Raise Fees for Ranchers*, N.Y. TIMES, Mar. 18, 1994, at B6; Melissa Healy, *Babbitt Tries Again to Reform Grazing Rules, Raise Fees*, L.A. TIMES, Mar. 18, 1994, at A23; Tom Kenworthy, *Babbitt Announces Plan to Create Local "Councils" to Manage Federal Rangelands*, WASH. POST, Feb. 15, 1994, at A5.

132. Elliot Diring, *supra* note 126, at A3.

133. 58 Fed. Reg. 14318 (1994).

134. *Id.* John H. Cushman Jr., *New Interior range reform plan outlined*, CASPER STAR-TRIBUNE, Mar. 18, 1994, at A1; Michael Riley, *Environmentalists: Local politics, not standards, guide range reform*, CASPER STAR-TRIBUNE, May 18, 1994 at A1; Riley, *supra* note 96, at A1.

135. Tom Kenworthy, *Babbitt Announces Plan to Create Local "Councils" to Manage Federal Rangelands*, WASH. POST, Feb. 15, 1994, at A5. The Colorado Rangeland Reform Working Group also "recognize[d] that this Colorado model may not be applicable to other Western states." 58 Fed. Reg. 14317 (1994).

now has the support of most Western Democrats,¹³⁶ its future is in doubt because of the Republican landslide in the 1994 elections. Even if the plan is enacted, both ranchers and environmentalists may bring lawsuits.¹³⁷

Although scholars would not characterize Babbitt's most recent efforts as an ideal dispute resolution process, Western Democrats have given their support because it met more of the requirements for a successful dispute resolution process.¹³⁸ First, these new meetings broadened public involvement¹³⁹ to create "a collaborative process."¹⁴⁰ The process also created better opportunities for the exploration of shared interests. Environmentalists and ranchers realized, for example, that perhaps the biggest threat to the West in the 21st century is the explosion of condominiums and secondary homes.¹⁴¹ But instead of using the exploration of interests to develop a number of options and possible solutions, Babbitt's process took a twist. His proposal would give responsibility to the local councils. Consequently, Babbitt's proposal would balance the number of environmentalists and ranchers because he "wants genuine consensus from the new panels, not recommendations adopted when one side outvotes the other."¹⁴²

136. Representative George Miller, then chairman of the House Interior Committee, stated that "nobody is 100% satisfied" but predicted the proposal would be implemented. Melissa Healy, *supra* note 131, at A23. Senator Harry Reid of Nevada, paladin of grazing reformers in the Senate, said "it was not a thumbs up or a thumbs down," but "kind of a thumbs sideways." Cushman, *supra* note 131, at B6. Both agreed that Babbitt had worked very hard to develop this proposal and they "don't want to rain on his parade." *Id.*

137. See Steve Hinchman & Donica Mensing, *The West's grazing war grinds on*, HIGH COUNTRY NEWS, June 27, 1994, at 5.

138. The author believes that Western Republicans will not support Babbitt's newest proposal for political reasons.

139. A reporter at the meetings described Babbitt's approach:

Again and again, Babbitt stressed that full public participation was the way to build consensus and come to a shared vision of the land on a local level. The model, he said, would be the working groups ranchers and environmentalists have formed to manage various grazing allotments around the West.

Christensen, *supra* note 108, at 8; see also John H. Cushman Jr., *A Consensus Approach on Land Use*, NEW YORK TIMES, Feb. 19, 1994, at 8.

140. Jeff Barker, *Babbitt plan would double grazing fees; new proposal fails to please either side*, ARIZONA REPUBLIC, Mar. 18, 1994, at A19.

141. "Increasingly, the cowboy, that tarnished icon of American mythology, is being viewed as a potential ally against the relentless encroachment of subdivisions, shopping centers, golf courses and mass tourism." Frank Clifford, *Ecologists and Ranchers Try to Mend Fences*, L.A. TIMES, Sept. 6 1993, at A1. "Ultimately what both sides want is the same thing . . . Healthy, productive ranges and healthy, productive communities." Jim Carrier, *Land Rivals Reach Common (Grazing) Ground*, THE DENVER POST, Apr. 3, 1994 at 1C (quoting T. Wright Dickinson, rancher and participant in Colorado negotiations over ranching). Other well-known environmental advocates have also argued that trying to kick ranchers off of federal land is a poor strategy for environmentalists. WILKINSON, *supra* note 77, at 150-53; See Marston, *supra* note 106, at 15.

142. Cushman, *supra* note 134. See also Babbitt, *supra* note 108, at 404. To insure a general consensus exists, at least three out of five members of each subgroup

Unfortunately, forcing the development of options and solutions down to the local level will probably fail to produce consensus for the simple reason that it is not voluntary. Consensus cannot be produced by federal fiat.¹⁴³ Bryce Reece, executive director of the Wyoming Wool Growers Association cautions: "There is a lot of value to people sitting down and talking [but] I'm just not sure it should be mandatory."¹⁴⁴ In addition, Babbitt may have mistakenly believed that individual examples of cooperation would be accepted by disputing interests groups that are more comfortable with conflict.¹⁴⁵ The Gunnison group took a decade to build trust and were aided by a common enemy—real estate developers. Consequently, in spite of Babbitt's hopes, the only thing environmentalists and ranchers agree on is that they do not like the councils. As one environmentalist opined, "[t]hey are basically a new forum through which the ritual combat will continue."¹⁴⁶

IV. THE LIMITS OF CONSENSUS FOR ENVIRONMENTAL POLICYMAKING

The preceding section described Bruce Babbitt's efforts to resolve environmental disputes through consensus. It used dispute resolution theory to explain the reasons for his successes and failures. This descriptive analysis is politically important to government leaders like Secretary Babbitt because it can help him improve his dispute resolution efforts, producing more agreement and support for his policies, and ultimately more votes for President Clinton. The individuals whose lives will be affected by the Clinton Administration's policies also stand to benefit from processes that give all sides more control over the outcome. This descriptive analysis, however, raises normative questions about use of dispute resolution processes to develop environmental policy—that is, when should the goal of consensus drive environmental policy?¹⁴⁷ This

(i.e. industry, environmentalists, and public officials) must support a decision. Riley, *supra* note 21, at A10.

143. *Id.* at A10.

144. *Id.*

145. *Id.* at A1, A10.

146. Cushman, *supra* note 134, at A1. Joe Feller, an Arizona attorney who recently won a court case against the BLM also doubts whether consensus can be achieved. See Feller, *supra* note 86, at 577. Steve Hinchman & Donica Mensing, *The West's grazing war grinds on*, HIGH COUNTRY NEWS, June 27, 1994, at 5. The biggest obstacle to the success of the counsels may be environmentalists who do not want any grazing at all. "I really don't want people on these regional advisory councils who are dedicated to the notion that we want the ranges cattle free," Mr. Babbitt said. "They are outside the parameters." Cushman, *supra* note 134, at A1.

147. In other words, analyzing Bruce Babbitt's consensus building style begs the question of whether joint gains in fact exist. See *supra* notes 14-22 and accompanying text. As dispute resolution has grown more popular, it has become a "common error" to focus

section concludes that the goal of environmental consensus is appropriate in only limited situations.

Dispute resolution experts have a decided disagreement about the appropriate role of dispute resolution in environmental conflict.¹⁴⁸ For example, Lawrence Susskind believes that government sponsored mediation can be used to establish and implement governmental policy.¹⁴⁹ John McCrory, on the other hand, cautions against confusing mediation with policymaking:

The Susskind proposal is flawed by a failure to consider, in a practical way, the role that mediation can and should play in the resolution of environmental disputes. It is not designed to establish policy or to establish standards which implement policy. Mediation is part of a negotiation process, and its function is to help parties to a dispute reach their own agreement. As such, mediation has great potential as a device for developing a consensus which might aid in establishing or implementing policy. The distinction between using mediation to establish policy and using it to aid such an effort is one of significance. A mediator is a facilitator, not a decisionmaker nor a policymaker. It is important to recognize mediation for what it is and to formulate the role which it will play in resolving environmental disputes accordingly. Alteration of the process in the ways suggested by Professor Susskind is likely to curtail rather than to enhance its acceptability and use.¹⁵⁰

Bacow and Wheeler contend that many environmental conflicts arise because "people assess probabilities, outcomes, and risks differently."¹⁵¹ Others argue that environmental conflicts are only a problem of misunderstanding, to which dispute resolution can always provide a remedy.¹⁵² Gerald Cormick believes that consensus-building is appropriate only when there is a relative balance of power between the parties, which occurs in about ten percent of environmental conflicts.¹⁵³

on style to "the exclusion of the underlying substantive quest to create value." LAX & SEBENIUS, *supra* note 15, at 113-14.

148. See AMY, *supra* note 11, at 170-85 (discussing the different approaches to environmental conflict).

149. Susskind, *supra* note 13, at 11-13.

150. John P. McCrory, *Environmental Mediation—Another Piece for the Puzzle*, 6 VT. L. REV. 49, 63-64 (1981).

151. BACOW & WHEELER, *supra* note 12, at 9.

152. AMY, *supra* note 11, at 170-71 (criticizing mediation techniques that assume most environmental disputes are caused by misunderstandings rather than direct and unavoidable conflicts of interest between environmentalists and developers).

153. *Id.* at 80-82.

Clearing up the confusion over the appropriate role of consensus in environmental conflict requires a reexamination of the fundamental principle of dispute resolution. Dispute resolution is a process by which two or more conflicting parties make themselves better off through cooperative action.¹⁵⁴ In other words, cooperative action allows both parties to expand the pie, or prevent the pie from shrinking, giving each party a larger slice when they eventually divide the pie.¹⁵⁵ Thus, to determine if dispute resolution techniques are appropriate for a particular environmental conflict, the critical threshold question is whether there is a mutual opportunity for gain.¹⁵⁶

A simple example helps to illustrate the importance of this concept. Many people today are using alternative dispute resolution, or ADR, rather than litigation to resolve their disputes. ADR techniques are generally considered faster, cheaper, and better able to leave the parties satisfied with the process.¹⁵⁷ Thus, if litigation and an ADR technique are likely to produce virtually identical substantive outcomes, both parties benefit from the speed and lower costs of the ADR technique. If, however, one party expects that an ADR technique will produce substantive outcomes that are systematically worse than litigation,¹⁵⁸ then that party

154. LAX & SEBENIUS, *supra* note 15, at 11 (1986); *see also supra* notes 14-16. Dispute resolution does not simply mean the cessation of conflict. Under that definition, dispute resolution could include war and litigation. Both war and litigation, however, *usually* leave both parties worse off. Another way to conceptualize the process is to analyze whether the conflict is a "zero-sum game" or a "plus-sum game." In "zero-sum games" gain for one party causes loss for another. On the other hand, "plus-sum games" create the possibility of "win-win" solutions through collaborative effort. Harter, *supra* note 37, at 48.

155. For example, cooperative action may include both parties agreeing to arbitration to avoid litigation expenses.

156. "[T]he parties themselves must believe that it is in their interests to negotiate the policy with the other parties, and that other means of exercising power are frustrated by countervailing power of one or more interested parties." Harter, *supra* note 37, at 45-46. In the parlance of Fisher and Ury, authors of *Getting to Yes*, each party must be able to achieve a better outcome through negotiation or a dispute resolution process than their "Best Alternative to a Negotiated Agreement," or BATNA. FISHER & URY, *supra* note 23, at 104. If a party's BATNA is better than any collaborative outcome, they will have no incentive to explore options and possible solutions; instead, they will simply pursue unilateral action. In addition, the parties must be receptive to the creation of a dispute resolution process, and not view it as a dilatory tactic. *See* Peterson, *supra* note 42, at 370.

157. *See e.g.*, BACOW & WHEELER, *supra* note 12, at 12-23. Douglas Amy disagrees with these assertions in the case of mediation, but has little empirical support for his arguments. AMY, *supra* note 11, at 71-79.

158. Many environmentalists believe that Babbitt's efforts to develop consensus about grazing reform will systematically disadvantage environmentalists. For example, environmentalists may not have the training or support to counter well-funded ranchers with professional lobbyists. Dan Heinz, *Consensus May Not Be the Best Way to Reform Grazing*, HIGH COUNTRY NEWS, Jan. 24, 1994, at 15 (also stating that "[t]here is a fundamental ethical flaw in consensus decision-making" because ranchers have a monetary stake in public land management); *see generally* AMY, *supra* note 11, at 87-153; Owen Fiss,

will naturally oppose the ADR technique. In addition, if ADR produces unfair results, then society should not impose this process on the disputants and should allow them to use our legal system.

By establishing that dispute resolution processes should be used only when mutual opportunity for gain exists, it follows that we need a better understanding of those situations in which opportunities for mutual gain are likely. This determination can be difficult, however, because the opportunity for mutual gain is not always apparent *ex ante*. Parties may not discover "win-win" solutions until they begin collaboratively brainstorming. Nevertheless, there are several cues that signal the presence of opportunities for mutual gain.

Sometimes the number of issues that are at stake will provide an indication. If only one issue is at stake, there is no opportunity for gains from trade,¹⁵⁹ and consequently, the dispute is very likely a "zero-sum game."¹⁶⁰ If on the other hand, the dispute concerns several issues, the parties may be able to benefit from gains from trade.

A better indicator than the number of issues is the presence of fundamental values. Generally defined, a party's fundamental value is a deeply held belief that cannot be compromised or traded without somehow changing the nature of a person.¹⁶¹ Consequently, consensus-building processes cannot solve disputes over fundamental values. As Phillip Harter aptly suggests, "[s]urely, no agreement could be reached over which of several religions is superior."¹⁶² To cite an environmental example, environmentalists simply will not compromise when a developer tries to build a dude ranch in a wilderness area.¹⁶³

Although the presence of fundamental values provides a clear indication of when dispute resolution techniques are appropriate, fundamental values can be difficult to identify. Large organizations or political move-

Against Settlement, 93 YALE L.J. 1073 (1984). For a contrary view, see Leigh L. Thompson, Elizabeth A. Mannix, & Max H. Bazerman, *Group Negotiation: Effects of Decision Rule, Agenda, and Aspiration*, 54 J. PERSONALITY & SOC. PSYCHOL. 86, 92 (1988) (finding that groups who seek a consensus are more likely to achieve higher joint outcomes, to integrate the interests of group members, and to distribute resources more equitably than groups using a majority decision rule).

159. For a discussion of how parties can develop "win-win" solutions through gains from trade, see LAX & SEBENIUS, *supra* note 15, at 89-114.

160. Harter, *supra* note 37, at 50.

161. WILLIAM OPHULS, *ECOLOGY AND THE POLITICS OF SCARCITY REVISITED* 199-202 (1992).

162. Harter, *supra* note 37, at 49.

163. See Steve Hinchman, *Developer Builds in a Wilderness*, HIGH COUNTRY NEWS, Sept. 7, 1992, at 1 (reporting environmentalists unwilling to compromise or negotiate about inholding in Colorado wilderness).

ments may have internal disagreements about when compromise or concessions are acceptable. For example, some "grass roots" environmentalists such as Alexander Cockburn have decried "Establishment" environmental groups who support President Clinton's Pacific Northwest timber proposal. Cockburn believes these "Establishment" groups are too willing to compromise:

On the other side of the fence are the defenders of the forests, who have their own schedule: Save the last of the ancient forest of the Pacific Northwest and ban log exports . . . The defenders also seek protection for ravaged forests east of the Cascades. But outside this set of core demands there is predictable diversity, from the environmental Establishment through the spectrum to the Western Ancient Forest Campaign, Save America's Forests or the Oregon Natural Resources Council. Here we enter the shadow of the trade-off, where the Establishment groups cut the deals.¹⁶⁴

Because Cockburn believes any further cutting in the old growth Northwest forests is wrong, he eschews the goal of consensus, arguing that consensus is just a code word for compromise.¹⁶⁵ "Consensus," asserts Cockburn, is a "verbal soft toy[]" of President Clinton and "one of the most insidious catchwords of the Clinton era."¹⁶⁶

While it is not possible to resolve environmentalists' disagreement over the definition of fundamental values, it also is not necessary. What is necessary is that any government sponsored dispute resolution process must be *voluntary*. So long as parties are free to withdraw from the process, concerns about fundamental values are immaterial. The Alaska fishermen's controversy demonstrates this point. Exxon chose not to come to the bargaining table. Had Babbitt tried to force a compromise between

164. Alexander Cockburn, *Compromise Kills Nature by Inches*, L.A. TIMES, Apr. 1, 1993, at B7 [hereinafter *Compromise Kills*]. For another criticism, see Jeffrey St. Clair, *Babbitt is no Stegner or Abbey*, HIGH COUNTRY NEWS, Sept. 6, 1993, at 16. For a response from an "Establishment" group, see Karin Sheldon, *Wilderness Society* (editorial letter), L.A. TIMES, Aug. 28, 1993, at B7. In a later article, Cockburn charges that the "Establishment" groups have compromised their fundamental values because "the mainstream environmental leadership in Washington has grown fat with corporate contributions and subventions from foundations such as the Rockefeller or the Pew Charitable Trusts and shun confrontation." Alexander Cockburn, *Ulterior Secretary: Babbitt Makes Me Miss Jim Watt*, WASH. POST, Aug. 29, 1993, at C1 [hereinafter *Ulterior Secretary*].

165. See *id.* See also AMY, *supra* note 11, at 170-71; Seth Cagin and Philip Dray, *Are the Greens Turning Yellow?*, N.Y. TIMES, May 25, 1993, at A23.

166. Alexander Cockburn, *Clintonspeak Meets the Chain Saw*, L.A. TIMES, Oct. 19, 1993, at B7. Cockburn goes on to characterize "alternative dispute resolution" as "coercive harmony," an ideological movement which he believes has swept the country.

the parties, a conflict over fundamental values may have developed.¹⁶⁷ On the other hand, Babbitt's attempt to develop a consensus about the "New West"¹⁶⁸ clashed sharply with fundamental interests of ranchers—maintaining their livelihood as well as culture.

There may be a reason why some scholars have been over-anxious to recommend government-sponsored dispute resolution. When private parties hire a dispute resolution expert to facilitate a solution, it is easy to preserve a voluntary process. But when scholars suggest that the successes of private dispute resolution can be achieved with governmental dispute resolution they overlook an insidious danger: governments can force parties to participate in a dispute resolution process, eliminating voluntariness.¹⁶⁹ Moreover, governments can use the process not to create opportunity for mutual gain but to squelch opposition to government policies.¹⁷⁰ This occurred during the 1989 Pacific Northwest "timber compromise."¹⁷¹ President Clinton and Secretary Babbitt, trying to resolve the same timber controversy, also have succumbed to this temptation to coerce a "consensus." They threatened to propose legislation that would make timber sales immune from legal challenge if the environmentalists did not support Clinton's plan.¹⁷² Thus, politicians should be charged with the responsibility to not corrupt dispute resolution processes or consensus-building efforts by eliminating voluntariness. It is also incumbent upon dispute resolution experts to recognize the natural tendencies of politicians, and to counsel against government perversion of dispute resolution processes.

While we should be wary of government sponsored dispute resolution processes, the view of some environmentalists that consensus is always bad should also be questioned. For example, environmentalists like Cockburn believe that consensus means compromise, and compromise is always bad for the environment:

The rhythms of the trade-off are antipathetic to [the protection of old-growth trees, ecosystems and bio-regions]. Trade-offs means a preserve here against the lifting of an injunction there, saving the

167. Although we normally do not think of corporations as having fundamental values, if they have any, one would certainly be not wasting money—giving money to those who the corporation believes are undeserving claimants.

168. See *supra* text accompanying note 118.

169. AMY, *supra* note 11, at 149-50.

170. *Id.* at 151-52.

171. See *supra* text accompanying notes 29-36.

172. Tom Kenworthy, *Interior, Allies at Loggerheads Over Timber*, WASH. POST, Sept. 23, 1993, at A9.

west side of the Cascades at the expense of everything east, a bit of "sufficiency," [i.e. legislation making logging plans immune to legal challenge] some regulated pillage and, at the end of the day, the fragmentation of ecosystems in a fashion familiar to the beleaguered gnat catcher, facing doom in its "win-win" scenario.¹⁷³

The contention that shared interests and consensus can never exist is flawed. The ranchers and environmentalists who developed genuine consensus in Gunnison, Colorado,¹⁷⁴ and other experiences¹⁷⁵ prove otherwise. In addition, while compromise may not be popular with environmentalists or ranchers, some times it is a better option than conflict.

V. CONCLUSION

Government policymaking by a consensus process is a noble aspiration. It gives individuals the opportunity to design the laws that govern their lives. As this article has discussed, however, there can be many barriers to the cooperative resolution of conflict. If a government sponsored dispute resolution process is poorly designed, disputing parties can overlook mutually beneficial solutions and may never reach a consensus.

The first half of this article suggests that Secretary Babbitt could benefit from dispute resolution theories. Bruce Babbitt became the Secretary of Interior because he believed he could develop a consensus around the philosophy of a "New West." His initial efforts at grazing reform, however, created more opposition than consensus. His initial efforts failed because his process was not voluntary and it did not allow for a genuinely collaborative search for creative solutions. It remains to be seen whether Babbitt's latest grazing reform proposal, which establishes councils comprised of both ranchers and environmentalists, will produce consensus at the local level.

Having suggested ways to improve government sponsored dispute resolution processes, the second half of this essay warns that policymaking by consensus may not always be appropriate. Some conflicts—those that do not provide an opportunity for mutual gain—simply are not amenable to a consensus solution no matter what

173. Cockburn, *Compromise Kills*, *supra* note 164; *see also* AMY, *supra* note 11, at 173; Cockburn, *Utterior Secretary*, *supra* note 164.

174. *See supra* notes 128-29 and accompanying text.

175. *See e.g.*, Melling, *supra* note 10, at 1693-1703, for a discussion of how politicians, environmentalists and water users worked together to find a collaborative solution to a dispute over water in Utah.

process is proposed.¹⁷⁶ Occasionally, such as during the Timber Summit of 1989, government leaders succumb to the temptation of forcing dispute resolution processes on unwilling parties, either to use the process as a political sham or to arm-twist the parties into consent. In neither case will true consensus be obtained. Instead, voluntary participation should guide governments' attempts to foster dispute resolution. In short, "[i]f there is no consensus about using consensus, the whole process simply will not work."¹⁷⁷

176. In addition to trying to resolve the controversies surrounding grazing, the California gnatcatcher, the Florida Everglades, and the Northwest ancient forests, Babbitt is hoping to avoid these "train wrecks" in the future by conducting a National Biological Survey. The survey is designed to promote an ecosystem approach to land management, and make plans to protect species before they become endangered. William K. Stevens, *Battle Looms Over U.S. Policy on Species*, N.Y. TIMES, Nov. 16, 1993, at C1. If the federal government hopes to resolve more natural resource disputes by consensus, Babbitt's preventative medicine approach is the key.

177. Jones, *supra* note 11, at 168.