



**Federal Bar  
Association**

**CLE SEMINAR**

**USE OF THIRD PARTY NEUTRAL APPROACHES IN THE CONTEXT OF NATURAL  
RESOURCE DAMAGE ASSESSMENT UNDER US LAWS AND RELATED CASE AND OTHER  
ENVIRONMENTAL LAW CONTEXTS**

**WEDNESDAY, SEPTEMBER 25, 2019**

**1:00 TO 5:00 PM**

**DISTRICT OF COLUMBIA BAR BUILDING -- POTOMAC ROOM  
WASHINGTON, DC**

**A G E N D A**

**1. INTRODUCTION**

*Barbara J. Goldsmith, Executive Director, Ad-Hoc Industry Natural Resource Management Group and President, Barbara J. Goldsmith & Company LLC; and Steven Miller, Deputy Assistant General Counsel, United States Department of Energy*

1:00 PM

**2. UNDERPINNING OF NATURAL RESOURCE DAMAGE LIABILITY AND  
ASSESSMENT REQUIREMENTS UNDER US LAWS AND THEIR RELATED  
REGULATIONS**

*Barbara J. Goldsmith*

1:15 PM

**3. REVIEW OF NATURAL RESOURCE DAMAGE CASES LENDING THEMSELVES TO  
THIRD PARTY NEUTRAL APPROACH INTERVENTION LEADING TO CASE  
SETTLEMENT**

*Steven Jawetz, Principal, Beveridge & Diamond PC*

1:45 PM

**4. US DEPARTMENT OF ENERGY USE OF ALTERNATIVE DISPUTE RESOLUTION  
TECHNIQUES – BOTH GENERAL POLICIES AND USE IN THE CONTEXT OF  
SPECIFIC CASES**

*Steven Miller*

2:15 PM

**5. US DEPARTMENT OF THE INTERIOR'S OFFICE OF COLLABORATIVE ACTION  
AND DISPUTE RESOLUTION – POLICIES, OBJECTIVES AND USE IN SPECIFIC  
CASE AND OTHER CONTEXTS**

*William Hall, Ph.D., Director, Office of Collaborative Action and Dispute Resolution  
US Department of the Interior*

2:45 PM

**AGENDA, continued**

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**6. HOW THE UDALL FOUNDATION'S US INSTITUTE FOR ENVIRONMENTAL CONFLICT RESOLUTION HELPS PARTIES ADDRESS LEGAL AND OTHER ISSUES RELATED TO NATURAL RESOURCE DAMAGE CASES AND OTHER ENVIRONMENTAL MATTERS**

*Dana Goodson, Senior Program Manager, Udall Foundation*

3:15 PM

**7. TECHNIQUES AND STRATEGIES FOR EFFECTIVE COLLABORATION – WAYS TO IMPLEMENT COLLABORATION AND CONFLICT RESOLUTION**

*David Batson, Senior Alternative Dispute Resolution Specialist and ADR Counsel, U.S. Environmental Protection Agency; Adjunct Professor of Law, Georgetown Law; Expert Consultant to AlterEcho*

3:45 PM

**8. CHALLENGING THE PANEL – PRACTICE CHALLENGES AND WAYS TO EXPAND OPPORTUNITIES FOR USE OF THE SUBJECT TECHNIQUES BY LAWYERS AND OTHERS**

*Sheila Slocum Hollis, Partner, Duane Morris LLP*

4:15 PM

**9. QUESTIONS AND ANSWERS/OPEN DISCUSSION**

# **Underpinnings of Natural Resource Damage Liability and Assessment Requirements under US Laws and Related Regulations**

**Barbara Goldsmith, Executive Director  
Ad-Hoc Industry Natural Resource Management Group  
President, Barbara J. Goldsmith & Company LLC**

**September 25, 2019  
Washington, DC**



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## **OVERVIEW OF THE PRESENTATION**

- **The Basics of the Natural Resource Damages Statutory/Regulatory Regime**
- **Characterization of the Practice Arena**
- **Identification of Issues Being Raised by Multi-Stakeholders**
- **Ways That Third Party Approaches Can Be Beneficial to Practice Arena**



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## NATURAL RESOURCE DAMAGES – THE BASICS

- What is NRD?
- What are the key federal and state statutes?
- How long has the NRD practice been around?
- What kinds of incidents can give rise to NRD claims?
- Who can bring NRD claims?
- What is the measure of damages?
- What limitations are there on NRD recoveries?
- What is required via a Natural Resource Damage Assessment (NRDA)?



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## OVERVIEW OF NATURAL RESOURCE DAMAGES

- Liability for natural resource damages (NRDs) was first introduced in 1980 under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or “Superfund”)
- NRD, authorized by statute to be in addition to site remediation or “clean up” requirements, may include the costs to restore and/or replace the resource, compensation for lost uses (“services”) of the resource and trustee assessment costs
- The overall goal is to restore the services provided by injured natural resources to its “baseline” through restoration or replacement of the resource, or acquisition of an equivalent resource



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## KEY STATUTES

- Liability for NRD is authorized under 5 key federal statutes as well as statutes in over 40 states
- Federal Statutes
  - Comprehensive Environmental Response and Liability Act of 1980 (CERCLA) (42 U.S.C. §§ 9601, et seq.)
  - Oil Pollution Act of 1990 (OPA) (33 U.S.C. §§ 2701, et seq.)
  - Clean Water Act of 1977 as amended (33 U.S.C. §§ 1251, et seq.).
  - Marine Protection, Research and Sanctuaries Act of 1972
  - Park Systems Resource Act NRD Amendments of 1988
- State Statutes/Regulations (Examples)
  - New Jersey Spill Compensation and Control Act (N.J.S.A. 58:10-23.11 et seq.)
  - Natural Resources and Conservation (Title 31, Texas Administrative Code)



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## INCIDENTS THAT CAN GIVE RISE TO NRD

- Liability for natural resource damages may arise at sites involving historical contamination, instantaneous oil spills or accidents involving the release(s) of oil or hazardous substances
- Early NRD claims were brought for “Superfund” sites, particularly those in which the statutes of limitations was about to run
- Other major site types which have led to claims for NRD include releases of hazardous materials (from industrial plants, landfills, mega-Superfund sites, industrial accidents or spills, federal facilities, paper mills, chemical manufacturing, etc.), oil spills, shipping accidents/collisions
- Claims for NRD can also be brought under Common Law (e.g., trespass, nuisance, etc.) for incidents that fall outside the scope of federal and state statutes such as wildfires, release of contaminants (e.g. PFOS, PFAS)



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## AUTHORITY TO BRING NRD CLAIMS

- Federal, state, local and tribal officials (natural resource “trustees”) may file claims on behalf of the public
- These departments and agencies are usually designed by the President (federal) or Governor (state)
- Federal Trustee Departments and Agencies
  - US Department of Agriculture
  - US Department of Commerce/National Oceanic & Atmospheric Administration
  - US Department of Defense
  - US Department of Energy
  - US Department of the Interior
  - US Environmental Protection Agency (Deepwater Horizon)
- State Trustee Departments and Agencies (examples)
  - New Jersey Department of Environmental Protection
  - Texas Commission on Environmental Quality



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## NATURAL RESOURCE DAMAGE ASSESSMENT PROCESS

- NRDA is the process by which Trustees (generally) assess the amount of damage to the natural resource services that was to have been caused by the release or incident in question.
- Two sets of federal regulations provide the overall construct for performing NRDA, both involving sequential phases of assessment and restoration
- Regulations are optional unless the trustees want the findings of the NRDA to have the force of a rebuttable presumption
- Federal Regulations
  - DOI NRDA Regulation (43 CFR Part 11)
    - 4 Phases: Pre-Assessment Screen; Assessment Plan; Assessment Implementation; Post Assessment
  - DOC/NOAA Regulations (15 CFR Part 990)
    - 3 Phases: Pre-Assessment; Restoration Planning; Restoration Implementation



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## **INFLUENCES ON PRACTICE OVER THE YEARS**

- **Case Law**
  - Judge Young's Court (MA); Seattle Case Rulings; LA Harbor; New Jersey
  - Tribal engagement
  - Reopener test in Exxon Valdez
  - Use of common law remedies
- **Challenges to DOI regulations and NOAA regulations**
- **NRD-specific government programs and activities**
- **Increased practice exchange and cooperative approaches via the Group and various Joint Assessment Teams**
- **Regulatory reform initiatives**



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## **A SNAPSHOT OF TODAY'S NRD PRACTICE ARENA**

- **800 NRD cases (Federal and State)**
- **~70% Federal, 30% State**
- **Over 300 brought in the last 10 years alone**
- **Cases may be resolved in 1-2 Years or over a decade**
- **Over \$9 Billion collected for NRD**
- **There are cases on the books with ZERO damages**
- **Many cases settle between \$100,000 and \$5 Million**
- **Commonly injured resources include groundwater, water, soil, sediment, fish, and wildlife**
- **Considerable State activity in New Jersey, New York, California, Washington, Texas**



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## KEY PRACTICE ISSUES TODAY

- Oil spill vs. hazardous waste site
- Pollution vs. injury
- Inflated damages
- Preponderance of scaling techniques
- Monetary only vs. other damages
- Remediation/restoration interface
- Early focus on restoration projects
- Flexibility vs. certainty
- Formal vs. informal NRDA and settlement process
- Principals vs. external experts
- Resource condition vs. resource services
- Standing of specific methodologies
- Re-opener provisions
- Federal v. state laws



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## THE BOTTOM LINE

- It can take years – or even decades – to resolve some NRD liability claims
- Most cases should be able to proceed quickly and fairly
- Each case is different
- Devil is in the details, not the number of cases
- There are common themes and common principles
- The statutory regime is complicated relative to what it aims to achieve
- Many suggestions to get to restoration more quickly
- Changing face of NRD claims
- Assessments practices may vary



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## **WAYS THAT THIRD PARTY APPROACHES CAN BE BENEFICIAL TO THE PRACTICE ARENA**

- Facilitate the conduct of NRDA's
- Agree on objectives and end points
- Better regiment timelines and budgets
- Agree on data adequacy and address treatment of uncertainty
- Could be used to help settle contribution determinations
- Agree on guiding principles integral to NRD's definition and identification of restoration needs
- Agree on cleanup/restoration coordination and various other aspects of the NRDA process



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## **MY CONTACT INFORMATION**

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**[www.BJGCO.com](http://www.BJGCO.com); [www.NRDOnline.org](http://www.NRDOnline.org)**



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# Using Third Party Neutrals in Natural Resource Damages Cases

Steven M. Jawetz

September 25, 2019



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## CAN SOMEBODY PLEASE HELP?

- Time to resolve CERCLA NRD matters
- Cost to resolve NRD matters
- Allocating NRDs
- Alternative to court



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## Overview – Practitioner’s Perspective

- When might a neutral help?
- When did a neutral help?
- Legal issues: Confidentiality

## When Might a Neutral Help?

- Allocation within PRP groups
  - Almost no case law on NRD allocation
  - The larger or more diverse the group, the more critical
- Mediating between PRPs and Trustees?
  - Setting up processes – more useful for negotiations than Cooperative Assessments
  - But: Could facilitate topical Technical Work Groups
- Helping Trustees within Councils?

## Mediating Between PRPs and Trustees - Factors to Consider

General: No hard and fast rules, but consider -

- Size and complexity of site
- Number of Trustees; degree of organization
- Trustee knowledge/experience base
- Timing relative to remedy selection
- NRDA status; whether long-term studies necessary
- Number of PRPs; degree of organization
- Experience of counsel with ADR
- NRD experience of available neutrals

## When Did a Neutral Help?

- Respected third party economist (academic) facilitated discussions/negotiations between two PRPs and Trustees over recreational fishing RUM in NY
- EPA convener facilitated entry into confidential mediation process agreement concerning river site; private mediators then brought in
- Mediated intra-parcel allocation of DSAYs among PRPs at Hylebos Waterway in WA to enable NRD settlement by PRP group
- Technical facilitator aided TWG on remedial design issue in NM – transferable to CERCLA NRD world?

## Legal Issues: Protecting the Process

### ADR Agreement

- Confidential dispute resolution communications
- Government limitations on confidentiality: FOIA; State equivalents; need for some public statements
- Protect neutral from legal proceedings

## Legal Issues: Protecting the Process

- Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 574
  - § 574(a) protects neutral; § 574(b) protects parties
  - § 574(j) provides exemption from FOIA
  - Practice tip: Need to except § 574(b)(7), because otherwise any communication circulated by one party to all other parties is excluded from protection
- FRE 408 and State equivalent

## 5 U.S.C. § 574(b)(7) - Detail

“(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication, unless—

...

(7) except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.”

## Summary

- Third party neutral allocator clearly helpful for NRD allocation/intra-PRP group mediation
- Neutrals have been helpful in facilitating technical work groups
- Less evidence of neutrals moving major NRDA's along on multiple issues – but could try to build into cooperative assessments

# ENVIRONMENTAL CONFLICT RESOLUTION AND COLLABORATION (ECCR)

September, 2019

Steven Miller

\*Any views expressed during this presentation are those of the presenter and do not necessarily reflect views of the Department of Energy

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## Examples of ECCR

*How has Department of Energy (DOE) used ECCR?*

In FY18, DOE used ECCR for :

- A total of 29 cases from 21 respondents, three of which involved third-party assistance
- Site remediation, decontamination, and decommissioning under CERCLA and RCRA
- Neutral third-parties used when there are disputes of cost under CERCLA contribution disputes

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## Examples of ECCR

### *How has DOE used ECCR?*

In FY18, DOE used ECCR for :

- Site permits
- Collaborative discussion with stakeholders (both federal and non-federal)
- Natural resource protection
- Cultural resources protection
- Multi-issue and Multi-party Environmental Disputes

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## DOE Use of ECCR: Example 1

### *West Valley Demonstration Project (WVDP) in New York*

- WVDP and New York State Energy Research and Development Authority (NYSERDA) used third-party neutral and ECCR techniques in conflicts over decontamination and disposition of the WVDP
- **Outcome:** allowed the parties to overcome 30 years of entrenched disagreement; on course to reach mutual and final decisions on the ultimate disposition of the site in 2020
- **Benefits:**
  - avoided lengthy and expensive litigation
  - keeping decision-making process on track
  - avoiding work stoppages

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## DOE Use of ECCR: Example 2

### *CERCLA Contribution Cases*

- In 2018, we attempted a mediation among the DOE, Dept. of the Interior, Environmental Protection Agency (EPA), Dept. of Justice, and El Paso Natural Gas Co. to explore a resolution of the cleanup of uranium mines in Arizona pursuant to CERCLA
  - Several meetings were held but no resolution was reached
  - The case proceeded to trial and a judgement was issued in April 2019 (14-cv-08165-DGC)
- In prior years, third-party neutral have been used to successfully resolve CERCLA contribution cases
  - San Mateo Mines in New Mexico
  - Freeport Mines in Arizona
- Third-party neutrals are still utilized in CERCLA contribution cases where agreed to by the parties

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## DOE Use of third-party neutrals in Natural Resource Damage Trustee Councils: Example 3

- ECCR is a central component of the Office of Environmental Management's (EM) engagement with counterpart trustees on issues relating to Natural Resource Damages. EM is currently involved in three formal trustee councils (Hanford, Los Alamos (LA), and Oak Ridge).
- For Example: EM – LA utilizes an outside facilitator in monthly meetings amongst the Natural Resource Trustees consisting of representatives from the state, nearby Pueblos, and the Forest Service.
- **Benefits:**
  - Overall improved relationships between DOE and Trustees
  - Allows efficient information gathering for future decision-making
  - Builds useful working relationship

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## DOE'S OTHER METHODS

Third-party neutrals are generally not used in environmental compliance agreements

Methods include:

- Dispute resolution terms set out in environmental compliance agreements
- Negotiations strategies that use ECCR principles
- Use of collaborative negotiations and information exchange through informal meetings
- Trainings in conflict resolutions techniques
  - Monthly calls and annual in-person training
  - Participation from Institute for Environmental Conflict Resolution

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## Environmental Compliance in Federal Facility Agreements: Dispute Resolution Process

1. Parties agree to exercise reasonable efforts to informally resolve disputes at project manager and immediate supervisor levels
2. If informal efforts fail, a party submits a written statement to the Dispute Resolution Committee (DRC) including the:
  - nature of dispute, work affected, party's position and information supporting positions
3. The DRC, a forum comprised of party representatives, handles the submitted written disputes → Requires a unanimous resolution
4. If DRC cannot agree, then the dispute is designated to Senior Executive Committee (SEC) comprised of senior members of: DOE, EPA region, and the state
5. If a party appeals the resolution, then the issue is elevated to EPA Administrator for final resolution

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## UDALL HYPO: OVERVIEW

Fordham Small Nuclear Reactor Test Facility

- Joint Project of the Navy and Atomic Energy Commission
- Operated as a research and training reactor
- As of 2005, reactor was shut down and decommissioned
- DOE has been conducting a CERCLA RI/FS



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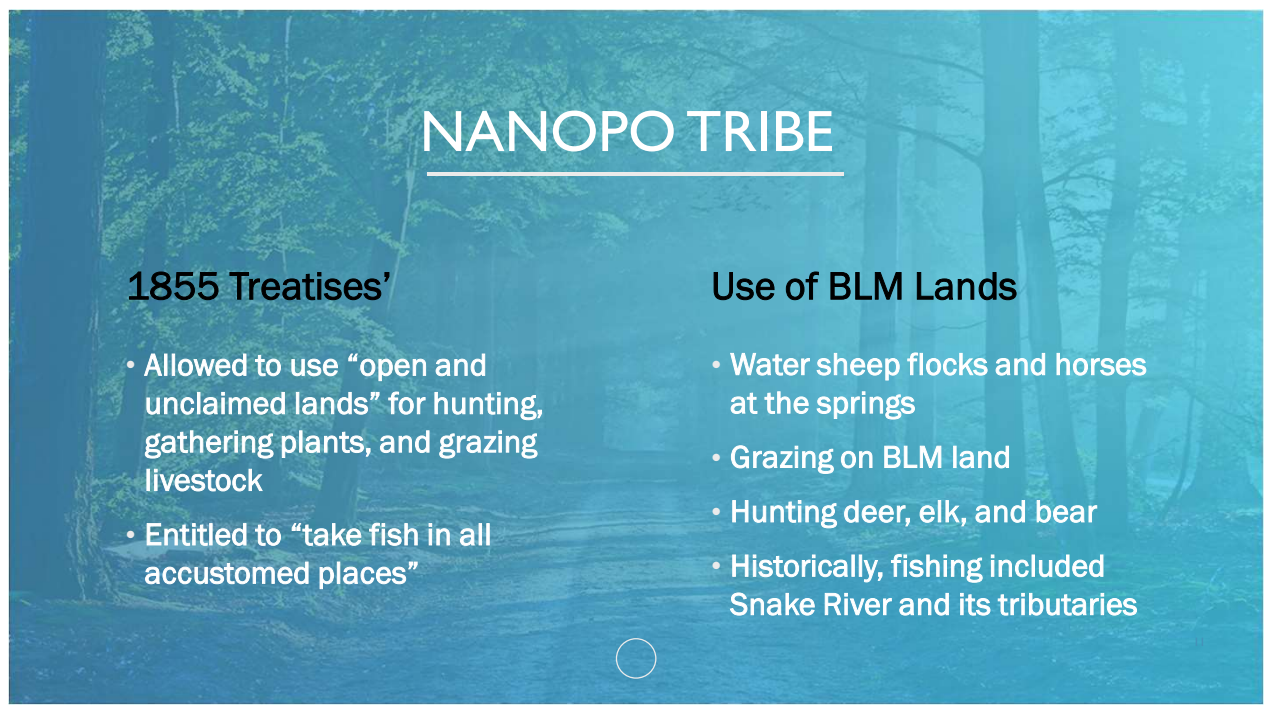
## THE FORDHAM SITE:

- Adjacent to Nanopo Reservation
- Authorized entry to the site
- Included building a dam across the creek to use water to cool the reactor (no permit obtained by Corps)
- The creek was a tributary of the Snake River and an established spawning beds for salmon and trout
- The dam raised the local water table, increasing the flow from the facility to springs downhill on public land managed by the BLM



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## NANOPO TRIBE

### 1855 Treatises'

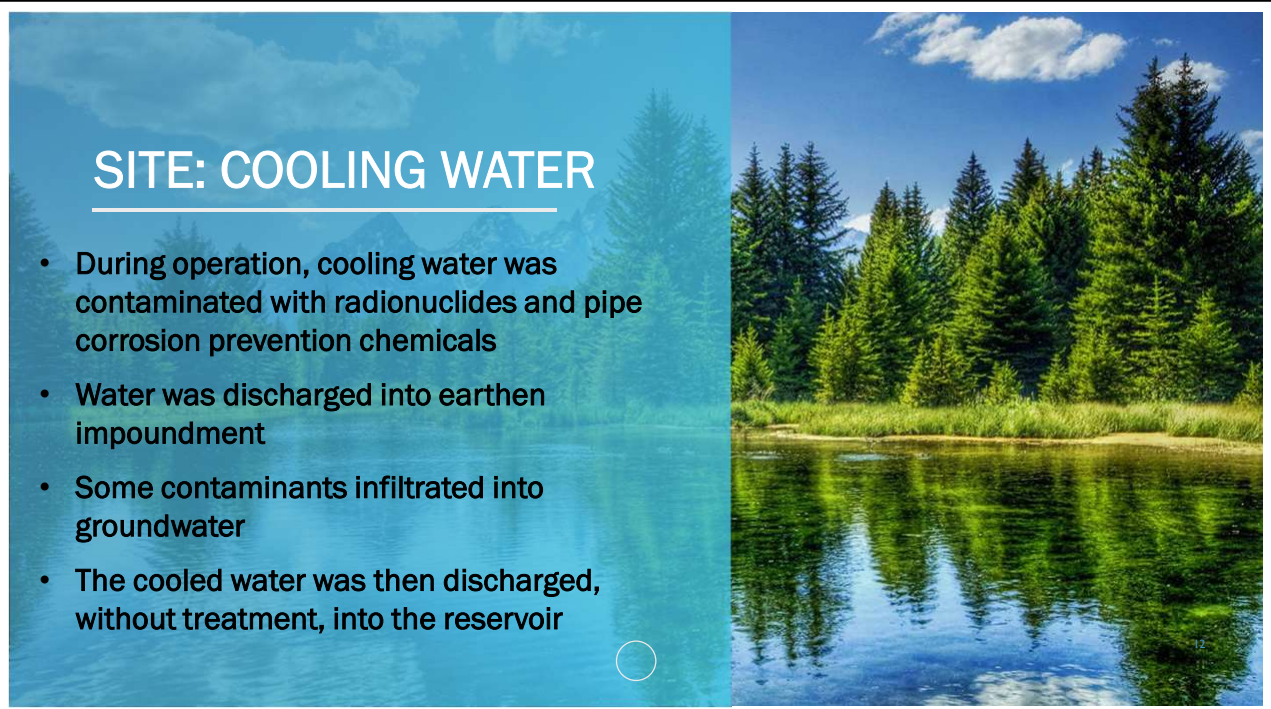
- Allowed to use “open and unclaimed lands” for hunting, gathering plants, and grazing livestock
- Entitled to “take fish in all accustomed places”

### Use of BLM Lands

- Water sheep flocks and horses at the springs
- Grazing on BLM land
- Hunting deer, elk, and bear
- Historically, fishing included Snake River and its tributaries

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## SITE: COOLING WATER

- During operation, cooling water was contaminated with radionuclides and pipe corrosion prevention chemicals
- Water was discharged into earthen impoundment
- Some contaminants infiltrated into groundwater
- The cooled water was then discharged, without treatment, into the reservoir

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## SITE: HAZARDOUS MATERIAL

- Spent nuclear fuel stored on the facility
- Spent nuclear fuel moved into onsite storage after reactor decommissioning
- Solid waste, contaminated with radionuclides, stored in on-site landfill until 1970
- Contaminated solid waste then stored in steel building, pending eventual shipment to Waste Isolation Pilot Plant in New Mexico

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## DOE

Began Remedial Investigation & Feasibility Study

<h3>Created a Natural Resource Trustee Council</h3> <ul style="list-style-type: none"> <li>• Included: DOE, BLM, USFWS, State of Idaho, and Nanopo Tribe</li> <li>• Others with interest in area declined participation</li> </ul>	<h3>Proposed Alt CERCLA remedial Action</h3> <ul style="list-style-type: none"> <li>• Onsite burial of the reactor core</li> <li>• Address contaminated soils and groundwater</li> </ul>
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# NANOPO TRIBE

## Recommendations & Concerns

- Recommends the dam be breached to restore water flow and fish spawning beds
- Wants a Natural Resource Damages Assessment conducted (fish, groundwater, spring water, and potential contaminants on reservation)
- Concerned with potential disturbance of the remains of some of their ancestors and archeological evidence relating to the tribe





# Environmental Collaboration and Conflict Resolution at the U.S. Department of the Interior

William E. Hall, Director

DOI Office of Collaborative Action and Dispute Resolution

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[www.doi.gov/cadr](http://www.doi.gov/cadr)

# U.S. Department of the Interior

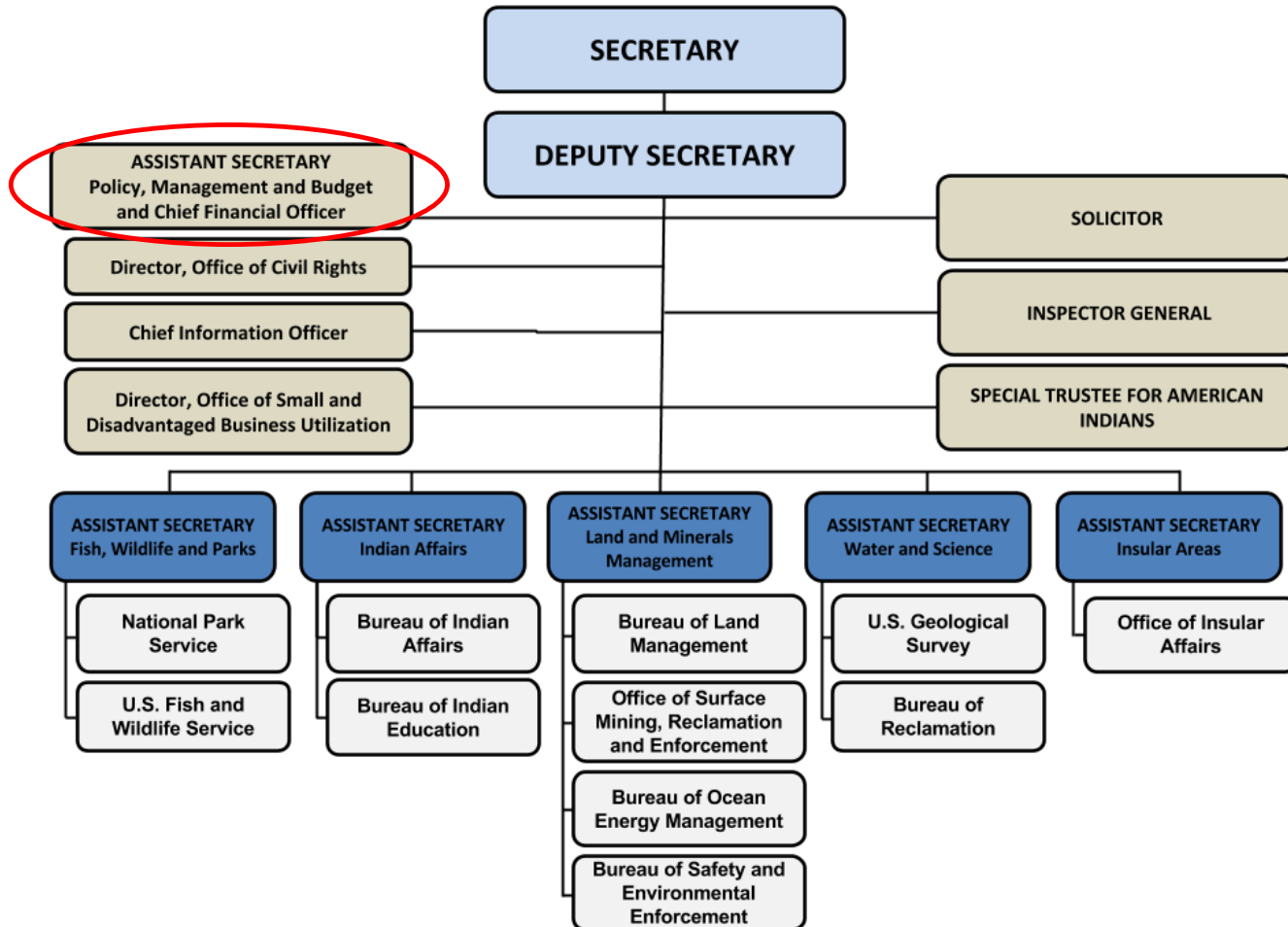


- Founded March 3, 1849
- Protects and manages the Nation's natural resources and cultural heritage
- Provides scientific and other information about those resources
- Honors its trust responsibilities or special commitments to American Indians, Alaska Natives, and affiliated island communities
- 10 bureaus
- 72,000 employees
- More than 280,000 volunteers
- More than 2400 locations





# U.S. Department of the Interior

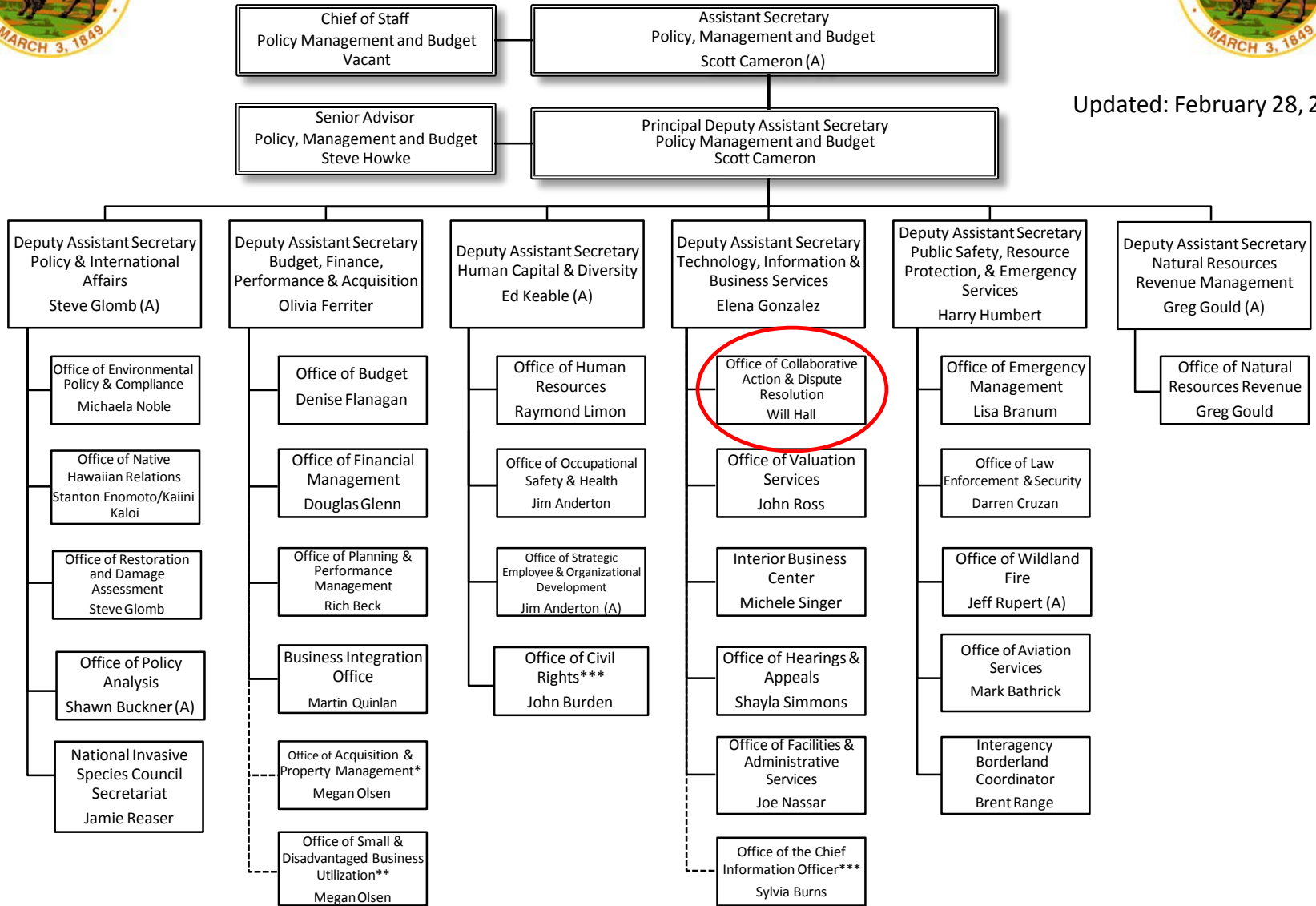




# Assistant Secretary – Policy, Management and Budget



Updated: February 28, 2018



\*The Senior Procurement Executive reports to the Assistant Secretary - PMB who is the Chief Acquisition Officer and receives administrative support and guidance from the Deputy Assistant Secretary - Budget, Finance, Performance and Acquisition.

\*\*Reports to the Deputy Secretary with administrative support provided by the Deputy Assistant Secretary - Budget, Finance, Performance and Acquisition.

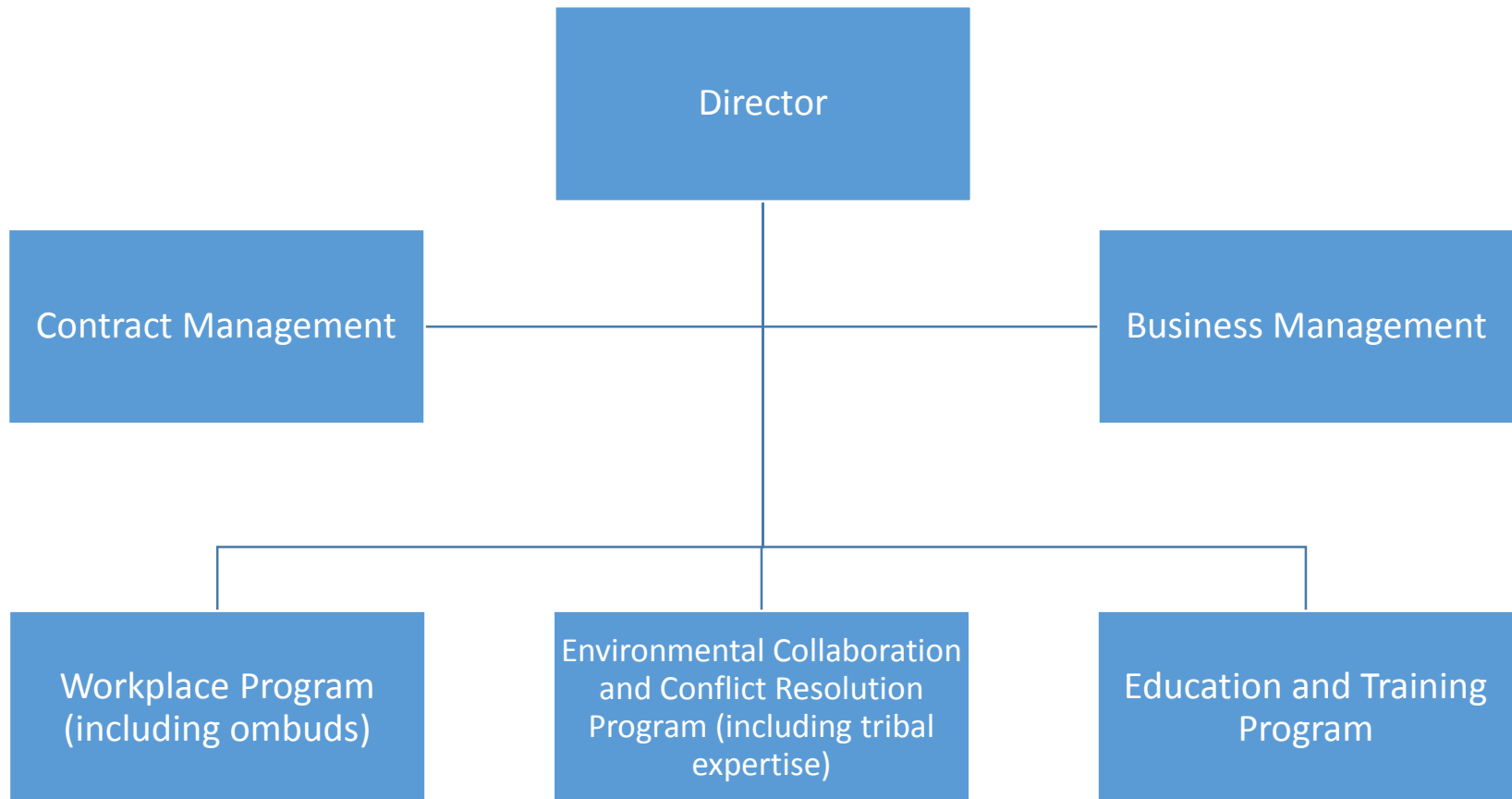
\*\*\*Reports to the Secretary of the Interior and receives administrative support and guidance from the Assistant Secretary - PMB and Deputy Assistant Secretary - Human Capital and Diversity (Director, Office of Civil Rights); and Deputy Assistant Secretary – Technology, Information and Business Services (Chief Information Officer).

# CADR Background

- CADR Director is the Dispute Resolution Specialist
- Established in October 28, 2001
- 11 CADR Staff Members
  - Director
  - Senior Contract Project Officer
  - Business Manager
  - Environmental – 3 Conflict Management Specialists
  - Workplace – 1 Coordinator, 4 Organizational Ombuds
- Organizational Departmental Manual Chapter published at 112 DM 21
- Interior Dispute Resolution Council of Bureau Dispute Resolution Specialists to coordinate and implement policies in all bureaus and offices
- Network of internal mediators and facilitators throughout the Department



# Office of Collaborative Action and Dispute Resolution (Functional Chart)



# CADR Overview

- **Vision-** DOI employees work collaboratively to prevent, manage and resolve conflict at the earliest opportunity to achieve organizational health, gain trust, maximize productivity, and improve efficiency in accomplishing mission.
- **Mission-** CADR leads DOI's conflict management and dispute resolution programs and provides:
  - Policy and procedures on conflict management and alternative dispute resolution processes
  - Process expertise and impartial services including confidential consultations, situation assessments, process design, coaching, facilitation, mediation, teambuilding, and organizational ombuds services
  - Education and training on managing and resolving conflicts
  - Feedback on process use and results to identify opportunities for improvement
- **Key Goals**
  - Promote collaborative approaches to manage conflict and resolve disputes within DOI and with external stakeholders including federal, state, local and tribal governments, non-governmental organizations, industry, and the public
  - Achieve excellence in CADR program operations and service delivery for DOI bureaus and offices

**What is**  
**Environmental**  
**Collaboration**  
**and**  
**Conflict**  
**Resolution ?**

- *a range of assisted collaboration, negotiation, and facilitated dialogue processes*
- *related to environmental, public lands, or natural resources issues or conflicts*
- *directly engages affected interests and federal decision makers in collaborative problem solving and conflict resolution*
- *includes the use of a neutral third party, such as a mediator or facilitator, who assists the parties or participants in negotiations/dialogue*

# Why ECCR?

- The Challenge:

- Protracted and costly environmental litigation
- Unnecessarily lengthy project and resource planning processes
- Costly delays in environmental protection
- Lower quality outcomes and opportunities
- Deep-seated antagonism and hostility from unattended conflicts

- Goals:

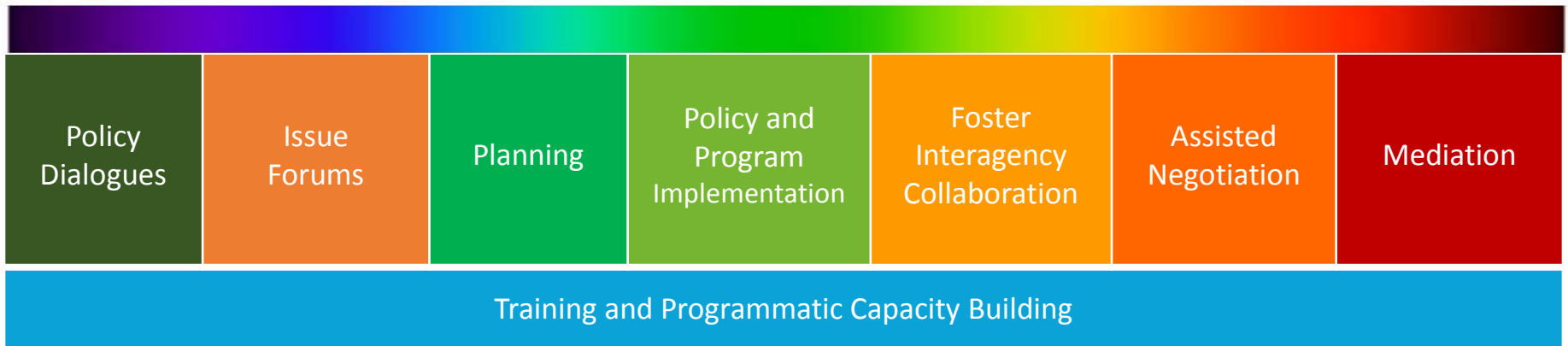
- Faster resolution of issues
- More creative solutions
- Reduced transaction costs
- Fostering a culture of respect
- Improved working relationships
- Increased likelihood of compliance
- Broader stakeholder support
- Better outcomes

# What Does ECCR Encompass?

## Collaborative Policy Making

## Conflict Prevention and Management

## Conflict Resolution



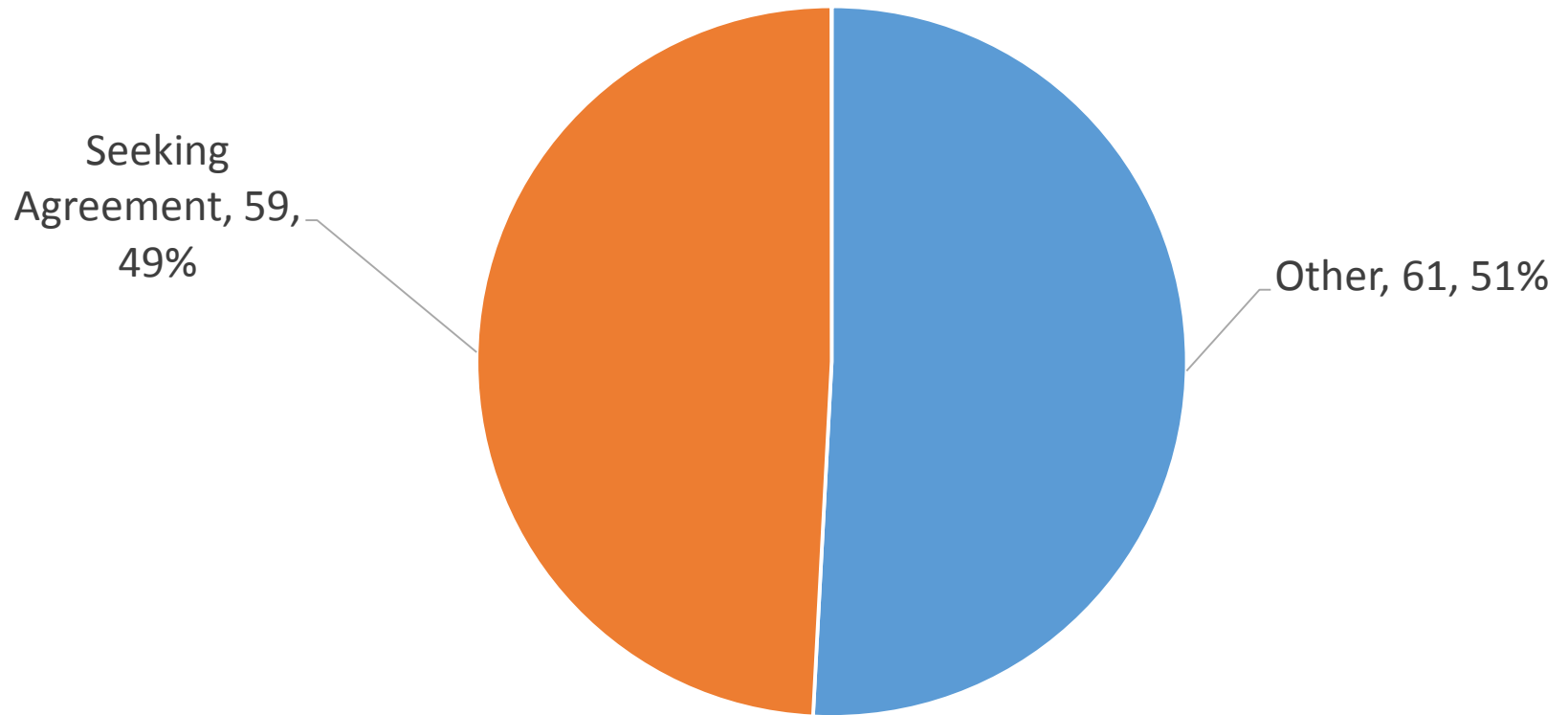


# Principles of ECCR

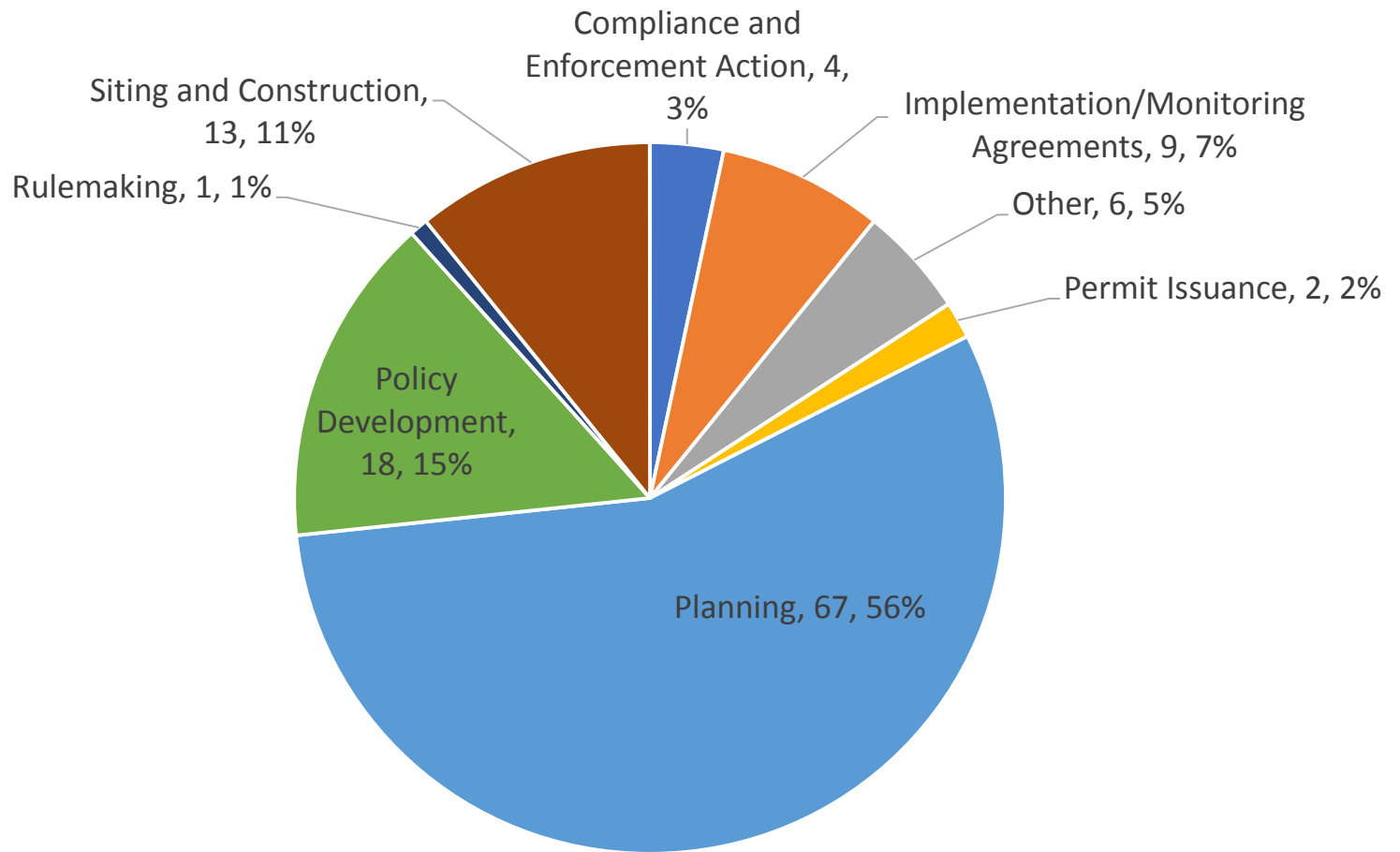
- Informed Commitment
- Balanced Representation
- Group Autonomy
- Informed Process
- Accountability
- Openness
- Timeliness
- Implementation

FY 2017 DOI ECCR Cases

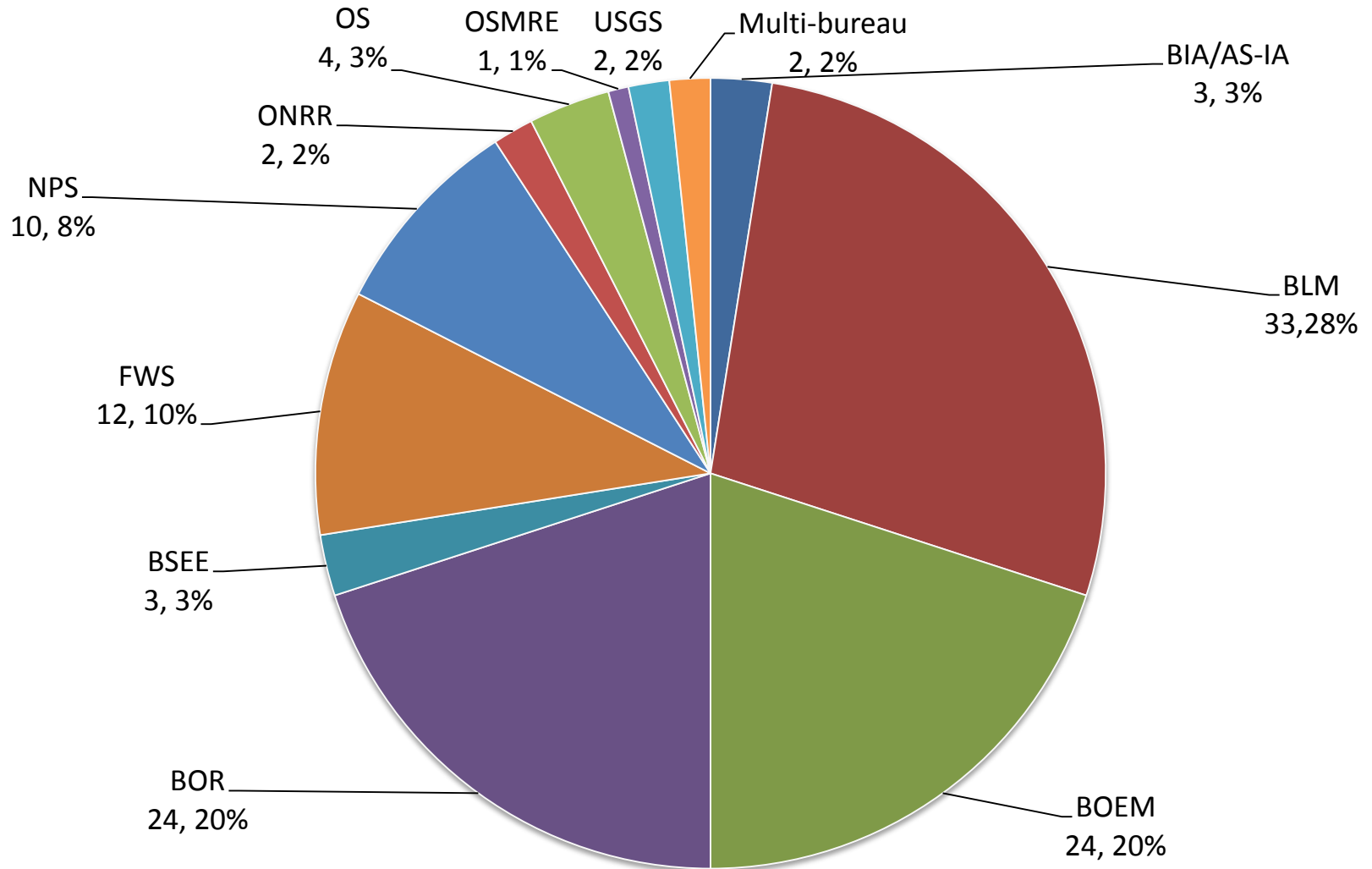
# ECCR Case Process Goal FY 2017 (N=120)



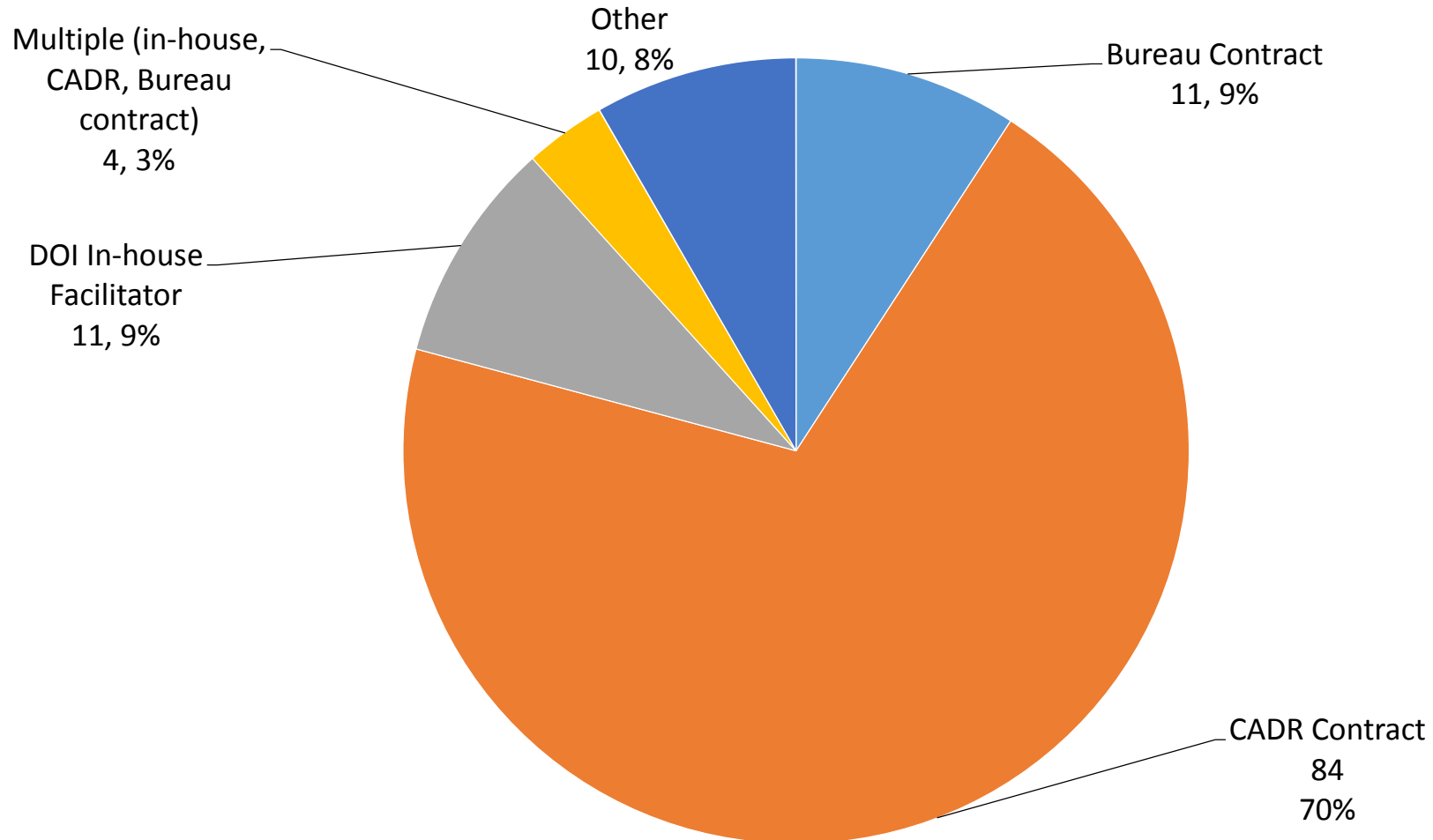
# ECCR Case Policy Context FY 2017 (N=120)

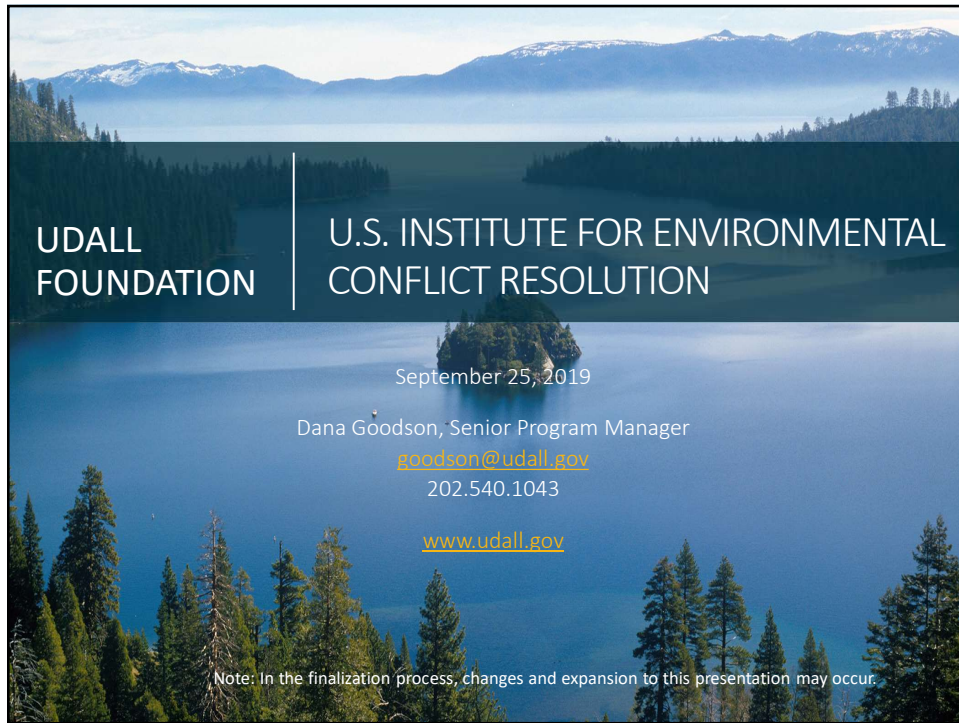


# ECCR Cases by Bureau FY 2017 (N=120)



# Sources for ECCR Case Neutrals FY 2017 (N=120)





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**INTRODUCTION**

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SESSION OUTLINE

1. Introduction to the U.S. Institute for Environmental Conflict Resolution at the Udall Foundation
2. Case Examples
3. Overview of Collaboration Assessment
4. Case Study Exercise
5. Debrief and Q & A

U.S. Institute for Environmental Conflict Resolution  
Udall Foundation

2

# THE UDALL FOUNDATION

PARENT ORGANIZATION TO THE INSTITUTE



U.S. Institute for  
 Environmental Conflict Resolution  
 — Udall Foundation

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U.S.  
 INSTITUTE  
 MISSION

Help federal agencies and other affected stakeholders **address environmental disputes**, conflicts, and challenges, including helping agencies **build internal capacity to address those challenges**

4



## U.S. INSTITUTE

### KEY FEATURES

- **Unique program** dedicated entirely to **ECCR across federal government**
- Focus on **federal issues and decision-making**
- Support work between agencies, Tribes, stakeholders, and the public
- Provide ECCR services, and galvanize private sector work
- **Neutral and Impartial**

U.S. Institute for  
Environmental Conflict Resolution  
— Udall Foundation

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## Help resolve environmental conflicts involving federal agencies

## U.S. INSTITUTE SERVICES

### Case Services



- Consultations
- Assessments
- Process Design
- Convening
- Mediations / Facilitations
- Project Management

### Training and Program Support



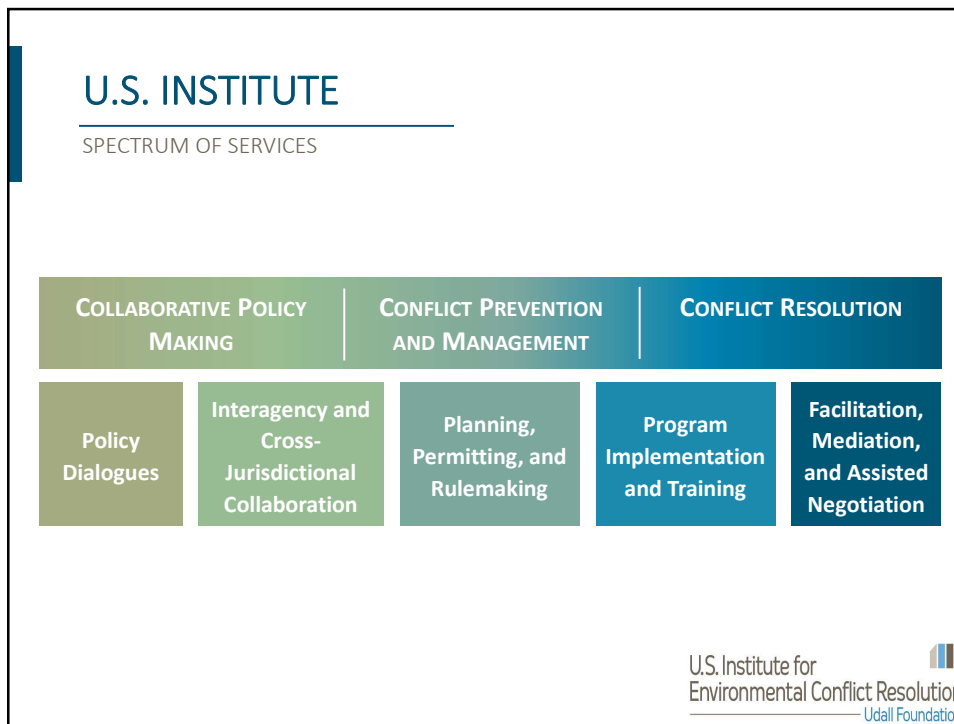
- ECCR Training
  - Open Sessions
  - Customized
- ECCR System Design
- ECCR Program Support

### ECCR Leadership

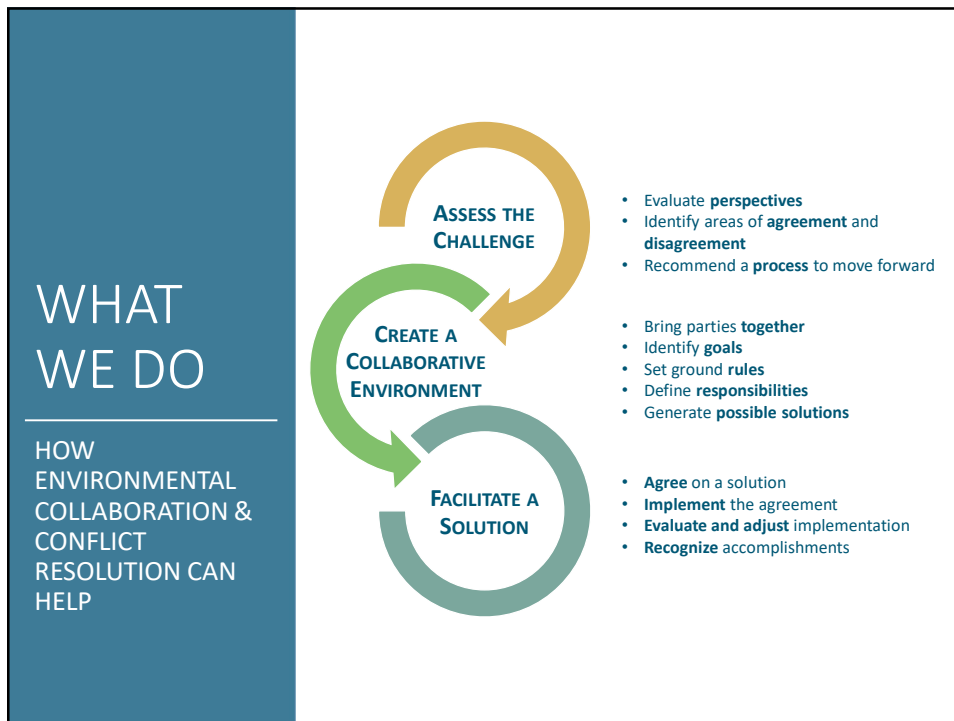


- Assist the federal government implement NEPA Section 101
- Help implement 2012 joint OMB/CEQ ECCR Policy Memorandum
- Support National ECCR Conferences

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## NATIVE AMERICAN AND ALASKA NATIVE PROGRAM

We provide collaboration and conflict resolution services across a range of environmental, natural resources, public lands and trust land issues involving Native American and Alaska Native communities and federal agencies or interests, including

- Environmental planning;
- Government-to-government consultation;
- Policy development and implementation;
- National Environmental Policy Act (NEPA) actions; and
- Traditional cultural property and sacred sites.

Contact: Stephanie Lucero, Senior Program Manager, [lucero@udall.gov](mailto:lucero@udall.gov)

## (SOME) ECCR MISSION CRITICAL APPLICATIONS

- Forest plan revision
- Ecosystem restoration
- Renewable energy interconnections
- Grazing disputes
- Tribal consultation
- Off-road vehicle use
- Hydropower licensing/relicensing applications
- Coastal zone management
- Land use/encroachment
- External civil rights
- Transportation project development
- Energy fast tracked projects
- Water rights
- **NEPA!**

## ECCR TRACK RECORD

WHAT ARE THE BENEFITS?

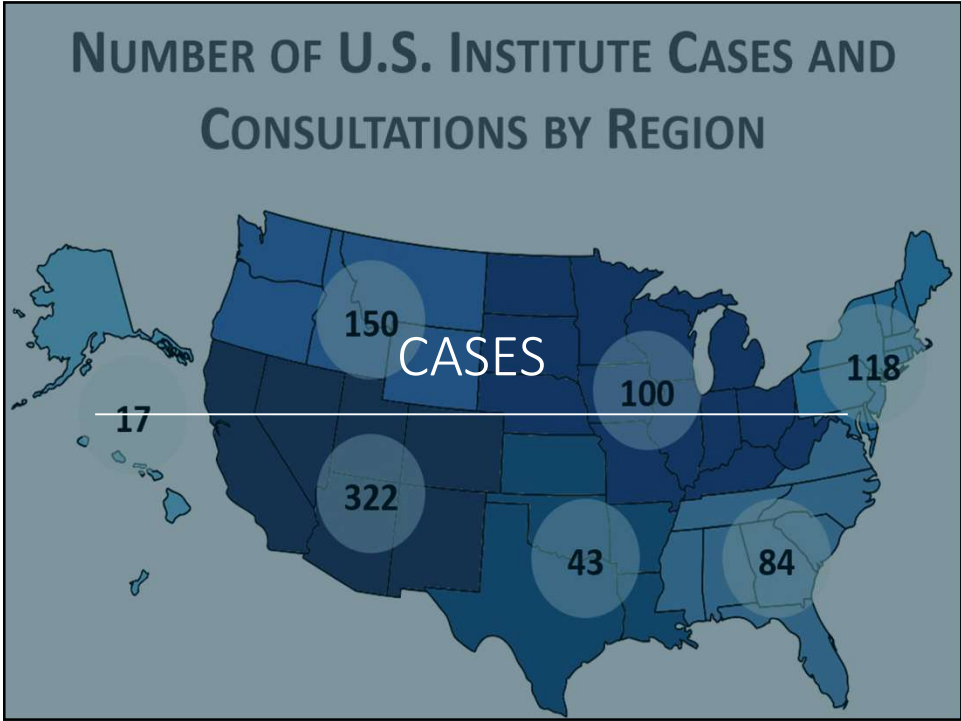
REPORT: Environmental Collaboration and Conflict Resolution (ECCR): Enhancing Agency Efficiency and Making Government Accountable to the People

Available at [NEPA.gov](http://NEPA.gov)

BENEFITS OF ECCR	
<b>Efficiency</b>	Cost savings, timely process, minimizes litigation
<b>Outcomes</b>	Better, more durable solutions
<b>Relationships</b>	Improves communication and understanding
<b>Governance</b>	Increased capacity to serve citizens

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**REGIONAL & NATIONAL OCEAN PLANNING**

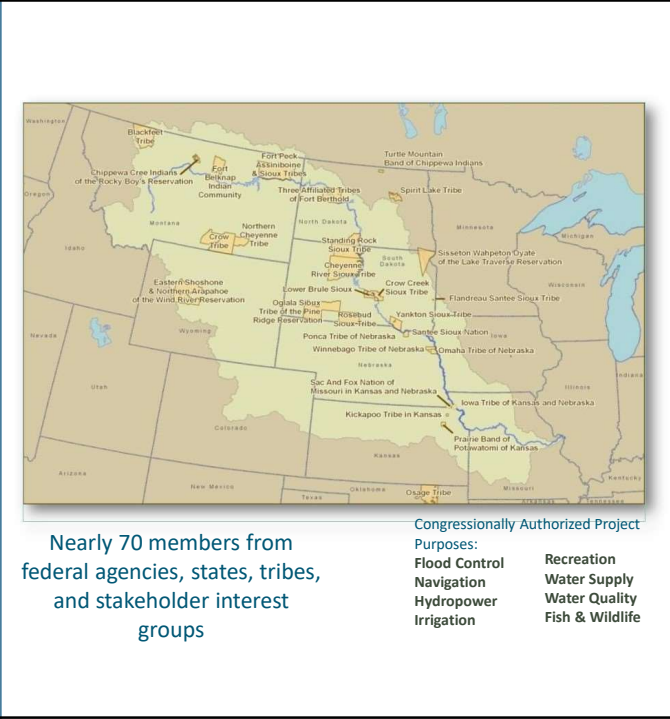
Have supported work at a national level and in the Northeast, Mid-Atlantic, West Coast, Caribbean, and Pacific Islands regions.



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**MISSOURI RIVER RECOVERY IMPLEMENTATION COMMITTEE**

Have supported work at a regional level across 8 states



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## WHAT IS A COLLABORATION ASSESSMENT?

- A learning process to:
  - Develop a knowledge base or understanding of the stakeholder/partner issues and dynamics
  - Helps determine the **potential for successful collaboration**
  - Explores collaborative processes or elements that are most likely to succeed
  - Provides input into designing a collaborative plan

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## KEY CONSIDERATIONS

Think Purpose, Process and People

- What is success? Clearly articulated **goals/outcomes**
- Decision making rules, authority and procedure **legitimacy**
- Proper **representation and participation** of essential affected stakeholders
- Agency **attitudes** towards collaboration with each other
- Leadership** support and involvement
- Time and resource** constraints and flexibility
- History and status of **relationships**

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## WHEN IS ECR LESS LIKELY TO BE APPROPRIATE?



*Judith sensed that the mediation would take more time than the half-day that it had been scheduled for.*

c.07CharlesFincher09.03 Scribble-in-Law at LawComix.com

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## ECCR WORKS BEST WHEN

- Issues identifiable and high priority to all key stakeholders
- Outcomes doubtful/genuinely in question
- Unsatisfactory results otherwise possible
- Negotiable solutions need to be tailored
- Joint inquiry useful to resolve technical issues (rather than “dueling experts”)
- Process design necessary to coordinate conflict resolution
- Confidential communication by neutral could help parties make progress in negotiations
- Favorable political climate supports collaborative process

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## ECCR WORKS BEST WHEN

- Multiple parties needed to resolve or implement agreement (no single party can effectively resolve on its own)
- No single party has complete control over situation
- Can create balance of power among stakeholders
- On-going relationship preservation critical
- Affected interests can be identified and represented by available representatives
- Willingness and capacity of all necessary parties to engage
- Adequate time & resources available, but time pressure exists

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## ECR IS LESS LIKELY TO BE APPROPRIATE WHEN...

- Primary focus is constitutional/legal rights or fundamental values
- Parties believe other approaches better serve their interests
- Issue(s) not perceived as a priority
- Key parties won't participate
- No appropriate entities available to represent interests
- Highly polarized —face-to-face discussion not possible/safe
- Sponsor or party/parties won't commit to implement agreements reached

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## THIRD PARTY NEUTRALS

How they can help.



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### WHEN IS A THIRD-PARTY MEDIATOR OR FACILITATOR NEEDED?

SOME CONSIDERATIONS

- Complex issues and contentious parties
- Multiple parties are involved
- History of distrust between parties
- First effort to use consensus processes
- Past efforts to resolve differences have failed
- Concerns about confidentiality
- Agency or other capacity for facilitation

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## Hypothetical Case Study: Tribal Nation Natural Resource Damage Claims

- Fordham Small Nuclear Reactor Test Facility
  - Lands withdrawn from public domain
  - Adjacent to Nanopo tribal lands with treaty hunting, fishing, and grazing rights
  - Dam built for reactor cooling water
    - Preventing fish spawning in creek
    - Flooding traditional grazing lands
    - Preventing access to areas
  - Contaminated water discharged directly into reservoir
  - Facility shut down and decommissioned in 2005
  - Spent nuclear fuel in onsite storage

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## Hypothetical Case Study

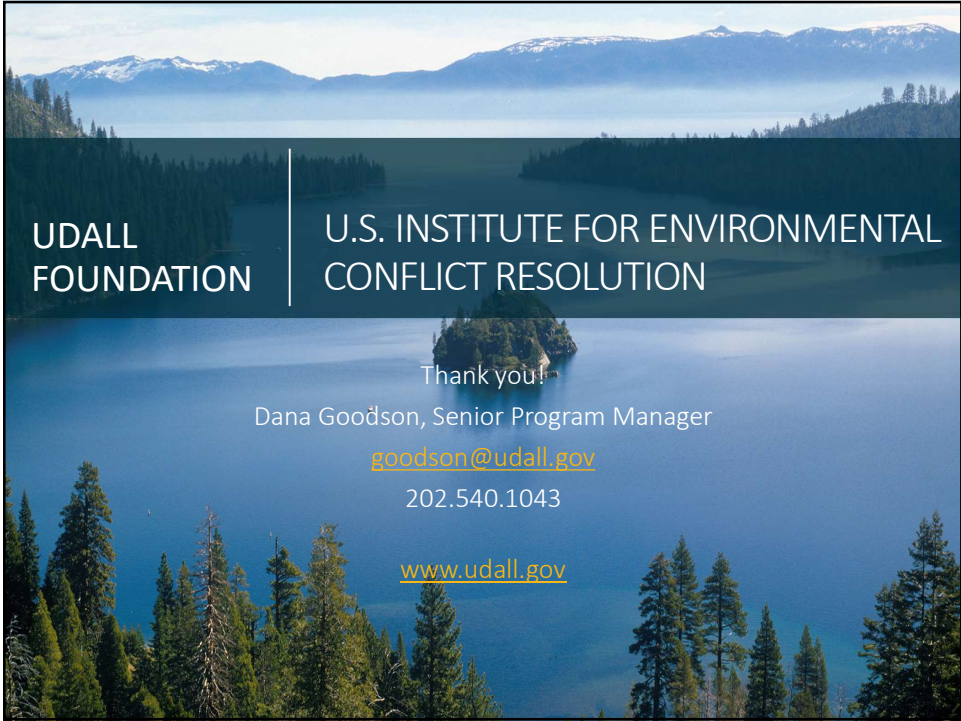
- DOE conducting CERCLA Remedial Investigation and Feasibility Study
  - Public consultation and government-to-government consultation
  - Natural Resource Trustee Council - DOE, BLM, USFWS, the State of Idaho, and the Nanopo Tribe
  - Alternatives considered include burial of reactor core and addressing contaminated soils and groundwater.

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## Hypothetical Case Study

- Nanopo Tribe's recommendations
  - Dam breaching to restore natural water flow
  - Conduct NRD assessment
- Concern about disturbance of ancestral burial grounds and sites

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# Be A Collaboration Champion

## Techniques & Strategies for Effective Collaboration

**David Batson**

Senior Mediator/Allocator

AlterEcho

Note: In the finalization process, changes and expansion to this presentation may occur.

# Collaboration is...

## An Approach

- Collaboration is an approach/process of shared decision-making and/or action by two or more parties working together to achieve a common goal

# Collaboration is...

## An Attitude

- The behaviors, actions, and emotions that you model to set the stage for collaborative interaction and a positive tone for your organization/group
- Your attitude prompts people to approach their tension or disagreement in the spirit of proactive cooperation and shared efforts that leads to more effective and creative outcomes



# Collaboration is...

## An Attitude

- Desire to be cooperative
  - Work to understand others
    - Be flexible and creative
      - Be a problem-solver
      - Be a partner
      - Be a facilitator
      - Be a leader

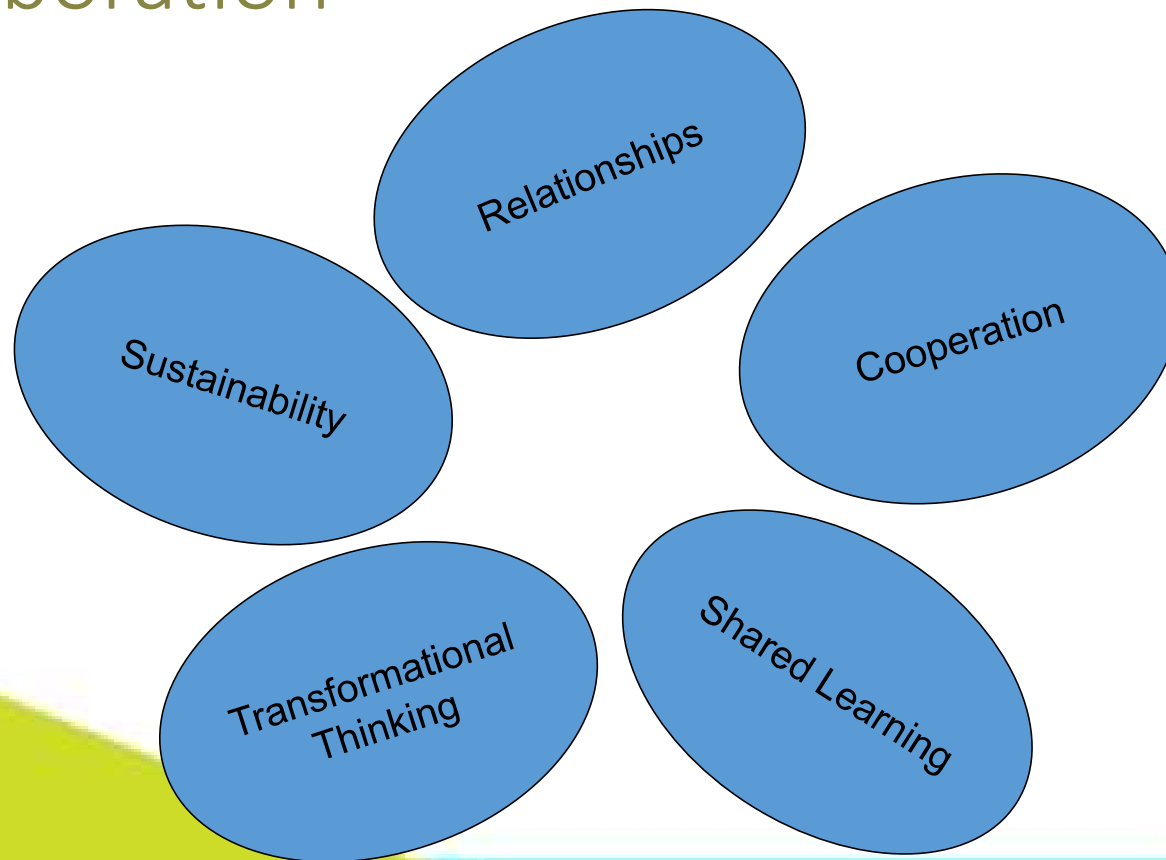
# Why Collaborate?



## Through collaboration we can achieve

- Construction of long-lasting solutions to complex problems
- Additional knowledge through peer learning/wisdom
- Reputation for responsibility and transparency
- Shared accountability for outcomes
  - Innovative problem solving
  - Effective decision-making

# Characteristics of Effective Collaboration



# Relationships



- Treat each other with respect
- Take the time to learn about others' values and interests
- Come to trust each other over time
- Become aware of others' interests as well as your own

*Characteristics of effective collaboration*

# Cooperation

- Everyone participates in the process
- Everyone understands how the process works
- Common understanding of problem and solution
- Work together to solve problems
- Focus on solving problems; not personal disagreements



*Characteristics of effective collaboration*

# Shared Learning



- Values and interests are made clear
- Everyone can see how their interests are addressed
- All information is made available and understandable to all parties
- Broad, comprehensive analysis of the problem is conducted

*Characteristics of effective collaboration*

# Transformational Thinking



- Collaborative solutions are not based on compromise but on shared discovery
- Creative thinking promotes unanticipated solutions
- Integration of interests results in positive gains for all participants

*Characteristics of effective collaboration*

# Sustainability

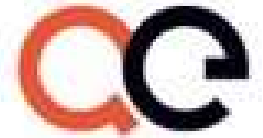
- Craft decisions using full range of stakeholder interests
- Seek for all parties to own decision
- Decisions are realistic
- Implementation and monitoring are part of decision-making
- Parties understand and agree upon their role and responsibility for maintaining the decision

*Characteristics of effective collaboration*

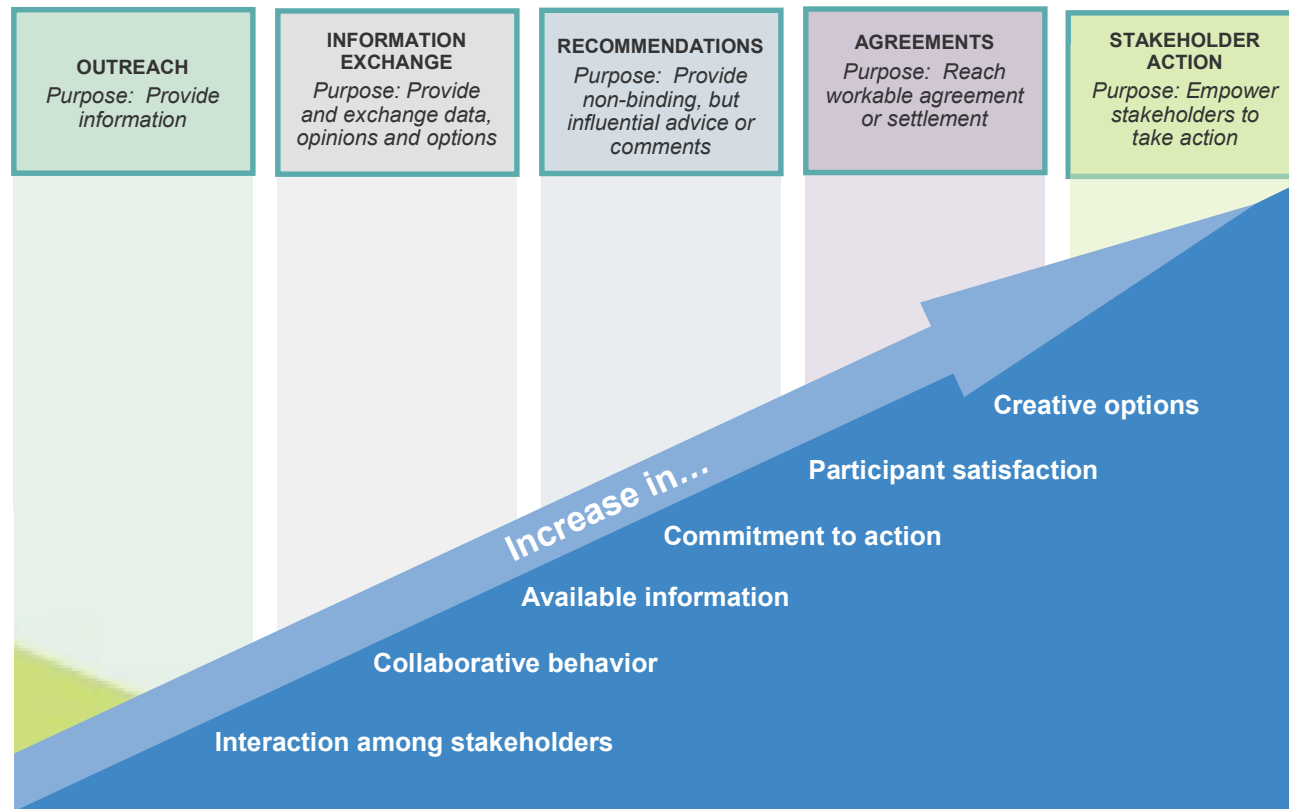


# Opportunities for Collaboration

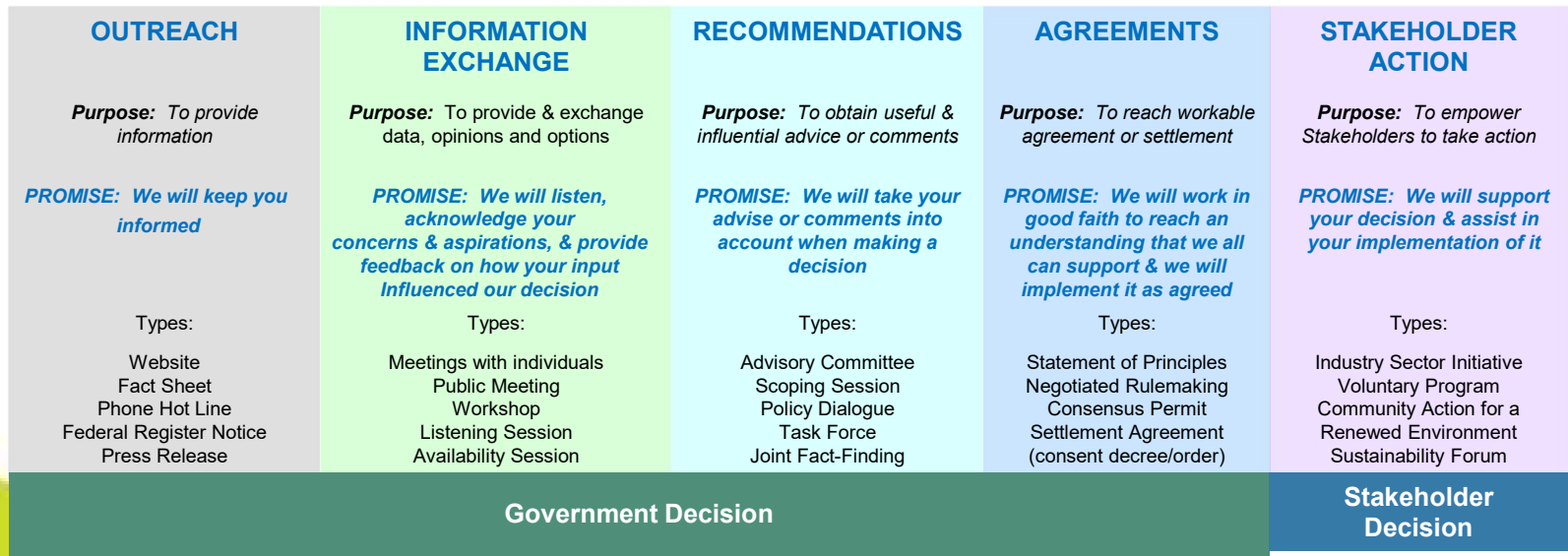
## Public Involvement Spectrum: A Range of Possible Processes



**ALTERECHO**  
plan • act • grow



# Processes for Effective Collaboration



*Potential Consensus Processes*

# Your Role in Collaborative Processes



## Enhancing a Collaborative Culture

- Listening deeply
  - Identifying common ground
    - Exploring differences for better decision-making
      - Building shared meaning

## Your Role in Collaborative Processes



**Willingness:** Work at being collaborative, put aside other agendas and put forth the effort required for collaboration

**Partnering:** Form alliances with colleagues and stakeholders to understand issues and solve problems, and to create and strengthen the relationships required for collaboration

## Your Role in Collaborative Processes



**Openness:** Be receptive to other points of view, interests, concerns and needs. Make sure that thought process is transparent so all parties can participate fairly

**Empathy:** Vicariously experience the feelings, thoughts or attitudes of others and try to see from another person's perspective. Recognize and respond appropriately to the emotions of others so that you can modify your behavior to develop productive relationships