Government Dispute Resolution Acts

*Compiled for the Policy Consensus Initiative by Charles Pou, Jr.

As ADR advances into the mainstream, a growing number of jurisdictions have passed legislation specifically addressing ADR use by agencies, courts, and other governmental bodies. The trend has resulted in a rich body of legislative approaches and thinking from which helpful insights and guidance can be gleaned.

While much of this legislation may prove useful in stimulating beneficial state activities, there is some portion that has been poorly informed and even detrimental. People who draft, comment on, or introduce ADR legislation should be mindful that implementing better dispute handling is a process, not an act.

Legislation is merely a starting point in this process. ADR legislation can be very useful if it recognizes this, creates a flexible framework for setting that process in motion, and provides resources, education, design, and evaluation that supports and promotes quality results. Conversely, ADR statutes that seek to obtain results without thought to quality program design and implementation will probably lead to programs that get little use by potential clients. In the worst case, laws that inflexibly mandate particular, inappropriate uses that are inconsistent with ADR processes' strengths and governmental realities can produce harmful outcomes.

What Legislation CAN Do

(Excerpted from Charles Pou Jr., "Legislating Flexibility", Dispute Resolution Magazine, Summer 2001)

Broad-based ADR legislation, rather than a patchwork approach spread across a number of statutes, can effectively address a number of important issues in governmental ADR. Specifically, it can:

- Create a statutory framework that promotes thoughtful, consistent policy toward agencies' use of ADR;
- Raise agencies' (and especially agency lawyers') awareness of and comfort with innovative dispute resolution methods;

- Reflect an appropriate general balance between prescription and flexibility in employing these processes, protecting sensitive communications, acquiring neutrals' services, and assuring judicial oversight;
- Address issues for which specific safeguards or enhanced certainty can promote fairness, prevent abuse, or encourage appropriate ADR use (e.g., an ADR Act's prohibition against requiring an agreement to use arbitration as a condition of awarding any contract or benefit; or meshing ADR procedures, such as confidentiality protections, with those prescribed under other laws);
- Assign responsibility – both within agencies and more broadly – for ADR implementation;
- Afford a basis for regular legislative oversight of agency dispute resolution initiatives;
- Require agency personnel to focus on use of ADR case-by-case in selected settings (e.g., the 1995 Federal Acquisition Streamlining Act's provisions requiring a response whenever ADR use is offered).

What Legislation CANNOT Do

Excerpted from Charles Pou Jr., "Legislating Flexibility", Dispute Resolution Magazine, Summer 2001

Though useful, legislation cannot single-handedly create a bureaucratic atmosphere conducive to implementing its directives. For example, it cannot:

- Assure adequate resources for improved dispute resolution;
- Significantly affect agencies' substantive or other priorities;
- Establish high-level champions or mid-level leaders who support and reward ADR "worker bees," or even assure that the proper individuals are the ones designated as worker bees;
- Create an administrative structure – either within an agency or on a broader interagency basis – that provides useful tools and mutual support (e.g., joint educational programs, shared neutrals programs, joint rosters, expert advice-giving);
- Create a structure that enables people in different agencies who are interested in improved dispute resolution to interact with each other and with outside experts, and that encourages and enables agencies to follow best practices;

- Assure inclusive, high-quality program design is undertaken when a new program is established (e.g., early, meaningful outreach to affected interests; attention to finding an ideal location for the program, as opposed to turf-based decision making; establishing acceptable, ethical programs; obtaining adequate neutrals; seeking feedback and rigorous evaluation of program outcomes and administration);
- Achieve an appropriate level of education and dispute resolution awareness among all, or even most, of the relevant actors within an agency – including players on the outside who can also influence process decisions;
- Address a broad range of real-world obstacles such as structural barriers within bureaucracies, certain segments of bureaucracies that are adept at co-opting new innovations to suit their narrow goals, and unforeseen interactions between dispute resolution legislation and other laws that have divergent goals or inconsistent processes.

State Dispute Resolution Acts

Below is information and links to Governmental ADR Acts passed in Texas, New Mexico, Utah, and Virginia. Each establishes and encourages the use of ADR procedures by those states' government agencies.

TEXAS Dispute Resolution Act

"The Act explicitly works to supplement, not replace or limit, all existing dispute resolution practices and procedures used by Texas agencies. The legislation is permissive in application, not mandatory, and does not alter application of the Texas sovereign immunity doctrine. It is based in part on the federal Administrative Dispute Resolution Act, enacted in 1990 and permanently reauthorized in 1996, which promotes the use of ADR in federal agencies in a government-wide, systematic manner. The GDR Act builds by reference upon key provisions of the Texas Alternative Dispute Resolution Procedure Act (ADR Procedures Act), first passed in 1987 to guide ADR use for all

civil disputes; in fact, the two acts are so closely intertwined that a simultaneous reading of both is necessary to fully understand the GDR Act."

(From: The University of Texas School of Law / Center for Public Policy Dispute Resolution, Public Resource Series #3, September 1998, Commentary on the Government Dispute Resolution Act and the Negotiated Rulemaking Act, p.12)

CHAPTER 2009:
Alternative Dispute Resolution for use by Governmental Bodies

Includes:

SUBCHAPTER A – General Provisions

2009.001 – The Government Dispute Resolution Act

2009.002 – Policy

2009.003 – Definitions

2009.004 – Agency Contracts; Budgeting for Costs

2009.005 – Sovereign Immunity

SUBCHAPTER B – Alternative Dispute Resolution

2009.051 – Development and Use of Procedures

2009.052 – Supplemental Nature of Procedures

2009.053 – Impartial Third Parties

2009.054 – Confidentiality of Certain Records and Communications

CHAPTER 2003
State Office of Administrative Hearings

Includes:

SUBCHAPTER A – General Provisions

2003.001 – Definitions

SUBCHAPTER B – State Office of Administrative Hearings

2003.021 – Office

SUBCHAPTER C – Staff and Administration

2003.042 – Powers of Administrative Law Judge

2003.047 – Natural Resource Conservation Division

NEW MEXICO Dispute Resolution Act

The Governmental Dispute Resolution Act “encourages state agencies to use alternative dispute resolution techniques (such as mediation, facilitation, negotiated rule making, public policy dialogues, etc.) in addressing issues and concerns coming under agencies’ jurisdictions.”

The Act authorizes and encourages state and local governments to use ADR to address conflicts and make government more effective. While the bill does not authorize appropriation of funds directly, it allows agencies to request authority to move money around in their budgets for ADR purposes.

In addition, the Act stipulates that each executive branch agency will designate an ADR coordinator who will report to the head of the agency. Agencies are responsible for developing plans for implementing ADR and training managers and staff.

Article 8A -- Chapter 12.8A
Governmental Dispute Resolution Act

Includes:

SECTION 12-8A-2 – Definitions

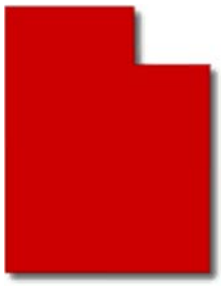
SECTION 12-8A-3 – Alternative Dispute Resolution; authorization; procedures; agency coordinators

SECTION 12-8A-4 – Agency budgets; contracts for services

SECTION 12-8A-5 – Effect on other laws

SECTION 1-2-2.1 – Administrative complaints; procedures

UTAH Dispute Resolution Act



According to the Act, agencies may use ADR to resolve disputes or issues involving any of the agency’s operations, programs, or functions, including formal and informal adjudications,

rulemaking, enforcement action, permitting, certifications, licensing, policy development, and contract administration with the consent of all the parties. Any ADR procedures developed and used by an agency must be consistent with the requirements of the Administrative Procedures Act.

Agencies that use ADR procedures must develop agreements with stakeholders that provide for the appointment of ADR providers or neutrals, and set forth how costs and expenses will be apportioned among the parties.

Title 63 -- Chapter 46c
Governmental Dispute Resolution Act

Includes:

SECTION 63-46c-102 – Definitions

SECTION 63-46c-103 – Alternative Dispute Resolution, authorization, procedures, agency coordinators, contracts

SECTION 63-46c-104 – Effect on other laws

VIRGINIA Dispute Resolution Act

The Act authorizes use of ADR by local governments and legislative and executive branch agencies in a variety of areas. It also creates the Virginia Alternative Dispute Resolution Council, which provides training opportunities, assists agencies in developing DR and consensus building programs, and develops recommendations for using and improving DR processes within government. The Council serves as an advisory council to the Secretary of Administration.

Under the Act, state agencies are required to adopt policies to address the use of dispute resolution proceedings within the agency and for the agency's programs and operations. Each state agency must designate a dispute resolution coordinator.

Title 8.01 -- Civil Remedies and Procedure
Chapter 20.2 -- Court-Referred Dispute Resolution Proceedings

Includes:

SECTION 8.01-576.4 – Scope and definitions

SECTION 8.01-576.5 – Referral of disputes to dispute resolution proceed

SECTION 8.01-576.6 – Notice and opportunity to object

SECTION 8.01-576.7 – Costs

SECTION 8.01-576.8 – Qualifications of neutrals; referral

SECTION 8.01-576.9 – Standards and duties of neutrals; confidentiality;

SECTION 8.01-576.10 – Confidentiality of dispute resolution proceeding

SECTION 8.01-576.11 – Effect of written settlement agreement

SECTION 8.01-576.12 – Vacating orders and agreements

Title 8.01 – Civil Remedies and Procedure
Chapter 21.2 – Mediation

Includes:

SECTION 8.01-581.21 – Definitions

SECTION 8.01-581.22 – Confidentiality; exceptions

SECTION 8.01-581.23 – Civil immunity

SECTION 8.01-581.24 – Standards and duties of mediators; confidentiality

SECTION 8.01-581.25 – Effect of written settlement agreement

SECTION 8.01-581.26 – Vacating orders and agreements

Additional DR Legislation Resources

Selected General ADR Legislation

- Administrative Dispute Resolution Act, 5 U.S.C. Secs. 571-584 (general provisions, confidentiality, administrative arbitration); 5 U.S.C. 556© (ALR authority); 9 U.S.C. 10 (arbitration, judicial review); 41 U.S.C. 604-607 (contract disputes); 29 U.S.C. 173 (FMCS authority); 28 U.S.C. 2672 (tort claims); and 31 U.S.C. 3711 (a)(2) (government claims).
- Negotiated Rulemaking Act, 5 U.S.C. Secs. 561-570.
- National Conference of Commissioners on Uniform State Laws, and the University of Pennsylvania Law School, Uniform Mediation Act, February 2001.

Other References

- American Bar Association Section of Dispute Resolution's Dispute Resolution Magazine, *The State of ADR: Dispute Resolution Spreads in the States*, (Vol. 7 No. 4; Summer 2001).
- University of Texas Center for Public Policy Dispute Resolution, 1999 Texas ADR Legislative Report. Describes and analyzes ADR laws passed during Texas Legislature's 1999 session, and summarizes bills considered but not approved.
- University of Texas Center for Public Policy Dispute Resolution, *Commentary on the Governmental Dispute Resolution Act and the Negotiated Rulemaking Act* (September 1998).

Resolutions

Resolution on the Use of Consensus Building in Policy Making

CSG Midwest - The Council of State Governments 53rd Annual Meeting of the Midwestern Legislative Conference of The Council of State Governments

Hyatt Regency Hotel, Indianapolis, Indiana
August 2-5, 1998

WHEREAS, the role of states within the American federal system has grown increasingly important in recent years; and

WHEREAS, the issues and challenges confronting state leaders today are more complex and often more divisive than ever before; and

WHEREAS, to be effective in addressing the wide array of issues they face, state leaders need to employ a variety of strategies and problem solving tools; and

WHEREAS, the process of consensus building represents an important alternative approach to dealing with complex issues, particularly those involving multiple stakeholders and competing interests; and

WHEREAS, consensus building embodies a set of concepts and processes, including collaborative problem solving, mediation and facilitation, that can be used by states to craft better policies and better tools for implementing them; and

WHEREAS, many states that have used consensus building processes as policy-making tools have been successful in addressing such difficult issues as environmental protection, the regulation of nursing homes, affordable housing, HIV prevention and more; and

WHEREAS, a growing number of states have already established consensus programs and dispute resolution offices to assist state leaders in applying the concept of consensus building to the development and implementation of public policy; and

WHEREAS, state leaders would be well served by further efforts to promote consensus building as a tool to be used in addressing complex issues and developing effective public policy; and

WHEREAS, states would also benefit from the greater use of consensus building processes in the development of regional and national solutions to multistate problems; now therefore be it

RESOLVED, that the Midwestern Legislative Conference recognizes the importance of consensus building as an efficient approach to policy development and an effective means to be used by state leaders in addressing issues that lend themselves to resolution through techniques such as collaborative problem solving, mediation and facilitation; and be it further

RESOLVED, that the Midwestern Legislative Conference encourages the development by individual states of consensus building programs and resources to be used by state leaders as appropriate in fostering consensus solutions to complex policy issues; and be it further

RESOLVED, that the Midwestern Legislative Conference supports the efforts of the Policy Consensus Initiative and other proponents of conflict resolution tools to encourage the appropriate use of consensus building techniques by state leaders; and be it further

RESOLVED, that the Midwestern Legislative Conference encourages the states and the federal government to make greater use of consensus-building processes in developing regional and national solutions to multistate policy issues as appropriate; and be it further

RESOLVED, that the Midwestern Legislative Conference will transmit this resolution to appropriate state and federal officials and other interested parties.

Attorney General Uses Law Day to Promote ADR

May 1, 1998

In celebration of Law Day, Attorney General Janet Reno has kicked off a comprehensive campaign to promote the use of ADR and conflict resolution. The Attorney General has written letters to all of the nation's governors and state attorneys general, encouraging them to use the annual Law Day celebrations in their states as an opportunity to speak out about dispute resolution programs in courts, schools and communities. She said:

I believe we have an obligation to those we represent and to society as a whole to serve as peacemakers and problem solvers. It is our job to help resolve disputes in ways that promote civility, preserve relationships, and minimize the burdens on our court systems. Many dispute resolution programs serve these purposes admirably.

In addition, Reno also asked all ninety three United States Attorneys, as well as her senior Department managers in Washington, to participate in an appropriate Law Day observation. She suggested that they identify and promote successful dispute resolution activities in their areas.

Finally, the Attorney General has made a ten-minute video tape message suitable for presentation to bar groups on the benefits of using dispute resolution in a variety of settings. Bar associations can obtain a copy of this tape from the Senior Counsel for ADR at the Department of Justice by calling (202) 616- 9473.

Letter from the Attorney General to all of the Nation's Governors and State Attorneys General

Dear Governor

By Presidential Proclamation, every May 1 is designated as Law Day, an opportunity to celebrate and reflect upon the role of law in our society. This year, I will be spending all of my time on Law Day advancing the cause of dispute resolution programs. I am writing to ask that you participate in this effort, by speaking out on this important day about dispute resolution programs. I have extended a similar request to your fellow governors, the state attorneys general, our United States Attorneys, state bar associations and other influential, interested parties.

I believe we have an obligation to those we represent and to society as a whole to serve as peacemakers and problem solvers. It is our job to help resolve disputes in ways that promote civility, preserve relationships, and minimize the burdens on our court systems. Many dispute resolution programs serve these goals admirably.

Dispute resolution programs take many forms: mediation, neutral evaluation, arbitration, and other processes help parties to settle civil litigation; schools use conflict resolution programs to reduce youth violence; conflict prevention techniques, practiced as part of community policing, generate greater respect for law enforcement officers.

The attached material, prepared for my use, summarizes the Department of Justice's commitment to dispute resolution programs rams and describes the benefits that can flow from such a commitment. I ask that you review this material, supplement it with information about dispute resolution programs in your own state, and take this opportunity to educate your constituents about the advantages of these programs.

Because these and similar programs can make our communities more civil, less violent, and more focused on problem-solving than fault-finding, they can have a transforming effect upon our society. Especially on Law Day, our support of these programs is crucial. If together we send a unified message, we will be heard and we will make a difference.

Thank you for your assistance and cooperation.

Department Of Justice Conflict Resolution Fact Sheet

Conflict resolution techniques and appropriate dispute resolution (ADR) forums encourage people to resolve disputes in mutually acceptable and peaceful ways. Increasingly, these techniques are being used in a number of areas that impact on litigation and work in partnership with schools, law enforcement and communities throughout the country.

The Department of Justice is involved in a range of efforts to use and encourage the use of conflict resolution. Following are a few examples:

Litigation

- Since 1995, the Department has quadrupled the number of cases annually where some form of ADR has been used by our attorneys. In Fiscal Year 1997, some form of ADR was used in 1,579 cases. The Department uses third-party neutrals to settle all types of litigation ranging from tort claims and environmental disputes to civil rights enforcement matters, workplace disputes and issues involving administrative law.
- The Department works with other federal agencies to encourage the use of ADR to resolve administrative agency-level cases, including employment, contracting and enforcement disputes.
- The Department has conducted 28 training sessions in "Enhanced Negotiations and Mediation Advocacy" for its attorneys. Attorneys from the Department in 42 states have been trained to use ADR in appropriate cases.

Law Enforcement

- In a jointly supported program through the Office of Justice Program's Executive Office of Weed & Seed and the Office of Community-Oriented Policing Services (COPS), several Weed & Seed sites are developing conflict resolution programs that link community mediation and community policing to efforts with young people.

Communities

- The Department's Community Relations Service (CRS) provides mediation and other conflict resolution assistance, as well as training and support services, for communities seeking to ease racial and ethnic tensions. For example, CRS successfully convened a series of mediation sessions in the Little Rock, Arkansas School District that resulted in the adoption of a Revised Desegregation and Education Plan on January 16, 1998 after nearly 40 years of litigation. CRS works with schools, law enforcement and communities across the country.
- The Department's Office of Justice Programs (OJP), through its bureaus and program offices, provides ongoing support and resources, through funding and technical assistance, for a range of conflict resolution and problem-solving approaches to prevent violence and reduce crime in communities and schools throughout the country.

- The Weed & Seed program, soon to expand to 178 sites nationally, supports the development of local crime prevention strategies that include conflict resolution and mediation for adults and children in neighborhoods across the country.
- The Bureau of Justice Assistance's Comprehensive Communities Program (CCP) and Pulling America's Communities Together (PACT) initiative sites --representing over 40 cities and ten counties --have implemented a variety of comprehensive conflict mediation and non-violent dispute resolution services. Training and skills development are provided for students, educators, police officers, social service professionals, and families.
- The National Institute of Justice publishes Community Mediation Programs: Developments and Challenges, which describes efforts within communities to resolve their own disputes using mediation and other consensus-based processes.
- The Office For Victims of Crime is currently developing training materials to assist communities in starting victim-offender mediation programs.

Schools

- The Office of Juvenile Justice and Delinquency Prevention (OJJDP) provides funding, training and technical assistance in connection with conflict resolution and violence prevention for young people. OJJDP recently sponsored a series of regional trainings at its National Conference for Conflict Resolution Education: Implementing Youth Centered Programs in Schools and Juvenile Justice Settings. Morethan1500 teachers, students, judges, school administrators, probation officers, juvenile facility staff, and counselors have been trained in the last two years. This program will be expanded, in partnership with the U.S. Department of Education, to increase the number of schools, juvenile justice programs and youth service organizations implementing quality conflict resolution education programs.
- Conflict Resolution for Youth: Programming for Schools, Youth-Serving Organizations, and Community and Juvenile Justice Settings, published by OJJDP in partnership with the Safe and Drug Free Schools Program at the U.S. Department of Education, is a guide to implementing conflict resolution programs in schools and other youth-oriented programs. Since it was first published in 1996, more than 50,000 copies have been distributed.

  To obtain Office of Justice Programs Publications, call (800) 851-3420 or visit our website.

  For more information about the department's Conflict Resolution Activities, call (202) 616-9471.

Presidential Memorandum on ADR

The White House
Office of the Press Secretary
(Palo Alto, California)
May 1, 1998

Memorandum for Heads of Executive Departments and Agencies

Subject: Designation of Interagency Committees to Facilitate and Encourage Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking

As part of an effort to make the Federal Government operate in a more efficient and effective manner, and to encourage, where possible, consensual resolution of disputes and issues in controversy involving the United States, including the prevention and avoidance of disputes, I have determined that each Federal agency must take steps to:

1. promote greater use of mediation, arbitration, early neutral evaluation, agency ombuds, and other alternative dispute resolution techniques, and

2. promote greater use of negotiated rulemaking.

By the authority vested in me as President by the Constitution and laws of the United States including sections 569(a) and 573(c) of title 5, United States Code, as amended by the Administrative Dispute Resolution Act of 1996 (Public Law 104-320), I hereby direct as follows:

An Alternative Dispute Resolution Working Group, comprised of the Cabinet Departments and, as determined by the Attorney General, such other agencies with a significant interest in dispute resolution, shall be convened and is designated under 5 U.S.C. 573(c) as the interagency committee to facilitate and encourage agency use of alternative means of dispute resolution. The Working Group shall consist of representatives of the heads of all participating agencies, and may meet as a whole or in subgroups of agencies with an interest in particular issues or subject areas, such as disputes involving personnel, procurement, and claims. The Working Group shall be convened by the Attorney General, who may designate a representative to convene and facilitate meetings of the subgroups. The Working Group shall facilitate, encourage, and provide coordination for agencies in such areas as:

1. development of programs that employ alternative means of dispute resolution,

2. training of agency personnel to recognize when and how to use alternative means of dispute resolution,

3. development of procedures that permit agencies to obtain the services of neutrals on an expedited basis, and

4. recordkeeping to ascertain the benefits of alternative means of dispute resolution.

The Working Group shall also periodically advise the President, through the Director of the Office of Management and Budget, on its activities.

The Regulatory Working Group established under section 4(d) of Executive Order 12866 is designated under 5 U.S.C. 569(a) as the interagency committee to facilitate and encourage agency use of negotiated rulemaking.

This directive is for the internal management of the executive branch and does not create any right or benefit, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

William J. Clinton

May 1 1998

Western Governors' Association
December 5, 1997
Western Governors’ Association Resolution #97 - 024

Sponsors: Governors Kitzhaber and Geringer

A. Background

1. The challenges confronting today's governments are perhaps greater than ever before. Vital issues are not only complex, but also potentially more divisive, in part because they often involve a wide array of stakeholders representing different interests and perspectives. Yet the duty of government to establish and implement sound public policy remains unchanged.

2. Among the greatest barriers to achieving that end is the increased opportunity for conflict, for interference of one policy with another, and for duplication of effort, which translates into waste - of time, energy and money - something no government today can afford.

3. Meanwhile, changes occurring in state governments are actually reducing their ability to solve problems and reach consensus on major policy issues. Downsizing, for example, has led to reduced staffing, and term limits affect the knowledge base necessary to develop sustained, consistent solutions.

4. While the needs of one state will obviously differ from those of another, there is a growing need for all states to be able to address issues and resolve problems involving multiple stakeholders, both private and public, and to do so with a maximum of efficiency and a minimum of conflict. It is essential for all stakeholders to be involved at some level in policy decisions. The experience of several western states suggests that this can best be accomplished through a structured process of consensus building.

5. Consensus building represents a set of concepts and processes - collaborative problem solving, mediation, facilitation - that can be used by states to craft better policies and better tools for implementing them. Such methods are already being employed in the legal system but they are not yet widely accepted by state government.

6. However, those states which have adopted consensus building processes as an essential tool of policy-making have met with considerable success in improving government performance. State programs and offices of dispute resolution are among the options available to state governments interested in applying the concept of consensus building to the formation and implementation of public policy.

7. The federal government can play an important role in both encouraging consensus resolution of issues as well as supporting consensus decisions.

B. Governors' Policy Statement

1. Because of the growing need for and interest in the use of consensus building and other problem-solving approaches at the state level, this is an opportune time to strengthen existing state programs, to establish new ones, and to promote the use of these tools throughout state government.

2. Wide use of such programs would expedite the policy process by reducing conflict and focusing on shared objectives. This would hold true both within states and in the case of issues which cross state borders and require multi-state solutions.

3. The WGA, therefore, supports the development and/or enhancement of structured consensus building programs as an essential part of state government.

4. When appropriate, federal agencies should participate in consensus-building processes as one of the stakeholders, both for the legal parameters and the information the process provides, as well as for their subsequent role in the implementation of the agreement. Other affected governments (e.g. local and tribal) should also participate.

5. Further, in both policy development and management activities, federal agencies should respect and work to accommodate state and multi-state consensus-building solutions which used consensus-building processes to resolve policy issues.

6. Finally, many federal laws are currently up for reauthorization. Reauthorizations should encourage the use of state and multi-state consensus-building processes and solutions. They should do this by providing legal authority to accommodate state and multi-state consensus solutions as well as by providing resources to support state and multi-state consensus-building processes and solutions reached by broadly representative groups of stakeholders.

C. Governors' Management Directive

1. Western Governors' Association shall convey this resolution to the governors of the Western States.

2. Western Governors' Association shall convey this resolution to the Administration, the Western Delegation, and the chairs of congressional committees.

Principles for Environmental Management in the Western Governors' Association
February 24, 1998
Western Governors’ Association Resolution #98 - 001

Sponsors: Governors Leavitt, Kitzhaber, Geringer, and Knowles

A. Background

1. Throughout the 1990s, the population growth rate in the Western United States has surpassed that of every other region of the country. Much of this increase is fueled by in-migration to the West, both from other regions of the United States and from outside the country. The West's population increased by over six million with nine out of the ten fastest growing states in the nation. Migrants to the West seek a better quality of life, as measured by better jobs, a cleaner environment, open spaces and recreational opportunities, strong and safe communities, and a brighter future for their children, while current residents seek to protect these same qualities. Paradoxically, it is growth that both energizes the current economic prosperity and threatens the other qualities Western citizens seek to protect.

2. At the same time, the economy of the West has changed dramatically. While its historic base of natural resource-related industries such as farming, fishing, mining, wood products, and tourism remain central to its economy, the West has diversified and now counts telecommunications, recreation services, transportation,

information technologies, software and entertainment companies among its larger employers. Furthermore, all Western businesses now compete in a robust international economy that demands superior performance for businesses to survive.

3. Population mobility and growth, new businesses, rapid communications and the attendant increased diversity in values are changing political dynamics in the region. These forces make policy-making more complex and difficult, occasionally hardening positions on issues and polarizing public debate. Often, inflexible federal requirements compound the problem and help create a zero-sum atmosphere surrounding environmental issues.

4. As these trends continue, we must find new ways to vest our citizens with policies that both protect the heritage and traditions in the West that are valued and advance the kind of development that will maintain the region's extraordinary quality of life.

5. The nature of environmental and natural resource problems is changing. As large, easily identified sources of pollution are controlled, the threat to the environment has shifted to diffuse, numerous, and smaller scale sources that are more difficult to control through enforcement-based command and control regulation. Agricultural consolidation and fragmentation due to dispersed development have affected land-use patterns, threatening good stewardship born of locally controlled, and economically sustainable agriculture.

6. New computer and communications technologies, as well as new environmental monitoring and characterization technologies, create opportunities for implementing innovative solutions for preserving and enhancing the environment and communities of the West. In addition, the accelerating pace of technological change makes even more imperative the need to avoid mandated technological solutions. Innovative solutions hold the prospect of achieving the desired environmental outcome and increasing economic wealth.

7. During the 1990s, the Western governors have experimented with a variety of ways to improve management of the natural resources of the West. Valuable lessons have been learned from regional, interstate projects and public-private partnerships such as development of the Park City Principles for Water Management, the Great Plains Partnership, the Grand Canyon Visibility Transport Commission and from individual state efforts such as The Oregon Plan for Salmon and Watersheds, the Texas Regional Water Supply Planning Process, Trails and Recreational Access for Alaska and the Wyoming Open Lands Initiative. These efforts have demonstrated that the environmental strategies that work best have strong governors' commitment, vested local support, and federal collaboration.

B. Governors' Policy Position

1. Based on extensive state and regional experience, the Western governors commit to a new doctrine to guide natural resource and environmental policy development and decision-making in the West. That doctrine is based upon the principles below, each of which is dependent upon the others. The integration of these principles is critical to their interpretation and the success of the new doctrine.

- **National Standards, Neighborhood Solutions**

  Assign Responsibilities at the Right Level

  The federal government is responsible for setting environmental standards for national efforts. These standards should be developed in consultation with the states and in the form of scientifically justified outcomes. National standards for delegated programs should not include prescriptive measures on how they are to be met. States should have the option of developing plans to meet those standards and ensuring that the standards are met. Planning at the state level is preferable because it allows for greater consideration of ecological, economic, social and political differences that exist across the nation. A state can tailor its plans to meet local conditions and priorities, thereby ensuring broad community support and ownership of the plans. States can also work together to address conditions and issues that cross their boundaries. It is appropriate for the federal government to provide funds and technical assistance within the context of a state plan to achieve national standards. In the event that states do not want to develop their own plans the federal government should become more actively involved in meeting the standards.

- **Collaboration, Not Polarization**

  Use Collaborative Processes to Break Down Barriers and Find Solutions

  The old model of command and control, enforcement based programs is reaching the point of diminishing returns. It now frequently leads to highly polarized constituencies that force traditional actions by governmental authorities without first determining if they are the most effective ways to protect environmental values. Successful environmental policy implementation is best accomplished through balanced, open and inclusive approaches at the ground level, where interested public and private stakeholders work together to formulate critical issue statements and develop locally based solutions to those issues. Collaborative approaches often result in greater satisfaction with outcomes, broader public support, and lasting productive working relationships among parties. Additionally, collaborative mechanisms may save costs when compared with traditional means of policy development, and can lessen the chance that an involved party will dispute a final result. To be successful however, and given the often local nature of collaborative processes, private and public interests must provide resources to support these efforts.

- **Reward Results, Not Programs**

  Move to a Performance-Based System

Everyone wants a clean and safe environment. This will best be achieved when government actions are focused on outcomes, not programs, and when innovative approaches to achieving desired outcomes are rewarded. Federal and state policies should encourage "outside the box" thinking in the development of strategies to achieve desired outcomes. Solving problems rather than just complying with programs should be rewarded.

- **Science for Facts, Process for Priorities**

  Separate Subjective Choices from Objective Data Gathering

  Competing interests usually point to the science supporting their view. It is best to try to reach agreement on the underlying facts surrounding the environmental question at hand before trying to frame the choices to be made. Using credible, independent scientists can help in this process and can reduce the problem of "competing science" but it may not eliminate it. There comes a time in the collaborative process when the interested stakeholders must evaluate the scientific evidence on which there may be disagreement and make difficult policy decisions.

- **Markets Before Mandates**

  Replace Command and Control with Economic Incentives Whenever Appropriate

  While states and most industries within the states want to protect the environment and achieve desired environmental outcomes at the lowest cost to society, many federal programs require the use of specific technologies and processes to achieve these outcomes. Reliance on the threat of enforcement action to force compliance with technology or process requirements may result in adequate environmental protection. Such prescriptive approaches, however, reward litigation and delay; cripple incentives for technological innovation; increase animosity between government, industry and the public; and increase the cost of environmental protection. Market-based approaches and economic incentives which send appropriate price signals to polluters would result in more efficient and cost-effective results and may lead to quicker compliance.

- **Change A Heart, Change A Nation**

  Environmental Understanding is Crucial

  Governments at all levels can develop policies, programs and procedures for protecting the environment. Yet the success of these policies ultimately depends on the daily choices of our citizens. Beginning with the nation's youth, people need to understand their relationship with the environment. They need to understand the importance of sustaining and enhancing their surroundings for themselves and future generations. If we are able to achieve a healthy environment, it will be because citizens understand that a healthy environment is critical to the social and economic health of the nation. Government has a role in educating people about

stewardship of natural resources. One important way for government to promote individual responsibility is by rewarding those who meet their stewardship responsibilities, rather than imposing additional restrictions on their activities.

- **Recognition of Benefits and Costs**

  Make Sure Environmental Decisions are Fully Informed

  The implementation of environmental policies and programs should be guided by an assessment of the costs and benefits of different options and a determination of the feasibility of implementing the options. The assessment of the feasibility of implementing options should consider the social, legal, economic, and political factors and identify a viable strategy for addressing the major costs.

- **Solutions Transcend Political Boundaries**

  Use Appropriate Geographic Boundaries for Environmental Problems

  Many of the environmental challenges in the West span political and agency boundaries. Challenges may be circumscribed by specific transboundary water or air sheds, and their solutions may better be defined by the geography of certain markets or biologic factors rather than by the geography of a single political jurisdiction. Recognizing these factors voluntary interstate strategies as well as other partnerships may be an important tool in the future.

2. The Western governors call on the leaders in the public and private sector as well as Native American leaders, Congress and the Administration to embrace these principles in their environmental policy and decision-making.

C. Governors' Management Directive

1. WGA staff shall distribute this resolution to the President; Vice President; the Council on Environmental Quality; the Administrator of the Environmental Protection Agency; the secretaries of Interior, Energy and Agriculture; the chairmen and ranking minority leaders of the relevant committees of Congress; the Western delegation to Congress; Western tribal leaders; leaders of business associations and environmental institutions; and interested CEOs.

2. Governors direct WGA to incorporate these principles into its projects and activities in environmental and natural resources policy development and to work with the states to identify specific areas where they have been demonstrated and adopted or may be in the future.

3. Governors direct WGA to communicate the commitment of the governors to these principles to organizations, institutions and media concerned with environmental protection and natural resources

management and to seek opportunities to expand their practical application in regional policy development and programs.