



Alternative Dispute Resolution in the
“Mineral Patch” — Alternatives to Litigating
the Environmental Claim

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Synopsis

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§ 7.01. Introduction.

Industries involved in the exploration, development and production of natural resources have not been immune to the litigation explosion of the 1980s and 1990s. Over the course of the last two decades, competition for scarce resources and a continuing demand for coal, oil, and natural gas have spurred the development of resource reserves. As industry began using these previously sacrosanct resources, a concomitant movement in the public and governmental sectors arose to oppose such activities. That opposition frequently is anchored on the real or suspected environmental impacts of development, and often takes the form of a lawsuit.

Most attorneys and other professionals practicing in the energy and natural resources fields are familiar with the use of mechanisms other than court proceedings to solve a variety of problems arising outside the environmental arena. For example, followers of current events know that most employment contracts contain mandatory alternative dispute resolution (ADR) clauses. These contractual agreements allow federal arbitrators or mediators to provide assistance with difficult labor disputes. Similarly, almost since their inception, electric power sale agreements and natural gas transportation contracts have provided that disputes arising under these documents must be submitted to arbitration or mediation.¹ Parties include ADR requirements in these types of agreements because they realize that without such clauses, litigating a disputed claim would consume far too much time, money, and other resources; interfere with ongoing business relationships and production needs; and present the risk of an uncontrollable or unacceptable outcome.

¹ See e.g., Brunet and Stern, “Drafting the Effective ADR Clause for Natural Resources and Energy Contracts.” 11-SUM *Nat. Resources & Envtl* (Summer 1996).

The complex tangles of factual, technical, and legal issues involved in environmental litigation give rise to an analogous phenomena of skyrocketing costs and unpredictable judicial decisions. As a result, in the mid- to late-1980s, practitioners began to make use of ADR in the environmental context. That trend continues to the present, and likely will increase in the future.

As part of a push to reduce the costs of litigation within the federal government and to ease the burdens of delay often seen as a symptom of that situation, President Clinton in 1996 signed Executive Order 12988. This Executive Order makes the use of alternative dispute resolution a federal priority for all executive agencies.² The U.S. Department of Justice has embraced the concept, as has the head of its Environment and Natural Resources Division.³ Indeed, even Congress now encourages ADR for environmental disputes. In 1997, it established the Morris K. Udall Center for Environmental Dispute Resolution to make available fee-for-service third party neutrals to federal agencies and private or state parties.⁴

Practitioners can tailor appropriate dispute resolution methodologies to solve problems involving complex factual circumstances, complicated legal issues, or both. ADR provisions between lessors and lessees in oil and gas industry leases are not unknown.⁵ There are many other types of situations in the environmental context where parties might use ADR to resolve a potential or actual coal, oil, gas or other natural resource dispute. These include the following:

[1] Mediation or allocation of contaminated site cleanups, including Superfund, RCRA, leaking storage tanks (above or underground), and state landfill or disposal sites.

² See E.O. 12, 988 61 *Fed. Reg.* 4729 (Feb. 7, 1996).

³ See Schiffer, "Alternative Dispute Resolution in the Department of Justice," 11 - *SUM Nat. Resources & Envtl* (Summer 1996).

⁴ The Environmental Policy and Conflict Resolution Act of 1997, Pub. L. No. 105-156.

⁵ See Shade "The Oil and Gas Lease and ADR: a Marriage Made in Heaven Waiting to Happen," 30 *Tulsa L.J.* 599 (Summer 1995).