Managing Natural Resources Conflicts

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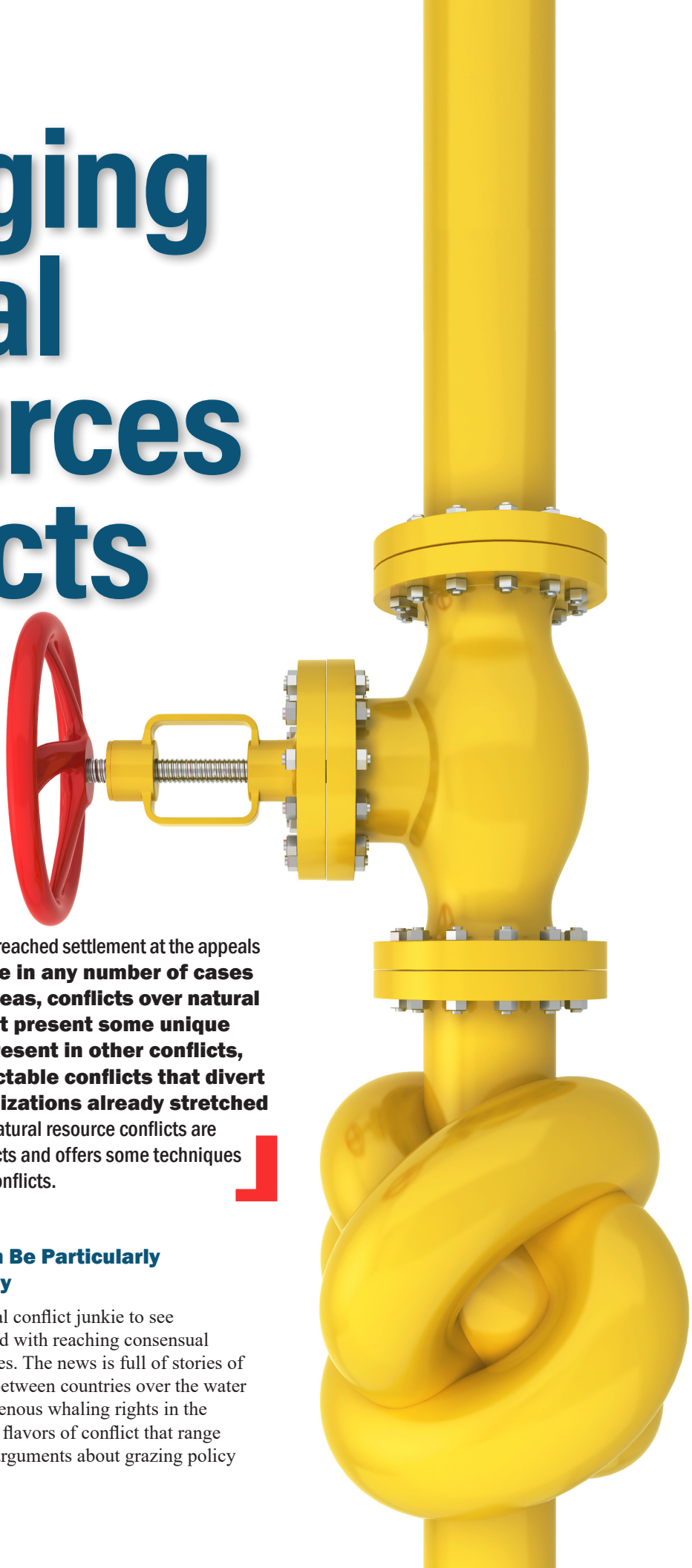

Any attorney even tangentially familiar with the basics of conflict will recognize phrases like interest-based resolutions, stakeholders, and collaboration. From 2013-17, nearly 60 percent of civil cases filed in the U.S. were settled outside the courtroom.[1] The Nevada Supreme Court reports that 52 percent of the cases submitted to its settlement program have reached settlement at the appeals level.[2] **While settlement is possible in any number of cases spanning any number of legal areas, conflicts over natural resources and their management present some unique challenges that aren't always present in other conflicts, and can lead to repeating, intractable conflicts that divert the time and resources of organizations already stretched thin.** This article explores the reasons natural resource conflicts are prone to these kinds of intractable conflicts and offers some techniques that have been used to manage similar conflicts.

Natural Resources Conflicts Can Be Particularly Difficult to Resolve Consensually

You don't have to be an environmental conflict junkie to see examples of the extra challenges associated with reaching consensual resolution to disputes over natural resources. The news is full of stories of natural resource conflict—from conflicts between countries over the water in the Jordan River, to conflicts over indigenous whaling rights in the Pacific. Here in Nevada, we have our own flavors of conflict that range from localized water disputes to national arguments about grazing policy and fire suppression.

What's so different about natural resource conflict, though? The main difference between it and most other kinds of cases is in the number of parties with standing to get involved at every level, and the ongoing relationships these parties have through multiple conflicts.

Modern natural resource management law has the twin goal of increasing the amount of public involvement in these decisions and ensuring the decisions that managing agencies make are scientifically sound.

To further these goals on the national level, the National Environmental Policy Act requires agencies to go through the process of preparing reports detailing the effects of proposed actions and to hold notice and comment periods where individuals and groups can submit comments and propose alternatives to a proposed agency action in response to the agency's report.[3] The Endangered Species Act requires the Fish and Wildlife Service to determine if the listing of a species is warranted using the best scientific and commercial data available,[4] and the Wild Horse and Burro Act requires the Bureau of Land Management to determine the appropriate management level for horse herds and remove extras.[5]

This trend toward more collaborative, science-based decision making allows citizens to be directly involved with the decisions that affect them, and participation in these processes is necessary for parties to have standing to challenge an adverse decision in court. This policy may be sound, but it also tends to make resolution of this type of dispute more complicated.

Science-Based Decision Making Can Be Surprisingly Subjective

Conflicts over natural resource management, where science-based decisions need to be made, have an added layer of complexity. To come to any negotiated agreement, the stakeholders must agree on an interpretation of the existing data. This process may be counter-intuitive, since in popular usage science often means an objective, independent body of knowledge used to make wise decisions. But in the realm of natural resources management conflict, the biases – perceived or actual – present in the bodies of scientific knowledge opposing groups rely on to support their positions can take on an adversarial nature.

When science becomes adversarial, the experts employed by opposing groups, many of whom consider their research independent and quality work, can find themselves embroiled in a debate where their objectivity and incentives are called into question along with their methods and other scientific practices. The stakeholders may use science as a shield to defend their perspectives, or they may use it as a tool to persuade the other stakeholders that their position is the right one. These situations have the potential to devolve into costly, zero-sum, intractable conflicts if they aren't managed well. As conflicts over natural resource management become intractable, parties often cloak their positions in the guise of objective science to avoid the appearance that one side's preferred resource management plan is born of self-interest or ideology. Conflicts over scientific evidence are only a part of a larger values conflict between parties who would like to see the resources managed in different ways.

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It is tempting to see the scientists involved in these conflicts as hired guns who churn out questionable science to further the goals of their employers, but in many instances these scientists actually believe their research reflects high scientific standards and is the truth. If their position is that their research accurately reflects reality, then often their interest is their identity as objective scientists. Identity interests are often non-negotiable because a person's identity, how they define themselves, and how they see themselves fitting into the world, is at the core of their beliefs.[6]

Stakeholders who have experienced the dueling expert paradigm know firsthand how frustrating and unproductive it can be and don't want to go through it again. So why does it come up so often? During active negotiations, participants will often resort to comfortable roles and use scripts they have used in the past.[7] These culturally learned and reinforced scripts begin with the participants making requests and escalate predictably into open hostility. They can be even stronger when the same or similar parties have engaged in multiple similar conflicts, because the participants will have pre-constructed narratives to explain the conflict even as it develops.

If this sounds abstract and esoteric, that's because it is. To put it more concretely, the parties involved in natural resource conflict in Nevada are often similar, if not the same, individuals and organizations, and they have established ways of engaging with each other that protect their own immediate interests and can lead to these intractable conflicts.

Alternative Dispute Resolution May Offer a Solution

There are ways to avoid these intractable conflicts, or to manage them once they've manifested. The most effective method of dealing with dueling experts is by providing opportunities for the stakeholders and their experts to explore an issue with the help of a neutral third party in a scientific mediation process. Search conferences, wherein stakeholders meet to discuss the state of the body of science, identify areas of agreement, and clearly define the disagreement, can provide an opportunity for a process known as social learning to bring the stakeholders to a point where they can each view the available science through their own lens and discuss the merits of the disagreement as they work toward a shared interpretation of available, universally trusted data. Social learning, also known as joint fact-finding, is "learning that

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occurs when people engage one another, sharing diverse perspectives and experiences to develop a common framework of understanding and basis for joint action"[8] and is an important part of the scientific mediation process. In other words, social learning is how groups can develop an agreed-upon groundwork to start building collaborative solutions to the overarching problem.

There are other processes available to bring stakeholders out of their accustomed roles in conflicts, including serious gaming, where "simulations may provide significant support in the formation of new or stronger coalitions and collaborative partnerships while addressing existing power plays and building trust with other stakeholders."[9] By separating the participants from their accustomed roles, serious gaming provides opportunities for them to engage in low-risk collaborative problem-solving. This process allows for the formation of new conflict scripts that can open the way for improved discussion when the parties return to the scientific conflict, and the overarching conflict.

Conflict over natural resources is inevitable in the driest state in the country, where the federal government controls more than 80 percent of the land, and which holds more than 50 percent of the nation's wild horse herd. What can be avoided, however, are the intractable conflicts. Practitioners who are able to identify conflict scripts and avoid the dueling expert paradigm, either through social learning, serious gaming, or other processes, are more likely to be able to keep these processes on track and reach a negotiated, scientifically sound agreement.

ENDNOTES:

1. Yun-chien Chang & Daniel M. Klerman, "Settlement around the world: Settlement rates in the largest economies," *SSRN Electronic Journal* (2021).
2. Settlement program overview, https://nvcourts.gov/Settlement_Program/Overview/ (last visited Jan 20, 2022).
3. 40 CFR 1503.1 et. seq.
4. 16 USCS § 1533
5. 16 USCS § 1333
6. Jay Rothman & Michal Alberstein, "Individuals, groups and intergroups: Theorizing about the role of identity in conflict and its creative engagement," *SSRN Electronic Journal (2013).*
7. Dean G. Pruitt, "Flexibility in conflict episodes," 542 The ANNALS of the American Academy of Political and Social Science 100–115 (1995).
8. Tania M. Schusler, Daniel J. Decker & Max J. Pfeffer, "Social Learning for Collaborative Natural Resource Management," 16 Society & Natural Resources 309–326 (2003).
9. Wietske Medema et al., "Exploring the Potential Impact of Serious Games on Social Learning and Stakeholder Collaborations for Transboundary Watershed Management of the St. Lawrence River Basin," 8 Water 175 (2016).

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