

Superfund on Tribal Lands: Issues, Challenges, and Solutions

ASSESSMENT REPORT

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Executive Summary

Mediation and facilitation have been used by the U.S. Environmental Protection Agency (EPA) and a number of tribes to address Superfund actions on tribal lands. The resolution of Superfund issues on tribal lands can be complicated by the constraints agencies face in adopting strategies that align with the unique cultural needs of tribes with Superfund sites. The U.S. Institute for Environmental Conflict Resolution (U.S. Institute) was requested by the EPA Conflict Prevention and Resolution Center (EPA-CPRC) to assess the range and nature of the CERCLA cases on tribal lands in which alternative dispute resolution (ADR) was considered or applied and the outcomes experienced.

The Assessment goals were to:

- Identify the ways in which ADR is being applied at Superfund sites on tribal lands
- Investigate and summarize common issues and challenges that arise while mediating and negotiating Superfund activities on or near tribal lands
- Describe approaches used by facilitators and mediators at these sites and whether they were effective
- Describe successful and unsuccessful outcomes of the mediated or facilitated processes, and the reasons for those outcomes
- Convey recommendations from the Assessment participants to conveners and mediators working at these sites, and to EPA Superfund for better integrating tribal issues and concerns at the national, regional, and site-specific level

After a nation-wide search, seven (7) sites were included in the Assessment that met the threshold criteria for this Assessment, as follows:

- The site was a federal Superfund site
- The cleanup had substantial involvement of at least one tribe
- At least one mediated or facilitated process was carried out

EPA staff, tribal representatives, and mediators were contacted for each site, and 22 interviews involving 27 individuals were carried out. The results of these interviews are included in this report, summarized to protect the anonymity of the respondents.

The case study interviews made it clear that Superfund sites on tribal lands are subject to all the complexities of other sites, with a number of additional technical, historic, cultural, legal, and jurisdictional challenges. These added complexities suggest the value of ADR in helping the parties navigate the process, but also present challenges that are significant and which should be carefully evaluated through a situation assessment, if possible, prior to beginning a mediated or facilitated process. These sites involve dynamics that may

challenge mediators considerably in terms of overcoming historical and current distrust, bridging cultural divides, clarifying expectations and goals, and dealing with jurisdictional and legal issues.

The Assessment results contain several overall themes that suggest possibilities for future work and Superfund program development:

- Better defining consultation and tribal trust responsibilities in the context of Superfund, and integrating meaningful consultation into everyday practice
- Training for EPA staff and mediators in tribal relations, cultures, uses of the land, oral communication styles, government, history, and law, as well as ensuring that mediators have appropriate grounding in Superfund and other EPA programs
- Following appropriate government-to-government lines of communication and protocol
- Increasing funding for and use of situation assessments prior to beginning a mediated or facilitated process, with the support of agency resources such as EPA-CPRC and the U.S. Institute
- Ensuring that EPA site managers and tribal representatives have a clear understanding of mediated and facilitated processes and what they can expect before beginning
- Building better risk assessment models and standard-setting processes that incorporate tribal land-use scenarios, including residential, subsistence, cultural, and spiritual uses
- Addressing ARARs issues surrounding soil and waste standards and land-use regulations and planning on tribal reservations
- Designing remedy selection processes that can more effectively take into account tribal needs to permanently restore and protect reservation lands for tribal uses

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Introduction and Background

Mediation and facilitation have been used by the U.S. Environmental Protection Agency (EPA) and a number of tribes to address Superfund actions on tribal lands. The resolution of Superfund issues on tribal lands can be complicated by the constraints agencies face in adopting strategies that align with the unique cultural needs of tribes with Superfund sites. The U.S. Institute for Environmental Conflict Resolution (U.S. Institute) was requested by the EPA Conflict Prevention and Resolution Center (EPA-CPRC) to assess the range and nature of the CERCLA cases on tribal lands in which alternative dispute resolution (ADR) was considered or applied and the outcomes experienced.

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In this report, the term “mediator” is used to represent the range of conflict resolution professionals practicing at these sites, including those acting in a facilitation, mediation, or arbitration role, and including both lawyers and lay practitioners. Similarly, the term “tribe” is used to represent the variety of American Indian nations, tribes, bands, villages, and other communities, whether or not federally recognized, whose reservations, communities, or traditional fishing, hunting, and gathering lands and waters are affected by the Superfund sites included in the Assessment. This is in part intended to protect the anonymity of those participating in the Assessment. For the same reason, no person is identified by name, gender, or affiliation and no site is identified by name or location.

Methods

Identification and Selection of Sites and Interviewees

The initial targets for this Assessment were to identify at least six (6) sites and conduct at least 18 interviews associated with these sites. For each site, the interviews were anticipated to include EPA staff, tribal representatives, and the mediator who participated in a facilitated or mediated process related to the site.

Candidate sites were identified through several processes, including:

- Information requests to EPA tribal liaisons and Superfund program and site managers in all regions
- Information requests to EPA's contract alternative dispute resolution provider SRA, forwarded to all SRA roster mediators
- Review of case files at EPA CPRC and the U.S. Institute
- Personal contacts by EPA CPRC and U.S. Institute staff
- Announcements, flyers, and posters at the Association for Conflict Resolution Environment and Public Policy Section and the U.S. Institute's May 2010 ECR conferences in Tucson, AZ, targeting environmental mediators, U.S. Institute ECR Roster and Native Network mediators, and EPA staff

The vast majority of the Superfund sites involving tribal interests are located in EPA Regions 9 and 10, consistent with the number of tribes, native corporations, and reservations located there. EPA Regions 1, 2, 5, and 6 also identified some sites involving tribal lands or interests.

Candidate sites were reviewed to determine if they met the threshold criteria for this Assessment, as follows:

- The site was a federal Superfund site
- The cleanup had substantial involvement of at least one tribe
- At least one mediated or facilitated process was carried out

The Assessment focused on the cleanup process itself, rather than Natural Resource Damage Assessment (NRDA) processes. It was considered preferable to obtain sites with a variety of geographic locations, site characteristics, issues, and participants. However, in the end, all sites that were not screened out in this step or the step described below were

included. Despite a thorough nation-wide search, it was notable how few facilitated or mediated processes have occurred at Superfund sites involving tribal lands.

Nine (9) sites met the qualifying criteria above, and for these sites, follow-up was conducted to identify participants and their contact information and obtain permission to include the site in the Assessment from the participants. Two sites were screened out at this stage: one because it was in litigation and the parties declined to participate, and the other because participants could not be identified who were involved in the mediated process. Thus, seven (7) sites were ultimately included in the Assessment. In addition, interviewees were invited to add perspectives on the interview questions from other similar sites they had been involved with.

For each of the seven sites, EPA staff, tribal representatives, and mediators were identified who participated in a mediated or facilitated process regarding the site. Numerous attempts by e-mail and phone were made over the course of a month to contact potential participants and schedule interviews. Only one of the 21 target organizations did not respond. In many cases, multiple individuals representing EPA or a tribe were identified and scheduled for interviews. In a number of cases, EPA or the tribe included legal counsel in the interviews. In one case, an individual from a state agency was also interviewed, due to the integral participation of that agency in the negotiations. Ultimately, 22 separate interviews were conducted involving 27 individuals.

Interviews

Interviews were conducted between June 16 and July 14, 2010. Interviews varied between one and two hours and were conducted by telephone in all but one case, which was conducted in person. Each interview involved one to three people with the same affiliation (EPA, a tribe, mediator).

All participants were informed of the sponsoring agencies and purpose of the Assessment, how their responses would be used in developing this report, and anonymity arrangements prior to initiating the interview. Participants were provided an opportunity to ask any questions they might have in advance, and once their questions were answered, oral permission to conduct the interview was requested and received from each person prior to initiating the interview.

Following this introduction, the interviewees were asked a series of questions, including:

- Factual details about the site
- Their personal involvement in the site and the mediated or facilitated process
- How the process was convened and structured
- What the site-specific issues and challenges were

- Techniques the mediator used that were perceived as most helpful
- What the outcomes of the process were
- What benefits or risks the mediated process provided
- Their recommendations to conveners, to mediators, and to the EPA Superfund program in working on Superfund sites on tribal lands

Questions followed the same general topic order in each interview, but the specific questions asked were tailored to the group and the site, and also varied according to how the interviews evolved. In general, the interviews were loosely structured to meet the goals of the Assessment, but allowed for variation to obtain the most information from each interview and focus on what each participant was most interested in adding to the discussion.

Handwritten notes were taken during the interviews, which were destroyed once the report was finalized and were not provided to the sponsors of the study. This approach was designed to allow the interviewees to speak freely about their experiences and views, particularly considering that many of the site cleanup processes are ongoing.

Assessment Report

The notes from the interviews were compiled into a series of bulleted items organized by topic, which were used to conduct an initial oral briefing to the sponsors of the study. The detailed, handwritten notes and bulleted lists were then generalized into the results and recommendations provided in the following sections of this report. To preserve anonymity, the findings presented in the report do not identify names, sites, or specifics of the individual situations of the case studies. Rather, they identify overall themes, findings, and recommendations suggested by the interviewees.

Interview Responses

A summary of the interview responses is presented below, including:

- Reasons for initiating a conflict resolution process
- Issues identified and discussed by the parties during the process
- Challenges that affected the success and effectiveness of the process (as defined by the participants)
- Approaches used by mediators and facilitators during the process that were most effective (and a few that were not)
- Outcomes of the process

Key issues addressed by many of the respondents are highlighted in blue.

For some items, substantial additional commentary is provided. These discussions do not represent the individual views of the author. Rather, they are a synthesis of the discussions held during the interviews—many of which were wide-ranging and philosophical in nature—and the views of the interviewees.

Objectives of Alternative Dispute Resolution

The most frequently cited reasons for initiating a facilitated or mediated process were:

- Increase trust between the agencies and tribes
- Find more meaningful ways to communicate and share information
- Improve working relationships among the parties involved

Other similar but less frequently mentioned reasons included:

- Reduce conflict
- Understand tribal and stakeholder issues
- Better explain how decisions are being made
- Educate participants and the public
- Look for opportunities for collaboration

Most of the reasons given for initiating an alternative dispute resolution process were related to communication or relationships. In many cases, communication had completely

broken down or was entirely negative between the parties. It was often difficult for EPA to discern what the most important issues were or for the tribe to understand EPA's reasoning for its decision-making. In the worst cases, private and public meetings were dissolving into acrimonious name-calling and threats, both physical and litigious, or litigation had already been initiated. In other cases, there was simply a lack of progress, and everyone was ready to try a new way of communicating.

Some processes had specific substantive goals in mind, including:

- Completing a specific work product as part of the Superfund cleanup process or a related process, or getting to a final Record of Decision (ROD)
- Establishing a functional Community Advisory Group or other standing advisory body
- Identifying and resolving specific issues that had been problematic
- Identifying priorities for action, such as emergency removals
- Allocation of liability
- Obtaining buy-in from the public and/or tribes on EPA decisions or directions

Mediators noted some problematic aspects of this last reason from a best practices perspective, but it was nevertheless quite frequently cited as a reason for initiating a process. **A mediated or facilitated process should have the opportunity for at least some movement on both sides.** If the decision was already made or a direction set, it was not clear that every party's needs could be met through a collaborative process.

Many of the participants noted that this is a particular risk in the context of the history between the tribes and the federal government. Most tribes are acutely aware of a long legacy of broken promises by the federal government, and it is already a stretch for most to trust any federal agency. Tribal representatives and mediators pointed out that if a tribe commits time and energy to a process that appears to offer the possibility of meeting some of their goals, but in the end does not really offer that, it adds to the sense of injustice and further deepens the institutional distrust that already exists.

Interviewees stressed that tribes may also enter a process such as this with specific points that are not flexible or negotiable, perhaps more so than other parties. It became apparent from the interviews that there are certain matters, discussed later in the report, involving sovereignty, jurisdiction, and culture that may not be resolvable in this context and may require direct consultation processes, national policy change, and/or legal action to address.

Site-Specific Issues

The following were the site-specific issues raised and addressed as part of the mediated or facilitated process involving EPA, at least one tribe, and in some cases additional parties and stakeholders. Legal and regulatory issues specific to the Superfund program are described in the subsequent section.

Several issues came up in larger advisory or community groups that are common to many Superfund sites, including:

- Competing priorities between economic and environmental benefits to the community
- Whether cleanup should focus on human health or give protection of wildlife an equal priority
- Obtaining funding and/or allocating liability for the costs of investigation and cleanup
- The slow pace of investigations and cleanups, and the health, land use restrictions, and cultural impacts that were being experienced by the community in the meantime

From a tribal perspective, there were a number of additional broad issues that were brought to the table, including:

- An overall view that EPA does not have the same sense of stewardship for the land as tribes do and is not meeting the needs of the tribes in selecting remedies
- A desire to have EPA adopt a longer-term (seven-generation) perspective when assessing risks and selecting remedies, given that tribes have limited resources encompassed by the boundaries of their reservations
- Environmental justice issues, including a perception among some tribal representatives that EPA was applying less stringent standards and cleanup remedies for reservation sites
- Insufficient enforcement of environmental laws for companies operating on reservations

EPA site managers expressed the following broad-based concerns:

- A learning curve in understanding the deep connection that tribes have to the land, the unique ways in which they use the land, and how that affects the remedial investigation/feasibility study (RI/FS) process (this was particularly true in regions with only a few tribal sites)

- Fairness and consistency among tribal and non-tribal sites
- Tribes frequently requesting very conservative and expensive remedies that are difficult for a site manager to justify to managers and potentially responsible parties (PRPs) under the existing legal framework
- The degree to which site managers can incorporate the recommendations or preferences of the tribe into risk assessment or remedy selection processes, while still weighing the other factors in the manner required by law and guidance

The requirement for consultation with tribes within the Superfund program was poorly understood by most interviewees in all groups, in terms of:

- What specific form it should take
- The degree of deference that should be given to tribal requests or positions
- Who has or should have the final decision authority on a variety of issues

It was generally felt that there was no clear or consistent policy on these issues. **Treaty rights and tribal trust issues were also frequently raised by tribes**, and site managers did not feel that they had clear guidance on how to specifically address or incorporate them into the Superfund process.

Among the sites discussed as part of this Assessment, **there were a large number of mining sites on or near tribal lands, many of which were immediately adjacent to or even underneath residential communities**. These sites pose a specific set of technical issues that came out strongly in the interviews. Many of these mining sites in the West involve radionuclides and metals contamination, and have large exposed waste piles, ponds, and significant fugitive dust emissions problems. In addition, contamination from the site may have affected surface water and drinking water resources for rural communities, as well as hunting and gathering resources relied on by the tribe for subsistence and cultural uses. Many of these communities do not have reasonable alternatives for replacing these resources.

At a number of sites, there is very little data to characterize large areas and/or obvious waste areas with known health and safety risks. At these sites, one priority for discussion was filling these data gaps and making progress on completing the remedial investigation.

Tribal representatives generally expressed as their highest priority the selection of cleanup standards and remedies that will be permanent and protective over the long-term of subsistence and cultural uses. Tribal representatives described any contamination of the land and water as a violation of the land and the spirit of its people and resources, and they generally have very limited areas of land and resources to work with for all future

generations; thus, expressed a need to be more protective of it than cultures that are not as place-based or integrated with the land and its resources.

As a result of this conceptual world-view, a number of issues were frequently raised by tribes during the remedial investigation stage:

- Use of risk assessment models that incorporate tribal use scenarios, consistent with subsistence and cultural/spiritual uses of the resources
- Selection of risk levels within the 10^{-4} to 10^{-6} range, with tribes favoring lower risk levels that will protect each tribal member
- Accurate definition of background concentrations and risks associated with background, as well as consideration of background concentrations as cleanup standards
- Selection of conservative soil and water standards consistent with the tribal risk assessment scenarios, preferred risk levels, and background considerations described above

These twin issues of risk assessment and related soil cleanup standards were dominant themes among the interviews, and would be productive areas on which to focus at a programmatic level.

Remedial alternatives and remedy selection issues were also frequent topics of discussion. **In general, tribes were focused on selecting a remedy that would allow unrestricted subsistence and cultural land uses now and many generations into the future.** Identification of “reasonable future land use” was key to many of these decisions, and was a point of contention in many instances. For example, EPA land use scenarios would typically not include a future residential scenario at a former mining site. However, on many reservations, residences are located adjacent to or within former mines. Land use restrictions such as institutional controls were not looked on favorably by the tribes, because this permanently removes an already limited area of the reservation land from uses that are viewed as protected by treaty rights and tribal trust responsibilities of the federal agencies.

As a result, **the most frequently cited issue during the interviews was tribal preference for complete removal of wastes and other contaminated material rather than management in place.** This was generally considered both the most expensive and the most protective cleanup alternative, and may be associated with risks during removal, transportation, and disposal of the wastes. Therefore, it was not typically the alternative proposed by the PRP or by EPA. Many site managers felt that they understood the reasons why this alternative was favored, but believed it was infeasible to accomplish, particularly at large mining sites. In turn, tribal representatives expressed concern that the more expensive and protective alternatives were not selected due to their cost alone, and some EPA staff confirmed that

there was concern about whether the Superfund could handle the cost of the selected remedy should the cleanup become an orphan site (i.e., a site without a viable PRP to provide funding), as well as concern over loss of voluntary participation of the PRP, litigation, or bankruptcy should the PRP find the remedy excessively expensive. The Superfund remedy selection criteria require balancing cost and technical feasibility against environmental protection, and this is an approach on which tribes and EPA were often in fundamental disagreement.

Aside from complete cleanup or waste removal, other remedial issues were raised and discussed, including:

- Use of presumptive remedies
- Use of interim actions rather than conducting a full RI/FS
- Siting of disposal facilities (on- or off-reservation)
- Treatment of wastes remaining in place
- Permanency of caps and of remedies in general
- Permission and compensation for use of tribal resources for conducting the cleanup (e.g., fill material)
- Managing risks during the cleanup and providing appropriate mitigation of continuing risks (e.g., providing drinking water or relocation of households)
- Responsibility for long-term maintenance of caps, water treatment facilities, or other elements of the remedy and funding for the same
- Calculating the true life-cycle costs over the long-term to better compare the cost-effectiveness of the remedial alternatives
- Providing educational and economic opportunities for tribal members during the investigation and cleanup in terms of training, field work, jobs, and long-term management of facilities, rather than having the PRP or consultants do the work

Process issues were not raised nearly as often as the technical issues above. Typical process issues addressed included:

- Negotiating milestones and metrics
- Negotiating the specific language of documents and agreements
- Who should be at the table at various points in the process

There was frequently a desire by EPA to include a larger number of participants, including the PRP and various stakeholders, while the tribes often preferred to work directly with EPA without other parties involved. During the assessment phase, some of the mediators

also identified the relationship between EPA and the tribe to be of particular concern, and recommended that the process focus on that relationship before involving other parties.

There were a variety of process concerns that tribal members particularly expressed with the Superfund process as they have encountered it. These include:

- Cultural differences in communication styles
- Lack of consultation with the tribe before making decisions with the PRP that materially affected the RI/FS (e.g., risk assessment assumptions)
- Assuming that tribal audiences will not understand the technical information and simplifying it before presenting it
- Not providing all the backup data in a timely manner
- Showing a bias toward the more technical participants in a process as opposed to traditional ways of knowing about the land and uses of the land, such as oral traditions
- Requests from EPA for information considered confidential and sacred to the tribe
- A desire to conduct their own risk assessments with tribal expertise and knowledge and have the results used in the process
- Processes that are described as consultation but come too late in the decision process for meaningful input
- Document review timelines that are too short to allow for internal tribal coordination among technical staff, department heads, and the tribal council

Finally, while some tribes felt that consultation was working well and their input was valued, others felt largely ignored prior to the mediated or facilitated process.

Superfund-Related Issues

Overall, tribal representatives reported mixed feelings about Superfund. On the positive side, **many tribes supported and advocated for National Priority List (NPL) listing of contaminated sites on or near reservations**, because of a belief that NPL sites receive greater regulatory attention and action. Many tribes have had unsatisfactory experiences with state cleanup programs and local jurisdictions, and felt they fared better at a federal level. Tribes were often grateful for the added resources that EPA brought to the table from a legal, regulatory, and financial standpoint, including funding for the tribes to participate.

Tribes sometimes found themselves at odds with states and local communities over NPL listing, due to local concerns about impacts on businesses, tourism, revenue, or property

values. In at least a few cases, local community leaders or elected officials were PRPs or had other economic interests in the site, which put them at odds with the tribe. These issues were part of the backdrop of some of the cases studied here, and generally led to tribes favoring NPL listing and Superfund involvement in cleanup.

The Superfund cleanup process was viewed by most participants as providing more structure, formality, and procedures/guidance to follow than many state cleanup processes, which was considered a mixed blessing by tribal representatives. On the one hand, it allowed for government-to-government consultation, clearer rules for public notice and comment, access to documents, etc. On the other hand, tribal representatives found the procedures and guidance somewhat inflexible in addressing tribal concerns and values, as discussed above in the RI/FS sections. In addition, concerns were expressed about the slow pace of the process.

By far the most frequent Superfund-related issue raised by both EPA and tribal representatives (and identified by mediators) was jurisdiction. Clashes arose over which government has or should have decision-making authority at various points in the process. Some of the EPA site managers and legal counsel interviewed firmly expressed the view that EPA cannot negotiate a final remedy and cannot share this decision authority with tribal governments. At these sites, tribal representatives often felt they had not been heard and their concerns were not included in the final decisions, despite opportunities for consultation and comment during the process.

However, other interviewees in all groups believed that there is substantial room for interpretation, experimentation, and development of different approaches to shared decision-making between EPA and tribal governments at sites on reservations. For example, at one site studied, government-to-government consultation appears to be working well enough that the tribe has been satisfied with the decisions ultimately made by EPA. At this site, consultation began early and has been used continuously throughout the process. This is a case in which EPA retained all of its decision authority, but conducted effective consultation that resulted in a satisfactory outcome for both governments.

At another site, the tribe has the authority to formally concur on the ROD. This authority stems from a MOU between the tribe and EPA. However, EPA staff stated that they believed that concurrence by the tribe was an appropriate interpretation of CERCLA whether or not an MOU was in place. At this site, a facilitated process was initiated because the tribe was not in concurrence with EPA on the ROD and EPA did not feel it could move forward without that. This is an example of shared decision-making under a formal framework.

At yet a third site, EPA deferred to the state, who did not want an NPL listing, on the condition that the state and the tribe successfully develop a plan for co-managing the area, which fell partly on reservation land and partly off-reservation. In this case, EPA remained in a support role in a process that allowed for shared decision-making between the tribe

and the state, to ensure that the resulting agreement would be acceptable to EPA under Superfund. In this case, EPA retained its authority to step in if things did not go well, but deferred to other government bodies and helped craft a cooperative decision process between them.

These examples illustrate that **there were substantial differences among the Superfund sites included in the study in whether and how shared decision-making occurs between EPA and tribal governments**, ranging from almost no input or ability to influence the outcome by a tribe to full concurrence on the ROD and interim documents. In the experience of the interviewees, most instances of shared decision-making fall somewhere between these two extremes and rely on government-to-government consultation, which unfortunately is poorly defined or understood. Among the sites included in this study, capacity issues did not appear to be a substantial factor in determining the form of decision-making that was applied. Rather, it appeared to depend more on the individuals involved in working on the site and the relationship between the agency and the tribe.

As noted by several interviewees, **further complicating this picture is substantial variation among EPA laws and programs in the degree to which tribes can exercise autonomy in regulation and decision-making on reservations**. For example, under the Clean Air Act and Clean Water Act, tribes can obtain “treatment as a state” and develop their own water and air standards, which are subsequently enforceable and are considered applicable or relevant and appropriate requirements (ARARs) under Superfund. No such ability exists under the Resource Conservation and Recover Act (RCRA) or Superfund for waste or soil standards, and several tribal participants expressed that this appears inconsistent and is frustrating.

As mentioned previously, **the issue of soil standards that are protective of subsistence and cultural uses was the most frequently raised among the interviewees in this Assessment**, and most tribes expressed a strong desire to be able to set soil standards, have them be treated as ARARs, and be enforceable by EPA and the tribe. Due to its importance and the success that tribes have had developing water standards, a few interviewees mentioned that this issue is likely to be subjected to litigation and/or attempts at legislative action in the near future.

Another jurisdictional area discussed was that of land-use planning. When tribes have a land-use plan or zoning regulations, they stated that they would like these to take precedence over any assumptions EPA would normally make about reasonable future land use for the purposes of determining exposure pathways and setting cleanup standards. EPA site managers indicated that they were uncertain as to the degree to which such regulations could be considered ARARs or how to balance them against EPA national policy and guidance.

Aside from jurisdiction and decision-making, there were two other issues that were frequently raised that relate directly to the structure of the Superfund program, both of

which have to do with the relationship between EPA and the PRP. The first was **discomfort with the PRP conducting the RI/FS and remedial work**. Tribal representatives who raised this would have preferred that either EPA or the tribe did the work, for several reasons:

- Lack of trust in the PRP to do the work well, draw fair conclusions, and/or not delay the proceedings; often this stemmed from an existing negative relationship between the tribe and the PRP arising from past events or ongoing problems, not all of which were related to the cleanup
- A perception that EPA was not enforcing various aspects of the RI/FS process when PRP work was inadequate, and not ensuring that tribal comments and perspectives were integrated into final documents prepared by the PRP
- A belief that if EPA or the tribe was conducting the investigation and alternatives selection, the work would be more rigorous, transparent, and result in a better outcome
- A desire to have more control over work performed at the site, particularly sites on reservations at which a full and permanent cleanup was not likely; in such cases, the tribe wanted to be involved in conducting the work and managing the site, providing training and job opportunities for its members

This last preference by the tribes is not provided for in the normal Superfund process in which the PRP is expected to do the work with EPA oversight.

Another area of concern was **a belief that selection of the remedy was unduly influenced by its cost**, particularly if there was any chance that EPA might have to cover the cost of cleanup through bankruptcy of the PRP or an orphan share. Tribal representatives expressed the view that selection of the remedy should be based on what was needed to protect tribal members and trust resources, and should not be influenced by what the PRP or the federal government was willing to pay. Several site managers and mediators noted that the current process for selection of the remedy and the fact that the Superfund tax has not yet been renewed (although EPA and legislative efforts continue this year) create obstacles for EPA in selecting these more costly remedies.

Other less frequent Superfund-related issues that were discussed during the mediated or facilitated processes included:

- Lack of an enforcement instrument or weak enforcement of EPA remedial decisions
- Requests by tribes for EPA to address or enforce non-CERCLA issues, such as access issues, RCRA permit compliance, water quality standards, etc.
- Tribal immunity under Superfund
- Funding for tribal participation in the Superfund process

Challenges to Alternative Dispute Resolution

The following circumstances presented challenges to the facilitated or mediated processes at these sites. Some of these are fundamental to Superfund sites on tribal lands, and are issues that any mediator working in this area should be aware of. Others should be carefully evaluated during the situation assessment phase, as they can adversely affect the outcome of a process, while still others can be managed or improved during the process.

The most commonly cited challenge was that of competing processes. Most frequently these were litigation or settlement negotiations occurring parallel to the facilitated or mediated process. Often not all of the parties overlapped among the processes or were fully aware of how one process might affect the other. In addition, these legal processes at times had the effect of taking certain topics off the table, contributing to poor relationships among the parties, making parties reluctant to participate or speak freely, and/or dictating solutions to problems that might be different from those that parties would have arrived at in the collaborative process.

Other competing/concurrent processes included:

- Water rights adjudication
- Natural Resource Damage Assessment (NRDA)
- RCRA permitting and cleanups
- Adjacent contaminated areas being addressed by different agencies or programs
- Federal Energy Regulatory Commission proceedings
- Direct government-to-government consultation that was sometimes being conducted at the same time as and separate from the facilitated process

Government-to-government consultation parallel to the facilitated process was especially challenging for mediators to manage. Federally recognized tribes have the right to conduct government-to-government negotiations and consultation with the federal government and generally expressed a preference to do that in the absence of other parties. Mediators and tribal representatives indicated that tribes are often better able to meet their needs through direct consultation than through facilitated or mediated processes involving a larger number of parties. However, to the other parties participating in the process, this can appear to be a breach of trust or ground rules of the process, and may increase conflict or resentment among the participants.

Another challenge that was present in most of these processes is the historical (and ongoing) relationship between the tribes and the federal government. In most cases, that history is fully present and brought into the process, and it can be very difficult for tribes to trust any process involving a federal agency. Tribal representatives sometimes began a

process with significant pent-up frustration and anger that was poorly understood by the site manager and that may or may not have been specifically related to the current project. Some individuals who have been fighting for the rights of tribes for a very long time may have difficulty ever letting go of an adversarial approach (including litigation), often because it is the only approach that has produced results in the past or because their sense of injustice simply runs too deep.

It was frequently mentioned that site managers and mediators need to be familiar with this issue to effectively attempt a cooperative process between the parties. In many cases, this history of distrust cannot be entirely overcome, but the parties can nevertheless make progress on their issues. Because building trust or cooperative relationships can be more difficult than usual, changes in the participants in the process can also be more problematic than usual, and that was cited as an issue in a number of cases.

Other relationships that affect the process can also be quite strained. **A frequently cited problem was opposition by the local community to the tribe**, particularly to any attempt by the tribe to exert regulatory authority on or adjacent to the reservation. Issues of competing property rights and water rights, economic opportunity, political opposition, and outright racism were often mentioned by interviewees as negatively affecting processes involving other members of the community. These dynamics sometimes influenced the willingness of state agencies or governors to actively pursue cleanup or support NPL listing of a site.

In addition, there were sometimes quite negative relationships between the PRP and the tribe. These arose not only because of the contamination and cleanup process, but also issues such as:

- Non-payment of lease or permit fees
- Property access issues
- The company pursuing additional permits to operate without having cleaned up past contamination
- Attempts by the PRP to settle their liability with members of the tribe or tribal council in ways that did not necessarily benefit the tribal community living near the site
- Litigation between the tribe and the PRP that was ongoing or had occurred in the past

These issues affected the willingness of tribes to allow the PRP to participate in a mediated or facilitated process, and contributed to a preference for a party other than the PRP to conduct the RI/FS work. In some cases, EPA also had a difficult relationship with a PRP that was particularly recalcitrant or litigation-oriented. In these cases, it was more difficult than

usual to ensure that plans and reports prepared by the PRP incorporated tribal concerns and comments.

Additional challenges were sometimes presented by internal issues within the tribe, including differing needs or expectations of the tribal council, environmental departments, and local communities or villages. Often tribal representatives to the process were not tribal members and/or lacked authority to make decisions on behalf of the tribe. Interviewees noted that additional time and process steps may be needed for tribal representatives to obtain approval from tribal councils, and in some cases, all written statements or comments on behalf of the tribe were required to be approved by the council.

An added complication at some sites was representation of the tribe by the Bureau of Indian Affairs (BIA), for example, in cases where the site was located on lands held by the federal government in trust for the tribe. In general, the BIA was not reported to be an effective advocate for the tribe or a positive participant in the process by the interviewees in this Assessment.

Consultation and cultural issues also presented challenges. In most cases studied, EPA and the tribe had different expectations with respect to the form and the purpose of consultation. In some cases, EPA staff inadvertently gave offense by assuming that a facilitated process could serve as consultation or by giving insufficient notice of consultation. Cultural and inter-governmental protocols were at times not observed, even by tribal liaisons, with detrimental effects on the process and relationship between EPA and the tribe. These mistakes were viewed as largely avoidable with better understanding of cultural protocol and a more thoughtful approach to government-to-government consultation. Establishing and using appropriate lines of communication with the tribe was also an issue, not only for EPA but also for the PRP and consultants.

Other challenges that affected some processes included:

- Overcoming a past history of failure between the parties
- Limited capacity or funding for tribes and agencies to participate in facilitated or mediated processes
- Perceptions that mediated or facilitated processes may compromise tribal and/or EPA authority to make decisions
- Participant attitudes and communication styles
- The number and diversity of parties involved

Approaches Used by Mediators

Given all of these issues and challenges reported by the participants in these processes, the following are the approaches used by the mediators that were perceived as helpful, along with a few that were found to be ineffective or unhelpful.

Among the most frequently cited helpful activities was conducting an effective situation assessment prior to the start of the mediated or facilitated process. In addition to the interviewees mentioning this, it was clear from the Assessment results that the processes with the best outcomes included very thorough situation assessments, and some of those that failed did not include this step at all.

The most effective situation assessments went well beyond identifying the issues, familiarizing the mediator with the situation and parties, and determining whether the situation was appropriate and ready for a collaborative process. Such an assessment was considered by most mediators a necessary step for success, but in those processes that the parties were most satisfied with, much more was done at this early stage. For example, one mediator worked to develop and tailor a process that specifically met the needs of the situation, included recommending the right parties to include at the table and developing an approach for obtaining input and communicating with other parties that wanted to be included but were not. This mediator presented alternatives for moving forward, along with a recommended approach that helped the group take ownership of the process eventually chosen. The mediator was willing to present this process to the public and take the heat from the parties that would not be included in the process. Years later, the parties are still referring to this situation assessment as an information resource.

Another mediator used the situation assessment process as an opportunity to begin healing past rifts in the community and prepare the parties for a cooperative process. This mediator worked to help the participants identify the benefits of such a process to them, determine what it would take to overcome their personal obstacles to participating, see the failures of the past with a new perspective, and identify their personal hopes for the future. This led to all parties agreeing that it was worthwhile to set aside old animosities and try again. It can be seen from these examples that not only are situation assessments critical steps in the process for sites with such complex issues and relationships, they can be much more than pro forma assessments and are often most effective when they are.

Another key positive contribution of the mediator that was mentioned by a number of interviewees was the ability to gain the trust of the tribal community, especially the community living closest to the site, and to give everyone a voice. At many of the sites it appeared that others had been speaking for the local residents, and the mediators used various approaches to provide the residents with a stronger voice, including:

- Rebalancing representation on workgroups

- Reducing communication barriers (sometimes by speaking the native language)
- Acting as a literal or cultural translator, bridging communication styles (western science vs. knowledge of the land, literature-based vs. oral traditions, generational differences within the tribe)
- Using appropriate language for the audience
- Using analogies and metaphors to cross cultural divides

In cases where proper communication and respect for tribal governments was not always shown, mediators were able to model appropriate behavior by understanding and using proper lines of communication, scheduling some meetings on the reservation and arranging cultural events, and educating participants on sovereignty, government-to-government relationships, and Indian law. Tribal participants strongly appreciated mediators who had appropriate knowledge of tribal culture and Indian law, and similarly, EPA appreciated mediators who had a thorough understanding of Superfund. Co-mediation was suggested as potentially the most effective way to obtain both of these skill sets; however, this approach was used in only one of the cases studied.

Mediators also used a variety of standard mediation and facilitation techniques, and several of these were called out by the interviewees as helpful and effective. **Managing negative behaviors in meetings was mentioned the greatest number of times.** That this technique rose to the top may speak to the issues identified above, in that the present and historic relationships among the parties at these sites may be very strained, to the point of anger, barely contained frustration, and at times, verbal and physical threats. Most of the processes were rocky at the start and mediators initially focused a lot of attention on this aspect of the meetings, setting and strongly enforcing ground rules around communication and respect, and modeling those behaviors themselves. Passive behaviors, such as not participating (or not in a constructive way), not doing assigned work between meetings, etc., also had to be addressed.

Interviewees also appreciated the structure that the mediators were able to bring to the process. Mediators used process management techniques effectively to:

- Help frame and organize discussions
- Manage information-sharing
- Work through issues
- Provide a record of how these issues were resolved or progress that was being made
- Assess which issues were most important to address and in what order
- Help the parties continue to make progress even when they disagreed

- Make effective use of electronic tools, such as issues matrices or online collaborative document revision tools, to produce collaborative documentation of the results that the parties could share ownership of and continue to work with in the future

A wide variety of other typical mediation techniques were mentioned, including:

- Caucusing and holding confidential discussions
- Helping parties understand each other
- Clarifying and reframing issues
- Not letting the participants get stuck in the past
- Keeping everyone moving
- Getting issues out on the table and providing reality checks
- Recapping and determining next steps
- Maintaining a calm and respectful demeanor even when the discussions got heated

Mediators who had a wide variety of techniques to draw upon as the situation dictated were especially appreciated.

Mediators themselves mentioned some additional techniques that they found useful in these processes, including:

- Working with parties to build commitment to the process and providing general encouragement
- Taking initial control of documents and other aspects of the situation but gradually giving control back to the participants as they became more collaborative and effective
- Holding educational discussions
- Modeling and teaching good communication practices
- Uncovering sources of suspicion and mistrust and promoting healing
- Encouraging the parties to work together on solving their own problems, developing presentations, and producing documents

In some cases, mediators worked out strategies for obtaining the support of elements of the community not at the table, such as the business community or legislature, that would be necessary to implement the final agreement.

With one exception, there was very little concern expressed about any of the mediators; **participants' comments about the mediators and the approaches and techniques they used were overwhelmingly positive, even when they did not consider the outcomes successful.**

One issue pointed out by the case studies was the neutrality of the mediator. EPA and other non-native participants had clear expectations of neutrality on the part of the mediator; however, native mediators found this expectation very difficult to fulfill when the mediator was native to the tribe that was participating (and was hired for that expertise), particularly since local communities living adjacent to Superfund sites often lacked effective advocates and were counting on the mediator to give them a stronger voice in the process. In addition, these mediators questioned whether neutrality was appropriate or necessary to do a good job under these circumstances. Neutrality in conflict resolution is not a given in all cultures, and this should be considered further in cross-cultural mediation training and related projects.

One mediator found after working on a number of these cases that the more informal approach that might be comfortable for getting to know and working with other groups is not necessarily an appropriate approach for working with tribal governments. More formal recognition of sovereignty, and appropriate lines of communication and decision processes, are often needed, at least until strong working relationships are established.

In only one instance did participants have negative feedback specifically on a mediator (involving more than one case). Comments were related to:

- Lack of preparation
- Lack of understanding of the site or participants and their issues
- Not tailoring the approach well enough to the situation, i.e., bringing a “cookie-cutter” template to the process
- Not holding the group to deadlines or otherwise managing negative behavior

Aside from the mediator specifically, these comments add weight to the importance of a thorough situation assessment, as this could potentially have avoided lack of preparation and understanding of the site and participants. Mediators are not always provided this opportunity, which can put them in a difficult situation at the outset of a process.

Outcomes

The following are the outcomes reported by the interviewees for the case studies evaluated.

The most frequently mentioned positive outcomes were related to communication and relationships:

- Improved communication
- Constructive information-sharing
- Better understanding of each other
- More positive relationships (both business and personal)
- Greater respect for each other
- Being more supportive of each other
- Improved trust between the parties
- Feeling more positive and optimistic that the group could work together in the future

One mediator related that the group had transformed from highly positional entities to individuals able to share their own opinions and work across group lines.

Another frequently mentioned area was that of feeling heard for the first time. This was true of many local tribal communities, and was also expressed by EPA staff in one case. There were some processes that were able to draw in a greater variety of stakeholders to the discussion, and due to these various voices being effectively represented in the process, EPA reported that it had a better understanding of stakeholder and tribal concerns. In one case, the PRP began working effectively with the other participants and conducting activities voluntarily. There were also cases where the mediated process helped the agencies and tribes work more effectively with local and state governments.

Processes also improved. Even in cases where major substantive accomplishments were not achieved, structure was added to the process, functional meetings occurred, and the parties were able to discuss each of their issues, determine the extent to which they had been resolved, and what future work needed to be done, and in some cases, what could or could not be done.

In a number of cases, **significant substantive products or decisions were reached.** Interviewees reported:

- Development of a good work environment that allowed products to be successfully completed, and promoted the formation of good working relationships for implementation of that agreement or product
- Improvements in group problem-solving
- Co-ownership of decisions or products
- Improvement in government-to-government relationships
- Achieving a remedy or ROD
- Obtaining a better remedy than they would have had otherwise
- Obtaining funding
- Avoiding litigation
- Avoiding formal NPL listing

Several interviewees mentioned that they did not believe they could have reached these outcomes on their own, or it would have taken much longer. It was also considered a positive outcome by many participants and mediators that the group began working effectively enough together that mediation or facilitation could be phased out.

Even when the process was successful from a substantive and relationship standpoint, participants mentioned the time and cost of the process as a drawback, with the time required being the most frequent concern. This was true even when participants realized that lack of agreement could have drawn out the process even more or prevented a solution from being found.

Some other issues reported included:

- Initial resistance by EPA management
- More difficult underlying issues being put off or not addressed in favor of resolving immediate problems or completing a milestone
- The process not lasting long enough for parties to internalize new communication skills and establish a long-lasting positive relationship for the future

In some cases, the mediated or facilitated processes were not able to resolve the issues or improve relationships. In general, this was attributed to the parties already having fixed positions or having made up their minds, rather than to the mediators or the approaches they used. This result again reinforces the recommendation to do a careful situation assessment to avoid wasting time and money on such processes when the parties are not able or willing to negotiate or listen to one another. Even when the mediator felt there were intangible benefits (e.g., learning how to conduct an effective meeting, listening to

one another, etc.), **the parties generally considered the process a failure if it did not result in substantive outcomes and agreements or at a minimum, significant improvements in relationships and communication styles.**

At times, process issues created substantial interference either during the mediation or later. If not all parties were present at the table (e.g., the PRP, local governments, other stakeholders), there were in some cases a perception that decisions were made in a less than open process without all the necessary parties involved, whether or not this was actually true. In two cases, later litigation ensued in which this was one of many issues. As noted above, there is some tension at these sites between the desire for open, inclusive processes with a greater number of participants and one-on-one government-to-government consultation between the tribe and EPA.

Some parties perceived the lack of a binding agreement as a negative outcome, although it was not always the case that all of the parties intended the process to result in a binding agreement. Typically, EPA expected the process to provide input into a decision that would then be subsequently made by EPA, while tribes preferred the process to result in a specific substantive agreement.

In one case, a settlement was achieved that was not considered particularly fair by most of the parties, although it was recognized that it may have been the best that could be achieved given the extreme recalcitrance and litigiousness of one of the PRPs. In another case, the mediated process was not considered useful due to the lack of preparation and knowledge of the site and participants by the mediator, and the parties settled the case outside the process using their own legal counsel. However, this appeared to be quite unusual among the cases studied, as well as other cases that participants had been involved in throughout their careers.

Recommendations

All of the recommendations described in this chapter for EPA Superfund, conveners, and mediators were provided by interviewees as part of the study.

Recommendations for EPA Superfund

The interviewees had a number of recommendations for EPA regarding reducing conflict at Superfund sites on tribal lands or with tribal interests involved. Many of these did not specifically involve ADR, but are described here in the interests of improving relations between EPA and tribal governments. Many of these issues currently affect ADR processes and came up in various ways in the cases studied. The recommendations included some that would require national-level policy, guidance, or legislative change, as well as those that could be implemented on a regional or site-specific basis. These three categories are discussed separately below.

National-Level Recommendations

The most frequent recommendation was for EPA (and the federal government across all agencies) to better define consultation with tribes. Very few of the interviewees, regardless of affiliation, felt that anyone involved knew what tribal consultation should look like. A number of interviewees described an apparent conflict in expectations about what consultation is and would lead to between EPA and the tribe. Site managers appear to be doing their best to figure it out as they go along, with varying degrees of knowledge, support, and capacity to do so. All sides confirmed that conflicts over consultation are frequent and run to the heart of what it means to be a sovereign nation and have an effective government-to-government relationship. EPA and tribal interviewees reported that even when a Memorandum of Agreement (MOA) or policy existed defining the consultation process on a regional or tribal basis, it was frequently not followed.

When asked to define what consultation should look like, most agreed that it should be something in between EPA receiving input and making a unilateral decision and EPA being expected to do exactly what the tribe requests. Both of these more extreme ends of the spectrum were reported at various sites (sometimes at the same site). One of the most positive descriptions of consultation suggested was “one government working with another on issues of common concern.” However, the difficulty lay in knowing just how to do that, and having some consistency among agencies, regions, sites, and tribes. The issue of consultation was further complicated by tribe- or region-specific treaty rights that may affect consultation practices. **Most participants felt there was clearly a role for ADR in the consultation process if the middle ground described above was followed.**

Following closely on the above was the need to understand and define what it means to meet tribal trust responsibilities in the context of Superfund. Most tribal members had a

keen sense of what this means to them, and expected site managers to take this into account and fulfill the tribal trust responsibilities of the federal government. However, most site managers did not know how to specifically carry this out or whether it could legally be incorporated into the Superfund process, especially when it would conflict with and require changes to established Superfund procedures and policies.

A number of tribal representatives and EPA staff had questions based on issues that arose at their sites that are common enough that a national policy and/or changes to the rule may be warranted. Highest on the list was the issue of soil and waste standards; specifically, **whether the tribe could pass their own standards and have them be treated as ARARs under Superfund.** Several tribes wanted to be able to have treatment as a state for soil standards, as they do for water and air standards under other statutes. Barring treatment as a state, it was suggested that EPA guidance could be revised to acknowledge such standards as ARARs. Several EPA site managers also expressed a preference for having this issue resolved at a legal level to reduce conflict at individual sites. A related question is whether land use regulations passed by the tribe should be considered binding for the purposes of determining future land use in risk assessment scenarios and development of cleanup standards. **Finally, more than one tribe requested that the tribal Chairman have the same authority as the Governor to influence whether sites on reservation lands are listed on the NPL.**

While tribes are already working on risk assessment models and guidance within and across regions, they stated that **it would be helpful to have some EPA national guidance on building models for risk assessments that take into account tribal exposure pathways and subsistence/cultural scenarios.** It was noted that these would have to be adjusted on a tribe-by-tribe basis; however, some overall guidance that these are valid scenarios and exposure pathways and how to work through the process would be considered helpful.

The interface between consultation and remedy selection criteria was a point of discussion. Currently, the only criterion that seems to reflect tribal concerns is “community acceptance,” which is far down the list of importance for remedy selection and does not adequately reflect the government-to-government relationship that exists. It was suggested that this criterion could be considered a threshold or balancing criterion for sites on reservations, or a new criterion could be considered that would allow tribal preferences and concerns to be given more weight in the remedy selection process.

Finally, some of the lawyers interviewed (mediators, tribal lawyers, and EPA Office of Regional Counsel) offered additional recommendations. **They placed a high priority on securing reauthorization of the Superfund tax,** because this would provide more funding for selection of more protective and expensive cleanup alternatives favored by the tribes. In addition, they recommended that attention be given to resolving the issue of division of liability. **Division of liability was favored because it provides incentives to PRPs to participate voluntarily rather than litigate. However, they also strongly recommended that orphan shares should be divisible among the PRPs rather than falling to EPA,** which

would also help remove the internal conflict that EPA may currently face when considering more expensive alternatives that could deplete the Superfund. Lastly, they recommended that EPA and/or the Dept. of Justice provide more explicit policies and guidance on tribal issues under Superfund.

Recommendations for Regional Offices

Some of the recommendations for regional EPA offices had to do with training and hiring. **Additional tribal, cultural, and legal training for management, site managers, and tribal liaisons was recommended, particularly involving trainers from local tribes. Interviewees also recommended hiring more tribal members, and being particularly careful to ensure that tribal liaisons are well qualified for that position.** Having EPA staff placed in local areas with tribes was also considered helpful, because they could develop personal relationships and on-the-ground knowledge of the situation and issues faced by tribes.

Interviewees recommended that regions work to develop a culture that embraces and respects tribal jurisdiction and sovereignty from the Director on down, and that site managers try their best to meet the spirit of what the tribes need, rather than just what Superfund is required to do. There was strong concern expressed from tribal representatives that not enough was being done fast enough, and that tribal members were experiencing severe health effects and deaths, as well as cultural and spiritual impacts, while waiting for cleanup to occur. There was a sense that protocols and procedures hindered what needed to be done, and a greater sense of urgency and flexibility was needed.

Recommendations for Site Managers

The most frequently mentioned recommendation for site managers was to **spend more time with the tribe up front and involve them as early in the process as possible.** It was acknowledged that this takes more time initially, but it avoids conflicts later and produces a more cooperative process and better results. Along these lines were recommendations to spend time on the reservation getting to know not only environmental staff, but also Council members, elders, and residents near the site, and to spend time researching the tribe ahead of time to understand its history.

Tribal members and mediators emphasized that it is important to understand how each tribe's government works. Tribal governments are all different and each has its own internal dynamics, decision-making processes, and appropriate lines of communication. Interviewees recommended that the site manager be aware of and use these protocols and model them to the PRP, other stakeholders, and public. Generally, the tribal environmental staff person assigned to the project was identified as the appropriate place to start in determining the right approach.

While tribal Council members and/or the Chairman will most likely need to be involved in consultation processes, scheduling such high-level consultations well in advance and limiting their frequency was suggested as important to be respectful of their time and the number of different tribal government issues they are simultaneously addressing. **Mediators and tribal members emphasized that the site manager should ensure, to the extent possible, parity in the level of individuals participating on both sides** throughout the process, as this shows respect for the government-to-government relationship. For example, when the tribal Council or Chairman is involved, the EPA Regional Director should be involved at that point in the consultation.

Additional recommendations included:

- Provide technical and financial resources for the tribe to participate, if needed
- Listen carefully and be open-minded to alternative approaches
- Take a longer-term view of protecting human health and the environment, commensurate with tribal perspectives
- Emphasize teamwork over control
- Address environmental justice issues, especially in remote areas with few services or utilities, and where native languages may be spoken
- Give as much ownership to the tribe as possible during field work, cleanup, and maintenance, and provide knowledge and training opportunities
- Avoid giving cultural offense or breaching protocol
- Try not to take things personally; remember that there is a long history of harmful actions toward tribes by the federal government whose effects are still very much present in the daily life of tribal members. Negativity toward federal agency staff is frequently an expression of frustration and anger over past and present injuries not directed specifically at the individual

Recommendations for Conveners and Sponsors

A convener is an organization that initiates an alternative dispute resolution or collaborative problem solving process. They do the initial work to bring parties together and determine the scope of the process at the outset. In this role, conveners generally act as neutral parties, although they may also be a party to the process once it begins. Sponsors of the mediated or facilitated process provide funding and arrange for the mediator/facilitator (either directly or under contract). Both conveners and sponsors play a key role in laying the foundation for a successful process (neutral selection, situation assessments, etc.).

By far the most frequent recommendation by the interviewees for the conveners is to **provide all parties with the opportunity to participate in selecting the mediator**. In the cases in which this was done, the parties perceived the mediator as more neutral and the mediators felt that they could hit the ground running without the need to spend as much time establishing their credibility or neutrality. This approach seemed to get the mediator off to a good start with the group and also provided an opportunity for the group to make their first decision together.

Another frequent recommendation was to **ensure that there was funding and time for a thorough situation assessment**. In some cases, mediators felt that the value of this part of the process may need to be “sold” to EPA management and staff that may see it as an unnecessary expenditure of time and money. One mediator suggested the use of analogies to the Superfund process to explain why this is important, for example, comparing it to development of a conceptual site model that a sampling plan would then be based on, or to collecting enough data before designing and selecting among remedial alternatives. Greater emphasis on the situation assessment could also be incorporated into ADR training for EPA staff. **Mediators noted this as an area where independent agencies like the U.S. Institute or programs such as EPA-CPRC can provide funding** for an activity that mediators saw as essential, but clients may not be as prepared to fund as part of the mediated or facilitated process.

Other recommendations for the conveners included:

- Take into consideration how the source(s) of funding may affect the power dynamics of the process
- Ensure that the mediator is and is perceived to be a bona fide neutral third party
- Explicitly describe the roles of EPA, the tribes, and other participants in the ADR process
- Ensure that the purpose of the process and expectations for outcomes are clear
- Continue to build ADR skills among Native American practitioners

Recommendations for Mediators

Interviewees felt that it was important for mediators working at Superfund sites on tribal lands to have both strong intercultural skills and good rapport with agencies and scientists/engineers. Tribal representatives preferred mediators with a strong background in tribal culture and traditions, Indian law and history. Thus, one of their strongest recommendations was to obtain as much training in cross-cultural and tribal issues as possible, particularly from Native American trainers. One important area that was recommended was to learn about oral traditions and traditional ways of communicating. Similarly, EPA staff recommended that mediators have a thorough understanding of

Superfund, be able to differentiate between the roles of different EPA and agency programs, and understand the structure and purpose of Superfund.

As noted above, interviewees felt that it was critical for mediators to conduct a thorough situation assessment before beginning the mediated or facilitated process. Because these are complex sites with difficult technical, relationship, jurisdictional, and legal issues, it was recommended that mediators make sure that issues are carefully identified and clearly stated. Mediators were encouraged to be assertive in naming the challenges ahead and possible solutions to them, as well as choices participants may have for proceeding.

Several of the mediators suggested that one should make sure the situation assessment is not overly optimistic about the potential benefits of ADR or its possible success, given the many challenges present at these sites. If there are factors present that would likely cause a process to fail, mediators should make sure they are addressed and ensure that the parties are aware of what they would need to do to overcome them before beginning. Several mediators have encountered cases where there did not appear to be opportunity for movement or for input to be meaningfully incorporated into the process, and they emphasized knowing when to turn down a job or advocating for a better approach when the process appears to be one-sided or misleading about its goals.

Mediators suggested that this issue should be thoroughly explored ahead of time to ensure that all participants are open to changes in their positions. If they are not, and the sole goal is to better explain one's position to the other parties and obtain at least understanding if not agreement, it was considered very important to ensure that everyone going into the process has a clear understanding that this is the case. This cannot be an unspoken or unshared goal of one of the participants, or the process may be set up for failure and the expectations of the other parties may not be met.

There were also times when EPA and/or the tribe had expectations of the mediator or the process that were unrealistic or inappropriate for ADR. In such cases, or possibly in all cases, **it was suggested that it may be beneficial to hold pre-meetings with the parties to ensure that they understand what ADR is, how it works, what approaches the mediator will use, and what will be expected of them in the process.**

In working with tribes, recommendations for mediators were very similar to those for site managers:

- Do sufficient research on the tribe and the local history ahead of time
- Look for someone within the tribe who can help act as a guide to that tribe's form of government, appropriate protocol, culture, and specific issues
- Be willing to listen, be humble, and seek to learn – “know what you don't know”

- Spend time on the reservation, meeting the people, and learning about the specific technical, cultural, and spiritual issues of concern at the site
- Recognize that tribes are political entities like any government, and in that sense to do not function entirely like agencies
- Understand the dynamics of how decisions are made and the governmental structure, and to be prepared for elections and other events to change the landscape

In addition, it was noted that there may be significant differences between the needs and priorities of tribal governments and agencies and those of the local residents near the site. Both or all may need to be represented in the process.

Other recommendations for mediators included:

- Be fully aware of the long and difficult history between the federal government and tribes, the credibility issues that have resulted, and the need to give sufficient time and recognition to this history in nearly every case
- Don't expect agreement; in many cases, disputes and grievances are so long-standing that they cannot be overcome in a short process. Manage expectations and don't try to force consensus. Recognize these difficulties and make whatever progress you can in the time you have
- Avoid over-identification with any one party or emotional investment
- Have patience and don't take things personally; just as with site managers, long-standing anger and frustration may be directed at mediators
- Use of language is very important, due to cross-cultural communication barriers and differences; be careful how things are phrased, and avoid giving offense through what is written or spoken
- If the process includes consultation or is related to it in any way, make sure the role of the mediator and the process is clear with respect to formal consultation. Possible roles for ADR include:
 - ensuring that protocol is followed
 - bringing the right levels of participants together
 - designing an effective meeting to make the best use of the participants' time
 - ensuring that the goals of consultation are clear
 - setting ground rules for the discussion
 - making sure that follow-up actions are defined and carried out

Conclusions

The case study interviews made it clear that Superfund sites on tribal lands are subject to all the complexities of other sites, with a number of additional technical, historic, cultural, legal, and jurisdictional challenges. These added complexities suggest the value of ADR in helping the parties navigate the process, but also present challenges that are significant and which should be carefully evaluated through a situation assessment, if possible, prior to beginning a mediated or facilitated process. These sites involve dynamics that may challenge mediators considerably in terms of overcoming historical and current distrust, bridging cultural divides, clarifying expectations and goals, and dealing with jurisdictional and legal issues.

The Assessment results contain several overall themes that suggest possibilities for future work and Superfund program development:

- Better defining consultation and tribal trust responsibilities in the context of Superfund, and integrating meaningful consultation into everyday practice
- Training for EPA staff and mediators in tribal relations, cultures, uses of the land, oral communication styles, government, history, and law, as well as ensuring that mediators have appropriate grounding in Superfund and other EPA programs
- Following appropriate government-to-government lines of communication and protocol
- Increasing funding for and use of situation assessments prior to beginning a mediated or facilitated process, with the support of agency resources such as EPA-CPRC and the U.S. Institute
- Ensuring that EPA site managers and tribal representatives have a clear understanding of mediated and facilitated processes and what they can expect before beginning
- Building better risk assessment models and standard-setting processes that incorporate tribal land-use scenarios, including residential, subsistence, cultural, and spiritual uses
- Addressing ARARs issues surrounding soil and waste standards and land-use regulations and planning on tribal reservations
- Designing remedy selection processes that can more effectively take into account tribal needs to permanently restore and protect reservation lands for tribal uses