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ENVIRONMENTAL MEDIATION

In 1975 Homestake Mining Company (herein Homestake or company) announced plans for developing a uranium mining and milling operation in Saguache County, Colorado. This facility, known as the Pitch Project, attracted prompt and vocal opposition from a number of environmental groups and local residents.

This opposition initially was directed at the approval by the Forest Service of Homestake's mining plan of operations and a final environmental impact statement (EIS) for the project. The Forest Service's approval of the operating plan and EIS was appealed by a number of individuals and conservation groups to the Regional Forester.

When the Regional Forester affirmed the decision, project opponents sought legal counsel for a further administrative appeal to the Chief of the Forest Service.[1] They retained attorneys employed by the National Wildlife Federation Natural Resources Clinic (Clinic).

The Clinic is an office funded by the National Wildlife Federation (NWF) to make legal counsel available to the NWF, its affiliates, and other conservation groups in a six-state region of the Rocky Mountain West. Through an affiliation with the University of Colorado School of Law, it also provides clinical legal education and experience in natural resource law to students at the School of Law.

On behalf of their clients[2] Clinic attorneys filed and argued the administrative appeal before the Chief of the Forest Service. While decision on the appeal was pending, Homestake and the Clinic's clients began a mediation process. That effort, beginning in the spring of 1980, entailed nearly a year of discussion of a host of complex issues. It culminated in settlement agreements reached in March of 1981.

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[1] Decisions affecting National Forest Lands are reviewable up through the chain of command at the Forest Service. 36 C.F.R. § 211.19 (1981). The Forest Service, after completing an Environmental Assessment on the Pitch Project dated February 22, 1977, prepared a draft Environmental Impact Statement (EIS) which was followed by a final EIS published in April 1979. The major federal action which triggered the need for an EIS was the Forest Service's decision to approve an Operating Plan (OP) for the Pitch mine and mill pursuant to regulations at 36 C.F.R. Part 252.

The Forest Supervisor's approval of the Pitch OP and final EIS was the subject of the environmental groups' appeal to the Regional Forester in Denver. Regulations require that further appeal, if any, be to the Chief of the Forest Service. 36 C.F.R. § 211.19(j). The chief's decision may be reviewed by the Secretary of the Department of Agriculture on the Secretary's own initiative. *Id.* at § 211.19(j)(2). No appeal, *per se*, is allowed to the secretary. If the secretary does not review the chief's decision within ten days, the Forest Service's approval of the Pitch OP, based on the analysis in the final EIS, would be ripe for federal district court review.

[2] The group of clients was large and diverse. It included one national organization, the National Wildlife Federation. It also included general statewide organizations such as the Colorado Wildlife Federation and Colorado Mountain Club, and the Colorado Open Space Counsel, which itself is an umbrella group composed of numerous other organizations. The appellants also included a number of groups in the general project area, such as the High Country Citizens Alliance, the Gunnison Valley Alliance, and a number of individual local residents.

This article is intended to describe that mediation process, to discuss the potential benefits of mediation in resolving such disputes, and to shed some light on the dynamics of successful dispute resolution in environmental cases.

ARTICLE I. INTRODUCTION.

Conflicts between natural resource developers and environmental groups have often been fought out in the courtroom. The results of these court-room battles usually have not been satisfactory to either side. Though some judicial disagreements have resulted in settlement, there is a growing belief that alternative means of dispute resolution, such as mediation, may offer benefits to both sides. But the litigation habit is hard to break.

Mediation differs in several important respects from the traditional face-to-face negotiation process with which all lawyers are familiar. First, employing a neutral mediator minimizes the logistical problems of deciding when and where to meet, facilitates developing a clear agenda for meetings, and allows for easier communication on mechanical issues. Second, both parties may feel able to share their concerns more frankly with a mediator than with adversaries. A mediator may be able to communicate more easily to both sides what issues are truly critical and where there is room for flexibility. As a "sounding board," a mediator may be able to carry ideas back and forth between the adversaries without requiring anyone to be committed to a position. Third, a skilled mediator can offer helpful suggestions on such sensitive issues as how press coverage is to be handled, what information should be made public, and who needs to be present at mediation sessions. Finally, there is an important psychological dimension. While a mediator is in no sense an arbitrator or judge, and should rarely if ever express an opinion on substantive issues, most of us like to believe we are reasonable, and that our clients' position, if well presented, would be persuasive to a neutral party. Thus, the simple presence of a disinterested third party helps to discourage participants from taking extreme positions or insisting on unreasonable goals.

A few of the obvious incentives for mediation are cost-effectiveness, easier communication of positions, and maintaining positive public images.[3] When confrontation in traditional adversary proceedings is perceived as an unsatisfactory way of addressing complex technical and policy issues, mediation may be a constructive means of striking a balance between developers and environmental groups or, at least, of narrowing the issues to those which lend themselves to resolution.

A final clear benefit of mediation may well be that it allows the parties to focus on what is truly at issue. Environmental law is, of course, almost entirely statutory in origin. Many, perhaps most, environmental statutes create rights which are basically procedural in nature. The National Environmental Policy Act (NEPA),[4] the principal federal statute involved in the Pitch Project controversy, is a classic example of a procedure-oriented law.

While procedural fairness and consideration of all relevant information are important values in themselves, they are only rarely the principal objectives of environmental groups. Environmentalists are clearly more interested in what happens to the environment than the content of studies of documents. Defects in environmental impact statements are thus important only in two respects: first, that poor procedure may lead to poor substantive results, and, second, that procedural rights, unlike substantive rights, are protected by law.

This phenomenon has been further developed and encouraged by at observable tendency on the part of environmental groups to emphasize procedural litigation, probably because such issues are much easier to resolve on summary judgment or motions to dismiss which, frankly, are less expensive and less consumptive of the limited resources of the conservation movement. This tendency also is encouraged by

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[3] *See generally*, Wiener, *Is Arbitration An Answer?*, 15 NAT. RESOURCES LAW. 449 (1982).

[4] 42 U.S.C. §§ 4321 *et seq.* (1976).

the wide latitude given agency decisionmakers under the Administrative Procedure Act.[5] Rather than argue with agency decisions on factual grounds, it is often far easier to challenge clear errors of law.

Thus, the ultimate issue is almost always what happens on the ground—whether and how the dam gets built, the highway is constructed or the mine developed. However, when the dispute winds up in court, it is, almost always fought on other issues—whether alternatives were honestly evaluated, whether enough hearings were held, or whether adequate data were presented—rather than the substantive questions which are the "real" issues for both developers and environmentalists. There may be no substantive legal right to protection of the values of direct concern. If, for example, wildlife protection is the key value but no statute gives direct protection to wildlife, litigation might gravitate to other issues simply because legal remedies are more clearly available.

Mediation may be a way of getting results on the ground and of approaching directly the substantive issues which are the center of everyone's concern. Mediation, for environmentalists, may obtain results in excess of what any court can order. A commitment to protect wildlife or water quality, going beyond any applicable legal requirements, may be much more valuable than an order requiring an agency to hold more hearings or rewrite an environmental impact statement. From the developer's point of view, agreeing to mitigation measures may allow development to proceed more quickly, more efficiently, and at less expense than litigation. To the extent that the company has to spend money, it may well prefer to spend it on benefiting the environment rather than on legal fees and compliance with bureaucratic procedures.

Three types of environmental mediation have emerged in recent years. The first concentrates on broad policy issues which have aroused public concern. For example, the National Coal Policy Project (NCPP) sponsored by the Center for Strategic International Studies at Georgetown University attempted to formulate coal policies on a national scale. Initially conceived in 1976, the NCPP over the last several years has provided a continuing forum for development of coal policy recommendations by representatives of industry and environmental organizations.[6] This first type of mediation seeks principally to develop a consensus on broad policy issues.

A second type deals with mixed policy and site-specific issues. For example, the state of Alaska has required that disputes between the Alaska Coastal Policy Council and local coastal planning districts be mediated.[7] The "mixed" mediation typically considers the application of laws, regulations, and public policies to particular regions.

A third type of mediation is site-specific. The end-product of a site-specific mediation is not intended for use by a legislative or administrative body as are typically the end-products of the first two types. Site-specific mediation is aimed at on-the-ground issues arising from a particular site or project.[8]

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[5] 5 U.S.C. §§ 500 *et seq.* (1976).

[6] The history of the NCPP and the results of its first attempt at compromised policy development is provided in a two-volume work produced by the NCPP. Georgetown University, Center for Strategic International Studies, *Where We Agree—Report of the National Coal Policy Project* (1978). *See also*, Alexander, *A Promising Try at Environmental Detente for Coal*, 3 FORTUNE 94, 97 (1978).

[7] *See*, ALASKA STAT. § 46.060(b) (1981) which provides, "[I]f the [Alaska Coastal Policy] council finds that a district coastal management program is not approvable or is approvable only in part . . . it shall direct that deficiencies in the program . . . be mediated." Regulations implementing the statute were issued in April 1981 specifying procedures for: selecting a mediator; holding special public hearings prior to mediation sessions; determining the time, notification, and location of mediation sessions, settling deadlines for reaching agreement; and establishing adjudicatory hearings if agreements are never reached.

[8] Certain site-specific mediation projects address amendments to government authorizations for natural resource developments. The Pitch mediation, among other things, focused on changes to existing reclamation and water-quality permits.

This article deals with one site-specific mediation effort. The initial impetus for the Pitch mediation effort was the recognition by Homestake and its opponents that the extremely complex and technical issues surrounding reclamation of an open-pit mining operation would probably not be resolved effectively in any traditional adversary setting. Each party perceived that its interests could be best achieved outside that setting.

ARTICLE II. WHAT LED TO THE PITCH MEDIATION.

A. *Homestake's Pitch Project*

In 1955 at the height of the first uranium boom,[9] prospectors found a radioactive outcrop at the confluence of Indian and Marshall creeks in Saguache County, Colorado. Mining claims were staked, and production from the "Little Indian 36 Mine" began in 1957. Later discoveries resulted in production from the "Erie 28 Mine" until 1962, when curtailment of purchases by the U.S. Atomic Energy Commission halted production.[10]

Another example of this site-specific approach has begun to guide water-related developments along the Oregon side of the lower Columbia River. Twelve negotiators signed an agreement on June 30, 1981, as representatives of industry, environmental groups, and government agencies. The agreement focuses on issues to be addressed, party involvement, and mediation goals for developments along the river. Five specific sites varying in size from 50 to over 200 acres each were discussed; findings were made for each site; development designations were mapped; and filling, dredging, and mitigation policies were outlined.

An extensive bibliography on mediation generally has been prepared by RESOLVE, the Center for Environmental Conflict Resolution. Contact either the RESOLVE office, 360 Bryant Street, Palo Alto, California 94301, or the Conservation Foundation, 1717 Massachusetts Avenue, N.W., Washington, D.C. 20036.

[9] The first uranium boom in the United States was stimulated by congressional authority given to the Atomic Energy Commission (AEC) to search for the mineral. Section 5(b)(6) of the Atomic Energy Act of 1946 (60 Stat. 755 (1946), 42 USCA § 14 (1952); Section 66 of the Atomic Energy Act of 1954 (68 Stat. 919 (1954), 42 USCA § 23 (Supp. 1954)). Under these and other statutory authorities, the AEC encouraged the development and growth of a major domestic mining program through production bonuses, subsidized ore prices, and development allowances. The AEC also awarded exploration drilling contracts to private companies pursuant to competitive bids and built miles of roads to increase public access into suspected uranium-bearing regions. *See, e.g.*, AEC Domestic Uranium Program Circular No. 1, 13 Fed. Reg. 2089 (Apr. 20, 1948); Circular No. 2, *id.* at 2090; Circular No. 3, *id.* at 2090; Circular No. 4, *id.* at 3339; and Circular No. 5, 14 Fed. Reg. 731 (Feb. 18, 1949).

Under the influence of these subsidies, the uranium industry, which had been virtually nonexistent as late as 1948, experienced what one observer called "the greatest mining boom in history." Melich, *Some Interesting Sidelights in the Development of the Uranium Industry*, 27 ROCKY MTN. L. REV. 451 (1955).

See generally, Tippitt, *Federal Incentives to Uranium Mining*, 27 ROCKY MTN. L. REV. 457 (1955); Palmer, *Problems Arising Out of Public Land Withdrawals of the Atomic Energy Commission*, 2 ROCKY MT. MIN L. INST. 77 (1956); Groves, *Uranium Revisited*, 13 ROCKY MT. MIN L. INST. 87 (1967); and Joskow, *Commercial Impossibility, the Uranium Market, and the Westinghouse Case*, 7 J. LEGAL STUDIES 119 (1977).

[10] "The AEC controlled the uranium market between 1948 and 1962. The AEC operated its own mill at Monticello, Utah, and bought uranium feed ore at guaranteed minimum prices. Because the AEC was the primary purchaser of uranium concentrate, contracts between the AEC and other private mills required those companies to pay at least the guaranteed minimum ore prices established for the Monticello mill. The guaranteed ore prices were maintained from April 11, 1948, to March 31, 1962,

In 1962 the AEC eliminated, in large measure, the guaranteed ore price program. As AEC uranium stockpiles grew, AEC purchases dwindled and private mills were left without a market for their product. *See*, Groves, note 9 *supra*. The industry, which had been built up at enormous public expense, virtually collapsed. *See* Joskow, note 9 *supra*.

In the late 1960s electric utilities began to purchase uranium for nuclear reactors. Production was resumed at the site and continued sporadically. In 1970 a small open-pit operation was developed. Homestake acquired an 85 percent interest in the properties in 1972 from Pinnacle Exploration Company, a subsidiary of Calahan Mining Company.

The properties are about thirty-five miles southeast of Gunnison, Colorado. They are entirely within the Gunnison National Forest. They consist of patented and unpatented mining claims covering approximately 2,200 acres. Homestake's exploration efforts from 1972 to 1976 delineated substantial uranium reserves. After completion of feasibility and environmental studies, Homestake decided to build an open-pit mine and a uranium mill on the site.

Homestake began open-pit mining operations in 1979. By then the Pitch Project had received many federal, state, and local permits from Saguache County, the Colorado Department of Natural Resources, the Colorado Department of Health, the U.S. Environmental Protection Agency, and U.S. Forest Service.[11] However, a number of other approvals, needed for milling or other later stages of the project, had still not been issued.[12]

B. The Environmental Groups and Their Interest in the Pitch Project

Several environmental groups participated in the Pitch mediation. The NWF is America's largest conservation organization, with over 4.5 million members and supporters. The Colorado Wildlife Federation is the state affiliate of the national federation.

The Colorado Open Space Council is a statewide umbrella organization of environmental groups. The Colorado Mountain Club is one of Colorado's oldest and most active conservation organizations.

Several local and regional groups, some from the area of the Pitch Project, the Gunnison Valley Alliance, the High Country Citizens Alliance, and the Gold Hill Committee on Mining and the Environment were also involved in the mediation, as were several individuals who had joined in the Forest Service appeal.

In addition, some other organizations and individuals were parties to the Forest Service appeal, but declined, for reasons discussed below, to participate in the mediation process.

This coalition of environmentalists had been interested in the Pitch Project for a long time. They participated in various agency hearings on Pitch Project permits and took an active role in the review of the Pitch EIS prepared by the U.S. Forest Service.[13]

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[11] Federal authorizations received to that date included: Forest Service operating plan approval; archaeological clearances; permit to store and use explosives; explosives permit; permit to operate microwave communications systems; mobile FM license; and spill prevention control program approval.

State authorizations received included: two development and extraction mining permits (reclamation permits); water quality discharge permit (NPDES); fourteen air quality emission permits; four fugitive dust permits; one open burning permit; radioactive source material license (for storage only of contaminated buildings, materials); water quantity well permit; and accidental ore spillage response plan approval.

Local authorizations received included: mineral resource development permit; certificate of designation of solid waste disposal site (sanitary landfill); various building and construction permits; and sewage disposal system permit.

[12] Government authorizations yet to be received included: radioactive source materials license (to construct and operate the uranium mill and related facilities); development and extraction permit (amendment to existing reclamation permit covering the mill complex); and subsurface disposal permit (covering the tailings facilities).

[13] "The history of the Pitch environmental impact statement (EIS) itself could fill volumes. Homestake filed its application for operating plan (OP) approval in early 1975. In March 1976, the Forest Service unilaterally determined the approval of the Pitch OP was not a "major federal action" significant enough to trigger an EIS. *See,*

Clearly in any such diverse coalition the specific concerns of each participant diverged, at least in emphasis, from the concerns of other members. No list of issues can do full justice to the position of each of the appellants. Several of the problems which the environmentalists had with the project deserved special attention.

First, while there had been some small-scale mining in the area for two decades, the surrounding National Forest land was to a great extent undisturbed. The scenery is spectacular, rising to 14,000 foot peaks. The National Forest offers outstanding recreational opportunities, important wildlife habitat, watershed, and other resources. There was a real concern that these values not be sacrificed.

Second, water resources were of particular concern. Indian Creek, which runs through the project site, is a tributary of Marshall Creek. Marshall Creek is one of the state's outstanding trout fisheries. The environmental groups were very concerned that runoff from the steep walls of the open pit mines and from mine waste dumps and other disturbed areas might increase sedimentation, heavy metal concentrations, or radionuclide levels in Indian and Marshall Creeks. In addition, it was feared that the proposed consumptive withdrawals of water from Marshall Creek for the mill circuit could sufficiently lower water levels in that stream to damage the fishery.

Third, environmental groups feared that revegetation and reclamation could not succeed on the steep, high-altitude slopes of the mine pit and waste dumps. Further, Homestake planned to allow lakes to form in the mine pits. The environmentalists were concerned that the water quality in these lakes might be poor, and would thus be incapable of supporting a "beneficial use of such mined . . . land."[14]

Fourth, there was a significant worry that air- or waterborne radiation from the project would pose a hazard to the surrounding area.

Finally, many of the members of the loose environmental coalition were simply opposed to nuclear power. Some of this opposition-was on general grounds of energy policy—that there are cheaper, easier ways to meet energy needs. Some of it was on environmental grounds, largely related to the past environmental record of the uranium industry in the state.[15] And some of the opposition was on moral

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42 USC § 4332(2)(3) (1976). Pressure from environmental groups and the state of Colorado forced the Forest Service to review the issue. After some long and protracted arguing, the Forest Service decided in August 1977 to prepare an EIS in cooperation with the U.S. Nuclear Regulatory Commission (NRC) and the state.

The NRC had delegated responsibility in 1968 to Colorado pursuant to the Agreement States Program to issue the radioactive materials license (RML) for the Pitch mill facilities. (See, Agreement Regarding Discontinuance of Certain [Nuclear Regulatory] Commission Regulatory Authority and Responsibility Within the State [of Colorado], 33 Fed. Reg. 244 (Jan. 31, 1968).) This delegation of otherwise applicable federal authority to Colorado eliminated the possibility that issuance of the RML might trigger a federal EIS. Nevertheless, because the NRC was better equipped from a technical expert standpoint to evaluate the environmental impacts of the Pitch mill facilities, Colorado and the Forest Service relied heavily on technical studies by NRC experts. Thus, although the final Pitch EIS issued in April 1979 was published by the Forest Service, substantial portions of the final document are taken directly from NRC-prepared studies and comments. By the time mediation discussions began, then, various environmental groups had been actively involved with Pitch for over four years.

[14] "C.R.S § 34-32-111 (1973) states that "[r]eclamation shall be required on all the affected land." Reclamation is defined as the taking of "measures appropriate to the subsequent beneficial use of such mined and reclaimed land." C.R.S. § 34-32-103 (13) (1973).

[15] The history of uranium production in Colorado presents some very clear examples of environmental problems and of industry actions which have, whatever the ultimate effect on the environment, created a widespread concern among conservationists and others. Among these problems was lack of adequate concern for occupational radiation safety for underground uranium miners. *See* Vranesh, *Radiation Exposure*, XX Am. Law of Mining.

Radioactive uranium mill waste at Durango, Colorado was discharged into the Animas River, resulting in significant reduction in stream fauna for forty-five miles downstream. Studies showed an average radium content in

grounds, reflecting ethical concerns over both military and civilian uses of uranium and its product, plutonium.

Soon after release of the final Pitch EIS in April 1979, this coalition filed an administrative appeal with the Forest Service challenging the EIS. During the pendency of administrative appeal to the Chief of the U.S. Forest Service, discussions began which led to the Pitch mediation.[16]

C. *Initial Contacts and Proposals*

The possibility of mediation was first discussed in any detail by Robert Golten, counsel for the Federation, and George Simchuk, General Manager of Pitch Operations. This followed informal contacts between Golten, Homestake officials, and some members of the coalition.

Homestake's Vice-President, Ken Canfield, Corporate Counsel, William G. Langston, and Simchuk were intimately involved in the premediation discussions. They saw that mediation could short-circuit the EIS administrative appeal and take the heat off other government permit procedures for Pitch. Homestake was then preparing for the proceedings necessary to obtain the permits and licenses required to build the uranium mill associated with the Pitch mine. Homestake recognized it faced formidable obstacles in licensing the mill and wanted to avoid a two-part war. Homestake believed the participants in the Forest Service appeal were the most effective opponents of the project. The company hoped that mediation would make the entire project less controversial.

After a casual meeting in December 1979, Golten and Simchuk exchanged letters about the scope and format of mediation. Mr. Golten initially suggested a "quasi-arbitration" panel composed of three "experts" from the Forest Service, the Colorado Mined Land Reclamation Board, and the U.S. Environmental Protection Agency. Homestake and the appellants would present evidence at formal hearings that could be attended by any interested party, including members of the public. The hearings would result in an advisory opinion which could be used by any party for any purpose, including future legal proceedings.

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edible crops from irrigated farms below the mill to be about double that of food from farms above the mill. TSIVOGLOU & O'CONNELL, WASTE GUIDE FOR THE URANIUM MILLING INDUSTRY at 49-51 (1962).

In addition, unstabilized piles of uranium mill tailings were left at a number of sites, including Gunnison, Durango, and Grand Junction, Colorado, where wind blew tailings into the surrounding community. Id. at A-9, A-11, A-23. *See generally*, H.R. No. 94-1480 on the Uranium Mill Tailings Radiation Control Act of 1978 11978) U.S. CODE CONG. & AD. News 7433. In a number of these communities, tailings were even used as construction material around houses, schools, and other buildings. Thousands of structures are affected, and radiation levels in some buildings are several multiples of maximum allowable occupational exposure levels. *Uranium Mill Tailings: Congress Addresses a Long-Neglected Problem*, 202 SCIENCE 191 (Oct. 13, 1978).

[16] "Preliminary mediation discussions and substantive mediation meetings lasted from approximately December 1979 through March 1981. At about the midpoint of this 15-month process, on August 14, 1980, the Chief of the Forest Service issued his decision upholding the Regional Forester's approval of the Pitch operating plan and final environmental impact statement. The decision was a blanket approval of Homestake's construction, operating and decommissioning plans. The Forest Service decision was ripe, then, for judicial review.

After the decision was issued, Homestake gave some token consideration to stopping the mediation meetings. Unfortunately, the Forest Service decision was not the impregnable fortress Homestake wanted. In the environmentalists' view, for which there was some support, it just ignored most of the significant issues raised on appeal and showed obvious misperceptions of fact on the issues which were addressed. Even if the decision had been better reasoned, better organized, and more all-inclusive, though, Homestake likely would have continued the mediation. It became obvious early on that the mediation was providing Homestake with a unique educational forum, Homestake, for the first time since 1975, had the leaders of the Pitch opposition essentially as a captive audience. The converse also was true. Both sides were anxious to continue in spite of, and at moments because of, the Forest Service Chief's decision.

The Federation's proposal limited the scope of the arbitration hearings to the environmental and reclamation issues concerning the open-pit mine. The federation said it was not prepared to consider mill-related issues.

After discussing the proposal internally and with outside counsel, Mr. Simchuk suggested expanding the scope to include the proposed mill, eliminate the expert panel, and use an institutional mediator to serve as a go-between.[17] No advisory opinion would be prepared and the parties would attempt to resolve their differences privately. Mr. Simchuk also asked the Federation to drop the Forest Service administrative appeal pending the outcome of the mediation.

Correspondence continued for several months. Members of the environmental coalition held intensive discussions about the advisability of entering the mediation process. Essentially the primary controversy was one of goals. On the one hand, some environmental participants felt the project was unacceptable under any conditions. Their goal was to secure denial of some or all of the permits necessary to allow the project to operate and stop development entirely. Entering mediation, in the view of these people, implied the environmental groups would, if more reclamation guarantees could be secured, permit the project to go forward unhindered. Since no set of reclamation measures would make the project acceptable to these people, mediation was for them impossible. These people thought mediation would legitimize Homestake's goals, which some viewed as an unacceptable result. They believed mediation implied a retreat from their philosophical belief that nuclear power and uranium mining are simply wrong.

One source suggests that even where the preconditions for negotiations are present, parties may choose not to participate because "negotiating confers sense and legitimacy to an adversary, their goals, and needs."[18] In essence this is what happened here: a number of the environmentalists felt that negotiation would legitimize uranium mining. This they were unwilling to do.

Of course this concern often cuts the other way as well: developers may not care to admit that their opponents are numerous, sincere, or cogent enough to acknowledge by mediating. There are numerous examples of developers refusing to enter mediation or negotiation for these reasons.

On the other hand, many members of the coalition felt the project would proceed eventually in any event. The benefit of litigation, in their view, was its potential for securing better reclamation and environmental protection. If these goals could be achieved through mediation rather than litigation, then mediation should be pursued. So long as mediation did not require them to foreclose eventual litigation, little would be lost by exploring it. In this view mediation did not imply a concession that uranium mining was wise or beneficial. Rather, these people believed the merits of uranium mining and nuclear power would eventually be settled by the political process. Judicial proceedings were not seen as the most effective resolution of these "global" issues. Getting results, in terms of concrete commitments to

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[17] Perhaps the most disturbing aspect of the Golten proposal to Homestake was its severe formality. Homestake was particularly reluctant to invent what the company saw as an additional administrative tribunal. A few of the more significant concerns expressed by Homestake's lawyers included:

1. To what extent, if at all, would the Colorado (or federal) rules of civil procedure and evidence apply?
2. Would agency involvement trigger application of the hearing strictures of either the state or federal Administrative Procedures Act?
3. Could the "hearings" before the "quasi-arbitration panel" be closed to the press and public?
4. What limitations could be placed on access to federal or state courts during the "hearings"?

In short, Homestake could foresee months of argument over the procedural and evidentiary framework for the proposed panel. Homestake was not interested in wasting any more time on "procedure."

[18] "Moore, *Negotiation*, in NATURAL RESOURCE CONFLICT MANAGEMENT at 3 (1982). For some further thoughts on what makes a dispute suitable for mediation, *see* S. MERNITZ. MEDIATION OF ENVIRONMENTAL DISPUTES at 117-121 (1980).

improved reclamation, was not seen as inconsistent with a more general view that uranium mining was unwise.

This group recognized that none of the statutory provisions which could form the basis for a cause of action prohibits uranium mining. Thus, any victory in the courts would likely be a procedural one. While a court victory might require new hearings or a reconsideration of permits, it would probably not stop the project. While the resulting delay could put pressure on Homestake, it also would drain the financial and personal resources of the state's environmentalists. Environmental groups in Colorado would have fewer resources to spend on oil shale development, other uranium processing facilities, wilderness issues, and federal land management policy changes. Such opportunity costs are recognized as very real indeed by those who have had to face the responsibilities of allocating the limited resources of a typical environmental organization.

In short, even if litigation would not be a major financial burden, the environmental groups faced real opportunity costs by litigating. The price of litigation would be paid in terms of other projects, possibly posing major environmental threats, which would escape any meaningful review and analysis by environmental public interest representatives.

Eventually, a two-part consensus emerged among the Federation's clients. The majority decided that compromise was potentially acceptable with respect to mining and mine reclamation issues. However, an equal majority decided that no acceptable grounds for compromise existed on issues relating to the uranium mill and long-term disposal of mill tailings,[19] since that group believed that Homestake's proposed site was not acceptable and that Homestake did not want to discuss other sites.

Those who felt that no mediation should be undertaken on any issue decided they would seek separate legal representation and make their own determination whether to pursue litigation if the Chief of the Forest Service approved the Pitch EIS. The clients' disagreements reached the press. A February 14, 1980, article in the *Chaffee County Times*, entitled, "Homestake Mediation Plan Draws Strong Protest," discussed the internal dispute in inflammatory terms.[20]

Homestake decided to pursue the mediation. The company recognized that a lawsuit by nonparticipants was possible. Homestake was confident it could successfully defend, but saw little reason to wait for a lawsuit. Mediation would be inexpensive. It could calm fears. Successful mediation might convince nonparticipants that a lawsuit was futile.

Despite a temporary delay caused by the internal disputes, several procedural issues were resolved before the first mediation meeting:

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[19] The House Interior and Insular Affairs Committee voiced these concerns:

> Because only 1 to 5 pounds of useable uranium is extracted from each 2,000 pounds of ore, tremendous quantities of waste are produced as a result of milling operation These tailings contain many naturally-occurring hazardous substances, both radioactive and non-radioactive. The greatest threat to public health and safety is presented by the long radioactive decay process of radium into radon-222, an inert gas which may cause cancer or genetic mutations. This decay process, and the dangers which accompany it will continue for a billion years. As a result of being for all practical purposes, a perpetual hazard, uranium mill tailings present the major threat of the nuclear fuel cycle. H.R. No. 95-1480, [I978] U.S. CODE CONG. & AD. NEWS 7433.

Essentially the environmental organizations were skeptical that the tailings could be stabilized at the high altitude mill site for the extremely long periods of time in question.

[20] Homestake was particularly surprised, and not a little disturbed, to find such strong opposition to the mediation coming from within the environmental ranks. The newspaper article was the prelude to the most difficult decision Homestake would make—whether to participate knowing a group of antinuclear activists refused to participate in the mediation.

1. The parties agreed to use a go-between mediator, rather than a panel of experts. The parties met with Gerald Cormick and Orville Tice of the Institute for Environmental Mediation at the University of Washington. Although other possible mediators were identified,[21] the Institute's procedures were closest to the approach adopted by Homestake and the Federation;

2. The Clinic agreed to proceed even though it would not represent in the mediation all of the clients it represented in the administrative appeal;

3. The parties agreed to meet privately to establish procedures to attempt to resolve open questions including participation by agency personnel, press and public access to mediation meetings, and the presentation of the Federation's concerns; and

4. Although most of the Clinic's clients agreed to pursue the mediation, they did not agree to withdraw the appeal on the Pitch EIS.[22]

The parties and the Institute met on March 29, 1980. The mediation process had begun.

ARTICLE III. THE DECISION TO MEDIATE.

The decision to mediate was not an easy one. Both sides carefully weighed the advantages and disadvantages of mediation before proceeding. It became clear that a number of preconditions must exist before mediation can succeed and that various obstacles for successful environmental mediation of site-specific issues must be overcome.

A. *General Preconditions*

A party holding all the cards has little reason to seek a compromise through negotiation, mediation, or any other process. Certainly, even the most meritless claim has a nuisance value. But, in the context of a project costing tens of millions of dollars, pure nuisance value is worth little.

The environmentalists had a number of potential claims under both federal and state law.[23] While both sides in the dispute had expressed confidence in their legal arguments, neither side was absolutely certain it would prevail.

Both sides had something substantial at risk. Homestake's risk was that costly litigation might result in serious project delays, might require repetition of procedural steps already completed, and could

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[21] The other mediation organization that received the closest consideration was the Rock Mountain Center on the Environment (ROMCOE) based in Boulder, Colorado. Unfortunately. and perhaps undeservedly, the environmental representatives viewed ROMCOE as being too closely connected with industry to serve as a neutral mediator.

RESOLVE, based in Palo Alto, California, was considered but was viewed more like a education conduit (nearly a trade association) than an active mediating organization.

Since the winter of 1980 when the Institute was chosen for the Pitch mediation, a virtual flood of new organizations have sprung up across the country offering mediation service. Now, more than ever, anyone considering a mediation effort must carefully choose the mediator. Homestake and the Federation did not enjoy the luxury (or the curse) of many groups from which to chose.

[22] "Four months later, on August 14, 1980, the Chief of the Forest Service upheld the EIS. The Federation elected not to take the proceeding to court, pending the outcome of the mediation process.

[23] The major state law claim was that the Mined Land Reclamation Board had erred in approving a reclamation plan which called for leaving the open pits in place without backfilling. It was believed by the Board (and other parties) that the pits would eventually fill with water.

The potential plaintiffs argued vehemently that these pits full of seepage would not be susceptible of a "beneficial use" within the meaning of the Mined Land Reclamation statute. *See* note 11, *supra*.

result in unpredictable additional requirements which could upset project planning. The environmental groups faced another unpalatable possibility: that tremendous amounts of time and energy and a significant amount of scarce funds would be expended, without any change in the project, no better protection of the environment, and demoralization and weakening of the organized public support the groups had struggled to build. Mediation also might serve to weaken public support even if successful, since it could reinforce the mistaken notion that the average citizen has little role in solving environmental problems, which should be left to lawyers, experts, and courts. Further, an adverse ruling could easily have served as affirmation of a number of agency practices and policies which environmentalists have long been seeking to change. From a practical viewpoint, past mining operations and associated disturbance in the area weakened some arguments which would have been stronger had the project been developed in a completely pristine setting.

A second precondition was time. While the environmental groups recognized that continuing work at the mine would gradually weaken arguments for preliminary injunctions or other relief, conditions were not likely to be drastically altered in the immediate future. No immediate filing deadlines existed. No remedies would be lost in the time it would require to explore the mediation process far enough to see whether it offered realistic chances of success. Nor was time a problem in Homestake's view, since, once the EIS had been completed, the project was proceeding more or less on schedule.

A final precondition was the genuine support of the appellant organizations. After an initial period of discussion these groups made a commitment to see what could be gained through mediation. While the groups remained wary, they did decide to explore the possibilities fully and in good faith.

In the absence of such a position, it would have been foolish for the lawyers representing those groups to proceed. Every lawyer is or should be aware of the difficulties which can ensue if settlement is discussed without the consent or participation of the client. It rarely works. Even if it does, the client usually accepts the result grudgingly and with a feeling that he or she has been forced into something by the lawyer.

This puts a tremendous burden on the lawyer for the environmental organizations. It is always tempting to proceed to negotiate or mediate on behalf of those clients who are complacent and willing to accept without question the lawyer's advice, and simply to forget about the clients who take an active and skeptical attitude. Such a course may be welcomed by the opponent, since it can claim the endorsement of environmentalists for its plans without having to make serious concessions. It also may titillate those who, taken with the current fashion for mediation, would like to pretend that there are no real conflicts, just misunderstandings. But in the long run, such attempts to mediate without a constituency are counterproductive for all concerned. Developers do not gain much by an agreement which is transparently no more than a deal struck with a few individuals; those who reach such agreements without the support of the environmental constituency are discredited; and in the process the participants may discredit the mediation idea itself.

There should be no mistake on this score. The Homestake dispute has been a real conflict, fought out with few holds barred, between serious and determined adversaries.

B. *Obstacles to Mediation*

(1) THE ENVIRONMENTALISTS' NEED FOR TECHNICAL EXPERTISE

A major obstacle facing environmentalists in a dispute such as this one is access to expert advice on technical issues. In order to prepare and defend its numerous permit applications, Homestake was required to employ a number of technical experts in fields ranging from groundwater hydrology, revegetation, and soil mechanics to mining engineering. These experts are not only skilled in their fields, but are experienced at presenting their technical cases in public hearings.

In the absence of comparable technical advice, a lawyer representing environmental groups faces real difficulties. The experts are highly skilled in the art of persuasion. They can make a solid case for the proposition that the company's plans are flawless or nearly so, and they are unlikely to volunteer any views on the defects of the proposed plan or the range of uncertainties surrounding their predictions.

One alternative for the opposing lawyer is essentially to accept such expert presentations at face value. Even if the lawyer is willing to do this, environmental clients usually are not. If a case is to be made, the lawyer is pushed into raising procedural arguments. Lawyers are the experts at finding flaws in procedure. As pointed out above, however, there are very real limits to the utility of procedural victories. Even an impressive string of procedural wins may ultimately do little to further what should be the real goal: on-the-ground protection of the environment.

Substantive arguments are harder to raise in the context of the opponent's overwhelming superiority of expertise. A lawyer can try to create a case out of the opposing experts' own mouths, but this is extremely difficult. Any experienced lawyer will likely shudder at the thought. The difficulty, of course, is most pronounced in the more technical fields.

But the greatest flaw in such a strategy is that it precludes building a thoughtful affirmative case on the substance. Suppose, for example, that the greatest flaw in the applicant's proposal is its potential for contaminating groundwater through seepage. The applicant's groundwater expert may be highly skilled, glib, and persuasive—a very tough nut to crack. Perhaps the applicant's soil engineer is less articulate or is easy to catch in contradictions.

In such a case it is very easy for attention to shift from the most serious environmental issues to peripheral concerns, based solely on the fortunes of battle. Further, even if one pokes a hole in the applicant's case, this falls far short of presenting a coherent, thoughtful alternative proposal which better protects the environment.

The problem is most pronounced when one considers environmental tradeoffs. A mine spoil dump with steep slopes is more prone to slope failure and erosion and more difficult to revegetate. Yet a dump with more gradual slopes may occupy a much larger surface area, which is also undesirable. How is the nonexpert lawyer to decide which way to push the decisionmaker?

In any event, building a winning case generally requires presenting some practical alternative. This is most obvious in NEPA cases,[24] but applies elsewhere as well. Few goals are met by objecting to what an applicant proposes without being able to demonstrate that there is some other feasible way to do things.

These problems clearly apply to a negotiated or mediated settlement as well. If the environmental participants are unable to decide what the real issues are, to develop thoughtful alternatives, or to weigh assertions, agreement is virtually impossible. The mediation in this case would not have succeeded had the environmental groups been unable to secure the active participation and advice of a number of expert advisors.[25]

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[24] "For example, it is not adequate for an environmental plaintiff simply to argue that energy conservation is an alternative to a new power plant. The plaintiff has some burden to be more specific in developing and defining a particular set of measures. *See*, Vermont Yankee Nuclear Power Corp. v. N.R.D.C., 435 U.S. 519 (1978).

[25] "The primary source of such advice was faculty members and graduate students at the University of Colorado. Colorado State University, and the Colorado School of Mines, and staff of the Environmental Defense Fund.

(2) COMMUNICATION

A second major obstacle to successful mediation is the difficulty of communication. Those actually participating in the mediation are likely to find that their understanding of the issues develops so rapidly that it leaves their clients and colleagues behind. While this observation applies to a large organization such as Homestake, the problem is obviously most acute for a lawyer, like the Clinic lawyers, representing a dozen clients with thousands of members and a high degree of internal democracy. As noted above, this need applied not only to participating organizations, but to some extent, to other environmental organizations and other mining companies.

To resolve the problem the parties must insure that some of the most active representatives of the client groups participate actively in the mediation to ensure they are fully informed. It also is necessary to communicate incessantly almost every detail of the proceedings. The environmental coalition in the Pitch mediation spent more effort on internal than external communication. Even then, it was barely enough. Obviously, the need for confidentiality—keeping the hole card face down—makes the task even more difficult.

Such problems extended even to relatively minor spheres. The professionals—the Homestake staff, the lawyers, the paid staff members of environmental groups—usually wanted to meet during working hours on weekdays. The volunteers who formed the backbone of the environmental groups often wanted to meet at nights or on weekends.

In the course of the mediation, the environmental groups made a number of proposals which were subsequently withdrawn after it became apparent they were infeasible. Even with a persuasive rationale from the company's experts, buttressed by advice from our own experts, it was often difficult to persuade clients—particularly those who were not in attendance—that withdrawing an idea was not a sellout. When a proposal is floated as a trial balloon, it is important to make sure that clients understand from the beginning that it may be withdrawn or modified, and that changing one's mind may be a sign of strength rather than weakness.

(3) HOMESTAKE'S RISKS

Homestake faced its own obstacles in entering mediation. First, given liberal standing rules and the multiplicity of environmental groups, there was no guarantee that an agreement with participants in the mediation would not be followed by litigation by nonparticipants. But Homestake concluded that the participants included a sufficient number of environmental groups, including many of the groups with the most interest in Pitch and the most resources, to make agreement with them a worthwhile objective.

Second, Homestake was understandably reluctant to allow what amounted to extensive informal discovery from the very experts it would have to rely on if litigation did ensue. Given the likelihood the normal, and expensive, discovery procedures in a court setting would have the same impact, Homestake took this risk too.

ARTICLE IV. MEDIATION BEGINS.

A. Logistics—May 29, 1980

Approximately six months after the initial mediation idea surfaced, the institute arranged a meeting on May 29 to discuss procedural rules. The results of that first meeting are summarized here.

The parties agreed that the responsibilities of the institute would include:

1. Serving as a communications channel to government agencies and the press;
2 Serving as prods or "ticklers," if needed, to clarify procedural issues and agreements; and

3. Handling mediation scheduling and other logistics.[26]

The parties also agreed that the first phase of the mediation would be limited to the open-pit mine and related impacts. Impacts from the uranium mill and tailings facilities were left for later discussion. On the one hand, Homestake was vitally interested in considering mill issues because mill licensing was critical to the success of the Pitch Project. The environmentalists, on the other hand, were extremely reluctant to expand the mediation to the mill because of the complexity of the technological issues and lack of a consensus that any mill operation at the proposed location was acceptable. Homestake believed that it could not accept any major relocation of the proposed mill. In retrospect, inclusion of mill-related issues would have been counterproductive, at least in the early stages.

The Clinic attorneys confirmed that they did not represent those groups and individuals who believed no compromise was possible. Those clients who accepted mediation agreed to exclude pronuclear and antinuclear philosophical issues, recognizing that neither party would convince the other to change strongly held beliefs.

Meetings would be closed to the public and the press. Either party could discuss the mediation process with the press, but not the substance of the discussions.

The environmentalists still wanted government agency experts to participate. Homestake insisted that such participation was premature. As a compromise, they agreed that the Institute would inform government agencies that the mediation effort was being undertaken. Messrs. Cormick and Tice met with representatives of the Governor of Colorado and the Colorado Departments of Natural Resources and Health. The Institute also met with the Forest Service and the Saguache County Commissioners.

This was obviously a difficult and critical role about which much more could be written. Clearly, Homestake and the environmental groups could not simply implement many possible ideas without agency permission, particularly where a possible agreement might differ from the terms of a permit already issued.

The agencies were to some extent pulled in opposite directions. On the one hand, they did not want to give the impression that their rules or standards were negotiable or that their long-held policies might be changed because of an agreement among private parties. Thus, the agencies were generally disinclined to participate directly, even had they been asked to do so.

On the other hand, most of the agencies recognized the value of avoiding a full-scale litigated conflict, in which they would inevitably have been made parties as defendants. Thus, they wished to encourage a private agreement, so long as important agency policies and goals were not sacrificed.

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[26] Homestake and the Federation had already agreed to bypass any type of formal or quasi-arbitration of their differences. They were not looking for judges. They, themselves, wanted to be judge, jury, and advocates.

Although readily available, both parties agreed to avoid the strictures of formal arbitration. The Uniform Arbitration Act has been adopted in Colorado and could have provided a forum for discussions. The primary deterrent to arbitration, from Homestake's perspective, was the audience the company wanted to address. Homestake did not want to convince a supposedly objective panel of lawyers and other experts that the Pitch Project was a valuable and environmentally safe mine/mill complex. Homestake wanted a chance to look its adversaries in the eyes and educate its opponents directly. No traditional adversary setting allows that. Similarly the environmental groups wanted a chance to deal with Homestake directly on their serious concerns about the project. Any understanding either side could glean from arbitration would necessarily be overshadowed by lawyerly procedural maneuvering and gamesmanship.

The Institute, then, provided an essential service to the parties as a watchdog and handmaiden—not as judge or jury.

The mediators were of immense service in this regard. They communicated frequently with the agencies as time went by in an attempt to insure that agreement, if it were reached, would be acceptable to these government bodies.

The environmentalists agreed to submit a list of issues and technical questions to Homestake for review and response. At the next meeting, the parties were to review the list, establish priorities and prepare an agenda for the substantive meetings. The substantive meetings began with Homestake and its experts making presentations of Homestake's reclamation plans for the open-pit.

B. *Federation's List of Issues and Homestake's Response*

On June 23, 1980, the Federation presented its list of issues:

1. First priority—Feasibility of backfilling. Twenty-one substantive questions were addressed to the feasibility of backfilling the open-pit site;
2. Second priority—Slope stability, revegetation, and sedimentation. Twenty questions were addressed to those issues;
3. Third priority—Radiation exposure and emanation. Four questions were directed to those matters; and
4. Fourth priority—Wildlife. Three questions were posed to those subjects.

Five weeks later, at a July 30, 1980, meeting, Homestake reviewed the results of its efforts to respond to the questions. After extensive discussions on specific questions, the parties agreed on a series of meetings devoted to each of the four categories.

The environmentalists were impressed by the detail and candor of Homestake's responses to these questions. Personal rapport began to develop between Homestake and the environmental representatives. That rapport was tested at times but served well throughout the process.

C. *The Hard Work Begins -*
Substantive Meetings and Negotiable Issues

Three technical meetings were held on August 14, September 9, and September 23. This section will not discuss the substantive meetings in detail. The primary areas of negotiation and discussion which led to the preparation of a list of "negotiable issues" by the environmentalists will be outlined.

As the issues list presented by the environmentalists was reviewed and discussed among Homestake personnel, it became obvious that the primary objectives of the conservationists were long-term stability of the open-pit and mine dumps and mitigation of the long-term impacts of the mine and dumps, particularly as they affected water quality. Homestake recognized no compromises would be reached without a thorough understanding of Homestake's proposed operations. Homestake's representatives viewed the mediation meetings as opportunities to educate their potential adversaries about mining and reclamation plans. They hoped their educational efforts would bear fruit later in the process.

The conservationists pressed Homestake hard to backfill the open pits as soon as mining operations were completed in each pit. Homestake refused to make any commitments during the first three substantive meetings. Homestake wanted to keep the two mine pits open to allow access to potential underground uranium reserves. Homestake's position was that if any lakes formed in the pits, the quality of the water would allow swimming, fishing, and drinking. Homestake presented information that partial or complete backfilling of the open-pits might create environmental hazards. The company's surface and groundwater leaching studies indicated that heavy metals and radioactive substances present in the overburden used for backfilling could be dissolved and transported by surface and groundwaters.

Homestake presented alternative plans for partial and complete backfilling of both pits and for waste dumps to show the advantages and disadvantages of its proposed solutions.

High-alpine mining areas with steep slopes present difficult revegetation problems. Homestake had been studying high-alpine revegetation for several years. A variety of revegetation test plots had been prepared at the site to determine the best vegetation mix and the best methods to ensure revegetation. These were outlined.

The potential surface and groundwater contamination resulting from the open-pit mine and waste dumps was a contentious issue. The conservationists insisted that fundamental physical conditions at the site, not mere promises by Homestake, would have to guarantee long-term water quality.

Ground and water quality issues arose in several contexts. The stability of pit and dump slopes would directly affect long-term surface water quality. Soil loss and revegetation would also affect water quality. The effectiveness of isolation of radioactive materials and other contaminants in "envelopes" in the mine dumps was a major concern.

At the last of the four technical meetings on October 7, the conservation groups outlined to Homestake a list of "negotiable issues." The Federation explained initially, however, that:

1. It had no interest in "negotiating the scientific data submitted by Homestake at this time;"
2. The list was only the "first installment" of "what-ifs" for discussion;
3. The environmentalists expected to focus on the results or impacts of concern rather than detailing suggested methods of achieving its proposed objectives; and
4. Resolution of the negotiable issues might lead to a mediation agreement.

The environmentalists then presented their proposals.

Issue No. 1—Water Quality

Will water quality conditions deteriorate long-term?
How can the success of mitigation measures be assured?

Proposal—The environmental groups wanted assurance that Homestake would provide the fundamental physical conditions at the site for permanent water quality improvement. They wanted to discuss basic physical conditions and parameters to be met and were willing to discuss actual numbers later in the dialogue.

Issue No. 2—Revegetation

The conservation coalition wanted to insure impact mitigation would be achieved as soon as possible after shutdown of operations—faster than would take place by unaided forces of nature.
The coalition wanted long-term revegetation foundations to be established.
The environmental organizations wanted to insure off-site impacts were minimized during the revegetation program.
The environmental groups recognized that a primary revegetation problem was the absence of information about high altitude revegetation in semi-arid regions.

Proposal—Homestake was requested to undertake a continuing obligation to insure successful revegetation. To implement this obligation, the proposal focused on: (1) Outlining a methodology to define revegetation success, and (b) Development of quantitative measures of success.

The environmentalists also suggested that a study program determine what would occur ten to fifteen years or more after Homestake had left the site. The study program would review old mine sites and existing sites in high altitude regions to determine what had happened since the sites were abandoned. Research would establish benchmark data that could be used by Homestake and other mining companies in high altitude regions.

Issue No. 3—Backfilling

The environmentalists continued to insist on backfilling the open-pits. They were not persuaded that potential underground uranium reserves justified abandonment of backfilling.

The Clinic clients suggested that less steep pit and dump slopes would benefit revegetation and thus reduce erosion.

The environmental groups regarded the Homestake studies of slope stability as incomplete.

The Federation clients found Homestake's predictions on the characteristics of a lake in the open-pits unpersuasive or unreliable. They were concerned about stagnation and the vitality of an ecologic community.

Proposal—The conservation groups proposed that a research program address the unknowns during mining of the first open-pit and provide decision criteria to determine whether to backfill.

Issue No. 4—Dump Stability

The conservationists were concerned with physical safety of people in the area.

The conservationists were concerned that steep dump slopes could frustrate revegetation.

Proposal—The client group suggested that Homestake leave the dump faces at an angle less acute than the "angle of repose." As an alternative, the Federation suggested the "short-lift contour disposal method."

D. *Homestake's Proposal*

Homestake responded in writing to the list of negotiable items. On Issue No. 1, Homestake's primary concern with the long-term water quality study proposals was that they would duplicate the statewide stream reclassification efforts of the Colorado Water Quality Control Commission.

On Issue No. 2, Homestake agreed that the definition of "successful revegetation" was critical. For the specific Pitch area topography and climate, "success" could be achieved only after many years. Homestake saw the conservationists' proposal as a subsidy program for graduate students. Homestake believed that its revegetation research program was more than adequate and suggested that the conservationists look to government agencies and universities for additional research.

On Issue No. 3, the company doubted that the objective backfilling criteria the conservationists wanted could be developed. The conservationists wanted a specific "set of decision criteria" to determine the extent of backfilling of the pits.

On Issue No. 4, Homestake agreed to review the proposals for mine dump design.

The conservationists' proposals and Homestake's written responses provided the agenda for the next meeting held on October 21. The meeting was the most critical in the entire process. As the meeting progressed it became painfully obvious that another round of internal review and discussion would have to occur before Homestake or the negotiators for the coalition could agree on specifics. Those at the negotiating table needed further discussion with those who were not present. Further, clients on both sides were concerned by how an agreement could be perceived by the broader public. The environmentalists were sensitive to the views of other environmental organizations; Homestake was sensitive to the perceptions of the mining industry. Nevertheless, for the first time since March 1980, the end of the mediation was in sight.

As expected, the holidays delayed further progress until February 1981. A meeting was then held when, for the first time, specific language was proposed for the settlement agreements. Literally dozens of drafts were circulated in the weeks which followed.

E. *Agreements Are Signed*

The parties agreed initially that two separate documents would be prepared:

(1) One encompassing the commitments to be included in revisions or amendments to Pitch permits and licenses; and
(2) Another specifying commitments for "non-permit" items.

To this point discussions had centered on Homestake's commitments and the vehicles for implementation of those commitments. Very little time had been spent on the environmentalists' *quid pro quo* for the company's agreements. In a fit of creative negotiation, the parties focused on the execution of a covenant-not-to-sue. The basic idea behind the covenant was that the mediation process committed the parties to work together with government agencies instead of litigating. The environmentalists, therefore, were asked to agree not to oppose issuance of mine-related licenses because the commitments made by it in the mediation adequately protected their interests.

Ultimately three separate agreements were prepared for permit-related items, non-permit-related items, and a covenant-not-to-sue. To avoid any misinterpretation from paraphrasing the agreements, each agreement is included as an appendix for easy reference.

Statement of Understanding. The parties were Homestake, the National Wildlife Federation, the Colorado Wildlife Federation, the Colorado Open Space Council, the Colorado Mountain Club, Gunnison Valley Alliance, Marian Skinner, Gold Hill Committee on Mining and the Environment, and the High Country Citizens Alliance. The Statement of Understanding, which outlines permit-related agreements, follows as Appendix A.

Mediation Agreement. The parties to the Statement of Understanding also signed a mediation agreement dealing with "non-permit" items. This agreement follows as Appendix B.

Covenant-Not-To-Sue. The conservation parties agreed not to challenge any mine-related permit then issued to the Pitch Project or to challenge mining claims then held by Homestake in the project area. This covenant follows as Appendix C.

The parties signed the agreements and covenant-not-to-sue on April 10, 1981, approximately sixteen months after the initial contacts had been made. They agreed the next step would be to inform the affected governmental agencies of the agreements. The Institute contacted the agencies and meetings were held to review the agreements.

Despite initial discussions on the subject, no mill-related mediation was possible. Hearings had been held in December 1980, and January and February 1981 on mill permitting. All mill-related permits and licenses were subsequently issued and the time for appealing those permits had nearly run on the date the mine-related mediation agreements were signed. Lawsuits were filed challenging the issuance of the mill-related permits and licenses in mid-April by the Colorado Open Space Council and Gunnison Valley Alliance, two of the participants in the mine mediation.

Although the Federation had suggested to Homestake that a mill-related mediation was still a possibility, and that lawsuits could conceivably be treated as "friendly" litigation designed only to preserve appellate rights, the possibility of continuing the mediation disappeared in the acrimony generated by contested public hearings over the mill licenses and later appeals. Homestake decided to take its chances in court.[27]

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[27] "Homestake won both mill-related lawsuits. The first lawsuit was filed in state district court in Saguache County and challenged three of the four final permits issued for the mill facilities. Gunnison Valley Alliance, Inc. v. Water Quality Control Commission, 81-CV-16 and 81-CV-3594 (consolidated), Saguache District Court, Dec. 29, 1981. The court upheld the issuance of each permit in every particular. No changes were made to any permit as a result of the lawsuit.

The second lawsuit challenged an amendment to the Pitch reclamation permit approved by the Colorado Mined Land Reclamation Board. The case, filed in state district court in Denver, was decided in July 1982. Rocky

ARTICLE V. CRITIQUE.

A. *Limiting Issues and Anticipating Pitfalls*

Clearly delineating the issues to be discussed during mediation is the first and most critical step. In the Pitch mediation, despite the company's continued interest in discussing mill facilities, limiting issues to the open pit mine and related facilities was necessary, given the technical complexity of the mill issues, the inability of the conservationists to pay technical consultants to review Homestake's mill plans, and lack of any consensus in the coalition on what, if any, mill-related issues might be negotiable. For the most part, the conservationists' technical critique was based on free consultations with university professors, graduate students, and scientists from other public interest groups.

The parties must define a manageable number of issues for mediation. In the Pitch case, the parties agreed to target on-the-ground environmental issues. They also agreed to put aside philosophical disputes over nuclear power and regionwide mineral development. Once the parties were able to agree that air, water quality and wildlife impacts of the Pitch open pit mine were the major issues of concern, the process to deal with those issues could be defined more easily.

The parties to a site-specific mediation must keep meetings closed. The parties to the Pitch mediation limited the availability of information to members of the public and the press. The meetings were closed to all press and other nonparties. Communications with press and agency personnel were coordinated through the Institute. As it turned out, these voluntary limitations obviated any need to deal with the press or members of the public.

The parties must constantly keep in mind that relatively minor problems can cause the mediation process to break down.

The mediation nearly collapsed on two occasions. The first time was in November 1980 when Homestake strongly pressed for expansion of discussions to include mill facilities. Some history is needed to set the stage. The open pit mine, which was the initial subject matter of the mediation, had been operating since 1979. However, the proposed mill facilities could not be constructed until several additional approvals were obtained. While the mediation process was continuing through the summer and into the fall and winter of 1980, Homestake was preparing for public adjudicatory hearings on mill licenses. The first set of major hearings occurred on December 10-12, 1980.

On November 16, 1980, persons who wished to become parties to the mill hearings had to apply to the agencies involved for party designation. Unknown to Homestake, the NWF had decided it would not become a party to the mill hearings. The Federation's decision was a clear signal to Homestake that the Federation was satisfied with the progress of the mediation.

A preliminary informational meeting to discuss possible mill mediation was scheduled for November 19. Because certain Homestake consultants were not available on that day, Homestake informed the environmentalists at the last minute that the meeting would have to be postponed. The cancellation of the meeting occurred on November 16, the last day the Federation could have applied for party status in the mill proceedings. The Federation concluded that Homestake was playing games by cancelling the preliminary meeting.

The Federation's concern was conveyed to the Institute which immediately called Homestake representatives. John Watson, Homestake's attorney, was able to reassure Luke Danielson that the cancellation was not the result of gamesmanship. The parties were once again on speaking terms. Without

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Mountain Chapter of the Sierra Club v. Colorado Mined Land Reclamation Board, 8I-CV-3836, Denver District Court. July 7, 1982. Judge Fullerton upheld the issuance of the amended reclamation permit in every particular.

The plaintiffs did not appeal either mill-related case. Even though the company had to de-fend these suits, it still viewed the mediation process as having been a net gain.

the quick action of the Institute and without the mutual trust that had developed through the mediation, the coincidence could have ended the mediation.

The second event that could have stopped the process was a letter written by one of the Federation clients. Following the mill license hearings in December 1980 and the approval of the final licenses for the mill, a letter from one of the environmentalists was published in several Colorado newspapers. The letter was a scathing attack on the agencies and Homestake. The letter was sent without the knowledge of other Federation Clients. The letter incensed Homestake, particularly because the parties were then discussing the possibility of a mill-related mediation. In the view of one Homestake negotiator, the letter bordered on "betrayal."

The parties to a mediation must try to anticipate the risk of collapse. Communications must be kept open to head off and resolve disputes and get the process moving once again. This is an example of the value of a neutral mediator. Without such help these talks would almost certainly have collapsed.

B. *The Risks and Values of the Homestake Mediation*

When a development project faces legal obstacles, the most obvious risk of mediation is exposure of its position to opponents. The primary risk to Homestake in the mediation was premature disclosure of the details of the Homestake project, with all its strengths and weaknesses. The Clinic lawyer spent many hours questioning Homestake's experts very closely on technical issues. This would have been an invaluable start on discovery if litigation had ensued. However, Homestake also perceived the potential advantage of identification through mediation of undiscovered weaknesses in its position.

If a developer's case is weak, the risk of premature disclosure may be too great. However, Homestake believed that, on balance, the mediation process could make the Federation aware of the weakness in its own case and thus reduce the likelihood of further legal challenge by the Federation.

One of the most troublesome obstacles that mineral developers have to contend with in the permitting process is an insistent demand by opponents that all possible questions, however remote or hypothetical, be definitively answered before a shovel of dirt is turned. From Homestake's perspective, the greatest advantage to mediation was the opportunity to persuade environmental representatives that not all technical and substantive issues can be resolved in advance. Homestake believes that its operations and facilities were designed on the basis of the best technical and management information available when permit applications were made. In fact, all permits provide for agency reconsideration of permit requirements in the light of data developed as mining operations and development proceed.

Through the mediation environmental groups began to understand the dynamic nature of a mining operation and the changes in operations as mining progresses. For example, whether lakes would form in either the north or south pit and whether the water would be capable of supporting recreation and wildlife uses, could not be proved in any definitive sense until long after mining was completed. Although Homestake's studies strongly indicated that backfilling the pits would result in at least a minor reduction in water quality, Homestake and the environmentalists recognized that further studies throughout the five- to ten-year life of the mine would provide more definitive answers.

From the point of view of environmental groups, there were several benefits to the mediation process. First of these was the opportunity, generally not provided by the judicial forum, to focus directly on the environmental impacts of the project rather than on peripheral procedural issues. Second was the opportunity to engage the company in direct dialogue on specific issues. On some of these issues, the environmentalists were eventually persuaded that (a) the company had a cogent rationale for its proposals, (b) that there were no easily identifiable sensible alternatives, or (c) both. On some other issues they found they were able to give the company a creative nudge in its thinking. For example, the Company early contended that backfilling of either mine pit would be inordinately expensive and was thus infeasible. As the discussions proceeded, Homestake, in response to questions submitted to it, did some

detailed calculations which indicated that backfilling one of the pits would not cost substantially more than the company already anticipated spending without backfilling.

It is important to emphasize that increased availability of technical advice to environmental groups may be a key to better dispute resolution. If settling such disputes short of litigation is in the interest of natural resource developers, and if good technical advice to environmentalists is necessary for settlement to occur, then it is in everyone's interest to insure that such help is available. Even where disputes do lead to litigation, the litigation would be more likely to focus on real, substantive environmental problems and less likely to consume endless blocks of time on sterile procedural issues.

Third, and of overriding importance, mediation produced results with which it is hard to argue. The agreement with Homestake is a guarantee of solid efforts toward reclamation, perhaps in excess of what could have been obtained by other means.

To an objective outside observer, the bottom line results of the Pitch mediation may not look substantially different from those that might have been achieved in another forum. A judge may have found fault with the Pitch EIS and required revisions to the EIS and Forest Service approval of the Pitch operating plan. Likewise, a panel of arbitrators could feasibly have reached the same results.

What ultimately distinguishes the Pitch mediation from other available processes, however, is the parties' focus. Homestake was able to concentrate its financial and personnel resources on educating its opponents; so, also, was the Federation. The short-term results of that education are summarized in the three mediation agreements. The long-term results of that education are significantly more amorphous.

For those of us involved in the process who are lawyers, though, no doubt exists that the long-term benefits surface whenever we meet again head-on, debating the value and substance of particular natural resource development projects. We have developed a new sophistication, understanding, and perspective as to what can be achieved through our traditional system of justice. We have a new appreciation for what it means to be the victor. We understand more of what opposing parties' purposes truly mean when transferred to on-the-ground objectives. Moreover, we understand better what it means to save our clients a substantial amount of money and to break free of the strictures of our legal training which preaches the litigation gospel.

What began as an experiment for both Homestake and the NWF became a valuable exercise in the art of persuasion—persuasion of one's adversaries, not a judge or jury. What is important is maximizing the client's gains. Both sides feel that this was accomplished through the mediation process in this instance.

APPENDIX A

STATEMENT OF UNDERSTANDING

Re: Homestake Pitch Mine

This statement of understanding results from the mediation of concerns over what constitutes adequate reclamation of Homestake Mining Company's Pitch Mine, located within Gunnison National Forest, Saguache County, Colorado. Parties to the understanding are the Homestake Mining Company (represented by Kirkland & Ellis of Denver) and the National Wildlife Federation, Colorado Wildlife Federation, Colorado Open Space Council, Colorado Mountain Club, Gunnison Valley Alliance, Marian Skinner, Gold Hill Committee on Mining and the Environment, and High Country Citizens Alliance. All parties unanimously adopt and support the principles embodied in this understanding. Furthermore, it is the parties' intention that their understanding be useful to the Federal, State and County agencies that share ultimate responsibility for regulating, and authority for permitting, Pitch Mine operations, and, to the extent deemed appropriate, incorporated in the Pitch reclamation plan.

Maintenance of Water Quality—Indian Creek. Homestake commits to take responsibility for the quality of water discharged from the mine area after active mining operations close. One criterion for determining the success of reclamation at the mine site shall be the quality of the water draining from the mine area into Indian Creek. Reclamation shall not be deemed complete until the water quality in Indian Creek, without benefit of active treatment measures, is adequate to protect post-mining beneficial uses, including the Indian and Marshall Creek Fisheries, on an ongoing basis, and that it shall remain so under reasonably foreseeable long-term circumstances. Water quality parameters and numerical standards for determining successful reclamation shall be based upon the best available data, and be set by the Water Quality Control Division of the Department of Health, its successors, or other appropriate agencies in consultation with the Mined Land Reclamation Board. It is anticipated that water quality parameters and standards will be set with regard for seasonal variation in flow rates and natural sediment loading, and shall not apply to waters below the existing NPDES discharge point.

Backfilling—North Pit. A stipulation will be added to the existing Pitch Development and Extraction Permit requiring Homestake, at an appropriate future date, but in no case later than the point at which sufficient materials remain in the South Pit to allow backfilling, to submit an application for amendment of the mine reclamation plan authorizing partial backfilling of the North Pit, provided that:

1. If partial backfilling would obstruct designed access to underground uranium reserves, Homestake may later apply to the Division for a permit amendment which would provide an alternative feasible means of access to those underground reserves. And further, if no alternative feasible access to underground reserves exists, Homestake may apply for an amendment authorizing access through the North Pit which will, only if necessary, obviate partial backfilling into the North Pit. The Division and Board will determine the need for and content of such an amendment;

2. Deterioration of groundwater quality migrating through a partially back-filled North Pit, due to loading of numerous components present in backfill material, would not exceed existing NPDES levels, as predicted by studies by Leeds, Hill & Jewett, San Francisco and Envirologic Systems, Inc., Denver. Reclamation measures to be employed in the North Pit will be reevaluated by the Division if studies now in progress or conducted in the future indicate to the Division a substantial likelihood that backfilling will have an impact on water quality that exceeds then current NPDES standards as measured at the current discharge point into Indian Creek; and,

3. The material to be used for backfilling the North Pit will come directly from the South Pit and will not be required to be removed from the mine waste dumps. However, Homestake will commit to scheduling its mining operations in such a manner that when mining in the North Pit is concluded, adequate material for the planned partial backfilling will be available from the South Pit to partially backfill the North Pit to the agreed level. Nothing in this paragraph requires that Homestake continue mining operations anytime its business judgment dictates otherwise.

Backfilling—South Pit. A stipulation will be added to the existing Pitch Development and Extraction Permit requiring Homestake, at an appropriate future date which date shall be in sufficient time to ensure availability and use of materials specified in paragraph (1) immediately below, to submit an application for amendment of the mine reclamation plan authorizing partial backfilling of the South Pit, provided that:

1. Barren waste materials or barren overburden from any surface or underground mine developed by Homestake in the Pitch Mine vicinity will be used for partial backfilling of the South Pit, taking into consideration distance, elevation, and type of material;
2. If the South Pit is not partially backfilled and a lake forms, and if contrary to what is now expected, future observations and research provide reason to believe, in the opinion of the Colorado Water Quality Control Division, that:
   (a). the lake in the South Pit may be eutrophic or may contain levels of any pollutant in excess of acceptable water standards; or
   (b) the lake will be permanently incapable of supporting reproducing populations of fish;

Homestake agrees that the Mined Land Reclamation Board shall consider amendments for its permit appropriate to assure adequate reclamation of the South Pit based on those new circumstances. One of the alternatives to be considered by the Board in such circumstances will include partial backfilling of the South Pit. [1]If the South Pit is retained as a lake, Homestake will use its best efforts to create a flat shore at water level around so much of the lake as is feasible.

Soil Loss. Homestake stipulates that it will use soil loss from the Pitch Project area as one measure of the success of reclamation, together with other measures already in force. While present soil loss equations are not ideally suited to Pitch operations, if a soil loss methodology applicable to Pitch conditions is developed it will be adopted for use prior to completing reclamation. If no suitable method is developed, reclamation will be judged by other measures incorporated in the Pitch permit.

CONCLUSION

The signing parties to this Statement of Understanding believe they have settled on a series of measures that result in significant progress toward their shared goal of environmental protection and adequate reclamation of the Pitch Mine. Furthermore, the parties represent their willingness to support these measures when they are incorporated into the permits of the appropriate governmental regulatory agencies.

In witness whereof, the parties hereto have signed this Statement of Understanding effective this tenth day of April 1981.

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[1] 'Reclamation—The conservationists wish to make it clear that they know of no method of reclaiming either pit—other than (1) partial backfilling, or (2) creation of a lake with water of acceptable quality—which they could regard as an adequate means of reclamation. They oppose any option which would leave an open pit.

APPENDIX B

MEDIATION AGREEMENT

The following obligations and agreements are hereby entered into on behalf of Homestake Mining Company (Homestake or HMC) and the National Wildlife Federation, Colorado Wildlife Federation, Colorado Open Space Council, Colorado Mountain Club, Gunnison Valley Alliance, Marian Skinner, Gold Hill Committee on Mining and the Environment, and High Country Citizens Alliance (conservationists).

Water Quality. Homestake agrees promptly to make available to the public, subject to first review by appropriate governmental bodies, the results of future research relating to water quality. When and as such research becomes available, Homestake will be deemed to have met this obligation by:

1. Notifying a maximum of eight individuals, at addresses to be supplied by the conservationists and appropriate officials at the Water Quality Control Division, the Mined Land Reclamation Division, and the three affected counties of the nature and availability of any such report or study;
2. By sending one copy of each such report or study to two individuals named by the conservationists, and to appropriate governmental bodies as above;
3. By making additional copies available on request at actual lowest practicable duplicating cost, which cost shall be paid by individuals requesting copies.

Revegetation. Homestake agrees to undertake during the life of the mine a thorough and comprehensive program of research in revegetation (including reforestation) at the mine site. Included in this program of research are review and testing of various plant species, soil amendments, and planting and application techniques. The goal of this program is to develop the best possible methods to insure thorough revegetation and reforestation of the project site.

1. By June 1, 1981, Homestake will submit to the Division and to the conservationists a report on the proposed content, funding, and future direction of this thorough and comprehensive program.
2. All reports, studies, and other materials relating to revegetation research will be made publicly available promptly upon their completion, in the same manner as water quality research, described above.
3. At least once annually, during the life of the mine, and for at least five years after mining ceases, Homestake will convene meetings of experts from various disciplines, open to interested members of the public, to examine the results of revegetation activities and research and to solicit ideas and recommendations for additional or improved research.[1] The conservationists may nominate at least four attendees to each such meeting. If Homestake does not adopt any recommendations made, Homestake will discuss with the attendees to the meeting the reason(s) such recommendations were not agreed to.
4. Homestake will enlist the assistance of an adequate number of graduate students under the direction of Dr. Hugo Ferchau in a review of local abandoned mine dumps and sites in the three-county area including Saguache County, Chaffee County, and Gunnison County. The purpose of this review will be to determine those plant species and other area characteristics

[1] The conservationists recommend that such meetings should take the form of an annual Symposium on High Altitude Revegetation in Gunnison sponsored by Homestake, academic institutions, and/or appropriate other sponsors.

which may be used as a foundation to insure successful revegetation and reforestation at the Pitch Site.

Citizens Advisory Committee. Homestake agrees to add two members nominated by the conservationists to its Citizens Advisory Committee.

Wildlife. Homestake recognizes a responsibility to protect and preserve wildlife and wildlife habitat in the project area. The conservationists are concerned that the project road, which bisects outstanding big-game winter range, will cause disturbance, moving animals out of the area and increasing pressure on adjacent range, and that the project will otherwise disturb wildlife and increase pressure on surrounding habitat. Homestake believes that the existence and magnitude of such problems have not been demonstrated.

If such wildlife problems can be satisfactorily demonstrated to exist, based on competent scientific evidence which focuses on conditions at the Pitch Project, Homestake agrees to implement, in cooperation with the United States Forest Service and the Colorado Division of Wildlife, a program adequate to compensate for range loss and habitat disturbance which results from the Pitch operations. Such mitigation will include such measures as agreed to among HMC, the Forest Service, and the Division of Wildlife to be appropriate, useful, and effective in improving wildlife habitat on lands surrounding the project.

The existence, extent, and nature of effects on wildlife of the Pitch Project will be the subject of a meeting among those parties to this agreement, the Colorado Division of Wildlife, and the United States Forest Service, to be convened on or before May 1, 1981. The parties agree to exert their best efforts to reach accord as to the existence, extent, and nature of any such effects, and the scale and scope of appropriate mitigation measures, on or before July 1, 1981. Mediation services will be employed as the parties deem them useful.

Should no agreement be reached by July 1, 1985, HMC will agree to implement such measures as recommended by the Forest Service and the Colorado Department of Wildlife to improve wildlife habitat on lands within the Pitch Project area or on lands in the immediate vicinity of the Pitch Project. Such measures may include: a program of selective random clearcutting in dense stands of lodgepole pine to provide appropriately sized wildlife parks; appropriate fertilization of rangeland; and/or other measures. Provided that such program shall be limited to the period of active mining operations and shall be reasonable in scope considering such factors as costs, benefits, and impacts on other resources.

Subject to the agreement outlined in the immediately preceding paragraph, it is understood that Homestake may not be held responsible for the costs of mitigation measures in excess of what is necessary to compensate for wildlife and habitat losses that are demonstrated based on competent scientific evidence to be attributable to operations at the Pitch Project. Further, so long as such measures are effective in mitigation, in the opinion of the Colorado Division of Wildlife, the specific choice of mitigation measures, or combination of measures, to be employed shall be Homestake's.

Nothing in this agreement shall be construed to prohibit Homestake, in its discretion, from taking measures in excess of those necessary strictly to compensate for wildlife disturbance or habitat loss.

Fisheries. The conservationists recognize that Homestake is owner of a valuable water right on Marshall Creek, senior to state minimum flow appropriations. Homestake recognizes that all of the citizens of Colorado, including its own staff and employees, have an interest in protecting and maintaining the outstanding Marshall Creek trout fishery.

Homestake will not and does not hereby agree to maintain a specified minimum flow in Marshall Creek below Homestake's point of diversion. Homestake does reaffirm its existing commitment, stipulated in its Development and Extraction Permit No. 77-4, issued by the Mined Land Reclamation Board, which states:

Homestake Mining Company will monitor the stream flow in Marshall Creek when monitoring is possible, and information from that program will be included in the annual report. Upon submission of the annual reports (to the MLRB), Homestake will confer with the Division of Mined Land Reclamation and the Division of Wildlife to anticipate that if there is any impact or problems to the fishery, that the government agencies and the operator will make their best efforts to rectify same, and its intention to take all practicable steps to avoid reducing flow in the creek below that level at which injury to the fishery may be expected to occur.

In addition, HMC will use its best efforts to insure that no action by HMC will result in flow rates in Marshall Creek falling below 2 c.f.s. winter, 6 c.f.s. summer, or such other minimum flows as may be demonstrated as adequate to protect the fishery resources, such efforts to include, but not be limited to:

1. use of all reasonably available nontributary sources of groundwater;
2. should existing or contemplated sources of nontributary groundwater prove inadequate to supply the amount of water now permitted, HMC will take all reasonable steps to secure the full amount of nontributary groundwater allowed it by existing permits; and,
3. such other augmentation as may be authorized by appropriate agencies and water adjudications.

Homestake agrees to notify the Division of Wildlife at least fifteen days before taking any action which would result in flow below those levels stated above except in cases of emergency threatening life or property which may prevent such notice. In such cases, Homestake will notify the Division of Wildlife as soon as reasonably possible.

In witness whereof, the parties have signed this Mediation Agreement effective this tenth day of April 1981.

APPENDIX C

COVENANT NOT TO SUE

Covenant Not To Sue executed on this tenth day of April 1981, by Homestake Mining Company (Homestake), State of Colorado, and the National Wildlife Federation, Colorado Wildlife Federation, Colorado Open Space Council, Colorado Mountain Club, Gunnison Valley Alliance, Marian Skinner, Gold Hill Committee on Mining and the Environment, and High Country Citizens Affiance (Conservationists) of the State of Colorado.

RECITALS

WHEREAS, Homestake and the Conservationists have completed a series of meetings over the last several months focusing on mediation with regard to the environmental impacts of mining operations at Homestake's Pitch Project in Saguache County, Colorado.

WHEREAS, the Conservationists have in the past asserted certain legal claims with respect to various requirements governing operation and reclamation of the mine and mine site.

WHEREAS, after extensive negotiating and mediation, the parties have reached a compromise of those potential claims, whereby, in return for certain agreements, commitments, and covenants on the part of Homestake, the Conservationists covenant and agree, and to the extent expressed herein, not to institute or maintain suit on said claims.

WHEREAS, such mediation meetings have resulted in the execution of two agreements which are attached hereto as Exhibit A, "Statement of Understanding," and Exhibit B, "Mediation Agreement."

WHEREAS, this Covenant Not To Sue is premised on fulfillment of the obligations specified in Exhibits A and B.

WHEREAS, it is recognized and accepted that negotiation and mediation among the parties have not extended to construction, operation, or reclamation of the mill or mill tailings facilities at the Pitch Project, that this covenant does not extend to those matters, and that the rights of no party with respect to those matters are hereby affected.

WHEREAS, the parties to this Covenant Not To Sue intend that each will, in good faith, fulfill the commitments made herein and in the attached Exhibits A and B.

SECTION I

Covenant Not To Sue

In consideration of the mutual promises, covenants and obligations specified herein, Conservationists agree for each of them and their respective legal representatives, and assigns, to irrevocably bind themselves never to institute any action or suit at law or in equity against Homestake or relevant government agencies, or any member, officer or employee thereof, nor institute, prosecute or in any way aid in the institution or prosecution of any claim, demand, action, or cause of action for declaratory relief, damages, costs, expenses or temporary or permanent injunction arising out of the following:

1. Approval of the Final Environmental Statement (FES) on Homestake's Pitch Project as prepared by the USDA Forest Service and published in April of 1979, alleging that such FES is inadequate, incomplete, insufficient or otherwise not in compliance with applicable law, in whole or in part;

2. The adequacy, completeness, or sufficiency of any past or existing Operating Plan issued by the USDA Forest Service for Homestake's Pitch Project;

3. The adequacy, completeness or sufficiency of any past or existing Development and Extraction Permit or any provision of any such permit occasioned by this agreement, and accompanying plans for reclamation and operation, issued by the Division of Mined Land Reclamation of the Colorado Department of Natural Resources as approved by the Colorado Board of Mined Land Reclamation;

4. The adequacy, completeness, or sufficiency of the Water Quality Permit, as amended, (referred to as the NPDES permit for the Pitch mine) issued pursuant to Article 8, Title 25, C.R.S. 1973, for Homestake's Pitch Project by the Colorado Water Quality Control Division. Provided, however, that this covenant shall extend only to the existing NPDES permit and that certain NPDES permit for the Pitch mine which is now under review and which will be issued for a renewal term of two years sometime this year of 1981, and this covenant shall not extend to future renewals thereof;

5. The adequacy, completeness, or sufficiency of any past or existing air emissions permits and fugitive dust permits issued by the Colorado Air Pollution Control Division for facilities and activities at the Pitch mine;

6. The adequacy, completeness, or sufficiency of the Saguache County Certificate of Designation for a solid waste disposal site for the Pitch mine dumps;

7. All other past or existing mine-related authorizations under the jurisdiction of federal, state and local agencies, to include but not be limited to any county zoning restrictions, microwave communications licenses, electrical power rights-of-way, access rights-of-way;

8. Challenges to surface and/or underground water rights owned, to be owned, permitted or to be permitted for Homestake's use at the Pitch Project; or

9. Approval of patented or unpatented mining claims within the permitted Project Area as defined on the date of execution of this agreement; as any of the above permits, licenses, authorizations, or approvals relate to uranium mining facilities or mining activities at Homestake's Pitch Project.

Conservationists are free to make their views known to appropriate agencies with respect to the pending renewal of Homestake's NPDES Permit for the Pitch Mine, as well as with respect to the amendments to Homestake's Development and Extraction Permit which may be occasioned by these agreements. However, Conservationists shall not request formal adjudicatory hearings on either of said matters.

SECTION II

Covenant as Defense to any Action

Conservationists expressly agree that this instrument may be treated as a defense to any action or proceeding that may be brought, instituted, or taken by Conservationists or in their behalf, against Homestake or relevant government agencies, and shall further be a complete bar to the commencement or prosecution of any action or proceeding whatever against Homestake or relevant government agencies, on account of items listed in Section I hereof.

SECTION III

Limitation

The foregoing covenants shall not extend to, and shall not be construed to bar any proceedings:

A. Seeking to enforce the terms of this covenant, or Exhibit A or Exhibit B;

B. Based upon facts or information not now known to Conservationists, and of which Conservationists, in the exercise of due diligence, could not reasonably have learned, which facts or information are of substantial importance in determining matters relating to protection of the environment during or after mining operations at Pitch;

C. Arising out of matters outside the scope of questions relating to operation and reclamation of the mine at the Pitch Project; or

D. Arising out of any action by any individual or entity which in any way obstructs, inhibits, or prevents implementation of any provision of this Covenant or the related Exhibits A and B.

SECTION IV

Homestake's Obligations

In consideration of the undertakings by the Conservationists herein, Homestake hereby obligates itself, its legal representatives and assigns to undertake those specific commitments, agreements and covenants contained in Exhibits A and B, attached hereto and incorporated herein, and binds itself to the same.

Homestake further covenants to render full assistance in the implementation of Exhibits A and B hereto, and forever waives any and all claims heretofore accrued against Conservationists, or any of them arising out of any matter relating to operation or reclamation of the Pitch Mine.

SECTION V

Voluntary Execution

The parties hereto have read this instrument and understand all its terms. They have executed this instrument voluntarily and after full consideration.

IN WITNESS WHEREOF, the parties have executed this Covenant Not To Sue at Denver the day and year first above written.