

MEDIATING LARGE DISPUTES

INTRODUCTION

The principal case that follows draws together many of the ideas introduced earlier in the book. The central dispute was over the proposed construction of the Foothills Dam near Denver, Colorado. It involved scores of parties, raised questions about the accuracy of key data, ultimately required mediation, and almost went unresolved because of problems in binding the parties. In short, the case provides a rich opportunity for synthesizing material that has been developed throughout the book.

Indeed, the issues in the Foothills case are so complex and the details so varied that there are important comparisons that can be drawn within its own boundaries. This was a case, for example, that was litigated, negotiated, and mediated. Mediation, moreover, was attempted twice: one effort failed whereas the other succeeded. A comparison of the two attempts reveals important lessons about the timing of mediation and the choice of a mediator. The second Foothills mediator deliberately flouted commonly held precepts about the importance of neutrality and open participation. In large measure, he succeeded not in spite of these transgressions but because of them.

The Foothills case is also significant because it tests the proposition that ~~some environmental disputes are simply too cumbersome to be negotiated~~. Although it certainly does not prove that all large cases can be settled out of court, it is persuasive evidence that some can be. It is true that the process was protracted and that some of the parties agreed to the settlement only with great reluctance. Yet, it is also true that whatever the shortcomings of negotiation, the parties preferred it to alternative social processes. They did, after all, agree to abandon a concurrent lawsuit. Moreover, the situation was highly politicized; had the case not been settled, the president might have been required to arbitrate differences among competing federal agencies. If Foothills illustrates the difficulty of nego-

tiating complex problems, it also demonstrates that legal and bureaucratic machinery may be even less adequate.

The case also reveals the important distinction between specific disputes and the more general conflicts that usually underlie them. The parties here did come to agreement over the terms under which the Foothills Dam would be built, but the conflict over growth control, water conservation, and local autonomy persists. Even with specific disputes, there may be degrees of resolution. In the case of Foothills, there have been continuing skirmishes over implementation of the agreement.

The case study is followed by a series of general questions intended to raise issues about the interrelationship of the parties and their relative bargaining positions. A second series of questions deals specifically with mediation issues. The important matters of mediator ethics and accountability are the core themes of the next chapter.

CASE STUDY: THE FOOTHILLS WATER TREATMENT PROJECT

This case study is adapted from an account prepared by Heidi Burgess.

Introduction

Background on the Foothills Project

The story of the Foothills water treatment complex is filled with political and theoretical surprises. Designed and developed by the Denver, Colorado, Water Board (DWB), the Foothills complex was planned to extend the DWB's raw water treatment system. The system treats mountain water and supplies it to the city and the surrounding suburbs for residential, commercial, and industrial use.

The DWB began studies of the project in 1952 and obtained the necessary federal rights-of-way in 1967. Because projections showed a need for additional treatment capacity by 1977, the DWB asked the voters of Denver to approve the issuance of a bond in a 1972 election. The proposal was rejected. In 1973, the DWB submitted another proposal to the voters and coupled it with a heavy advertising campaign. This bond issue was approved by a solid majority, although turnout was only 13.7% of all eligible voters. The bond issue did not specify the Foothills plant in particular; however, the DWB assumed that vote represented support for the Foothills project, and they decided to begin construction in 1974.

Five years, two lawsuits, and many million dollars later, construction of the Foothills plant began. During that time, two federal agencies wrote four environ-

mental impact statements (three drafts, one final version), and six federal agencies fought internally and with the DWB over numerous technical, economic, environmental, and aesthetic issues. Local and state agencies as well as various environmental groups joined the fray, which concerned a project that was approved by a local government, apparently supported by local voters, required no federal money, and involved only 87 acres of federal land (see Figure 12).

The extent of the conflict was striking in itself; that it was resolved by mediation out of court appears even more improbable. The success of the mediation effort defied the emerging rules of environmental mediation. The principal mediator was considered to be biased in favor of the Foothills project before the negotiations began. Instead of involving all the parties initially (as theory dictates), the mediation began with only three parties; subsequent sessions included other interested stakeholders.

The Foothills water treatment project is a raw water treatment facility designed, owned, and operated by the Denver Water Department—an independent municipal government agency. In addition to a treatment plant, the project would include a concrete diversion dam and reservoir to be located on South Platte River, approximately 25 mi southwest of Denver. The proposed dam would rise 243 ft above the existing river channel, creating a reservoir 1.7 mi long, 400 ft wide, and 240 ft deep. The elevation of the dam would be 6,002 ft above sea level.

The treatment plant would be located about 3.5 mi northeast of the diversion dam on 490 acres of low, rolling, undeveloped grassland. The plant would be linked to the reservoir by a tunnel, emerging as a conduit a few hundred feet before entering the plant. The plant's elevation would be 5,889 feet; the drop in altitude from the dam to the plant would allow the DWB to install a hydroelectric turbine at the treatment plant intake. The turbine would produce electricity in net amounts far greater than needed for plant operations. In addition, the filtration plant's location above Denver would allow for the use of a gravity feed to distribute the treated water throughout much of the DWB service area.

The plant was designed to be built in units. The first unit was to be capable of treating 125 million gallons of water per day (mgd) with expansion capability for three additional 125-mgd units on the same site. Because the capacity of the existing DWB treatment system is only 520 mgd, the first unit represents almost a 25% increase, and the ultimate 500-mgd facility would represent almost a 100% increase in the plant's capacity for raw water treatment. At a treatment level of 125 mgd, the system uses only existing water supplies. The project would expand Denver's treatment facilities but not its raw water supply system.

If the new system's capacity expands to 500 mgd, the total capacity of DWB's treatment system (1,020 mgd) would exceed the existing raw water supplies. New supplies of raw water would eventually have to be developed to meet peak summer and winter needs. Because Denver (and much of the western

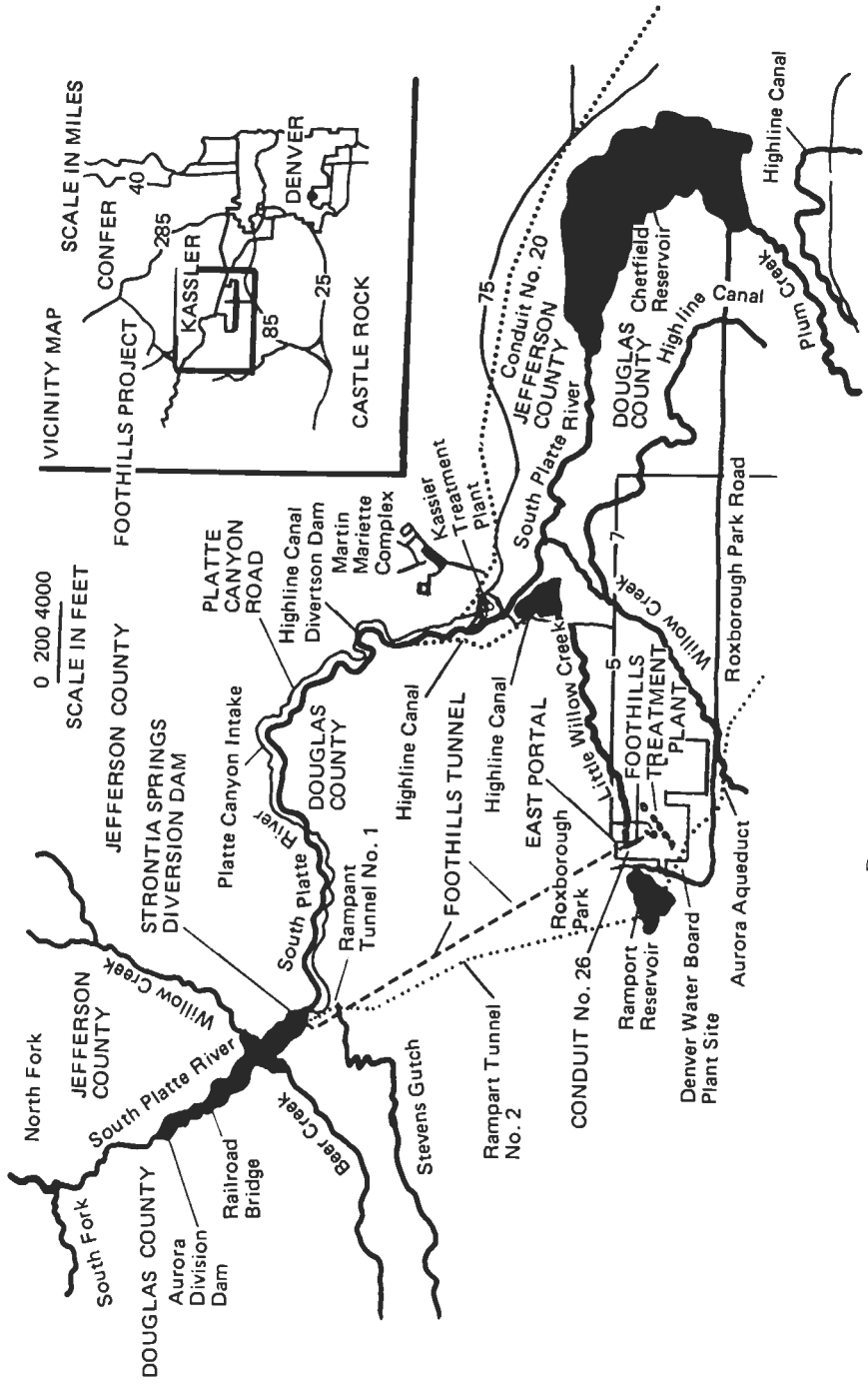


FIGURE 12. Proposed Foothills plant.

United States) is situated in a semiarid region, additional water supplies are not easily obtained. Much of Denver's water now comes from the western slope of the Rocky Mountains (Denver is on the eastern slope) because the western slope is much wetter. This requires extensive transmountain diversion of water through 10- to 20-mile-long tunnels underneath the Continental Divide. However, western slope water is scarce when it is compared with the water supplies in the eastern part of the county, and residents of the western slope are increasing their demands that western slope water be saved for their area. Although the DWB claims that it has the right (through very complicated Colorado water laws) to divert much more water to Denver from the western slope, many environmentalists and residents of the western slope disagree. Further water diversion has become a major political and legal issue.

Because the Foothills dam, tunnel, and conduit systems were designed to accommodate the final 500-mgd plant, many opponents of the project are sure that the plant will inevitably be expanded to that size. This would mean the development of additional systems for transmountain water diversion. For this reason, opponents viewed even the initial 125-mgd plant as a potential threat to western slope water supplies. They have fought construction of the plant on these and other grounds.

Problems in Obtaining Federal Permits

The Foothills Project was funded entirely by the Denver Water Department, which raised the necessary money through general obligation municipal bonds; federal money was not involved. Nevertheless, the federal government got deeply embroiled in the Foothills controversy because the dam and reservoir were to be located on 27 acres of national forestland and on 22 acres of land administered by the Bureau of Land Management (BLM). For this reason, the DWB was required to obtain right-of-way permits from these two agencies. Although these permits originally were issued in the 1960s, they had expired and had to be reissued in the early 1970s. By that time, the National Environmental Policy Act had been passed, and the project required completion of an environmental impact statement (EIS).

The EIS process lasted 5 years; the lead agency designation was contested and the extent of the EIS necessary was debated. Opponents of the project tried to block approval by arguing that the three draft statements and the final impact statements failed to deal adequately with either direct or indirect effects on the environment and did not consider sufficient alternatives to the proposal.

The EPA was one of the many agencies, groups, and individuals to denounce the impact statements. After the BLM issued the final environmental impact statement (FEIS), the EPA used its statutory authority under section 309 of the Clean Air Act to request the Council on Environmental Quality (CEQ) to

intervene in the Bureau of Land Management (BLM) and United States Forest Service (USFS) right-of-way decisions. Although the EPA's complaint was lengthy, its objections were summarized initially in a letter from Douglas Costle, EPA Administrator, to Secretary of Interior Cecil Andrus:

1. Construction of the Foothills Project would make the attainment and maintenance of national ambient air quality standards in Denver more difficult and perhaps impossible. (Because providing water would encourage growth and urban sprawl.)
2. Construction of the Foothills Project would result in significant environmental degradation to a unique aquatic wildlife and recreational resource that could be avoided by other practicable alternatives.

The EPA also contended that there was virtually no analysis of secondary impacts as required by CEQ guidelines.

After quick deliberation, the CEQ concurred with the EPA's findings and recommended that the federal permits for the construction of the Foothills Project at the 500-mgd and 125-mgd levels be denied, or alternatively, that the department withdraw the EIS as inadequate under the National Environmental Policy Act for failure to analyze air quality impacts and water conservation and other reasonable alternatives. The CEQ statement concluded,

The analysis in the impact statement indicates that raw water supply will not be a limiting factor until 1990. We believe that there is time available to develop the new analysis needed to reach an informed decision on the Foothills project and on its relationship to federal resources, water conservation, air quality, and to the development of an overall water supply and treatment policy for the growing Denver region.

Despite the CEQ's findings, the BLM and USFS chose to issue the permits on the grounds that issues of growth, air pollution, and land use were state and local issues and thus outside the authority of the BLM and the USFS. The CEQ did not exercise its only remaining option (to refer the issue to the president), although the permits were challenged in court by both the DWB (which did not like the conditions that were imposed) and by environmentalists who wanted the project stopped altogether.

In addition, because a dam involves fill materials, the Denver Water Department had to obtain a 404 dredge-and-fill permit from the United States Army Corps of Engineers. The Corps of Engineers is the primary agency responsible for reviewing 404 permits, which are required under the terms of the Clean Water Act. The construction process also was expected to deposit additional fill material into the South Platte River, which is a navigable stream. This meant that an additional 404 permit was necessary.

The corps is required to consult with EPA to be sure that projects under consideration are not excessively damaging to the environment. If the EPA finds

a project unacceptable from an environmental standpoint, it may object to issuance of a 404 permit. The matter is then taken up by the federal hierarchy to make "every effort . . . to resolve differences at the Division Engineer level before referring the matter to higher authority." If the differences between the corps and the EPA remain unresolved, the division engineer must refer the case to the chief of engineers in Washington who must try to resolve remaining differences with the administration of the EPA. If the differences still cannot be resolved, the EPA administration has the final authority to deny the permit under section 404c of the Clean Water Act. Although the Foothills dispute between the EPA and the corps was not referred to the chief of engineers by the EPA administrator, it was referred to the division engineer; it could have been sent to Washington had the mediation process failed.

The United States Fish and Wildlife Service (FWS) also became involved as an opposition group through the Fish and Wildlife Coordination Act, which requires the coordination of federal decisions on permits affecting fish and wildlife with the FWS. In addition, regulations of the Corps of Engineers prohibit the district engineer from issuing a permit over the unresolved objections of another federal agency in the event that the agency requests that the application be referred to a higher level of authority for review. Under these conditions, therefore, the FWS has the authority to prevent approval of the permit at the district or division level.

In addition to these permits, numerous other permits were required from additional federal, state, and local agencies. Those permits were easily obtained because the local and state governments favored the project. The other federal permit (actually a "checkoff" on the BLM and USFS rights-of-way permits) from the Federal Energy Regulatory Commission was also granted easily after the other disputes ended. Thus, the primary federal agencies in the dispute were the BLM, the FWS, the USFS, the Corps, and the EPA.

Issues and Disputants

Introduction

Many factors transformed this simple, locally supported, and locally funded project into a complex intergovernmental controversy. In its application and throughout the controversy, the DWB contended that the current capacity of the Denver Water Department's water treatment facility would be inadequate by 1977 due to increasing population growth and increasing per capita water use. The DWB wished to incorporate the Foothills Project into the system by 1977 to assure continued unlimited supplies of treated water to the metropolitan area. If the project was not built, the DWB contended that it would not be able to meet peak summer demands for water in 1977. Although the shortage predicted for

1977 was not severe in its extent and duration, future shortages of greater impact were anticipated (because the DWB assumed both continuous population growth and a continued increase in per capita consumption).

Nevertheless, the DWB's analysis was disputed by many environmentalists, the EPA, and, to a lesser extent, by the Corps of Engineers. The environmentalists charged that the DWB's and the BLM's projections of future water needs were excessively high, thus rendering the entire environmental impact statement erroneous. Both environmentalists and the EPA charged that additional treatment capacity provided by the Foothills Project "is needed only to allow unlimited lawn watering through the year 1988" (when the supply of raw water, not treated water, would become the limiting factor). This contention was supported in the FES, which states that

the principal purpose of the project is to enable the Denver Water Department to meet projected max-day demands in order that Denver Water Board customers can irrigate horticulture without restriction during the hot summer months.

According to opponents of the project, if watering restrictions similar to those instituted in 1977 were imposed, the need for the Foothills system could be delayed until 1988 or later, when additional supplies of raw water also would be needed. In fact, the 1977 restrictions on watering reduced the max-day 331 million gallons per day, or 64% of existing capacity. If these restrictions were applied in the future (taking into account expected population growth), the Corps of Engineers estimated that the treatment capacity would not be exceeded until the year 2000.

Thus, according to the analyses of the EPA and the environmentalists, the Foothills Project could easily be replaced by a program of conservation or water rationing, or both. The environmentalists contended that either measure would have significantly fewer harmful effects and be much less expensive than the proposed Foothills Project. The EIS pointed out that in 1977, restricted watering increased the health of lawns. The argument over the Foothills Project included, among other issues, debate about proper lawn care.

Growth, Sprawl, and Air Pollution

A major concern underlying the Foothills controversy was control over growth, urban sprawl, and air pollution. Denver is one of the fastest-growing urban areas in the United States and ranks second to Los Angeles in the severity of its air pollution problem. The pattern of growth in Denver has been characterized by low-density urban sprawl, resulting in high per capita use of the automobile—the source of most of Denver's air pollution. It has been suggested that the best way to control Denver's air pollution would be to reduce its rate of

growth and to direct growth toward existing centers of urban activity. Often there is a strong link between the provision of public services and settlement patterns; hence, many viewed control of water distribution (in this case, by preventing construction of the Foothills Project) as the first step in a major effort to control growth and air pollution.

Proponents of the Foothills Project disagreed with this analysis for several reasons. First, they argued, growth would occur with or without the Foothills Project. Citing the experiences of several other rapidly growing cities in arid regions (among them, Salt Lake City, Las Vegas, Phoenix, and Los Angeles), both project proponents and the BLM (in its FES) contended that the Foothills Project would neither suppress nor encourage population growth in the Denver area. The only party that disagreed with this position was the EPA. The agency pointed out that the cities just cited have "gone out of their way to provide water for growth," implying a relationship between the provision of water and the influx of population.

Although the parties debated the potential of water supply planning to influence the rate of growth, almost all agreed that water planning would affect development patterns. The DWB is required by law to fulfill all requests for service (water taps) within the city limits. Limitation of taps would favor inner-city growth over urban sprawl because the limitation would apply only to the suburbs. The existing limits on new taps, according to the *Denver Post*, "spurred a dramatic increase in the number of single family homes being built or planned within Denver." Thus, the EPA and many environmentalists contended that not constructing Foothills would promote higher densities by encouraging housing construction in the city of Denver where water taps would be more readily available. According to the EPA analysis, this situation would decrease reliance on the automobile and thus lessen air pollution.

The EPA also maintained that "construction of the Foothills project would make the attainment and maintenance of National Ambient Air Quality Standards in Denver more difficult and perhaps impossible." The EPA concluded that the project was "unsatisfactory from the standpoint of public health, welfare and environmental quality" and therefore subject to CEQ intervention. In addition, the EPA warned that, as required by the Clean Air Act, it would impose costly economic sanctions if the national ambient air quality standards (NAAQS) were not met by 1987. These economic sanctions could make Foothills Project prohibitively expensive.

Foothills Project proponents—especially the DWB—contended that limit on water service would increase urban sprawl. They argued that such limits encouraged the development of separate, independent water districts during a limitation on new water development in 1951. According to the DWB, "without Foothills, the limitation on new water taps must continue, and leapfrog develop-

ment . . . is bound to occur. EPA's action, if successful, will only serve to create and stimulate the very kind of development which it abhors."

In addition to the arguments over impacts on growth, the DWB and others contested the federal permitting agencies' right to make land-use decisions for the city of Denver and the surrounding region. According to DWB, such decisions should be made by local residents and their elected representatives, not by the agencies required to supply water to the area or by federal officials.

In the DWB's view, local residents made their decision in the 1973 bond election, and it was clear that the duty of the board was to carry out this choice. According to the DWB,

As the public interest group, Historic Denver, has pointed out, the citizens of Denver over 100 years ago chose an esthetically pleasing environment patterned over the English Garden style of the East. The people have continued this lifestyle, the people have voted water works improvements with this in mind and neither narrowly based special interest groups nor federal officials have the right to reject the people's choice and destroy this Historic Value.

The BLM and USFS shared this view, maintaining that,

the issues involved in the Foothills project are based on questions of land use and population distribution in the Denver area, and, thus, should be dealt with by state and local governments, not federal land management agencies.

On this basis, the BLM chose to issue the right-of-way permits over objections from the EPA and the CEQ.

The EPA continued to believe that such matters were its appropriate concern under its mandate to protect the environment. Thus, it actively opposed the project. The debate widened to include not only matters of land use and pollution but also the issue of local, state, and federal control of land use.

It was also feared that the Foothills Project would have other adverse environmental impacts, particularly in Waterton Canyon, where the Strontia Springs dam was to be built. Waterton Canyon is the only relatively undeveloped, steep-walled, narrow canyon near Denver, with a rapidly descending, free-flowing river coursing its length. In addition to providing excellent white-water kayaking, the canyon offers excellent opportunities for hiking, fishing, bicycling, and wildlife observation near Denver.

Development of Future Raw Water Supplies

The fourth major issue concerned the future development of additional supplies of raw water for the Denver system. As was indicated previously, without new supplies Denver would face a shortage of raw water beginning in 1988. As a

result, severe summer watering restrictions would be needed, whether or not Foothills was built. The plans to expand the Foothills Project to 500 million gallons per day depended on the development of additional supplies of raw water. The source of such supplies was a matter of deep concern.

One means of increasing future water supplies would be to construct an additional large dam and reservoir on the South Platte River, which was upstream from the Foothills treatment plant. The DWB had been planning this project, called Two Forks Dam and Reservoir, for many years, although it had not set dates for construction nor applied for the necessary permits. Two Forks was highly controversial because of its probable local environmental impacts (which were substantially greater than those of Strontia Spring because Two Forks would be 19 miles long, whereas Strontia would be only 1.7 miles long) and because it would depend on further diversion of western-slope water to the eastern slope.

Sensitive to the diversion controversy, the DWB insisted that Foothills and Two Forks were separate projects and that Foothills was necessary regardless of whether Two Forks was built. However, they conceded that additional water supplies would have to be developed for Foothills to function at its full 500-mgd capacity.

Other Issues

Competition between the city and the suburbs over water, population, land use, and political power surfaced throughout the controversy. The intensity of the debate about the need for lawn watering revealed how tightly attitudes were tied to differing life-styles and conflicting visions of the future. To an outsider, unlimited lawn-watering capacity might seem like a trivial issue, but project proponents saw it as a potent rallying point, claiming it was essential to the preservation of historic values. The Corps of Engineers concurred in this analysis, citing a passage from an encyclopedia of gardening:

In Denver some statisticians estimated that as many as 86 million man-hours were being devoted to lawn care during the five-month season; calculating the labor at \$1.60 an hour, they concluded that lawn tending was the largest single industry in the area.

Environmentalist John Bermingham countered that he observed changes in life-styles that would actually decrease the demand for water. Among the changes he noted was the back-to-the-city trend, which he believed was a response to problems of energy and home financing. This trend, he predicted, would lead to a decrease in water use because "apartment dwellers do not water lawns." In addition, he felt water use could be controlled by the emerging "conservation ethic" that could be fostered through increasing public awareness.

Thus, Birmingham concluded, prevailing life-styles would not suffer if the Foothills Project was abandoned.

Although the presence of a multiplicity of issues can aid negotiations by providing the parties with ample grounds for bargaining, the issues must be separable and manageable. The number and complexity of issues in the Foothills controversy, the relationships among them, and the uncertainties of projected demands and impacts greatly complicated the negotiation process.

The Disputants

Most of the major disputants have been introduced. The project sponsor was the DWB—an independent government agency of the city and county of Denver responsible for supply water to Denver and many of the surrounding suburbs.

Federal agencies involved included the USFS and the BLM, which worked on environmental impact statements and collaborated in receiving and issuing their respective rights-of-way permits. Although the EPA and the Corps of Engineers were supposed to collaborate on the 404 permit, they fought at length before they reached a settlement. The CEQ was involved briefly, as were other federal actors, including the Federal Energy Regulatory Commission and, to a lesser extent, the FWS.

A number of state agencies were involved in the dispute, including the governor's office, the Department of Natural Resources, and the Colorado Department of Health. These three agencies supported the Foothills Project at the 125-mgd level, and participated actively in the dispute either by issuing permits (the Department of Health) or by taking part in the negotiations and mediation between the DWB board and the federal agencies.

A multitude of interest groups were aligned with the major disputants. The Denver Regional Council of Governments and numerous local governments supported the project and conducted studies, wrote press releases, lobbied, and generally tried to influence the public and the government agencies in favor of the Foothills Project. Local businesses also became involved, as did a nonprofit group known as Water for Colorado, which lobbied with the businesses and the DWB in favor of the Foothills Project.

Aligned with Foothills Project opponents were numerous local, state regional, and national environmental groups. These include the Water Users Alliance (Birmingham's group), the Colorado Open Space Council, the Sierra Club Legal Defense Fund, the Rocky Mountain Bighorn Society, the Colorado Mountain Club, the Colorado White Water Association, the National Wildlife Federation, the American Rivers Conservation Council, the Environmental Policy Center, the Concerned Citizens for Upper South Platte, the Environmental Defense Fund, Trout Unlimited, Friends of the Earth Foundation, the

Wilderness Society, the Foothills Coalition, and the League of Women Voters. These groups were plaintiffs and defendants in two suits linked to the dispute. One was brought by the DWB in Denver, whereas the other was instituted by environmentalists in Washington. Many more individuals and environmentalists were involved to a lesser degree.

Major political figures in Colorado were involved, including the governor, the senators, and the congressional representatives. With few exceptions, all of them perceived the Foothills Project to be a very dangerous political battle and steered clear of taking sides, particularly as the 1978 election drew near. At the same time, all were under pressure from their constituents, as well as from the DWB and the EPA, either to support or oppose the project. In fact, Alan Merson, the EPA regional administrator, stated that if only one major political representative, senator, congressman, or the governor had supported the EPA's stance, the agency would have opposed the project steadfastly and probably would have prevailed on its terms. As time went on, however, more and more politicians publicly voiced approval of the DWB, which was a crucial factor in Merson's decision to drop his opposition first to the project and, later, to the Strontia Springs dam site.

Obstacles to Mediation

Polarization

In addition to the controversy's size and complexity, there were other obstacles to successful mediation. Most important was the DWB's unwillingness to compromise and its hostility to the idea of mediation. Although delay was increasing costs daily, the DWB was firm in its insistence that Foothills Project be built as designed. They maintained that the dam at Strontia Springs was the only technically satisfactory alternative. Because the environmentalists and the EPA were opposed to the Strontia Springs site (and many were against the project altogether), the DWB saw no benefit in pursuing mediation.

The polarization of the conflict grew over time, and the personal animosity between several of the major actors was intense. For instance, Merson received fierce public attack from the DWB, the *Denver Post* (which was strongly pro-Foothills), local politicians, and numerous other Foothills supporters. They claimed that both he and the EPA staff, which supported him, were incompetent, irresponsible, and politically motivated. In their comments to the corps in regard to the 404 permit, the DWB said:

The EPA has simplistically characterized "the principal purpose of the project" as permitting the Denver area unrestricted summer lawn watering. This provides an excellent example of the danger inherent in any attempt to oversimplify a complex issue. . . .

Both the Board of Water Commissioners and the Environmental Protection Agency are charged with the responsibility of ensuring that the people of Denver are provided with high quality drinking water. It is submitted that EPA, in taking its recent action, has shirked that statutory responsibility. The temptation of social meddling to further political philosophies was apparently too great.

The "true fact" of the matter is that opponents of Foothills are using this as a tool to advance their political philosophies; political philosophies which are not held by those whom the people have elected to public office.

Although none of these statements mentioned Merson personally, many similar comments in the *Denver Post* did. The editorial writers at the paper were particularly hostile:

The decision is broadly troubling for the simple reason that one man, not elected by the people, has worked with his Washington superiors [also not elected] to overturn a decision on a water project made in 1973 by the voters of Denver. . . . Like other transplanted Coloradans, Merson wants "quality" growth now that he has established roots here.

A subsequent *Denver Post* article reported that

Merson is well aware of the accusations that having lost three attempts to win elected office, he now is trying to impose his personal political philosophy on an unwilling public.

Merson did not respond to the personal attacks in kind. However, until the mediation process began, he took a firm anti-DWB stance and, like his opponents, made extensive use of media to wage his war against the project. After the USFS and the BLM had issued the permits and the case had been sent to the Corps of Engineers, Merson flatly told the *Denver Post* that "the fact is Strontia Springs is not going to be built. I think the Denver Water Board should realize that and modify their proposal." Such strong public statements were characteristic of Merson's strategy and made backing down or negotiating much more difficult for the other parties. This strategy heightened the DWB's distrust of his motives, making the initial stages of mediation very difficult.

In addition, John Bermingham, a leading anti-Foothills environmentalist, became embroiled in a similar public debate in which he tried to destroy the DWB's credibility and image. Bermingham issued a lengthy report entitled *Foothills \$135,000,000—In the Wrong Place* that charged the DWB with misleading the public, inaccurately assessing the need for additional water treatment, and withholding the figures that the public and government must consider if they were to make an informed decision. Bermingham even asked the Denver district attorney to file criminal charges against DWB manager James Ogilvie on the grounds that he refused to release financial information about construction

costs for the project and the cost of acquiring new supplies of raw water for future expansion of Foothills. If these figures were made available, Birmingham charged, the information would “show that Foothills is going to be worthless in a few years . . . [and that it would] be cheaper to put in a recycling plant than to go to the mountains for additional water supplies.”

This bitterness had to be replaced by some measure of mutual respect and trust before constructive negotiations could begin. Even after the DWB agreed to negotiate, the mediation team faced a major challenge in defusing the battle and creating a climate of cooperation.

Scope of the Dispute

Foothills is particularly interesting to students of mediation because two people attempted to mediate the dispute at different times. Because the second effort succeeded after the first attempt failed, the case provides an instructive comparison of alternative methods for initiating mediation.

Representative Pat Schroeder tried to introduce mediation fairly early in the dispute (May 1977) after she had heard from a friend about the University of Washington-based Office of Environmental Mediation. Because the DWB had recently gone to court to seek an end to federal delays, Schroeder thought mediation might bring an even speedier settlement.

The DWB and other Foothills supporters promptly rejected this suggestion for a number of reasons. Most important, Schroeder was perceived to be an environmentalist. Although she was careful not to take a public stand for or against Foothills, most proponents of the project assumed from her voting record that she was against it and that her proposal was simply another tactic for delay. Also, little was known about the Office of Environmental Mediation members—what they could do, how they worked, and if they could be trusted. Those who believed in Schroeder (the environmentalists) thought the organization's participation might be helpful, whereas those who distrusted her thought that it probably consisted of more antigrowth environmentalists who simply would further delay the decision process.

The problem was exacerbated by a major strategic error. Instead of privately selling the idea of mediation to each party individually, Schroeder immediately publicized the idea, which made it appear as if agreeing to mediation was agreeing to her environmental position. In addition, it made many of the contesting parties believe that she was primarily seeking good press coverage and had little real interest in resolving the dispute.

In January, Schroeder again tried to begin mediation by holding a press conference at the mouth of Waterton Canyon. According to the *Denver Post*, she said the DWB and Foothills opponents “should work out their differences rather than have lawsuits from now to kingdom come.” She further accused both

rejected
Schroeder
but
no

sides in the dispute of ignoring the possibilities of compromise because "a lot of people think in the long term they're going to win and egos get involved."

The conference did not change the DWB's position, and they continued to rebuff Congresswoman Schroeder's efforts. Later, when asked why they opposed Schroeder's initiative, Wayne Williams, DWB general counsel, stated,

We felt we would be dealing with a situation where there was no possibility of our coming out with our project. We would have to sacrifice one or more important features . . . In my experience, that is normally the result of mediation.

At the time, the formal position of the DWB was presented in a letter from Charles F. Brannan, then president of the DWB, to Congresswoman Schroeder. Williams read the letter in a meeting called by Schroeder to consider mediation further. In addition to the primary parties present, there were also other interested parties, including Gerald Cormick and Leah Patton from the Washington Office of Environmental Mediation, Helmut Wolff from the American Arbitration Association, and John Kennedy and Susan Carpenter from the Rocky Mountain Center on Environment. All gave presentations on the merits of mediation, but Williams had his "mind made up" and read this statement:

Mediation and compromise are, of course, useful in many situations, but we do not believe that anything is to be gained, and much may be lost by attempting to pursue such a series of meetings at this time. I am writing this letter to give you a statement of the more important reasons for our conclusion as follows:

First: The people of Denver approved the Foothills Project and authorized the bonds for its construction in the 1973 election. We do not believe that the expressed will of the people can be mediated or negotiated away.

Second: The vital decisions to be made respecting the Foothills Project are to be made, according to law, by various agencies of the Federal government. Mediation has no proper place or function in the completion of this process. The agencies are obliged to make their determinations according to the standards provided by the law and without reference to which special groups are able to speak the loudest or get the most publicity. Whatever conclusions might be arrived at by mediation, they cannot take the place of review and action by the prescribed federal governmental agencies.

Third: The duty of the federal agencies to act is presently involved in a pending law suit before Judge Winner, Chief Judge of the U.S. District Court, and certain dates for federal action have been established by agreement in that case. A mediation effort involving various special interest groups would simply tend to remove the controversy from the forum where it belongs, and substitute talk for proper agency action. Mediation could contribute nothing to the progress of the case now before the Court, and would probably delay resolution of the entire matter with consequent mounting expense.

Fourth: As stated in my letter to you of 4 August 1977 on this same subject, negotiation with people who have no authority in the matter and whose agreement or consent would be utterly unenforceable in any administrative or legal forum would be without purpose and be an indefensible waste of public funds.

Cornick and others from the Office of Environmental Mediation held a number of meetings before and after the DWB made this statement, but they were unable to alter the DWB's position. Other parties, including the environmentalists and the EPA, said that they supported the idea of mediation; however, mediation was meaningless without the DWB's participation.

Moreover, most observers agreed that Schroeder's efforts came too early in the process, at a time when Foothills' proponents had no incentive to negotiate. The FES had not yet been issued, and the major permits (BLM, USFS, 404) were not yet under active consideration. No mediation proposal offered the DWB an outcome that would have been superior to that that they expected from litigation. Federal district court Judge Fred Winner was believed to hold a strong antienvironmental, prodevelopmental position. Many thus expected that he would rule in favor of the DWB. The DWB also expected the litigation to proceed quickly, ending the federal delays and perhaps the conflict itself. (This optimism later proved to be unfounded; a credible mediator might have persuaded the DWB that success in a court trial could still be followed by years of appeals.)

Schroeder followed the Waterton Canyon press conference with a seminar on mediation a few days later. Representatives from the American Arbitration Association, the Rocky Mountain Center of Environment, and the Office of Environmental Mediation each gave presentations illustrating the potential usefulness of mediation in solving such disputes. Most agreed that the meeting accomplished nothing. The environmentalists who were present were receptive because they thought mediation would force the DWB to reveal information about the plans and costs related to additional diversion of western-slope water. This information, they believed, would vindicate Bermingham's assertions that the plant was unnecessary and lead to resolution that was completely in their favor.

The DWB again rejected mediation, citing its earlier letter. Thus, the dispute continued in administrative and judicial forums, and the idea of mediation was put aside.

The 404 Permit Dispute

The third draft environmental impact statement was issued in August 1977, and hearings on it were held in September. One major concern was whether the

statement anticipated the impacts of the proposed 500-mgd facility. In November 1977, Judge Winner effectively removed this hurdle by requiring the DWB to limit the first phase of the plant to 125 mgd and by requiring additional EISs and permits for any future expansion. The BLM was ordered to finish the FES by February 1978, and to issue their final permit decision by the following month. Although a great deal of last-minute work was required, the BLM met these deadlines and issued the right-of-way permits despite CEQ's objections. The EPA continued to oppose the project, fortified by the power to veto the pending 404 permit and thus send the case to federal court.

None of the parties wanted the case to take this course. Foothills was widely considered a local dispute, and a major political battle was brewing over local-versus-federal control. In addition, both the EPA and the DWB were afraid of losing if the case went to federal court. The DWB estimated that the delay cost them \$630,000 each month, and the project itself was at some risk because President Carter's administration was perceived to be firmly against water development.

Still, the EPA was not confident about support from Washington. EPA Administrator Costle apparently pressured Merson to settle the dispute at the regional level. Costle wanted to stay out of what he saw as a politically dangerous local fight. Merson did not report feeling such pressure, although he recalled that after the BLM and USFS had issued their permits, Costle had said to him, "Well, that's it, isn't it?" as if conceding defeat.

Others anticipated little, if any, federal opposition to the Foothills Project. The CEQ refused to take the matter to the president on the grounds that "environmentalists in the Carter Administration didn't plan further protest actions." The *Denver Post* quoted an unnamed federal official, who explained that "the federal handle was small" in attempting to block the Foothills Project. The two best arguments developed by the EPA and the CEQ—protests of environmental impact to both the Colorado western slope and the Denver area—had been turned down.

Finally, on April 7, 1978, the EPA retreated under public pressure and announced that it would not block construction of the water development project, but it added that it hoped to attach stipulations regarding water conservation before the 404 permit was granted. The BLM permit already required that the DWB institute a loosely defined plan for water conservation before permits were granted for future expansion of Foothills or other aspects of its water system.

Merson attributed his change in position to the "lack of firm political support for the EPA's position on Foothills." Still, he did not back down any further than was necessary. The battle was far from over. The EPA could still threaten to veto the 404 permit and force the DWB to make concessions in favor of the environment. Specifically, the agency hoped to generate sufficient opposition against the Strontia Springs dam to force the DWB to build a smaller, less damaging dam in another part of the canyon.

To gather such support, the EPA planned another round of Foothills hearings in April 1978 on both the eastern and western slopes. The DWB objected strenuously to further delay, maintaining that the prior BLM hearings made them unnecessary. The earlier sessions had focused on the right-of-way decisions. However, hearings had not been held on the 404 permit and water conservation issues the EPA wished to emphasize. A *Denver Post* article quoted Merson as saying, "We've lost all of our leverage, quite honestly, if we issue the permit, and then talk about water conservation." The article went on to report that Merson was personally leaning toward approval of the water board plans for a 245-foot high dam and reservoir at Strontia Springs. "We'll never smile on Foothills," he said, but he would accept it "if mitigating measures can be applied."

The DWB also objected to the EPA holding any hearing on the western slope, contending this was beyond the EPA's authority. The EPA justified the action by saying that many still feared that Foothills was linked to future projects for western slope water diversion and that residents of the western slope deserved a chance to voice their concerns on this issue. Although lawyers for the DWB attended the western slope hearings, they refused to answer questions, saying that the DWB's presentation would be given in the public hearing to be held in Denver the next evening.

More than 300 people attended the EPA hearing in Denver. Although most of them opposed the project, a number of important statements were made in favor of it. A spokesman for the mayor of Denver pointed out that in 1973 Denver voters had approved a DWB bond issue by a margin "approaching a landslide. . . . Now EPA, here today, is in a very devious way trying to circumvent these decisions made by the administration through the guise of the 404 permit program." The mayor's spokesman also accused the EPA of "attempting to change the lifestyle of Denver residents, superimposing its fanatical water conservation ethic on our area."

DWB Manager Ogilvie also attacked the EPA, saying it had no legal authority to require water conservation as a condition of the 404 permit and that the DWB could not accept such conditions. Ogilvie asserted that the DWB's "record on water conservation is exemplary and unsurpassed by major utilities in the area." He went on to say that whereas the board

intend[s] to be at the forefront on conservation, Denver will have no part and will not permit the EPA to extend its federal tentacles beyond the lawful jurisdiction provided that agency by Congress. Denver views this procedure [the hearing] as a baldfaced attempt by the regional administrator of the EPA to interject himself in a matter of local concern and local prerogative for which he has no legal authority.

Despite the anti-EPA comments, the bulk of the testimony at the hearings strongly favored water conservation and opposed the destruction of the natural

ecosystem in Waterton Canyon. As the EPA had hoped, the hearings supported strict conservation and impact mitigation measures. As a result, on May 25, 1978, Merson announced that the EPA had recommended to the Corps of Engineers that it deny the 404 permit for Foothills on the grounds that the Strontia Springs dam would have serious adverse impacts on the environment of Waterton Canyon and that alternatives less damaging to the environment warranted further examination.

The EPA's recommendations were then forwarded to the corps district office, which sent them to the division level along with the district engineer's findings. Most observers expected the division engineer to route the dispute to Washington to be resolved by top EPA and corps officials. Because the 404 permit allows the EPA final veto power, Costle eventually would make the permit decision. According to Merson, "Mr. Costle is aware of my position and has expressed his concurrence with it." Nevertheless, Merson refused to predict whether Costle would veto the corps if it chose to issue a 404 permit without additional mitigation measures.

Wirth Initiates Mediation

Tim Wirth, the other congressional representative from the Denver area, entered the controversy at this stage. According to his aides, Wirth could see that the dispute was going nowhere and he considered a stalemate unacceptable. He also believed that the dispute was local and should be resolved locally—not at the federal level. Although he could have remained neutral, as did the rest of the Colorado congressional delegation, Wirth had voiced his support of the 125-mgd project, a stance that sparked criticism from his environmental constituents. At the same time, the pro-Foothills forces were demanding he do more to "get the Feds off Denver's back," and James Kenney, DWB president, had specifically requested Wirth's help in attaining final federal approval of the project.

Wirth's seat in Congress had never been secure. He realized that neutrality would anger both sides; action would alienate, at worst, half of his constituents. If he was careful, he might achieve a politically advantageous resolution that would satisfy most of the parties. Neither a continued stalemate nor a federally imposed solution was desirable to any of the disputants. Neither side was certain of a satisfactory outcome. The situation was ripe for the intervention of a mediator.

Timing was not Wirth's only important advantage. Contrary to theory, Wirth's success is also due to his widely perceived, long-standing support of the 125-mgd project. Specifically, when he suggested mediation, the DWB expected it to work to their benefit. In addition, Wirth began the process by persuading the Corps of Engineers to complete what he hoped would be the definitive study of the remaining issues. Because both the corps and the DWB favored water devel-

opment and structural solutions to water-related problems, most DWB members believed the cards were stacked in their favor. Getting the EPA to concur was more difficult, but Wirth fashioned his proposal so as to leave them little choice.

Unlike Congresswoman Schroeder, Wirth started the negotiation process privately and carefully. First, he talked with Merson, who was also a friend. Merson, already under heavy political pressure, had reduced his opposition to the project. Yet, he still objected to issuance of the 404 permit because, as he told Wirth, he felt that the alternatives to the Strontia Springs dam had not been adequately considered. Wirth thus concluded that if he could arrange a study of such alternatives, Merson would have to agree to the process. Because the corps already was involved in the dispute and its expertise in dam design was widely acknowledged, a corps study of alternatives seemed appropriate.

Wirth then consulted another friend, Clifford Alexander, secretary of the army, as well as several members of the corps. He suggested that Merson (and thus the EPA) probably would acquiesce if the corps was to expand its normal review process for 404 permits to review thoroughly the alternatives to the Strontia Springs dam. After brief discussion, the corps agreed to the expanded review; the DWB also agreed to this because they expected the corps to agree with their analysis and rule in their favor.

Although the EPA objected to Wirth's choice of the corps as the reviewing agency (some said it was like letting the "fox look after the chickens"), no one could dispute the corps' expertise in dam design or contest its statutory authority to review the dam and proposed alternatives. Because Merson had already publicly and privately defined the two remaining issues as the dam's location and size, he had no political or legal grounds for blocking the corps' analysis.

But Merson could make his approval of the mediation process contingent upon the adequacy of the corps' review. He told Wirth and the press that he would not abdicate his decision-making responsibilities. Thus, he could not agree to binding arbitration before knowing the quality of corps review. However, he asserted, if both he and the EPA staff were satisfied with the corps' procedures and results, "we would find that very persuasive." Although the EPA did not make a commitment to accept the corps' study, Merson acknowledged that "he would find it very difficult to ignore."

The DWB also refrained from publicly accepting the corps' review as binding, although they came very close by saying that "if we're wrong, then these are the people to tell us we're wrong. If we're right, then they are the ones to tell the public." When Kenney was asked what the DWB would do if the corps' study "went against the Water Board," he replied, "I just don't know. I guess we'd go to the people of Denver . . . I just don't know."

Neither party explicitly agreed publicly to be bound by the corps' review, but they agreed to pursue the study with the hope of reaching a settlement. This agreement was announced to the public in a press release issued by Wirth on June 16, 1978:

Wirth today reached agreement with the Denver Water Board, the Environmental Protection Agency, and the Army Corps of Engineers on a proposal for a final, full, and complete consideration of the most significant outstanding controversy still surrounding Foothills, the Strontia Springs Dam in Waterton Canyon.

Under the terms of the Wirth proposal, the Army Corps of Engineers will go beyond its normal review procedures to conduct a major study of the Strontia Springs Dam and alternatives to it. Both the Water Board and the EPA have agreed that they would have no problem with the Corps' decision as long as the procedure established and carried out is fair and thorough.

Failure to consider the alternatives to the dam was the ground on which EPA based its recommendation to the Corps that the necessary federal permit not be granted. Under the regulations governing such matters, a ruling on whether or not to grant the Water Board a permit to construct a dam in Waterton Canyon now rests with the Corps of Engineers, but normal Corps procedures do not call for a review in the depth contemplated by the Wirth proposal. Under the proposal, the Army's review would not consist solely of approval or disapproval or a permit for the Strontia Springs Dam, but would be expanded into a full-scale review of the dam and its alternatives.

At present, should the Corps differ with EPA's recommendation, EPA holds a veto power over the granting of the permit. Under the Wirth proposal, EPA and the Water Board said they should have no problem with the final result if it was reached after a full and equitable study by the Corps.

The press release did not refer to the corps' review as mediation; however, the participants perceived it as such and hoped the review would result in a settlement. When the *Denver Post* asked Wirth about the implications of the agreement, he replied, "We think we've got this thing sorted out," and he said that "he was hopeful the study recommendation would be binding" to the DWB and the EPA.

The Corps' Review Process

The Corps' Role

Although many factors contributed to the success of Wirth's mediation, one important factor was the care with which he initiated discussions. Just as he proposed the mediation in a way that induced both the DWB and the EPA to accept, he structured the mediation process in a way that made their withdrawal difficult. As the study went on, the *Denver Post* continued to reinforce the notion of binding fact-finding, thereby increasing public pressure, and, in turn, the obstacles to withdrawal. Although the EPA and the DWB each continued to

claim that they could always retire from the negotiations if they were dissatisfied with the corps' study, anyone who did so risked looking as if they had gone back on their word. Given the EPA's tenuous political position in the state at the time, the agency especially could not risk creating an adverse image.

According to the Bob Drake, Wirth's aide, "we could see that the EPA wanted to throw in the towel [withdraw from the mediation process], but they could not because of the power of the press and the process itself." Press coverage put pressure on the DWB as well. On several occasions, according to David Aylward, the DWB threatened withdrawal from the negotiations but did not do so when Wirth or his aides threatened to renounce them publicly.

In addition, Wirth quickly established an interactive and cooperative procedure that created additional pressures on the parties to remain in the process until they reached a settlement. Rather than allow the corps to design and complete the review on its own, Wirth arranged a series of meetings among the corps, the EPA, and the DWB in order to clarify jointly the remaining issues in contention and determine the scope and procedures for the corps' review. This turned the process into a cooperative venture and set a precedent for the joint consideration and discussion of issues. Further, this joint procedure improved the study and increased its legitimacy. Because the EPA was so heavily involved in both the design and implementation of the study, they could not easily repudiate the corps' review.

The parties spent the entire first month of negotiation, July 1978, discussing and defining the outstanding questions and determining what information they needed in order to resolve them. Although both the corps and the DWB sought to complete the study as quickly and as simply as possible, the EPA insisted upon a thorough review. Because the study's usefulness for resolving the dispute was contingent upon its acceptance by the EPA, the agency was able to enforce its demand, despite the objections of the other parties.

The *Foothills Newsletter* was introduced as a medium for public announcements concerning the progress of the corps' study. The first issue identified three key topics:

The need for additional water treatment, [the] existence of superior alternatives [to either the project as a whole or just the Strontia Spring dam], and [the] severity of environmental, social, and economic impacts, whether direct or indirect.

The resulting study was far more comprehensive than the corps originally had planned.

Although the EPA's veto power gave it the upper hand in the early negotiation, the agency was not to prevail throughout. Although the corps agreed to expand the study considerably, they also promised (at the DWB's insistence) to complete the study as expeditiously as possible and to limit the analysis to

unresolved issues. In the Foothills Review Procedure Outline, approved by the DWB, the EPA, the corps, and Wirth on July 4, 1978, the corps asserted that its study would not "beat any drum twice. If an alternative is demonstrably infeasible from the standpoint of construction or operations, we shall not enter into time-consuming economic, social or environmental evaluations." The EPA was wary of the emphasis on speed and insisted that the study last at least five or six months. According to the same *Denver Post* report:

The U.S. Environmental Protection Agency has served notice it will abide by the findings of a U.S. Army Corps of Engineers review of the first phase of Denver's Foothills water treatment project only if sufficient time is devoted to that review.

That means a study of at least five or six months, said Roger Williams, EPA's Deputy Regional Administrator. And that effectively would put off the start of construction of Foothills for another year because it would miss this year's construction season.

By placing this demand in the newspaper, the EPA tried to strengthen its hand and maintain an escape should the study lead to conclusions they did not wish to accept. Thus, the EPA tried to counter Wirth's manipulation of the press in kind. Though it was less successful, largely because of the abiding press bias against the EPA, the agency enjoyed less success than Wirth with this tactic.

The Role of the Public

Another item of contention in the early phases of negotiation was the public's role in the corps' review process. Although the EPA strongly favored a high level of public participation, including more hearings and a public advisory committee, the corps was against further public participation and wanted their studies to remain confidential until the findings had been reviewed by the parties involved. In fact, the corps tried to conduct the first few meetings among parties confidentially and, at one meeting, ejected a reporter from the *Rocky Mountain News*. The EPA then refused to take part in the meeting, and the session was adjourned.

After this scene, the parties agreed to forego additional public hearings but to allow the public and the press to attend the meetings on the corps' review process. In addition, the corps agreed to issue additional *Foothills Newsletters*, which would review for the public the course of the study and its major findings. Dale Vodehnal of the EPA Region 8 pointed out that this procedure ultimately may have hurt the EPA because the EPA gave the corps its comments after publication of the newsletter, the public saw only the corps' point of view on some topics. Although the EPA's objections were upheld and the analysis was revised, the preliminary results already had been publicized in previous newslet-

ters and, as Vodehnal described, "the damage had already been done." Nevertheless, the publicity allowed some public scrutiny of the process, which further pressured the corps to produce an adequate study.

The Need for the Plant

The first phase of the corps' review was an analysis of the need for the plant. The corps released its initial findings on need on August 9, 1978, very soon after the study guidelines had been established. Although the corps concluded that the FES estimates of further water use in Denver were "unrealistically high," the corps' analysis indicated that:

Based upon a continuation of typical past consumption patterns, . . . Denver's treatment capacity will be exceeded in the summer of 1980. A permanent program of conservation comparable to that experienced in 1977 would postpone the need for more treatment another fifteen years, but not without some economic and environmental costs.

Furthermore, according to the corps' newsletter, these costs would be sufficiently high enough so that options for conservation should be considered at length before a particular plan was chosen. In addition, the corps pointed out that a substantial unmet need already existed as a result of drought and the DWB's subsequent limitation on new taps, which the board said they could not lift until Foothills was built. This limitation resulted in a two-year wait for water hookups in some areas. The corps concluded:

The near-term need for treatment appears valid since conservation alone is not the answer. Nonetheless, the Water Board has an obligation to continue a vigorous program of water conservation as it prepares to cope with future growth. Governmental agencies in the metropolitan area which are charged with land use management and zoning activities should also bend their efforts toward this end.

The EPA and several private citizens disagreed with this analysis and contested the findings during both the August 9 meeting and in follow-up letters. The main issues of contention, as listed in the next *Foothills Newsletter* were that the corps' analysis

did not present additional evaluations of rationing which postponed the need for treatment by more than the fifteen years [as] shown by MRD. Did not evaluate Denver's ability to utilize existing clear water storage and overload capacity of existing plants to meet peak demand without building new treatment facilities. Did not disclose that additional sources of water treatment will be needed under many assumptions of future use. Did not substantiate the economic, social, and environmental costs attributed to immediate im-

position of conservation measures sufficient to remove the need for additional treatment.

These issues were discussed at the August 9 meeting, at which time additional analyses were presented by William Ganner, a private consultant, and John Bermingham, head of the opposition group called the Water Users Alliance. Both their analyses were included in the *Foothills Newsletter* of September 27, 1978. The analyses contained different estimates of future need that were based on different assumptions about future per capita use. Neither changed the corps' overall assessment significantly. Ganner determined the per capita use to be about 10% higher than the corps' estimate, thereby confirming that Foothills, indeed, was needed immediately if unlimited per capita use were to be maintained. Bermingham pointed out an error in the corps' estimates of the impact of 1977-style rationing. This meant that if rationing patterned after 1977 rules was instituted immediately and permanently, Foothills would not be needed until the year 2,000 (the corps previously had estimated 1995). The corps readily agreed to this correction and based its subsequent conclusion on that estimate.

In addition, the newsletter contained a brief analysis of the possible effects of various conservation measures at the request of the EPA. An analysis of the actual capacity of the current Denver Water Department's system by an engineering consulting firm was also published in the newsletter.

These additions were responses to comments made by the EPA and Bermingham in the August 9 newsletter. Although the answers were not as extensive as the EPA had wanted, the dialogue continued as the corps' study moved on. The EPA and Bermingham did obtain some responses to their questions for themselves and the public.

After completing another analysis of the impacts of rationing and other water conservation measures, the corps concluded that:

If conservation measures were used to keep average and peak (with rationing use rates to the 1977 level), need for additional treatment would not occur until the year 2000 and the need for more water would occur at about the same time . . .

Efforts to predict future trends become increasingly uncertain the farther they are extended; nonetheless one conclusion is apparent from an examination of the data presented above: Denver's water dilemma has not one horn but the conventional two. In selecting a consumption pattern—whether unrestricted or constrained—the citizens of the Denver area will be establishing water supply requirements as well as water treatment requirements.

This statement confirmed the view of the EPA and the environmentalists that Foothills was linked to meeting future water needs of Denver. Because most future water would come from the western slope, they felt the issue of water

diversion from the western slope should be considered in making choices about treatment or conservation. The corps maintained that state and local governments should make this choice and that it was not appropriate for federal consideration once the state and local governments had made their decisions. Therefore, the corps did not further consider western-slope water diversion versus water conservation on the eastern slope.

A Review of Plant Impacts

The focus of the study then switched to the second key item—the analysis of secondary environmental impacts. The October 7, 1978, newsletter dealt with Foothills' impact on urban sprawl, air pollution, and "the operating regime of Dillon Reservoir (the western slope reservoir feeding Foothills) and the quality of water on the western slope."

The urban and regional planning firm Llewelyn-Davies-Carson, Ltd., of Toronto, Canada, performed the analysis of growth, sprawl, and air pollution. This firm previously had conducted similar studies for the United States National Water Commission and the Bureau of Reclamation in Utah, New Mexico, and Arizona.

Although the firm's report was lengthy and polished, it was completed quickly and lacked substantial documentation. The EPA was angered by the study's conclusion that

there is little direct relationship between water supply and pattern of growth. The Foothills Project, whether built or not, will have little effect on urban sprawl in the Denver Region and therefore cannot influence ambient air quality in the area.

Llewelyn-Davies-Carson based their conclusion on the observation that water is only one of a large number of urban services that must be planned, regulated, and coordinated in order to control urban sprawl. Unfortunately, the firm said, the "institutional framework of municipal government" in the Denver region is highly fragmented and thus is unable to engage in the necessary comprehensive planning. Therefore, they concluded, any attempt to control growth in one segment of Denver by controlling one service (e.g., water) will only divert growth and quite possibly increase urban sprawl in other areas. This, they pointed out, had happened in nearby Boulder, which has limited the number of building permits available as well. Llewelyn-Davies-Carson also asserted that:

It has been suggested the provisions of service such as water, sanitary drainage and major roads be used as growth management tools. It is not, however, the responsibility of these service agencies to engage in land use planning. Rather it is their duty to provide the service where it is required.

The firm maintained that the responsibility for land-use planning is regional and must spring from a coordinated effort between local and regional government, utilities and the private sector.

The EPA strongly disagreed with this assessment and wrote a letter to the corps at the conclusion of the study summarizing its criticisms. After pointing out that the study had twice misquoted or misinterpreted EPA statements and positions, the letter charged:

There is a disturbing theme throughout the report with which we must take issue. The report contends that nothing can or should be done about a given urban service since there is not a regional entity with appropriate authority to plan for and manage all urban services. Unfortunately, the many problems we face in urban areas like Denver (such as the Denver air situation) are too serious to await new institutional arrangements.

The EPA continued to believe that growth and air pollution could be controlled by water use limits and that enforced conservation would ameliorate both population density and air pollution in the Denver area. However, they did not have further data with which to support these claims. Nor did they have the time, money, or expertise to generate such data or reports. As a result, the contractor's findings were published without dispute in the October 7, 1978, *Foothills Newsletter*.

The newsletter also included a discussion of the impact of the 125-mgd Foothills unit on the supply and quality of water on the western slope. Because this area was outside the region of the corps division that was conducting the analysis (the Missouri River Division), the corps contracted the work to the Colorado district of the United States Geological Survey (USGS). The USGS presented a "preliminary technical analysis" on this issue.

According to this analysis, the Foothills Project would slightly affect the quantity and quality of water on the western slope by decreasing the level of water and increasing the concentration of dissolved solids in Dillon Reservoir. The analysis pointed out that this pattern would occur even if Foothills was not built—although more slowly. Not building Foothills, the corps concluded, would delay minor negative impacts but not prevent them. Effects on the quality and quantity of water on the western slope therefore were not regarded as sufficiently negative impacts to prevent further consideration of the Foothills plant. The EPA disputed this analysis. They held that the increase in salinity and the removal of water from the Dillon Reservoir were significant negative impacts and that the corps underestimated their importance. However, this objection was submitted after the last newsletter was published, and thus was not publicized.

A Review of Alternatives

The final segment of the corps' study and the final substantive newsletter dealt with an analysis of structural alternatives of the Strontia Springs dam. This

was the corps' area of expertise, and the EPA acknowledged the quality of the corps' analysis. The analysis considered six different proposals, including the corps' original proposal for the Strontia Springs dam and four alternatives that would utilize an existing reservoir. The EIS considered only two of these alternatives; the other three arose after completion of the FES.

The most promising alternative involved a smaller dam at the mouth of Waterton Canyon. Although such a reservoir would be longer than that at Strontia Springs, its location far downstream was strongly favored by environmentalists because that section of the canyon was already heavily impacted. Flooding the lower canyon area, therefore, was not as objectionable as was flooding the wider, upstream section of the river.

In addition, use of the lower dam site had significant implications regarding land use. Because the Strontia Springs dam was considerably higher than the DWB service area, the DWB would be able to provide water to much of the southwestern Denver area by using a gravity-flow distribution system. Building the Strontia Springs dam would remove economic constraints that had previously deterred extensive urbanization. The "canyon mouth" dam was 337 ft lower than the Strontia Springs dam and would not be able to provide water to the southwestern Denver area without extremely high pumping costs. Merson and the EPA thus favored the canyon mouth dam, seeing it as "much less damaging from the urban sprawl focus, as well as with respect to direct environmental impacts."

The corps released its findings on the alternatives in the October 31, 1978, newsletter. The engineering, environmental, and economic advantages and disadvantages of each proposal were presented. The list demonstrated that the assets of the canyon-mouth dam were comparable to those of the Strontia Springs dam without stating any conclusions.

The Strontia Springs dam had several advantages. First, it could be built 1 to 3 years sooner than the canyon mouth dam because engineering designs had been completed and construction only awaited the 404 permit. In contrast, the canyon mouth dam would require extensive engineering and design work.

Second, the Strontia Spring dam was designed to produce more energy (through hydroelectric generators) than it would use. In contrast, the canyon mouth dam would not be capable of generating hydroelectric power and would consume 41 million kilowatt hours a year. The corps estimated that the annual operation and maintenance costs for the Strontia Springs dam would be one third of those at the canyon mouth dam.

In addition, the Strontia Springs dam was designed to provide water for Aurora, a Denver suburb, whereas the canyon mouth dam would not. If the canyon mouth dam was chosen, Aurora would have to replace its temporary and insufficient structure with a new dam, intake, and tunnel. According to the corps' estimates, this would add \$22,770,000 to the construction costs of the

canyon mouth dam. Nevertheless, the construction costs of the canyon mouth dam were significantly lower (\$133 million) than those for the Strontia Springs dam (\$170 million), even including the additional Aurora project.

Thus, both proposals had certain economic advantages. Although the DWB maintained that the pumping costs for the canyon mouth dam were prohibitive, the economic consultant hired by the EPA to assess the economics of the two proposals concluded that "the economic differences between the Foothills alternatives are actually very narrow and likely to be well within the errors of estimating the projected future costs." He also added that "economics should not play a determining role in deciding the issue."

The primary advantages of the canyon mouth were environmental. Although the corps' newsletter tended to deemphasize the environmental advantages of the canyon mouth site, it indicated that a "moderate" deterioration in aquatic habitat would occur at Strontia Springs as compared with a negligible impact at the canyon mouth site. In addition, the canyon mouth dam probably would have less of an impact on prehistoric artifacts than would the Strontia Springs dam.

The Study Concludes

The final newsletter stated that the next step in the process "will be the formulation of a decision on the 404 permit application." It requested that comments be sent to the division engineer by November 16, 1978. He would then make a decision and forward it to the EPA for concurrence or veto. If the EPA still disagreed with the corps' decision and chose to veto the permit, the dispute would be taken to Washington for resolution.

Because a Washington decision was still unpredictable, all of the parties preferred settlement at the regional level. Yet the corps' study was not as conclusive as the parties originally had hoped, and, in the end, the EPA still disputed major aspects of the corps' analysis. In particular, the EPA still disagreed with the corps' assessment of the viability of conservation as an alternative to Foothills:

With respect to conservation and environmental benefits, the newsletter contained no discussion of benefits such as postponement or environmentally damaging water development projects, less fluctuation in reservoir levels, or reduced mass emissions of pollutants from wastewater treatment plants.

The EPA also disagreed strongly with the corps' lack of emphasis on the environmental advantages of the canyon mouth alternative.

Whereas the EPA continued to favor the canyon mouth location, the DWB steadfastly refused to agree to that site because it would take longer to build, and

it would be expensive to operate. Although the corps apparently agreed with the DWB's assessment, it did not wish to confront the EPA directly, nor did the EPA wish to refer the case to Washington. Discussion continued over the remaining issues until after the November elections when Wirth reentered the dispute.

Concurrent Suits

The DWB Files Suit

As the corps carried on its study, the controversy was escalating on various legal fronts. The DWB and the BLM were locked into a dispute over the terms of the right-of-way permit. In March 1978, the BLM issued the permit with broadly worded conditions requiring that the DWB ensure minimal streamflows below the Strontia Springs diversion dam and implement a water conservation program. The details were to be worked out between the parties in the following months. The BLM held several meetings with the corps to discuss these issues, but when the revised BLM permits were issued in July, the DWB rejected the conditions attached as unacceptable and illegal. They contended that maintenance of streamflow would require the DWB to release water over which they had legal rights.

In addition, the permits required that the water conservation program be approved by both the Denver Regional Council of Governments and the state of Colorado before the DWB could either expand Foothills beyond the 125-mgd capacity or "alter any existing federal water agreement or seek a new one that would use or affect any federal resources." The DWB charged that both stipulations forced it to "hand over some of its charter-delegated power" to regional and federal agencies. This, their lawyers argued, would "cause havoc" with their future plans for water development in the Denver area. Therefore, the DWB rejected the BLM permits and continued their lawsuit in the U.S. District Court in Denver to seek the unconditional right to begin construction on Foothills.

Presiding Judge Winner tried to broaden the case by involving all interested parties, both those for and against the projects, to participate in the proceedings. According to Winner, the invitation "was designed to combine as many legal aspects of the Foothills controversy as possible in one lawsuit." Winner anticipated "more litigation and suits . . . in connection with the project, no matter what direction it takes." He also requested that the DWB file an amended complaint because so much had changed since it filed its first pleading.

The DWB did so on August 22 as the corps completed the first phase of its study on the need for Foothills and after the DWB, Wirth, and the EPA had accepted the Wirth/corps mediation process. The complaint was expanded considerably from the earlier version and named seventeen federal officials and fourteen environmental groups as defendants. As described in the *Denver Post*:

The suit asks that Winner assess \$30 million in damages against Jack Horton, former Assistant Secretary of Interior, Dale Andrus, State Director of Interior's Bureau of Land Management, and Curt Berklund, former Director of the Bureau of Land Management. It was alleged that the three officials "conspired together and agreed to impede, delay and prevent the construction of the Foothills project" in 1975 by unlawfully expanding the scope of the original impact statement, even though federal law didn't require that expansion. . . . [The complaint also said the officials] "conspired to attach illegal conditions to permits which, if allowed to stand will cost taxpayers millions of dollars and will further delay the Foothills construction."

In addition, the lawsuit asked that three million dollars in damages be assessed against Alan Merson and Roger Williams.

It is clear that the DWB was not relying solely on the corps and Wirth to obtain approval of the project; further, they may have hoped the demand for damages would inhibit further opposition. Also, as U.S. Attorney Hank Meshorer suggested, they might have expected the charges to "galvanize the federal agencies and get them to do something fast, for once."

The charges worried most of the defendants, but they had been processing the permit application as quickly as they believed the regulatory procedures allowed. The charges simply increased their insistence on obeying every detail in the statutes and regulations. Some observers believed that the charges worried Merson more than anyone and may have influenced his final decision to accept the Strontia Springs site. Merson, however, felt that other factors were at least as important and that the hostility created by DWB's attack actually hindered the permitting process.

Even more self-damaging was the DWB's decision to name the seventeen environmentalists in the suit. Supposedly, the purpose was to involve all interested parties in the court settlement to avoid subsequent suits on the same grounds. But most observers interpreted the tactic as harassment and typical of the DWB's attempt to "steamroll over" the opposition.

Also, the complaint seeking an injunction against the environmentalists potentially violated their rights under the First Amendment. They were charged with having interests "adverse" to those of the DWB and with expressing those interests in public hearings and in meetings with personnel from federal agencies. In some respects, the DWB was suing individuals and organizations for exercising their constitutional and statutory rights to speak in opposition to the DWB's plans. If these grounds proved to be an acceptable basis for suit, many of the environmentalists and federal attorneys believed the entire NEPA process—and in fact, all public participation programs—would be threatened. The DWB was forced to make additional concessions in the later stages of the mediation process to amend these "wrongs."

The Environmentalists' Suit

One week before the DWB filed its amended complaint, the environmentalists filed a lawsuit against the Foothills Project in the United States District Court in Washington. They told the press that the grounds for the suit were that "basic Foothills decisions have been made by government officials in Washington and the interpretation of the federal statute (the Federal Lands Policy and Management Act) sought in the new suit will have national implications." In fact, the reason for the suit was that the Washington judge was proenvironmentalist and thus more likely than Judge Winner to decide in their favor.

The environmentalists planned to claim violations of both the Federal Land Policy and Management Act (FLPMA) and the NEPA and to seek a temporary restraining order against further construction by the DWB. (The DWB already had started some road construction with permission from the BLM, the USFS, and the corps.) Although the environmentalists did not have sufficient money for a protracted court battle, they were hoping to obtain quickly either a temporary restraining order or a summary judgment. They also hoped that, by developing the dispute into a landmark case over the FLPMA, they could enlist the help of national environmental groups, but the suit was eventually withdrawn.

Outcomes of the Corps' Review

The corps' study precipitated conflicts between the parties who participated in the process and those who did not. Some federal agencies did not accept Merson as an adequate representative of their views. He had already angered USFS and BLM officials by speaking too quickly and too strongly on Foothills soon after he had become EPA regional administrator and before he was fully aware of the details of the controversy. Merson acknowledged that he had "jumped into the fray" more quickly than he would have liked. "Substantively our position was correct, but we needed much more time to inform the public of our stance."

Although the corps' study did not generate sufficient agreement to enable the parties to move easily to a settlement, the process did provide an important platform from which further negotiations could be initiated. Most important, forcing the disputing parties to interact frequently helped to break down much of the previous hostility and distrust among the parties. They began to understand each other better, to trust each other more, and although they continued to disagree, to realize that their disagreements were based on legitimate differences that might be negotiated.

In time, the tone of the exchanges became more polite, though differences of opinion were still strongly expressed. Debate focused more on facts and less on

personalities. With this new civility, the parties came to appreciate each others' beliefs, biases, and values. This helped both the parties and the mediators to identify possible areas of compromise that set the stage for achieving a mutually beneficial solution. The new emphasis on compromise rather than conflict facilitated achievement of a positive outcome. It was no longer acceptable to take all and give nothing, and even the DWB recognized the need to make concession. The disputants finally saw that compromise could protect most of their interests and that continued conflict would achieve less satisfactory results. This recognition probably was the most important outcome of the corps' review process, and it helped to hold the negotiations together after completion of the formal review.

Wirth Resumes Negotiations

Introduction

The structure of the negotiation had to be changed because the corps study had not led to indisputable conclusions. The corps briefly persisted in the role of primary mediator, but their study had made them advocates of the Strontia Springs dam, casting them in opposition to the EPA. Wirth, who had been recently reelected, recognized this problem and reentered the negotiations as mediator to try to break the impasse. Wirth was assisted by Aylward, his legislative director in Washington, Bob Drake, his district representative in Denver, and Hank Meshorer, the attorney representing the federal agencies in the DWB lawsuit.

Meshorer had mediated among the various federal agencies to resolve their internal and interagency differences in order to unify his clients' defense. Although Meshorer was not a formal member of the Wirth mediating team, he worked in close coordination with it.

Wirth, Aylward, Drake, and Meshorer spent the next 10 months holding meetings and making telephone calls; during this period they also drafted, negotiated, and redrafted letters, interim agreements, and settlement documents. Because few records were kept and memories have become blurred, some of the details of the negotiations have been lost. Nevertheless, the general strategies and positions of each agency and the mediator indicate the important aspects of the negotiation process.

Preliminary Work

Rather than try to settle all the issues at one time, Wirth segmented the negotiations. He devoted the initial stages to the major parties and the largest issues; he integrated other issues and parties into the later negotiations.

Wirth's first step in November and the first half of December was to deter-

mine the negotiable demands of the EPA, the DWB, and the corps—the conditions that each agency required in a settlement. Getting the parties to articulate their positions for the record was a slow and difficult process.

Most of this footwork was done by Drake and Aylward who constantly shuttled back and forth between the EPA, the DWB, and corps. They attempted to persuade each party to agree on a stated position that they thought the other parties would find acceptable.

At first they focused on the location of the dam because the canyon mouth dam appeared to be a logical compromise between the positions of the EPA and the DWB, but the DWB would not accept it because it felt that the pumping costs would be excessive. Citing the analysis done by the economic consultant for the corps' review, the EPA challenged this argument.

The EPA met in early December with the corps and Aylward in Omaha to discuss the technical and economic merits of the two sites. The technical adviser to the corps and the EPA spent the entire day arguing about technical issues. According to Aylward, by the end of the meeting, the EPA's argument was destroyed. "Merson and I both went in there open-minded . . . but the EPA just didn't have a case that would stand up." Although Merson did not formally surrender the canyon mouth dam at that time, he was "visibly deflated," according to Aylward. This meant that a major element of the controversy was resolved, though at the cost of a promising compromise solution. Aylward and the mediation team had to devise another compromise that the DWB could make that would persuade the EPA to drop its opposition to issuance of the 404 permit. Merson indicated that a good program of water conservation together with substantial impact mitigation would meet his goal.

Although some members of the EPA staff were firmly opposed to Merson's concession, Merson had decided that relinquishing this point was almost inevitable from a political standpoint. As he pointed out later, in December he still believed that barring a change in the EPA administration, he had support from Washington to prevent construction of the Strontia Springs dam. Because the fight in Washington would take a long time, Merson thought it impossible that the Washington office would change its position. If this were to occur, Region VII would lose all its control and easily emerge without any gains. Merson felt that the best strategy was to use the leverage over the dam to require a good program of water conservation.

A water conservation program had been one of the EPA's major goals all along because a good conservation program would eliminate the need for expensive and environmentally harmful projects for subsequent water diversion and treatment. The loss of the natural ecosystem in Waterton Canyon was a lamentable price to pay, but Merson decided that mitigation and conservation would produce long-term environmental benefits for the Denver region.

The DWB was not pleased with the idea of water conservation, especially if

it was to be administered by a federal agency. But Wirth and the other mediators thought the board would comply if they were allowed to build the Strontia Springs dam. By the middle of December, Kenney and Merson were close to an agreement, although members of their staffs and other DWB members still opposed the concession. Thinking that one more concerted effort was all that was needed for the parties to agree to terms for a settlement, Wirth scheduled a negotiation session for the evening of December 15, 1978.

The First Negotiation Session

The December 15 meeting was preceded by drinks and dinner, during which time the participants did not discuss Foothills. Instead, Kenney talked about his childhood, and Merson told stories about his days in Alaska. This relaxed the participants and strengthened the friendliness and trust that had been developing since June. Negotiations began in earnest at 10 P.M. and continued (at Wirth's insistence) until the parties reached an agreement. At the beginning of the meeting, each party summarized its positions.

The corps contended that there was need for a measurable conservation program, for minimal streamflow provision, and for a habitat improvement program to mitigate the adverse environment impacts of the project.

The DWB insisted that Strontia Springs was the only dam site that the DWB would consider but acknowledged the need for water conservation. The DWB also indicated its willingness to agree to minimal streamflows and mitigation if the released water could be recaptured for DWB use. (This could be done by allowing the DWB to store the water in the corps-owned Chatfield Reservoir.)

The EPA continued to state that the farther down the canyon the dam was placed, the more environmentally sound it would be. They also stated that water conservation would be required with any permit. Wirth concluded that water conservation was essential to any agreement. He urged everyone to exert maximum effort to solve the remaining issues.

Because the parties had reached a clear consensus on the need for water conservation, the discussion focused on the design of an acceptable conservation program. The EPA wanted a much stricter program than did the DWB.

Discussion proceeded slowly, lasting into the night. Wirth intended to break down the resistance of the disputants through marathon negotiation sessions. As Aylward pointed out, "People fight harder at 10 A.M. than at 10 P.M.—and by 5 A.M. resistance was nil." The strain also increased the sense of common purpose and cooperation; the goal became not only to reach an agreement but simply to go home. Although some of the participants disapproved of these tactics, all stayed until they reached an agreement. They feared that, if they left, it would appear as though they cared less about a settlement than did the others.

The psychology seemed to work and, finally, at 5 A.M. a Memorandum of Understanding was approved by all the parties.

This memorandum, signed by Wirth, Merson, Kenney, and Selleck, established the basic outline of a settlement. In essence, it said that the corps would issue a 404 permit for the Foothills Project and Strontia Springs dam without EPA opposition but that the permit would contain conditions that required water conservation and impact mitigation. All the federal parties involved were required to agree to these terms. These programs were to be worked out in detail over the next few weeks, and the parties agreed to meet again no later than January 8, 1979, to reach a more definitive agreement.

The memorandum was accompanied by a statement by Mr. Kenney that confirmed the DWB's agreement with the EPA and the corps concerning water conservation. According to this agreement, the DWB would design a conservation program by March 15, 1979, that would reduce the average per capita consumption of water by 3% by January 1, 1982, and by 5% by January 1, 1984. At the end of each period, the corps would evaluate the program and its progress and, after the first 5 years, determine a goal for the next 5 years that would fall in the range of 3% to 5%. Similarly, the corps would then evaluate the program after 10 years and set the goal for the next 10 years in the range of 5% to 10%. The DWB alone would determine the manner in which these reductions would be accomplished. The board could use any measures it thought best as long as the program was credible and the goals were reached.

This agreement differed somewhat from conditions concerning water conservation in the UFS and BLM permits. The BLM and USFS did not set numerical goals or dates as did the EPA/DWB agreement. But they did require the support of the water conservation plan by the city and county of Denver, the Denver Regional Council of Governments, and the state of Colorado before the DWB could either increase the capacity of Foothills to more than 125 mgd or apply for future permits or grants from the federal government. The BLM felt that such local participation and approval were very important and, in fact, should prevail over any federal determination of the adequacy of any conservation plan. Consequently, the BLM was very concerned about the difference between the EPA/DWB agreement and the conditions of their own permit. In addition, according to some sources, the BLM was irked at being left out of the discussions on water conservation.

Yet, the BLM and USFS had not participated in the corps' review process, which was designed specifically to resolve the EPA/DWB dispute. Wirth had felt that the negotiations would be facilitated if the basic EPA/DWB agreement was outlined before the other parties became involved. Therefore, he had risked the displeasure of the BLM and USFS by keeping them out of the negotiations until after the December 15, 1978, session. Only then were the other parties invited to participate in the discussion, which turned to the question of impact mitigation.

The BLM continued to express concern about the discrepancies between the two water conservation plans, despite assurances from Wirth and the other mediators that the differences were insignificant. According to Wirth, the DWB acted in good faith, and the water conservation plan would satisfy all the parties involved as well as the city and county of Denver, the Denver Regional Council of Governments, and the state of Colorado. No further efforts were made to resolve the discrepancy, which still exists in the signed settlement agreement that is now in effect.

Negotiation over Impact Mitigation

Wirth, the EPA, and the corps agreed that concurrence of the BLM, the USFS, and the FWS on the impact mitigation program was very important. Consequently, Wirth invited the three agencies to join the negotiations at this point. Although the agencies were disturbed by their initial exclusion from the sessions, all three readily accepted the invitation and participated fully in the subsequent negotiations.

In order to help coordinate the newly broadened negotiations, Wirth asked Meshorer if he would be willing to speak for and help coordinate the federal parties. Meshorer supported the mediation effort and willingly linked his efforts with Wirth's after the December 15 meeting.

In order to appraise the remaining differences, Wirth asked Meshorer to prepare a draft settlement agreement that would be acceptable to all the federal parties. In the interest of time, Meshorer, in turn, asked each agency to prepare separate draft settlement agreements, which he then revised and combined into one document. Meshorer gave the document to Aylward, who combined it with a similar draft from the DWB to produce a negotiation text that provided the basis for subsequent discussions.

The most controversial BLM and USFS impact mitigation condition had been the requirement that the DWB ensure minimal streamflows below the dam to protect fish and other aquatic wildlife. The DWB had turned down the BLM and USFS permits, charging that this condition would force them to relinquish water to which they held legal rights. Once it became clear that they could recapture the water in Chatfield Reservoir, the issue of water rights ceased to be a problem, and the DWB agreed to maintain the minimal streamflows. They also agreed to a program of habitat improvement that was intended to ensure good trout fishing below the dam in compensation for the trout habitat destroyed by the reservoir. None of these conditions provoked controversy, although formulating the details to the satisfaction of all parties was a slow process.

These negotiations settled the disputes and the litigation between the DWB and the federal agencies. However, the environmentalists' dispute with the DWB remained unresolved. Although some environmentalists still favored carrying on

the case, the cost of the Washington litigation was mounting rapidly, and the case was proceeding much more slowly than the group had hoped. The environmentalists also had doubts about their chances of winning because their lawyers disagreed considerably about the strength of their case.

Therefore, when Aylward and the DWB approached the environmentalists about a settlement, most of the leaders were very receptive. Birmingham especially was interested in settlement because he had spent \$20,000 of his own money on the case and saw no end in sight. Others too had expended much time and effort, but thus far they had won little and future prospects were unclear. Now that the federal parties were reaching a settlement, the environmentalists felt that their case was further weakened and that their chances of stopping the project were very slim. Therefore, they decided that negotiation was their best option and were determined to bargain for as much as they could obtain.

The environmentalists met independently and frequently to generate a set of demands to present to the DWB through Wirth. Included among their demands were the following:

1. The DWB should implement an open planning process through which its short and long-range planning would be carried out with extensive public consultation. Such a process should include a commitment to complete a systemwide EIS for any further project (including extensions of Foothills) before they are built.
2. The DWB should form and fund a Citizens' Advisory Committee to help in the open planning process and to otherwise advise the board on its future activities.
3. The DWB should provide compensation for the recreational losses on Waterton Canyon by improving similar sectional facilities elsewhere. For instance, they should construct a white-water kayak chute on the South Platte River downstream from the dam and buy enough land (now privately owned) to provide recreational access.
4. The DWB should admit in the settlement agreement that joining the environmentalists in their lawsuit was illegal and that the environmentalists were "not proper parties defendant."
5. The DWB should agree to pay the environmentalists' attorney fees.
6. The agreement between the environmentalists and the DWB should be awarded so as to be enforceable by the public—that is, by making a third-party beneficiary proviso.

Some of these demands were tactical, establishing ground that the environmentalists intended to yield, such as a kayak chute in Denver. The group held some terms to be nonnegotiable: most important among these was that the DWB should admit that the environmentalists were not proper parties to the Denver suit. The environmentalists felt that, without such a provision, the NEPA would be weakened permanently because the DWB would appear to have succeeded in

its strategy to force unwilling parties to settle or be sued for simply voicing their objections to a project.

The issue of attorney fees also was very important. Although several environmentalists considered this condition nonnegotiable, and most of the environmentalists thought the fee demand was legitimate, others thought that the attorneys' fees played far too great a role in the decision to settle. Several environmentalists agreed with their opponents that the fee payment had bribed the most influential environmentalists—those with the greatest amount of money at stake—to settle for terms that they would not have otherwise accepted. When Bermingham and his associates agreed to settle, the others had to settle as well because they could not press the case without the leaders' financial support.

The DWB negotiated the environmentalists' demands over the next few weeks while they also carried on negotiations with the federal agencies. The DWB's negotiations with the environmentalists were kept separate from those with the federal agencies, but Wirth, Drake, and Aylward provided mediation for both.

Although the negotiations might have succeeded if the mediators had not provided this service, the mediators' credibility and fairness facilitated compromises that otherwise might not have been reached. When Aylward or Meshorer said to the DWB, "You are not going to get a settlement if you don't agree to the following . . .," the DWB was more likely to agree to the demands that had been communicated directly by the federal agencies or by negotiators for the environmentalists. The mediators also were able to talk freely enough with both sides to identify grounds for compromise. Negotiations continued sporadically, both directly (among the parties) and through go-betweens (Aylward and Meshorer) throughout the following two weeks until the parties seemed to approach agreement.

Settlement

Terms

Wirth then scheduled a set of meetings for January 3, 1979, to formulate the final principles of the settlement. The first meeting was between the environmentalists and the DWB. It was held at the DWB offices in the afternoon. The environmentalists (represented by Robert Golten of the National Wildlife Federation, John Bermingham of the Water Users Alliance, and Robert Weaver of Trout Unlimited) presented the DWB (through Aylward) with a revised list of demands.

At Wirth's request, Aylward then joined a meeting between the DWB and the federal representatives. The environmentalists moved their meeting to this location. The environmentalists met with the DWB attorneys in one room,

while Kenney and other DWB attorneys met with federal attorneys and principals in another room. Aylward mediated in both meetings until the parties reached a settlement. Late into the night the federal representatives and the DWB signed a document entitled *Principles of Agreement* and the environmentalists and the DWB signed a *Memorandum of Understanding*.

The *Principles of Agreement* was an elaboration of the document signed earlier in December and contained few significant changes. The agreement listed a number of conditions that were to form the basis of formal legal documents (the settlement agreement and the consent decree) to be drafted in the following weeks. The conditions were the following:

1. The Corps will issue a 404 permit for Foothills and the Strontia Springs dam without objection by the parties to the document.
2. The DWB will comply with all the conditions of the permits granted previously by the BLM and the USFS.
3. The DWB agrees to accept BLM and USFS permits without objection.
4. The DWB may use Chatfield Reservoir for storage of water released downstream in order to comply with the minimal streamflow requirement.
5. The DWB will undertake a program of water conservation that incorporates the goals of the December 16 agreement but assigns the primary role of monitoring to the EPA, not the Corps of Engineers.
6. The DWB agrees to increase public participation in its decision making.
7. All parties will cooperate in developing the South Platte River as a recreational resource for the entire community.
8. The federal agencies will do a systemwide environmental analysis of all DWB projects currently under construction and/or any future water project "to determine site specific and cumulative effects of these projects." (This was requested by the environmental parties, which took this to mean that the federal government would prepare a system wide EIS for the next DWB project.)
9. The Foothills suits in Denver and Washington will both be dismissed with prejudice.
10. Finally, the parties pledge to continue to cooperate for the purpose of avoiding future litigation over similar issues.

Nothing in this agreement differed from the earlier tentative agreements, except that the primary responsibility for enforcing the minimal streamflows and habitat improvement programs was transferred from the corps to the BLM and USFS.

Although some of the environmentalists' demands were included in this document, the environmentalists and the DWB also signed a Memorandum of Understanding. This document specified that the DWB was to include the public in their decision making by establishing a citizens' advisory committee to participate in long- and short-range planning. The agreement also stated that the

DWB would pay the environmentalists' attorney fees up to a total of \$47,000. In exchange, the environmentalists agreed not to initiate litigation or otherwise try to prevent the construction of Foothills and to

use good faith efforts to discourage other individuals and environmental organizations from undertaking litigation or claims, or administrative proceedings to challenge, contest, disrupt, interfere with, or prevent the construction of the currently-permitted Foothills project.

The only major demands that the DWB refused to accept immediately were the statement of wrongdoing regarding the lawsuit, a citizens' enforceability provision, and a provision that they prepare a systemwide EIS on their next project for raw-water development (the Williams Fork River on the western slope). The DWB's refusal on the last point was not considered to be very important because the federal agencies already had agreed to make an environmental assessment of current or future DWB projects. Though the stipulation did not specifically say that this assessment should include an EIS, it did say that the agencies would follow CWQ regulations which require "the integration of the NEPA process with other planning."

Discussions continued for several weeks while the parties reviewed the draft settlement agreement. Finally, the DWB conceded and agreed to include in the settlement agreement a statement that said,

The plaintiffs hereby recognize that the environmental defendants have asserted their opposition to the construction of the Foothill project, and related facilities, in good faith and within their Constitutional and statutory rights. The Denver Water Board and its members now recognize that in light of the affidavits of the environmental defendants and other facts, the environmental defendants are not proper parties to this litigation.

The environmentalists also won an important concession concerning future DWB projects. This agreement stated that

when any such [environmental mitigation] measures are lawfully required, their cost shall be considered as part of the cost of developing and implementing those projects and should be borne by the DWB.

Thus, the DWB committed itself to internalizing the costs of environmental mitigation in all of its future projects. The environmentalists found these terms acceptable.

The settlement agreements were signed by all the parties on February 14, 1980. The documents included the Stipulation to Dismiss and the Settlement Agreement, which settled both the DWB and environmentalists' litigation with prejudice. A proposed Consent Decree, which included the same items, was then presented to Judge Winer for his approval and signature.

Enforceability

Much to the surprise and dismay of all the parties, the judge refused to sign the Consent Decree because he felt the document raised several serious legal problems. Instead, he wrote a three-page addendum to the Consent Decree in which he explained his reasons for not signing:

1. I think it quite possible that all the parties have done is to enter into an agreement. I do approve the agreement and I do sign the "Consent Decree" with the limiting comments.

2. My signature does not indicate any opinion as to whether a contempt remedy would lie for breach of the provisions of the document. . . . Nor do I rule on whether I retain jurisdiction to change the "Consent Decree" because of change of conditions.

3. Under no circumstances should this "Consent Decree" be interpreted as being a ruling by me on the intent or meaning of the Blue River Decree [part of Colorado law] or a ruling on any question of state or federal law.

4. I do not approve the payment by plaintiff of any attorneys' fees to attorneys not employed by plaintiffs. I do not rule on the legality of such payment and I do not rule on the ethical propriety of the acceptance of such payment. Indeed, I have serious doubts as to both the legality and the ethical propriety.

I sign this "Consent Decree" with this addendum because the public, the plaintiff, and the court are under unbelievable pressure to get on with the building of the project. From an academic standpoint it would be nice if the questions I have raised could be finally answered in advance but inflation being what it is, I cannot indulge the luxury of a briefing schedule, an opinion, and an appeal. . . . The public can't afford the thousands of dollars a day it would cost to engage in litigation over counsels' legal or moral right to demand payment of their fees as a condition of settlement of a case they essentially lost. The public's pocket isn't that deep. The project can be built and the legal and ethical questions can be answered in due time.

All the parties were disturbed by this action because it made the enforceability of the settlement very unclear, particularly in view of the judge's stated doubts about the propriety of a contempt remedy should the agreement be violated. Yet, like any contract, the agreement still could be enforced through a new lawsuit. Moreover, it was partially self-enforcing because payment of the environmentalists' attorney fees depended on the environmentalists first having met their obligations in the settlement agreement. (The funds were placed in escrow immediately after the agreement was signed but were not to be released until a year later, and then, only if the environmentalists had kept their pledge not to obstruct the Foothills Project.)

The environmentalists and the federal parties, however, had no reciprocal

assurances, and instead, they had to rely on public and government pressure to assure DWB compliance. The federal representatives and Wirth made it clear that they would monitor the DWB's compliance carefully and exert whatever legal and administrative pressure they could if the DWB violated the terms of the settlement. Meshorer, now acting as a federal attorney, asserted that he would *drag* the DWB back into court if they violated the agreement. The other federal representatives indicated that the DWB's ability to obtain future permits would depend on their implementation of the water conservation plan. Although other conditions of the permits were not explicitly linked to future DWB projects, these too were enforceable through normal provisions for permit enforcement. Therefore, the DWB had strong incentives to abide by the settlement, as did the federal parties who now wanted to end the dispute. Judge Winner's unwillingness to endorse the terms of the agreement was considered unfortunate, but that did not foreclose implementation.

The Aftermath

The environmentalists and the EPA regretted the construction of Foothills, but they realized that this settlement was the best they were likely to obtain. They were generally satisfied with the agreement and optimistic about its potential influence on future DWB plans and planning procedures. Birmingham was quoted in the *Denver Post* as saying, "We may have lost the battle [the dam] but we think we've won the war." Robert Golten, a lawyer for the National Wildlife Federation, agreed: "I think we got much more than we would have achieved had we continued the litigation."

Merson, too, was pleased with the settlement, although some EPA staff members remained disappointed and perhaps, somewhat bitter. They believed that they could have stopped construction of the dam if Merson had not "sold out" under pressure. Some environmentalists also were upset that Birmingham and others "sold out" for the attorney fees and would have preferred to press the litigation. Birmingham had been paying most of the legal fees, however, making it difficult for the other environmentalists to carry on without his support. Even those who were least happy with the settlement realized that it had its benefits. Ben Harding was harshly critical of Wirth and the mediation process, commenting, "It wasn't mediation—we were beat over the head." But he thought the environmentalists could use the settlement as a legal base to influence future DWB projects. Aside from this, however, he felt that the DWB "managed to beat us down on everything . . . we got our money back, nothing else."

Although the outcome was not satisfying to all parties, most acknowledged that it was probably better than what they would have achieved without negotiations. Each party backed the settlement in the hope that, despite the judge's reservations, the agreement would be binding.

Although the DWB and the federal agencies apparently are satisfied with the implementation of the settlement, the environmentalists have become increasingly disappointed with the DWB. They contend that the DWB has violated first the spirit and then the letter of the settlement. Weaver and Harding did not become members of the advisory committee. Bermingham was head of the committee in 1979 and 1980; and he is the only environmental or conservation organization representative on the permanent advisory body. According to Golten:

John Bermingham for over a year has been urging restraint on some of us most concerned about post-settlement developments. John felt that, through his position in the Advisory Committee, with time he would be able to incline the Board and the Water Department to the position we thought we had achieved in February 1979. I think John now concedes that he was mistaken. Some of the rest of us are convinced of that—and that the Citizens' Advisory Committee (on which he appears to be the only environmental/conservation organization representative) is ineffective as presently constituted for assuring that the Water Board will be accountable to the "public" (as opposed to special) interests.

These remarks appeared in a letter from Golten to DWB General Counsel Williams. Enclosed with the letter was a list of seven alleged DWB violations of the Settlement Agreement. These included:

1. Violation of the commitment to full public participation in future decision making by the Denver Water Board.
2. Violation of the DWB commitment to provide staffing and technical support for the Advisory Committee.
3. Violation of the DWB commitment to "develop" a "program" making available to the Citizens Advisory Committee and to the public its present and future plans.
4. Violation of the DWB commitment to keep the Advisory Committee regularly appraised of the status of its planning for water diversion and storage facilities and structures.
5. Violation of the commitment to coordinated planning and coordinated implementation of planning.
6. Violation of the commitment to provide advance notice of the pending proposals well before they are considered for adoption.
7. Violation of the commitment to achieve timely consultation with affected property owners concerning management of flows of the North Fork of the South Platte River.

Golten concluded his letter by saying,

What is more important than fussing over these matters through the mail, however, is to sit down and review the implementation of the Foothills settlement.

We think it time, before further thought is given to other approaches, to meet with you and one or two other representatives of Tim Wirth's office. We suggest Congressman Wirth's involvement since he has asked to be kept informed and he also assured us of his continuing interest.

The DWB has agreed to meet though the meeting has not yet taken place.

GENERAL STUDY QUESTIONS

1. There were many agencies, groups, and individuals that had a clear stake in the Foothills controversy. What impact did the number and diversity of these interests have on the course of negotiation?

2. Unlike some of the other cases we have examined, the Foothills dispute was played out in the public eye from start to finish. Indeed, some influential news organs—most notably, the *Denver Post*—not only reported developments but actively supported one side. In a proper analysis of this dispute, should the *Post* be regarded as a party? (Other aspects of the role of the press are discussed in a section that follows these questions.)

3. In several other cases, there were divisions within one or another group; this was true in Brown Paper presented in chapter 4. In Foothills, there was division within the EPA and among the environmentalists. First, consider the EPA. We have seen it in a number of roles in earlier cases: as a permitting agency in Holston River, as an enforcer in Brown Paper, and as a grant maker in Jackson Hole. (In chapter 11 we shall see the agency engaged in administrative rule making.) What was its role here? In what ways were its priorities conflicting? How did divisions within the agency affect the course of negotiation? In contrast, consider the situation of the environmentalists: Did division among them weaken or strengthen their hand?

4. In this case, perhaps more than in the others we have looked at, many of the principal parties were represented by legal counsel. They also had specialists to represent them on technical issues, such as projected water needs and anticipated development. What impact did the use of such representatives have on the process of negotiation?

5. Initially, there seemed to be little room for negotiation. A Denver Water Board spokesman rebuffed the first mediation attempt, saying,

Mediation and compromise are, of course, useful in many situations, but we do not believe that anything is to be gained, and much may be lost by attempting to pursue such a series of meetings.

What other considerations explained the board's posture?

6. Early in the dispute, Alan Merson of the EPA publicly stated that the dam would never be built. So long as the dispute was cast in the simple terms of build or not build, is it understandable why there was no incentive to negotiate? How did the character of the dispute change in such a way so as to alter the incentives of the parties?

7. Early in the dispute, the Denver Water Board justified its refusal to negotiate by invoking the results of an election authorizing the sale of bonds that would be used to finance the construction of Foothills. Those who opposed the dam, they claimed, were trying to subvert the public will. Timothy Sullivan's proposal that referenda be used to resolve environmental disputes was introduced in chapter 7. Should the Denver bond election have closed the issue here? Does the fact that this dispute continued in spite of the election disprove Sullivan?

MEDIATION STUDY QUESTIONS

1. Representatives Schroeder and Wirth each tried to initiate mediation; the latter succeeded after the former had failed. To what extent does timing explain the difference in results? How did circumstances change from the time Schroeder made her proposal to the time Wirth made his? Did the previous false start help or hurt Wirth's efforts?

2. Another explanation for the different results lies in the way each representative tried to initiate mediation. Why do you suppose that Schroeder decided to use a press conference to float the proposal? The stratagem failed here. Might there be other instances in which such a move would be wise? How did Wirth's approach differ?

3. Schroeder nominated an experienced mediation team—Gerald Cormick's Office of Environmental Mediation from Seattle—but the disputants rebuffed the suggestion. Why do you think the OEM was accepted in the Snoqualmie case (described in chapter 6) but not in the Foothills dispute?

4. The mediating role that Wirth assumed was quite different from the one that David O'Connor played in the Brayton Point case (described in chapter 8). Was this simply a matter of personal style, or did the cases call for different treatment? Could a mediator operating the way that O'Connor did have resolved the Foothills dispute? Would a Tim Wirth have succeeded in Brayton Point?

5. When O'Connor mediated Brayton Point, very explicit ground rules were adopted at the outset. Would such rules have been desirable here?

6. At various stages of the dispute, the parties made wildly divergent assessments of the potential impact of the dam on population growth, water demand,

and wildlife. Were these differences based on contradictory information and models, or did they reflect a more fundamental conflict in personal and social values? Ultimately, Wirth enlisted the Corps of Engineers to resolve some of these differences. We have seen data mediation in Brown Paper (chapter 4) and Holston River (chapter 5). How was it different here? What was Wirth's goal in involving the Corps of Engineers? Who else might have served the same function? What effect did this data negotiation have on the larger negotiation process?

7. One of the central factual disputes in Foothills was whether construction of the dam would increase suburban sprawl and thus worsen air pollution. The private consultant retained by the Corps of Engineers concluded that attempts to control growth by limiting water service were futile. The EPA strongly disagreed with this analysis but ultimately did not challenge it in the *Foothills Newsletter*. Why did the agency surrender such an important point?

8. Wirth defied many common mediation precepts. In Brayton Point, the parties had agreed that everyone had to be present at mediation sessions. By contrast, Wirth began his efforts by meeting separately with some of the more powerful groups. Moreover, O'Connor was viewed as nonpartisan, but Wirth was known to be in favor of dam construction. Should Wirth's success be regarded as an exception to the rule, or does it call the rule into question?

9. The Foothills case is an example of what the late Lon Fuller termed a *polycentric problem*. There were numerous issues, each one of which was intricately laced to the others. Consider the way in which Wirth structured the mediation agenda: What issues did he choose to tackle first and why? He attempted to segment the problem, getting resolution on particular points before moving on to others. What are the advantages and risks of this approach?

10. The Foothills dispute had dragged on for years before Wirth intervened. What techniques did he employ to accelerate the mediation process? Are they applicable to other disputes?

11. To prod the parties into agreement, Wirth arranged an all-night negotiating session. What are the risks inherent in this approach?

12. The Bureau of Land Management (BLM)—excluded from Wirth's intense negotiation process—expressed concern that the conservation plan worked out in those sessions differed from the conditions it had imposed on the Denver Water Board in its permit. Wirth, however, was not worried about this discrepancy, which still exists. In a sense, it could be said that the agreement that the DWB made with some parties was inconsistent with the understanding it had with another. What might explain Wirth's lack of interest in resolving this discrepancy, particularly in view of the importance of the water conservation issue?

13. As with many environmental cases, there was considerable difficulty in binding the parties. At one point, the Denver Water Board brought suit against EPA officials, environmental groups, and individuals seeking large money damages against them. By putting pressure on many of the dam opponents, this tactic may have spurred settlement. It also expanded the number of litigants, thus potentially binding more parties to any judicial resolution. The board's move caused much antagonism, however, and easily could have polarized the disputants even more. Was there any less risky method the board could have used to the same end?

14. It is ironic, of course, that after all the parties were included in the suit and after they came to agreement, the federal district court judge sitting in the case was reluctant to ratify the agreement in a consent decree. Should judges be required to accept a settlement that is satisfactory to all the parties? What options are open to the parties if the judge refuses to issue a consent decree?

15. The material in the following chapter will explore the ethical duties of a mediator. One important question is the degree of the mediator's responsibility—if any—for the terms of settlement. Here, resolution was reached when project sponsors agreed to pay some of the attorneys fees for the environmentalists. Was it Wirth's function to determine whether in seeking payment for themselves, the environmentalists' lawyers had compromised their clients' interests?

FOOTHILLS EPILOGUE

This postscript on Foothills is adapted from the conclusion of the case study prepared by Heidi Burgess.

Some readers and Foothills opponents may question the quality and wisdom of the Foothills settlement. As mentioned earlier, the settlement appeared better than any alternatives that were possible, although an even better outcome might have been reached had the social and political arrangements been different. Given the overwhelming political power of the Denver Water Board and the extent of local support for the project, construction of Foothills was essentially impossible to stop. If the opponents (especially the EPA) had been better organized and had started negotiations earlier, they may have been able to delay the project further or force the DWB to accept the downstream dam. However, the support of local politicians and the media for Foothills, together with the growing list of people waiting for new water taps, practically eliminated the possibility of entirely blocking the project.

In view of this, the Foothills result was a good one. The DWB obtained its

permits more quickly than it would have through litigation or further administrative action. The environmentalists received significant concessions, several of which almost certainly would not have been possible in a court judgment. Although they were not able to block the first stage of the Foothills project, the agreement increased their influence on future DWB projects and may have given them a better chance of prevailing in future water disputes.

The agreement also improved relations among many of the parties and set a precedent for open discussions and cooperation that will benefit both the parties and the public. Although disagreements of a similar nature are certain to recur, the pattern of cooperation and joint problem solving introduced by the Foothills negotiations may facilitate resolution of future disputes. Also, their success with negotiations will lessen the likelihood of stalemates.

On the other hand, the EPA and the environmentalists still believe that the project is unnecessary and that a much less expensive and less wasteful program of water conservation could accomplish the same ends. Unfortunately, a more extensive program for conservation was never given adequate study. Denver does not employ water meters in its older sections, and many residents still pay a flat monthly water rate. If a fraction of the money for Foothills had been invested in metering, inverted rate pricing, and other simple conservation stimuli, the environmental and economic savings might have been substantial. Conservation as an alternative to Foothills deserved serious consideration that it did not receive in the course of the dispute. After such consideration, the decision to construct Foothills with a program of impact mitigation and compensation might have been the wisest choice. But the decision was not a thoroughly informed one; and it is possible that the region's interests might have been better served by a stronger conservation plan.

THE ROLE OF THE PRESS

The press, most notably the *Denver Post*, played several distinct roles in the Foothills dispute. First, it was a conduit for information. Because of local interest in water development, the dam proposal was well publicized from the start. The publicity, in turn, likely generated still greater interest. The emergence of environmental opposition made the story all the more newsworthy. As with many such issues, it is impossible to determine how much the press was reflecting public opinion and how much it was generating it.

Some of the other major cases we have encountered were largely unreported. The Brayton Point coal conversion case, for example, attracted far less media attention than did Foothills. In part, this contrast may be due to the differing nature of the disputes. A controversy over the proposed construction of a dam may appear clear-cut; the issues can easily be understood, albeit on a

superficial level. By contrast, questions about the nonattainment status of the air shed and the potential effectiveness of precipitators can seem more obscure.

The difference in press attention can also be a function of media markets. Fall River, where Brayton Point is located, is near Boston and Providence, both of which have major television stations and newspapers. Yet the city is often overlooked by both. Had coal conversion been proposed for a generating plant in the immediate Boston vicinity, undoubtedly there would have been far more coverage. The character of an environmental debate thus is determined not merely by the technical issues at stake, but by the communications context in which they arise.

The press in Foothills was not only a conduit for information, but in the eyes of some disputants, it was a tool to be manipulated to further their interests. Representative Wirth used the press to keep the parties involved. His initial press releases, for example, gave the impression that the parties had agreed that the corps' study would be binding, although the parties actually felt that a firm agreement had not been made. (They agreed to abide by the corps' findings only if the study was fair and equitable.) Nevertheless, if either side had rejected the corps' conclusions without strong reasons, the public would have regarded it as backing out of an agreement. Had Wirth not used the press to publicize the corps' role, the EPA and the DWB could have repudiated the results of the engineering study more easily.

The Denver Water Board and the EPA both tried to use the press to obtain more coverage for their points of view. The EPA hoped to open up the corps' review to the scrutiny of the press and the public to legitimate their anti-Foothills stance. This strategy backfired, however, because the corps' findings were widely reported whereas the EPA's rebuttals were discussed less often. This gave the public a one-sided view of the final corps/EPA negotiated findings, further eroding public support for the EPA.

The press in Foothills also played a third role—that of a party of sorts. The *Denver Post* was not a mere neutral reporter of facts but a strong advocate of dam construction. Some environmentalists felt that the paper's position was reflected not only in strongly worded editorials but by one-sided general reporting. From their viewpoint, the *Post* was an important force with which they had to reckon.

It is difficult, nonetheless, to regard the press as simply another party. It is true that newspapers and television stations need not be mere bystanders in environmental disputes. They can certainly wield power by delivering support and controlling information. Yet, when the press is at the bargaining table, it is there ostensibly as an observer, not a participant. When the disputants deal among themselves, they may bargain over acceptable levels of particulate emissions or the amount to be spent for mitigation, but when they individually approach the press to try to influence its coverage and to win its support, the currency of exchange is often obscure. There was a period in American history in

which developers would offer bribes to reporters and editors, and government officials and politicians might counter with special favors. Though this kind of yellow journalism is largely gone, other kinds of power brokering still occur. Just as public officials must nurture press support, newspapers and television outlets always remember that they are businesses that cannot afford to alienate too many advertisers and readers. Similarly, reporters sometimes subconsciously tilt their stories in favor of sources who seem likely to provide good news material in the future. In a sense, there may be two parallel negotiations, one in which the parties bargain over the environmental problem, and another in which they court the press. If agreement ultimately is reached, the press will not be a signatory; yet, the degree of its enthusiasm for any settlement may be key to implementation.

In short, the press plays a role that is unique in important respects. Distinct from being a mere bystander, it can wield substantial power to further its own priorities. Yet, unlike the other parties, it seldom has a formal place in the proceedings.

In some instances, the role of the press may be defined by the other parties. In the Brayton Point case, for example, the parties to mediation agreed at the outset that they would tell the press only that they were meeting but would not reveal the content of the negotiation sessions. Where there is high mutual trust, a self-imposed gag rule may work, but if one party grows dissatisfied with the process, there may be a strong temptation to leak information to the press in hopes either of winning public support or perhaps even sabotaging the negotiation. In some instances, open-meeting or "sunshine" laws may compel agencies to negotiate in public. Most of these statutes, however, contain exceptions that cover sensitive discussions of lawsuit settlement. Even when an agency is completely within its legal rights in closing the door to the public, an aggressive newspaper or television station can wave the banner of the open meeting law and make it seem as if the officials are trying to hide from the public.

Most students of negotiation believe that serious discussions of controversial issues usually can take place only in private. This certainly has been the case in collective bargaining of labor disputes. Tentative concessions that invite reciprocal concessions might not be made in the glare of the public eye. Negotiators do not want to be accused by their constituents of selling out their interests or of bargaining poorly. Not everyone, however, agrees with the proposition that publicity inhibits negotiation. Lawrence Susskind describes a case that he mediated in which there was substantial public involvement and press coverage (see Susskind, *The Negotiated Investment Strategy in Columbus*). He believes that the presence of the press can be salutary overall. The press can monitor and confirm information; it can give bystanders more confidence that their interests have been represented and accommodated; and, as in Foothills, the press can be used to commit parties to agreements that otherwise would be difficult to en-

force. Susskind has particular hopes for the use of local cable television in environmental disputes. "Narrowcasting" would allow extensive information to be provided to communities that are too small to receive the attention of conventional broadcasters. Interactive systems could, in Susskind's view, be used to involve a greater segment of the public in the debate.

Thus far, the experience of cable television has not fulfilled this vision, but as vast areas of the country are now being wired, the technology will soon exist for improvising a new sort of political process, one based on negotiation among far more people than could fit around the traditional bargaining table.

It may well be that communications technology has advanced beyond our understanding of how best to use it. Social and political systems may have to be adapted before cable-based negotiation can take place. Still, there is a larger lesson in Susskind's musings: Disputants should not necessarily regard public participation and press scrutiny as negative. Parties may sometimes find it in their mutual interest to enhance the press's role rather than to diminish it.