

**Floods, Fires, Drought and More:
The Climate is Changing and Dispute Resolution Tools are Needed (Now!)**
indisputably.org/2020/01/theory-of-change-symposium-part-5-and-coming-attractions/
Theory-of-Change Symposium
January 19, 2020



[Lara B. Fowler](#) notes that addressing climate change – both in reducing greenhouse gas emission and adapting to the impacts from a changing climate – requires incredibly difficult conversations. She argues that the tools of dispute resolution – negotiation, mediation, and even arbitration – are critical in addressing these global challenges at all levels, local to global. She is a Senior Lecturer at Penn State Law School and Assistant Director for Outreach & Engagement, Penn State Institutes of Energy & the Environment. Currently, she is in Sweden on a Fulbright researching where people are working together on challenging water issues.

The Crisis and Opportunities in Climate Change

As I watch the news from Australia of the absolute devastation from numerous, massive wildfires or read about the worst ever floods in Jakarta, Indonesia, I see, now more than ever, the critical need for good dispute resolution tools to help address climate change issues. The urgency highlighted by the daily news provides a very good opportunity for the dispute resolution community to share our skills in negotiation, facilitation, mediation, and to be aware how arbitration is being used to shape outcomes related to climate change.

In the climate change world, the terms “mitigation” and “adaptation” are terms of art. Mitigation is the reduction in greenhouse gas emissions, notably carbon dioxide but also a range of other gases like methane or even nitrous oxide (used as an anesthetic in medical procedures). Adaptation is the process of adjusting to the impacts resulting from climate change, such as moving a town because of eroding coastlines, cutting electricity deliveries to avoid fires, or pumping groundwater to handle drought conditions. Obviously, mitigation and adaptation are extremely difficult tasks.

In response to the U.S. Government’s announcement of its intent to withdraw from the Paris Climate Agreement, some cities, states, tribes, businesses, universities, healthcare organizations, and faith groups created a coalition called “[We’re Still In.](#)” This coalition represents a commitment by the signatories to reduce their own greenhouse gas emissions and meet the goals of the Paris Climate Agreement.

Climate change is both a challenge and an opportunity. It is predicted to act as a “threat multiplier,” magnifying underlying tensions into larger threats and conflicts. As I work this year in Uppsala University’s Peace and Conflict Research Department, I’m

surrounded by discussion of armed conflicts and the devastating human impacts that result.

Climate change also is an opportunity. In her [2016 TedTalk](#), Christiana Figueres, the leader of the Paris Climate negotiations, noted that climate change gave her optimism, in part because of how it was bringing unusual parties together. Though global dynamics have changed since 2016, the We're Still In Coalition has made remarkable progress. In 2019, the [Global Commission on Adaptation](#) found that investing now in adaptation can repay up to ten times the amount invested, saving trillions of dollars over the long run.

The challenges of mitigation and adaptation offer critical opportunities to take advantage of our dispute resolution tools. People with negotiation, facilitation, and mediation skills could be incalculably valuable in having more productive conversations at all levels. Arbitration is already being invoked in many energy related disputes, especially investor-state disputes. In talking with a colleague who focuses on arbitration, a significant number of arbitration decisions are energy-related.

What Can We Do?

Based on my experience having worked in public policy for the State of Oregon, as a private practice facilitator and mediator, and now working in the academic sphere, I think there are many ways we can use dispute resolution skills to address critical problems of climate change. The following are some possible ways forward, which are not ranked in priority and which could be pursued simultaneously.

Work with Our Students to Engage Local Communities on Climate-Related Issues. Our students are quite aware of the concerns related to climate change and may be interested in knowing that their dispute resolution skills could be put to use locally. Many communities are trying to achieve climate-related goals. While focused on the *substance* of what they want to accomplish, such communities may not be as focused on the *process* to ensure that their goals can be supported and effectively implemented. Clinics, classes, or even individual students can be of immense help to a community or group thinking through these issues.

As an example, I taught “Mediation of Environmental and Public Policy Issues” during the 2018 spring semester. In this course, my law students helped facilitate a public dialogue on water management in our local region. They interviewed interested parties, conducted a situation assessment, and then worked with local elected officials to set up and conduct a public event that brought together more than 120 people. My students were thrilled to both learn skills and help the community. In turn, community leaders were pleased with the very professional help they received from the students.

Going forward, we need to solve some problems to use students to accomplish these goals. My students are concerned about getting practical experience and skills. How can we help meet our students’ and communities’ needs at the same time?

How can we match students' need for professional skill building with community needs? How can we convince local stakeholders that dispute resolution skills can be quite helpful in having very challenging conversations? How can we bridge the environmental world and the dispute resolution world, much as Lawrence Susskind has done at MIT or the University of Utah's S.J. Quinney School of Law's [Environmental Dispute Resolution Program](#) has done?

Bridge Areas of Expertise Within a University or Community. Changing energy systems and adapting to climate impacts require a wide range of knowledge. In a university system, it is critically important to engage colleagues working on climate science, energy, or other climate-related subjects. Colleagues at Penn State, for example, want more productive conversations within research teams; between research faculty, post docs, grad and law students; with policy makers; and with communities. In particular, I have heard a marked interest in negotiation training. We, in the dispute resolution world, can help lay the groundwork for better engagement about key climate challenges.

We should engage with existing programs and leverage the work we are doing to address climate challenges. We should partner with others who already focus on team science. For example, the [Interdisciplinary Integration Research Careers Hub \(Intereach\)](#) recently hosted [a webinar](#) on careers in team science facilitation. The [University Network on Collaborative Governance](#) also focuses on bridging university programs focused on collaborative governance.

We should build specific programs that seek to bridge between universities and communities, such as the University of Maryland's Francis King Carey School of Law's [Public Policy Conflict Resolution Fellows Program](#), which "brings together a diverse group of influential Maryland leaders to expand their negotiation, conflict resolution, and consensus-building skills" through 2.5 day training session. Another example is Florida State University's [Civic Advance Project](#), which recognizes communities for their engagement efforts. In one of these efforts, the [City of Smyrna Beach](#) "held a 10-month civic input process to gather ideas regarding resiliency and sustainability. One outcome was the creation of a \$15 million bond issue to purchase land that was slated for development along a critical watershed, Turnbull Creek. The group did significant public outreach. The bonds were approved with over 75% of votes cast."

Create "How To" Guides for Effective Processes to Address Climate Change.

I have been impressed by Ohio State's Moritz College of Law's [Divided Communities Project](#) in compiling key lessons learned from communities facing civil unrest.

Developing ADR tools and working with agencies at different levels can help bridge the dispute resolution and climate change worlds. Although there are numerous guides related to public policy engagement in general, we should develop similar materials specifically relevant to communities struggling with climate-related goals. This would take working together as practitioners, academics, and various stakeholders to

assemble straightforward and easy-to-use materials for communities or businesses to collaborate in achieving their climate-related goals.

An interesting example comes from California, which passed the State Groundwater Management Act in 2014 during the state's five-year drought. As part of this initiative, California [provided for facilitation assistance](#) and a set of tools for communities working to implement local regulations. In 2019, [a study](#) looking at the development of local groundwater agencies suggested that "local and state agencies should be doing more to educate their members on the value of alternative dispute resolution processes, like mediation and facilitation."

Bridge Areas of Expertise within the Legal Profession and American Bar Association. There are a lot of efforts in the legal world to deal with problems of greenhouse gas emissions, but there seems to be less linkage with the dispute resolution world.

In 2018, Michael B. Gerrard and John C. Dernbach published a book entitled "[Legal Pathways to Deep Decarbonization in the United States](#)." In August 2019, the [ABA adopted a climate resolution](#) encouraging its members to do pro bono work related to climate, particularly reduction of greenhouse gas emissions. These proposals particularly focus on changing laws associated with greenhouse gas emissions, such as promoting energy efficiency.

As Brian Farkas noted in his post, "[A Modest\(ish\) Proposal: Enhancing Impact Through Joint Spring Conferences](#)," we could build bridges between different parts of our own constituencies such as between the ABA Dispute Resolution Section and the Section on Energy, Environment, and Natural Resources (SEER). Several years ago, I worked with others to conduct a session at the Dispute Resolution Section conference on stormwater management. Unfortunately, this session was seen as an outlier and had only limited attendance. There may be many reasons for this, but connecting dispute resolution and substantive issues is important to realize our field's potential to solve important social problems.

The opportunity for bridging and leveraging different sections, or sub-committees, is very real. SEER has a committee on [environmental dispute resolution](#) and a different committee on [climate change, sustainable development and ecosystems](#). The Section on Dispute Resolution has a committee on Public Policy, Consensus Building, and Democracy. We should collaborate with each other.

The Pace Environmental Law Review and the Pace Energy & Climate Center offer an opportunity for this kind of discussion through an upcoming conference in November 2020 on energy and decarbonization. A call for abstracts is out now, due in May 2020; for more details, see [online](#).

Recognize Arbitration as a Key Part of Addressing Climate Change. Arbitration is an increasingly important part of the dispute resolution toolkit in energy and climate-

related topics. At a global level, cross-border disputes are likely to end up in arbitration. During a panel on energy and arbitration during the 2017 Penn State Energy Days forum, one speaker noted that the vast majority of energy cases are arbitrated. As noted above, many cases in arbitration deal with energy issues. In 2019, the International Chamber of Commerce (ICC) published a report entitled “[Resolving Climate Change Related Disputes through Arbitration and ADR](#).” While it discusses mediation as one tool, most of the report focuses on potential arbitration of climate-related disputes, particularly at an international level.

When we teach about arbitration, we should help our students better understand the substantive concerns related to climate change and energy. As noted in the ICC’s report, finding arbitrators who understand energy is a critical challenge.

There seems to be a sizable split between mediation and arbitration in the dispute resolution world, yet both these tools are important in preventing and resolving disputes. We should think constructively about how the various tools of dispute resolution can be used together.

Conclusion

The challenges of climate change are playing out now in communities around the globe. There are tremendous opportunities for our dispute resolution field to constructively engage with efforts to reduce greenhouse gas emissions and adapt to the rapidly changing conditions in our communities, regions, states, countries, and planet.