

FY 2010 ECR Policy Report to OMB-CEQ

On November 28, 2005, the Director of the Office of Management and Budget (OMB), and the Chairman of the President's Council on Environmental Quality (CEQ) issued a policy memorandum on environmental conflict resolution (ECR).

The memorandum requires annual reporting by departments and agencies to OMB and CEQ on progress made each year. This joint policy statement directs agencies to increase the effective use and their institutional capacity for ECR and collaborative problem solving.

ECR is defined in Section 2 of the memorandum as:

“third-party assisted conflict resolution and collaborative problem solving in the context of environmental, public lands, or natural resources issues or conflicts, including matters related to energy, transportation, and land use. The term “ECR” encompasses a range of assisted negotiation processes and applications. These processes directly engage affected interests and agency decision makers in conflict resolution and collaborative problem solving. Multi-issue, multi-party environmental disputes or controversies often take place in high conflict and low trust settings, where the assistance of impartial facilitators or mediators can be instrumental to reaching agreement and resolution. Such disputes range broadly from administrative adjudicatory disputes, to civil judicial disputes, policy/rule disputes, intra- and interagency disputes, as well as disputes with non-federal persons/entities. ECR processes can be applied during a policy development or planning process, or in the context of rulemaking, administrative decision making, enforcement, or litigation and can include conflicts between federal, state, local, tribal, public interest organizations, citizens groups and business and industry where a federal agency has ultimate responsibility for decision-making.

While ECR refers specifically to collaborative processes aided by third-party neutrals, there is a broad array of partnerships, cooperative arrangements, and unassisted negotiations that federal agencies enter into with non-federal entities to manage and implement agency programs and activities. The Basic Principles for Agency Engagement in Environmental Conflict Resolution and Collaborative Problem Solving presented in Attachment A (of the OMB/CEQ ECR Policy Memo) and this policy apply generally to ECR and collaborative problem solving. This policy recognizes the importance and value of the appropriate use of all types of ADR and collaborative problem solving.”

The report format below is provided for the fifth year of reporting in accordance with this memo for activities in FY 2010.

The report deadline is February 15, 2011.

We understand that collecting this information may be challenging; however, after compiling previous reports, the departments and agencies are requested to collect this data to the best of their abilities. The 2010 report, along with previous reports, will establish a useful baseline for your department or agency, and collect some information that can be aggregated across agencies. Departments should submit a single report that includes ECR information from the agencies and other entities within the department. The information in your report will become part of an analysis of all FY 2010 ECR reports. You may be contacted for the purpose of clarifying information in your report. For your reference, copies of prior year synthesis reports are available at www.ecr.gov.

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Date this report is being submitted:	February 15, 2011

Section 1: Capacity and Progress

1. Describe steps taken by your department/agency to build programmatic/institutional capacity for ECR in 2010, including progress made since 2009. If no steps were taken, please indicate why not.

[Please refer to the mechanisms and strategies presented in Section 5 of the OMB-CEQ ECR Policy Memo, including but not restricted to any efforts to a) integrate ECR objectives into agency mission statements, Government Performance and Results Act goals, and strategic planning; b) assure that your agency's infrastructure supports ECR; c) invest in support or programs; and d) focus on accountable performance and achievement. You are encouraged to attach policy statements, plans and other relevant documents.]

The Commission continued to take steps to build programmatic/institutional capacity for environmental conflict resolution (ECR) in FY 2010. Below are highlights of these activities and significant accomplishments during the year.

FERC Orders Promoting ADR/ECR:

In FY 2010, the Commission continued to identify issues and proceedings that lend themselves to consensual resolution. In Order No. 734, (available in e-library at FERC.gov) the Commission transferred all jurisdictional infrastructure complaints and disputes from Office of Enforcement to the Dispute Resolution Helpline. The majority of the cases that were transferred have an environmental component. This new authority for the Dispute Resolution Service (DRS) has resulted in an increased number of ECR cases in FY10 and will continue to increase ECR cases in FY11. By transferring authority for helpline concerns from the Enforcement Hotline to the DRS, the Commission showed its commitment to building institutional capacity for the use of ADR/ECR. The majority of new cases have used a third party neutral predominantly in a role of conciliator, and mediator to a lesser extent. The responsibilities were transferred to the DRS in May 1, 2010.

In past years the Commission has added order language to transmission interconnection agreements that gives any party to an interconnection dispute the right to request alternative dispute resolution (ADR)/ECR. In FY 2010, the Commission used mediation to assist parties with disputes over interconnection agreements. These interconnection disputes often arise from problems with integrating renewable energy from wind, solar, and methane onto the transmission grid. This new order language has increased the successful integration of renewable energy through an ECR process.

Joint Partnership Study on ADR/ECR (Phase 2):

The DRS partnered with the Harvard Negotiation and Mediation Clinical Program (HNMCP) to produce the Phase II study "Conflict Resolution at FERC". This study was a follow up on the Phase I study which assessed ADR use in the energy industry. The Phase II study focused internally on how energy conflicts are handled by different FERC offices, with an emphasis on identifying and building institutional capacity for ADR/ECR.

The DRS teamed with three HNMCP law students that fulfilled their clinical requirements over the course of one semester to develop and administer surveys and conduct one-on-one interviews with 35 FERC employees, representing many different offices and staff levels. These interviews were followed by focus group sessions to discuss the interview results and explore future DRS policies to incorporate more ADR/ECR in the Commission's process.

Phase II of the HNMCP broadly recommended the DRS increase its visibility within the Commission, raise awareness of dispute resolution services, and provide advanced substantive ADR training to Commission staff. The DRS is working to address these recommendations.

In FY 2011 the DRS will focus its attention on the study's findings to build more programmatic and institutional use of ADR/ECR at the Commission.

ADR/ECR Performance and Achievement Measures

The annual Performance Budget Request to the Office of Management and Budget tracks environmental collaborative problem-solving and ADR processes (including ECR). It also identifies specific performance-measurement data to demonstrate the extent to which such activities have supported the Commission's ADR and ECR initiatives.

The FY 2010 ADR/ECR performance and achievement measures are as follows:

- DRS completed 95 new ADR requests and referrals. The FY 2010 results exceeded the results of the base year. In FY 2004 the DRS received 41 requests/referrals.
- In FY2010, of mediated or facilitated cases closed during the reporting period, 93.3% achieved consensual agreement. This exceeds the target of 75% set for FY 2010.
- Customers for all casework and outreach services expressed favorable satisfaction with DRS. Of respondents to casework surveys, DRS received a 100% customer satisfaction rate. Of respondents to outreach surveys, DRS received a 90% customer satisfaction rate. This well exceeds the target of an 80% customer satisfaction rate set for FY 2010.
- DRS delivered 22 outreach events. In FY 2004 the DRS delivered 11 events.
- Of respondents to casework surveys, all affirmed that involvement of DRS saved them time and/or money over traditional processes. Affirmation from 100% of respondents exceeds the target of 75% set for FY 2010.

Section 2: Challenges

2. Indicate the extent to which each of the items below present challenges or barriers that your department/agency has encountered in advancing the appropriate and effective use of ECR.

	Extent of challenge/barrier		
	Major	Minor	Not a challenge/barrier
	Check <u>only</u> one		
a) Lack of staff expertise to participate in ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
b) Lack of staff availability to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
c) Lack of party capacity to engage in ECR	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
d) Limited or no funds for facilitators and mediators	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
e) Lack of travel costs for your own or other federal agency staff	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
f) Lack of travel costs for non-federal parties	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
g) Reluctance of federal decision makers to support or participate	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
h) Reluctance of other federal agencies to participate	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
i) Reluctance of other non-federal parties to participate	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
j) Contracting barriers/inefficiencies	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
k) Lack of resources for staff capacity building	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
l) Lack of personnel incentives	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
m) Lack of budget incentives	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
n) Lack of access to qualified mediators and facilitators	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
o) Perception of time and resource intensive nature of ECR	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
p) Uncertainty about whether to engage in ECR	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
q) Uncertainty about the net benefits of ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
r) Other(s) (please specify): _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
s) No barriers (please explain): _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Section 3: ECR Use

3. Describe the level of ECR use within your department/agency in FY 2010 by completing the table below. [Please refer to the definition of ECR from the OMB-CEQ memo as presented on page one of this template. An ECR “case or project” is an instance of neutral third party involvement to assist parties in reaching agreement or resolving a dispute for a particular matter. In order not to double count processes, please select one category per case for decision making forums and for ECR applications.]

	Cases or projects in progress ¹	Completed Cases or projects ²	Total FY 2010 ECR Cases ³	Decision making forum that was addressing the issues when ECR was initiated:				Of the total FY 2010 ECR cases indicate how many your agency/department	
				Federal agency decision	Administrative proceedings /appeals	Judicial proceedings	Other (specify)	Sponsored ⁴	Participated in but did not sponsor ⁵
<i>Context for ECR Applications:</i>									
Policy development	_____	_____	_____	_____	_____	_____	_____	_____	_____
Planning	_____	_____	_____	_____	_____	_____	_____	_____	_____
Siting and construction	25 *includes 1 DRS case	15 *includes 3 DRS cases	40	40	_____	_____	_____	40	_____
Rulemaking	_____	_____	_____	_____	_____	_____	_____	_____	_____
License and permit issuance	25 *includes 4 with separated staff	10 *includes 3 DRS cases	35	35	_____	_____	_____	35	_____
Compliance and enforcement action		103 *includes 83 Enforcement	103	103	_____	_____	_____	103	_____

¹ A “case in progress” is an ECR case in which neutral third party involvement began prior to or during FY 2010 and did not end during FY 2010.

² A “completed case” means that neutral third party involvement in a particular matter ended during FY 2010. The end of neutral third party involvement does not necessarily mean that the parties have concluded their collaboration/negotiation/dispute resolution process, that all issues are resolved, or that agreement has been reached.

³ “Cases in progress” and “completed cases” add up to “Total FY2010 ECR Cases”.

⁴ Sponsored - to be a sponsor of an ECR case means that an agency is contributing financial or in-kind resources (e.g., a staff mediator's time) to provide the neutral third party's services for that case. More than one sponsor is possible for a given ECR case.

⁵ Participated, but did not sponsor - an agency did not provide resources for the neutral third party's services for a given ECR case, but was either a party to the case or participated in some other significant way (e.g., as a technical expert advising the parties).

		Hotline matters and 20 DRS cases								
Implementation/monitoring agreements	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
Other (specify): _____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
TOTAL	50	128	178	178	_____	_____	_____	_____	178	_____
	(the sum should equal Total FY 2010 ECR Cases)			(the sum of the Decision Making Forums should equal Total FY 2010 ECR Cases)					(the sum should equal Total FY 2010 ECR Cases)	

4. Is your department/agency using ECR in any of the substantive priority areas you listed in your prior year ECR Reports? Indicate if use has increased in these areas since they were first identified in your ECR report. Please also list any additional priority areas identified by your department/agency during FY 2010, and indicate if ECR is being used in any of these areas. Note: An overview of substantive program areas identified by departments/agencies in FY 2009 can be found in the FY 2009 synthesis report.

List of priority areas identified in your department/agency prior year ECR Reports	Check if using ECR	Check if use has increased in these areas
Natural gas facility certificate application	✓	✓
Hydropower licensing/relicensing application	✓	<input type="checkbox"/>
Liquefied natural gas facility authorization application	✓	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
List of additional priority areas identified by your department/agency in FY 2010	Check if using ECR	
Renewable energy interconnections	✓	
_____	<input type="checkbox"/>	
_____	<input type="checkbox"/>	
_____	<input type="checkbox"/>	

Please use an additional sheet if needed.

5. It is important to develop ways to demonstrate that ECR is effective and in order for ECR to propagate through the government, we need to be able to point to concrete benefits; consequently, we ask what other methods and measures are you developing in your department/agency to track the use and outcomes (performance and cost savings) of ECR as directed in Section 4 (b) of the ECR memo, which states: *Given possible savings in improved outcomes and reduced costs of administrative appeals and litigation, agency leadership should recognize and support needed upfront investments in collaborative processes and conflict resolution and demonstrate those savings and in performance and accountability measures to maintain a budget neutral environment* and Section 4 (g) which states: *Federal agencies should report at least every year to the Director of OMB and the Chairman of CEQ on their progress in the use of ECR and other collaborative problem solving approaches and on their progress in tracking cost savings and performance outcomes. Agencies are encouraged to work toward systematic collection of relevant information that can be useful in on-going information exchange across departments?* [You are encouraged to attach examples or additional data]

The DRS continues to track and report on performance of ECR services including cases, outreach activities, educational programs, time spent to resolve ADR/ECR cases, cost savings, and satisfaction with the ADR/ECR process.

In FY 2010, the DRS created a new database to more accurately track all of its casework. As directed in section 4(g) of the ECR memo, when the DRS received new authority in Order 731 to use ECR process to address jurisdictional infrastructure disputes such as those between pipeline companies and landowners, the DRS recognized a need to better track ECR disputes. All new cases are screened for an environmental component during intake for the new database, which makes reporting the use and outcome of ECR case work and measuring the amount of time it takes to reach resolution by process much easier for the DRS to evaluate for its performance measures and reporting information.

In FY2010, the DRS disseminated a Tenth Anniversary Newsletter of ***FERC ADR News*** that illustrated, among other things significant outcomes, ADR/ECR performance outcomes over a decade.

A step in the direction of tracking use and outcomes of ADR/ECR is the Phase 2 joint FERC- HNMCP partnership study, which evaluated the use of ADR/ECR processes in the electric, hydroelectric, and natural gas industries based on interviews of 35 targeted Commission employees. The study gathered some data on ADR/ECR, how it is being used, whether its use could be expanded, and whether current conflict resolution tools are effective based on quantitative and qualitative analysis.

Finally, in FY 2010 the DRS completed a new Intranet site for FERC employees. The goal of updating the Commission's Intranet site was to help other FERC employees understand the types of cases that can be resolved through an ADR/ECR process and

other services such as training and facilitating meetings (such as scoping) that the DRS could provide advisory staff in accomplishing its goals. In FY2011 the DRS plans to build more content and drive more traffic to this resource.

6. Describe other significant efforts your agency has taken in FY 2010 to anticipate, prevent, better manage, or resolve environmental issues and conflicts that do not fit within the Policy Memo's definition of ECR as presented on the first page of this template.

In April 2010 the Commission created a series of web-based tools to assist developers of small hydropower projects with, among other things, enhanced coordination and consultation with stakeholders and other agencies.

In May 2010 the Commission and the State of California signed an MOU to coordinate procedures and schedules for the review of hydrokinetic projects off the California coast.

In August 2010 the Commission and the State of Colorado signed an MOU to simplify procedures authorizing small-scale hydropower projects in Colorado, incorporating increased consultation, coordination, and information sharing of relevant economic, environmental and technical data.

Section 4: Demonstration of ECR Use and Value

7. Briefly describe your departments'/agency's most notable achievements or advances in using ECR in this past year.

FERC's Strategic Plan

The DRS contributed to a Commission-led initiative to seek input from external stakeholders to advance the use of consensual resolution of disputes and particularly, ADR/ECR services and the use of a neutral third-party to prevent and resolve energy conflicts. FERC's Strategic Plan (2009-2014) specifically identifies "the use of ADR services" as a strategy to promote broad stakeholder involvement/participation to meet the Commission's energy regulatory goals and objectives. Meetings with external stakeholders in four energy sectors the Commission regulates began at the end of FY 2010. The Strategic Plan can be viewed at www.ferc.gov.

Outreach Achievements

American Cultural Resources Association (ACRA): The Commission's DRS engaged an audience of 119 cultural resource industry professionals for ACRA to present on ECR and how to resolve environmental and cultural resource conflicts arising from federal undertakings.

California Public Utility Commission (CPUC): The DRS conducted training for CPUC executives and Administrative Law Judges on effective tools DRS mediators have employed to resolve complex regulatory and environmental disputes. FERC and the CPUC are identifying opportunities, inclusive of training, to bolster and broaden the use of ADR/ECR techniques in the energy decision-making and collaborative stakeholder process in the future.

52nd Annual Regulatory Studies Program: This summer the DRS gave two workshops at the Institute for Public Utilities Annual regulatory Studies Program at Michigan State University. The training focused on teaching regulators about the mediation process.

8. ECR Case Example

- a. Using the template below, provide a description of an ECR case (preferably completed in FY 2010). Please limit the length to no more than 2 pages.

Name/Identification of Problem/Conflict
<p>Overview of problem/conflict and timeline, including reference to the nature and timing of the third-party assistance, and how the ECR effort was funded</p> <p>Recently, the Commission’s Dispute Resolution Service (DRS) resolved a multi-party dispute involving transmission for a large proposed wind farm. The parties to this dispute were the potential wind farm generator and two transmission providers. Their disagreements involved the type of transmission one of the transmission providers would provide the generator.</p> <p>Before DRS became involved the parties tried to negotiate a transmission arrangement that worked for all of them. In FY 2010, when they could not resolve their conflicts, one of the transmission providers filed two sets of unexecuted transmission service agreements with the Commission. The delivery point on the first transmission provider’s system the generator wanted to use was highly constrained, resulting in the generator not being able to deliver as much output as it desired during certain times of the year. In its order the Commission accepted one set of agreements to become effective in the future and rejected the other set without prejudice. The order encouraged the parties to use the DRS to resolve their differences. When the DRS contacted the parties, they determined mediation would be the most appropriate ADR/ECR process. During FY 2010, DRS worked with the parties. They reached agreement in early FY 2011 and filed with the Commission. The Commission accepted the filing shortly after it was filed.</p> <p>No outside funding was required for ECR services. The Commission’s DRS assisted parties in the resolution of their conflict.</p>
<p>Summary of how the problem or conflict was addressed using ECR, including details of any innovative approaches to ECR, and how the principles for engagement in ECR were used (See Appendix A of the Policy Memo, attached)</p> <p>Through the DRS-guided mediation process, the parties reached agreement. The addition of a co-mediator toward the end of the mediation aided the process resulting in the parties reaching a timely agreement.</p> <p>The conflict itself was resolved through the parties reaching an arrangement that allows the generator flexible transmission arrangements with the first transmission provider. This arrangement reduces the number of curtailable hours and thereby the cost of the transmission agreements. Further, the second transmission provider is studying the creation of a new delivery point on its system which the generator might prefer. If the second transmission</p>

provider creates the new delivery point, the generator will have a one-time option to switch to the new delivery point.

The principles of engagement per the ECR memo were used in this fashion:

- Informed Commitment - The Commission issued an order involving the DRS and ADR/ECR type of engagement.
- Balanced/Voluntary Representation – The DRS co-mediators ensured the process was balanced to address parties’ concerns and interests.
- Timeliness – The decision and outcome are timely.

Identify the key beneficial outcomes of this case, including references to likely alternative decision making forums and how the outcomes differed as a result of ECR

Having the parties collaborate to reach a solution that met all parties’ interests allowed this project to move forward. The use of ADR/ECR resulted in giving the parties more certainty as to the project’s path while also saving the parties litigation fees. Had the parties proceeded through the adjudicative process it is may have taken longer to reach resolution/completion and one party would have probably won while the other would have lost. Depending on the outcome of the adjudicative process, the decision may have been so unfavorable to the generator that it might have been necessary to give up the project altogether.

Reflections on the lessons learned from the use of ECR

This mediation process demonstrated that when parties collaborate and work together toward a common goal with a third-party neutral, they most often achieve more timely results without going through the adjudicative process. Further, support for ADR/ECR at the highest level of the Commission and in the Commission’s Strategic Plan (2009 -2014) adds heightened credibility and legitimacy to the value of third-party neutral services in the resolution of regulatory conflicts.

b. Section I of the ECR Policy identifies key governance challenges faced by departments/agencies while working to accomplish national environmental protection and management goals. Consider your departments'/agency's ECR case, and indicate if it represents an example of where ECR was or is being used to avoid or minimize the occurrence of the following:

	Check <u>all</u> that apply	Check if	
		Not Applicable	Don't Know
Protracted and costly environmental litigation;	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Unnecessarily lengthy project and resource planning processes;	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Costly delays in implementing needed environmental protection measures;	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Foregone public and private investments when decisions are not timely or are appealed;	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Lower quality outcomes and lost opportunities when environmental plans and decisions are not informed by all available information and perspectives; and	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Deep-seated antagonism and hostility repeatedly reinforced between stakeholders by unattended conflicts.	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

9. Please comment on any difficulties you encountered in collecting these data and if and how you overcame them. Please provide suggestions for improving these questions in the future.

Please attach any additional information as warranted.

Report due February 15, 2011.

Submit report electronically to: ECRReports@omb.eop.gov

Attached A. Basic Principles for Agency Engagement in Environmental Conflict Resolution and Collaborative Problem Solving

**Basic Principles for Agency Engagement in
Environmental Conflict Resolution and Collaborative Problem Solving**

Informed Commitment	Confirm willingness and availability of appropriate agency leadership and staff at all levels to commit to principles of engagement; ensure commitment to participate in good faith with open mindset to new perspectives
Balanced, Voluntary Representation	Ensure balanced inclusion of affected/concerned interests; all parties should be willing and able to participate and select their own representatives
Group Autonomy	Engage with all participants in developing and governing process; including choice of consensus-based decision rules; seek assistance as needed from impartial facilitator/mediator selected by and accountable to all parties
Informed Process	Seek agreement on how to share, test and apply relevant information (scientific, cultural, technical, etc.) among participants; ensure relevant information is accessible and understandable by all participants
Accountability	Participate in the process directly, fully, and in good faith; be accountable to all participants, as well as agency representatives and the public
Openness	Ensure all participants and public are fully informed in a timely manner of the purpose and objectives of process; communicate agency authorities, requirements and constraints; uphold confidentiality rules and agreements as required for particular proceedings
Timeliness	Ensure timely decisions and outcomes
Implementation	Ensure decisions are implementable consistent with federal law and policy; parties should commit to identify roles and responsibilities necessary to implement agreement; parties should agree in advance on the consequences of a party being unable to provide necessary resources or implement agreement; ensure parties will take steps to implement and obtain resources necessary to agreement