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## One Quest for Eleven Distinct Wine Regions: How Implementing Mediation Would Benefit the AVA Creation Process

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*One Quest for Eleven Distinct Wine Regions*  
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# One Quest for Eleven Distinct Wine Regions: How Implementing Mediation Would Benefit the AVA Creation Process

Jayme Lehman\*

## I. INTRODUCTION

Paso Robles is a region just north of San Luis Obispo in California and is home to more than 200 wineries offering dozens of different varietals of wine, from albariño, a summery Spanish white, to pinot noir, a smooth, popular red. Paso Robles is home to large wineries, like J. Lohr, whose bottles can be found nationwide in grocery stores, and boutique operations, like Aaron Wines, whose bottles may be hard to find except online. Paso Robles has been making news in the wine industry for years because of its offerings, but more recently, Paso Robles has been the center of a long-standing dispute over American Viticultural Area (AVA) and their creation and modification process.

An AVA must be recognized and approved by the Alcohol and Tobacco Tax and Trade Bureau (TTB), the federal group that regulates a large portion of the United States alcoholic beverage industry.<sup>1</sup> An AVA is one commonly noted element on wine bottle labels and refers to the geographic

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1. *About TTB, ALCOHOL & TOBACCO TAX & TRADE BUREAU*, <http://ttb.gov/about/index.shtml#Who> (last updated Aug. 25, 2014).

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origin of the wine, also known as the appellation of origin.<sup>2</sup> This may be as broad as the state name where it was produced, such as Oregon or Arizona, or as narrow as Ballard Canyon or Oakville, a specially designated area with California's Napa Valley region.<sup>3</sup> The idea behind an AVA is based in part on the European system of denominating areas as specific winegrowing regions that are distinct because of their *terroir*.<sup>4</sup> *Terroir* is a French term without an English equivalent but conveys the idea that the grapes grown on one portion of land can produce a very different wine than the same varietal of grapes grown on a different portion of land<sup>5</sup> because of the effects of climate, soil quality, and elevation.<sup>6</sup>

Because the United States had to create and implement its own system and did not decide on a sufficient method until 1978,<sup>7</sup> most of the winegrowing regions within the nation have had to submit petitions to the TTB in order to establish AVAs. Paso Robles is one such region in

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2. RICHARD MENDELSON, FROM DEMON TO DARLING: A LEGAL HISTORY OF WINE IN AMERICA 145 (2009) [hereinafter FROM DEMON TO DARLING].

3. 27 C.F.R. § 4.25(e)(3) (2012).

A wine may be labeled with a viticultural area appellation if:

- (i) The appellation has been approved under Part 9 of this title . . . ;
- (ii) Not less than 85 percent of the wine is derived from grapes grown within the boundaries of the viticultural area; . . . ;
- (iv) In the case of American wine, it has been fully finished within the State, or one of the States, within which the labeled viticultural area is located . . . .

*Id.*

4. FROM DEMON TO DARLING, *supra* note 2, at 142.

5. RICHARD MENDELSON, WINE IN AMERICA: LAW AND POLICY 252 (Vicki Been et al. eds., 2011) [hereinafter WINE IN AMERICA].

6. *Id.*

7. FROM DEMON TO DARLING, *supra* note 2, at 145. TTB's predecessor, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), considered a variety of ideas on how to regulate winegrowing regions. *Id.* at 144. One idea was to cede this authority to the individual states and allow each to implement its own appellation system. *Id.* Another idea was to create "seal wines," a stamp of approval from ATF on particular wines "that indicated either a 'viticultural area' defined as 'a delimited grape growing region, distinguishable by geographic features,' or a vineyard designation, defined as a continuous plot of land under the same ownership." *Id.* ATF abandoned this second idea in fear that the American people would view a seal as governmental endorsement of an alcoholic beverage. *Id.*

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California that has been established with the TTB as an AVA since 1983.<sup>8</sup> However, Paso Robles is the largest single AVA in California,<sup>9</sup> and in 2007, the Paso Robles Wine Country Alliance filed a new petition with the TTB requesting to subdivide and create eleven new AVAs nested within the Paso Robles AVA.<sup>10</sup> After years of submitting information and research to the TTB accompanied by “public comment” periods, where anyone could voice his or her opinion regarding a petitioned-for AVA, the TTB ultimately denied the request for the eleven new AVAs.<sup>11</sup> At the same time, a different, new AVA located within the Paso Robles AVA, entitled Paso Robles Westside, was also requested and subsequently denied for failure to establish that the name Paso Robles Westside had any knowable viticultural significance.<sup>12</sup> Additionally, a request to expand the boundaries demarking the Paso Robles AVA was approved, adding 2,635 acres to it.<sup>13</sup> The Paso Robles Wine Country Alliance did not give up in its quest for subdivision, though; in September 2013, it filed another petition with the TTB, again requesting the eleven new AVAs.<sup>14</sup>

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8. 27 C.F.R. § 9.84 (2012).

9. Jason Haas, *Celebrating 11 New AVA's in Paso Robles*, TABLAS CREEK BLOG (Sept. 28, 2013), <http://tablascreek.typepad.com/tablas/2013/09/celebrating-11-new-avas-in-paso-robles.html>.

10. Daniel Sogg, *Paso Robles Vintners Divided over Subappellations*, WINE SPECTATOR (Jan. 31, 2007), [http://www.winespectator.com/webfeature/show/id/Paso-Robles-Vintners-Divided-Over-Subappellations-\\_3375](http://www.winespectator.com/webfeature/show/id/Paso-Robles-Vintners-Divided-Over-Subappellations-_3375); Laura Ness, *The Appellation Divide: Can the Paso Pie Be Cut Without Ruining the Crust*, APPELLATION AMERICA (Apr. 30, 2007), <http://wine.appellationamerica.com/wine-review/386/Paso-Robles-AVA-Division.html>.

11. Proposed Establishment of the Paso Robles Westside Viticultural Area (2006R-087P), 74 Fed. Reg. 82 (proposed Apr. 30, 2009), available at <http://www.gpo.gov/fdsys/pkg/FR-2009-04-30/html/E9-9855.htm>.

12. *Id.*

13. Proposed Expansion of the Paso Robles Viticultural Area (2008R-073P), 74 Fed. Reg. 12 (Jan. 21, 2009) (to be codified at 27 C.F.R. pt. 9.84), available at <https://www.federalregister.gov/articles/2009/01/21/E9-994/expansion-of-the-paso-robles-viticultural-area-2008r-073p>.

14. *Eleven Viticultural Areas Proposed Within the Paso Robles Viticultural Area (TTB)*, PASO ROBLES WINE COUNTRY ALLIANCE (Sept. 20, 2013), <http://www.pasowine.com/media/viewpress.php?id=609>.

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AVAs are important to both wine producers and to consumers for a number of reasons. The use of an AVA on a wine label “allows vintners to describe more specifically the origin of their wines to consumers and allows consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to its geographical origin.”<sup>15</sup> It is a way to build an identity that can be easily recognized by the general public and to distinguish the characteristics of one wine from another.<sup>16</sup> For example, just the words “Napa Valley” are quickly associated with Northern California, cabernet sauvignon vineyards, and a celebrated, forty-year history of winemaking. The ability of a winemaker to print the words Napa Valley on its label can be a marketing tactic—these two words carry with them an assumed public confidence in the contents within the bottle.<sup>17</sup>

The process of creating or amending AVAs can be difficult to manage and certainly requires much patience. The entire process of petitioning the TTB requires arguments, evidence, and public comments to be submitted to the TTB so that it can make decisions.<sup>18</sup> This method is time-consuming and demanding, not only for the TTB but also for the committee and the winegrowers that dispute the proposed name of an AVA, as to whether there is enough evidence of viticultural differentiation in an area, whether the AVAs should be further divided, and if so, where the boundaries should be.<sup>19</sup> In the instance of Paso Robles and its petitions to the TTB over the past decade, essentially all of these problems have arisen.

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15. Establishment of the Calistoga Viticultural Area (2003R-496P), 74 Fed. Reg. 234 (proposed Dec. 8, 2009), available at <http://www.gpo.gov/fdsys/pkg/FR-2009-12-08/html/E9-29217.htm>.

16. Haas, *supra* note 9.

17. *See id.*

18. *American Viticultural Area Manual for Petitioners*, ALCOHOL & TOBACCO TAX & TRADE BUREAU 4-6 (Sept. 2012), available at [http://www.ttb.gov/wine/p51204\\_ava\\_manual.pdf](http://www.ttb.gov/wine/p51204_ava_manual.pdf) [hereinafter *AVA Manual*].

19. *Id.* TTB warns prospective petitioners that the process may take years to complete and perfect. *Id.* at 6. “The shortest approval time I am aware of was an amendment to the Chalk Hill viticultural area several years ago which sailed through in 9 months, partly due to unanimous support from growers and wineries in the area.” Sara Schorske, *American Viticultural Areas: Boon or Boondoggle?*, VINEYARD & WINERY MGMT. (Mar./Apr. 2001), available at [136](http://www.csa-</a></p></div><div data-bbox=)

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This article proposes that introducing both an “intent to petition” stage as well as mediation during the early phases of the AVA petitioning process will streamline the process and more easily address concerns that opposed parties bring up. In the current formal process, once TTB accepts a petition, it allows for a period of public comment.<sup>20</sup> In this way, there is already a form of dispute resolution in that the TTB is requesting information both in favor of and against the proposal, and this entire process is handled outside of a courtroom. However, the majority of the public comments are in the aforementioned problem areas (the proposed name, the boundaries, the evidence relied upon, and the viticultural distinctiveness of the area), and the TTB will, pursuant to its own discretion, make the final decision.<sup>21</sup> If mediation were introduced at some earlier stage, the petitioners would be made aware of the most contentious areas of their proposals and could possibly resolve disputes in advance of the public comment period. The TTB would then be presented with a clearer, more uniform petition, or in the event of a complaint arriving after the establishment of an AVA, a method to address the concern outside of court.

This article will address the petition process and its pitfalls and will provide a recommendation regarding changes that can be made in order to improve the system. Section II will first address the specific requirements that must be presented to the TTB when petitioning for a new or modified AVA. Section II will then discuss the options available to the TTB to address incoming petitions. Section III will examine the three areas of an

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compliance.com/html/CSA-Articles/american-viticultural-areas.html. See Sogg, *supra* note 10 (finding that in the Paso Robles petition for eleven nested AVAs, “the committee has already spent more than \$100,000 on soil and climate studies, as well as legal and administrative expenses”).

20. AVA Manual, *supra* note 18, at 11. There is no general, specified number of days for the length of the public comment period; it can be as little as 60 days, and it may be as long as 120 days. See Haas, *supra* note 9; Wine—Notices of Proposed Rulemaking, ALCOHOL & TOBACCO TAX & TRADE BUREAU, <http://www.ttb.gov/wine/wine-rulemaking.shtml> (last visited Feb. 27, 2014) (listing Notices of Proposed Rulemaking and providing the dates that the public may comment on the notices).

21. AVA Manual, *supra* note 18, at 10-11.

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AVA petition that can be the most problematic and will cite specific examples of those problem areas (with an emphasis on the Paso Robles petition). Section IV introduces the suggestion to create a new intent to petition stage at the onset of the process and recommends using mediation to resolve complaints that arise in the process. Lastly, Section V notes that this article is not stating that mediation is the only method for updating this process, but mediation is similar to an option already available to the TTB. Mediation also achieves the goals of the public comment period but is more efficient when combined with the public comment period.

## II. THE PROCESS TO PETITION FOR A NEW OR MODIFIED AVA

In order to establish a new AVA or modify an already existing AVA, a person or group must file a petition with the TTB.<sup>22</sup> The changes that can be made to an already existing AVA are: (1) creating a new AVA that is entirely or partially within an already existing AVA; (2) changing the boundaries of an AVA; and (3) changing the name of an existing AVA.<sup>23</sup> Depending on the nature of the petition, different information will be required by the TTB.<sup>24</sup> For the purposes of this article, the process for creating an entirely new AVA and its components will be addressed.

### A. *The Required Evidentiary Portions of a Petition*

The required contents of a petition are: (1) Evidence that the name selected is known (on a local or national scale) in association with the designated area; (2) Evidence to support the creation of the boundaries requested for the AVA; (3) Evidence to support a decision that the area is of viticultural distinctiveness (i.e., that the soil, climate, topography, and general geography of the area are different from those components of

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22. *Id.* at 5.

23. *Id.* at 5-6.

24. *Id.*

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another area); and (4) Evidence that the requested boundaries are founded on features located on U.S. Geological Survey's topographical maps.<sup>25</sup>

### 1. The Name of an AVA

An AVA may not be given a name chosen at random by the petitioner. The TTB requires that:

The proposed name must directly relate to the proposed AVA location, and both the name as well as the exhibits in support of it must derive from sources other than the petitioner. . . . [T]he name must have a current and direct relationship to the area, even though it may also have a historical basis.<sup>26</sup>

A petitioner submitting this name to the TTB must indicate to the TTB why the name was chosen and why it would be an appropriate designation for the area.<sup>27</sup> In other words, there must be some pre-existing nexus for the choice. A petitioner must submit information, such as maps, books, newspapers, or even statements from local individuals affirming knowledge of the name and its association with the area.<sup>28</sup>

Additionally, a petitioner would be unwise to choose the name of a local vineyard or other smaller landmark, such as the name of a street that traverses a part of town; the name selected must be known and associated with the entire region that has been included in the petition.<sup>29</sup> Because the AVA is supposed to be distinctive, a petitioner also must present a name to the TTB that will not be misconstrued with another area.<sup>30</sup> The TTB is

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25. 27 C.F.R. § 9.12 (2012).

26. *AVA Manual*, *supra* note 18, at 13.

27. *Id.*

28. *WINE IN AMERICA*, *supra* note 5, at 256.

29. *AVA Manual*, *supra* note 18, at 13. The name chosen and proposed does not need to have any individual association with wine or viticulture. *WINE IN AMERICA*, *supra* note 5, at 256. Napa of Napa Valley is a Native American term that was associated with that particular area of Northern California. *Id.*

30. *AVA Manual*, *supra* note 18, at 13. Take, for example, the name Sunshine Valley. This is a ski resort in British Columbia, Canada, the name of a farm in Missouri, and horse stables in Oregon. If a petitioner requested the name "Sunshine Valley AVA" from the TTB, the petitioner

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primarily concerned that the requested name not be “misdescriptive and confusing to consumers.”<sup>31</sup> For example, when creating the Temecula AVA in Southern California, the TTB determined not to include any vineyards within the nearby city of Murrieta on the basis that grapes grown in Murietta were never associated with the name Temecula, which is another city.<sup>32</sup>

In the event that a proposed AVA name is identical or contains identical words as a pre-existing brand name, the TTB is hesitant to approve such a name.<sup>33</sup> The TTB acknowledges that a brand name has a value all its own and that consumers may not be savvy enough to be able to distinguish the brand name from the AVA.<sup>34</sup> One exception to such an idea occurred with the Chalone Vineyard, who allowed its name to be used as the AVA name; however, Chalone Vineyard “owned or controlled, and intended to use, all the grapes in the Chalone AVA,” so the TTB’s concerns regarding consumer misconceptions were assuaged.<sup>35</sup>

## 2. The Boundaries of an AVA

The boundaries of AVAs are a unique concept when compared to the boundary-delineating methods used by European nations, like France.<sup>36</sup> The French method has been in place for centuries and uses property lines (which have not changed) to determine the extent of an *origen contrôlée*.<sup>37</sup>

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would have to present evidence indicating that Sunshine Valley is something that a consumer would associate with that particular area.

31. WINE IN AMERICA, *supra* note 5, at 256. The TTB is charged with upholding the “twin aims” of the Federal Alcohol Administration Act of 1935: to give consumers adequate information regarding a product and to ensure that labeling does not deceive consumers. See 27 U.S.C. §§ 201-219(a) (2006).

32. WINE IN AMERICA, *supra* note 5, at 256-57 (citing ATF Final Rule, 49 Fed. Reg. 42563 (Oct. 23, 1984) (to be codified at 27 C.F.R. pt. 9)).

33. AVA Manual, *supra* note 18, at 13.

34. *Id.*

35. WINE IN AMERICA, *supra* note 5, at 256 (citing ATF Final Rule, 47 Fed. Reg. 25517 (June 14, 1982) (to be codified at 27 C.F.R. pt. 9)).

36. *Id.* at 257.

37. *Id.*

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The TTB, on the other hand, requires “historical or current evidence”<sup>38</sup> to support why a boundary line was drawn where it was, and the boundaries are often geographical in nature (i.e., a river, a mountain, or a road).<sup>39</sup>

The petition must also indicate to the TTB the ways in which the area included within the boundary demarcations are similar as well as the reasons that the areas excluded from the region are different and should not be included when the TTB orders the boundaries.<sup>40</sup> Also, if “elevation plays a role in determining the boundary . . . , an explanation of why grape-growing occurs above or below a certain elevation line should be included, if available.”<sup>41</sup>

### 3. Evidence Regarding Viticulturally Distinctive Features

The area petitioned for must be viticulturally distinctive from the surrounding areas; that is, the characteristics of the land and the environment must be such that the grapes grown in that area are different from the grapes grown in the excluded locations.<sup>42</sup> These factors include “temperature, humidity, precipitation, wind direction, and speed” as well as the soil quality, watershed pathways, geology, topography, and elevation.<sup>43</sup> This evidence is decidedly scientific in nature and requires the collection of data over extended periods of time.<sup>44</sup> If available, the TTB would also like to

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38. *Id.*

39. *Id.*

40. *AVA Manual*, *supra* note 18, at 14.

41. *Id.*

42. Schorske, *supra* note 19; Alan Goldfarb, *AVA Consultants: How Will the AVA System Be Altered?*, APPELLATION AMERICA (Sept. 4, 2007), <http://wine.appellationamerica.com/wine-review/465/AVA-consultants-analysis.html> (“The Napa Valley, for instance, has so many climates, soil types, terrain, that how can you say it’s different from surrounding areas? But the level of distinction is very different when looking at a much smaller appellation, for example, Sonoma Mountain. That difference makes it hard for TTB to strictly apply the criteria.”).

43. *WINE IN AMERICA*, *supra* note 5, at 258.

44. *AVA Manual*, *supra* note 18, at 14-15. Features such as rainfall, temperature, and wind direction and speed cannot be accurately reported if only one year’s worth of data are collected. For these elements, a petitioner would have to collect years’ worth of data and synthesize that data to

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have data from excluded areas in order to have a stronger understanding as to why that area was not included and what features create the distinguishing characteristics.<sup>45</sup> “The discussion of distinguishing features is often the longest and most complex portion of a petition because each feature identified as ‘distinguishable’ must be fully explained and documented.”<sup>46</sup>

#### 4. Evidence of Boundaries in Writing and on U.S.G.S. Maps

A petitioner must submit its proposed boundaries to the TTB along with the other components on hard copies of United States Geological Survey (U.S.G.S.) maps.<sup>47</sup> The petitioner has to denote the boundaries in a manner that still enables the TTB to view the original markings and features of the U.S.G.S. maps.<sup>48</sup> The petitioner must also indicate in writing a geographical description of the location of all boundaries and “must start at a designated beginning point, proceed unbroken in a clockwise direction, and conclude by returning to the designated beginning point.”<sup>49</sup> The descriptions should avoid survey lines and coordinates unless there is no other suitable alternative.<sup>50</sup>

In addition to these four areas of evidence, the petitioner must also submit a list of all of the commercial vineyards and bonded wineries located

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indicate averages and expectations. For smaller regions, this data may not be readily on hand as it would be for an area like a city or a national park. See WINE IN AMERICA, *supra* note 5, at 258.

45. AVA Manual, *supra* note 18, at 15.

46. *Id.* See Schorske, *supra* note 19 (“It can be difficult to find actual empirical data to support an area that is intuitively understood or popularly accepted to be unique. This was especially true in the early days of AVAs, when many areas were newly converted to winegrapes. Today more is known about existing vineyards, and more soils and weather consideration often goes into planning new plantings. But it still can be challenging to find enough of the right kind of information to support a petition.”).

47. AVA Manual, *supra* note 18, at 15.

48. *Id.*

49. *Id.* at 16.

50. *Id.*

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within the proposed area to the TTB.<sup>51</sup> With so much information required, it is not surprising that there is often quite a bit of contention between the petitioners and those who will be affected by the request for a new AVA. The next section will discuss the life cycle of a petition once it has been filed with the TTB and will highlight the options that the TTB will take when reviewing the petition.

### *B. The Life Cycle of an AVA Petition*

Once submitted, the TTB will notify the petitioner within one month that it has received the petition and will then review the petition and all of the supporting documentation and evidence.<sup>52</sup> In examining the evidence presented, the TTB does not act as an independent scientist; the TTB merely evaluates what the petitioner has presented and accepts it as true unless there is some glaring inaccuracy.<sup>53</sup> If the TTB deems that the evidence is sufficient to justify establishing the requested change, the petition will be considered “perfected,” and the TTB will then issue a notice of proposed rulemaking and begin a public comment period.<sup>54</sup> In the instance that the evidence presented is not sufficient, the TTB notifies the petitioner and allows the submission of a supplement to the petition with additional evidence and information.<sup>55</sup>

During the public comment period, anyone can make a comment regarding the proposed change, but the TTB is especially concerned with comments relating to the accuracy of the evidence presented in the petition

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51. *Id.* at 21. Ideally, this would be a way for the TTB to know all of the persons who would be affected by the creation of a new AVA and would assist the TTB in terms of establishing boundaries.

52. Schorske, *supra* note 19.

53. See WINE IN AMERICA, *supra* note 5, at 258 (noting that in the discussion regarding the petition for the Paso Robles Westside AVA, the scientific evidence was disputed during the public comment period).

54. *Id.* at 252.

55. Schorske, *supra* note 19.

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as well as comments from affected parties.<sup>56</sup> There is no mandated time frame for the public comment period, but it is typically sixty or more days.<sup>57</sup> Of interest is the fact that “[a]lthough [TTB] is not legally obliged to consider comments arriving after the close of the comment period, as a practical matter, they do take these into consideration.”<sup>58</sup> In the event that the comments submitted “raise relevant new issues that are appropriate for public comment,” the TTB may also re-open the public comment period to enable additional investigation.<sup>59</sup> The TTB will then weigh these comments and make a ruling according to what it believes to be best for all of the parties.<sup>60</sup>

If the TTB determines that the evidence presented in the petition is the most reliable and that there are no significant concerns in making the requested change, the TTB can issue a final ruling and grant the request for the new or modified AVA.<sup>61</sup> If the TTB believes that the public comment has raised some significant issue, the TTB can request that the petitioner modify the petition or do more research before resubmitting the petition, at which point the TTB will decide whether or not to issue a new proposed rulemaking and reopen the public comment period, cycling through the process again.<sup>62</sup> If the TTB finds that there is unrelenting dissent or that the information originally presented could absolutely not be relied upon, the

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56. *AVA Manual*, *supra* note 18, at 7; *Wine—Notices of Proposed Rulemaking*, ALCOHOL & TOBACCO TAX & TRADE BUREAU, <http://www.ttb.gov/wine/wine-rulemaking.shtml> (last visited Feb. 27, 2014).

57. *Wine—Notices of Proposed Rulemaking*, *supra* note 56. In reviewing the listing of notices regarding proposed viticultural areas, there is a date indicating the day the notice was issued and the date that the public comment period will terminate.

58. Schorske, *supra* note 19.

59. *AVA Manual*, *supra* note 18, at 11.

60. *Id.*

61. *Id.* Of note is that although a petition may be approved, the TTB still has the ultimate authority in deciding what portions of a petition to grant; the TTB may make its own changes, such as to the boundaries, and this would still be considered a final rule.

62. *Id.*

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TTB can withdraw any proposed rulemaking and order the petition withdrawn.<sup>63</sup>

Interestingly, one option available to the TTB as a government agency is the use of negotiated rulemaking.<sup>64</sup> Under this method, the TTB has the option to host a meeting in an area near the one being petitioned, and the TTB would allow anyone interested in attending to discuss the petition at the meeting before issuing a notice of proposed rulemaking.<sup>65</sup> “[TTB] can use this method if it believes that it would streamline the process and resolve differences of opinion or data more effectively than the traditional procedure.”<sup>66</sup> Unfortunately, this process requires the head of the agency to make the determination that it is necessary because of public interest in the matter.<sup>67</sup>

Looking at the issues that arose with the Paso Robles AVA, the TTB chose to: (1) expand the boundaries of the existing AVA after looking through all of the evidence presented and reviewing the public comments; and (2) withdraw the proposed rulemaking for both the request to subdivide the Paso Robles AVA into eleven new, nested AVAs and the request to establish a new Paso Robles Westside AVA. In the next section, this article will examine and discuss the areas that are most susceptible to problems, of which the various Paso Robles petitions encountered the majority of them.

### III. THE PRIMARY PROBLEM AREAS IN AVA PETITIONS

The primary areas where problems arise in the AVA petitioning process are, not surprisingly, closely related to the four major areas of the petition. These include: (1) the proposed name of the AVA (including conflict with a

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63. *Id.*

64. 5 U.S.C. § 563 (2012).

65. Schorske, *supra* note 19.

66. *Id.* Unfortunately, Ms. Schorske (who has a long history of writing applications for new and modified AVAs that were later approved) notes that she is unaware of the TTB ever opting to use the negotiated rulemaking method. *Id.*

67. 5 U.S.C. § 563 (2012).

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pre-existing name brand as well as evidence sufficient to establish the significance of the name); (2) the disputes regarding the location of the boundaries; and (3) the lack of evidence substantiating the viticultural distinctiveness of an area. Each of these problems will be discussed herein and will provide specific examples of when each problem occurred.

A. *Conflict Because of the Requested Name*

In 2001, the ATF (TTB's predecessor) issued a final ruling creating a new AVA: the Santa Rita Hills AVA.<sup>68</sup> When the original petition for the Santa Rita Hills vineyard was submitted to the ATF in 1998, Chilean wine makers, who operated under the name Santa Rita Winery since 1880,<sup>69</sup> alleged that consumers would be confused between wines from Santa Rita Winery and wines from the Santa Rita Hills AVA. Furthermore, the Santa Rita Winery held the Santa Rita trademark and notified ATF that it "feared infringement, tarnishment, and dilution if the Santa Rita name were used by other wineries."<sup>70</sup> Upon learning of the final ruling, Santa Rita Winery petitioned the court for an injunction to stop and prevent ATF from approving any wine labels using the Santa Rita name.<sup>71</sup> Although the Chilean winery made clear to the court its long history and involvement in the wine industry as well as its prominence in international wine sales, the court failed to order the injunction and instead deferred to the ATF's decision-making process, believing that trademark infringement would be a more appropriate action.<sup>72</sup> Although Santa Rita Winery never filed any trademark infringement actions, the ATF subsequently re-assessed its decision upon discussion between the winery and vineyards within the AVA

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68. WINE IN AMERICA, *supra* note 5, at 262.

69. Sociedad Anonima Viña Santa Rita v. U.S. Dep't. of Treasury, 193 F. Supp. 2d 6, 10 (D.D.C. 2001).

70. WINE IN AMERICA, *supra* note 5, at 262.

71. Sociedad Anonima, 193 F. Supp. 2d at 8.

72. *Id.* at 9-10.

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and changed the AVA name to “Sta. Rita Hills” in order to prevent consumer confusion.<sup>73</sup>

In the 2004 case of *Bronco Wine Company*, the California Supreme Court addressed the concerns of having brand names that feature geographic area words that are also used in AVA designations.<sup>74</sup> Although the TTB created a grandfather clause that allows for the continued existence of name brands like “Napa Ridge” and “Napa Creek Winery,” the TTB also requires labeling that informs consumers of the true origin of the grapes used to make the wine.<sup>75</sup> However, California had created its own statute to mandate that a minimum of seventy-five percent of the grapes used to make the wine in a bottle featuring the AVA words, such as “Napa,” had to come from within that AVA.<sup>76</sup> The court reasoned a consumer purchasing a bottle of “Napa Creek Winery” wine would likely be confused that the wine was actually from the Lodi AVA.<sup>77</sup> Additionally, the court feared that using such a name

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73. 27 C.F.R. § 9.162 (2012) (codifying the renaming of Santa Rita Hills to Sta. Rita Hills in 2006); Santa Rita Hills Viticultural Area Name Abbreviation to Sta. Rita Hills (2003R-091P), 70 Fed. Reg. 72,710, 72,710-13 (Dec. 7, 2005) (to be codified at 27 C.F.R. § 9.162), available at <http://www.gpo.gov/fdsys/pkg/FR-2005-12-07/pdf/05-23682.pdf>.

74. *Bronco Wine Co. v. Jolly*, 95 P.3d 422, 424-25 (Cal. 2004).

75. 27 C.F.R. § 4.39(i) (2012).

(1) Except as provided in subparagraph 2, a brand name of viticultural significance may not be used unless the wine meets the appellation of origin requirements for the geographic area named.

(2) For brand names used in existing certificates of label approval issued prior to (July 7, 1986):

(i) The wine shall meet the appellation of origin requirements for the geographic area named; or

(ii) The wine shall be labeled with an appellation of origin in accordance with § 4.34(b) as to location and size of type of either:

(A) A country or a viticultural area, if the brand name bears the name of a geographic area smaller than a state, or;

(B) A state, county or a viticultural area, if the brand name bears a state name . . . .

*Id.*

76. *Bronco Wine Co.*, 95 P.3d at 424-25.

77. *Id.* at 425-27.

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without guaranteeing that the product matched its description would decrease the value of those vintners who paid a premium to be in the Napa Valley AVA.<sup>78</sup> The TTB allows for the implementation of such statutes and further prioritizes that states may exercise stricter regulation so that consumers will not be misled or deceived.<sup>79</sup>

In the case of the aforementioned Paso Robles Westside AVA, the TTB ordered a withdrawal of its notice of proposed rulemaking for a number of reasons. The TTB failed to find substantial evidence “that a delimited grape-growing region exists that is recognized by the name Paso Robles Westside.”<sup>80</sup> The TTB received 220 comments regarding the petition, but 61 of those comments opposed the petition and came from 43 winegrowers in the Paso Robles AVA—more than double the amount of supporting comments from winegrowers.<sup>81</sup> Chief among the comments was that the Westside name “refers to a much smaller area, limited to a portion of the City of Paso Robles and the entire Adelaida District.”<sup>82</sup> In essence, the proposed Westside name encompassed an area much larger than it was actually known by. Additionally, according to public comment, a majority of grape growers in the area stated that the name “Westside” had little significance in the proposed area and would likely cause consumer confusion between the Paso Robles AVA and the proposed Paso Robles Westside AVA.<sup>83</sup>

#### *B. Conflict Because of the Proposed Boundaries*

In 2005, Paul Thorpe petitioned the TTB, requesting that it redraw the boundary lines demarcating the Santa Lucia Highlands AVA and the Arroyo

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78. *See id.* at 457.

79. *Id.* at 429.

80. Proposed Establishment of the Paso Robles Westside Viticultural Area, *supra* note 11, at 19,917.

81. *Id.* at 19,919.

82. *Id.*

83. *Id.*

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Seco AVA, both of which are located in the Central Coast AVA.<sup>84</sup> Thorpe, who filed the request on behalf of E. J. Gallo Winery, noted three reasons for relocating the boundary lines:

(1) It would bring the western boundary of the Arroyo Seco viticultural area into conformity with the western boundary of the historical Arroyo Seco Land Grant; (2) it would conform the boundary line to land ownership boundaries; and (3) it would end the current division of the Olsen Ranch vineyards between the two viticultural areas.<sup>85</sup>

Olsen Ranch's vineyards at the time were primarily within the Santa Lucia Highlands AVA, but approximately 200 acres fell within the Arroyo Seco AVA.<sup>86</sup> Thorpe also presented *terroir* evidence to the TTB to support the request.<sup>87</sup> In 2006, the TTB resolved the issue by finding the evidence applicable, approving the petition, and moving 200 acres of vines from the Arroyo Seco AVA into the Santa Lucia Highlands AVA.<sup>88</sup>

One of the TTB's primary concerns in addressing boundaries is that it is always disadvantageous to draw a boundary that intersects a parcel of property, which was the main reason for the request in this instance.<sup>89</sup> Because of the TTB's labeling requirements, Gallo would either be required to keep the Santa Lucia Highlands grapes separate from the Arroyo Seco grapes and make separate wines and labels indicating the individual origins, or it would have to make sure that no more than fifteen percent of the Arroyo Seco grapes went into a bottle of Santa Lucia Highlands wine.<sup>90</sup> This sort of requirement is burdensome on a winegrower, and when

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84. Proposed Realignment of the Santa Lucia Highlands and Arroyo Seco Viticultural Areas (2003R-083P), 70 Fed. Reg. 3333 (proposed Jan. 24, 2005) (to be codified at 27 C.F.R. pt. 9), available at <http://www.gpo.gov/fdsys/pkg/FR-2005-01-24/pdf/05-1192.pdf>.

85. *Id.* at 3333-34.

86. *Id.*

87. *Id.*

88. Realignment of the Santa Lucia Highlands and Arroyo Seco Viticultural Areas (2003R-083P), 71 Fed. Reg. 34525 (June 15, 2006) (to be codified at 27 C.F.R. pt. 9), available at <http://www.gpo.gov/fdsys/pkg/FR-2006-06-15/pdf/E6-9365.pdf>.

89. *Id.*

90. 27 C.F.R. § 4.25(e) (2012).

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combined with the scientific evidence establishing distinction, the TTB found it appropriate to move the boundaries.

*C. Conflict Because of the Evidence or Lack of Distinguishing Features*

Among other reasons, the rulemaking on the Paso Robles Westside AVA petition was also withdrawn due to dispute over the scientific evidence submitted to the TTB. Opponents of the proposed AVA specifically referenced the scientific evidence and data that the petitioners had used when submitting the petition to the TTB.<sup>91</sup> One comment stated that the petitioners had “cherry-picked” the data it was using,<sup>92</sup> while others hired a meteorologist to analyze the data that was presented.<sup>93</sup> One of the meteorologist’s primary concerns was that in the area that had been designated as the Paso Robles Westside AVA, there were regions of distinct microclimates that would go against the idea that this area was, on a whole, a unique region.<sup>94</sup> Those opposed to the new AVA stated that the petitioners failed to use truly accurate data and that there was substantial similarity between the proposed Westside AVA and the already existing Paso Robles AVA.<sup>95</sup>

Because of the many opportunities that give rise to disputes and the potential for adversely affecting the business and livelihood of wineries, the TTB did stop and give pause to the petition process in 2007,<sup>96</sup> but little

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91. WINE IN AMERICA, *supra* note 5, at 258.

92. Proposed Establishment of the Paso Robles Westside Viticultural Area, *supra* note 11, at 19,919.

93. WINE IN AMERICA, *supra* note 5, at 258.

94. *Id.*

95. Proposed Establishment of the Paso Robles Westside Viticultural Area, *supra* note 11, at 19,918.

96. Goldfarb, *supra* note 42. Goldfarb questions how the TTB will address the AVA process, asking: “Will there be drastic changes? Will the broken AVA system—which some say is being used merely as a marketing tool as opposed to the delineation of real climactic and soil distinctions—continue to exist as we know it?” *Id.*

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appeared to change.<sup>97</sup> In the next section, this article will advocate that a slight modification to the process, the institution of a preliminary stage coupled with mediation, could begin to smooth out this system.

#### IV. THE INTRODUCTION OF MEDIATION INTO THE AVA PETITIONING PROCESS

This article proposes, as a reform to the current TTB process for creating or altering an AVA, the introduction of mediation into the process to create a more efficient process and to more fully vet out issues before the parties involved have dedicated large amounts of time, money, and effort.<sup>98</sup> Sara Schorske, an AVA petitioning consultant, noted, “I think there should be some kind of speed bump put into the system, something that will make people think more about the big picture effect before they submit an application.”<sup>99</sup> Rather than requiring a petitioner to submit a proposal with all of its evidence, followed by a TTB review of the evidence and subsequent public commentary stage, this article proposes that the TTB should instead create a preliminary intent to petition stage. This would be similar to the negotiated rulemaking option but would not require the head of the TTB to make a determination that it would be beneficial and likewise, would not require the TTB to host an open meeting in the petitioners’ area. This new intent to petition stage would require the petitioner to file only a very basic notice of intent with the TTB, whereupon the TTB would open a

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97. Schorske, *supra* note 19; see *AVA Manual*, *supra* note 18, at 11. In comparing the petition process as described by Schorske in her 2001 article and the process as outlined in the TTB’s more recent publication, there are practically no differences.

98. See LAURENCE BOULLE, MICHAEL T. COLATRELLA, JR. & ANTHONY P. PICCHIONI, *MEDIATION: SKILLS & TECHNIQUES 2* (2008) (stating that mediation’s goal is not encompassed in getting two sides to agree; “[m]ediation sometimes resolves disputes, sometimes contains them, and sometimes defines them more clearly”).

99. Goldfarb, *supra* note 42. In a statement that is quite relevant considering Paso Robles’s request, Goldfarb notes that “[i]n the last decade, the agency has approved sub-appellations at such an alarming rate that some believe it has rendered the system toothless. Worse, such regional approvals serve only to further confuse the consumer . . .” *Id.*

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public comment period to identify contentious areas: the name, the viticultural distinctiveness of the area, and where the boundaries should be drawn.

At this point, the TTB could evaluate the public commentary, and if appropriate, designate a mediator or other uninvolved third party to address issues.<sup>100</sup> This mediator would not have to be a TTB official; for example, an attorney with experience in the wine industry in that region or another area close by could serve as a mediator. The mediator's determinations could be as simple as appointing a particular agreed upon geologist to conduct soil samples throughout the proposed region or something more complex, such as hearing the reasons that a potentially affected winegrower has for opposing a suggested name. The purpose of creating this introductory stage and utilizing mediation is to help avoid unnecessary expenditures and research, as exemplified in the case of the original Paso Robles subdivision petition. Additionally, this method should uncover problems, such as the dispute between Santa Rita Winery and the Santa Rita Hills AVA, and provide a solution early in the process so that the dispute does not end up in court only to be later addressed again by the TTB.

If the intent to petition stage did not uncover concerns, but they arose at a later point during the petition process, it would still be appropriate to submit the concerns to mediation. As noted earlier, the TTB currently attempts to field concerns and disputes solely through the public comment phase. This essentially keeps the two sides separated and discourages them from seeking any joint resolutions; a party simply hopes that the TTB listens to its comments and finds them more compelling than others' comments.<sup>101</sup> If the TTB instead appointed a mediator to meet with the parties and investigate the comments and accusations, the mediator could then make an

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100. In mediation, "the parties to a dispute are assisted by someone external to the dispute . . . who aids their decision-making about the dispute in various ways. Mediation . . . gives the parties the opportunity to make their own decision rather than have it imposed on them as happens in many other forms of binding dispute resolution . . ." BOULLE ET AL., *supra* note 98, at 1.

101. See WINE IN AMERICA, *supra* note 5, at 258; see also Proposed Establishment of the Paso Robles Westside Viticultural Area, *supra* note 11, at 19,919-20.

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independent report and recommendations to the TTB, hopefully alleviating some of the comment fielding.

A similar form of alternative dispute resolution has already been put into effect in another governmental agency, the Food and Drug Administration, which uses its Office of the Ombudsman to handle complaints and disputes within its industry.<sup>102</sup> The Office of the Ombudsman has a specific goal of resolving disputes that are presented to the FDA and occur “between companies or individuals and FDA offices concerning fair and even handed application of FDA policy and procedures.”<sup>103</sup> The FDA notes that it is “committed to the principle that regulated industry has a right to disagree with an agency decision, action, or operation, and that full and open discussion of issues in controversy produces a better decision in the end.”<sup>104</sup>

Likewise, the alcoholic beverage industry is very highly regulated on both national and state levels and would benefit from having a system like the FDA’s for addressing the TTB’s policies and procedures. AVAs are fully determined at the federal level through petition to the TTB, and although the TTB claims that it makes every effort to assist a petitioner through the process, there does not appear to be any kind of established mechanism in place to guarantee the kind of assistance that exists in the FDA.<sup>105</sup> In examining the previously discussed problems that have occurred prior to the approval of an AVA, such as the April 2009 TTB decision to deny the various Paso Robles requests, the TTB appears to make its decisions entirely through its own review of the evidence presented and the

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102. *FDA’s Office of the Ombudsman: Dispute Resolution and Problem Solving*, U.S. FOOD & DRUG ADMIN., available at <http://www.fda.gov/downloads/AboutFDA/CentersOffices/OC/ExecSec/UCM164330.pdf> (last visited Feb. 27, 2014).

103. *The FDA Ombudsman*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/AboutFDA/CentersOffices/OC/OfficeofScientificandMedicalPrograms/ucm197508.htm> (last updated May 29, 2013).

104. *Dispute Resolution*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CDER/ContactCDER/CDERombudsman/ucm278559.htm> (last updated June 3, 2014).

105. *AVA Manual*, *supra* note 18, at 9.

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public comments.<sup>106</sup> There was no TTB-organized “full and open discussion of issues,” which, if mandated and overseen by a mediator, could have resulted in the Paso Robles Wine Country Alliance and its antagonists coming to agreements or compromises on at least some of the concerns.<sup>107</sup>

In the event that someone lodges a complaint after the TTB has approved the creation of an AVA, appointing a mediator to address the concern first (similar to the FDA’s method with the Office of the Ombudsman) would likely eliminate the need to litigate those complaints in court. For the Santa Rita Winery, the litigation accomplished little in resolving the consumer confusion and trademark infringement concerns of the winery.<sup>108</sup> Indeed, the court strongly deferred to the TTB’s own judgment in the creation and naming of AVAs and was satisfied in its “careful review of each of the applicable criteria and its assessment of the evidence presented by the petitioner and others.”<sup>109</sup> Following the litigation, however, the matter was later taken up, addressed, and resolved by the TTB.<sup>110</sup> If a winemaker had the option to first file a complaint with the TTB and know that it would be heard and addressed, that winemaker would be able to avoid the costs and time that accompany bringing a suit. Further, if a mediator was not able to help bring about a resolution to the complaint, the winemaker could then move forward in the court system.

Another concern that the TTB ought to take into account is that even though the wine industry is large and covers broad areas that can be affected by the creation of new AVAs, from grape growers to wholesalers to consumers, the communities within the proposed AVA are often quite tightly knit and those relationships could be greatly impacted by the petition

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106. Proposed Establishment of the Paso Robles Westside Viticultural Area, *supra* note 11.

107. *Dispute Resolution*, *supra* note 104.

108. *Sociedad Anonima Viña Santa Rita v. U.S. Dep’t of Treasury*, 193 F. Supp. 2d 6, 14 (D.D.C. 2001).

109. *Id.* at 17.

110. 27 C.F.R. § 9.162 (2012) (codifying the renaming of Santa Rita Hills to Sta. Rita Hills in 2006).

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process.<sup>111</sup> One of the more subtle foci of mediation is “on the future lives of the parties rather than their past behavior. The energy of the parties is shifted toward creating an amicable agreement that will enable the parties to move past the dispute and move on with their lives.”<sup>112</sup> In the wine industry, this shift in focus is important because these winegrowers often live and work nearby one another. Maintaining a positive but competitive relationship will assist them in achieving their final goal: the recognition of offering a special, distinct product and building a successful identity among consumers.<sup>113</sup>

#### V. CONCLUSION

Under the current AVA petition process with the TTB, petitioners requesting new AVAs or modifications to existing AVAs can only hope that the evidence presented to the TTB is strong enough and persuasive enough to withstand any negative commentary or contradictory evidence that another party might put forth. The use of the intent to petition stage might be the “road bump”<sup>114</sup> that Sara Schorske imagined. This stage could open the eyes of idealistic petitioners to the realities of this difficult process and force awareness of different opinions within a winegrowing community. Alternatively, it could provide much needed encouragement and build camaraderie in a region fighting for recognition.

If these two ideas were adopted by the TTB, the timeline for establishing new AVAs would be decreased and members within the regions would better understand each other’s positions. For the Middleburg Virginia AVA that was finally recognized in 2012, perhaps it could have cut down on

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111. Wineries: Paso Robles Wineries, PASO ROBLES WINE COUNTRY, <http://www.pasowine.com/wineries/> (last visited Feb. 28, 2014). The Paso Robles Wine Country Alliance describes its region as “home to more than 200 wineries, mostly comprised of boutique and small family-owned vineyards and wineries.” *Id.*

112. BOULLE ET AL., *supra* note 98, at 3.

113. Haas, *supra* note 9.

114. Schorske, *supra* note 19.

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the six years that petitioners spent fighting “the lengthy bureaucratic process” to establish the AVA.<sup>115</sup> For Paso Robles, perhaps it could have prevented three years of division in the community, the expenditure of more than a quarter-million dollars in efforts to overthrow the Paso Westside petition, and subsequently re-filed petitions.<sup>116</sup> In the words of winegrower Doug Beckett, the dispute in Paso Robles “doesn’t make sense.”<sup>117</sup> Beckett “would prefer for this to not be a divisive issue for the community. But it is.”<sup>118</sup>

This article does not propose that mediation is the only method for addressing concerns and conflicts that arise during contentious petitions; it simply takes a method that already exists within the TTB’s options, the negotiated rulemaking option, and simplifies it for both the TTB and petitioners. The use of mediation to address the concerns and conflicts that arise throughout the process would provide more structure and focus in achieving agreements, compromises, and narrowing issues than the TTB’s public comment period does. Rather than be a mere sounding board, mediation could organize those comments and provide a mechanism for the disputing parties to make themselves heard without dividing their communities.

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115. Alexis Korman, America’s Newest AVAs, WINE ENTHUSIAST (Jan. 29, 2013), <http://www.winemag.com/Web-2013/Americas-Newest-AVAs/>.

116. Ness, *supra* note 10.

117. *Id.*

118. *Id.*