



**US Army Corps
of Engineers**

**The Executive Seminar on
Alternative Dispute Resolution
(ADR) Procedures**

The U.S. Army Corps of Engineers

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Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser--in fees, expenses and waste of time.

Abraham Lincoln

Our distinct forebears moved slowly from trial by battle and other barbaric means of resolving conflicts and disputes, and we must move away from total reliance on the adversary contest for resolving all disputes. For some disputes, trials by the adversarial contest must, in time, go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people. To rely on the adversarial process as the principal means of resolving conflicting claims is a mistake that must be corrected.

Chief Justice Warren E. Burger, in his Annual Report on the State of the Judiciary at the mid-year meeting of the American Bar Association on February 12, 1984.

Clearly, the Corps' record has established that ADR can be used to resolve disputes arising in Government. Some of the more significant lessons learned from our experience indicate that ADR can bring the resolution of issues closer to factual realities because ADR encourages those closest and most knowledgeable in the technical aspects to work out agreements directly. Moreover, ADR permits the decision makers to make the decisions, rather than have them made by third parties. ADR can decrease the load on the litigation system by insuring that only major precedent-setting claims go the full litigation route. Lastly, ADR can re-establish trust between government and industry. ADR techniques encourage parties to work collaboratively and jointly on solutions.

Obviously, I bring certain biases to bear in favor of alternative dispute resolution. I am biased in support of ADR methods, including mini-trials, in lieu of litigation where appropriate. I am biased in support of decision makers being urged, if not required, to make the decisions they are paid to make, instead of passing them on to third parties, whether the third party be a judge, a lawyer, a disinterested third party, or a so-called neutral expert. I am biased in support of interest-based bargaining in lieu of positional bargaining. I believe to the greatest extent possible, that when the parties leave the negotiating table, whether there be two or ten parties of interest, the result should be a win-win situation rather than a win-lose situation. Rarely, if ever, should there be a lose-lose situation. The latter two types of situations do not last, as they only result in renewed or continued confrontation.

The Federal Government is rapidly recognizing the need to use more innovative approaches in resolving disputes. Relying exclusively upon traditional negotiations and the judicial process is not working in today's litigious environment.

ADR methods such as collaborative problem solving, interest-based negotiations, mini-trial, disputes review panel, and non-binding arbitration hold the promise for the development of a system which can resolve disputes quickly and efficiently. Already, the Corps and several Government agencies have used some of these ADR methods successfully.

If we're serious about making a dent in litigation now and in the future, ADR is available--with ADR the future is now.

Lester Edelman, Chief Counsel, U.S. Army Corps of Engineers in testimony before the Committee on the Judiciary, Subcommittee on Courts and Administrative Practice, United States Senate, May 25, 1988.

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SECTION 1

ABOUT THIS COURSE

1

ABOUT THIS COURSE: RATIONALE AND OBJECTIVES

As senior leaders in the Corps of Engineers, each of you has extensive knowledge and experience in resolving disputes. Why, therefore, invest 2-1/2 days examining alternative dispute resolution (ADR) procedures? What is the rationale for this course and the context surrounding the need for ADR in the Corps? The following section summarizes some of the reasons and history behind the course. It also outlines the course objectives.

Currently, many federal agencies are facing the challenge of how to effectively adapt to changing demands in a changing world. Major forces influencing federal agencies include a more litigious public; changing social conditions and values including the extensive requirements for public involvement, along with required detailed analyses of the environmental, social and economic impacts of agency planning and policy making; the changing nature of inter-governmental relationships; and the increasingly political nature of federal agency missions and senior manager roles. The result of these changes has been increased conflict; increased opportunities for higher quality and acceptable agency decisions; and increased utilization of collaborative procedures by federal agencies as a way of effectively managing conflict and decision making.

The Corps has also been impacted by these changes. For instance, contract claims have doubled in the last eight years. Claim procedures frequently take more than three years to complete, while cases qualifying for fast-tracking can take more than one year.

About This Course: Rationale and Objectives

The changing social conditions and values which require a balance of economic, environmental, social and political interests in agency decision making have also produced conflicts within our own public service engineering profession. Diverse studies portray continued public concern for and endorsement of environmental quality. This steady change in values has occurred during both conservative and liberal political administrations in the U.S. and throughout the industrial world (Milbraith, 1984). Public works expenditures in the U.S. must now be justified in terms of impacts on environmental quality and public health, as well as in traditional economic development terms. Indeed, such concerns now top the list of DOD and DOE defense related priorities, and the Corps is the DOD's environmental agency.

The Corps has been struggling with a greater number of complex and controversial issues as well as an expanding collection of conflicting interests. For example, public concerns for water resources have increased from flood control and water transportation to include toxic waste impacts, hazardous wastes, waste water management, water resources management, wetlands protection, and environmental enhancement. These new issues and subsequent disputes within and among agencies, the public, and other interest groups, have become the new domain of water resources engineers and managers. The budget for waste water and hazardous waste is now greater than the combined budgets of the Bureau of Reclamation and the Corps Civil Works program.

Today the word "partnership" characterizes the ideal inter-governmental and intra-organizational relationship. Interdependence, mutual ability to leverage the attitudes and behavior of others, unpredictability of outcome, etc., have resulted in the need for a more collaborative problem-solving process among various levels of government. In order to effectively manage conflict and solve problems, the Corps must now work more explicitly in "partnership" with local sponsors of projects, rather than in the traditional way where the federal government provided direct engineering and construction services. Forming a partnership has also become crucial among Corps managers and construction contractors. Life Cycle Project Management (LCPM) is requiring new partnerships within our own organization.

It has never been a simple matter to separate the political, technical, administrative and legislative mandates and influences associated with our programs. In addition, the administration of laws which are often less than precise, and which significantly impact the distribution of benefits and values across diverse segments of society contribute to the political nature of our work. Consequently, the Corps' mission often looks more and more political to those whom it impacts and serves. While the executive senior manager has always had a political component to his role, the nature, extent and importance of that political piece has shifted. Not only must he be politically sensitive to what is happening inside the Corps, but he also must be effective in the external political arena which extends to the Corps' relationships with other federal agencies, other governmental entities, industry, multiple interest groups who make up "the public", etc. To be successful he must therefore be effective in the expanding political arena as well as exhibiting a high degree of technical competence. Indeed,

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one could say that the primary job of the executive senior manager is to manage the gray area between the technical and the political. Changes in the Corps' mission and management responsibilities, which emphasize the political/legislative as well as the technical/administrative, along with the diversity of our programs can foster numerous conflicts among the Corps and those we serve as well as within our agency. It is therefore important for the Corps to recognize the potential for conflict, to identify both internal and external sources of conflict and to design procedures which will help recognize and reconcile the interests of the various stakeholders--other federal agencies, subcontractors, customers, employees, etc.--impacted by Corps policies and decisions. Several illustrations will clarify this point.

- In Civil Works, scarce resources, interdependence and competing interests make conflict inevitable between the Corps and local sponsors as they plan and implement local cost sharing agreements (LCAs). In response to the likelihood of disagreement, both planning and LCA partnerships now contain dispute resolution clauses requiring ADR approaches.
- Our Section 10 and 404 Regulatory Program, which issues over 20,000 permits per year, has as its centerpiece the balancing of competing interests and the discovery of "public interests" from among the stakeholders.
- Our Operations and Maintenance Program, which has grown to comprise over 50 percent of Civil Works, has become more prominent especially in times of drought or flooding. Management of the impacts of natural disasters will continue to increase visibility of projects, the way they are managed, and the apportionment of resources within the project management.
- In the military construction program, the Corps more actively than ever seeks to discern the interests and needs of its customers. These interests can differ from those of the Corps as well as from those of other customers. As DOD's environmental agent, the Corps explores ways to negotiate apportionment of responsibility in hazardous and toxic waste clean-up at hazardous waste sites. Frequently, potentially responsible parties (PRP) strongly disagree regarding who should bear the burden of and the amount of clean-up costs.
- Pressures from inside and outside the Corps to revise our way of thinking about problems and how we address them can create significant intra-organizational conflict. For example, the introduction of new personnel with diverse skills and new responsibilities has led to the need for collaborative problem solving within our own hierarchical structure in order to address competing mandates, goals, and interests within the organization.

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- How we view ourselves may be a source of internal conflict. As Corps professionals, are we engineers who provide a relatively narrow range of solutions to water resources problems, or are we public service engineers who address a wider variety of water and construction related problems, and who create a broader range of possible solutions?

The opportunities for disputes continue to increase much faster than the resources to resolve them. If procedures exist to more effectively manage disputes, then you--senior Corps leaders--need to know and use them because they could significantly reduce the cost of making decisions.

Such procedures do exist and are evolving every day. Private and public organizations throughout society have successfully developed and used procedures which reduce settlement time, avoid costly litigation, build firmer partnerships, and produce viable settlements.

Academics and professionals in explaining and transferring these procedures have called them ADR procedures. Unfortunately, the term ADR can be misleading. You might ask "alternatives to what?" Originally, this meant alternative to litigation. However, professionals have discovered that the phrase may be too limited. To begin with, ADR procedures should not be seen as replacing our legitimate legal processes. Rather, ADR processes are intended to "offload" the legal system and to relieve that system of those disputes which are not precedent setting, which do not turn on points of law and which can be resolved by other means. ADR procedures also endeavor to preserve future relationships and prevent unnecessary and extended disputes through anticipation, upfront collaboration and effective dispute management.

ADR, therefore, is broader than the notion of an alternative and incorporates procedures which anticipate and manage as well as resolve disputes. In this broad sense, ADR procedures include skills such as collaborative problem solving, participatory management, partnering, mediation, facilitation, negotiation, and third party intervention. However, since the acronym, ADR, is recognized, we continue to use it in this course.

The Corps has played a significant role in the development of alternative dispute resolution approaches and procedures, in both its civil and military programs. In the 1970's, the Corps led federal agencies in employing innovative methods of public involvement. The Corps developed several levels of training programs to prepare its personnel to effectively apply and implement the new procedures to a wide variety of difficult public disputes. Hundreds of professionals have been trained in these skills and procedures which have been used to enhance the quality of decision making in hundreds of conflicts.

About This Course: Rationale and Objectives

In the early 1980's, the Corps developed a mid-level management course on Negotiating, Bargaining, and Conflict Management. This course was designed for Corps personnel to empower managers to resolve conflicts at the lowest appropriate level within the organization. Over 500 COE personnel have been trained since the course's inception, and they are now in the field using improved communication, data collection, negotiation, and facilitation procedures to resolve COE problems.

Since the mid-1980's, the Corps has been an organizational leader in the application of ADR procedures to tough issues. The Corps has been a successful pioneer in the application of mini-trials, facilitated problem solving, mediation, dispute panels, and technical advisory panels to complex issues. The following are representative examples of the disputes in which the Corps has applied ADR procedures:

- In 1988, a dispute over the interim and long-term operating plan of a mid-western COE flood control dam came to a head. A governor, Congressional delegation, numerous state agencies, and public interest groups all moved to limit the generation capacity of the project, over the objections of the utility companies which were advocating increased hydro-generation. Law suits and legislative battles appeared imminent. Mediation was used to successfully address a range of environmental and operating issues.
- A \$55.6 million claim (including interest) involving differing site conditions on the Tennessee Tombigbee Waterway was filed with the Corps of Engineers Board of Contract Appeals by Tenn Tom Constructors, Inc. Both the Corps and the contractor had the prospect of losing a tremendous amount of money and resources as a result of the way that the case was handled. A mini-trial was used to successfully settle the claim.
- In the last few years, the Corps has used regional Section 404 General Permits to facilitate the permitting and regulatory process. In 1987, a district proposed such a permit in a rapidly urbanizing Rocky Mountain county so as to facilitate construction of small fills associated with residential and industrial development. The multiplicity of parties and the number of controversial issues between the Corps, environmentalists, developers, the county and a city resulted in a series of difficult conflicts. The dispute appeared to be unresolvable short of court action. Facilitation was used to enable the parties to resolve their issues.
- Noise generated by maneuvers of battle tanks has outraged many citizens of small towns located adjacent to military bases or practice ranges. This has especially been a problem when maneuvers occur at night or during Sunday church services. Some citizens have argued that changes of use have occurred since the bases were sited, and that the training activities should be stopped. Other citizens have proposed that the noise is "the sound of freedom" and have welcomed the increased activity in their communities. Negotiation and facilitation have been used to address the needs of both the community and the military installation.

About This Course: Rationale and Objectives

- A proposed harbor expansion resulted in local cost-sharing discussions between the Corps and the local sponsor. Differences between Corps regulations and client expectations led to a flurry of calls between the Congressional delegation and the Corps. The elected officials were asking for some flexibility on the Corp's part in evaluating the proposed cost-sharing arrangement. The Corps saw this as bending the rules. Negotiation was used to settle the disagreement.
- The technical staff of the Board of Engineers for Rivers and Harbors raised some very serious concerns about several components of a project that was carefully negotiated by a district/division and a local sponsor. The Board staff suggested that unless changes were made, they would recommend to the Board that the project be delayed or halted. The district and division initiated moves to circumvent the Board staff and put pressure on the Board through the Congressional delegations. Cooperative problem solving was used to manage the differences.

Many of the procedures presented in the next few days should make intuitive and practical sense to you. No doubt, you will have heard about or tried some of these procedures on disputes encountered in your daily work. Indeed, your instructors will be surprised if they do not hear "ah-ha, I've done that." This course will provide a framework and a language by which you, as managers, will be able to identify, analyze and categorize disputes and conflict situations that you have encountered or will encounter. In addition, it will provide a common understanding and repertoire of dispute resolution procedures to help you consciously manage such situations. Finally, the course will provide opportunities to practice procedures in a low-risk environment. The procedures presented are based on experiences both within and outside of the Corps, and have been effective in managing and resolving a variety of disputes.

To sum up, the objectives in this course are to:

1. Expose you to a range of ADR procedures;
2. Demonstrate how these procedures add to your "tool kit" of management techniques;
3. Provide you opportunities to discuss and to practice procedures;
4. Encourage you to encourage your staffs to try such procedures where appropriate; and
5. Put you in contact with the resources to support your use of ADR procedures.

About This Course: Rationale and Objectives

In pursuing these objectives, you will:

- Learn about and be able to identify the basic causes of disputes and conflicts.
- Add conflict management concepts, dispute resolution procedures and skills to your repertoire of general management knowledge and skills.
- Understand the continuum of dispute resolution and conflict management procedures that are available to resolve or manage disputes.
- Learn about how ADR procedures have been successfully used in the Corps to resolve conflicts, and the high level of support the use of these procedures has received.
- Understand which dispute resolution procedures are appropriate for particular problems, and how and when these procedures can be most beneficially utilized in the "life cycle" of a conflict.
- Learn specific skills that will enhance your ability to negotiate internal organizational disputes and to work more effectively with external agencies and the public.
- Identify when third party assistance in dispute resolution is appropriate, and how to obtain it.
- Understand how to plan for or avoid increased litigation costs.
- Identify how ADR can be a benefit to you, your staff, and the Corps.
- Build the knowledge and skills to apply Alternative Dispute Resolution procedures in a current or future Corps dispute.

In short, this course is the most recent step in a history of Corps leadership in the ADR field.

SECTION 2

AGENDA

2

AGENDA

THE COE EXECUTIVE SEMINAR ON ALTERNATIVE DISPUTE RESOLUTION (ADR) PROCEDURES

<u>Time</u>	<u>Topic</u>	<u>Approach</u>	<u>Workbook Reference</u>
DAY I	8:00 A.M. - 5:00 P.M.		
8:00 - 8:15	Welcome and Introductions		
8:15 - 8:30	Course Overview and Agenda Review	Presentation	Chapter 1
8:30 - 9:00	Types of Disputes Encountered by the Corps	Group Exercise & Discussion	Chapter 1
9:00 - 9:15	ADR Principles for Managers	Presentation	Chapter 3
9:15 - 9:30	Break		
9:30 - 10:45	The Causes of Disputes and Conflict Management	Group Exercise, Presentation, Discussion	Chapter 4
10:45 - 11:00	Stretch Break		
11:00 - 12:00	Dispute Resolution Procedures and Their Applicability to the Corps	Presentation & Discussion	Chapter 5, 6
12:00 - 1:15	Lunch		
1:15 - 2:30	Introduction to Negotiation	Presentation & Discussion	Chapter 5, 7
2:30 - 2:45	Break		
2:45 - 3:30	Negotiation Simulation	Exercise	Chapter 7
3:30 - 3:45	Discussion of the Simulation	Discussion	Chapter 7
3:45 - 5:00	<u>Assisted Problem Solving</u> I: Procedural Assistance: Mediation and Facilitation	Group Exercise and Discussion	Chapter 5, 8

Agenda

DAY II

8:00 A.M. - 5:00 P.M.

<u>Time</u>	<u>Topic</u>	<u>Approach</u>	<u>Workbook Reference</u>
8:00 - 8:05	Agenda Review		
8:05 - 9:00	Mediation/ Facilitation Demonstration	Presentation & Discussion	Chapter 8
9:00 - 9:15	Break		
9:15 - 11:30	<u>Assisted Problem Solving II: The Mini-Trial and Other Procedures</u>	Simulation & Discussion	Chapter 5, 9
11:30 - 12:00	<u>Assisted Problem Solving III: Non-Binding Arbitration, Settlement Conferences, Dispute Review Boards</u>	Presentation & Discussion	Chapter 5, 9
12:00 - 1:15	Lunch		
1:15 - 1:45	Pass Out and Read Case		
1:45 - 2:15	Selecting and Implementing Appropriate ADR Procedures	Presentation & Discussion	Chapter 10, 11, 12
2:15 - 3:15	Case Study: Managing Disputes and Selecting ADR Procedures	Presentation and Discussion	Chapter 14
3:15 - 3:30	Break		
3:30 - 4:00	Case Study Analysis/Critique	Presentation and Discussion	Chapter 10, 11
4:00 - 4:45	Obstacles and opportunities for using ADR procedures	Group Exercise	Chapter 14
4:45 - 5:00	Wrap up and Evaluation		

SECTION 3

ADR PRINCIPLES FOR MANAGERS

3

ADR PRINCIPLES FOR MANAGERS

Dispute resolution *is* management. Look at your own job as a manager and executive. Studies have shown that 30 percent of first line supervisors' time and 25 percent of all management time is spent on resolving disputes. More than 85 percent of those leaving jobs do so because of some perceived conflict. Almost 75 percent of job stress is generated by disputes. Festering disputes are time consuming and can result in alienation, stress, reduced productivity, loss of quality, ruptured relationships, and even violence. One might say that being an executive or senior manager is *dispute management*. Some guidelines for managing disputes and assessing the effectiveness of a specific dispute resolution approach are listed below. These general guidelines provide a framework within which to choose ADR procedures outlined in subsequent chapters.

- 1. Strive to keep decisions as close to the hands of the manager, decision-maker and substantive expert as possible.**

ADR techniques are management tools. The more the management of the disputes and the solutions are in the hands of the managers or those closest to the substance of the problem, the higher the probability that both the letter and spirit of solutions will be implemented. Indeed, it is often possible to obtain more satisfactory and timely decisions when those closest to the problem or those who know something about the situation are involved in the solution. Often, the tendency is to do just the opposite. Frequently managers who encounter a sticky problem are quick to turn over its resolution to lawyers or other outside parties, rather than more directly participate in a problem-solving process where control over the outcome remains with the parties, themselves. This can deprive the decision-making process of the involvement of the people who best know about the problem and who

are best suited to design an elegant solution. Managers should be more careful in delegating this responsibility to less informed parties, and should seek to own the process as well as the solutions to disputes.

2. Seek not only the rational but the reasonable.

Frequently engineers and technical people forget that their goal is to seek not only the technically superior solution but also the reasonable and workable alternative. Undue emphasis upon technical elegance and legal purity can become the ingredients of stalemate and intransigence. Seemingly minor issues can become battles to the death in the crusade of technical purity.

It is important to remember that the most technically rational or perfect solution is not always the one which parties find most acceptable or feasible to implement. Obviously the "reasonable" solution should not require a compromise of ethical or legal standards, but the degree of purity a solution contains should be weighed against the desirability of resolving a dispute and the long-term impacts of a stalemate.

There are multiple satisfactory, and genuinely elegant, solutions to most problems. It is important for parties to be open to exploring multiple options to satisfy their interests rather than becoming deadlocked over positions. Managers once again will recognize that attaining this goal involves finding the balance between a variety of competing interests. ADR procedures can often help managers to find such a delicate balance.

3. Seek to "offload," not replace, the legal system.

ADR does not seek to replace the legal system or challenge our democratic principles. Alternative dispute resolution techniques are intended to make the legal system--judicial, legislative, and executive--work more efficiently and to help that system adapt to new realities and problems. ADR is also concerned with solving key problems in addition to settling the issues--something critics of the formal judicial process say is missing. However, ADR is not a panacea for the resolution of all social ills. ADR should not be applied in all circumstances or to all disputes. For example, cases where a legal precedent is at stake should go through the traditional judicial process. But remember, it is easy to think that every case fits such criteria. If this trend is continued, the formal system will remain overloaded and it will rapidly reach the point where it cannot perform. When that happens, its very legitimacy will be questioned.

A significant percent of most disputes in America could easily be resolved outside the expensive adversarial process. Indeed, over 80 percent of current cases within the U.S. court system are settled outside of the court. The point is that by offloading the formal legal system, ADR will result in a more effective and efficient judicial system.

4. Anticipate and act to prevent.

Since most cases are settled outside of court, we know there are vast opportunities to anticipate and to prevent highly adversarial disputes. To anticipate means projecting where the dispute is heading and asking if things could be different. Preventing does not mean caving in. To prevent means understanding and satisfying interests before they are hidden and locked behind positional posturing.

If we assume that the situation will become adversarial, we can be sure that's what we will create. Do not advocate the use of procedures which encourage the adversarial relationships we seek to avoid. Do not succumb to a sense of powerlessness over the process. Pull your organization out of unproductive and excessively expensive dispute resolution; anticipate and act to prevent.

The best ADR success is the conflict that has been avoided because interests have been met before destructive confrontation has occurred. In the legal arena, this is often referred to as "preventative" law.

Anticipating and preventing conflicts is a management decision. It is often difficult to prove the benefit of such action because it is hard to document potential negative impacts or benefits should another course of action be selected. Nevertheless, anticipating and addressing interests which could generate conflicts is the most efficient form of ADR.

5. Explicitly assess the alternatives to using ADR and negotiation forums.*

Considering the best alternative to a negotiated agreement or other intervention is a powerful tool for evaluating the viability of, and building commitment to, a process of resolving disputes. Assessing the desirability and probability of a non-negotiated decision is often the first step in determining if negotiation, with or without the assistance of a neutral third party, is a superior procedural option.

How often have negotiators shied away from asking other disputants, "Why are you still at the table?" or "Why do you want a negotiated agreement?" Such questions are often avoided because of the fear that the opposing party will leave the table, and the negotiator will have failed. Requesting all parties to review and

*Roger Fisher and William Ury, *Getting to Yes*. Boston, Massachusetts: Houghton Mifflin Publishing Company, 1981.

assess their alternative procedures is important because it forces all those at the table, or those who have not agreed to even begin a dialogue, to understand and to clarify why they are or are not participating in a cooperative dispute resolution process. In other words, the assessment of the alternative procedures encourages disputing parties to select, to commit to, and to own a conflict resolution process because it provides a better or more predictable opportunity to achieve an acceptable settlement.

Third-party facilitators and mediators can be quite effective in appealing to parties' best alternatives as a means of encouraging them to assess the viability of various dispute resolution procedures, but the appeal may also be initiated just as effectively by a manager who is a party to a dispute.

6. Think of dispute resolution as a creative process.

Managing conflicts and resolving disputes is not always a zero-sum game or a question of slicing up and allocating a limited pie. Obviously, slicing the pie and zero-sum gaming are present in many disputes. However, this need not be the dominant approach. The maximization of any one party's benefits does not necessarily have to be at the expense of another. Parties should seek ways that joint gains can be created and that unnecessary losses for other parties are minimized.

Managing conflict need not always result in sharing losses. Through cooperative efforts, unique alternatives can be crafted which may benefit one or more of the parties without resultant losses to others. ADR procedures seek to find the key interests underlying each party's needs as well as common interests all parties share. By helping the parties understand their interests, and by designing solutions which maximize the satisfaction of diverse interests, ADR procedures seek to produce solutions where there is joint gain rather than mutual loss or a win for one party and a loss for another.

In a sense, ADR procedures seek to create a whole, or solution, which is greater than the sum of its parts. ADR can often result in settlements which are much more creative than merely slicing up and dividing a limited "pie".

7. Rather than ignore them, visibly isolate extremes.

Extreme positions and views always exist in conflict situations. They should be identified and publicized so that they can be evaluated, by the broader public and other parties to a dispute, as to how well they truly represent or satisfy broader public interests. One of the prerequisites for participation in a dispute resolution process should be the exposure of various views or proposals to public scrutiny.

Extreme views need not be bad or destructive. They may be the leavening or catalyst for the development of more creative solutions. Many individuals or groups who advocate extreme positions are very committed and have valid and important reasons for adhering to their views. They often serve an important function of moving society's consciousness toward new and important insights. To a significant degree this is what has happened with environmental awareness in the 1970's and 1980's.

Extreme positions may also be destructive and create barriers to resolving public issues in a mutually acceptable way. An effective dispute resolution process should provide a forum to develop rational settlement options, which can be compared and contrasted to more extreme positions. It is through this comparison and evaluation of how diverse solutions meet broader public interests, that it becomes more difficult for parties holding extreme positions to mobilize widespread public support.

Frequently, reliance upon adversarial models allows those advocating extreme positions to go on without clear and visible proof of major constituency support. In addition, prematurely resorting to adversarial means for resolving disputes tends to assure that we will move to extreme positions, and compromise will not be encouraged. The incentive becomes finding extremes and not a middle ground. Visibly isolating extreme views often builds incentives to find and share the middle ground and to create more broadly acceptable settlement options.

8. Negotiate and solve problems by satisfying interests, rather than capitulating to positions.

Often the key to the successful resolution of a dispute is to explore the unexamined assumptions, to go behind proposed solutions or positions which themselves represent values, and to understand the underlying interests or needs behind such values. Alternative dispute resolution is an educational process. That is, it seeks to provide a forum where disputing parties can educate each other about their underlying assumptions and needs. Interests are essentially the reason why people support specific positions or proposals. By educating each other about their interests, the parties are in a much better position to design settlement options which will be acceptable.

9. Seek psychological and procedural, as well as substantive satisfaction from solutions.

Disputes are not solely caused by substantive differences. Psychological and procedural barriers to settlement may also be present. Solving disputes has a lot to do with how people feel and the procedures that have been tried or used to

manage differences. If a durable settlement is desirable, each dispute process must be evaluated in terms of not only its ability to produce a substantively acceptable outcome but its procedural and psychological impacts as well.

Dispute management is not simply a contest or a game in which substantive gains are either won or lost. It is a relationship-building process. It involves process, content, and emotions. Frequently, parties must live in the future with those with whom they are disputing. The way that a dispute is resolved may often be as important as the specific settlement.

10. Design ADR procedures to address the causes of disputes.

There are many causes of disputes and conflicts. Experts generally categorize these causes in terms of conflicts of: interests, values, data, relationships, and structure. It is important to discern which of these, or which combination of these, is causing a dispute and then build a process which addresses the specific problem. Just as a military commander must carefully select the appropriate strategy, tactics and weaponry to use in a specific battle, so must the conflict manager select the appropriate dispute resolution procedure to address the basic causes of a conflict. Failure to accurately assess the needs of any given situation may result in an ineffective resolution or one that is more costly than necessary.

11. Try to separate personal egos from the issues in dispute.

Individuals and organizations frequently have conflicting needs. Personal hurt can be separated from the overall situation or solution to the organization's problem, with some effort by the involved individuals or with the assistance of a third party.

12. Consider both short- and long-term goals and objectives in deciding on dispute resolution procedures and desired outcomes.

All too frequently parties in conflict "win the battle, but lose the war" because they have confused long- and short-term goals and objectives. In some cases, the decision regarding which dispute resolution processes to select will be strongly influenced by the "shadow of the future" and what kinds of future interaction between the parties is projected or desired.

SECTION 4

WHAT CAUSES DISPUTES?

4

WHAT CAUSES DISPUTES? AN OVERVIEW

What is a Conflict or a Dispute?

Conflict is a form of competitive behavior between people or groups. It occurs when two or more people compete over perceived or actual incompatible goals or limited resources (Boulding, 1982). In order to manage or resolve conflict, it is necessary to identify its causes. This chapter examines several of the diverse sources of conflict and begins the discussion on how disputes can be resolved.

What Causes a Conflict or a Dispute?

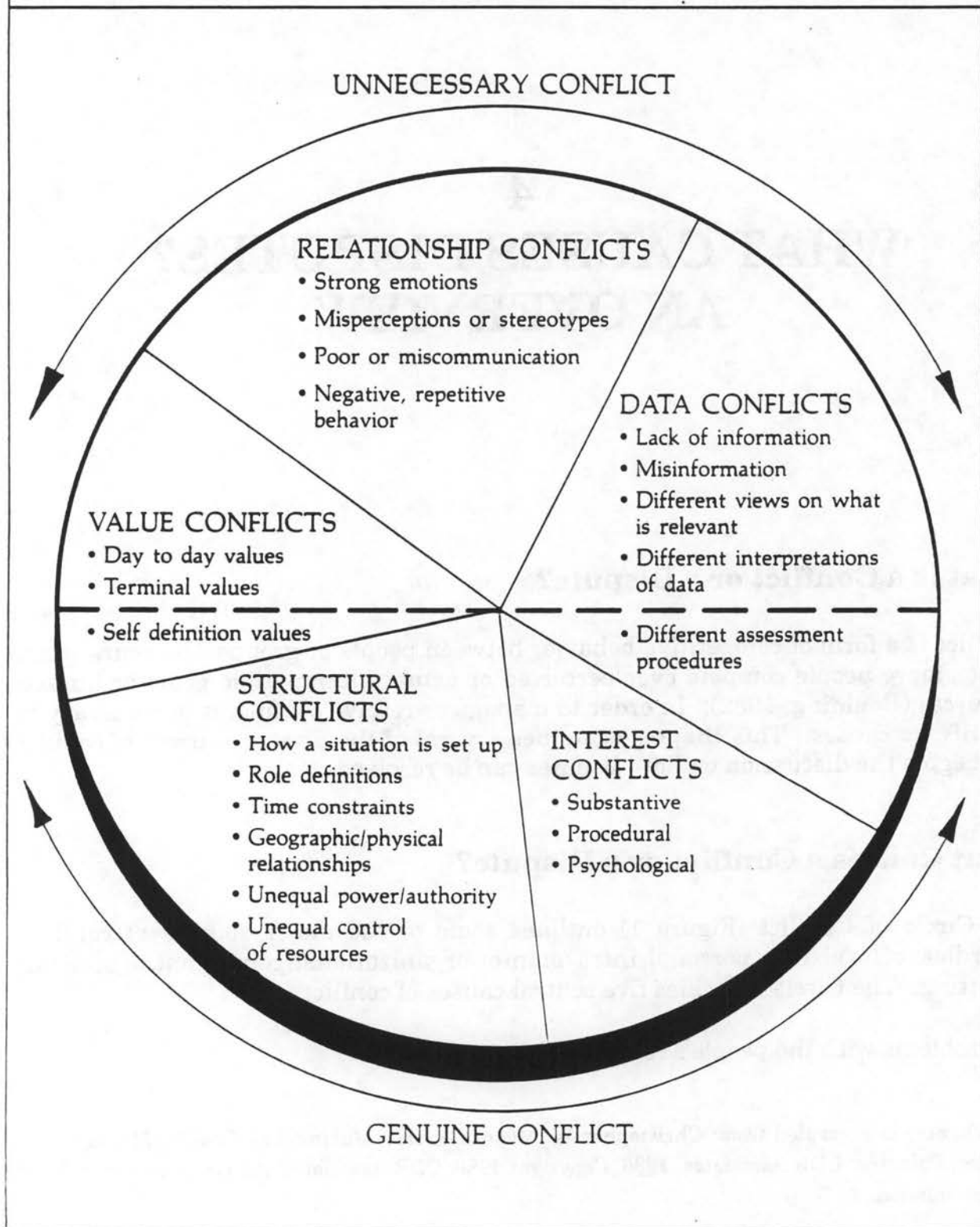
The Circle of Conflict (Figure 1) outlines some of the major sources of conflict, regardless of level (interpersonal, intra- or inter-organizational, communal, or societal) or setting. The Circle identifies five central causes of conflict:

- Problems with the people's relationships

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CIRCLE OF CONFLICT

Figure 1



What Causes Disputes? An Overview

- Problems with data
- Perceived or actual incompatible interests
- Structural forces
- Perceived or actual competing values

Relationship Conflicts occur because of the presence of strong negative emotions, misperceptions or stereotypes, poor communication or repetitive negative behaviors. These problems often result in what has been called unrealistic (Coser, 1956) or unnecessary (Moore, 1986) conflict in that it may occur even when objective conditions for a dispute, such as limited resources or mutually exclusive goals, are not present. Relationship problems often fuel disputes and lead to an unnecessary escalatory spiral of destructive conflict.

Data Conflicts occur when people lack information necessary to make wise decisions, are misinformed, disagree over what data are relevant, interpret information differently or have competing assessment procedures. Some data conflicts may be unnecessary, such as those caused by poor communication between the people in conflict. Other data conflicts may be genuine in that the information and/or procedures used by the people to collect or assess data are not compatible.

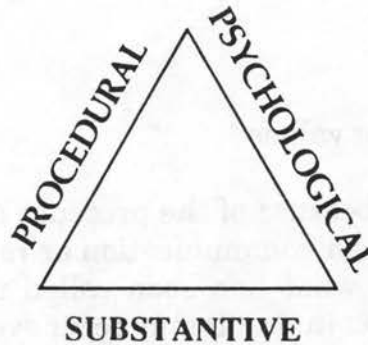
Interest Conflicts are caused by competition over perceived or actual incompatible needs. Conflicts of interest result when one party believes that in order to satisfy his or her needs, those of an opponent must be sacrificed. Interest-based conflicts occur over substantive issues (money, physical resources, time), procedural issues (the way the dispute is to be resolved), or psychological issues (perceptions of trust, fairness, desire for participation, respect). For an interest-based dispute to be resolved, all parties must have a significant number of their interests addressed and/or met in each of these three areas.

The Satisfaction Triangle below illustrates the interdependence of these three kinds of needs (Figure 2). The Triangle, or a settlement, is not complete unless there is satisfaction on each of the three sides. A satisfactory substantive settlement, without procedural and psychological satisfaction, may be inadequate to induce a final agreement.

Conflicts often result when a disputant adopts a position, a specific solution to a problem, and equates that preferred option with his or her interests. Generally interests can be satisfied in a variety of ways (Fisher and Ury, 1983). Inability to separate interests from positions often results in a deadlock or escalatory win/lose conflict behavior.

SATISFACTION TRIANGLE

Figure 2



Structural Conflicts are caused by patterns of human relationships. These patterns are often shaped by forces external to the people in dispute. Limited physical resources or authority, geographic constraints (distance or proximity), time (too little or too much), organizational structures, and so forth, often promote structural conflict.

Value Conflicts are caused by perceived or actual incompatible belief systems. Values are beliefs that people use to give meaning to their lives. Values explain what is good or bad, right or wrong, just or unjust. Differing values need not cause conflict. People can live together with quite different value systems. Value disputes arise only when people attempt to force one set of values on others or lay claims to exclusive value systems which do not allow for divergent beliefs.

The Circle of Conflict and Conflict Mapping

The Circle of Conflict is a useful analytical tool for examining disputes and uncovering the causes of conflict behavior. By examining a conflict and evaluating it according to the five categories--relationship, data, interest, structure, and value--it is possible to determine the primary causes of the dispute and to assess whether the cause is a genuine incompatibility of interests or an unnecessary perceptual or relationship problem between the parties. These insights can be of assistance in designing a resolution strategy that will have a higher probability of success than an approach which is exclusively trial and error (Moore, 1986).

SECTION 5

**PROCEDURES
FOR
RESOLVING DISPUTES**

5

PROCEDURES FOR RESOLVING DISPUTES: A CONTINUUM

INTRODUCTION

Historically, conflict resolution efforts have been focused in two directions. The first route has been toward newer and more powerful warfare technologies and more effective conflict waging strategies, which would act initially as a deterrent to prospective conflict, and if necessary, to physically repel aggression.

Frequently the focus of individuals, organizations or societies has been only on the first route. Indeed, much of what is known about conflict is fraught with images of competition, struggle and win-lose strategies. Many, and in fact most people, probably adhere to some form of Social Darwinism--that is, life is the story of the survival of the fittest. However, recent scientific research indicates that the struggle for survival is far more complicated than originally projected. Competition is just one side of the survival equation; cooperation is the other, and perhaps more important, side. Indeed, new research on social evolution and human nature indicates that cooperation provides a more viable explanation for the development of life and development and survival of society.

The second route, that of cooperation, has been toward less destructive ways of addressing competing interests and resolving disputes, which include the rule of law, democratic judicial institutions, representative forms of government and innovative means of collaborative problem solving. This route has emphasized fair and nonviolent

means of resolving disputes. The route contains both adversarial and non-adversarial approaches and procedures. ADR procedures are in large measure, creative new initiatives in this second route.

A CONTINUUM OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

Alternative dispute resolution procedures can be placed on a continuum of gradually more directive initiatives by the parties and increased involvement and interventions by third parties who provide various types of resolution assistance. Many of the procedures involve some form of cooperative problem solving or negotiations. Most of the procedures have some elements of relationship building, procedural assistance, substantive assistance, or advice giving as a means of facilitating resolution, but they differ significantly in degree and emphasis. Figure 3 outlines a general continuum of ADR procedures while Figure 4 describes, in more depth, the procedures found in the middle third of the Continuum, roughly from point 2 to point 17. Turning to Figure 3, Point A represents what some affectionately call the "hot tub" approach. That is, we all jump into the hot tub and somehow agree. Point B represents the opposite extreme, that is, we go to war or use a highly adversarial approach. ADR refers to the numerous possibilities between these points. Some are well known, others are emerging, and most make common sense.

Four important points should be made about this Figure 3 continuum. First, as we move from Point A to Point B, we gradually give over the power and authority to settle to outside parties. A dividing line, roughly two-thirds from A to B, symbolizes that point at which power to resolve disputes moves out of the hands of the disputants and into the hands of an outside party. The main thrust of this course is to encourage you to find ways to remain to the left of the dividing line. Second, the basic principles and procedures of interest-based negotiations and bargaining can be applied on any technique along the continuum. They are appropriate in facilitated problem-solving meetings, mediations, mini-trials, and deliberations after fact-finding.

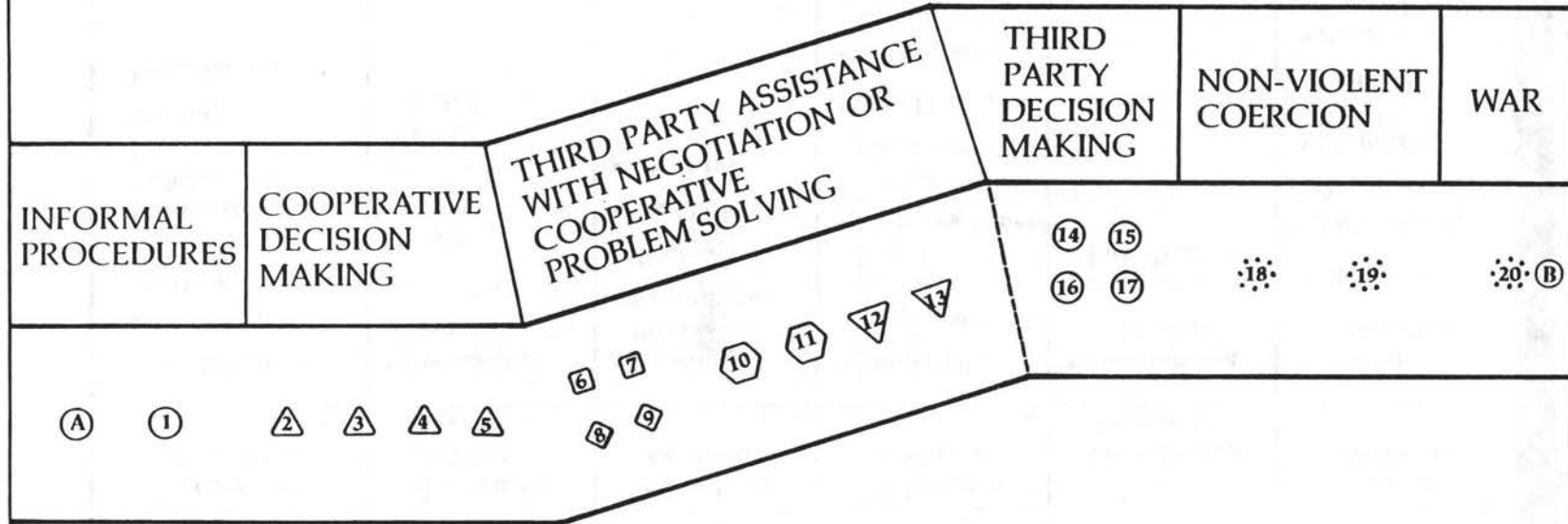
Third, as the unnamed points on the continuum indicate, there is much to learn. Possibilities exist to create new procedures across the continuum. The last word on ADR is far from in. In fact, ADR invites managers to innovate and create.

Four, it is important to remember all communication in disputes contains both content and process. Very often, the way we talk or the process of dialogue will determine how and if people listen to the content of the dialogue. The major premise behind ADR techniques is that by separating the process of dialogue and the content of dialogue in a dispute, we can better manage the discussions and promote agreement. This separation of process and content is what leads us to the use of third parties, sometimes called "interveners." These third parties, in various ways, become caretakers of the dialogue process in the disputes.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

A Continuum & Procedures

Figure 3



EXAMPLES OF PROCEDURES

- | | | | |
|---|----------------------|---|-------------------------|
| (A) Hot Tub | (6) Conciliation | (12) Disputes Panels | (18) Civil Disobedience |
| (1) | (7) | (13) Non-Binding Arbitration | (19) |
| (2) Informal Discussions | (8) Facilitation | --- Dividing Line Delegating Decision Making to Third Party | (20) War |
| (3) Cooperative/Collaborative Problem Solving | (9) Mediation | (14) | |
| (4) | (10) Mini-Trials | (15) Binding Arbitration | |
| (5) Negotiations | (11) Advisory Boards | (16) Administrative Hearings | |
| | | (17) Litigation Adjudication | |

A CONTINUUM OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

Figure 4

COOPERATIVE DECISION MAKING	THIRD PARTY ASSISTANCE WITH NEGOTIATIONS OR COOPERATIVE PROBLEM SOLVING			THIRD PARTY DECISION MAKING	
	Relationship Building Assistance	Procedural Assistance	Substantive Assistance	Advisory Non-Binding Assistance	Binding Assistance
Parties are Unassisted <ul style="list-style-type: none"> • Conciliation • Information Exchange Meetings • Cooperative/ Collaborative Problem-Solving • Negotiations 	<ul style="list-style-type: none"> • Counseling/ Therapy • Conciliation • Team Building • Informal Social Activities 	<ul style="list-style-type: none"> • Coaching/ Process Consultation • Training • Facilitation • Mediation 	<ul style="list-style-type: none"> • Mini-Trial • Technical Advisory Boards/ Disputes Panels • Advisory Mediation • Fact Finding • Settlement Conference 	<ul style="list-style-type: none"> • Non-Binding Arbitration • Summary Jury Trial 	<ul style="list-style-type: none"> • Binding Arbitration • Med-Arb • Mediation-then-Arbitration • Disputes Panels (binding) • Private Courts/ Judging

Figure 4 displays, in depth, the major known ADR techniques falling from cooperative decision making to third party decision making in Figure 3. Figure 4 further groups these techniques into the following categories: unassisted procedures, relationship building assistance, procedural assistance, substantive assistance, advisory/non-binding assistance and binding assistance.

Cooperative Decision Making

On the left end of the continuum, is a category of procedures which have been labeled "Joint-Cooperative Decision Making." These are settlement procedures which the parties initiate together without third party assistance. Among the most significant procedures in this category are conciliation activities, information exchange meetings, cooperative problem solving and negotiations.

Conciliation refers to building positive social relationships which are often a pre-requisite for productive problem solving or negotiations. Site visits to projects, meals, or casual conversation over a meal or drinks are often conciliatory gestures initiated by parties that open up dialogue, allow people in conflict to get to know each other better, build positive perceptions, enhance trust, and promote the openness to take the risk to begin negotiations.

Information Exchange Meetings are meetings in which parties share data and check out perceptions of each other's issues, interests, positions, and motivations in an effort to minimize unnecessary conflicts over data. Information exchange meetings are often the first step toward productive cooperative problem solving or negotiations.

Cooperative Problem Solving involves meetings of concerned parties to resolve a question or issue of mutual concern. Cooperative problem solving is most commonly used when a conflict is not highly polarized and prior to parties forming hard line positions. It is usually the procedure of first resort when all parties recognize that a problem exists and that every one may be negatively or positively impacted by its settlement. Cooperative problem solving involves a positive effort by concerned parties to collaborate rather than compete to resolve a common problem.

Negotiations are the major alternative dispute resolution procedure. Negotiations involve a bargaining relationship between two or more parties who have either perceived or actual conflicts of interest. The participants join voluntarily in a temporary relationship to educate each other about their needs and interests and exchange specific resources or promises that will resolve one or more issues. Negotiations may be highly collaborative if an interest-based bargaining approach to problem solving is used, or may be more adversarial if the parties decide to use hard line bargaining over positions. Almost all of the alternative dispute resolution procedures, in which the parties maintain control over the outcome of the conflict, are variations upon or elaborations of the negotiation process.

Third Party Assistance with Cooperative Problem Solving or Negotiations

While the majority of disputes are handled by the parties themselves through joint cooperative decision making, a smaller number of conflicts may require the assistance of a third party to help the involved parties move toward a resolution. Third party assistance involves the intervention of a neutral and impartial person or persons into a dispute, to provide specific help to cooperative problem solvers or negotiators. This assistance enables the disputing parties to overcome relationship, procedural, or substantive barriers to settlement.

To facilitate the explanation of the various forms of third party assistance, the procedures have been divided into several discrete categories. In real life interventions, a third party may play more than one role or perform more than one function--such as that of a conciliator, trainer, or mediator--within the context of a given intervention. However, the presentation here of various discrete roles and functions will more easily enable a manager to discern both what procedures are available to him or her and to decide what assistance is needed.

RELATIONSHIP BUILDING ASSISTANCE

Frequently the major obstacles to productive negotiations are psychological barriers between the parties. These barriers may be due to the presence of strong emotions based upon recent or past interactions between the parties; misperceptions or stereotypes about a party's behavior, goals, motives, or personality; communications problems related to the amount, style, form, or content of the information being transmitted; or negative repetitive behavior which creates resistance to dialogue or cooperation.

To overcome psychological barriers to negotiations or cooperative problem solving, the parties may need assistance in building positive relationships. The focus of this type of third party assistance may be upon one person or multiple parties. The degree of directiveness of the intervention may also vary, depending upon the situation and needs of the individuals involved. Described below are some of the intervener activities which may be used to build a relationship between the parties and overcome psychological barriers to settlement.

Counseling and Therapy are generally oriented toward helping individuals work through psychological issues which hinder productive relationships within themselves or with others. There are many diverse types of counseling programs and therapies which can respond to particular individual or group problems. In some disputes it is

appropriate for one or more of the participants to seek, or be referred to, third party therapeutic or counseling assistance as a means of addressing the psychological barriers to productive problem solving.

Conciliation is another form of relationship-building assistance. Conciliation when initiated by one or more of the disputing parties sometimes fails, not because the intent or actions are not right or adequately initiated, but because of *who* is making the initiative. Conciliation by a third party, who may or may not be totally neutral, involves assisting parties in conflict to establish communications, clarify misperceptions, deal with strong emotions, and build the trust necessary for cooperative problem solving. Conciliators may accomplish the above goals by providing for a neutral meeting place, carrying initial messages between/among the parties, reality testing regarding perceptions or misperceptions, and affirming the parties' abilities to work together. Conciliation is often practiced in tandem with procedural assistance such as coaching, training, facilitation, or mediation.

Team Building is another form of relationship-building activity. In this model of assistance, a third party plans and conducts structured activities with the parties which promote positive perceptions of each other, encourage productive communications, build trust, and encourage a positive working relationship. Some examples of team building activities include: discussion groups on topics such as, "What constitutes an ideal or positive working relationship?"; common work projects or problem-solving sessions on issues or topics about which the parties are not conflicted; structured social gatherings such as meals or sports events; or relationship-building activities such as Outward Bound experiences.

PROCEDURAL ASSISTANCE WITH NEGOTIATIONS

The next broad category of dispute resolution procedures involves the assistance of a third party with the negotiation *process* to promote more effective joint problem solving. Third party assistance is often sought by the parties in dispute because the parties do not know each other or potential disputants have not been identified; no acceptable forum exists for the negotiations; there is no designated convener to begin negotiations or no party is unilaterally able to accomplish this goal; the relationships between the parties are so strained that rational discussions are difficult or impossible; an effective negotiation process has not been identified; or the parties have reached a substantive impasse and the parties need procedural help to break the deadlock. Assistance at this level of intervention is quite circumscribed; it involves help with improving either the cooperative problem-solving or negotiation *process*, not substantive assistance or advice as to possible solutions.

Coaching or Process Consultation. In this type of intervention, the third party is invited by one or more parties to make suggestions about how the negotiation process can be improved. This type of process coaching is different from advocacy in that the process coach is making suggestions that will enhance the probability of positive

Procedures for Resolving Disputes: A Continuum

benefits for all of the disputing parties rather than merely one "client." The coaching may involve procedural suggestions on how to make conciliatory gestures, improve communications, start negotiations, identify interests, generate options, make offers, back parties off hard line positions, and so forth.

Training is the second form of procedural assistance. In this intervention, a third party trains one or both parties in effective negotiation or problem-solving procedures which will be mutually beneficial to all of the parties. These training events may be conducted separately with each of the parties or in joint sessions. Training is often a conditioning process which enables the parties to meet each other prior to direct negotiations or meetings, and to build a relationship in a less threatening environment than a direct confrontation. Training, especially when conducted jointly, builds common awareness and assumptions about the goals and outcomes of the negotiations, and teaches common procedures and skills which facilitate the parties' efforts to coordinate their dispute resolution efforts. Training can also provide a forum for pre-negotiation planning of procedures to be used in future negotiation sessions.

Facilitation is the next level of procedural assistance. Facilitation involves the assistance of an individual, who is impartial toward the issues or topics under discussion, in the design and conduct of a problem-solving meeting. The facilitator, unlike the process coach described above, works with all of the meeting participants in a whole group session and provides procedural directions as to how the group can efficiently move through the problem-solving steps of the meeting and arrive at the jointly agreed upon goal. A facilitator may be a member of one of the disputing groups, or may be an external consultant. Facilitators do not necessarily have to be outsiders to a dispute; however, they must remain impartial as to the topics or issues under discussion and focus only on procedural assistance, or their value as a neutral will be lost.

Facilitators and facilitation may be used to improve the flow of data in information exchange meetings, such as public meetings where data is either being provided to, or solicited from a group; or in decision making meetings, where a specific outcome is desired. In the latter form of meeting, the facilitator may help the group to develop a list of mutually acceptable outcomes or a preferred decision that will be referred to a superior or decision-making body for approval or implementation, or the facilitator can assist the group to make its own binding decision when the members have the authority to do so.

In general, facilitation is most applicable when the intensity of the participants' emotions about the issues in dispute or the other parties is low to moderate; the parties or issues are not extremely polarized; the parties have enough trust in each other that they can work together to develop a mutually acceptable solution; or the parties are in a common predicament (such as an internal organizational problem) and they need or will benefit from a jointly acceptable outcome. Facilitation is not as appropriate for highly polarized disputes.

Mediation is the final and most directive form of procedural assistance. Mediation is best known from its use to resolve labor and international disputes, but in recent years it has been applied successfully to environmental, public policy, commercial, construction, organizational, personnel, and interpersonal conflicts. Mediation involves the intervention into a dispute or negotiation of an acceptable, impartial and neutral third party, who has no decision-making authority, who will procedurally assist the parties to voluntarily reach an acceptable settlement of issues in dispute. It should be noted that the mediator is an outsider to the conflict and has no substantive investment in how the dispute is settled other than allegiance to broader principles of fairness, equity, and the voluntary nature of the exchanges or promises made between/among the parties.

The mediator, like the facilitator, makes primarily procedural suggestions regarding how parties can reach agreement; but on occasion, s/he may also suggest some substantive options as a means of encouraging the parties to expand the range of possible settlements under consideration. Frequently the mediator works with the parties individually, in caucuses, to explore acceptable settlement options or develop proposals that will move the parties closer to agreement.

Mediators differ in their degree of directiveness or control in their assistance to disputing parties. Some mediators are more "orchestrators" (Kolb, 1983) who set the stage for bargaining, make minimal procedural suggestions, and intervene in the negotiations only to avoid or overcome a deadlock. Other mediators are "deal makers," and are much more involved in forging the details of a settlement. Regardless of how directive the mediator is, s/he performs the role of a catalyst that enables the parties to initiate progress toward their own resolution of issues in dispute.

Generally, mediation assistance is needed in highly polarized disputes where the parties have either been unable to initiate a productive dialogue, or in cases where the parties have been talking and have reached an insurmountable impasse. The mediator helps the parties to initiate new negotiations or reopen a stalled bargaining session.

SUBSTANTIVE ASSISTANCE WITH NEGOTIATIONS

While some disputes and disputants are the result of a procedural impasse, others are blocked by problems with data. The intractability of disputes is often increased by lack of information, different views about what is relevant, diverse means of collecting or interpreting data, or differing criteria to assess the data. The definition of data may include the legal merits or principles involved in a case, technical or scientific data, the way that data is valued, and so forth.

In cases where data is a problem, what the parties may need is a means to get a better handle on what is relevant and what variables need to be considered for negotiations to proceed more productively. Substantive assistance with negotiations involves the use of a third party to help collect, assess, manage, and/or design and facilitate a

Procedures for Resolving Disputes: A Continuum

procedure by which data can be explored in a manner that is useful to the parties. There are a number of third party procedures which enhance the quality of data needed for effective decision making. Several of the most common ones are described below.

The **Mini-Trial** is a major new way of assisting parties to accurately identify and assess relevant data. The mini-trial is just that, a miniature or abbreviated trial, but one which is non-binding and does not involve a formal judge or judgment. The mini-trial is a procedural and substantive intervention designed to provide key decision makers with detailed and explicit data about the legal basis and merits of a case. The assumption behind the mini-trial is that if decision makers are fully informed through the mini-trial process as to the real merits of their legal case and that of the opposing party, they will be better prepared to successfully engage in settlement negotiations.

In this procedure, the parties select a mutually acceptable third party, who is often a former judge or individual versed in relevant law, to oversee the process. The parties then negotiate the procedural rules which will determine the format of the mini-trial. Each side is invited to select a lawyer who presents to the major decision makers for both or all sides their best assessment of their case. Generally, rules for discovery and case presentation are somewhat relaxed from those used in the traditional courtroom, and the parties agree on specific limited periods of time for legal presentations and arguments.

In the mini-trial the decision maker(s) are senior managers or decision makers from the opposing sides, who have the authority to settle the case. The third party who oversees the procedure is responsible for explaining and maintaining an orderly process of case presentation.

In a mini trial, the presentation of legal arguments before the chief decision makers is a preliminary stage to a further bargaining session. Once the decision makers have "heard the evidence," they adjourn to a private forum to negotiate a settlement based upon the information presented. If they are still at an impasse, they may request an advisory opinion from the neutral third party regarding the possible disposition of the case if it were to go to court. Generally, the neutral third party makes an advisory ruling regarding a settlement range, rather than offering a specific solution. The parties can use this advisory opinion to narrow the range of their discussions and to focus in on acceptable settlement options. If the parties fail to reach an agreement, they always have the option to pursue an adjudicated settlement in court or to use an alternative binding decision-making process.

Technical Advisory Boards, Data Mediation, and Non-Binding Disputes Panels provide other means to clarify misperceptions, fill in gaps of information, or resolve differences over data. In these procedures, one or more impartial third parties

review conflicting pieces of data and suggest ways to reconcile the differences. These may be procedural suggestions or specific substantive recommendations. This information may then be taken back to the negotiation table and used in future bargaining.

Advisory Mediation is a variation of the mediation process described in the procedural assistance section above. In advisory mediation, the mediator first provides procedural assistance to the parties as they attempt to negotiate a settlement. If the parties reach an impasse and procedural assistance cannot break the deadlock, they may request the mediator to provide an advisory opinion of how s/he believes the case should be settled. The mediator's opinion is non-binding but serves the same function as advice from a fact-finder or neutral in a mini-trial--that being an informed objective opinion from a neutral and impartial observer. The parties can use this information to further negotiations, accept the opinion as is and settle, or refer the dispute to a third-party decision maker. Research on this process of dispute resolution has indicated that in cases where the parties did not accept the recommendation of the advisory mediator and referred the case to an arbitrator, the arbitrator concurred with the mediator's opinion approximately 80 percent of the time. Parties' knowledge of the high level of concurrence between the mediators' and arbitrators' opinions has led many disputants to accept the mediator's recommendations outright rather than incurring additional expenses by moving to arbitration or another third-party decision maker for a binding opinion.

Fact-Finding is a procedure that originated in the attempt to resolve labor disputes, but variations of the procedure have been applied to a wide variety of problems in other arenas. The process basically is quite simple. An impartial and acceptable third party, selected by the parties or by an individual or agency with the authority to appoint a fact finder, is authorized to investigate the issues in dispute and to come up with either: (1) a situation assessment--a document which organizes and describes the issues, interests, potential settlement options, and possible procedures to resolve a conflict; or (2) a specific non-binding procedural or substantive recommendation as to how the dispute might be settled. Either of these types of fact-finding reports are then taken by the parties and used as the basis for further talks or negotiations. The rationale behind the efficacy of fact-finding is the expectation that the opinion of a trusted and impartial neutral will carry weight with the disputants and with members of the public if the report is released to the media. It is hoped that the report will be seen as an unbiased, fair and equitable recommendation regarding how the parties' concerns and interests can be addressed; and that these qualities will lead to the parties' acceptance of the fact finder's advice. In the event that the fact finder's assessment or recommendation is accepted by the parties, they may move forward to complete their settlement negotiations and reach an agreement. If the recommendation is not accepted, the data will have been collected and organized in a fashion that will facilitate further negotiations or be available for use in a later adversarial procedure.

The Settlement Conference is an ADR procedure found within the judicial system and is a normal step in common practice in many jurisdictions. Generally the process involves a pre-trial conference between the lawyers for opposing parties, possibly the disputing parties themselves, and a settlement judge or referee; with the objective being a mutually acceptable negotiated settlement of the case. The settlement judge is a different individual than the trial judge. The role of the settlement judge is similar to that of the mediator, to procedurally assist the parties to negotiate an agreement, with the addition that the settlement judge may provide the parties with specific substantive and legal information about what the disposition of the case might be should it go to court, or what possible settlement ranges should be considered. In this respect, the settlement judge plays a much stronger authoritative role than the mediator because of his or her knowledge of the law, experience in hearing similar cases, and stature as a judge.

Third Party Advisory and Non-Binding Assistance

In some disputes, neither procedural assistance nor help with data enables the parties to reach agreement. What is needed is something stronger, a non-binding objective opinion or recommendation from a knowledgeable third party. At this level of assistance on the Continuum of Alternative Dispute Resolution Procedures, the procedures take a quasi-judicial form, as distinct from the previous forms of assistance which were variations of negotiation or cooperative problem-solving procedures. The majority of time and effort in these latter procedures is dedicated to presenting the facts of the case in a quasi-judicial manner to a third party "advisor" and obtaining an opinion, rather than upon the parties negotiating their own agreement. The goals of the process and the third party are no longer to assist the parties to reach a directly negotiated agreement, but to make a strong non-binding recommendation to the parties which they can accept or reject.

Two procedures which fall into this category of assistance include non-binding arbitration and summary jury trials. These procedures differ as to who is the third party and the level of formality by which the disputants' cases are presented.

Non-Binding Arbitration is probably the best known of the quasi-judicial procedures available to resolve disputes. Arbitration may be non-binding, advisory, or binding upon the parties. This process has a long history of use in the resolution of labor/management and commercial disputes. Recently it has seen applications in diverse arenas such as construction and insurance claims.

Arbitration is a private process whereby a dispute is submitted to an impartial and neutral individual or panel, for either a non-binding or binding decision. The third parties are often either lawyers or technical experts in the area of the dispute, although this is not a prerequisite to being an arbitrator. What is important in selecting an arbitrator is his or her acceptability to the parties, impartiality, objectivity, fairness,

and the ability to evaluate and make judgments about data. Generally in arbitration, the parties have some say in the selection of the third party and are able to choose an individual or panel with some degree of expertise and knowledge of the contested issues.

In an arbitration hearing, each side's arguments are presented to the arbitrator in a quasi-judicial manner with each side having an opportunity to present the facts and merits of the case as they see them. There is time for cross-examination and closing statements. Upon completion of the case presentation phase, the arbitrator issues an opinion which may be either non-binding or binding depending upon the prior agreement reached by the parties or the conditions set out in a commercial contract or applicable law.

The **Summary Jury Trial**, developed by Judge Thomas D. Lambros of Ohio, is designed to discourage unnecessary litigation by providing disputants with a preview of the outcome of a future jury trial. This abbreviated jury trial is conducted by the court, draws on the same jury pool used in actual trials, exposes jurors to the same arguments and evidence, and requires the jurors to retire, deliberate, and make a decision as in a real trial. The difference is in the parameters of the legal presentations and the non-binding nature of the verdict. Summary jury trials generally take less than a day to conduct and allow time between the summary process and the real trial date for the parties to reconsider the advisability of going to trial. The assumption is that with a realistic reading of how a jury might decide the case, the parties may be able to settle out of court.

Binding Third Party Assistance (ADR Procedures)

The final set of procedures on the continuum are alternatives to traditional judicial processes which also provide binding decisions or resolutions to disputes. In each of these procedures the disputing parties submit their differences to an impartial/neutral third-party decision maker, who uses a quasi-judicial procedure to hear the case, and who is authorized by the parties to make a decision that will be binding upon them. The most common procedures in this category are binding arbitration, med-arb, mediation, then binding arbitration, dispute panels, and private courts. **ALERT:** The Corps does not currently have the authority to turn issues over to binding ADR procedures, such as arbitration, med-arb, disputes panels, or private courts.

Binding Arbitration was already mentioned in the advisory assistance category. Binding arbitration differs from the procedure described above by the fact that the parties enter into the process with a commitment to be bound by the opinion of the decision maker, rather than merely being obligated to consider his or her recommendation. If the parties have elected binding arbitration, the third party's decision has the force of law, but it does not set a legal precedent nor is it appealable in a court of law except under extraordinary circumstances.

Med-Arb is a variation on the arbitration procedure. In med-arb the impartial/neutral third party is authorized by the disputing parties to mediate their dispute until such time as they reach a deadlock. To break the impasse, the third party is authorized by the disputants to make a decision and render a binding opinion on the barrier in question. While this procedure does result in a binding decision, it has been quite controversial among dispute resolution professionals because it mixes and confuses procedural assistance with binding decision making. Some professionals have argued that the parties are less likely to disclose necessary information for a settlement or are more likely to present extreme arguments in mediation if they believe that the third party will ultimately be requested to make a decision.

Mediation--then Arbitration is similar to the procedure described above except that the roles are divided between two people. A mediator works with the parties first, and if they fail to settle the case is turned over to another person to arbitrate and arrive at a binding decision. This procedure responds to some of the objective voices about the previous process.

Disputes Panels have already been discussed in the previous section on non-binding procedures. This procedure can also be binding if all of the parties contract for this outcome. There are a variety of ways that decision makers are selected in this model. One procedure is for the parties to receive a list of potential panel members from a reputable organization which provides impartial, such as the American Arbitration Association. The parties agree on the number of desired panel members and then take turns striking unacceptable members off the list until they are left with the desired number of individuals. This group is then convened to hear the case. Another procedure is for each of the disputing members to select a panel member and then for these two individuals to agree upon a third. In each of the above models, a decision is reached by a vote of the panel members with the majority opinion deciding the case. The panel members and the disputants can make pre-hearing agreements about how the procedure will be conducted.

Private Courts or Private Judging are a final alternative means of resolving disputes. In this procedure, experienced former judges are hired by private parties to hear legal disputes which usually have been filed in court. The private judges use applicable laws, statutes, and regulations to make their decisions and the rules of procedure are the same as in the public court system. In this procedure some legal processes may be abbreviated, such as the time allowed for and form of discovery, upon the mutual agreement of the parties to expedite rapid settlement of the case. This model provides a private and non-governmental binding settlement which generally is more rapid, less costly, and often more efficient than that available through the public court system.

APPLYING THE CONTINUUM

The procedures described above comprise a menu of options that managers and decision makers can use to select the appropriate form of assistance needed to resolve a dispute. Many, and in fact most of the procedures, can be used either independently of each other as a discrete procedure to move disputing parties toward agreement, or sequentially as part of a broader dispute resolution plan. For example, it is not unusual for parties to try unassisted negotiations first, and if they are not successful to obtain the services of a mediator or a fact-finder, or to move on to a mini-trial. Innovative managers, who are looking for expeditious ways to resolve internal or external organizational disputes, should carefully consider what kind of assistance will be most helpful, and then develop an integrated conflict management plan that sequences the most desirable procedures.

Figure 5 is a representative summary of how the Corps has begun to apply some of these procedures. The left side of the matrix characterizes six areas of Corps activities while the horizontal axis represents the middle third of the Figure 3 Continuum of ADR Procedures.

ADR PROCEDURES AND CORPS ACTIVITIES

Figure 5

APPROACHES/ PROCEDURES	THIRD PARTY ASSISTANCE				THIRD PARTY DECISION MAKING
	COOPERATIVE DECISION MAKING	Relationship Building Assistance	Procedural Assistance	Substantive Assistance	
AREAS	Unassisted				ADR Procedures/ Public Procedures
CONTRACT CLAIMS	<ul style="list-style-type: none"> • Cooperative Problem-Solving 			<ul style="list-style-type: none"> • Mini-Trials 	
CIVIL WORKS PLANNING/ LCA's	<ul style="list-style-type: none"> • Cooperative Problem-Solving 		<ul style="list-style-type: none"> • Training 	<ul style="list-style-type: none"> • Disputes Panels 	<ul style="list-style-type: none"> • Non-Binding Arbitration • Administrative Hearings • Adjudication
REGULATORY FUNCTIONS	<ul style="list-style-type: none"> • Cooperative Problem-Solving • Negotiation 	<ul style="list-style-type: none"> • Conciliation 	<ul style="list-style-type: none"> • Facilitation • Mediation • Training 		
SUPERFUND TOXICS & HAZARDOUS WASTE				<ul style="list-style-type: none"> • Mini-Trials 	
OPERATIONS	<ul style="list-style-type: none"> • Negotiation 		<ul style="list-style-type: none"> • Mediation 		
CONSTRUCTION CIVIL WORKS & MILCON	<ul style="list-style-type: none"> • Cooperative Problem-Solving 	<ul style="list-style-type: none"> • Partnering • Team Building 	<ul style="list-style-type: none"> • Facilitation • Training 		

SECTION 6

**BENEFITS
OF
ADR PROCEDURES**

6

BENEFITS OF ADR PROCEDURES

People in disputes who are considering using ADR procedures as a way to resolve their differences often want to know what the process can do for them. While no dispute resolution procedure can guarantee specific outcomes, there are some trends that seem to be characteristic of various methods. Below is a list of some of the benefits that often result from the use of ADR. While the resolution of particular disputes may not involve every one of the benefits listed below, many of them are often present.

The voluntary nature of the process: Parties elect to use ADR procedures because they believe that ADR provides the potential for better settlements than those available through litigation or other procedures involving third-party decision makers. Generally, no one is coerced into using ADR procedures.

Expedited procedures: Because ADR procedures are less formal, the parties are able to negotiate the terms of their use. This prevents unnecessary delays and expedites the resolution process.

Non-judicial decisions: Decision-making authority is retained by the parties rather than delegated to a third-party decision maker. This means that the parties have more control and predictability over the outcome.

Control by managers who best know their organizations' needs: ADR procedures place decisions in the hands of the people who are in the best position to assess the short- and long-term goals of their organizations and the potential positive or

Benefits of ADR Procedures

negative impacts of any particular settlement option. Third-party decision making often asks a judge, jury, or arbitrator to make a binding decision regarding an issue about which s/he may not be an expert.

Confidential procedure: ADR procedures can provide for the same level of confidentiality as is commonly found in settlement conferences. Parties can participate in ADR procedures, explore potential settlement options, and still protect their right to present their best case in court at a later date without fear that data divulged in the procedure will be used against them.

Greater flexibility in designing the terms of the settlement: ADR procedures provide an opportunity for the key decision makers from each party to craft custom settlements which can better meet their combined interests than would an imposed settlement by a third party. ADR enables parties to avoid the trap of deciding who is right or who is wrong, and to focus the key decision makers on the development of workable and acceptable solutions.

ADR procedures can also provide greater flexibility as to the parameters of the issues under discussion and the scope of possible settlements. ADR procedures enable the participants to "expand the pie" and develop more comprehensive settlements that address the genuine underlying causes of the dispute, rather than be constrained by a judicial procedure which is limited to making judgments based upon narrow points of law, such as whether proper procedures have been followed.

Savings in time: With the significant delays in obtaining court dates, ADR procedures offer expeditious opportunities to resolve disputes without having to spend years in litigation. In many cases, where time is money and where delayed settlements are extremely costly, a resolution developed through the use of an ADR procedure may be the best alternative for a timely resolution.

Cost savings: ADR procedures are generally less expensive than litigation. Cost is by and large a function of time, and third-party neutrals on the average charge less for their time than do lawyers. (A 1984 study found that third party neutrals charged between \$250 to \$700 per day.)

In addition to the lower costs of neutrals, expenses can be lowered by limiting the the costs of discovery, speeding up the time between filing and settlement, and avoiding delay costs. These front end expenses are often the most costly components of legal cases.

In addition to the above costs to the parties, ADR can mean significant savings to the taxpayers who bear the burden of supporting an expensive judicial system. Relieving the burden on the courts caused by unnecessary or inappropriate lawsuits can help save valuable public resources.

Benefits of ADR Procedures

Participants have noted that even in ADR efforts where agreements have not been reached, and these have been in a minority of cases in the Corps' experience, the minimal time and resources necessary to participate in an ADR effort would have been expended anyway if the case had gone to trial or through a prolonged political battle. The participation in the ADR procedure generally was considered to be worthwhile because it gave the opposing parties a better understanding of their case and that of others and often narrowed the range of issues to be litigated or addressed in the political arena, thus adding other cost savings.

Other savings include the lowering of management time spent in resolving the dispute. ADR procedures, when successful, are generally much less expensive in terms of staff time than a full legal suit.

Protection and maintenance of working relationships: ADR settlements, which result in negotiated agreements that address each of the parties' needs, are much better able to preserve present and future working relationships than win/lose procedures such as litigation. If a future working relationship is important, a negotiated settlement may be the best resolution possible.

High Rate of Compliance: Parties who have reached their own agreement are generally more likely to follow through and comply with its terms than when an agreement has been imposed by a third-party decision maker. This factor helps ADR participants avoid costly re-litigation.

Greater Degree of Control and Predictability of Outcome: Parties that negotiate their own settlements have more control over the outcome of their dispute. Gains and losses are more predictable in a negotiated or mediated settlement than they would be if a case was arbitrated or went before a judge.

Agreements That Are Better Than a Simple Compromise or Win/Lose Outcome: Interest-based negotiated settlements are generally more satisfactory to all parties than compromise decisions in which the participants share gains and losses. Interest-based negotiation enables the parties to look for ways to expand the pie, alternate satisfaction, or look for 100 percent solutions that create "gains for all and losses for none."

Decisions That Hold Over Time: ADR settlements tend to hold over time, and if a later dispute results, the parties are more likely to utilize a cooperative form of problem solving to resolve their differences than pursue an adversarial approach.

SECTION 7

NEGOTIATION

7

NEGOTIATION

DEFINITION OF NEGOTIATION

Negotiation is one of the most common approaches used to make decisions and manage disputes. It is also the major building block for many other alternative dispute resolution procedures.

Negotiation occurs between spouses, parents and children, managers and staff, employers and employees, professionals and clients, within and between organizations and between agencies and the public. Negotiation is a problem-solving process in which two or more people voluntarily discuss their differences and attempt to reach a joint decision on their common concerns. Negotiation requires participants to identify issues about which they differ, educate each other about their needs and interests, generate possible settlement options and bargain over the terms of the final agreement. Successful negotiations generally result in some kind of exchange or promise being made by the negotiators to each other. The exchange may be tangible (such as money, a commitment of time or a particular behavior) or intangible (such as an agreement to change an attitude or expectation, or make an apology).

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Negotiation is the principal way that people redefine an old relationship that is not working to their satisfaction or establish a new relationship where none existed before. Because negotiation is such a common problem-solving process, it is in everyone's interest to become familiar with negotiating dynamics and skills. This section is designed to introduce basic concepts of negotiation and to present procedures and strategies that generally produce more efficient and productive problem solving.

CONDITIONS FOR NEGOTIATION

A variety of conditions can affect the success or failure of negotiations. The following conditions make success in negotiations more likely.

Identifiable parties who are willing to participate. The people or groups who have a stake in the outcome must be identifiable and willing to sit down at the bargaining table if productive negotiations are to occur. If a critical party is either absent or is not willing to commit to good faith bargaining, the potential for agreement will decline.

Interdependence. For productive negotiations to occur, the participants must be dependent upon each other to have their needs met or interests satisfied. The participants need either each other's assistance or restraint from negative action for their interests to be satisfied. If one party can get his/her needs met without the cooperation of the other, there will be little impetus to negotiate.

Readiness to negotiate. People must be ready to negotiate for dialogue to begin. When participants are not psychologically prepared to talk with the other parties, when adequate information is not available, or when a negotiation strategy has not been prepared, people may be reluctant to begin the process.

Means of influence or leverage. For people to reach an agreement over issues about which they disagree, they must have some means to influence the attitudes and/or behavior of other negotiators. Often influence is seen as the power to threaten or inflict pain or undesirable costs, but this is only one way to encourage another to change. Asking thought-provoking questions, providing needed information, seeking the advice of experts, appealing to influential associates of a party, exercising legitimate authority or providing rewards are all means of exerting influence in negotiations.

Agreement on some issues and interests. People must be able to agree upon some common issues and interests for progress to be made in negotiations. Generally, participants will have some issues and interests in common and others that are of concern to only one party. The number and importance of the common issues and interests influence whether negotiations occur and whether they terminate in agreement. Parties must have enough issues and interests in common to commit themselves to a joint decision-making process.

Will to settle. For negotiations to succeed, participants have to want to settle. If continuing a conflict is more important than settlement, then negotiations are doomed to failure. Often parties want to keep conflicts going to preserve a relationship (a negative one may be better than no relationship at all), to mobilize public opinion or support in their favor, or because the conflict relationship gives meaning to their life. These factors promote continued division and work against settlement. The negative consequences of not settling must be more significant and greater than those of settling for an agreement to be reached.

Unpredictability of outcome. People negotiate because they need something from another person. They also negotiate because the outcome of not negotiating is unpredictable. For example: If, by going to court, a person has a 50/50 chance of winning, s/he may decide to negotiate rather than take the risk of losing as a result of a judicial decision. Negotiation is more predictable than court because if negotiation is successful, the party will at least win something. Chances for a decisive and one-sided victory need to be unpredictable for parties to enter into negotiations.

A sense of urgency and deadline. Negotiations generally occur when there is pressure or it is urgent to reach a decision. Urgency may be imposed by either external or internal time constraints or by potential negative or positive consequences to a negotiation outcome. External constraints include: court dates, imminent executive or administrative decisions, or predictable changes in the environment. Internal constraints may be artificial deadlines selected by a negotiator to enhance the motivation of another to settle. For negotiations to be successful, the participants must jointly feel a sense of urgency and be aware that they are vulnerable to adverse action or loss of benefits if a timely decision is not reached. If procrastination is advantageous to one side, negotiations are less likely to occur, and, if they do, there is less impetus to settle.

No major psychological barriers to settlement. Strong expressed or unexpressed feelings about another party can sharply affect a person's psychological readiness to bargain. Psychological barriers to settlement must be lowered if successful negotiations are to occur.

Issues must be negotiable. For successful negotiation to occur, negotiators must believe that there are acceptable settlement options that are possible as a result of participation in the process. If it appears that negotiations will have only win/lose settlement possibilities and that a party's needs will not be met as a result of participation, parties will be reluctant to enter into dialogue.

The people must have the authority to decide. For a successful outcome, participants must have the authority to make a decision. If they do not have a legitimate and recognized right to decide, or if a clear ratification process has not been established, negotiations will be limited to an information exchange between the parties.

A willingness to compromise. Not all negotiations require compromise. On occasion, an agreement can be reached which meets all the participants' needs and does not require a sacrifice on any party's part. However, in other disputes, compromise--willingness to have less than 100 percent of needs or interests satisfied--may be necessary for the parties to reach a satisfactory conclusion. Where the physical division of assets, strong values or principles preclude compromise, negotiations are not possible.

The agreement must be reasonable and implementable. Some settlements may be substantively acceptable but may be impossible to implement. Participants in negotiations must be able to establish a realistic and workable plan to carry out their agreement if the final settlement is to be acceptable and hold over time.

External factors favorable to settlement. Often factors external to negotiations inhibit or encourage settlement. Views of associates or friends, the political climate of public opinion or economic conditions may foster agreement or continued turmoil. Some external conditions can be managed by negotiators while others cannot. Favorable external conditions for settlement should be developed whenever possible.

Resources to negotiate. Participants in negotiations must have the interpersonal skills necessary for bargaining and, where appropriate, the money and time to engage fully in dialogue procedures. Inadequate or unequal resources may block the initiation of negotiations or hinder settlement.

WHY PARTIES CHOOSE TO NEGOTIATE

The list of reasons for choosing to negotiate is long. Some of the most common reasons are to:

- Gain recognition of either issues or parties;
- Test the strength of other parties;
- Obtain information about issues, interests and positions of other parties;
- Educate all sides about a particular view of an issue or concern;
- Ventilate emotions about issues or people;
- Change perceptions;
- Mobilize public support;
- Buy time;
- Bring about a desired change in a relationship;
- Develop new procedures for handling problems;
- Make substantive gains;
- Solve a problem.

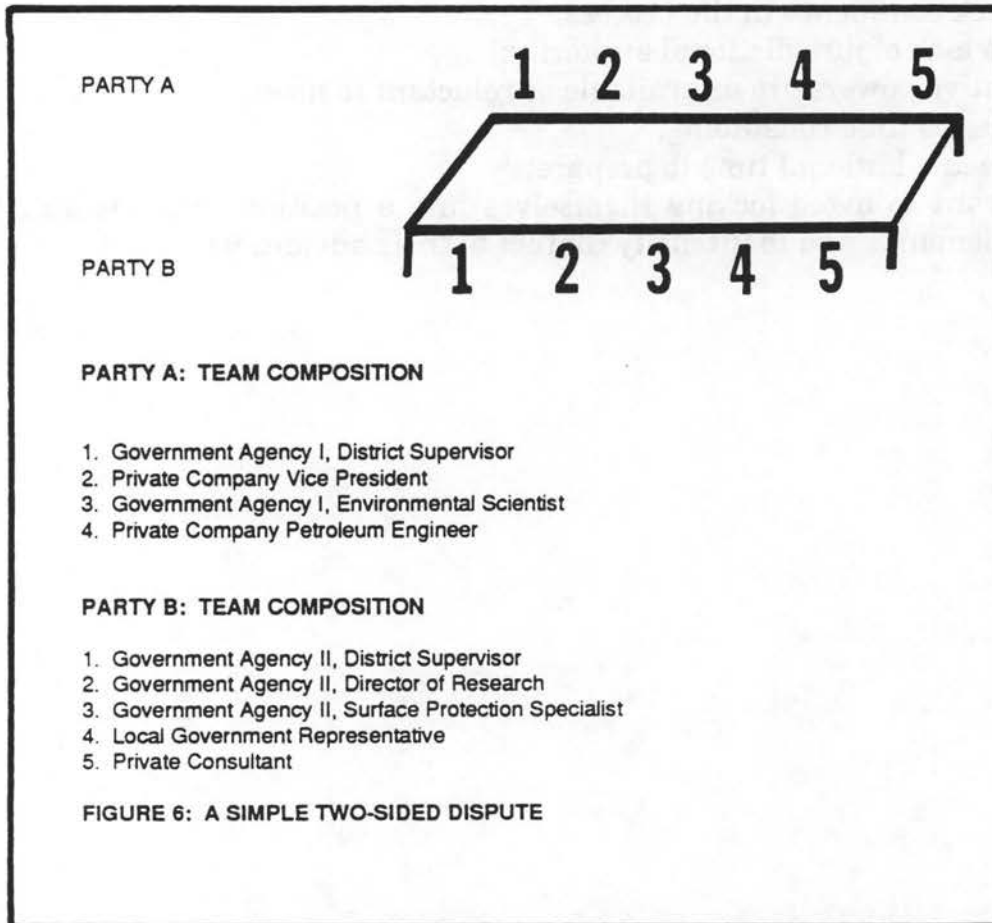
WHY PARTIES REFUSE TO NEGOTIATE

Even when many of the preconditions for negotiation are present, parties often choose not to negotiate. Their reasons may include:

- Negotiating confers sense and legitimacy to an adversary, their goals and needs;
- Parties are fearful of being perceived as weak by a constituency, by their adversary or by the public;
- Discussions are premature. There may be other alternatives available--informal communications, small private meetings, policy revision, decree, elections;
- Meeting could provide false hope to an adversary or to one's own constituency;
- Meeting could increase the visibility of the dispute;
- Negotiating could intensify the dispute;
- Parties lack confidence in the process;
- There is a lack of jurisdictional authority;
- Authoritative powers are unavailable or reluctant to meet;
- Meeting is too time-consuming;
- Parties need additional time to prepare;
- Parties want to avoid locking themselves into a position; there is still time to escalate demands and to intensify conflict to their advantage.

TYPES OF NEGOTIATION*

In any given negotiation session, many types of negotiation occur between interdependent individuals or groups. For simplicity's sake, let us illustrate this point by examining a two-sided dispute. At the negotiating table are parties A and B; the team members of each group are identified in Figure 6.



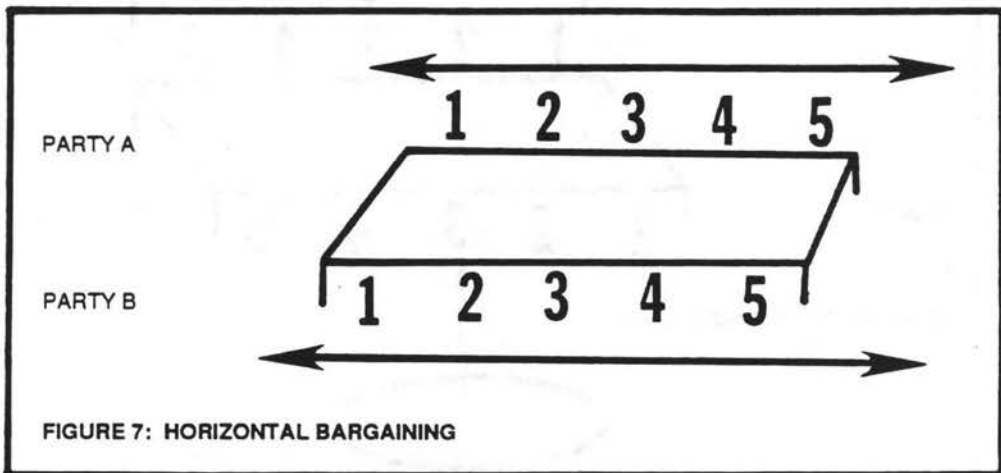
* Conceptualized by William F. Lincoln, National Center Associates. Used with permission.

INTRAORGANIZATIONAL BARGAINING--HORIZONTAL

The first type of negotiation occurs horizontally between members of the group, team, agency or organization (Figure 7). It is frequently referred to as in-team bargaining.

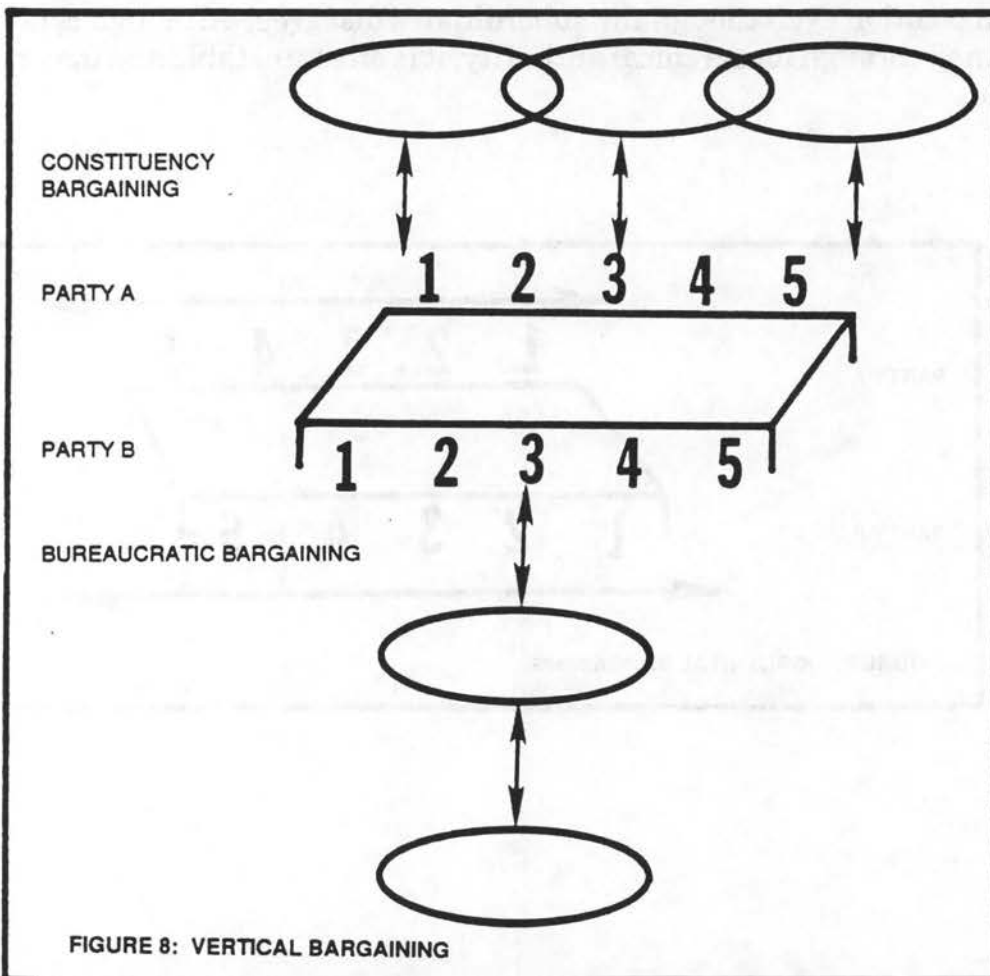
Team members may have different levels of power, prestige, authority, seniority, skills, information or resources. These differences, along with personality traits and conflict styles, will influence the outcome of negotiations within the team as members strive to reach a consensus on their issues and on how to deal with them.

It should be noted that when team members are nominally equal, a consensus must be reached if team cohesion is to be maintained. If the team members are not equal in position or status, the person with formal authority may be able to command adherence to the team position even though the subordinates disagree. Although consensus may be maintained through hierarchical authority, it is often unstable and may break down at any time.



INTRAORGANIZATIONAL BARGAINING--VERTICAL

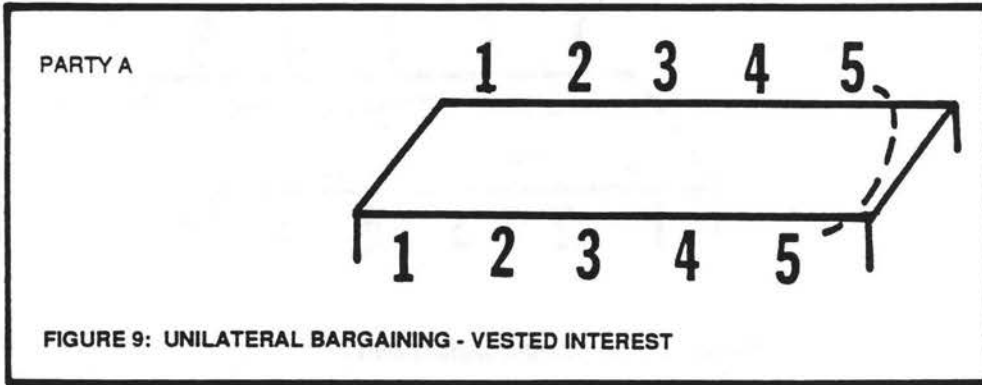
Intraorganizational bargaining also occurs vertically when the negotiating team is responsible to either a bureaucratic hierarchy or a broad-based constituency (Figure 8). For a final settlement to be reached in these situations, the negotiating team must bargain with one or more individuals or groups that have ultimate authority to approve or disapprove the settlement. Great care must be taken to keep authorities who are not at the table appraised of the possibilities and progress that is being made so that final approval of the settlement will be forthcoming.



UNILATERAL BARGAINING--VESTED INTEREST

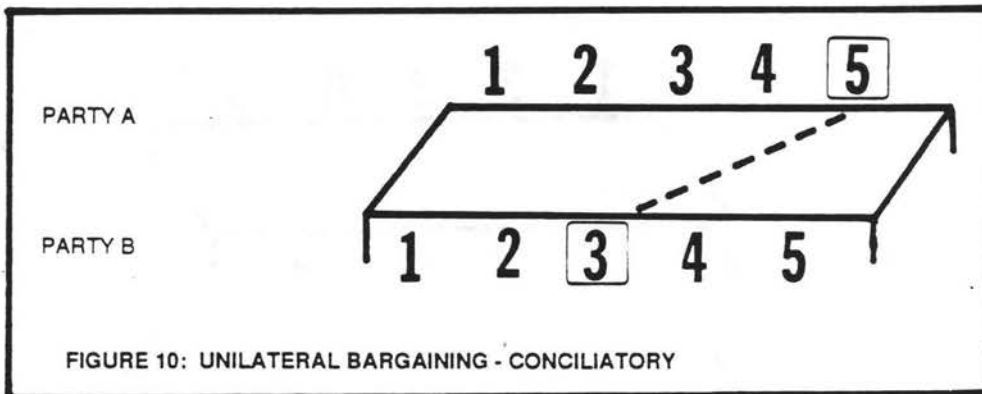
Unilateral vested-interest bargaining occurs when one or more members of a team covertly approach members of another team to explore settlement possibilities without the authorization of their teams (Figure 9).

This form of negotiation is conducted for the benefit of one or more team members at the expense of the whole team, a wider constituency or the organization at large.



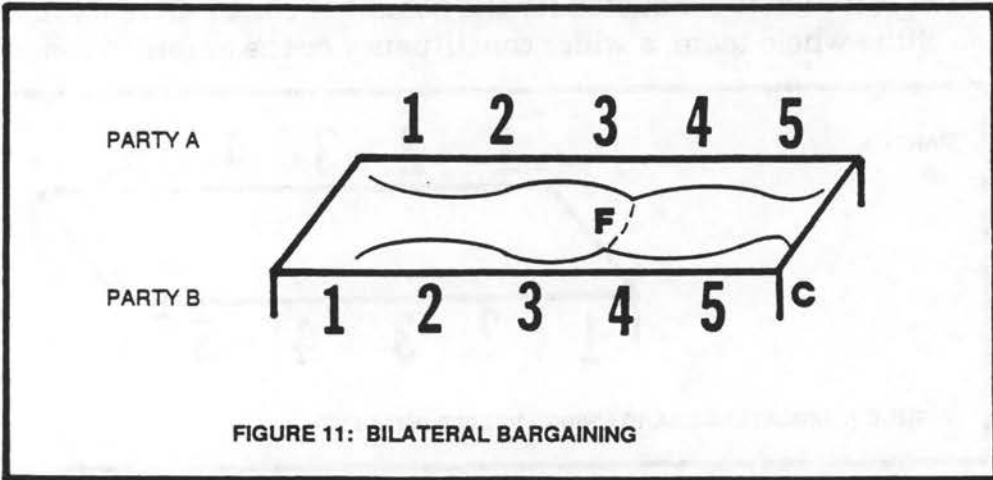
UNILATERAL BARGAINING--CONCILIATORY

Unilateral conciliatory bargaining occurs when one or more disputants informally, and possibly privately, explore alternatives for settlements with members of another team (Figure 10). Those overtures are conducted with the full knowledge of the team in the hope that the information shared will lead to fruitful bargaining for all sides. Team members who initiate conciliatory negotiations may be designated spokespeople, moderates who can see some merit in the "other side's" positions, or people who have something in common (educational background, profession, avocation or viewpoint) with team members of the other party.



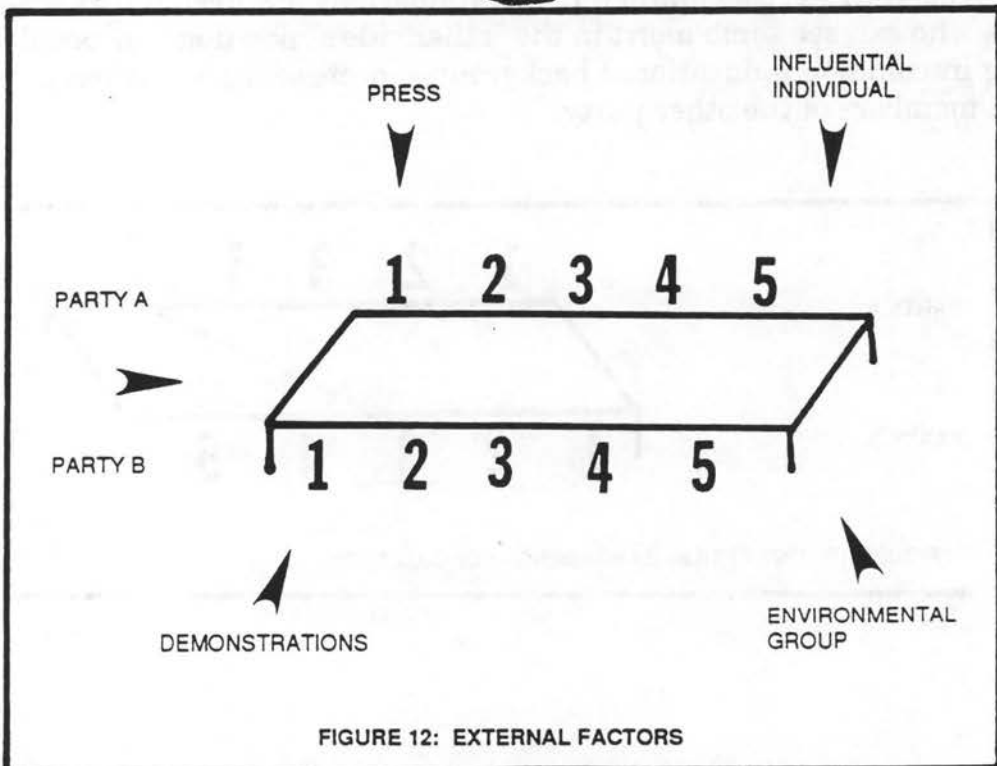
BILATERAL BARGAINING

Bilateral bargaining occurs between the teams and is generally conducted by a spokesperson or by authorized team members. In this type of negotiation, the history of the dispute is reviewed, issues and interests are identified, alternatives are generated and discussed, and agreements are reached. (Figure 11.)



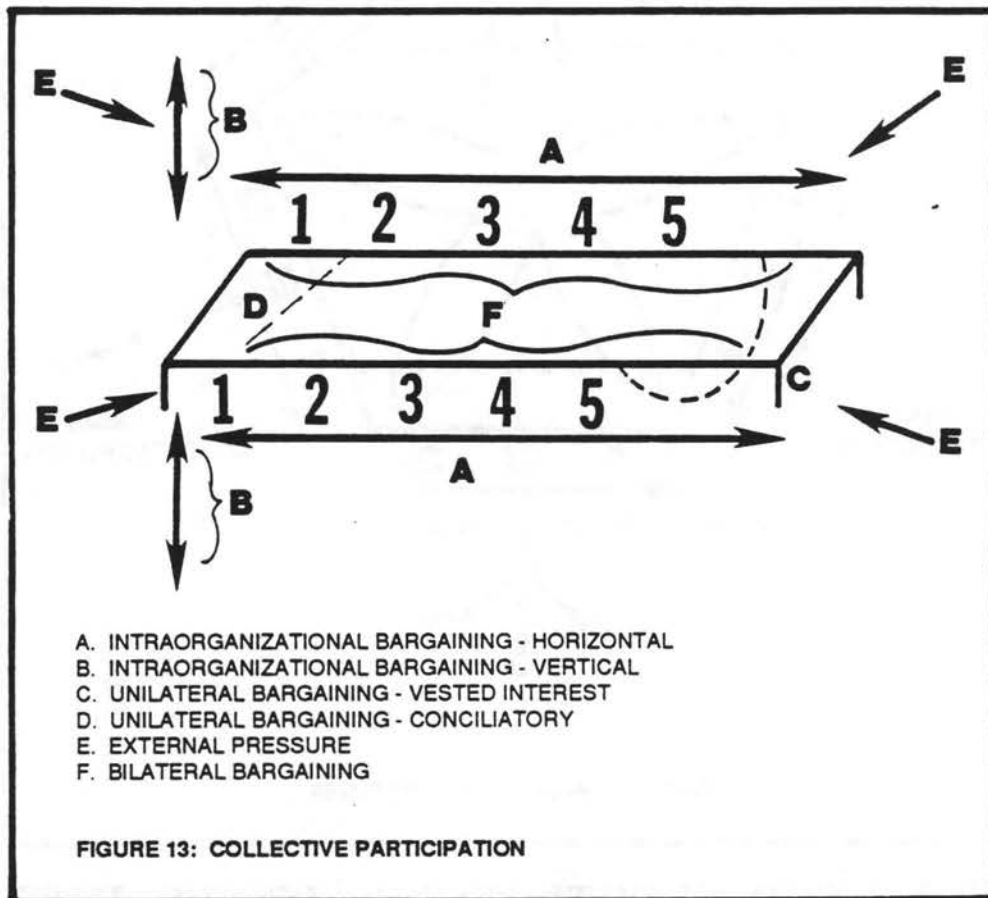
EXTERNAL FACTORS AND PRESSURES

Other parties who are neither at the table nor represented by the organizations involved may try to influence the outcome of the discussions. Forms of pressure include: the news media, public opinion, judicial decisions, legislation, lobbying groups, other agencies' policies or actions, or demonstrations. (Figure 12.)



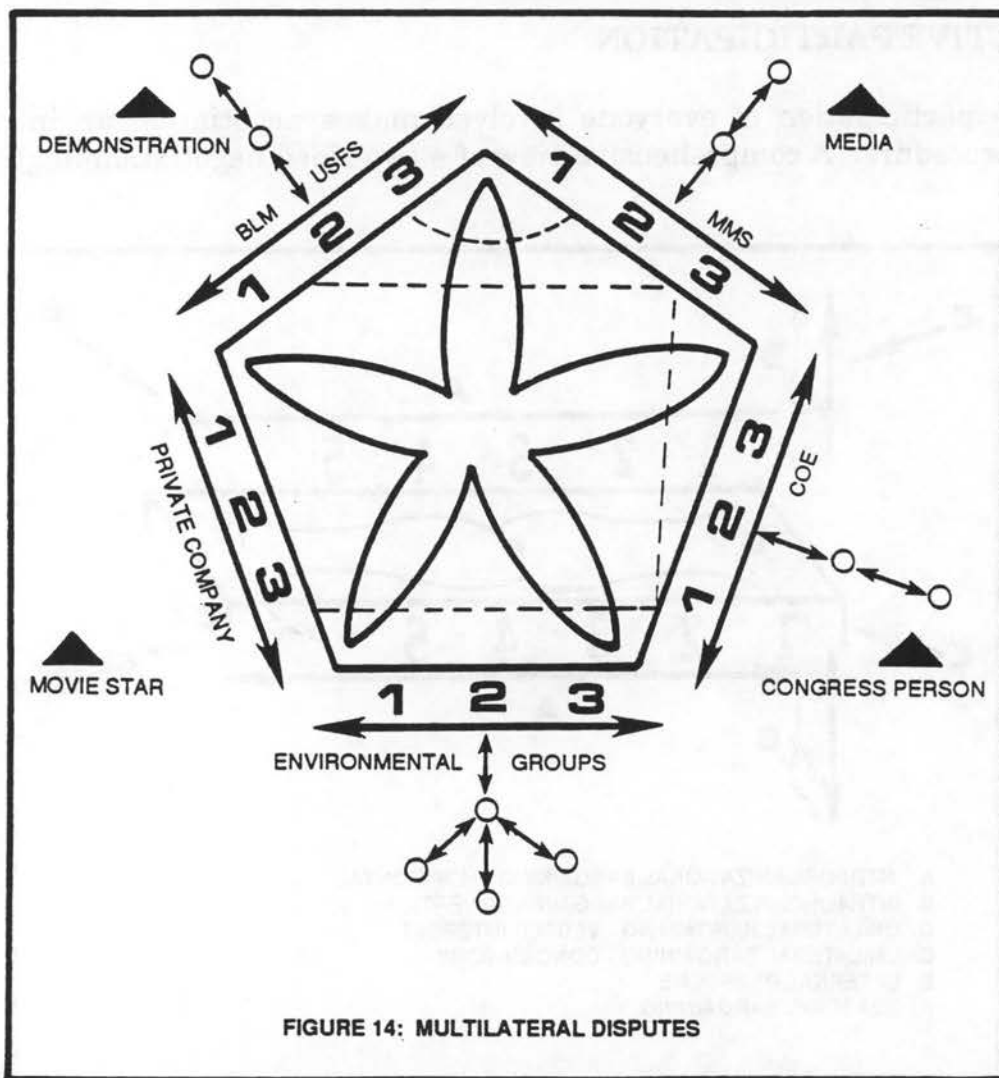
COLLECTIVE PARTICIPATION

Collective participation of everyone involved makes negotiation an intricate and delicate procedure. A comprehensive view of a two-sided negotiation might look like Figure 13.



MULTI-LATERAL NEGOTIATIONS

The types of negotiations we have just used for our hypothetical dispute illustrate the complexity of interactions that can occur. Most community and environmental disputes, however, have more than two sides, and the number of interactions is therefore greatly increased. Adding three more parties to our diagram yields a more realistic picture of the number and types of negotiations that might occur in a multilateral dispute (Figure 14).



PREPARING FOR NEGOTIATIONS: ISSUES, INTERESTS, POSITIONS, SETTLEMENT OPTIONS

Like any other conflict management process, negotiation requires planning if it is to be used most effectively. Information about the people, their relationships and the substantive issues is indispensable.

As mentioned earlier in this section, each party expects to be better off as a result of the negotiation process. For negotiations to result in positive benefits for all sides, the negotiator must define what the problem is and what each party wants. In defining the goals of negotiation, it is important to distinguish between issues, positions, interests and settlement options.

- An **issue** is a matter or question parties disagree about. Issues can usually be stated as problems. For example, "How can wetlands be preserved while allowing some industrial or residential development near a stream or marsh?" Issues may be substantive (related to money, time or compensation), procedural (concerning the way a dispute is handled), or psychological (related to the effect of a proposed action).
- **Positions** are statements by a party about how an issue can or should be handled or resolved; or a proposal for a particular solution. A disputant selects a position because it satisfies a particular interest or meets a set of needs.
- **Interests** are specific needs, conditions or gains that a party must have met in an agreement for it to be considered satisfactory. Interests may refer to content, to specific procedural considerations or to psychological needs.
- **Settlement Options**--possible solutions which address one or more party's interests. The presence of options implies that there is more than one way to satisfy interests.

PREPARING YOUR CASE

Prior to entering negotiations a good negotiator will carefully collect data to create a solid base for discussions. This information will be used to analyze and build a reasonable case and to anticipate the case that will be presented by the other party or parties.

Analyzing information in preparation for negotiations consists of seven steps:

1. **Identifying the Issues** that are important to *you*.
2. **Identifying the Interests** that *you* must have met in order to be satisfied with the settlement.
3. **Identifying Settlement Options** that will meet *your* needs, satisfy your interests and resolve the issues.
4. **Identifying the Issues** that you think will be important to the other party or parties involved.
5. **Identifying the Interests** that *they* would like to have met.
6. **Identifying Settlement Options** that *they* might find acceptable.

CONFLICT ANALYSIS AND STRATEGY DESIGN

PEOPLE/ PARTIES (Primary and Secondary)	INTERESTS (Substantive Procedural and Psychological)	ISSUES (Problem Statements or Agenda Items)	POSITIONS (Verbalized Substantive Preferences)	IMPORTANCE/ SALIENCE (Substantive, Procedural and Psychological)	POWER (Means of Influence)	DYNAMICS (Historical Development Promoting Escalation or De-Escalation)	WILL TO SETTLE (Benefits, Costs and Alternatives to Negotiation)	SETTLEMENT OPTIONS (Options that Meet Mutual Needs)	STEPS TOWARD SETTLEMENT

7. **Integrating the Issues, Interests and Options** of the two or more parties to determine where common interests exist, what alternative solutions might be acceptable to all parties and what differences will have to be overcome.

ASSESSING INFLUENCE AND POWER

Means of influence are the techniques that a party has at its disposal to change either the attitude or behavior of another party. It is always helpful for a party to assess its basis of influence and that of other parties prior to entering into negotiations.

There are numerous bases for influence in a negotiation. Some of them include:

- **Reward Influence:** The ability to control the reward or increased benefits that a party receives if they perform in a prescribed way.
- **Coercive Influence:** The ability to punish a party either through pain, embarrassment, increased costs or loss of positive benefits if they do not perform in a prescribed way.
- **Authority Influence:** The ability to change the attitude or behavior of another because one person has a role in an institution or society that grants him or her a recognized, legitimate right to make binding decisions.
- **Associational Influence:** The ability to change the attitude or behavior of another because those you are associated with have strong positive or negative value to the other party.
- **Expert Influence:** The ability to change the attitude or behavior of another because of special knowledge or information.
- **Habitual Influence:** The ability to modify the attitude or behavior of another because of their habitual responses or tendency to maintain status quo behavior.

Once a party has identified both its own basis of influence and that of the other parties, it should evaluate the costs and benefits to itself and to the others of using or threatening to use it.

SELECTING A GENERAL NEGOTIATION APPROACH

At this point, the negotiator should be ready to select a general negotiation approach. There are many techniques, but the two most common approaches to negotiation are positional bargaining and interest-based bargaining.

Positional Bargaining

Positional bargaining is a negotiation strategy in which a series of **positions**, alternative solutions that meet particular interests or needs, are selected by a negotiator, ordered sequentially according to preferred outcomes and presented to another party in an effort to reach agreement. The first or opening position represents that maximum gain hoped for or expected in the negotiations. Each subsequent position demands less of an opponent and results in fewer benefits for the person advocating it. Agreement is reached when the negotiators' positions converge and they reach an acceptable settlement range.

WHEN IS POSITIONAL BARGAINING OFTEN USED?

- When the resource being negotiated is limited (time, money, psychological benefits, etc.).
- When a party wants to maximize his/her share in a fixed sum pay off.
- When the interests of the parties are not interdependent, are contradictory or are mutually exclusive.
- When current or future relationships have a lower priority than immediate substantive gains.

ATTITUDES OF POSITIONAL BARGAINERS

- Resource is limited.
- Other negotiator is an opponent; be hard on him/her.
- Win for one means a loss for the other.
- Goal is to win as much as possible.
- Concessions are a sign of weakness.
- There is a right solution--mine.
- Be on the offensive at all times.

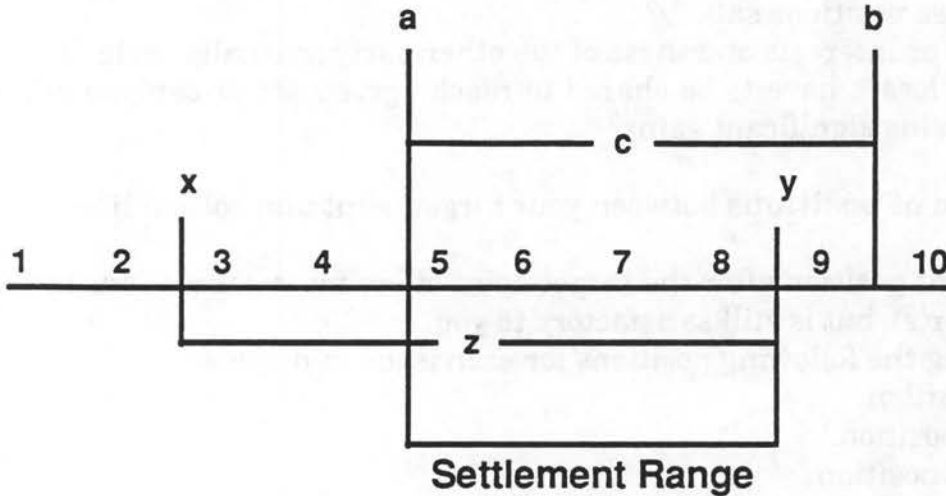
HOW IS POSITIONAL BARGAINING CONDUCTED?

1. **Set your target point**--solution that would meet all your interests and result in complete success for you. To set the target point, consider:
 - Your highest estimate of what is needed. (What are your interests?)
 - Your most optimistic assumption of what is possible.
 - Your most favorable assessment of your bargaining skill.
2. **Make target point into opening position.**
3. **Set your bottom line or resistance point**--the solution that is the least you are willing to accept and still reach agreement. To identify your bottom line, consider:

Negotiation

- Your lowest estimate of what is needed and would still be acceptable to you.
 - Your least optimistic assumption of what is possible.
 - Your least favorable assessment of your bargaining skill relative to other negotiators.
 - Your **Best Alternative To a Negotiated Agreement (BATNA)**.
- 4. Consider possible targets and bottom lines of other negotiators.**
- Why do they set their targets and bottom lines at these points? What interests or needs do these positions satisfy?
 - Are your needs or interests and those of the other party mutually exclusive?
 - Will gains and losses have to be shared to reach agreement or can you settle with both receiving significant gains?
- 5. Consider a range of positions between your target point and bottom line.**
- Each subsequent position after the target point offers more concessions to the other negotiator(s), but is still satisfactory to you.
 - Consider having the following positions for each issue in dispute:
 - Opening position.
 - Secondary position.
 - Subsequent position.
 - Fallback position--(yellow light that indicates you are close to bottom line; parties who want to mediate should stop here so that the intermediary has something to work with).
 - Bottom line.
- 6. Decide if any of your positions meets the interests or needs of the other negotiators.**
- How should your position be modified to do so?
- 7. Decide when you will move from one position to another.**
- 8. Order the issues to be negotiated into a logical (and beneficial) sequence.**
- 9. Open with an easy issue.**
- 10. Open with a position close to your target point.**
- Educate the other negotiator(s) why you need your solution and why your expectations are high.
 - Educate them as to why they must raise or lower their expectations.
- 11. Allow other side to explain their opening position.**

12. If appropriate, move to other positions that offer other negotiator(s) more benefits.
13. Look for a settlement or bargaining range -- spectrum of possible settlement alternatives any one of which is preferable to impasse or no settlement.
14. Compromise on benefits and losses where appropriate.



- a = Party A's resistance point
- b = Party A's target
- c = Acceptable options for Party A
- x = Party B's target
- y = Party B's resistance point
- z = Acceptable options for Party B

15. Look for how positions can be modified to meet all negotiators' interests.
16. Formalize agreements in writing.

CHARACTERISTIC BEHAVIORS OF POSITIONAL BARGAINERS

- **Initial large demand**--high or large opening position used to educate other parties about what is desired or to identify how far they will have to move to reach an acceptable settlement range.
- **Low level of disclosure**--secretive and non-trusting behavior to hide what the settlement range and bottom line are. Goal is to increase benefits at expense of other.

- **Bluffing**--strategy used to make negotiator grant concessions based on misinformation about the desires, strengths or costs of another.
- **Threats**--strategy used to increase costs to another if agreement is not reached.
- **Incremental concessions**--small benefits awarded so as to gradually cause convergence between negotiators' positions.
- **Hard on people and problem**--often other negotiator is degraded in the process of hard bargaining over substance. This is a common behavior that is not necessarily a quality of or desirable behavior in positional bargaining.

COSTS AND BENEFITS OF POSITIONAL BARGAINING

Costs

- Often damages relationships; inherently polarizing (my way, your way)
- Cuts off option exploration. Often prevents tailor-made solutions
- Promotes rigid adherence to positions
- Obscures a focus on interests by premature commitment to specific solutions
- Produces compromise when better solutions may be available

Benefits

- May prevent premature concessions
- Is useful in dividing or compromising on the distribution of fixed-sum resources
- Does not require trust to work
- Does not require full disclosure of privileged information

Interest-Based Bargaining

Interest-based bargaining involves parties in a collaborative effort to jointly meet each other's needs and satisfy mutual interests. Rather than moving from positions to counter positions to a compromise settlement, negotiators pursuing an interest-based bargaining approach attempt to identify their interests or needs and those of other parties *prior* to developing specific solutions. After the interests are identified, the negotiators jointly search for a variety of settlement options that might satisfy all interests, rather than argue for any single position. The parties select a solution from these jointly generated options. This approach to negotiation is frequently called integrated bargaining because of its emphasis on cooperation, meeting mutual needs, and the efforts by the parties to expand the bargaining options so that a wiser decision, with more benefits to all, can be achieved.

WHEN IS INTEREST-BASED BARGAINING USED?

- When the interests of the negotiators are interdependent.
- When it is not clear whether the issue being negotiated is fixed-sum (even if the outcome is fixed-sum, the process can be used).
- When future relationships are a high priority.
- When negotiators want to establish cooperative problem-solving rather than competitive procedures to resolve their differences.
- When negotiators want to tailor a solution to specific needs or interests.
- When a compromise of principles is unacceptable.

ATTITUDES OF INTEREST-BASED BARGAINERS

- Resource is seen as not limited.
- All negotiators' interests must be addressed for an agreement to be reached.
- Focus on interests not positions.
- Parties look for objective or fair standards that all can agree to.
- Belief that there are probably multiple satisfactory solutions.
- Negotiators are cooperative problem-solvers rather than opponents.
- People and issues are separate. Respect people, bargain hard on interests.
- Search for win/win solutions.

HOW TO DO INTEREST-BASED BARGAINING

Interests are needs that a negotiator wants satisfied or met. There are three types of interests:

- Substantive interests--content needs (money, time, goods or resources, etc.)
 - Procedural interests--needs for specific types of behavior or the "way that something is done."
 - Relationship or psychological interests--needs that refer to how one feels, how one is treated or conditions for ongoing relationship.
1. **Identify the substantive, procedural and relationship interest/needs that you expect to be satisfied as a result of negotiations.** Be clear on:
 - Why the needs are important to you.
 - How important the needs are to you.
 2. **Speculate on the substantive, procedural and relationship interests that might be important to the other negotiators.**
 - Assess why the needs are important to them.
 - Assess how important the needs are to them.

- 3. Begin negotiations by educating each other about your respective interests.**
 - Be specific as to why interests are important.
 - If other negotiators present positions, translate them into terms of interest. Do not allow other negotiators to commit to a particular solution or position.
 - Make sure all interests are understood.
- 4. Frame the problem in a way that it is solvable by a win/win solution.**
 - Remove egocentricity by framing problem in a manner that all can accept.
 - Include basic interests of all parties.
 - Make the framing congruent with the size of the problem to be addressed.
- 5. Identify general criteria that must be present in an acceptable settlement.**
 - Look for general **agreements in principle**.
 - Identify **acceptable objective criteria** that will be used to reach more specific agreements.
- 6. Generate multiple options for settlement.**
 - Present multiple proposals.
 - Make frequent proposals.
 - Vary the content.
 - Make package proposals that link solutions to satisfy interests.
 - Make sure that more than two options are on the table at any given time.
- 7. Utilize integrative option generating techniques:**
 - Expand-the-pie--ways that more resources or options can be brought to bear on the problem.
 - Alternating satisfaction--each negotiator gets 100 percent of what s/he wants, but at different times.
 - Trade-offs--exchanges of concessions on issues of differing importance to the negotiators.
 - Consider two or more agenda items simultaneously.
 - Negotiators trade concessions on issues of higher or lower importance to each.
 - Each negotiator gets his/her way on one issue.
 - Integrative solutions--look for solutions that involve maximum gains and few or no losses for both parties.
 - Set your sights high on finding a win/win solution.

8. Separate the option generation process from the evaluation process.

9. Work toward agreement.

- Use the **Agreement-in-Principle Process** (general level of agreements moving toward more specific agreements).
- **Fractionate** (break into small pieces) the problem and use a **Building-Block Process** (agreements on smaller issues that, when combined, form a general agreement).
- Reduce the threat level.
- Educate and be educated about interests of all parties.
 - Assure that all interests will be respected and viewed as legitimate.
 - Show an interest in their needs.
 - Do not exploit another negotiator's weakness.
- Demonstrate trust
 - Put yourself in a "one down position" to other on issues where you risk a small, but symbolic loss.
 - Start with a problem solving rather than competitive approach.
 - Provide benefits above and beyond the call of duty.
- Listen and convey to other negotiators that they have been heard and understood.
 - Listen and restate content to demonstrate understanding.
 - Listen and restate feelings to demonstrate acceptance (not necessarily agreement) and understanding of intensity.

10. Identify areas of agreement, restate them, and write them down.

COSTS AND BENEFITS OF INTEREST-BASED BARGAINING

Costs

- Requires some trust
- Requires negotiators to disclose information and interests
- May uncover extremely divergent values or interests

Benefits

- Produces solutions that meet specific interests
- Builds relationships
- Promotes trust
- Models cooperative behavior that may be valuable in future.

AN INTEGRATED APPROACH

Naturally, all negotiations involve some positional bargaining and some interest-based bargaining, but each session may be characterized by a predominance of one approach or the other. Negotiators who take a positional bargaining approach will generally use interest-based bargaining only during the final stages of negotiations. When interest-based bargaining is used throughout negotiations it often produces wiser decisions in a shorter amount of time with less incidence of adversarial behavior.

DYNAMICS OF NEGOTIATION

Examining the approaches to negotiation only gives us a static view of what is normally a dynamic process of change. Let us now look at the stages of negotiation most bargaining sessions follow.

Negotiators have developed many schemes to describe the sequential development of negotiations. Some of them are descriptive--detailing the progress made in each stage--while others are prescriptive--suggesting what a negotiator should do. We prefer a twelve-stage process that combines the two approaches.

STAGES OF NEGOTIATION

Stage 1: Evaluate and Select a Strategy to Guide Problem Solving

- Assess various approaches or procedures--negotiation, facilitation, mediation, arbitration, court, etc.--available for problem solving.
- Select an approach.

Stage 2: Make Contact with Other Party or Parties

- Make initial contact(s) in person, by telephone, or by mail.
- Explain your desire to negotiate and coordinate approaches.
- Build rapport and expand relationship.
- Build personal or organization's credibility.
- Promote commitment to the procedure.
- Educate and obtain input from the parties about the process that is to be used.

Stage 3: Collect and Analyze Background Information

- Collect and analyze relevant data about the people, dynamics and substance involved in the problem.
- Verify accuracy of data.
- Minimize the impact of inaccurate or unavailable data.
- Identify all parties' substantive, procedural and psychological interests.

Stage 4: Design a Detailed Plan for Negotiation

- Identify strategies and tactics that will enable the parties to move toward agreement.
- Identify tactics to respond to situations peculiar to the specific issues to be negotiated.

Stage 5: Build Trust and Cooperation

- Prepare psychologically to participate in negotiations on substantive issues.
- Develop a strategy to handle strong emotions.
- Check perceptions and minimize effects of stereotypes.
- Build recognition of the legitimacy of the parties and issues.
- Build trust.
- Clarify communications.

Stage 6: Beginning the Negotiation Session

- Introduce all parties.
- Exchange statements which demonstrate willingness to listen, share ideas, show openness to reason and demonstrate desire to bargain in good faith.
- Establish guidelines for behavior.
- State mutual expectations for the negotiations.
- Describe history of problem and explain why there is a need for change or agreement.
- Identify interests and/or positions.

Stage 7: Define Issues and Set an Agenda

- Together identify broad topic areas of concern to people.
- Identify specific issues to be discussed.
- Frame issues in a non-judgmental neutral manner.
- Obtain an agreement on issues to be discussed.
- Determine the sequence to discuss issues.
- Start with an issue in which there is high investment on the part of all participants, where there is not serious disagreement and where there is a strong likelihood of agreement.
- Take turns describing how you see the situation. Participants should be encouraged to tell their story in enough detail that all people understand the viewpoint presented.
- Use active listening, open-ended questions and focusing questions to gain additional information.

Stage 8: Uncover Hidden Interests

- Probe each issue either one at a time or together to identify interests, needs and concerns of the principal participants in the dispute.
- Define and elaborate interests so that all participants understand the needs of others as well as their own.

Stage 9: Generate Options for Settlement

- Develop an awareness about the need for options from which to select or create the final settlement.
- Review needs of parties which relate to the issue.
- Generate criteria or objective standards that can guide settlement discussions.
- Look for agreements in principle.
- Consider breaking issue into smaller, more manageable issues and generating solutions for sub-issues.
- Generate options either individually or through joint discussions.
- Use one or more of the following procedures:
 - Expand the pie so that benefits are increased for all parties.
 - Alternate satisfaction so that each party has his/her interests satisfied but at different times.
 - Trade items that are valued differently by parties.
 - Look for integrative or win/win options.
 - Brainstorm.
 - Use trial and error generation of multiple solutions.
 - Try silent generation in which each individual develops privately a list of options and then presents his/her ideas to other negotiators.
 - Use a caucus to develop options.
 - Conduct position/counter position option generation.
- Separate generation of possible solutions from evaluation.

Stage 10: Assess Options for Settlement

- Review the interests of the parties.
- Assess how interests can be met by available options.
- Assess the costs and benefits of selecting options.

Stage 11: Final Bargaining

- Final problem solving occurs when:
 - One of the alternatives is selected.
 - Incremental concessions are made and parties move closer together.
 - Alternatives are combined or tailored into a superior solution.
 - Package settlements are developed.
 - Parties establish a procedural means to reach a substantive agreement.

Stage 12: Achieving Formal Settlement

- Agreement may be a written memorandum of understanding or a legal contract.
- Detail how settlement is to be implemented--who, what, where, when, how--and write it into the agreement.
- Identify "what ifs" and conduct problem solving to overcome blocks.
- Establish an evaluation and monitoring procedure.
- Formalize the settlement and create enforcement and commitment mechanisms:
 - Legal contract
 - Performance bond
 - Judicial review
 - Administrative/executive approval

SECTION 8

PROCEDURAL ASSISTANCE AND DISPUTE RESOLUTION

8

PROCEDURAL ASSISTANCE AND DISPUTE RESOLUTION

It is often difficult for any key stakeholder to move beyond his or her own interests and to conduct an impartial process that recognizes all the parties' underlying needs and enables them to reach a negotiated settlement. The use of a neutral third party dramatically enhances the opportunity to reach a collaborative solution through the management of the process by someone without a stake in the solution.

This chapter explores two types of procedural assistance--facilitation and mediation. The use of these two procedures in managing complex public policy, site-specific, and legal disputes has increased steadily in recent years. Many agencies have found that mediation and facilitation procedures can be useful in involving parties in the development of policies and solutions in which they have a concern. These procedures provide a sense of "ownership" in the decision-making process for all the parties and provide the agency with an opportunity to profit from the ideas generated by the interaction of various interests, rather than merely hearing the respective positions through more traditional means.

FACILITATION

Facilitation involves the assistance of an individual, who is impartial toward the issues or topics under discussion, in the design and implementation of a cooperative problem-solving, collaborative decision-making or information-exchange meeting. The facilitator is the process expert in the group. More specifically, the role of the facilitator

is to help the parties define clear statements of desired outcomes; to help decide whom to involve in the meeting; to assist in the design of effective meeting agendas; to draw people out and keep discussion on track; to propose strategies for problem solving; to deal with needs for scientific or technical information; to help build high-quality, consensus decisions; to insure follow-up by organizing information produced; and to ensure planning for implementation of decisions and future meetings.

A facilitator often works with a recorder who takes minutes of meetings, as they occur, on a flip chart or wall chart in the sight of all group members. Public recording of meetings provides focus, avoids backtracking, makes it easier to follow what is happening, acknowledges speakers and helps clarify next steps.

Having a facilitator manage the process of a meeting and a recorder track the discussion enables the decision maker and meeting participants to focus on the substantive issues under discussion. The facilitator may or may not be a member of one of the disputing groups. He or she does not necessarily have to be an outsider. However, facilitators have no decision-making authority and must remain impartial as to the topics or issues under discussion and focus only on procedural assistance, or their value as a neutral will be lost.

CORPS INVOLVEMENT IN FACILITATION

Circumstances where the Corps has or might use a facilitator include:

- Public involvement meetings over the issuing of 404 general permits. Facilitation was used successfully on Sanibel Island, Florida, to develop a permitting procedure which received widespread public support.
- Problem-solving meetings to address issues arising from local cost-sharing agreements.
- Public hearings over the construction of flood control projects or the operation of flood control dams. The Corps has used facilitation in numerous cases concerned with both planning and operations.
- Meetings between potentially responsible parties regarding apportionment of responsibilities for the clean-up of hazardous sites.
- Meetings to develop agency strategies and policies on specific issues or problems.
- Meetings with other federal, state and local agencies to clarify mandates and responsibilities. The Corps is currently participating in a facilitated inter-agency dialogue on wetlands management.
- Situations where it is important for diverse groups to have a stake in a particular Corps plan and some assurance that the agency's actions do address their concerns.

WHEN FACILITATION IS APPROPRIATE

The selection of facilitation as a decision-making or conflict resolution tool is recommended when:

Procedural Assistance and Dispute Resolution

1. The parties are not highly polarized.
2. It is important to preserve some form of relationship between the parties and/or both parties need to come out of the problem-solving process with a sense of self-respect and dignity.
3. The parties need to have ownership of the solution and the parties themselves are the best resources on what kinds of solutions are possible and will work.
4. When a creative agreement may better resolve the dispute than a one-dimensional, traditional type of legal or administrative settlement.
5. When the issues are unclear and/or undefined.
6. When less procedural directiveness is important and/or appropriate for the parties.

BENEFITS OF FACILITATION

Parties participating in facilitated policy dialogues and collaborative problem-solving sessions have noted several significant benefits in comparison to unassisted collaborative problem-solving or negotiation processes. These include:

Provides a forum in which parties may conduct collaborative problem solving:

Facilitated problem solving provides a procedure which promotes the conditions necessary for a consensual as opposed to an adversarial approach to dispute resolution or problem solving. These include informality, a set of procedures which encourage cooperation, an emphasis on analysis, protection from pressures to posture to administrators, judges, juries, constituencies, and skilled third party assistance.

Creates attention to procedural and psychological needs as well as substantive interests:

Parties often value procedural and psychological satisfaction as much as a particular substantive settlement. Facilitators are the creators of procedural and psychological satisfaction in groups. By managing the process, ensuring that people leave a session with their egos intact and assuming that a fair and productive procedure was used, facilitators can promote settlement satisfaction. In addition, all parties are involved in developing a fair deal, and the process contributes to building a productive future working relationship.

Frames the problem so that it is solvable:

An important ground rule of collaborative problem solving is--if the group doesn't agree on the problem, people won't agree on the solution. Yet traditionally negotiations begin with the presentation of proposals or solutions before the problem has been sufficiently defined. Likewise, problem-solving oriented meetings often rush into solutions too quickly; creating a polarized, win/lose atmosphere resulting in damaged personal relationships and increased personal friction. A facilitator helps to frame issues in a jointly acceptable manner so that they are solvable and checks to make sure everyone agrees about what the problem is before trying to solve it. A facilitator also ensures the whole group is working on the same problem, at the same time, using the same process so that the group is conscious, focused, and efficient rather than unconsciously moving in many different directions which can be both frustrating and polarizing.

Allows managers and decision makers to actively participate in the substance without having to worry about process:

Managers face several dilemmas when working with groups, be it the public, other agencies or staff. They are responsible for decision-making on substantive questions; they are expected to have expertise in the arena in which a decision is to be made; they are responsible for controlling the process by which the question will be decided; and they are accountable for results when a decision is implemented. While assigning multiple responsibilities to the manager--decision maker, substantive expert, most active meeting participant and process manager--may work well in some circumstances, it is not often the best form for creative, efficient, and wise decisions. This is the case because:

- managers are not omnipotent and often do not have all the expertise or facts to make the best decision;
- a decision made by one person may not have the quality and acceptability of a group decision;
- exerting the kind of control managers feel is needed when attempting to perform all of these functions often results in lack of participation, commitment and buy-in from other group members;
- a simultaneous focus on substance and process in decision-making often overloads the decision-maker and does not allow for adequate attention to any of these functions.

For these reasons, the facilitation model assigns part of the decision-making responsibilities to four or more people--decision maker, substantive expert, meeting participant and facilitator/process manager. This way the responsibility for decision making remains with the person or agency in authority, but some of the other functions necessary for creative problem solving are delegated to others. Relieving the manager of so many roles can really pay off in the quality of both the meeting and the final decisions. The larger and more complex the meeting, the more role separation is

needed. The more the manager or parties involved in a meeting have strong convictions and feelings about the meeting outcome, the more important it is to give the process management role to someone else.

Provides a win/win and consensus basis:

Consensus is a process whereby a group makes a decision, without voting, that all members can support. An agreement is reached through a process of gathering information and viewpoints, discussion, analysis, persuasion, a combination or synthesis of the proposals and/or the development of totally new solutions that are acceptable to the group. A "big consensus agreement" usually does not suddenly emerge. It is based on a series of multiple little agreements. Consensus requires the parties to engage in open investigation, open discussion and open analysis of a problem before a decision is made. The goal of consensus decision making is to reach a settlement to which everyone can agree; but not to reach unanimity, in which everyone likes the solution equally well or has an equal commitment to it. A consensus decision requires a recognition by a group that it has reached the best decision for all the people involved. At its worst, consensus is a compromise; at its best, it is a better solution for all involved.

Consensus decision making is a valuable procedure because:

- Information flow and the range of options which are considered are increased.
- Solutions which satisfy all participants are emphasized.
- All participants have a commitment to implement decisions which are made.
- Valid minority positions get a fair hearing.
- The procedure is appropriate for both large and small groups.

Consensus builds cooperative work groups that often have greater satisfaction in their product. However, consensus decision making has drawbacks. Some of these include:

- Longer time to make decisions than other systems (although the implementation phase may be shorter).
- Reliance on people to respect opposing views.
- Dependence on people's verbal skills (talking, listening and persuasive abilities).
- Lack of familiarity with the process as compared to other decision-making procedures.

Can accommodate multiple sets of sides and interests:

Issues often have more than two sides. A decision-making process is needed which accommodates multiple sets of sides and interests.

Is consistent with the consensus-building role that Corps of Engineer managers must play in this emerging era of consultative management:

Experience shows that these processes are neither intended nor likely to lead to a diminution of agency decision-making authority. Rather, when used in the right circumstances--by agency officials who are skillful problem solvers and negotiators, fully cognizant of their substantive mandates--these approaches are likely to lead to improved understanding between affected interests as well as increased possibilities for mutually acceptable outcomes.

CONCERNS EXPRESSED ABOUT FACILITATION

Every dispute resolution technique has its strengths and weaknesses, and facilitation is no exception. Here is a list which includes both very real limitations of facilitation and concerns expressed by people who have not used the technique.

Is facilitation appropriate in situations where parties are extremely conflicted?

Facilitators and facilitation may be used to improve the flow of data in information-exchange meetings, such as public meetings, where data is either being provided to or solicited from a group, or in decision-making meetings, where a specific outcome is desired. Facilitators are often used as part of a public involvement process; facilitators can also be used to help groups make recommendations to decision makers or to help groups make their own binding decision. In general, facilitation is most applicable when:

- the intensity of the participants' emotions about the issues in dispute or the other parties is low to moderate;
- the parties or issues are not extremely polarized;
- the parties have enough trust in each other that they can work together to develop a mutually acceptable solution;
- or when the word *mediation*, which is more often used in highly polarized disputes, is politically unacceptable.

Facilitation is also effective in situations involving numerous parties and issues, where a dialogue can be established early to create alternatives addressing everyone's concerns. The key to this approach is to initiate a dialogue before positions harden and clashes become inevitable.

How do I know if facilitation is the right approach for the situation?

Factors to weigh when considering the use of facilitated problem solving include:

- Are key managers or decision makers committed to using a collaborative process?

- Is there time available to make a decision? Facilitated decision making requires significant investments of time.
- How important is the decision? It is not efficient to use this model for every decision.
- Where is the information and expertise needed to solve the problem? Is it in one person or in the whole group?
- Is there a need for buy-in? How important is it that final decisions be accepted and supported by those impacted by the decision or those responsible for its implementation?
- How polarized are people? If sides have been firmly drawn and parties are strongly divided, mediation or another process which gives the third party neutral more procedural and/or substantive power may be necessary.

How can a manager bring a facilitator into a meeting without creating confusion or surrendering his/her own authority?

When exposed to the idea of using a facilitator, many managers initially respond with hesitation. They are concerned that the model may undermine their authority, result in a loss of power, or give the impression to other group members that the manager is weak, incompetent at chairing meetings, afraid to make tough decisions, or an ineffective negotiator.

Managers who utilize a facilitated problem-solving model are not abandoning their leadership functions. Rather they commit themselves to the use of a collaborative process of problem solving and exercise their leadership by ensuring that the principles of facilitation are followed and by assuring that the facilitator lives up to the contract s/he makes with the group delineating his/her role. This type of leadership represents a departure from traditional leadership models and relies upon an effective working relationship between the facilitator and the manager/group. The roles and the process must be designed in a manner which does not disempower either the manager or any group member.

Finally, in making a commitment to facilitated problem solving, while it might appear that the agency gives up control over and responsibility for the content of the decision, the agency, as a committee member, must concur in all agreements. The agency cannot be forced to take stands it does not support. In addition, in many circumstances, the agency retains ultimate responsibility for promulgating decisions if negotiations fail to produce an agreement. In a sense, the Corps acts as a party in the facilitated negotiations and as an "arbitrator" if consensus is not reached, in situations where the COE has the mandate to decide.

Agreeing to participate in a facilitated problem-solving process means that "the nose of the camel is in the tent."

On occasion, some potential parties to a facilitated dialogue are hesitant to go to the table because they are concerned that their very presence implies a willingness to compromise. If, for example, the issue is how can a flood control dam be designed and sited so it is financially and environmentally feasible, opponents to the construction may be unwilling to discuss the "how" issue because it implies that the dam will be built. A facilitator can be useful in dealing with resistance to take part:

- by discussing with the parties how they can participate without sacrificing their interests;
- by discovering what other obstacles to participation there are, assuming taking part does not mean yielding on principles; and
- by helping potential stakeholders evaluate their alternatives to the facilitated problem-solving process.

MEDIATION

Mediation involves negotiations between or among parties with the assistance of a third person who is knowledgeable in effective negotiation procedures. The mediator coordinates the negotiation activities of the parties and helps them be more effective in their bargaining.

DEFINITION OF MEDIATION

Mediation is the intervention into a dispute or negotiation of an acceptable, impartial, and neutral third party, who has no authoritative decision-making power, to assist contending parties to reach voluntarily an acceptable settlement of issues in dispute. An analysis of this definition provides an in-depth description of the elements of mediation.

Intervention: To intervene means, literally, to come in or between so as to change or modify. The assumption behind intervention by an outsider to the conflict is that a third party will be able to alter the power and/or the dynamics of the conflict relationship by influencing the beliefs or behaviors of individual parties, by providing knowledge or information, or by providing a more effective negotiation process.

Dispute or negotiation: An important first step in mediation is the recognition that there is a dispute, an issue over which there are competing interests. For mediation to occur, the parties must be willing to negotiate, to begin some form of dialogue over the issue in question.

Acceptability: Acceptability of the third party implies that the parties approve of the mediator's presence and are willing to listen to and seriously consider the intervener's suggestions. Acceptability may derive from the mediator's professional credibility.

Impartiality and neutrality: Impartiality requires that the mediator have an unbiased opinion or lack of preference in favor of one or more negotiators. Neutrality means that the mediator has no previous relationship with the disputing parties which would influence the behavior of the intervener and that the mediator does not personally expect to gain benefits from one of the parties or from the solution reached through mediation. The need for impartiality and neutrality does not mean that a mediator may not have personal opinions; rather it requires that the mediator separate out his or her personal views from the desires of the disputants, treat both disputants in an impartial and neutral manner, and focus on ways to help the parties make their own decisions without unduly favoring one of them. The appearance of impartiality and neutrality is as important to consider as the actual attitude of the mediator.

No authoritative decision-making power: Unlike an arbiter or judge who makes a decision for the parties, the mediator works to reconcile people's competing interests. Although the mediator makes decisions and offers suggestions regarding the negotiation process, he or she refrains from making substantive decisions about the outcome of the dispute. (An exception to this is advisory mediation, where the parties request the mediator's opinion regarding a possible acceptable settlement at the end of mediation and in the event of a deadlock.) The mediator's goal is to assist the parties to look into the future, examine their interests or needs, and negotiate an exchange of promises and relationships that will be mutually satisfactory and meet personal and community standards of fairness.

Assistance to the parties: The mediator can assist the parties through a wide range of activities such as opening communication channels, providing a process for the orderly discussion of issues, helping parties identify underlying needs that must be met for them to be satisfied with an outcome, serving as an agent of reality, stimulating the generation of alternatives, identifying and underscoring agreements as they occur.

A voluntary process: The voluntary nature of mediation can come from the parties' free choice to participate and/or free choice to settle or not to settle.

CORPS INVOLVEMENT IN MEDIATION

The Corps has a long history of involvement in mediated disputes. In 1973, a mediated agreement was reached regarding flood control, environmental protection and development of the Snoqualmie River in Washington. This landmark effort launched a series of other successful environmental mediations. More recently, mediation has been used to manage negotiations regarding fisheries and hydro-power generation at a Corps dam in the mid-west.

WHEN MEDIATION IS APPROPRIATE

The selection of mediation as a conflict resolution tool is recommended when:

1. The disputing parties are highly polarized and unable to negotiate independently, due to lack of skills, poor relationship, lack of forum or structure for negotiation, intense feelings, or inability to "hear" the other side for whatever reason.
2. It is important to preserve some form of relationship between the parties and/or both parties need to come out of the dispute resolution process with a sense of self-respect and dignity.
3. The parties need to have ownership of the solution and the parties themselves are the best resources on what kinds of solutions are possible and will work.
4. When a creative agreement may better resolve the dispute than a one-dimensional, traditional type of legal or administrative settlement.

CONDITIONS CONDUCTIVE TO MEDIATION

Listed below are factors which are conducive to the success of mediation as a dispute resolution method. Absence of these conditions does not preclude successful mediation. However, the likelihood of a successful outcome is in direct proportion to the presence of these factors.

- The parties have been able to cooperate and solve mutual problems at some time in the past.
- The parties have a minimal history of adversarial relations or prior litigation.
- The parties' hostility and anger toward each other is moderate or low.
- The parties have, or will have, an ongoing relationship.
- Issues in dispute are not overwhelming in number or scope, and the parties have been able to agree on some issues.
- The parties' desire for the settlement of the dispute is high.
- The parties do not have other dispute resolution processes available that would be likely to provide a more favorable outcome.
- The parties accept the intervention and assistance of the third party.
- There is some external pressure to settle (time, diminishing benefits, unpredictable outcome, etc.)
- The parties have limited psychological attachment--negative intimacy--toward each other or the dispute.
- There are adequate resources to effect a compromise. (Limited resources tend to create more competitive relationships and striving for win/lose outcomes.)
- Parties have some leverage on each other (ability to reward or harm).

THE DIFFERENCE BETWEEN FACILITATION AND MEDIATION

What follows is a comparison of the difference between mediation and facilitation in terms of parties' characteristics, third party characteristics, issues and outcomes, and setting and dynamics.

FACILITATION AND MEDIATION: A COMPARISON

	FACILITATION	MEDIATION
PARTIES' CHARACTERISTICS		
Number of Parties	Three or more	Two or more
Organization of the Parties	Low to medium	Medium to high
Polarization of the Parties/Participants	Low to medium	Medium to high
THIRD PARTY CHARACTERISTICS		
Relationship of the third party to the participants	Third party may or may not be neutral in that he or she may have an ongoing relationship with group participants and may, in fact, be a member of the group in which he or she is working	Third party is neutral in that he or she generally does not have an ongoing relationship with the parties
Relation of the third party to the issues under discussion	Impartial - without a bias toward a specific substantive solution	Impartial - without a bias toward a specific substantive solution
Authority of the third party	Granted by participants or formally appointed	Granted by the parties or formally appointed
Degree of procedural directiveness of the third party	Low to medium	Medium to high
Means of influencing parties	Management of process, communication, and timing	Management of process, communication, creation of doubt, information exchange, and timing
Third party role in implementation of agreement	May or may not be involved in implementation	Generally not involved directly in implementation. This task is left up to the parties

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FACILITATION AND MEDIATION: A COMPARISON

FACILITATION

MEDIATION

ISSUES AND OUTCOMES

Clarity of issues	Issues are often unclear and/or undefined at beginning of facilitation	Issues are generally more clearly defined at the beginning of mediation
Polarization of issues	Low to high	Medium to high
Outcomes or goals of parties and/or third party	<ul style="list-style-type: none">· Sharing feelings· Meeting social needs· Information exchange (feedback or feed-forward meetings)· Generation of possible options to be proposed to a decision maker· Decision making by the participants	Decision made by parties on issues in dispute

SETTING AND DYNAMICS

Context for third party work	Meetings	Negotiation session
Timing of third party intervention	Entry may occur at time of impasse or crisis, or may be initiated prior to significant conflict escalation as a means to anticipate or avoid a destructive dispute	Entry generally occurs at the time of impasse. Parties have either been talking and reached a stalemate, or have been unable to initiate talks
Time frame/time pressure	Defined by the parties or outside authority	Defined by parties or outside authority. Pressure of a deadline, whether internally or externally imposed, is common
Physical set-up	Forum--all parties facing front of room with problem objectified on wall charts in front of participants	Parties face-to-face around a table (round or rectangular), or parties and mediator seated in triangle formation with mediator being equal in distance from each party
Use of private meetings (caucuses)	Generally not used in the formal context of meetings	Common, or may be used to the exclusion of joint meetings
Pressure to agree or settle	Whole-group pressures on individual or sub-group. Facilitator exerts relatively little pressure on the participants other than by managing group communication and general problem-solving procedures	Individual-on-individual in two-person dispute, otherwise team-on-team. Mediator manages process, time, communication, physical settings, relations with the parties' constituents, the parties' doubts, etc., to promote settlement

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SECTION 9

SUBSTANTIVE ASSISTANCE AND DISPUTE RESOLUTION

9

SUBSTANTIVE ASSISTANCE AND DISPUTE RESOLUTION

This chapter explores ADR procedures which can assist disputing parties in understanding and working with the substantive data and legal issues in conflict situations. Of particular importance are procedures which enable people in conflict to obtain and exchange information relevant to settlement negotiations, to clarify questions about data, to receive an objective appraisal of a legal case, or to resolve disputes over technical data. The primary emphasis of these procedures is the enhancement of negotiations through increasing the amount, quality, or understanding of the data available to the parties. Secondly, at the request of the parties, these procedures may also provide a third party advisory opinion as to how a problem might be addressed.

THE MINI-TRIAL*

The mini trial is a hybrid dispute resolution process in that it involves a data presentation component similar to that in litigation, a negotiation component, and the potential for third-party mediation and an advisory opinion. The mini-trial is a procedure which enhances the disputants' understanding of relevant data and significant legal issues in question. It places authority over the the terms of the resolution in the hands of the involved parties, rather than with a judge or jury.

* Sections adapted from: ADR pamphlet #4 "The Mini-Trial", by Lester Edelman, Frank Carr, and James Creighton (1988).

In essence, the mini-trial is an ADR procedure which provides disputing parties with an opportunity to present their best legal case in summarized form to each other and to use this information to further subsequent negotiations. The presentation is usually made by each party's legal counsel in a quasi-judicial manner, according to the terms reached in a pre-conference meeting concerning procedures to be used in the mini-trial. Attending the presentation are the key decision makers of each of the involved parties. At the conclusion of the legal presentations, rather than referring the decision to a judge or jury, the key decision makers adjourn to another room and use the information that they have heard to initiate or continue negotiations. The major assumption inherent in this process is that if the key decision makers in an organization, who have knowledge of broader organizational goals and interests and who have the authority to settle the dispute, are presented with the relevant facts of the case and the probabilities of how it might be settled in court, they will be able to jointly assess the costs and benefits of pursuing a legal action and will be better prepared, able, and willing to negotiate an out-of-court settlement, rather than opt for years of expensive and time-consuming adjudication. The track record of mini-trials seems to have verified this assumption.

THE CORP'S EXPERIENCES WITH MINI-TRIALS

In its first mini-trial, the U.S. Army Corps of Engineers successfully resolved a contract claim that was pending before the Armed Services Board of Contract Appeals (ASBCA). The mini-trial involved an acceleration claim in the amount of \$630,570 by Industrial Contractors, Inc. The principals resolved the claim in less than three days, and the dispute was settled for \$380,000. At the mini-trial, the government was represented by the Corps' South Atlantic Division Engineer, while the contractor was represented by its president. The neutral advisor was a retired senior claims court judge from the U.S. Claims Court.

The Corps' second mini-trial involved a dispute arising out of the construction of the Tennessee Tombigbee Waterway. The \$55.6 million claim (including interest) involved differing site conditions, and was filed at the Corps of Engineers Board of Contract Appeals by Tenn-Tom Constructor, Inc., a joint venture composed of Morrison Knudsen, Brown & Root, and Martin K. Eby, Inc. A vice president for Morrison-Knudsen acted as the principal for the joint venture, and the Ohio River division engineer represented the government. A law professor, who is an expert on federal contract law, was the neutral advisor. One interesting aspect of this case is that following a preliminary three-day mini-trial, the senior managers met, but decided they could not resolve the issue without additional information and scheduled a follow-up one day mini-trial two weeks later. Following this second mini-trial, the principals agreed to settle the claim for \$17.2 million, including interest.

Following this mini-trial, the settlement was investigated by the Department of Defense Inspector General. The investigation was initiated because of a "hotline" inquiry about the appropriateness of the settlement. After conducting an extensive

Substantive Assistance and Dispute Resolution

review, the Inspector General made a formal report. The Inspector General found that the settlement was in the best interest of the Government and concluded that the mini-trial, in certain cases, is an efficient and cost-effective means for settling contract disputes. This conclusion provides a strong validation of the mini-trial as an ADR method for resolving government contract disputes.

The Corps recently has also successfully concluded a mini-trial over financial responsibility for cleanup of a Superfund site, with the Corps acting on behalf of the Navy. In this case, the mini-trial led to a successful resolution, where other forms of negotiation had been unsuccessful.

Other Corps' uses of mini-trials included:

- Resolution of \$105 million of claims arising out of the construction of the King Khalid Military College, Saudi Arabia. This involved some sixty claims which were ultimately settled for \$7 million.
- Resolution of claims for \$765,000 from construction of a visitor's center at a recreation area. A settlement was reached for \$288,000.
- Nine appeals arising from a contract for the repair and modification of Trainer Gates at Greenup Locks and Dam, on the Ohio River, were settled after a two and one-half day mini-trial. The total amount claimed was \$515,000, which was settled for \$155,000.
- Seven disputes regarding the construction of the Consolidated Space Operations Center in Colorado were resolved using a mini-trial. The claims, totalling \$21.2 million were from the prime contractor and a subcontractor. These claims were settled for \$3.7 million.

EXPERIENCE OF OTHER GOVERNMENT AGENCIES AND THE PRIVATE SECTOR

Following the Corps' lead, both the Department of the Navy and the Department of Justice have begun to use mini-trials. The Navy has participated in three mini-trials. Two of the mini-trials resulted in negotiated agreements. The third mini-trial succeeded in narrowing the issues in dispute, but did not result in a negotiated settlement. Over the past two years, the Navy has developed two additional mini-trial agreements to resolve disputes, only to have the other parties settle the dispute prior to the actual mini-trial. Apparently whatever psychological/legal barriers were surmounted in deciding to participate in the mini-trial led to an immediate settlement.

A number of companies have used mini-trials, including Allied Corporation, American Can Company, American Cyanamid, AT&T, Borden, Control Data, Shell Oil, Standard Oil of Indiana, Texaco, TRW, Union Carbide and Xerox. Mini-trials have been used

in cases involving breach of contract, antitrust, construction, unfair competition, unjust discharge, proprietary rights, and product liability claims. They have also been used in complex multi-party cases and international commercial disputes.

WHEN AND WHEN NOT TO USE A MINI-TRIAL

A mini-trial may be the appropriate dispute resolution procedure when (Green, Marks and Olsen, 1978):

- The parties want to focus the negotiations on the legal merits which are central to the case and the parties have differing assumptions or evaluations of the case should it go to court.
- The parties want to re-translate a business problem, which has become a legal problem due to the litigation process, back into a management issue.
- The parties must unravel complex questions of mixed law and fact, which often result in costly legal battles.
- The uncertainty as to the outcome of an adjudicated case raises the potential for significant costs for one or more parties should the case be decided against them.
- The parties want to stop or curb rapidly escalating legal costs.
- The management or legal counsel of one or more parties believes that they are not accurately communicating the merits of their case to the other side, and that a clear and accurate presentation will lead to a settlement.

Mini-trials are not appropriate when:

- A case hinges solely on legal issues. In this case some form of ruling by an outside party (usually judge) is probably a more efficient means of answering the question.
- The dispute involves disagreements over factual questions involving credibility. Here the mini-trial suffers the same problems as arbitration and adjudication where witnesses will need to be cross-examined and the accuracy of their testimony verified.
- One of the party's goals is to create a legal precedent or to test a point of law.

THE TIMING OF MINI-TRIALS

Mini-trials may be initiated prior to or after the initiation of litigation. Green, Marks and Olsen note that most frequently the process is proposed after some pre-trial discovery has been initiated and the parties have become more familiar with some of the disputed issues in the case. This initial educational process will, ideally, inform the parties as to some of the costs that can be expected if they continue to pursue a litigious route to resolution. Clearly the earlier the procedure is initiated the more costs that can be saved.

STEPS TO INITIATE A MINI-TRIAL

There is no one right way to conduct a mini-trial; each procedure should be designed to fit the needs of the specific parties and issues involved. However, past experience has identified some general steps that have been found to be important.

1. Determine whether or not a mini-trial is appropriate for a particular dispute.
2. Obtain any needed Corps management commitments.
3. Approach the other parties to get their agreement to participate.
4. Select the management representatives for each organization.
5. Select a neutral advisor.
6. Develop a mini-trial agreement.
7. Work out a schedule/agenda for the parties' presentations.
8. Complete discovery.
9. Exchange position papers.
10. Hold a preliminary meeting between the neutral advisor and the management representatives to review roles and procedures.
11. Conduct the mini-trial conference.
12. Conduct negotiations following the conference.
13. Document the agreements that are reached.
14. Develop an implementation procedure.

ADVISORY MEDIATION

Advisory mediation is a procedure involving mediated negotiations with an added twist to assist the disputing parties to address particularly troublesome issues. In this procedure, the parties and mediator proceed in the same manner as described in the chapter on Procedural Assistance, until such time as the parties have reached an impasse and are prepared to conclude mediation without a settlement. In advisory mediation, the parties may request that the neutral third party issue an advisory opinion as to how the dispute might be settled in a fair and reasonable manner. Generally, the neutral will give a brief oral opinion about how s/he sees the issues in

the case and recommend a settlement and its underlying logic. The parties can take this recommendation and use it as the basis of future negotiations or can reject it outright and proceed to a more binding procedure or forum to resolve their differences. It should be noted that once the mediator has rendered an opinion, even though it is advisory and non-binding, s/he will usually lose a significant amount of procedural authority and perhaps impartiality in the eyes of the parties. While the advisory opinion may break the deadlock, the mediator's role has shifted from that of a process assistant to that of a substantive advocate, and s/he may have difficulty in continuing in the role of procedural coordinator of the negotiation process. For this reason, this procedure should only be used at the end of mediation and should not be used in the middle on any one intractable issue.

The major consideration for parties selecting this procedure is a pre-mediation "contract" with the neutral regarding whether s/he will play an advisory role if an impasse is reached, or whether the intervener will limit assistance to helping only with the procedure. A pre-mediation agreement on this question can alert the parties as to this alternative for gaining additional substantive input to their decision making, and can avoid putting the neutral into the uncomfortable position of being asked to serve as a substantive advisor when the intervention contract was for process assistance.

As noted earlier, this procedure has been quite effective in resolving a variety of disputes, particularly in the labor arena. Because parties have learned that subsequent arbitrators' opinions match the mediator's recommendations in approximately 80 percent of the cases that have gone on to arbitration, many disputants opt to accept the mediator's advisory opinion as the basis of settlement.

TECHNICAL ADVISORY BOARDS, DATA MEDIATION, AND NON-BINDING DISPUTES PANELS

These three procedures are means for parties to:

- Dialogue about data questions, and obtain information necessary for settlement, when inadequate data exists.
- Address competing sets of data by hearing about and assessing the merits of each case, and if deemed appropriate, to obtain an advisory opinion from a substantively knowledgeable third party or parties.

The Corps has used technical advisory boards and non-binding disputes panels in numerous situations. For example, the technical staff of the Board of Engineers for Rivers and Harbors performs the function of a technical advisory board for internal Corps dialogues over data.

Disputes panels have also been established by the Corps and contractors to resolve external disputes over technical issues or terms of contracts. The Fort Worth District has implemented a disputes panel to address issues arising from a \$48 million contract to construct four miles of tunnel under the city of San Antonio for the purpose of flood control. The ADR procedure consists of a panel of three persons with backgrounds in tunnel construction. Each party hired one panel member who was acceptable to the other party and these two individuals hired the third. The panel is required to meet quarterly at the construction site, with both the contractor and the government, for the purpose of keeping informed about the project's development and to render an advisory opinion regarding issues that might arise in the project's life cycle. Any dispute between the parties may be brought to the panel with the concurrence of the government. Although the recommendation of the panel is non-binding, it is expected that the opinion of these experts will carry significant weight with the parties and will strongly impact their decision to accept the opinion or use the recommendation to shape a more acceptable settlement in subsequent negotiations.

FACT-FINDING

Fact-finding is quite similar to the procedures described above in that it seeks to clarify and make recommendations regarding differences over data or substantive disagreements. Fact-finding may or may not involve a hearing format such as that found in a disputes panel or technical advisory board where differences between the parties are aired formally. In some fact-finding efforts, the third party may conduct individual interviews with the parties and then use the collective data to prepare a written, and on occasion, an oral presentation to the disputants which may take one of several forms. The fact-finder's report may:

- Present the relevant issues, interests, positions, and options as a means of organizing relevant data for the parties, but without making a specific recommendation as to how the dispute should be settled
- Present the relevant issues, interests, positions, and options **and make procedural or directional recommendations** on how negotiations might proceed
- Present the relevant issues, interests, positions, and options and then make a **specific substantive recommendation** as to how the dispute could be resolved.

The parties take the fact-finder's report and use it to initiate or to further productive negotiations.

The assumption behind fact-finding is that an independent and impartial view of a conflict situation, which reveals and/or clarifies contested issues and which is based upon principles of fairness and equity, will result in an organization of the facts of a case and will assist the parties to negotiate more productively. The addition of a

recommendation by the fact-finder may also provide a moral inducement to settle, provide for face-saving or be used to mobilize public constituent opinion toward settlement. The parties can use the fact-finder's report to provide both a procedural and substantive basis for negotiations, and in fact, the recommendations may perform the function of a "single-text negotiating document," which the parties can focus jointly upon and modify to better meet their interests.

THE TIMING OF FACT-FINDING

Fact-finding can be initiated prior to the initiation of legal action or negotiations as a means for concerned parties to organize data, identify issues, isolate areas of agreement and disagreement, or to identify an appropriate dispute resolution to be pursued. Fact-finding may also be initiated after the parties have reached an impasse or stalemate in negotiations. Mediation at this time in the cycle of conflict can often provide the parties with the needed catalyst to move them off dead center and toward a resolution of their differences.

THE CORPS OF ENGINEERS AND FACT-FINDING

The Corps has used fact-finding in several cases and has acted as a fact-finder in numerous disputes involving other federal agencies. In a recent case, the Corps used fact-finding to address issues involved in a \$9,800,000 appeal by Southwest Construction Company. In this dispute, the parties discovered that they were so far apart on their bargaining ranges that negotiation would be unproductive. The Corps initiated and Southwest agreed to use the services of a neutral technical expert to make an evaluation of the non-quantum elements of the dispute. Using the findings of the neutral, the parties could then determine if they should pursue settlement through normal negotiations.

The Corps has acted as a fact-finder in its capacity as lead agency in the conduct of Environmental Impact Statements. The Corps system-wide EIS on the water resources in Colorado has been used to respond to issues related to the proposed construction of the controversial Two Forks Water Project.

SETTLEMENT CONFERENCES

The settlement conference is an ADR procedure which occurs in the context of more formal judicial proceedings. Frequently confused with a pre-trial conference between opposing counsel and the **trial judge** where the evidence to be presented and the process used for the trial is discussed, the settlement conference is explicitly a forum with a non-trial **settlement judge** for final pre-trial negotiations. In this procedure, the disputing parties' lawyers, and on occasion the parties themselves, meet with a judge, magistrate or master, who will not be the trial judge, to attempt to negotiate the settlement of a legal case. The third party "settlement judge" is not authorized to

make a binding decision for the parties, but to act as a mediator and assist them in negotiations. The difference between this process and traditional mediation is that the settlement judge is a "mediator with clout" in that s/he may have significant input as to possible settlement ranges and may issue advisory opinions as to points of law. Many settlement judges also make extensive use of caucusing, private meetings with each of the parties, and shuttle diplomacy as a means of managing communications and exchanging only offers which move the parties toward settlement.

WHEN IS A SETTLEMENT CONFERENCE APPROPRIATE?

Settlement conferences should be considered when:

- The parties need clarification or advice from a knowledgeable or neutral third party on a point of law which will enable them to better handle a substantive impasse.
- The parties want a knowledgeable third party to suggest a possible bargaining range that will facilitate negotiations.
- Managers on one side want to talk with their counterparts on the other side, in the presence of their lawyers and with the assistance of a substantively knowledgeable third party, as a means of clarifying their understanding of their cases and obtaining a valid assessment of the costs and benefits of continuing litigation.
- One or more lawyers are having personality conflicts with opposing counsel, or are having trouble managing an unruly or unrealistic client, and third party assistance is needed to address the relationship problems or provide reality testing.
- Mediation is desirable but the parties want more than procedural assistance.

CONSIDERATIONS IN SETTING UP A SETTLEMENT CONFERENCE

Settlement conferences can be requested by either party's legal counsel and are usually scheduled at the convenience of the presiding settlement judge and the parties themselves. In setting up a settlement conference, managers and their legal counsel should:

- Make sure that the settlement judge will not be the trial judge. Private conferences, involving substantive discussions with the trial judge, may prejudice a subsequent legal case in front of that judge.
- Carefully assess who should participate. Ideally it should be a decision maker with the authority to settle, who is willing to take a fresh look at the costs and benefits of reaching a negotiated versus a litigated agreement.

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- Prepare a clear and concise presentation of the case and identify the points in question which are to be discussed or about which advice about law or settlement ranges are needed.
- Not be pressured into settling just because a judge makes a recommendation. Settle when a matter of principle is not at stake, key interests have been met, or when a negotiated settlement is less costly than the litigated option. In calculating costs and benefits, consider legal costs, time delays, appeal expenses, expenses of technical experts, and lost management time.

SECTION 10

DECIDING TO USE AN ADR PROCEDURE

10

DECIDING TO USE AN ADR PROCEDURE

The decision to use an ADR procedure requires at least two judgments: (1) that an ADR procedure is more appropriate than the normal administrative or legal procedure, and (2) determining which ADR procedure is most appropriate for the dispute in which you are involved. This chapter describes an analytic process which can be used to make these judgments. Keep in mind, though, that it is not unusual, and it is probably desirable, for a manager to try several different approaches and procedures in an effort to achieve a positive outcome for both his or her organization and the other parties. Some ADR procedures may be useful in preventing disputes, while others may be useful with a more mature dispute. This analytic process will help you select the technique most appropriate to your current situation.

The purpose in going through this analytic process is to ensure that you make a careful assessment as to the amount of resources --be it personnel, time, or credibility--you are willing to commit to a dispute, taking into account the potential benefits. The analytic process consists of a series of questions:

- 1. What is the relative power of the parties, and how important is this dispute to each party?**

In many conflicts, the parties are readily identifiable. In a contract dispute they are the contractor and the contractee; in a labor-management conflict, they are the union and the management. In some public disputes, the parties are not so readily identifiable. In establishing local cost-sharing arrangements, for example, there may be

Deciding to Use an ADR Procedure

multiple parties. In issues involving environmental or community concerns it can often be difficult to decide who represents those interests. People may become parties by virtue of: (1) their position in an organization involved in a conflict, i.e., their ability to make a decision for an organization, (2) their technical expertise or authority, (3) the impact of the decision upon them, or (4) their ability to mobilize political support.

Each party to a dispute has actual or potential power or influence which may be mobilized to settle a conflict in a manner which satisfies its interests. Each party's power needs to be analyzed because it can help you predict how the issue will be resolved.

Power, however, is relative. It depends on the relationship between the types and amounts of power held or available to the parties in conflict. Power, in a dispute, encompasses many things. If you have the strongest legal case, your power is increased. If you have greater credibility or technical reputation, your power is enhanced. If the other party is able to mobilize very significant political support, for example, you may make an administrative decision only to have it overturned by political realities. If one party has the resources to pursue a lawsuit and the other does not, then power is unequal. Generally, the more interdependent two parties are, the more influence they exert on each other. For example, if there is only one contractor providing a particularly valuable kind of expertise, and the Corps is one of the few organizations which utilizes that expertise, then interdependence between the Corps and that contractor will be very high and the contractor will have a significant degree of power in relation to the Corps. Conversely, if the contractor performs a specialized type of work and there are other firms which do similar work, the Corps because of its range of choices, has more influence over any prospective contractor.

Some of the sources of power include:

- **Formal authority**--legally mandated authority to establish policies, develop regulations, grant permits, etc.
- **Expert/information power**--access to knowledgeable people or information which others don't have.
- **Procedural power**--control over the procedure by which decisions are made.
- **Associational power**--derived from association with people in power.
- **Resource power**--control over money, services, materials, labor.
- **Sanction power**--the ability to inflict harm or deny benefits.
- **Nuisance power**--the ability to cause a party discomfort.
- **Habitual power**--the power of the status quo, or "the way things are done."
- **Moral power**--the ability to appeal to widely held values.
- **Personal power**--personal attributes or skills which magnify the other sources of power.

Power is a finite resource, so even if an organization or party possesses considerable power, the next question is whether or not to exercise that power on this particular dispute. This depends on how important this dispute is to that party. If the dispute threatens the very survival of an organization or a fundamental interest of the organization, then the organization may be willing to use whatever resources it has to influence the outcome of the dispute. If this is a relatively small dispute or one of many everyday problems, the same organization is likely to commit far fewer of its resources to this particular dispute.

2. Taking into account the relative power and commitment of each party, if this dispute continues on its present course, what is the most likely procedure by which it will be resolved?

- Administrative decision by the Corps?
- Administrative decision followed by legal/political tests?
- Lawsuit?
- Unilateral action by another party?
- Stalemate (no solution possible)?
- Imposed political solution?
- Other

This question addresses the process or procedure by which a dispute will be resolved. You are being asked to assess the *ultimate* manner in which the dispute could be resolved, so that--in subsequent questions--you can address the benefits and costs associated with this procedure. In making this decision, though, don't stop with just the immediate answer, but concentrate on the ultimate outcome. In the short run, the Corps may be able to make an administrative decision, but if the power of the other parties is strong enough, this administrative decision may be altered by legal challenges or political influences.

3. Taking into account the relative power and commitment of each party, if this dispute continues on its present course, what are the most likely substantive outcomes and what are their relative probabilities?

Question #2 asked you to address a question of procedures. Question #3 asks you to predict the actual substantive decision which will result if the dispute continues on its present course. To illustrate: if a dispute is currently moving through the courts, what is the likelihood that you will "win," and if you do win, what would that mean for the Corps? Similarly, if you make an administrative decision, what are the odds that it will be overruled by political realities, and what would that political solution look like? To do a proper risk analysis, you need to look at the odds that you could "lose," or only "win" in such a way that the organization achieves few benefits and expends significant resources for a relatively small return.

4. Taking into account your predictions in Questions #2 and #3, what are the potential benefits/costs of the current procedure by which the dispute will be resolved? These benefits and costs could include:

- Process costs (staff, time, delays, legal fees, etc.)
- Impact on the relationship with the other parties.
- Financial benefit/liability to the Corps.
- Increased/decreased risk of an unacceptable outcome.
- Establishing a legal precedent.
- Political impacts.
- Internal support/morale.

Here you are being asked to determine whether the costs and risks associated with the present manner in which you are handling the dispute are appropriate to the potential benefits. This provides the information you need to make a comparison with an ADR procedure which might be used instead.

5. Is the use of the current procedure justified?

By comparing your answers to Questions #2, #3 and #4, you should now be able to determine whether to continue using a particular procedure or whether another may be more viable.

6. Which ADR procedures are most suitable for this dispute?

In the event that the current procedure or procedures being used to resolve a dispute involve potential or actual unacceptable consequences, you may want to consider trying one or more ADR procedures as a means of attaining a more positive and beneficial outcome. There are numerous factors to take into account in selecting an ADR procedure; there's no simple cookbook formula. Here are some general guidelines, which you should consider when assessing whether an ADR procedure is appropriate for your dispute:

Level of Antagonism: If the level of antagonism between the parties is high, this may virtually rule out most unassisted procedures and increases the likelihood that you will need third-party assistance. The higher the level of antagonism, the more likely the parties will insist on relatively formal procedures such as mediation, mini-trial, settlement judges, and so forth. In addition, they may need the help of a third party to get all the parties to participate. Also, if antagonism is high, techniques such as conciliation, team building, or structured social interactions may be useful ways of breaking down the antagonism and building positive working relationships.

Level of Process Skills: There are skills to achieving agreements between parties, and it is actually easier to achieve mutually acceptable solutions if all parties are skilled in cooperative or collaborative problem solving or negotiation. If both or all parties are not equally skilled, then third-party assistance may be needed to provide the process skills which participants lack.

Clarity of Data: If the data necessary to make a wise decision is either not available, contradictory, or confusing to one or more parties, some form of information exchange or data clarification procedure may be helpful in resolving the dispute. If the conflict involves legal issues in which the merits of a party's case are unclear, or if the case is not one in which a precedent is important or will be set, a mini-trial may be an appropriate procedure. If an informed impartial third-party opinion about a dispute or conflicting data might move the parties off-center and toward a settlement, a dispute panel or fact-finding might be tried.

Unpredictability of Outcome: If the final disposition of a dispute in either an administrative procedure or court is highly unpredictable, parties may be more willing to try a procedure based upon negotiation which will provide them greater control over the outcome of the conflict. The greater the uncertainty of a dispute's outcome and the higher the potential costs, the stronger the impetus to try a procedure which promotes voluntary settlement.

Administrative/Legal History: The earlier you are in the development of a conflict, the more likely it is that you can use informal, unassisted procedures to resolve a dispute. After administrative decisions have been made or the litigation process has begun, it is more likely that you will have to use formal processes such as mediation, mini-trial, or non-binding or binding arbitration.

Legal Precedent: If a legal precedent is involved, most parties will be unwilling to accept any form of resolution except a judicial decision.

Number of Parties: If there are only 2-3 parties, then it may be possible to use unassisted procedures. But some public disputes may involve as many as 20-30 parties. This increases the likelihood that you will need third-party assistance, such as facilitation or mediation, to achieve coordination between the various stakeholders.

Ability of Parties to Make Commitments: In labor-management negotiations or disputes with contractors, it is relatively easy to determine who can make commitments on behalf of each party. In public disputes, however, it is not always clear who--if anybody--can make commitments on behalf of a particular interest or constituency. Which environmental leader, for example, can make a commitment that is binding for all people concerned with environmental values? Who can legally represent a number of neighbors potentially impacted by a project? The problem is that if some parties can make commitments and others can't, it is

difficult to reach agreements which genuinely resolve the dispute. Nobody, making concessions on behalf of his or her organization, wants to negotiate with another person only to find that this person doesn't have the authority to make concessions or binding commitments. If you are involved in a dispute where the parties are not well defined or parties can't make commitments, you may want to either delay your efforts to resolve the dispute, or engage a third party to assist in helping all parties get sufficiently organized that they can make commitments.

Relative Power of Parties: Although not an absolute rule, people are usually more willing to enter into negotiations, facilitated problem solving, or mediation when their relative power is approximately equal or the power relationships are unknown and there is a serious risk in testing them. Parties with less power are sometimes fearful of these procedures because they are concerned that they will have insufficient influence or resources to achieve an acceptable agreement or will not have sufficient power to insist that the powerful party will adhere to a negotiated settlement. A third party and an agreed upon procedure often have an equalizing effect on the power of the parties. Facilitators and mediators can often work with less powerful parties to enable them to address issues of concern and to satisfy their interests. Many parties, who felt themselves to be weaker than others going into negotiations, have reported very positive benefits as a result of participation in negotiations--greater access to here-to-for unavailable information, a chance to express their views, and tailored solutions which address their interests. In the event that parties have neither the desire, skill or resources to participate in cooperative problem solving or negotiations, they always have the alternative of using fact-finding, disputes panels, some form of arbitration or other third-party decision making procedure which can provide a rapid and efficient recommendation for settlement. ADR binding procedures are also possibilities.

Source of Conflict: If the conflict is over issues of fact, then procedures such as fact-finding, disputes panels, or mini-trials are helpful. If the source of conflict is over fundamental values or philosophy, such techniques will not prove useful, except possibly to reduce the number of issues about which the battle is to be fought.

If the conflict is over a relationship issue--for example, a party feels slighted, ignored, abused--then a technique needs to be selected which clearly provides a forum for expression of this grievance and makes all parties feel valued and important. A forum where a third party hears the disputants' grievance may be more emotionally satisfying, because it provides an ADR version of "a day in court."

7. What are the benefits/costs of using the most suitable ADR procedure?

Once the variables in Question 6 have been considered and you have selected a potential ADR procedure, you should assess the benefits and costs of using the process. Consider:

Deciding to Use an ADR Procedure

- Process costs (staff, time, delays, legal fees, etc.)
- Impact on the relationship with the other parties.
- Financial benefit/liability to the Corps.
- Increased/decreased risk of an unacceptable outcome.
- Establishing a legal precedent.
- Political impacts.
- Internal support/morale.

This question asks you to make the same kind of assessment of the ADR procedure as you made in Question #4 regarding the procedure you are already using. All dispute resolution procedures have benefits and costs. Your job as a manager is to insure that the costs are not disproportionate to the benefits, and that means using whichever procedure--ADR or not--that does the best job of meeting the interests of the organization.

8. Is use of the ADR procedure justified?

By comparing your answer to Question #4 to Question #7, you should now be in a position to determine whether use of the ADR procedure is preferable.

9. How would you go about implementing the ADR procedure?

Having decided that an ADR procedure is justified, and having selected the appropriate technique, your task now is to develop a program to get the buy-in of the other parties to use the ADR procedure.

SECTION 11

**RESOURCES
FOR
ADR ASSISTANCE**

11

RESOURCES FOR ADR ASSISTANCE

SELECTING THIRD-PARTY ASSISTANCE

If a determination is made that third party assistance is advisable to help resolve a conflict or facilitate a decision-making process, it is important to balance the following factors:

1. How much substantive knowledge does the intervener have regarding the issue in dispute?
2. How much experience does the person or organization have in the particular role they are being asked to fulfill?
3. What approach to intervention does the intervener take?
4. What level of structural neutrality is desirable?
5. How much personal credibility does the intervener have with all the parties?

It is sometimes necessary to choose among these factors. How they are weighted depends on the nature of the situation, the conflict resolution procedure being utilized, and the complexity of the issues involved.

Substantive Knowledge/Expertise

It is important to consider just how much substantive knowledge in the specific areas at issue the intervener needs. In most ADR procedures, the role of the intervener is not to find the "right" solution but to help the party develop an acceptable outcome or to choose from among the options developed during the intervention process itself. Therefore, while it is always helpful to be as familiar as possible with the issues, it is often less important for the intervener to be a substantive expert than it is for him or her to be a credible neutral with the ability to design and conduct a process that will make available the expertise of others in a useful way. The exception to this is when the intervener is asked to develop a set of options or an analysis of the substantive problem.

Procedural Experience

There are many different approaches to conflict intervention. The more experience someone has conducting a particular type of intervention, the more likely he or she is to achieve success, although even the most experienced intervener cannot guarantee a particular outcome. In selecting a third party, it is important to determine exactly what kind of experience he or she has had. Has the individual acted as a large group facilitator, mediator, fact finder, arbitrator or negotiator? How frequently? Each of these approaches is different, and the skills are not necessarily transferable. Furthermore, one intervention does not make someone an expert.

Even if someone is experienced in the particular procedure being utilized in a conflict, there are different approaches that can be taken to the same process. For example, some mediators view their role as finding the solution to a conflict that might be acceptable to the different parties and then convincing them of its merits. Others see their task to be helping parties identify and evaluate acceptable solutions for themselves. Some arbitrators will try to arrange an opportunity for parties to negotiate a settlement before they render a decision, and will even use the arbitration process to help parties identify mutually acceptable solutions. Others see their role as rendering a fair and clear decision for the parties and make no effort to encourage resolution. It is important to ask the intervener what his or her approach is and to see whether it matches the needs of the situation.

Neutrality and Impartiality

In all conflict intervention roles besides that of advocate or negotiator, impartiality is a critical factor. The intervener should not have preconceived biases, vested interests, or compromising relationships with the parties. However, there is a difference between impartiality and absolute structural neutrality. For example, someone may be able to act as a facilitator of a fair decision-making process even though he or she has had a previous connection with one of the participants or has been a party to a similar issue in the past. In fact it may be precisely because of such a background that the

intervener has the necessary substantive knowledge and personal (or organizational) credibility. On the other hand, in some situations, it is important that there be no "appearance of bias" and that the intervener be far removed from the parties and issues involved in the dispute. For example, sometimes it is unacceptable for the intervener to have had any previous acquaintance with anyone involved.

Trust and Credibility

Sometimes the trust parties have in a particular individual or organization is more important than all the above factors. An individual who has no particular substantive or procedural expertise and who knows the parties personally is in some situations the most appropriate intervener, although obviously there are many risks inherent in this process of selecting a third party. The role that public officials sometimes play in conflict is often related to the trust parties have in them, their independent resources and power, and the leverage they are able to exert.

CRITERIA FOR CHOOSING A THIRD PARTY

There are obvious tradeoffs between these different considerations. Personal credibility, substantive expertise, structural neutrality, and procedural experience are seldom all available in the same person. In deciding whom to use, the following questions should be asked:

1. What type of process is appropriate to this situation and why?
2. How important is the intervener's substantive role versus his or her procedural role?
3. How removed from the situation should the intervener be?
4. How much actual conflict intervention experience has he or she had?
5. How much familiarity does the intervener have with the specific subject area and what role has he or she played in previous disputes concerning these issues?
6. What specific conflict resolution processes is the intervener familiar with, and what is his or her approach to these processes?
7. Who can attest to the intervener's work? It is always important to ask and check for references from people who have seen the intervener's work.
8. What is the personal credibility of the intervener with **each** of the parties to the conflict? It is important to consider the viewpoint of everyone who is critical to achieving a successful outcome.

9. What is the relative importance of neutrality, personal credibility, procedural background and substantive knowledge?

Sometimes, it is easier to obtain the best combination of qualifications by utilizing the services of a competent conflict resolution organization or by obtaining referrals from a professional group such as the Alternative Dispute Resolution Committee of the American Bar Association.

SOURCES ON ADR ASSISTANCE

The Chief Counsel's Office is prepared to offer assistance and advice to Corps officials in selecting neutral intervenors, neutral advisors for mini-trials, or other third parties to assist in ADR procedures. Contact the HQUSACE Counsel's office at 202/272-0033; FAX 202/504-4123; or write

Office of the Chief Counsel
U.S. Army Corps of Engineers
Pulaski Building
20 Massachusetts Avenue N.W.
Washington, D.C.
20314-1000

The Administrative Conference of the United States, a federal agency, has compiled a roster of neutrals for use by federal agencies. The roster is organized under several categories including geographical region, substantive knowledge of the neutral, and experience. This roster is a valuable resource to aid in selecting a third party to assist in an ADR procedure. Contact the ACUS by telephone at 202/254-7020; or write

Administrative Conference of the United States
2120 L St. N.W., Suite 500
Washington, D.C.
20037

SECTION 12

GLOSSARY OF TERMS

12

GLOSSARY

Accommodation - a negotiation strategy in which one negotiator chooses to sacrifice some of his or her interests and allows the other party to make desirable gains. Accommodation is often used to preserve a relationship or to create the conditions for future exchanges that will compensate the accommodator for his or her concession.

Active listening - a communication procedure in which a listener determines the emotional content and intensity of a spoken message and feeds it back to the speaker for verification. Active listening builds empathy, confirms understanding and enables the speaker to “work through” strong emotions.

Advisory Mediation - the use of a neutral and impartial third party to mediate a dispute, with the option of a non-binding recommendation for settlement if the parties reach an impasse. The recommendation can be used to further negotiations, accepted as is by the parties, or rejected in favor of another form.

Agenda - a list of discussion items or problem statements that are ordered in a sequence and framed in a manner which facilitates efficient problem solving.

Agreement-in-principle - general levels of agreement that shape the broad parameters of a negotiated settlement.

Alternate dispute resolution - a range of dispute resolution procedures that provide for the settlement of disputes outside the traditional court procedures and structure.

Arbitration - the intervention into a dispute of an independent, private and impartial third party who is given the authority by the parties to make a decision on how the conflict will be settled. Arbitration may be binding or non-binding.

Assessment - an evaluation of a conflict situation involving a review of the parties, interests, issues, power, settlement options, etc.

Authority - responsibility for decision making that has been legally or legitimately delegated to an individual or organization.

Avoidance - a negotiation strategy in which a negotiator pursues a strategy of non-engagement in conflict or competition in order to achieve a desirable end or to avoid reaching an unfavorable or untimely settlement.

Bargaining - the process of making substantive, procedural or psychological trade-offs to reach an acceptable settlement. Bargaining occurs in the context of broader negotiations.

Bargaining formula - a combination of agreements in principle that define the general parameters of a negotiated settlement.

Bargaining range - a spectrum of possible settlement options, any one of which is preferable to a stalemate or breakdown of negotiations.

BATNA - an acronym for **best alternative to a negotiated agreement**. Negotiators usually compare alternative settlement options and/or available dispute resolution procedures as a means of determining whether a negotiated settlement is the preferred solution and/or process.

Bluff - a negotiation tactic in which one party misleads another as to his or her desired outcome, power, or willingness to take an action, in an effort to gain an advantage that would not be possible should his/her genuine concerns or power be known.

Bottom line (position) - a settlement option that represents the minimal substantive, procedural or psychological benefit that a party is willing to accept and still reach an agreement.

Building block procedure - a process for reaching a negotiated settlement in which a problem is broken into sub-issues and an agreement is reached on each of these smaller "parts." The final settlement is completed by assembling the "parts" into a comprehensive agreement.

Business relationship - a pattern of interaction between two or more people which is characterized by formality, limited levels of emotional disclosure, defined boundaries of the relationship and written agreements.

Caucus - a private meeting held by members of a negotiating team or between a mediator and negotiator(s) to determine strategies that will make joint session negotiations more productive. The caucus can focus on substantive, procedural, or psychological barriers to effective negotiations.

Coercion - negotiation tactics that limit the range of options available to parties by threatening or inflicting a cost on another party for non-compliance.

Common interests - substantive, procedural, or psychological needs that are held jointly by parties to a negotiation.

Competition - a negotiation strategy in which one negotiator pursues the satisfaction of his or her interests at the expense of the other party/parties. Competition often occurs when a party perceives that resources are limited and that a positive outcome for these can only be achieved if the other party receives less of the contested benefits.

Compromise - a negotiation strategy in which the parties agree to share jointly gains and losses.

Concern - a topic of importance to a party to a conflict.

Concession - a substantive, procedural or psychological offer, made by one party to another, which decreases the benefits requested by the offerer and rewards the other party.

Conciliation - the psychological preparation of parties by a negotiator or mediator to discuss substantive issues. Conciliation involves improving communications, building positive perceptions, and promoting trust.

Conflict - an expressed competition between at least two interdependent parties who have perceived or actual incompatible goals or interests.

Conflict anticipation - a conflict management approach which identifies disputes at their early stages of development, targets potential interest groups, educates them about issues, and attempts to develop cooperative responses to the future problem and thus avoid or lower the destructive effects of conflict.

Consensus - an agreement that is reached by identifying the interests of all concerned parties and then building an integrative solution that maximizes satisfaction of as many of the interests as possible. The process does not involve voting but a synthesis and blending of solutions. Consensus does not mean unanimity in that it does not satisfy participant's interests equally or require that each participant support the agreement to the same degree. Consensus is considered to be the best decision for all participants in that it addresses to some extent all interests.

Contract - formal legal document that outlines commitments, promises or exchanges that have resulted from negotiations.

Deadline - time limit, either internally or externally imposed, on the duration of negotiations.

Deadlock - inability of parties to a negotiation to move forward to a settlement. A deadlock may be caused by substantive, procedural or psychological barriers to agreement. (Synonyms: impasse, stalemate)

Decision - an outcome.

Dispute - a conflict in which the parties are unable or unwilling to resolve their problems or disagreements in the context of their private relationship, and have moved the problem into the public domain. Disputes often involve the presence of third parties, either observers, procedural facilitators or independent decision makers.

Disputes panel - the use of a panel of experts, chosen by the parties, either to assist in developing a recommendation about how the dispute might be resolved or to hear a case and make an advisory or binding judgment.

Doubt - uncertainty as to the outcome of an interaction or the validity of facts or the strength of a particular party to a conflict.

Evaluation - an assessment of an option.

Exchange - items of value traded by parties in dispute.

Exclusive interests - a party's needs that are totally incompatible with the needs of another party.

External influences - pressures from outside the negotiation "table" (people, structure, time, geography, etc.) that affect the dynamics of negotiators' interaction.

Facilitation - the use of a third party, who is impartial toward issues being discussed, to provide procedural assistance to group participants to enhance information exchange or promote effective decision making. The facilitator may or may not be a member of the group involved in the discussions.

Fact-finding - a dispute resolution process in which an impartial third party collects information about a dispute and makes either a report about relevant data or recommendations about how the dispute might be resolved. Fact-finding is used to minimize data conflicts and to provide an impartial assessment of the dispute to the parties or the public.

Fallback (position) - a series of options for settlement that are between the secondary position and bottom line position. Fallbacks are “yellow lights” for negotiators in that they indicate that it soon will be time to stop making concessions.

Feedback meeting - a meeting in which information is disseminated to participants.

Feedforward meeting - a meeting in which information is elicited from participants.

Framing - the manner in which a conflict situation, issue or interest is conceptualized or defined.

Impasse - the inability of parties to a negotiation to move forward toward a settlement. (Synonyms: deadlock, stalemate)

Incremental concessions - sequential offers made by a negotiator that grant gradually increasing benefits or rewards to another negotiator in return for agreement.

Incremental convergence - a gradual narrowing of differences between parties.

Information exchange - a dispute resolution process in which parties in conflict meet to exchange and clarify information. The goal of the meeting is to educate each other, answer questions, minimize data conflicts, and to check out perceptions.

Initial high demand - a tactic for opening negotiations in which a party begins by asking for a high concession from another negotiator in return for agreement. This tactic is used to educate another party about the importance of an interest or issue, to allow room for later concessions, to try to gain as many advantages as possible or to demonstrate toughness or strength of will.

Integrative decision/bargaining - a negotiation outcome or process that attempts to satisfy as many interests or needs as possible for all negotiators. (Synonym: interest-based bargaining decision)

Interest - a substantive, procedural or psychological need of a party to a conflict.

Interest-based bargaining - a negotiation process that attempts to satisfy as many interests or needs as possible for all negotiators. (Synonym: Integrative bargaining)

Intimate relationship - a pattern of interaction between two or more people which is characterized by informality, high levels of emotional disclosure, broad spheres of interaction, and verbal agreements. Intimacy can be based on positive or negative emotional involvement.

Issue - topic or statement of a problem that results from perceived or actual incompatible interests.

Joint problem-solving session - cooperative and face-to-face interaction by parties to a dispute to develop a mutually acceptable solution.

Mediation - the intervention into a dispute or negotiation of an acceptable, impartial, and neutral third party who has no decision-making authority but who will assist contending parties to negotiate voluntarily an acceptable settlement of issues in dispute.

Med-arb - a dispute resolution procedure in which the parties attempt to resolve their dispute through mediation, and if agreement is not reached, the mediator is authorized by the parties to make a binding decision.

Memorandum of Understanding ("MOU") - informal written document that outlines areas of agreement.

Mini-Trial - a settlement procedure which involves: (1) a summary presentation of the case by lawyers for each side before the key decision makers for each side, (2) facilitation of the process by a neutral third party who may, at the request of one or both of the parties, offer an opinion on how a court would decide the case, and (3) an opportunity for settlement discussions by the parties.

Mixed interests - needs held by the parties that are not mutually exclusive but are also not held in common. Mixed interests imply the potential for shared gains or losses.

MLATNA - acronym for **most likely alternative to a negotiated agreement**.

Negative bargaining range - a spectrum of proposed settlement options that are mutually exclusive in that no one option will satisfy adequately all parties' interests.

Negative intimacy - the destructive emotional attachment of antagonists to each other or to the conflict itself. The negative attachment of the parties to each other perpetuates the damaging relationship and the dispute.

Negotiation - a bargaining relationship between two or more parties who have a perceived or actual conflict of interest. The participants join voluntarily in a temporary relationship to educate each other about their needs and interests, exchange specific resources or resolve one or more intangible issues such as the form their relationship will take in the future.

Non-self-executing agreement - an agreement or exchange which cannot be completed immediately and requires continued performance over time (for example, payments made over time).

Offer - a proposal for settlement that addresses the interests or concerns of the offerer and/or the party to whom it is directed.

Opening position - a solution that represents the maximal demand of a party, which is usually presented early in negotiations.

Opening statement - a presentation made by a negotiator early in the dispute that presents how he/she sees the conflict. An opening statement may present the history of the problem, why there is a need for change (or maintaining status quo), issues to be addressed, interests to be satisfied and, possibly, positions or proposed solutions.

Option - a substantive, procedural or psychological solution that may satisfy the interests of a party to a dispute.

Package proposal - an offer for agreement that combines into one total proposal possible settlement options to multiple issues in dispute. Although it may contain unacceptable components, the proposal is offered as a "take it or leave it" totality.

Ploy - a tactic intended to frustrate, embarrass, mislead or weaken an opponent.

Position - specific solutions that a party adopts or proposes that meet his or her interests or needs.

Positional bargaining - a negotiation process in which a series of positions are presented as the solution to the issue in question. Positions are generally presented sequentially so that the first position is a large demand and subsequent positions request less of an opponent.

Positive bargaining range - a spectrum of settlement options, any one of which is more acceptable or preferable to all parties than a stalemate or impasse.

Pre-empt - a tactic to forestall potential negative activity of another negotiator. A party anticipates and takes action prior to the expected negative activity in such a manner that the negative behavior becomes irrelevant or impossible to perform.

Procedure - action steps, taken in a sequence, to achieve a desirable end.

Process - aggregate of procedural steps to achieve a desirable end. Process refers to the *way* something is done, as opposed to *what* is done.

Proposal - a suggestion, either substantive or procedural, on how to proceed or what should be done.

Purity of conflict - the degree to which the interests of the parties to a dispute are mutually exclusive. The more exclusive the interests, the "purer" the conflict.

Glossary

Reframing - the process of changing how a person or a party to a conflict conceptualizes his, her, or another's attitudes, behaviors, issues or interests or how a situation is defined.

Reward - benefit to be given or received by a party in return for cooperation or reciprocal exchange of another benefit.

Risk - a measure of the consequences of failure or success of a negotiation process.

Secondary position - concession made by a negotiator after the opening position that demands less or offers more to an opposing negotiator.

Self-executing agreement - an agreement or exchange that is carried out in its entirety at the time it is accepted or is formulated in such a way that the extent of the parties' adherence to its terms will be self-evident.

Settlement - an agreement.

Settlement conference - pre-trial settlement discussions between the parties, with the assistance of a judge who will not be hearing the case, which help the parties assess their legal arguments and opinions and encourage them to negotiate agreements rather than continue their case in court.

Sidebar - private meetings between two principal spokespeople and a mediator.

Simultaneous exchanges - a tactic in which parties make offers at the same time so as to avoid loss of position or face.

Spokesperson - individual authorized to speak for a team or interest group.

Stakeholder - a person or interest group which has an investment in the way that a dispute is terminated, and in the possible distribution of gains and/or losses that may result from the resolution process.

Stalemate - inability of parties in negotiation to move forward to a settlement. (Synonym: impasse, deadlock)

Strategy - a conceptual plan that outlines the general approach or steps to be taken to attain a desirable outcome.

Symbolic concession - an offer, in the form of a minor concession, that demonstrates a negotiator's intent to bargain in good faith and/or attempt to meet some of the needs of another party.

Symbolic issue - an issue that is a substitute for, or representative of, a much broader or general issue or interest. Symbolic issues tend to have greater psychological than substantive meaning.

Summary jury trial - an abbreviated hearing, in which lawyers for each side present the evidence before an advisory jury which renders a non-binding verdict.

Tactic - a behavior initiated by a negotiator designed to implement or operationalize a strategy.

Threat - a statement of intent to do damage or harm to a party.

Timing - the orchestration of critical events or moves so that they occur at an optimal moment in the negotiation, such as when negotiations begin and when offers are made.

Tit-for-tat - a pattern of negotiation moves that reward or coerce an opponent in reciprocal fashion. The negotiator offers back the same behavior that was initially given.

WATNA - acronym for **w**orst **a**lternative to a **n**egotiated **a**greement.

“Yesable” proposal - a proposal developed by a negotiator which is designed in such a manner that it is easy for an opponent to agree to its terms. The proposal addresses the other’s interests and concerns, is presented in a way that enables the other to save face and is easy to implement.

SECTION 13

BIBLIOGRAPHY

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275 South Beverly Hills Drive
Beverly Hills, California 90212

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Jossey-Bass, Inc. Publishers
350 Sansome Street
San Francisco, California 94104

Missouri Journal of Dispute Resolution
Center for the Study of Dispute Resolution
University of Missouri, Columbia
School of Law and Missouri Law Review
107 Tate Hall
Columbia, Missouri 65211

Negotiation Journal: On the Process of Dispute Settlement

Plenum Publishing Corporation

233 Spring Street

New York, New York 10013

Ohio Journal

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164 W. 17th Avenue

Columbus, Ohio 43210

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Bureau of National Affairs
Circulation Department
P.O. Box 40947
Washington, D.C. 20077-4928

Consensus

Public Disputes Network
Harvard Law School
Program on Negotiation
513 Pound Hall
Cambridge, MA 02138

Dispute Resolution

American Bar Association Special Committee on
Dispute Resolution, Public Service Division
1800 M Street, N.W.
Washington, District of Columbia 20036

Dispute Resolution Forum

National Institute of Dispute Resolution
1901 L Street, N.W., Suite 600
Washington, District of Columbia 20036

Mediation News

Academy of Family Mediators
P.O. Box 10501
Eugene, OR 97440

Mediator

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Negotiation Newsletter

Program on Negotiation at Harvard Law School
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Harvard University
Cambridge, Massachusetts 02138

Resolve (Environmental)
The Conservation Foundation
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Washington, District of Columbia 20037

OTHER ADR PAMPHLETS TO BE PRODUCED BY THE COE

Pamphlet	Projected Date of Publication
Principles/Overview	1989
Getting to the Table	1989
Non-Binding Arbitration	1989
Disputes Review Boards	1989
Negotiation	1989
Conciliation/Facilitation	1989
Mediation	1989
Summary Trial	1990
Settlement Judges	1990

SECTION 14
CASE STUDIES

The Snoqualmie River Conflict: Bringing Mediation into Environmental Disputes

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Introduction

All British diplomats, it is said, are given three rules to follow: never lie, never tell the whole truth, and never miss a chance to go to the bathroom. That advice might also be given to those involved in an endeavor requiring the same interpersonal skills and sensitivities as diplomacy—mediation. And in none of the new fields to which mediation has come in recent years is the need for such talent greater than in environmental affairs. Like the diplomat, the environmental mediator often works with disputes that have divided communities or regions for a decade or longer. A leading environmental mediator, in a frank discussion of his field, said recently: "Mediation takes power and the only basis for mediating disputes is fear—fear that something worse will happen" if there is no mediation. Change the word mediation to diplomacy and you might have had a diplomat speaking.

The environmental mediator who talked about fear is Gerald W. Cormick. In 1973, he and another mediator, Jane McCarthy, once an investment counselor, moved mediation for the first time in U.S. history into the field of environmental affairs, and they became the first formally designated mediators to undertake the settlement of an environmental dispute. They didn't pick an easy one.

For about fifteen years, a conflict had raged in and around Seattle, Washington, over whether a flood-control dam should be built on the Snoqualmie River. The battle involved local, state, and federal agen-

cies; farmers; land developers, and environmentalists. Cormick and McCarthy moved into this caldron. They are currently unofficially involved—although they successfully produced a mediated agreement at the end of 1974 after seven months of intensive negotiation, implementation still appears to be a long way off. The situation has raised questions about the responsibility of mediators with regard to implementation and about whether the right tactics were used in this dispute to insure implementation. There is even the possibility that the mediated agreement may come apart because of the lack of further progress, which would raise still more questions.

Governor Dan Evans appointed Cormick and McCarthy as the official mediators in the dispute. Now president of Evergreen State College in Olympia, Washington, Evans said that if the mediated agreement isn't implemented "it would be a shame; it's the best proposal to come along for solving a very complex problem."

This chapter tells the Snoqualmie story and describes the work of the mediators. Both mediators earned the respect and even the affection of participants in the mediation process and of observers. Cormick, who has been called the "inventor" of environmental mediation, has gone on to mediate other similar disputes and has inspired agencies and organizations to follow his lead. McCarthy received a top reference from George Yount, an environmentalist involved in the Snoqualmie dispute; he described her as a "minor god."

The environment is one of society's most recent concerns. Until Rachel Carson's *Silent Spring* of the early 1960s, land, air, and water were there to be taken and used, most often for commercial purposes. Nature existed to serve humankind. The realization that natural resources had limits and that care should be taken with the balance of nature grew slowly and fitfully, reaching a peak with Earth Day in 1970.

All the while, no weaker forces than business and labor stood side by side against the growing number of environmentalists. On one side was the understandable desire for profit and for jobs; on the other side environmentalists offered cleaner air and water. "We would rather save a man than save a tree," labor leaders scoffed. "Labor would brick over the Grand Canyon if it meant steady work," the environmentalists answered.

Then shortages began to be felt. Utility company executives, who had warned that if they could not build power plants they could not supply power, suddenly sounded less like misanthropes and more like

sensible men. The public realized that protecting the environment costs money, and they were less inclined to pay the costs than they had been to cheer for nature. Environmental standards were relaxed by community after community and by the federal government.

Still, the environmental movement successfully lobbied for legislation that embodied many of its goals, and it pressed the courts to enforce the legislation. Significantly, unlike the dissidents in many other disputes—involving racial balance in schools or housing, for example—environmentalists tend not to come from society's oppressed groups. Perhaps more than any other major protest movement of recent years, they draw the bulk of their support from the white middle class. By background, they are comfortable with the process of give and take that is negotiation. Often, their commitment is born of ideology rather than of pressing social or personal economic need. As a result, environmental clashes frequently lack the immediacy of disputes in other arenas. They can go on for years. No answer is required today. What's more, still unlike other disputes, delay favors the dissidents, and they have become skilled in the art of dragging things out.

The Issues

Against this background, politically powerful environmentalists and sportsmen in the Seattle area squared off against farmers and other residents of a fertile agricultural and recreational area thirty miles northeast of Seattle. The farmers and residents had suffered serious periodic flooding by the Snoqualmie River. The Snoqualmie winds its way out of the Cascade Mountains east of Seattle and moves through the agricultural area—the Snohomish River Basin—until it flows into Puget Sound, north of the city. The farmers and other residents wanted flood protection in the form of a dam, but the environmentalists feared that removing the flood threat would lead to heavy commercial development and would spoil one of the few remaining naturally scenic areas readily accessible to Seattle.

The upper portions of the basin form miles of white-water rapids used frequently by sports fishermen and kayakers and highly prized by naturalists. Hikers and others take great pleasure in the adjacent forests of Douglas fir. The environmentalists feared the development and suburbanization of this area if a dam were built on the Middle Fork of the Snoqualmie, as originally proposed in a study by the Army

Corps of Engineers. One contributing factor to the environmentalists' fears was the experience in the nearby Green River Valley. Ed Delanty, one of the key environmentalists and the chairman of the Interim Basin Coordinating Committee attempting to implement the mediated agreement, said: "We had gone through this tremendous experience in the Green River Valley in which . . . a dam provided 100-year flood protection in the lower valley and it went to instant development and cement."

The environmentalists and their supporters were also suspicious of the farmers' motives. They believed that the farmers wanted flood protection not so much to protect their crops, livestock, and homes, but rather to push already escalating land values much higher so that they could sell out at a large profit. Actually, as the mediation process disclosed, the farmers really wanted to remain on the land. They were as much against unrestrained development as were the environmentalists because it made farming uneconomical. One estimate placed the agricultural value of an acre at that time at \$800—yet it was selling for \$2,000.

Events Leading to Mediation

The formal mediation, which began in May 1974, was aided in successfully reaching a compromise agreement because the various sides had been meeting privately before the mediators entered the dispute. However, although they had agreed among themselves on broad outlines for an eventual settlement, no agreement had emerged from the private talks, and the talks were stalemated. The mediators got all sides talking again, and they suggested the direction in which the negotiations might fruitfully continue. Cormick noted that he and McCarthy took six months prior to coming into the dispute to determine whether the involved parties were ready to compromise and would really give mediation a fair chance. Such careful preparation is necessary, he feels, because mediation is a voluntary process that cannot work if either side is seriously hesitant about participating.

Actually, the damming of the Snoqualmie River had been debated for fifteen years. Yet the dispute was not at a crisis stage when the mediators first arrived on the scene in 1973. In fact, despite serious frustration on all sides, it had never been at a crisis stage, if crisis connotes violence or the threat of violence. There was no confrontation in

the streets, and there was not likely to be one. But this is normal for environmental disputes. Although partisans argue heatedly for their points of view, most environmental conflicts have no flash point. Only rarely do the environmentalists sit down in front of bulldozers and invite arrest. To underscore the limited impact of the Snoqualmie conflict on segments of the community at large, a number of the participants readily agreed that many people in Seattle and surrounding areas may never have heard of the controversy.

Although the dispute did not require immediate attention for the sake of public order, it was of vital concern to the residents of the flood plain, whose homes and property were regularly damaged, and it aroused strong emotions among those in the city thirty miles away who were committed to keeping the area free of suburban sprawl.

There was strong pressure on Governor Evans to act. After nearly ten years of confronting the problem, he felt he had to do something. Evans, a civil engineer by profession, agreed with the environmentalists that the Middle Fork dam was ill-advised, and he had twice rejected proposals to build it. In addition to the Corps of Engineers, which is charged with reducing flood damage in the United States, the state's Department of Ecology had also recommended the Middle Fork solution. Evans knew he could not keep saying no in the face of the studies and with the knowledge that sooner or later another flood would devastate the area. He liked the idea of mediation in part because it enabled him to buy more time in which to decide whether to allow construction of the dam.

Furthermore, some development was already going on in the flood plain, regardless of the danger that a major flood might someday wash everything into Puget Sound. The environmentalists realized that they were losing the battle to preserve the valley even without the dam's being built—and they didn't know how much longer they could delay construction. Thus, the indecision was hurting both the environmentalists and the farmers, both of whom saw themselves losing what they wanted. The environmentalists were watching the valley being developed, and the farmers were not getting flood protection. The need for mediation became clear.

The controversy surrounding the Snohomish River Basin, a watershed area of 690 square miles, began in 1959 when a major storm caused severe flooding on the Snoqualmie, Skykomish, and Snohomish rivers, doing \$8 million damage to homes, property, and utilities in

the largely agricultural region. The following year, the state of Washington requested flood-control assistance from Congress. A series of studies and reports by both King County (which includes Seattle and most of the land in the basin) and by the Army Corps of Engineers led to a proposal by the corps in May 1970 for a flood-control dam and reservoir on the Middle Fork of the Snoqualmie. That recommendation was based on ten years of extensive study. The King County Council approved the plan.

It must be noted that the environmental movement has far greater clout in the Pacific Northwest, with its rivers, forests, and other numerous examples of natural beauty, than in most other areas of the country. Even before the 1970 corps report, representatives of a number of politically powerful environmental groups had expressed concern about the construction of any dam on the Snoqualmie. The Sierra Club, the Mountaineers, the Kayak Club, the Washington Environmental Council, Friends of the Earth, the League of Women Voters, and other groups were strongly opposed to damming the river because of their belief that it would lead to commercial development of the land downstream that would be removed from the flood plain.

With the issues clearly drawn between the residents who wanted flood protection and the environmentalists who wanted land protection, the state's Department of Ecology analyzed the Corps of Engineers' proposal. In November 1970, the department recommended to Governor Evans that the Middle Fork dam not be authorized and that the corps be asked to study alternate methods of flood control. In December 1970, the governor agreed. The corps restudied the situation and concluded again that a dam on the Middle Fork offered the best protection to people living in the flood plain. But in December 1973, Governor Evans again rejected the proposal, calling the Middle Fork project "environmentally disruptive" and "unacceptable to a majority of our people based on today's standards."

In the meantime, although a stalemate seemingly existed, the situation was actually much more fluid. The farmers in the valley shared the environmentalists' desire to keep the land as it was. They did not want to lose their farms to commercial interests who would build tract housing, shopping centers, or industrial complexes.

This shared goal became clear when the environmentalists began meeting informally with the farmers and townspeople during 1973.

Dick Burhans, an architect who lives in the town of North Bend, which gets flooded every time the Snoqualmie overflows its banks, described what happened when a group of mountain climbers—the environmentalists—dropped by his house for a chat:

We start talking about a dam, we start talking about flood protection. They had no reason to object to flood protection. What they were objecting to was the result of that structure. They were complaining about what happens to land use on down the river. It turns commercial, and you lose the valleys.

I talked to my friends in town and my neighbors. They don't want the land commercial. They want the valley pristine, rural, just like it is. They don't want to lose their farms. These two groups are both saying the same thing.

Burhans, sensing the kernel of agreement, invited the leading farmers and the leading environmentalists to his home to see how far agreement extended and how far it could be pushed. The farmers were in a mood to talk because they thought Governor Evans's opposition to the dam project meant that they were beaten. They wanted to see what could be salvaged. "We drew an outline on what each side wanted," Burhans recalled. "I think there were 10 items on that outline which no one could object to. Flood protection. They had no objection to flood protection. Land protection. We had no objection to land protection."

At the meeting, a clash erupted between a major landowner and one of the most fervent environmentalists, who charged that the only thing the landowner wanted was to increase the value of his property so he could develop it. Among the landowner's holdings was a valuable parcel at the confluence of the three forks of the Snoqualmie River, land that the environmentalists had long sought for a park. To show his good faith, the landowner offered to trade the land for property elsewhere, and the Three Rivers Park eventually became part of the mediated agreement.

The group met twice more, and then sent a letter to the governor saying that a compromise had been struck. "The Governor either didn't see it or didn't believe it," Burhans said. "He didn't pay any attention to it. He just rejected the dam." It was at this point that Cormick and McCarthy entered the picture.

Mediation Begins

In 1973, Cormick, then 32, was director of the Community Crisis Intervention Center at Washington University in St. Louis. He was also an associate professor of sociology and he holds a Ph.D. in business administration. Cormick had mediated community, racial, and labor disputes in the United States and in Canada, where he was born. Prior to going to St. Louis, he worked with the Institute for Mediation and Conflict Resolution in New York. The institute was funded by the Ford Foundation at various levels, ranging from partial to complete, and as early as 1971 Cormick began talking to foundation officers about the possibility of moving mediation into the environmental field. He kept his interest in that concept while in St. Louis and late in 1972 he again talked with a foundation program officer about his interest in the environment. Cormick recalled: "I told him, however, that I was a little reluctant to go exploring this field because of my own lack of experience as to the issues and parties involved. He said, 'We have someone working with us here who might be just the person you need in this exploratory phase.' And that was Jane McCarthy."

McCarthy, then 42, was a consultant to the Ford Foundation and had served in the same position with other social agencies. She had worked in such areas as designing programs in urban environmental management and developing natural resource programs. She had also spent several years working as a counselor for an investment banking firm. She has a degree in labor economics.

One of McCarthy's projects involved work on river basin planning in Seattle, where she made valuable contacts among local, state, and federal officials. She also developed a reputation as someone concerned with environmental affairs—a fact that proved valuable later on.

Once they were introduced, Cormick and McCarthy agreed to search for an environmental dispute that would be suitable for a mediation effort. They looked for seven or eight months before deciding upon Snoqualmie. They realized that it would be an extremely tough assignment, but decided after about six months of study to go ahead. McCarthy described the process this way:

The tough part was finding somebody who was willing to let you experiment on them. Fortunately, I had built up a very strong relationship, as a result of a grant we had in Seattle, with Sydney Steinborn of

the Corps of Engineers. [Steinborn was then the corps' chief civilian engineer.] Sydney kept coming to the Snoqualmie issue, and he really desperately wanted to build an enormous dam on the Middle Fork. . . . He didn't understand why the Governor didn't understand that it was so valuable. So Sydney kept coming back to this, and I kept saying, "Sydney, we cannot do that. It is a multimillion dollar dispute; we have to start small. I want to start with something like a local developer and local authorities and sort of grow into something like this. If we do this and botch it, the whole process is in jeopardy and it's really not fair." Well, he kept coming back to it, and I didn't have a dispute so he said, "Come on let's take a look at it." We started talking to the parties and we ended up doing that dispute. That was how we got the dispute. We really got it because it was the only one we could find.

During the entire period of their participation in the mediation process, Cormick maintained his home in St. Louis and McCarthy kept hers in New York. They commuted to Seattle by air—and they feel that such a procedure added a beneficial sense of drama and urgency to the mediation process.

In determining whether mediation would be acceptable to the disputants, Cormick and McCarthy discovered who the key participants were by asking everyone concerned: "Can you name 10 or 12 persons who, if they could agree on something, would have stature and influence enough so that you, who are in disagreement, could reasonably support them and any agreement they might reach?" Those named most often became part of the group that would meet with Cormick and McCarthy to try to work out a compromise. Included in the final selection were Burhans; Delanty, an engineer at the huge Boeing headquarters plant in Seattle; George Yount, a high school teacher and dedicated environmentalist; a dairy farmer and a store owner, both of whom had suffered from past floods; and a realtor who lived in the flood plain. Each was a private citizen representing a view held by a group.

In a crucial decision, Cormick decided to keep out of the mediation sessions elected or appointed government officials who would someday have to implement any compromise agreement. He defends that decision now, even though implementation has stalled due to the reluctance of local officials to take certain actions. Cormick argues that it made no sense and, in fact, would have been counterproductive to have included government people in the Snoqualmie mediation ses-

sions. He firmly believes that officials who have the power to make decisions cannot meet on an equal and effective basis with private citizens who lack such power. "There are a couple of problems," he said.

One is that if you include them, you end up getting right back into the very same kinds of arguments that you get into at a public hearing. You've got someone in there who you think can make a decision, and you spend your time trying to persuade them that you are right rather than sitting down with your opposite number who disagrees with you and trying to see if you can come up with something jointly that you can take to the government decision makers. We wanted to get some sort of consensus among the citizens so that when they made a decision it was essentially based on some sort of harmony. . . . There is another reason, too. It may well be illegal under the Sunshine Laws out here for elected officials to sit down with selected citizens. I'm convinced there would have been no agreement if they [officials] had been involved.

On this point, Governor Evans, Delanty, and others tended to agree with Cormick, although at times they appeared to waver. Said Evans: "It was probably the best way to go. It gave the people involved a real stake in making the final decision." Evans, Cormick, and others pointed out that although officials did not actually attend the mediation sessions, some were briefed as regularly as possible on developments. Cormick kept King County officials reasonably informed of what was taking place. There was, however, less communication with officials of adjacent Snohomish County, in which part of the river basin lies, and there was virtually none with the fifteen towns in the river basin that would ultimately have to agree to adopt land-use regulations that were being drawn up. Under state law, land use prerogatives belong to the towns.

One problem that the mediators faced throughout was the need for deadlines. As is well known in labor disputes, people do not like to make decisions in negotiations unless they have to. In labor talks, the deadline is built in: The contract has an expiration date after which, if there is no agreement, there will be a strike. Decisions are made at the last minute because until then each side holds out in the hope of securing better terms. To overcome the problem, the mediators invented

deadlines by which time, they said, they had to report to the governor. But the sense of urgency had to be constantly created.

The promising start that the adversaries had made on their own quickly bogged down as each side pressed its presumed advantages in what had reverted to an adversary proceeding. "We had been talking at the level of specifics where it didn't matter and about generalities where it did matter," said Delanty, who is an influential member of the Kayak Club and probably the most persistent of the environmentalists. He has devoted hundreds of hours of his free time and spent a lot of his own money on travel and phone calls to try to settle the dispute as fairly as possible. "Of course, what you need to be doing is speaking of specifics where it matters and generalities where it doesn't," he added.

Although everyone in the mediation group agreed with the Corps of Engineers that the Middle Fork dam offered the best flood protection, the position of the environmental groups had hardened against it to the point that the mediators themselves had to force the discussions toward other alternatives. Every nonstructural flood-control idea was tried and discarded. The only viable alternative was a dam on the North Fork of the Snoqualmie plus an improved system of dikes and levees throughout the flood plain. Although this system offered less flood protection than the Middle Fork dam, it could be sold to the environmentalists because it would cause much less damage to the scenic areas.

"What makes mediation work is that it seeks to protect people from arbitrary change," said Cormick. "The environmentalists had agreed to a dam on the Middle Fork, but the mediators knew they [the environmentalists] couldn't sell it [to their organizations]. The mediators refused to hold any more joint meetings until the environmentalists went back to their constituents and tried it out on them." Delanty recalled:

I was arguing the case for the Middle Fork because I believed one, that technically it was the best solution, certainly from an engineering standpoint, and two, I thought that a very viable project could be put together on that basis that had a good chance of being implemented.

But the powers in the environmental movement were not so disposed. In fact, they said they would not do that. The only thing they would consider was a program built around the North Fork.

Delanty noted that the Middle Fork dam under consideration by the environmentalists was sharply altered in form and would have caused less environmental damage than the one proposed originally by the corps.

At this point, those in favor of the dam recognized the political problem of the environmentalists and compromised. "We all had to agree on a less-viable compromise, which was the North Fork," said Burhans. "It cost more money, doesn't give as good flood protection, but it was politically sellable." "We could understand that," Burhans added. "We got to the point where they were more concerned about our people and our problems with selling certain things, and we understood their problems on selling theirs. So when that happened, we didn't like it [the need to compromise], nobody liked it, but the North Fork is what had to be done to get the thing sold." "The process gave both sides someone to cry to," Burhans went on.

Jane and Gerry would say, "We understand, but you've got to understand, ecologists are ecologists" or "local people are local people." They were able to handle it without being fair at all. They were able to handle it as dictators. They had no rules. They didn't have to be fair. What they had to do was get the job done. They could lie to both sides. I know damn well many times we'd ask them to do something and they wouldn't do it. But it was asked, and they came back and gave us a phony answer. They weren't playing by the rules. But it was needed because they kept things moving.

I think their personalities did much for the process. Maybe you need someone in there to make you think you're winning while you're putting the pieces together.

The farmers in the valley were never completely united on what they wanted. Nor are they now. Before and during the mediation, many farmers' voices were raised for the full corps' proposal—the Middle Fork dam—because it would have had a very beneficial effect on flood control in the lower valley, whereas the mediated proposal will have only a minor impact. But the majority of farmers have changed their minds in the last decade; instead of demanding complete flood protection, they realized that land-use planning was the only way that they would be able to keep their farms. They had been exposed to the pressure of taxation and the pressure of industry, including a proposal by the Burlington Northern Railroad to build a large switching yard if

the valley could be removed from the flood plain. The farmers came to the conclusion that a certain amount of flooding would have to be put up with in order to keep land values within reason so they could afford to continue farming.

The environmentalists faced a different problem, which is a given in all environmental disputes that seek to prevent something from being built. Unlike labor disputes, where the parties can push a few cents back and forth in an effort to arrive at a final package, it is very difficult to "fine tune" a proposal for a dam. One either builds the dam or one doesn't. You can't build half a dam or three-quarters of a dam as a compromise.

In the Snoqualmie dispute, the compromise was reached by agreeing to a different dam than the one that would give the most flood protection—a dam in a different place, which, while it would afford less flood protection, would also cause less environmental disruption. "Most negotiations don't really happen around the table," Cormick said.

For every hour we spent in joint session, I suppose Jane and I spent 24 hours each in separate meetings with individuals. Much of the mediation and negotiations occurred within a party rather than between parties.

The mediators cannot bring the extreme party into line. All you can do is create a situation where it becomes very much in the best interests of the moderates to say to the extremists, "Look, we need you on this one. Let's not fight it any more. We'll support you on the next one." That's what the farmers did, that's what the people in the Middle Valley did, that's what the environmentalists did, and they all pulled their supporters into the center. And we had to help with that a certain amount.

Because the participants were relatively new to the negotiation process, the mediators had to instruct them along the way in how to read their opponents' signals and proposals and how to frame their own. Politicians and others skilled in the bargaining process know not to be misled or upset by bombastic rhetoric, but newcomers have to be warned not to be taken in. This training must be done carefully, lest the adversaries get the feeling that the mediator is partial. "In community disputes, it's not enough to want a settlement," said Cormick. "You have a real responsibility to do some training. There's an inverse relationship between the experience of the parties and the responsibil-

ity of the mediators." "The environmentalists were the hardest," Cormick continued. "They needed a whole change of perspective from being opposed to things to making proposals. Until they could make a proposal, there was no way to move on. We needed a counter-proposal from them, and that was one of the most difficult pieces." At times, Cormick said, the major help he was able to give the negotiations was to have a large supply of coffee and rolls on hand. "We always brought immense amounts of food," he said.

McCarthy, for whom Snoqualmie was the first mediation experience, said that the process was helped when the participants became "captivated by the process—which is one of the differences, I think, between environmental disputes and other kinds of disputes."

[In environmental conflicts,] the people are process-oriented because most of them are college graduates, and they have a great interest in what's being inflicted on them, and why you are doing what you're doing. They think that's fascinating, and I think they were intrigued by the process partly because it was unusual and because it was the first time that it had been done. Gerry and I were obviously giving it everything we could give it and, in a sense, they built up a loyalty to us and they really, sincerely, wanted to resolve the dispute.

Implementation

Whatever the problems, agreement was reached in a relatively short time on a comprehensive plan for the basin. In September 1974, four months and just six negotiating sessions after the governor appointed Cormick and McCarthy, a tentative agreement was in hand. Reducing it to writing took another two months because it was taken around piecemeal to all of the participants, a tactic that Cormick later said was a mistake. He believes he should have called a joint meeting and hammered out everything with all parties present. Then letters of endorsement were secured from the entire group to transmit the agreement to Governor Evans and to urge him to adopt the proposal. This was a bit of theater, since Evans already knew what the proposals were and had already agreed to them.

Nonetheless, on December 9, 1974, an agreement was signed by the mediation participants incorporating, among other things, the following provisions:

- A single, multipurpose dam would be constructed on the North Fork of the Snoqualmie River. Use of this site would leave the whitewater stretches on the Middle Fork untouched.
- The valley of the Middle Fork would be preserved undeveloped.
- Setback dikes for additional flood protection would be built in certain already developed areas.
- A major park would be established at the confluence of the three forks of the Snoqualmie.
- The lower valley would be preserved as an agricultural green belt.
- Neither quarrying nor development would be allowed on Mount Si, the major mountain in the basin, which hovers over the town of North Bend.
- Land use controls were included to guard against suburbanization of the valley.

The mediated agreement called on the governor to name an Interim Basin Coordinating Committee to make plans for implementing the recommendations through a Snohomish Basin Coordinating Council. Early in 1975, Governor Evans named twenty people to the interim committee, with Delanty as chairman. The committee received technical support from King and Snohomish counties, the state, and the Corps of Engineers. The governor's office provided a liaison officer, Alice Shorett; secretarial help; and a small budget.

Less than a year later, in December 1975, the interim committee made its recommendations on how to implement the agreement. The most controversial recommendation called for King and Snohomish counties and fifteen towns in the basin to commit themselves to a variety of land-use rules in order to monitor development and preserve the undeveloped areas envisioned in the mediated plan. That commitment would take the form of an intergovernmental agreement to establish the council, which would also need federal and state approval. It further called on the Corps of Engineers to do a reconnaissance study of the flood control proposals; the study, which was completed in November 1976, presented other problems, both economic and political.

One key issue, with many ramifications, involved the question of who was going to pay for the whole plan. Who, for example, was going

to compensate those who had acquired the development rights in the areas that were to be preserved? The federal government said that it would have nothing to do with that portion, but Delanty argued that prohibiting development in the flood plain would ultimately save the government money in federal flood insurance.

The corps' study included a benefit-cost analysis that found that the North Fork project could be undertaken with about \$78 million in federal funds for the dam and \$95 million in local money for everything else, \$62 million of which would be used to finance the new drinking water supply that the dam would make available.

Water supply is also a bit of a problem. At present, the city of Seattle sells water to all of King County at rates that the rest of the county finds too high. The city of Bellevue, across Lake Washington from Seattle, would very much like to have its own water supply, but whether it would be willing to assume \$62 million in debt to do it is a question that has not yet been answered. Said Delanty: "Bellevue is not playing the same cards that I am. My cards are involved in trying to get this mediated plan under way. Bellevue's cards are how they can use this to force the battle over water-rates that's going on with the City of Seattle. If nobody wants to pick up the water, then . . . we're not in good shape from a benefit-cost standpoint." The corps, whose approval was necessary, would not go along with the construction of a dam unless the benefits outweighed the costs under a formula it uses. Bill Bates, a member of the interim committee and publisher of the *Snohomish Tribune*, put it more succinctly: "If we don't find a water user, we don't have a project," he said.

But Delanty and King County officials realized that benefit-cost analyses were not set in stone and that money sought from the non-federal portion could be shifted to the federal portion. Efforts are under way to get the state's congressional delegation to persuade the federal government to assume more of the cost of the project.

Money aside, the major problem of the interim committee's recommendation was political: the proposed intergovernmental agreement among the counties and the towns with regard to land use. "The real problem we have is the structure by which they recommend that the planning and implementation phase of the project be completed," said Keith Artz of the King County Planning Department, who was working full time on the proposal.

We're having some problems in the wording of their document [the intergovernmental agreement], and legally we are not able to accept it.

The problem is that the committee said in their document that the county *shall* do this and the county *shall* do that; the county *shall* fund certain things or accepts everything as they have said. The county can't do that until it has gone through the process of public hearings.

That's the county's point of view, but Artz believes that eventually everything will be straightened out and the King County Council will approve some modified version of the proposal. The towns in the basin are much less enthusiastic, and they are wary of relinquishing land-use prerogatives to a new regional body. "I expect opposition from people who are opposed on principle to regional concepts of government," said Bill Bates. "They're going to call this a superagency Big Brother project because it requires a linkage of many independent governments. The word 'regional' is a red flag to them."

But if the financial problem can be solved, the towns will have an inducement to come in on the whole project, since the cost to them will be very small. "They'll go for something that isn't going to show up real heavy in their tax statements," Bates said. "If King County and Snohomish County and the State of Washington went into it and none of the towns signed on, the project would still happen," said Artz. "That's where the money's coming from, and they're the ones who have the responsibility for flood control." Bates was not so sure. "I don't think we can lose any of the governments," he said. "If it were just the counties, I don't think that would be enough to pull it across."

In general, King County favored the proposal and Snohomish County, to the north, was more skeptical. George Sherwin, director of the Snohomish County Planning Department, made complaints similar to Artz's. "The issue now comes down to saying who were the mediators and what was their power to mediate," Sherwin said.

Those people do not have the power to do it. The government can't just accept what they did because they did it. We have to look at the implications. We have to look at the broad public interest, which was not represented at the mediation.

The situation we are now in is that the draft intergovernmental agreement was found to have some inherent flaws, both legal and policywise. I have heard no jurisdiction saying that it disagrees with the

goal, and with the general findings of the mediated agreement, but the problem has arisen in that there is disagreement over how to put these things in a governmental document meant to be used in setting up the Basin Coordinating Council. Out county commissioners endorsed the last version of the agreement and said we were willing to proceed if others were. King apparently was not.

King County is now apparently asking for significant changes in the intergovernmental agreement.

Sherwin tied current troubles to the failure to have government officials take part in the mediation process.

Based upon the experience we're going through now, I'd say I probably would have to disagree with the way it was done. Had they selected a limited number of key government officials to participate, the way ahead would have been much better paved for implementation. Although the mediation group came up with a viable solution in the context of those parties who participated, we have had a never ending process of trying to integrate their solution into the political process.

Sherwin also said that he thought there had been a lack of sufficient staff to help push the implementation phase. Actually, Delanty, the chairman, had no paid aides. He did get occasional assistance from Alice Shorett, who is now a successful and highly regarded environmental mediator at the Office of Environmental Mediation situated at the University of Washington in Seattle.

All of the problems have created an enormous strain on the good will of the members of the interim coordinating committee, which has remained in existence to shepherd its proposals through the myriad governments involved. The committee is still trying—more than three years after the mediated agreement was reached—to convince the two counties and fifteen towns to go along with the settlement. Everyone who participated in the mediation agrees that the package must be adopted in toto. It is not a shopping list from which some items can be plucked and others discarded. "These people are being held together—almost psychically—by the mediation experience that they went through," Bates said. "Now they're desperately trying to push this project forward." "It's going to take longer than we thought," he went on. "The completion of the thing could be 10 or 15 years down the pike." Delanty said. "It's not clear to me whether you can ever get 15

incorporated municipalities, two counties, the state and Federal Government all coordinated to the same thing at the same time." "There's something wrong with the way that we picked the whole mediation process," he continued.

While we got agreement between some citizens, we did not have any agreement between the governing agencies.

We didn't intend to have the political power to implement it. That was O.K., because all we were providing was the guidance that said, if you do this, then we believe that you have a viable project that will not seriously be challenged in the public process. But on the other hand, we were terribly naive. We thought we were telling the Federal Government how to create a project: we want some things done, and we recognize that there is a need for some things like flood control, and if you make the following trades we believe it will survive a public hearing. If you fund it.

Well, that isn't the way the thing worked. That's a grand idea, but the trouble is that we've mixed things that are the absolute prerogative of lower government—the lowest level of government—into things that are the prerogative of the Federal Government. We never really have come to a complete understanding as to how you merge those governments. Conceptually, it's easy. But in the arena of the bureaucrats and the elected officials, it's a different world. They jealously guard things like land-use prerogatives. Tell a county commissioner that you're about to deliver a land-use plan from the Federal Government on him, and he's walking on the table, and besides that, stomping on your head.

Let us say that we're getting a hell of a lot smarter as a result of the mediation. As I look over this, I would definitely try to create an endeavor such that at least a certain number of elected officials were cranked into the original mediation process.

Some months later, Delanty changed his mind. "I guess that now, at least with the perspective that I have, I have a feeling that mediation, in environmental disputes, probably has to take place between the factions that are warring. My guess is that it would not be right to include government officials. It was not the governments that were warring."

Cormick does not believe that the Snoqualmie project is in danger of collapse. What would he say if he had to guess when construction would begin on the dam? "In three years," he replied quickly. Would he do anything differently? Cormick recalled that Alice Shorett was

assigned by Governor Evans to assist the interim committee that was established when the mediated agreement was concluded. But Cormick noted that Shorett was the only staff provided and that she was assigned on a half-time basis. "One of the things I would change is to have spent more time getting committed funds for two or three years so that we could have hired a couple of full-time staff people to help the Committee."

Some of the implementation delay can be attributed, Cormick believes, to a change in the top staff post at the Corps of Engineers in Seattle and to a change in the statehouse. Governor Evans decided not to seek reelection in November 1976. Evans, a Republican, had served three terms. He was succeeded by Democrat Dixie Lee Ray, who has called for additional studies of the Snoqualmie situation. Regarding the pessimism about implementation of the agreement, Cormick said: "People forget that this thing went 20 years before the mediated agreement. You know, you've still got to go through all the processes. I mean the very notion that the counties are even talking about sharing their great power over land use and planning . . . I mean, that's incredible!"

What are the key qualities a mediator should have? Said Cormick: "One is, not have the answers. Really, being willing to support the voluntary process." He believes that the team approach to mediation is better than one mediator working alone. "It's very difficult for one person to put together all the pieces of a complex dispute," he said. The team approach also allows participants to form different kinds of relationships with the mediators. "The environmentalists thought that they could really talk to Jane, although they trusted me, and industry and farmers thought they could really talk to me. I understood and they trusted me. You've got to have trust."

CASE STUDY: TENNESSEE-TOMBIGBEE CORRIDOR STUDY

INTRODUCTION

The Tennessee-Tombigbee Waterway, when placed in operation, is expected to stimulate economic development in the counties adjacent to the waterway. The Tennessee-Tombigbee Project, extending from Demopolis, Alabama, to the Tennessee River, is the connecting link in a waterway route between the Ohio River and the Gulf of Mexico. Areas along the entire route may be impacted by the waterway's use. Recognizing this possibility, government and private interests in this Corridor desire a planning aid that will identify options for development and indicate the best use for natural resources and opportunities for human resources. Fifty-one counties in four states (Alabama, Mississippi, Tennessee and Kentucky) comprise the 32,377 square-mile study area. The region is one of the poorest, most depressed in America.

In response to the need for future planning on the Corridor, Congress authorized a planning study remarkable for both its geographic and substantive scope. This study is known as the Tennessee-Tombigbee Corridor Study, and it addresses impacts in four categories: water resources development, environmental quality, economic development, and human resources development. Though economic and human resources development lies beyond the traditional concerns of the Corps, those are the areas of greatest concern to state and local government officials and the people living in the area.

The study represents an opportunity for comprehensive planning for meeting human needs on the state and local level. For the first time, citizens and planners will be able to test strategies and decisions before they are implemented. Until the Corridor Study, the level of planning expertise and access to technical resources varied widely throughout the Corridor, with a few cities and counties having large, sophisticated planning capabilities, and many rural areas having limited resources, if any.

THE CORRIDOR STUDY

A primary goal of the study is to offer a "planning service" to those planning the future growth of the Corridor which meets their needs as fully as possible. To assist in meeting that goal, the study has evolved into four major elements:

Case Studies

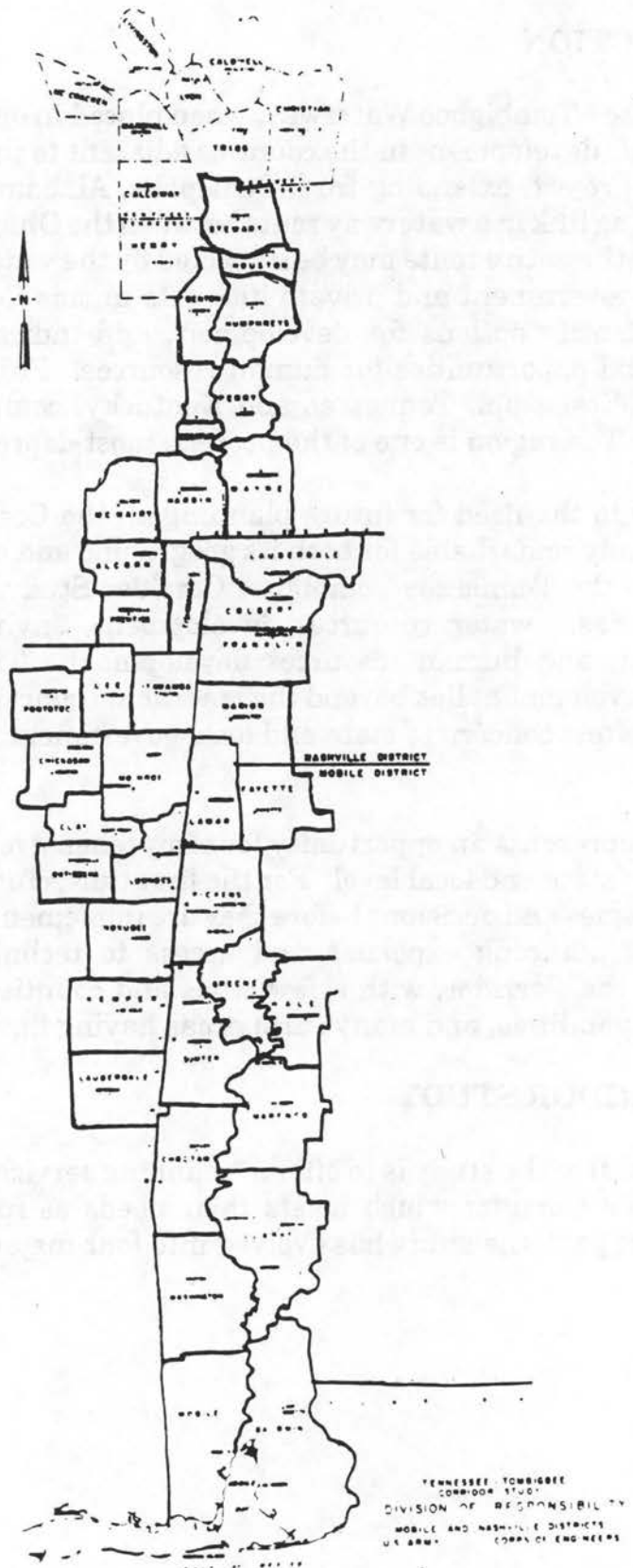


Plate 1

Case Studies

- 1. Design and Implementation of a Corridor-Specific Impact Assessment Model (EIAM).** Argonne National Laboratory has developed the model, an analytical tool which includes the following features: population projections to the year 2000; estimates of labor requirement and availability; and modules of public cost and public expenditures resulting from a given development. The model is in the form of a computerized product which predicts the likely results of certain actions or types of activities; specifically, if a particular type and size industry or groupings of industries were to locate within one of the corridor counties, the model will provide the expected employment, where the employees would be drawn from, and what the public revenue and expense effects would be.
- 2. Design and Implementation of an Integrated Data Analysis System (IDAS).** In addition to the assessment model, the Corridor Study includes a variety of technical studies: identification of industries with a high probability of locating facilities in the Corridor; identification of a baseline "population in need"; analysis of the education, vocational education, housing, community services and social services needs of the residents identified in the baseline study; environmental resource inventories; water supply, flood damage reduction and navigation needs studies; and an analysis of crop infrastructures and agricultural businesses in the Corridor. The IDAS takes this large database, adds additional geographic information, processes the information, and displays the outputs in a graphic format on a computer monitor. The IDAS system is "user-friendly" and can be easily accessed by local decision makers, who can sit at a remote computer terminal and perform their own analysis.
- 3. Technology Training and Transfer.** A compelling commitment to a useful study, rather than one which sits on a shelf, requires that the Corridor Study staff take regional planners, state planning officials, industrial development boards, local officials, special interest groups and other community influentials "down into" the total IDAS database. Once the data are complete, the computerized information system will be made available and readily accessible to local users. Interested persons will receive extensive "hands-on" training in the use and application of the IDAS, tailored to their level of technical expertise and potential application. The training format will allow participants to develop their own strategies for economic growth and test those approaches, using a microcomputer available at the training site. An equally compelling commitment to social equity requires that the location for easy access to terminals and accessories needed to maintain access to the database by all potential users be carefully addressed.

- 4. Public Involvement.** The study manager of the Corridor Study determined early that the scope and complexity of the study would benefit from an extensive, meaningful process for public input and information exchange between the Corps and the many publics on the Corridor. A subcommittee, composed of public officials, planning staff, representatives of community-based organizations and other special interest groups, meets regularly to design scopes of work, monitor contractors' progress and refine information. This information is then transferred to the members' agencies and organizations. Larger public meetings are held to receive public perception of the study, as well as to inform the general public about various study products. As a result of the public involvement focus, the need for the IDAS became apparent in order to make the huge database both comprehensible and accessible. Among the public involvement activities is a training effort which reaches beyond the traditional transfer of technical study products only to technicians. A wider range of community decision makers whose influence may affect the future of the Corridor will have access to training, as well as to the computer hardware which will be permanently housed for maximum accessibility. Public information activities which complement the public involvement activities include public service announcements, staff presentations, lectures, slides, brochures, film and videotape, and a periodic fact sheet. An outside public involvement consultant and an in-house public involvement coordinator are assigned to the study.

ISSUES FOR CONFLICT MANAGEMENT

Although many problems have arisen in the Corridor Study, due in part to the scope, complexity and untraditional nature of the study, four of these are particularly illustrative of the many forms conflict can take: conflict between the Corps and the public; conflict between the Corps and other agencies; in-house conflict among colleagues; and conflict between different staff levels within the Corps.

1. There is widespread distrust of the Corps and skepticism toward the Corridor Study on the part of some publics, most prominently among environmentalists and representatives of minority interests. As one example, leaders of groups representing blacks and the disadvantaged on the Corridor have demanded that the study address human resources needs with direct financial aid, which goes far beyond the mandate from Congress. They also fear that the study's focus on economic development will once again leave them out of the economic "pie", and that training in the use of the computerized information database will be limited only to agency personnel which have been unresponsive to their needs in the past.

2. A decision was made early in the study that the principal "clients" would be the fifteen Regional Planning Agencies in the four-state corridor. State agencies responsible for economic development were expecting a larger role in the study and were upset by what appeared to be a decision to pass them by. As the study progresses, the States are more concerned than ever that the database, software and hardware be compatible with their planning needs. There is evidence that state agency staff might cause political problems for the study by unfavorable comments to the Corridor congressional delegation.
3. An in-house Corridor Study team of Corps planners and outside contractors differs widely on the final intent of the study. Some team members approach the final product on a purely technical level, with training and delivery to a narrowly defined "client" population of regional planners. Other members of the team want to insure wider community participation in future planning and are concerned about the question of access to technical information for all decision makers, including special interest publics who have historically been closed out of planning in the past. The in-house conflict has created a "power struggle" between the competing camps.
4. The study is an untraditional one for the Corps in many ways, some of which are detailed above. The scope of the study is hard to comprehend, and the technical nature of the outputs make the study even more difficult to assimilate. As such, there has been continuing and debilitating miscommunication between the districts responsible for the study and the Division office. This has caused slippage in the schedule, due to lengthy waits for agreement to scopes of work, a continual need to "lobby" the Division every step of the way, and a perception on the part of the district staffs that the Division is "meddling" in a study with which they are profoundly unfamiliar.

ACTORS, INTERESTS AND POSITIONS

Environmentalists on the Corridor are largely uninformed or misinformed about the Corridor Study, partly because environmental concerns have not been well represented by a broad-based, informed leadership. The Corridor is not well articulated, and the few environmental leaders who are involved in the study have had difficulty in grasping a role for environmental quality. Their position appears to be that if the study produces an exhaustive inventory of critical areas to be avoided by developers, some protection will be offered.

The interests of minority group representatives are jobs for the unemployed and under-employed; economic development which raises the standard of living for all Corridor residents; and access to the political structure which makes those things happen. Their position concerning the study has been one of suspicion and confrontation: too little commitment of study monies to human resources work items; no money to meet pressing job training needs; fear that the training and transfer of the study

technology will be too narrow. Community-based organizations also war among themselves over contracts for work items needed to bolster the dwindling resources of black educational institutions in the Corridor.

Many of the fifteen Regional Planning Agencies identified as the principal "clients" of the study are in a struggle for survival. The information and hardware which the study will make available to them should shore up their planning programs, so their position is one of advocacy of the study. The state planning agencies, on the other hand, are concerned that the study database complement their own data needs, and that the hardware for delivery of the system be compatible with inhouse equipment. Their position is that the Corridor Study has failed to communicate with them sufficiently, thus rendering the information gathered useless for their needs.

The group dynamic among members of the Corridor Study team of inhouse personnel and outside consultants is especially provocative. Some members of the team have seized the study as an opportunity for personal career advancement and feel that a focus on the technical aspects of the study will produce the greatest chance for success. Others on the team are devoted to a wider public involvement focus and take the position that a successful product will be possible only if delivered to a broad-based congregation of community decision-makers. A few team members are interested in peace at all costs and have not as yet taken a firm position on the final outcome of the study.

The Corps districts involved in the study have the same interest as the Division: a need to produce a useful, well-received study, within budget and on time. The positions on how this is to be achieved, however, differ considerably. The Districts prefer to be left alone with the task of producing an exceedingly complex and demanding study, certain that day-to-day experience with the study is the only possible way to understand it. The Division's position is that the study's unconventionality may lead to embarrassing mistakes or cost overruns, which they will have to answer for, and thus strong oversight over the study team's work might mitigate these possibilities.

CONFLICT MANAGEMENT ACTIONS AND RESULTS

1. Environmental concerns are being addressed by the study team by incorporating the resource inventories and additional geographic information into the IDAS system, thus allowing decision makers the opportunity to exercise restraint when making development decisions. Informational meetings with environmental groups are planned as the study nears completion, in order to make up for the lack of information about the study from environmentalists directly involved.

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2. Special attention has been paid to minority groups in a variety of ways. The chairmanship of the Human Resources subcommittee is held by a staff member of one of the most active minority advocacy groups on the Corridor. Public meetings have been keyed directly to low-income residents of the Corridor, with presentations tailored for a poorly educated constituency. Minority contractors have bid successfully on contracts for the human resources portions of the study. Informal negotiations between representatives of community-based organizations and the study team have opened a continuing dialogue on training and hardware decisions involving questions of equity. One of the training alternatives under consideration is parallel training for public officials and special interest groups, which would differ in emphasis from the purely technical training of the regional planners. Alternatives for housing computer hardware in order to insure community-wide access include public libraries, universities, and local organizations, themselves.
3. A special videotape presentation has been prepared for those who have felt left out of the study in the past, in order to help them understand the capabilities and limitations of the study product. Special attention is planned for the disaffected state agencies, including visits by members of the study team, as well as direct assistance from the technical contractors to maximize compatible data-gathering and accessibility to the information system.
4. In-house conflict has been the most resistant to resolution. The study team relies heavily on the study manager as a mediator between opposing camps, but real communication has broken down.
5. Although resisting staff of the Division office have been invited to Corridor Study briefings and meetings, and a lengthy explanation and justification for the study was prepared and presented, conflict between the study staff at the Districts and the Division has also been mitigated very little. Increasingly, the District staff is relying on the help of Division personnel more understanding of the needs of the study, even when this means skipping around the usual chain of command.

CASE STUDY: SANIBEL ISLAND GENERAL PERMIT

Faced with a steadily increasing number of permit applications, Jacksonville District considered the use of general permits as a means of responding to increasing pressures on staff time. Once a general permit is established it defines in advance what an applicant must do to get a permit. If these standards are met, then the permit is granted without additional study, public hearings, etc. This offers economy in permit processing, and also establishes up-front environmental safeguards by defining conditions which must be met. It also provides predictability to developers who know that they will receive a permit if they fulfill the conditions.

Two efforts were made to develop general permits, but in both cases the response to the public notices was universally negative across the entire spectrum from developers to environmentalists. A careful analysis was made of these two cases, and the conclusion was reached that the problem was that the proposed conditions were developed solely by the Corps, without involvement of the various interests, and aroused distrust. Since the Corps has been successful in involving the public in project planning, it seemed reasonable that the same approach would work in developing a general permit. A series of workshops were planned to enlist the citizens of the Island in developing the special conditions for a general permit for fill activities in the interior wetlands of Sanibel Island.

SELECTION OF SANIBEL ISLAND

Considerable thought went into the selection of Sanibel Island as the place to conduct this test of public involvement on a general permit. Among the factors that went into the selection of Sanibel Island were:

1. The interior wetlands of the Island are substantially similar, so that overall standards could be reasonably applied.
2. If the special conditions are properly applied, the total cumulative impacts are expected to be minimal.
3. The District had received six to eight permit applications per year. The annual cost of processing these permits justified the initial costs of developing a general permit.
4. Sanibel Island is incorporated as a city and has developed a Comprehensive Land Use Plan. This plan, which is used as the basis for all land use planning and zoning on the Island, has received national recognition as one of the first and finest attempts to relate growth to ecological limits. This plan could also be relied upon substantially in developing the conditions for a general permit.

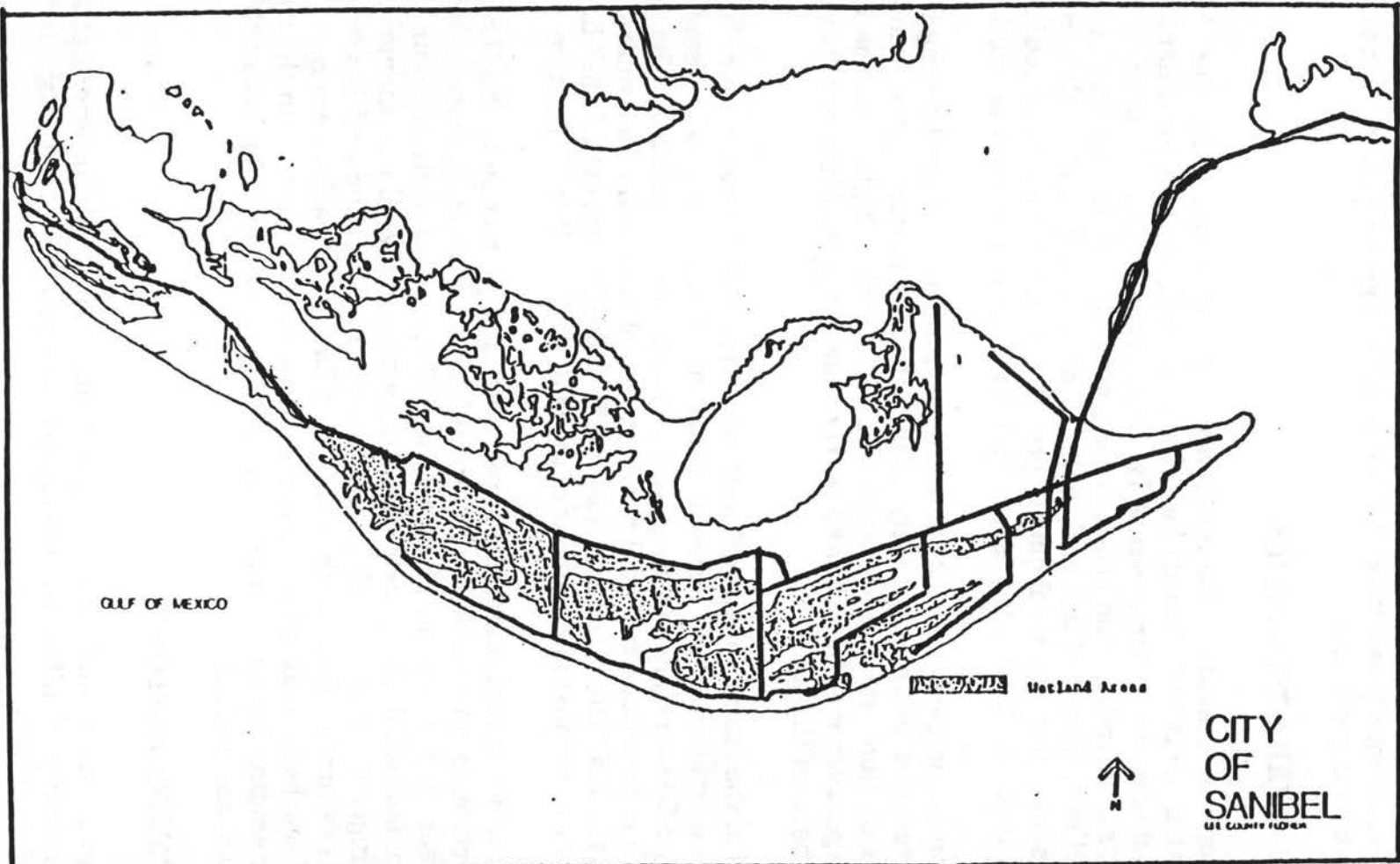


Figure 1

SI-3

5. The citizens of Sanibel Island are active in local affairs, responsive to new ideas, and environmentally sensitive. Some interest in a general permit had already been expressed by city officials.

PHYSICAL CHARACTERISTICS

Sanibel Island is located off the southwest coast of Florida, near Fort Myers. An 11,000-acre barrier island shaped like a giant fish and lying perpendicular to the coast, Sanibel includes an environmentally sensitive mixture of interior wetlands, mangroves, salt marshes, and beach areas, as well as tropical vegetation, abundant wildlife, and rare species of fish and shells. Since the early 1960's, this environment has come under increasing development pressures which have threatened its survival. Lee County is one of the two fastest growing housing markets in the country.

A population of approximately 12,000 residents inhabit the island during the winter, a number reduced to approximately 3,000 inhabitants during the summer. The resident population tends to be overwhelmingly white, higher income and above average in age: over one-third were 60 years or older in 1970. Many are retired persons from other parts of the country.

Almost half of the Island consists of wetlands, some 2,400 acres of which are interior wetlands and another 2,800 acres of which are mangroves. The remainder, approximately 5,500 acres, lies in developed and undeveloped uplands. The mangrove areas, which experience daily tidal flooding, as well as much of the interior wetland areas, lie in the J.N. "Ding" Darling National Wildlife Refuge, established in 1945, and named for the naturalist and founder of the National Wildlife Federation.

The refuge, which comes under the supervision and protection of the U.S. Fish and Wildlife Service, is an outstanding natural habitat, attracting close to one million visitors a year. It is the home of more than 267 species of birds, including the great white heron, mottled duck, roseate spoonbill, white and wood ibis, mangrove cuckoo, and grey kingbird. It houses alligators and otter year-round and is visited by the loggerhead sea turtle. Outside the refuge, on Sanibel's beaches, are more than 400 varieties of seashells, making it one of the finest shelling beaches in the world. The waters surrounding Sanibel annually attract thousands of visitors who fish for trout, snook, tarpon, and redfish.

DEVELOPMENT HISTORY

Development pressures on the natural environment and on the interior wetlands have begun only recently. Sanibel remained relatively uninhabited and unspoiled until the beginning of the 1960's.

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The Island's developmental history began with the construction of the Causeway in 1963. For the next 12 years, Sanibel was to become the center of controversy over its future growth, embroiled in a confrontation between developers, speculators, and elected officials on one side, and small landowners and environmentalists on the other. The confrontation ranged widely, from the County Courthouse, to the State Capital, and to Washington. It ended only with the adoption by the City of Sanibel of a Comprehensive Land Use Plan in 1975.

Interest in home rule for Sanibel Island, while discussed throughout the 1960's, began to be increasingly viewed as a reasonable option in the early 1970's. Committees were organized and straw votes taken and, in late 1973, a Home Rule Study Group was formed. A referendum for incorporation was placed on the ballot, and in November 1974, the voters overwhelmingly approved the establishment of a City of Sanibel.

The new City Government immediately issued a moratorium on new building permits and set forth the machinery for drawing up a new policy for growth. Two nationally recognized companies, a planning organization and a law firm, were engaged by the City to provide professional assistance, while an environmental firm was added to this team by the Island's Conservation Foundation. The efforts were directed towards devising "a strategy for conserving (the Island's) threatened land and water resources, its beaches and mangroves, its drinking water and wildlife—in a word, its remarkable quality of life." In July 1976, having received the work of its consultants, known as the Comprehensive Land Use Plan (CLUP), the City approved the ordinances necessary to implement the Plan. At the same time, the moratorium on building permits was lifted.

The Sanibel Plan sought to balance the protection of the natural resources with a reasonable level of development. It established five directions for its work: it set a population limit consistent with natural limits; distributed this population on the basis of the "carrying capacity" of the natural systems; established a set of performance standards for all development; developed a Plan for the restoration of past ecologic damage; and provided for a continuing public participation process. The CLUP has achieved national recognition as one of the first attempts to relate growth to ecological limits.

As a result of the restrictions, many properties which were purchased for sizable developments are not zoned to permit only minimal use. A few owners have taken their grievances to court over the downzoning of their property. In one pending case, a developer owning 415 acres at the western end of the Island had planned to build 1,600 units. Under CLUP, the land can now be utilized for only 50 units. The developer has claimed that the property was taken without just compensation and without due process.

The other common CLUP-related complaint concerns the time required to gain approval of development permits. The newness of the city Government and the unique and untried nature of the Sanibel Plan have created processing problems and delays in the City. In addition, until now the Corps of Engineers has relied exclusively upon individual permits, with each request for dredging or filling in the wetlands being reviewed and evaluated on an individual basis. The time-consuming processing has instigated the present interest in the General Permit.

ISSUES ADDRESSED IN SPECIAL CONDITIONS

The following issues were among those discussed during the Sanibel workshops:

1. Periodic inspections by Corps personnel of fill activities.
2. Erosion problems created by a rise in elevation substantially above existing grade.
3. "Grandfathering" and the general permit.
4. Buffer zones around wetland preserves.
5. Geographic boundaries of the general permit.
6. Concurrent processing on the federal, state and local levels.
7. Siltation problems created by fills too close to rivers or other water bodies.
8. Stabilization of slopes through active revegetation programs.
9. The need to avoid revegetation with exotic or aggressive species.
10. Protection of fish, wildlife, and natural environmental values.
11. Protection of mangroves.
12. Protection of National Register historic properties.

ACTORS, INTERESTS AND POSITIONS

The Mayor of Sanibel and other City officials expressed an interest in the General Permit, in part because anything which helped to speed up the permitting process would reduce criticism of the City's CLUP. The City government is dominated, however, by environmentalists, and there was a certain wariness about the Corps of Engineers and the development of a permit through a public involvement process which circumvented the usual political process. The position of the City, despite early

suspicion, was cooperative and positive, and the Mayor and city planner participated directly in the workshops in order to insure special conditions compatible with the CLUP.

Developers were interested in a generally accepted and easily understood permitting process. They felt that a general permit would speed up permitting, which had been rife with delays in the past. Special conditions for fill activities which everyone agreed upon and understood would also work to their advantage. On the other hand, they were concerned that environmental interests on the Island would dominate the workshops, and they were very skeptical about a public involvement process which did not signal political "business as usual" behind the scenes. While their official position was one of support for the workshops and the general permit, few developers participated directly in the process.

Environmentalists, including representatives of environmental groups as well as individual Island residents unaffiliated with an organization, had an historic mistrust of the Corps, based on their negative perception of Corps' flood control dams and structures. Their interests would not be served by a permitting process which speeded up permitting to the detriment of the environment. But the absence of a detailed set of criteria for the granting of permits was working to their disadvantage, with many developers and homeowners on the Island proceeding to build structures without obtaining the necessary permits. And so environmentalists shared with developers an interest in a permitting process which carefully spelled out special conditions for construction activities. They also shared an interest with the City in making sure that the special conditions in the general permit did not subvert the CLUP requirements. Environmentalists split their position at the beginning of the workshops, with some being adamantly opposed to a general permit on principle and others willing to make a try at developing adequate special conditions.

THE SANIBEL WORKSHOPS

The Sanibel process consisted of three all-day task-oriented workshops and one final half-day meeting. Pre-workshop interviews identified likely actors, issues and possible conflict areas which were given special attention in the design of the workshops. Representatives of the Corps were in attendance at all meetings to provide information about the general permit and to participate in the process, itself, as impartial facilitators. The District Engineer opened the first workshop and closed the final meeting, thanking Island residents for their help in developing the special conditions for the permit.

An evaluation of the process by an independent consultant found that the process was a success, when measured in terms of achievement of the goals and objectives of the workshop participants: the image of the Corps was enhanced; the Corps shared its decision-making authority with citizens; a general permit did issue; the Corps and the City government will share enforcement responsibilities; the need for a public hearing

was eliminated; wetlands will be protected by the special conditions; citizens had an opportunity to write their own permit conditions; and certainty about development constraints was provided to environmentalists, land owners, and public officials on Sanibel.

Among those factors contributing to the success of the process were the following: careful preliminary data collection gave planners a good handle on likely actors, issues and political environment: discussions with individuals most likely to be antagonistic were held prior to the workshops; the "rules of the game" were universally agreed upon and understood at the outset of the process; participants were not "pushed" into taking action, because sufficient time was allotted to the process; products were summarized after each workshop and mailed to participants prior to the next workshop; workshop times and locations were set in order to maximize participation; the facilitators from the Corps received professional facilitator training; and Corps personnel responded quickly to any and all requests for information.

THE CREST DISPUTE: A MEDIATION SUCCESS

by Verne C. Huser

A dispute over resource protection and port development in the estuary at the mouth of the Columbia River was recently settled through mediation. Known as the "CREST" (Columbia River Estuary Study Taskforce) Dispute, the conflict grew out of opposing priorities concerning appropriate use of the estuary and its shorelines in Clatsop County, Oregon.

Development of the Conflict

Both Oregon and Washington border the Columbia River Estuary. The CREST planning effort, an estuary-wide, bi-state program initiated in 1974 by local governments, had culminated in the 1979 Columbia River Estuary Regional Management Plan. While issues on the Washington side of the river were satisfactorily addressed in accord with Washington shoreline planning patterns, certain aspects of the plan were inconsistent with the statewide planning goals and guidelines of the Oregon Land Conservation and Development Commission (LCDC).

LCDC's emerging goals and guidelines had been a source of conflict throughout the five-year planning period, since they were still being interpreted, had not yet been tested in the courts, and were being resisted by many local jurisdictions. In 1980 the CREST Plan was rejected by LCDC. A 136-page document specified areas where the plan failed to conform to the LCDC goals and guidelines. Thus, by late 1980 the dispute focused on the development and/or preservation of five specific sites. At this point representatives of CREST called for mediation.

The Need to Negotiate

The Institute for Environmental Mediation's first involvement with the CREST Plan had been nearly four years earlier, when it had presented a workshop on negotiations and mediation to the parties participating in the CREST planning process. At that time there was obvious friction as the conflict was brewing, but neither the specific issues nor the parties who would be most directly affected by them were sufficiently well identified for mediation to be appropriate. Because the LCDC goals and guidelines had not yet been adequately interpreted, competing interest groups remained unclear as to what extent LCDC would support their positions, and were therefore uncertain of their relative strength.

As the planning process progressed, however, sides had been chosen. The "pro-development" forces, including four local jurisdictions and the Oregon Department of Economic Development, were on one "side," while "pro-protection" forces, including the Oregon Department of Fish and Wildlife and such federal agencies as the U.S. Fish and Wildlife Service (Department of the Interior), the National Marine Fisheries

Service (Department of Commerce), and EPA were on the other. Other agencies—including the Army Corps of Engineers, the Oregon Department of Land Conservation and Development (staff for LCDC), and the Oregon Division of State Lands—were pro-development or pro-protection, depending on one's point of view.

Ultimately it was necessary for the four local jurisdictions, four state agencies, and four federal agencies to be involved in negotiating a settlement of the differences. They not only represented a broad spectrum of positions and priorities, but each had a particular set of responsibilities to discharge. The 12 groups also explicitly represented private environmental and development interests concerned with the future of the estuary and its resources.

These pro-development and pro-preservation foci were sufficiently clear that it was also possible to create a caucus around each of these broad "positions." Sides were so clearly drawn that the mediators had the caucuses sit on opposite sides of the negotiating table in order to allow natural coalitions to form during the negotiations. The parties whose concerns were broader than the immediate sites in question, or whose positions varied from site to site (the Corps and DSL), sat on one end of the table and the mediators sat at the other. From time to time, the "unaligned" parties joined one or another of the caucuses as specific situations dictated. Due to the complexity of the situation, virtually every negotiating party found itself in an adversarial relationship to one party or another during the mediation effort.

The parties entered mediation on a pragmatic basis: Each knew that it could not unilaterally achieve all of its goals but hoped an agreement could be reached that it could accept. Without an agreement supported by all of the negotiating parties, no single party could be assured of achieving even its minimum goals. Administrative appeals and litigation had proved costly in time and money and uncertain in outcome. Therefore, it was the inability of the parties to succeed through other forums which brought them to the negotiating table.

Setting the Context for Negotiations

Before negotiations of the issues could begin, however, ground rules had to be established. The parties approached the exercise with different expectations for the process, different goals, and varying degrees of understanding as to what mediation could and could not accomplish. These matters were explored with the potential parties—both individually and, because of the complexity of the issues and number of parties involved, in two "process-design sessions," each one of two days' duration. The negotiations during this period dealt strictly with process matters: how any agreement would be achieved and formalized rather than what it would contain.

During the four days, the parties agreed upon who would be at the negotiating table, how private property owners and environmental groups would be represented, and how the public would be involved. It was agreed, for example, that local jurisdictions

would include private property owners' plans; that environmental organizations such as 1,000 Friends of Oregon and the Friends of the Earth would be briefed by the mediators and discuss their concerns with members of the "pro-preservation" caucus; and that special provision would be made to provide for general public involvement at the negotiating sessions.

Each party selected its own representatives, and each jurisdiction or agency not only authorized its representative to negotiate and sign a written agreement but agreed to participate in a ratification process once an agreement was reached and signed. A deadline of June 30—the day CREST would officially cease to exist—was set for the completion of negotiations. The final agreement was signed at 10:30 on the evening of June 30. During this "process-design" effort, the participants also determined that the mediation effort would have a two-fold goal: acknowledgement by LCDC, and greater predictability in the permit process.

Negotiations of the Issues

Throughout the effort to agree on ground rules for the process, the parties had been anxious to deal with the issues and debate the "rightness" of their positions. However, once the process matters had been resolved, the parties had difficulty engaging one another over the issues since the five large sites with which they were dealing stretched over some seven miles of the Oregon side of the estuary. Determining the most appropriate use for each site and the most appropriate site for each potential use would require trade-offs both between and within the sites.

The Department of Land Conservation and Development helped break the logjam during a caucus in which a "matrix" was suggested and approved by the department. That policy decision grew directly out of the problem-solving atmosphere that the mediation effort fostered.*

Using the matrix—which included a detailed listing of each site, options for developing or maintaining that site, and criteria for each of the options—the parties were then able to engage one another in a series of trade-offs. The resource agencies could say, "Yes, you can develop this site if you use the uplands, keep fill to the minimum, and mitigate for the loss of wetlands." The development forces could respond, "If we can have this area for development, we won't push for that other area which we've always wanted. We can live without it if we have some real guarantees here." The resource agencies made it clear that filling was worse than dredging and that mitigation for loss of habitat had to be in areas similar to those being degraded. Specifying the criteria for comparisons, such as depths, salinity, and currents, enabled the negotiators to consider and compare both "on-site" mitigation and "in-kind" mitigation concepts that were originally an anathema to development interests.

Negotiating in this manner meant the parties had to explore a series of possible accommodations and comparisons. Could a 40-foot channel at one site be traded for protected shallows around a particular island? Would it be possible and reasonable to trade a turning basin for ships for upland development at another site?

The gulf between parties was slowly bridged as they began dealing with each other's needs as well as demands. Participants began talking about under what conditions "this" activity or "that" structure might occur. Basic philosophies did not change, but positions did. As guarantees were granted on certain issues, greater flexibility developed on others; as possibilities improved for development in one area, demands for development lessened in others. "Bottom lines" were found in unexpected places and flexibility was possible where it had never been suspected.

During the two-month negotiating period, the mediators spent many hours checking with technical advisors, helping the negotiators communicate with their formal and informal constituents, and making sure that all interests were represented at the table. Records showed that for every hour spent at the negotiating table, the mediators spent 11 1/2 hours working behind the scenes. During one 8-hour negotiating session, 7 1/2 hours were spent by the negotiators working back and forth between caucuses with only a half-hour spent in joint sessions.

Through the many hours of process discussions and negotiations, the negotiators come to know one another well. Some had been working together—or in opposition—on these issues for five years. Through the mediation effort, they learned to trust one another, at least to a limited extent. Each party came to know the basis for the other sides' views and how far the opposition could be pushed. They learned what to expect from other negotiators and from their own constituents. And, the participants continued to operate from the premise that it was not just what they and the other negotiators could agree to but what they could sell to their constituents that counted.

Finding Agreement

Despite their emerging agreement and relatively congenial negotiating sessions, the parties were graphically reminded that basic differences in perspectives and values continued to separate them. Just hours before the deadline for concluding negotiations, spokespersons for the two sides got into a heated debate over language related to mitigation. For an hour neither side would budge, and it seemed the entire agreement might collapse. But too many people had invested too much time and effort on the agreement and all of the parties had too much to gain to let it die before it was born. It was rescued when other coalition members less emotionally involved in the immediate issue helped the two who were at odds to gracefully find a way to disengage their locked horns.

Three levels of agreements were reached: (1) *an agreement of "findings,"* containing the factual data that all parties would use in their deliberations and permit applications. The data base for this was checked out by technical advisors available to all the parties (neither mediator in the case had any technical expertise in estuary biology or engineering); (2) *an agreement on development designations,* identifying which specific areas could be developed and which would be retained as natural or conservation areas; and (3) *an agreement on "subarea" policies,* a key element of the final agreement detailing the conditions under which development could occur in the appropriate areas specified in the agreement on development designations.

After the Agreement

Philosophical positions were not changed by the negotiating process, and often the improved communications merely showed the parties how divergent their values really were. During the ratification process several of the parties spelled out in some detail certain aspects of the agreement that they wanted to have made "perfectly clear." The agreement of the negotiators became an agreement of the parties when it was ratified in writing by due political or agency process, as appropriate.

The parties entered mediation as adversaries and came out of it the same way; but they were able to fashion an agreement that is currently being incorporated into local, comprehensive plans. There is expectation that those plans will be acceptable to LCDC and that the Corps of Engineers will use the agreement at permit time.

CREST Chairman Henry Desler, who was chairman of the Port of Astoria Commission during the mediation effort, wrote to the Institute a few weeks after the agreement was signed and observed:

The final mediated agreement contains planning designations and specific subarea policies which will increase permit predictability and, above all, allow for regional economic growth while at the same time conserving the vital natural resources of the Estuary.

And he told a newspaper report that "the document represents an exchange of information and ideas far more valuable than the agreement itself."

**Some amount of development could occur at each site, provided that total development acreage in the estuary did not exceed a certain level and that various specific uses (log, grain, coal export, containerized cargo) remained within minimum acreage per site.*

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ENVIRONMENTAL MEDIATION AT THE PORT OF EVERETT

by Alice J. Shorett

An agreement signed in 1977 is now guiding the development of a major port in the State of Washington. The agreement ended a protracted dispute over the future development of the Port of Everett, the third largest port on Puget Sound. The symbol of the dispute was Jetty Island, 230 acres of uplands and 1650 acres of wetlands and tideflats stretching in front of the city. Jetty Island was viewed by environmentalists as a jewel on the Everett waterfront, but it was seen by port officials as a major piece of port-owned property ripe for development.

In the early 1970s, a group of Everett citizens organized to protect Jetty Island and the surrounding area from development. Calling themselves the "Jetty Set," an informal coalition of citizens—an architect, a schoolteacher, a civic activist, and a dentist—printed bumper stickers and raised funds for a lawsuit. One individual filed suit and prevented the port from filling an area in the Snohomish River which flows into the estuary on the Everett waterfront. Another individual filed suit and prevented a fill in the estuary.

These two legal victories gave the Jetty Set political clout, but the real objective of redirecting port development had not been met. At about the same time, federal fish and wildlife agencies had prevented a major development by the port for two years. As a result of opposition from the citizens coalition and federal agencies, the port found itself in a no-growth position.

Late in 1976, Gerald Cormick and Alice Shorett form the Office of Environmental Mediation at the University of Washington were asked by the port commissioners to informally investigate the dispute. They found the dispute involved not only the future of Jetty Island, but the extent, nature, and timing of future port development as well. Business interests in downtown Everett were allied with port officials in support of port development, including major expansion of the jetty. Environmentalists and citizens with recreation interests such as boating and fishing favored growth along already-developed areas of Everett's waterfront and opposed development along the jetty.

In January 1977, the Everett port commissioners officially appointed the mediators in an attempt to resolve this long-standing dispute. The mediators drew together a panel of ten citizens who had been active in the dispute representing labor, commercial, industrial, environmental, and recreation interests. Technical assistance was provided by federal, state, and local agencies involved in port issues.

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The mediators held a number of joint sessions in which positions were stated and areas of agreement and disagreement were explored. As the session progressed, a list of agreement areas was drafted by the group. The mediators carried this draft in shuttle diplomacy between the parties; individuals on the mediation panel checked with their constituencies to see if emerging draft language was acceptable.

After nearly ten months of intense negotiations, the mediation group reached agreement, and the agreement entitled "Consensus Guidelines, Future Development of the Port of Everett" was adopted unanimously by the Everett Port Commissioners on October 31, 1977. The major points of the agreement call for:

- reserving the shoreline for future water-dependent use, protecting the estuarine environment and wetlands, including exclusion of estuary area from future dredged spoils designation;
- orderly, timed port development beginning with areas adjacent to present development;
- commitment to create recreational access in port projects and citizen participation in planning recreational access areas;
- commitment to create a comprehensive plan including such elements as land use, parks, conservation, and transportation;
- no development of Jetty Island until after exhausting sites on city waterfront and until there is obvious regional demand and financial feasibility; and
- as development occurs, an equal portion of Jetty Island is set aside for preservation.

What can be learned from this experience? Mediation should be applied only when all parties to a dispute believe it to be in their best interest. Mediation is built on consensus from start to finish—agreement to sit down at the table; agreement on issues to address; agreement to continue discussions as mediation progresses; and finally, execution and signature of an agreement by all the parties.

The Port of Everett discussions generated a unanimity of ideas about both port development and protection of areas critical for conservation. Mediation expanded trust and opened communication between groups which had previously stereotyped each other as extremists. Mediation resulted in a cooperative effort which has been maintained.

The Port of Everett agreement, giving general policy direction for future port development was immediately capable of implementation. Attesting to the success of the agreement is the fact that growth of the Everett port has resumed at the same time that the jetty and estuary are being protected. A long stalled multi-million dollar

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project—including a boat terminal, a restaurant, an industrial park, and open space—is currently under construction along the waterfront. The project is being built in accord with the mediation agreement and is proceeding without opposition.

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