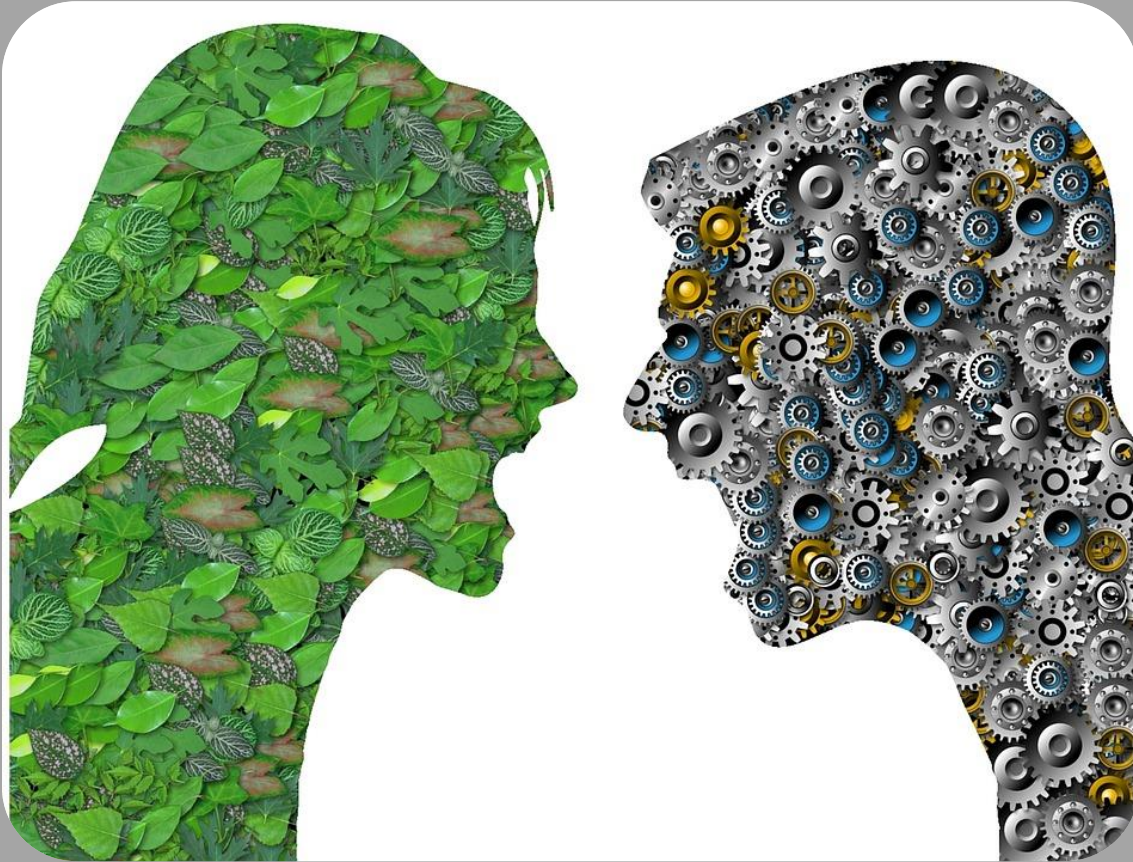


Environmental Conflict Resolution GUIDEBOOK



MaryKate Flanagan [marykateflanagan@gmail.com]

Emily Fucile Sanchez [emilyfucile95@gmail.com]

Elle Harmon [eharmon94@gmail.com]

Sandra Lee [maryalexandralee@gmail.com]

Bobbye Leigh Morgan [bobbyeleighbroncos@gmail.com]

Paul Mullen [paulmullen@aggienetwork.com]

Jayton Rainey [jlrainey15@aggienetwork.com]

Laura Stearns [12lstearns@gmail.com]

Marine Sciences 660

Fall 2016

with Dr. Ashley Ross

Texas A&M University
at Galveston

Table of Contents

INTRODUCTION	1
PHASE 1: PRE-NEGOTIATION	2
Introduction to Pre-Negotiation	3
<i>Northern Virginia Transportation Reformation Projects</i>	3
Conflict Assessment	5
Conflict Assessment Goals.....	5
Conflict Assessment Process	5
<i>Figure 1: Conflict Assessment Stages</i>	6
<i>Figure 2: Interview Protocol: Foundational Consensus Building Framework</i>	7
Conflict Assessment Benefits	8
Fact-Finding	10
The Need for Joint Fact-Finding.....	10
<i>Oil and Fishing Industries Negotiate</i>	11
Benefits of Joint Fact-Finding.....	12
Limits of Joint Fact-Finding	13
Building Relationships	15
Third-Party Role in Building Relationships	15
<i>Coeur d’Alene Lake Management Plan</i>	16
Improved Communication	17
Critical Relationships	17
Benefits of Building Relationships.....	18
PHASE 2: NEGOTIATION	20
Introduction to Negotiation	21
Perceptions of Parties and Building Relationships	22
Neutrality of the Mediator.....	22
<i>BLM Bridgeport Land Sale Mediation</i>	23
Trust & Fairness.....	24
<i>Figure 3. Tests to Evaluate Fairness</i>	25
Balancing Power	25
Perceptions of Negotiation Tactics	26

Relationship Building as Success.....	26
<i>Allagash Wilderness Waterway</i>	27
Negotiation Techniques for Environmental Conflict Resolution	30
Distributive Bargaining.....	30
Integrative Bargaining.....	30
<i>Table 1: Negotiation Techniques</i>	35
Techniques of Integrative Negotiation.....	32
Techniques for Mixed Approach.....	32
Conclusion	33
The Process of Negotiation	35
The Integrative Negotiation Process.....	35
<i>Figure 4: Key Steps in the Integrative Negotiation Process</i>	35
Mediator Role in Integrative Negotiations	35
<i>Figure 5: Frames and Their Role in Conflict Development</i>	36
Benefits of the Integrative Negotiation Process	36
In Consideration of the Environment	37
PHASE 3: IMPLEMENTATION.....	39
Introduction to Implementation.....	40
Implementation: Aspects of Agreement and Time-Frames	41
Binding and Non-Binding Agreements	41
<i>Coal Mining in the Black Warrior River Basin</i>	42
Relationships and Power.....	42
Accountability	43
Timeframe	44
Moving Forward.....	44
<i>Implementation of the San Jacinto River Waste Pits Environmental Settlement</i>	44
Sustainability of Agreements in Environmental Conflicts.....	47
Sustainability.....	47
<i>Lakeview Biomass Oregon Solutions Project</i>	48
Agreement Flexibility.....	49
In Consideration of the Environment	49
CONCLUDING THOUGHTS.....	52

REFERENCES.....	53
APPENDIX: CASE STUDIES.....	56
Case Study 1: Virginia Transportation Reformation Projects.....	57
Case Study 2: Oil and Fishing Industries Negotiate.....	60
Case Study 3: The Coeur d’Alene Lake Management Plan.....	63
Case Study 4: BLM Bridgeport Land Sale Mediation.....	65
Case Study 5: Allagash Wilderness Waterway.....	71
Case Study 6: Coal Mining – A Threat to Alabama Waters.....	75
Case Study 7: Remediation of the San Jacinto River Waste Pits Superfund Site.....	79
Case Study 8: Lakeview Biomass Oregon Solutions Project.....	84
GUIDEBOOK CONTRIBUTORS.....	88

Introduction

By Sandra Lee

Environmental problems are some of the most complex and challenging areas of conflict in our modern world. Often times, environmental disputes may attract public concern, be emotionally charged, and push stakeholders toward rigid positions making it more difficult to negotiate. This often leads to litigation in which only one party can win. The use of mediation is an innovative way to find solutions where all parties can find some benefit. Mediation, as a type of Alternative Dispute Resolution (ADR), has been used in many fields as a method to reduce discontent with the outcomes of conflicts. Environmental Conflict Resolution (ECR) is often a very complex matter which is dependent on the ability to address complex ecological and social systems where significant gaps in technical information exist. This guidebook focuses on the techniques and underlining aims of groups seeking to find mutually successful resolutions to environment conflicts. Mediator led negotiations are shown in research and through actual cases to be more successful and, therefore, are an essential part of high quality outcomes.

However, it is critical to acknowledge that ECR success is not based on a single perspective. The collaborative nature of the process lends itself to the variation of aims and purposes which define success between the three key roles: Mediators, Participants, and the Environment. Each of these holds a unique view of the ECR process which affects pre-negotiation tactics, behavior during active negotiations, and the sustainability of implementation. Participants, also referred to as stakeholders or parties prior to negotiations, are focused fundamentally on how mediation can help them to find a satisfactory resolution to an enduring problem which is both time and cost effective. Mediators, however, focus on their ability to maintain a neutral third-party person which allows parties to develop trust and relationships in order to find a solution to which all parties can agree. The third role is the most ethereal. The Environment is both the center of the conflict and a voiceless participant. It is dependent on the actions of groups, such as the Sierra Club, to represent its interests, and a mediator whom understands the long-term consequences of a conflict.

This guidebook outlines the technical aspects of mediations in which the environment is the fundamental point of dispute. It follows the process through anticipatory preparation to the actual negotiations, and concludes with implementation considerations. The guidebook strives to provide a perspective on effective techniques backed by both scientific literature and case studies, which will advance use of mediation in Environmental Conflict Resolution.

Phase 1: Pre-Negotiation



Introduction to Pre-Negotiation

By Elle Harmon

In the preliminary stages of Environmental Conflict Resolution, it is crucial that all participants thoroughly assess and outline their specific goals preceding the mediation process. When a convenor recognizes the possibility for utilizing alternative dispute resolution, they will call for an assessor to analyze the interests of the parties involved. A conflict assessment is a useful tool for the assessor in gathering information and establishing a frame of reference for identifying stakeholders and key issues. Creating guidelines, stating relevant issues, and paving the way for consensus-building are all imperative steps when developing a conflict assessment. A third-party assessor, who may also provide the role as mediator, maintains neutrality among stakeholders and establishes trust with the participants throughout the mediation process. At this juncture, it is appropriate to determine if ADR is a viable approach to resolving a specific environmental dispute.

Effective communication and establishing a relationship between stakeholders and the mediator is a critical step of pre-negotiation, as is keeping a professional demeanor and remaining unbiased. The mediator is responsible for making sure that each party involved feels they are being fairly and accurately represented. The convening parties must also evaluate their conflicts and address the potentially controversial issues, which involves fact finding and the gathering of applicable information. While there are different approaches to gathering information, when parties are able to gather information on their own the pre-negotiation process is likely to progress more fluidly. Each role should add knowledge that will help contribute to the successfulness of the mediation. The mediator efficiently facilitates and continuously assesses the positions of the participants and unrepresented parties to try and alleviate power imbalances that could potentially arise. Further establishment of procedural guidelines used throughout the remainder of the mediation will help create a solid foundation.

Northern Virginia Transportation Reformation Projects

Multiparty negotiations, especially in environmental conflict resolutions, involve interests other than the stakeholders, such as the environment, economics and societal impacts. The Southern Environmental Law Center proposes several main goals encasing all of these ideas. This case has yet to reach a final conclusion; however, it references some of the many complexities involved in environmental conflict resolution such as time, diversity of stakeholders, and environmental impacts as mentioned in this guidebook.

The Environment - With this case, several factors of the environment must be acknowledged. Potential affected areas involve: damages of up to 450 acres of wetlands; storm runoff compound pollution from the Chesapeake Bay; and increased exhaust and pollution from excess vehicles due to increased population. These areas are already in violation of federal air quality standards and now threaten the quality of drinkable water in the Northern Virginia areas.

The Economy - If Virginia and North Carolina, in conjunction with the VA/NC High Speed Rail, continue to build out their intercity rail as planned, this scenario will create an estimated 228,000 jobs and generate \$30 billion revenues into the Virginia economy. However, 2017 marks the 6th and final year for Virginia to come up with a sum of \$119 million for a continuous operation of six roundtrip regional trains. This exemplifies the potential timelines in environmental conflict resolution, however, litigation is likely to be more time consuming.

Social Implications - By establishing train routes and alternate transportation solutions, the community has been able to come together by collaborating on the project, especially with the use of a public forum where individuals are able to express their concerns and opinions regarding the project. Using ECR is a way to include different groups and stakeholders in the decision-making process making it more socially applicable than litigation. This case epitomizes environment conflict resolution because it creates a blueprint for timelines, relationship building, environmental, social, and economic complications.

For more details on this case, see Case Study 1 in the Appendix.

Conflict Assessment

By Ashley Ross and Bobbye Leigh Morgan

Conflict assessment is the foundation of alternative dispute resolution where building consensus is the chief aim. Consensus-based processes are those through which a collaborative effort and decision-making techniques and methods are utilized “to foster dialogue, clarify areas of agreement and disagreement, improve the information on which a decision is based, and resolve controversial issues in ways that all interests find acceptable”.¹ Ideally completed by a neutral third party, a conflict assessment unpacks the central components of the dispute at hand by identifying the central issues, interests and concerns, and relevant stakeholders. A sound conflict assessment not only determines if the dispute is ripe for resolution through consensus building processes but also sets the stage for successful resolution of the conflict by determining overlapping interests and linking principal stakeholders.

Conflict Assessment Goals

The goal of conflict assessment as to “identify the issues in the controversy, the affected stakeholders, and the appropriate forms of ECR for handling the conflict”.¹ Susskind defines a conflict assessment as an information-gathering process that identifies “who?” and “what?” - “who has a stake in a conflict or proposed consensus building-effort” and “what issues are important to those stakeholders”.² Conflict assessment also makes suggestions as to “whether or not it makes sense to proceed, given the institutional, financial, and other constraints; and if so, under what circumstances the key parties will agree to participate”.² While conflict assessments may take a variety of forms and employ a number of different methods, the overall objective shared is “to identify stakeholders and key issues, analyze the feasibility of moving forward, and design a work plan for proceeding”.³

“A conflict assessment offers an opportunity for all important topics and perspectives to be considered... [and] a neutral party can canvass the views of all stakeholders, smoke out difficulties and reluctant participants, and help set credible ground rules.”⁴

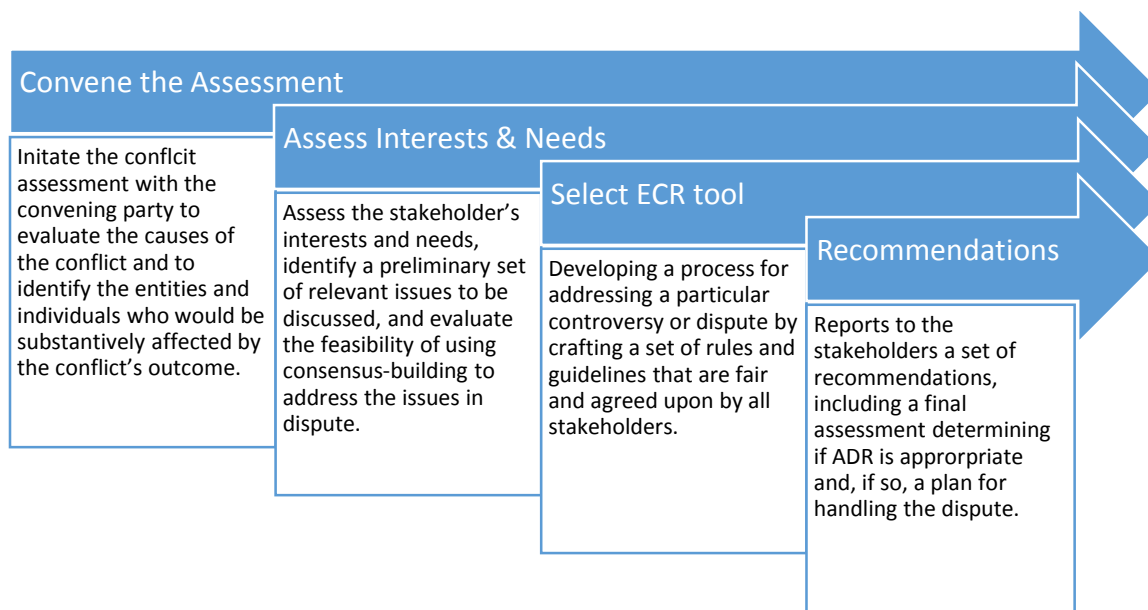
Conflict Assessment Process

Conflict assessment is a systematic process. It is first initiated by a convener, often a stakeholder in the conflict, then generally develops over three stages: “1) collection of information relevant for determining and understanding potential or actual causes of a conflict and for finding opportunities to create collaboration and greater understandings and agreements between disputing parties; 2) analysis of the data with the objective of helping parties and an intermediary to better understand the dispute; and 3) reaching

conclusions resulting from the analysis that will inform both the parties' and mediators' strategies and next steps to respond to the conflict".⁵

Figure 1 presents the stages of the conflict assessment process. While each assessor approaches the process differently depending on the conflict and the situation, the overall objective is similar for a successful outcome. All approaches "identify the relevant stakeholders, map their substantive interests, and begin to scope areas of agreement and disagreement among them..., as well as the parties' incentives and willingness to negotiate".⁶

Figure 1: Conflict Assessment Stages



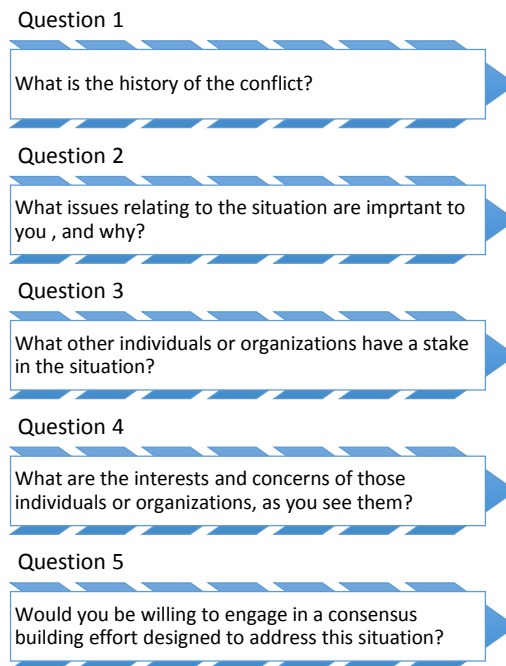
Source: Emerson (2003)

Conflict assessment is initiated by a convenor - the party interested in organizing an alternative dispute process, namely mediation. It is important that the process has the authority of an official contract between the convenor and assessor. Without such a contract, it may lack legitimacy in the eyes of parties involved and be perceived as a marketing tool for mediators.⁷ The assessor should be a neutral party, someone who all stakeholders perceive as impartial. "[A]n assessor should not have a stake in the conflict nor can he or she be perceived as partisan in the debate".⁸ Beyond this, the assessor should have experience in alternative dispute resolution processes. In particular, interview experience is necessary as an assessor must carefully probe to discover underlying interests, concerns, and values.

Stakeholder interests are assessed through interviews with the assessor. An interview protocol along the lines of the questions shown in Figure 2 guide assessors in identify

issues and information central to the conflict.⁹ In this stage of the process, experienced assessors avoid creating an environment where informal contact among stakeholders emerges because it may elicit coalitions and promote particular agendas that may create hostility, “often at the expense of group effectiveness”.¹⁰ Assessors also carefully weigh the parties involved in the conflict and seek out all relevant stakeholders, especially those that may lack strong representation. This is critical in environmental conflicts where “the voiceless” – especially ecosystems, species of flora and fauna, and even future generations of human society– are central to the conflict, but under-resourced and underrepresented.

Figure 2: Interview Protocol: Foundational Consensus Building Framework



Source: Susskind & Thomas-Larmer, 1999.

The stakeholder interviews provide information about whether the conflict is “ripe” for resolution via alternative methods. To determine this, the assessor must have an ability to connect disparate stakeholder interests, values, and perceptions. Such a skill requires careful balancing of stakeholder relationships to elicit information that accurately depicts the dynamics of the conflict.¹¹ This is only possible if trust is established between the assessor and stakeholder.

Once the interviews have been conducted with all relevant stakeholders, the assessor carefully analyzes the information gained to identify a preliminary set of relevant issues. These issues are considered across the range of stakeholders and their interests to evaluate the feasibility of using alternative dispute resolution methods to resolve the conflict. If it is determined that a consensus building effort should proceed, then the assessor sets up the structure of the process.¹² The process is designed to address the dynamics of the conflict at hand and be fair to all stakeholders involved.

The final step in the process is a report outlining the issues central the conflict. This report provides stakeholders an “impartial map” of the conflict, highlighting the parties involved and their interests.¹³ “Seeing their own interests...in print often helps each party feel heard and understood”¹⁴

Conflict Assessment Benefits

The conflict assessment process benefits the mediator, whether the assessor serves as the mediator during ECR or not. It creates an opportunity to define the most significant concerns of stakeholders, outline the key issues that are relevant to the dispute, and select the most appropriate techniques of ADR, all of which frame the subsequent alternative dispute process. It also determines if stakeholders are willing and able, given their existing resources, to fully participate in mediation and, if so, under which parameters. This can be accomplished by advising participants post-conflict assessment of the strengths and weaknesses of their case. After the feasibility of consensus building has been established, a preliminary process design can be developed. When the assessor performs a thorough analysis, the mediator will be well-informed of the collaborative and divisive issues and interests critical to assisting participants work towards their goals in an effective and efficient manner. The initial conflict assessment creates a frame of reference to overlap and better understand the issues and desired outcomes, as well as areas in which reaching an agreement would not be possible.¹⁵

Conflict assessment is a beneficial first step in the conflict resolution process for stakeholders as well. It educates stakeholders about alternative dispute resolution processes and provides the time and space for all parties to establish a relationship with the assessor, who may mediate the case. Individual interviews allow stakeholders to “assess the assessor” and “gauge whether that person is likely to be impartial and effective as a mediator”.¹⁶ It also is a tool for stakeholders to evaluate their own interests and appraise other stakeholder groups through the information shared. Moreover, conflict assessment can generate legitimacy for the mediation process among community members when the final report is shared broadly.¹⁷ This may be critical for leveraging community and environmental support needed for successful conflict resolution.

Notes

¹ Kirk Emerson, Tina Nabatchi, Rosemary O’Leary, and John Stephens. “The Challenges of Environmental Conflict Resolution,” in *The Promise and Performance of Environmental Conflict Resolution*, eds. Rosemary O’Leary and Lisa B. Bingham (Washington, D.C.: Resources for the Future, 2003), 10.

² Lawrence E. Susskind and Jennifer Thomas-Larmer, “Conducting a Conflict Assessment,” in *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement*, eds.

Lawrence E. Susskind and Sarah McKearnen (Thousand Oaks, CA: Sage Publications, 1999), 100.

³ Susskind and Thomas-Larmer, "Conducting a Conflict Assessment," 103.

⁴ Susskind and Thomas-Larmer, "Conducting a Conflict Assessment," 105.

⁵ Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass: San Francisco, 2014), 108.

⁶ Susskind and Thomas-Larmer, "Conducting a Conflict Assessment," 104.

⁷ Susskind and Thomas-Larmer, "Conducting a Conflict Assessment," 107.

⁸ Susskind and Thomas-Larmer, "Conducting a Conflict Assessment," 106.

⁹ Conflict assessment is a separate process from fact-finding. Fact-finding is "an independent process in which a neutral third party, or fact-finder, investigates a dispute and issues a report establishing the relevant facts" (Moore 2000: 106). The report may or may not be used as a basis for settlement.

¹⁰ Roy J. Lewicki, Bruce Barry, and David M. Saunders. *Essentials of Negotiations* 6th Edition (New York, NY: McGraw-Hill, 2015), 228-229.

¹¹ Susskind and Thomas-Larmer, "Conducting a Conflict Assessment," 106.

¹² Susskind and Thomas-Larmer, "Conducting a Conflict Assessment," 104.

¹³ Susskind and Thomas-Larmer, "Conducting a Conflict Assessment," 102.

¹⁴ Ibid.

¹⁵ Emerson et al., "The Challenges of Environmental Conflict Resolution," 10.

¹⁶ Susskind and Thomas-Larmer, "Conducting a Conflict Assessment," 104.

¹⁷ Susskind and Thomas-Larmer, "Conducting a Conflict Assessment," 130.

Fact-Finding

By Paul Mullen and Sandra Lee

Fact finding is a process where all parties are interviewed and information is gathered by a neutral fact finder. The fact finder conducts an independent investigation into the cause of the disagreement. After collecting the information, the fact finder will present the findings and possible solutions to the parties. Fact finding and non-binding arbitration are used to push along negotiations by having an unbiased third party opinion. The mediator, stakeholders, and the environment benefit from fact finding as it identifies the key issues in the dispute and then helps to develop proposals to resolve them.

In the January/February 2007 article “A Dialogue, Not a Diatribe: Effective Integration of Science and Policy through Joint Fact Finding” in the magazine *Environment*, retiring Representative Sherwood Boehlert at a November 2006 reception honoring his service as the chairman of the House Science Committee was quoted as saying that Washington (D.C.):

“...is a town where people say they are for science based decision making until the overwhelming scientific consensus leads to a politically inconvenient conclusion”. He added, “We should be guided by sound science. We shouldn’t have politics determining science.”¹⁸

Unfortunately, this is not only true in the case on national politics, but in most value judgements or cost assessments performed by people in everyday situations. This sociopolitical tactic is a typical stratagem of distributive bargaining. However, this makes finding and sharing facts even more necessary since it is the best way to clearly identify the issues within a conflict. In many environmental disputes politics has often over shadowed scientific facts, particularly in relation to the environment where parties “argue that science is on their side or exploit the uncertainty in the data and interpretations to delay a decision.”¹⁹ Often “scientists with different interpretations of the same data are pitted against each other, thereby canceling out what they have to say.”²⁰ When politics come into play and data is being scrutinized, it makes the mediator’s job harder as the opposing party begin to question the legitimacy of data which results in delaying the decision making process. Delaying the process does not benefit either participant, as the longer it takes to come to a decision, the more it will cost. All too often, the decision made is not in the best interest of the environment.

The Need for Joint Fact-Finding

In resolving environmental conflicts through alternative dispute resolution (ADR) methods, there are choices to be made in strategy. Distributive bargaining is a technique which often lends itself to concealing information in order to increase their power influence. From the perspective of a participant, this is a valuable technique, which allows for a better chance of controlling a larger part of a win/lose solution. Participants can also

use a more integrative method of bargaining. This allows for the equitable exchange of information. Integrative methods allow for both parties to make decisions based on the best information available. Mediators prefer this style because it fulfills the aim of being 'fair', but can put them in an awkward position. For example, they are absolutely prohibited from breaking confidentiality, according to the EPA Mediator's Guidebook. The ability to keep both sides' confidentiality is a key factor in their ability to remain neutral. As a general rule, most people practice a mix of the two styles. Information that is critical to their success might be kept concealed while other information is volunteered.

In order to satisfy the participants involved in the dispute, the well-being of the environment and to help the mediator conduct an efficient and cost effective dispute, a system needs to be put in place where the policy makers and the general public can use the specific scientific data collected in the best interest of the stakeholders freely. To ensure the best option for the environment and the participants is achieved a process called 'Joint Fact-Finding' can be used. This involves the collaborative exchange of scientific analyses that are undertaken within the conflict resolution process and benefits all parties involved in the process. "A well-designed, high-quality joint fact finding process ensures accessibility to all forms of knowledge by all stakeholders, thereby building trust—an essential condition for people to work together successfully."²¹

Oil and Fishing Industries Negotiate

Joint fact finding is a technique used to resolve factual disputes. A process where teams work together in an effort to find relevant facts often in the form of scientific, technical or historical claims. In the mid-1980s oil and fishing industries off the coast of California had a dispute over seismic testing. The oil industry claimed that acoustic testing had no negative impact on fish resources however, the fishermen claimed otherwise. Both sides presented data supporting their contradictory positions, and little progress was made.

Eventually mediators helped representatives from the two industries to define and agree on a process, place and agenda suitable for negotiation. After the first day of negotiations people from each industry were selected to represent their industry in a joint committee. The joint committee formed subcommittees to address each individual issue. A seismic subcommittee was established to consider the research needs relating to the impact of seismic testing on the fishery resource. Through the Subcommittee the parties agreed on a process. They would decide whether there was currently enough evidence of acoustic impacts on fish to merit further research. If

so, the parties would then jointly develop a research project to investigate the impacts.

In order to address the first task, the Subcommittee created the Fish Dispersal Committee, which convened a Science Panel. The Fish Dispersal Committee recruited highly respected scientists which had a wide range of opinions and approaches. The Science Panel concluded that there was enough information to indicate that seismic testing possibly had an impact on fish dispersal and recommended that more research be undertaken. The oil industry accepted the possibility of an impact, and agreed to further research. The reputation and credibility of the scientists involved helped legitimate both the research design and the findings.

As a result of using scientific experts for joint fact finding, the best result for all parties are taken into consideration as parties cannot exploit the uncertainty in the data. To be effective and useful, scientific analyses should not be undertaken independently of the policymaking process. A well-designed joint fact finding process ensures accessibility to all forms of knowledge by all stakeholders, thereby building trust which is essential for people to work together successfully.

For more details on this case, see Case Study 2 in the Appendix.

Benefits of Joint Fact-Finding

The use of experts is key to exploring the issues of most environmental conflicts completely. Once the issues have been identified in the conflict assessment, all parties (including the mediator) should find as much information as possible to establish a frame of reference. In cases such as the Southern Appalachian Man and the Biosphere cooperative, “[collaborative information exchange] also avoided duplication of work that might have been necessary if each agency had acted independently”.²² This is important to the participant because it speeds up the process, and allows them to create an informed opinion on the issues, thus increasing their feeling of success. For the mediator, gathering information on the issues might mean the discovery of another important stakeholder which supports their aim in mediation. But for the environment, the presence of experts in the field is critical to representation.

“Environmental problems exist partly because people lack the information to act appropriately”.²³ Exploring an issue in terms of the environment means that ecological processes and patterns are taken into consideration along with the human components.²⁴ It

is often academic experts and nature conservation societies which can most fully express the environmental aspects of an issue.

Equally important in exploring the issues is the flow of information. Participants need to remember that critical information comes not only from academic/political experts, but from the people that are 'on the ground' in areas of conflict. Farmers, park rangers, and citizens give concrete information on the applicability of theoretical policies and generalized knowledge. "[T]he substantive quality of decisions, recognizes the public as a valuable source of knowledge and ideas for making decisions".²⁵

Limits of Joint Fact-Finding

There are times when joint fact-finding may not be the best option to collect data. Such cases are when there is a large power imbalance between parties. If parties do not think that they can establish a fair fact-finding process to gather mutually beneficial data or if there are not enough financial resources joint fact finding is not recommended. When joint fact finding is not recommended the mediator may conduct the dispute resolution with a mutually agreeable plan. Fact-finding can occur at any time in the ADR process, however, it is particularly useful pre-negotiation and when all information is shared. Joint fact-finding helps the mediator explore all options, keeps costs relatively low for the stakeholders and helps to get the best outcome for the environment as every option is explored.

Notes

¹⁸ Herman A. Karl, Lawrence E. Susskind, and Katherine H. Wallace, "A Dialogue, Not a Diatribe: Effective Integration of Science and Policy through Joint Fact Finding," *Environment: Science and Policy for Sustainable Development* 49, no. 1 (January/February 2007): doi:10.3200/envt.49.1.20-34.

¹⁹ Karl, "A Dialogue, Not a Diatribe"

²⁰ Karl, "A Dialogue, Not a Diatribe"

²¹ Karl, "A Dialogue, Not a Diatribe"

²² Wondolleck, Julia Marie., and Steven Lewis. Yaffee. *Making Collaboration Work: Lessons from Innovation in Natural Resource Management*. Washington, D.C.: Island Press, 2000.

²³ Wondolleck, "Making Collaboration Work"

²⁴ Peck, Sheila. *Planning for Biodiversity: Issues and Examples*. Washington, DC: Island Press, 1998;

Samuel David. Brody, *Ecosystem Planning in Florida: Solving Regional Problems Through Local Decision-making* (Ashgate Publishing Group, 2008).

²⁵ Beierle, Thomas C., and Jerry Cayford. "Evaluating Dispute Resolution as an Approach to Public Participation." August 2001. Accessed November 18, 2016.
<http://ageconsearch.umn.edu/bitstream/10899/1/dp010040.pdf>.

Building Relationships

By Jayton Rainey and Ashley Ross

Alternative dispute resolution rests on the relationships among parties. To convene a conflict resolution process, the parties involved in the conflict must be willing to build or reframe relationships with one another in ways conducive to resolving issues at hand. Relationships among stakeholders and assessors, mediators, and/or facilitators set the stage for the negotiation process. In all, the relationships among groups involved in the dispute resolution process determines the range of the possible solutions to the conflict. “In a setting with hostility and mistrust, the options for resolution are much more limited than in a setting characterized by mutual trust and a common quest for the best solution.”²⁶ Parties involved in environmental disputes usually do not have an existing negotiating relationship (Bingham 1996); nonetheless most negotiations “occur within some historical context”²⁷ and unfold “against a backdrop of social and cultural expectations”.²⁸ Diverse cultural norms are particularly important to explore as they shape expectations of stakeholder relationships and interaction.²⁹ Perceptions of conflict history and expectations frame the dynamics of relationships among parties, including relative power, issues, and positions. This should come to light in the convening, pre-negotiation phase, as parties work together to begin a conflict resolution process or as an assessor works with parties during conflict assessment.

Third-Party Role in Building Relationships

Navigating contentious pasts and diverging expectations is difficult for parties involved in the conflict to do by themselves. Assessors, mediators, and/or facilitation practitioners may be called upon in the pre-negotiation phase to assess this alongside issues and positions in order to design a conflict resolution process that fairly balances power among parties and opens avenues for communication. “A mediator who understands these potential interrelationships will be better prepared to design processes that compensate for these difficulties and to respond more proactively to the dynamics of a negotiation process.”³⁰ From a mediator’s perspective, establishing a set of rules and guidelines before the negotiation process begins can help prepare future disputes and maintain order. The fundamental structure of a negotiation assesses whether the dispute will be handled as a distributive, integrative, or combination of the two types of negotiation techniques.³¹ This structure allows the negotiation to develop a sense of future strategies to implement throughout the negotiation, such as accommodating stakeholders, avoiding issues, and, eventually, compromising issues.³² Creating a set of rules and guidelines sets boundaries and expected forms of communication to maintain the peace. The mediator must

coordinate stakeholders' issues and identify times during bargaining to discuss certain topics, avoid them, or reframe the stated demands. It is important for mediators to remain unbiased throughout the negotiation to ensure third-party-neutrality and keep the avenues of communication open.³³

Coeur d'Alene Lake Management Plan

The importance of building relationships among multiple parties proves to be an effective tool in the case study of the Coeur d'Alene Lake Management Plan. The origins of the Coeur d'Alene Lake Management Plan first began due to concerns with the lake's water quality analysis conducted in the early 1990's. Dating back to 1996, with the support of the Clean Lakes Coordinating Council, the Department of Environmental Quality (DEQ), the local Tribe, and the Environmental Protection Agency (EPA), the Coeur d'Alene Lake Management Plan was officially adopted and would be revised every five years.

Increasing concerns associated to the lake's water quality levels led to the reevaluation of the 1996 Lake Management Plan in 2002 by the DEQ and the Tribe. From 2002-2004, a revised plan was created but was never formalized due to conflicting interests between parties. The EPA and the Tribe attempted their own versions of a proposed draft to the Lake Management Plan in 2004 and 2006, respectively, and failed.

Later in 2006, the EPA brought in a mediator that conducted interviews with the necessary lake basin stakeholders to provide a proper assessment strategy. The DEQ, the Tribe, and the EPA agreed on a technical consensus regarding the current water quality conditions in the lake in 2007. This information was shared with local, state, and federal elected officials, agency representatives, the State of Washington, business interests, and environmental representatives. A rough draft of the newly revised Lake Management Plan was published in June 2008 allowing public participation to provide comments and special interests. The final plan for the Coeur d'Alene Lake was officially declared and put into effect in 2009.

The updated Coeur d'Alene Lake Management Plan was established with the support of multiple parties. Initial revisions to the 1996 Lake Management Plan could not be implemented with just the EPA and the local Tribe. A mediator identified more potential stakeholders, including providing

public participation that proved to be efficient to develop a comprehensive management plan considering all party's interests. The addition of a mediator, and their methods, created a plan that was finalized in a shorter timeframe than the conflicts between fewer parties from 2002-2006. The current Lake Management Plan is updated every five years and encourages multiple party contributions to enhance and ensure the quality of the plan in place.

For more details on this case, see Case Study 3 in the Appendix.

Improved Communication

Communication is improved among stakeholders and mediators when all parties are willing to establish collaborative relationships with one another in a manner that shares, rather than conceals, information.³⁴ “Being direct, honest, and open is the first step for effective communication.”³⁵ As a tactic during negotiation, a sense of “story” brings a fuller picture to the table to identify each stakeholder’s interests, rights, and powers that can evolve as the frame of the story and issues develop and change.³⁶ Framing the “story” allows parties to have their voices heard and their demands brought forward in a manner that openly shares information. Building a “story” for the use of communication is important for environmental organizations that are most likely dominated by the larger corporations that they are working with to resolve environmental conflicts.

Critical Relationships

One of the most critical relationships built in environmental conflict resolution is among stakeholders and third party assessors, mediators, and/or facilitation practitioners. This begins in the pre-negotiation, convening phase during interviews. These interviews, which should be conducted in person (Susskind), not only serve to assess the conflict and existing relationships among stakeholders, but also provide “a vehicle for opening dialogue between the mediator and each party.”³⁷ Here the trust of the stakeholders may be gained. Elliott elaborates:

“Only a practitioner who is perceived as neutral will be able to gain the trust and confidence of all parties. Trust and confidence are essential, because effective intervention frequently requires the confidential exchange of information and ideas, and because a practitioner must often probe, test, and challenge parties in their efforts to make sense of conflict and its resolution. A participant who believes that a practitioner is seeking to

promote a certain viewpoint will be less forthcoming than one who perceives him or her as substantively neutral.”³⁸

Benefits of Building Relationships

The relationship between the mediator and stakeholders paves the way for a fair negotiation to develop, and for relationships among the parties of the conflict to improve.³⁹ Improved working relationships among stakeholders, including reduced hostility and enhanced trust, is a positive, and necessary, outcome of the process of environmental conflict resolution. “Collaborative stakeholder engagement and ADR processes often serve to mend or improve the overall relationship between parties because the focus is largely on identification of interests and common goals and on cooperation while protests, appeals, and litigation are focused on positions and win/lose outcomes.”⁴⁰ In both upstream and downstream conflicts, building relationships have proven repeatedly to be fundamental in resolving conflicts and sustaining environmental cooperation. This is particularly important in site-specific or place-based conflicts where stakeholders live near one another and work together to implement and/or monitor terms of the agreement.⁴¹ Even in cases where alternative dispute resolution has not produced an agreement resolving the environmental conflict, improvement among parties’ relationships has been reported to improve. This underscores that building relationships is necessary for successful environmental conflict resolution processes and that success in this area of conflict is as much defined by improved relationships as it is by reaching an agreement.

Notes

²⁶ Jerome Delli Priscoli and Aaron T. Wolf, *Managing and Transforming Water Conflicts* (New York, NY: Cambridge University Press, 2009), 98.

²⁷ Roderick M. Kramer and David M. Messick, *Negotiation as a Social Process* (Thousand Oaks, CA: Sage Publications Inc., 1995).

²⁸ Roy J. Lewicki, Bruce Barry, and David M. Saunders. *Essentials of Negotiations* 6th Edition (New York, NY: McGraw-Hill, 2015).

²⁹ Michael L. Poirier Elliott, “The Role of Facilitators, Mediators, and Other Consensus Building Practitioners,” in *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement*, eds. Lawrence E. Susskind and Sarah McKearnen (Thousand Oaks, CA: Sage Publications, 1999), 199-238.

³⁰ Lewicki, et al. Essentials of Negotiations.

³¹ Lewicki, et al. Essentials of Negotiations.

³² Lawrence E. Susskind and Jennifer Thomas-Larmer, "Conducting a Conflict Assessment," in *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement*, eds. Lawrence E. Susskind and Sarah McKearnen (Thousand Oaks, CA: Sage Publications, 1999), 99-136.

³³ Lewicki, et al. Essentials of Negotiations.

³⁴ "National Natural Resources Policy for Collaborative Stakeholder Engagement and Appropriate Dispute Resolution," Bureau of Land Management, accessed November 15, 2016, http://www.blm.gov/style/medialib/blm/wo/Planning_and_Renewable_Resources/adr_conflict_prevention.Par.44228.File.dat/ADR.pdf

³⁵ Lewicki, et al. Essentials of Negotiations.

³⁶ Elliott, "The Role of Facilitators."

³⁷ Elliott, "The Role of Facilitators," 218.

³⁸ Kirk Emerson, Tina Nabatchi, Rosemary O'Leary, and John Stephens. "The Challenges of Environmental Conflict Resolution," in *The Promise and Performance of Environmental Conflict Resolution*, eds. Rosemary O'Leary and Lisa B. Bingham (Washington, D.C.: Resources for the Future, 2003), 3-26.

³⁹ "National Natural Resources Policy"

⁴⁰ Emerson et al., "The Challenges of Environmental Conflict Resolution," 36.

⁴¹ E. Franklin Dukes, "What We Know About Environmental Conflict Resolution: An Analysis Based on Research." *Conflict Resolution Quarterly* 22(2004): 191-220.

Phase 2: Negotiation



Introduction to Negotiation

By Laura Stearns

During the actual process of negotiation, the mediator plays a crucial role in guiding the participants who often benefit from the relationships made during this stage of ECR. While some connections are made between parties in the pre-negotiation stage, the bulk of relationship building and the solidifying of these bonds occurs during the actual mediation. Based on tactics used by the mediator to remain neutral and create a balance of power, participants should trust one another throughout the process and potentially carry this trust into future endeavors. When strong relationships are formed, they are often seen by participants as result of a successful mediation process; they allow parties to resolve future conflicts that may ultimately benefit the environment.

However, if parties choose to use deceitful tactics or refuse to be open to alternative solutions, this trust will be dissolved, spoiling the chance of an agreement and damaging relationships during the negotiation and in the future. These tactics are associated with distributive, or competitive, bargaining. By using this technique of negotiation, parties seek to maximize their outcome to ultimately reach a win/lose result. In contrast, an integrative bargaining strategy often times strengthens relationships and leads to more beneficial outcomes for both the participants and the environment. This approach creates a collaborative environment, allowing parties to focus on problem solving rather than competing. In some cases, a combination of these two strategies can best establish a strong position while working with others to achieve a win/win agreement.

Because a more integrative style is often considered better for environmental conflicts, it is important to understand the process of a more collaborative negotiation. With the guidance of a neutral mediator, stakeholders identify their problems and then surface their interests and needs based on these problems. By focusing less on their positions and more on their interests, participants are able to generate alternative solutions and then evaluate and reach a mutually beneficial agreement for everyone involved. Mediators will often reframe or redefine issues to allow parties to see others' perspectives, allowing for transformations to take place and relationships to be strengthened. However, it is also imperative for the mediator to be aware of underrepresentation of the environment. Underrepresentation is signified by inherit biases that often lead to agreements that do not maximize improvement to environmental quality.

Perceptions of Parties and Building Relationships

By Bobbye Leigh Morgan and Elle Harmon

All facets of negotiations are dependent on the relationships of the parties involved throughout the process. While all relationships are built on trust, throughout the development of negotiations outcomes and varying degrees of success may be significantly altered by the evolution of trust between the participants. Through the neutrality of the mediator, the stakeholders' willingness to participate, power dynamics, and the effective management of negotiations, relationships may progress in a positive way. While these characteristics may improve and even expedite the processes of negotiation, if neglected or imbalanced, they may cause a stalemate or change the course of the outcome altogether. It is, therefore, imperative to understand how the perceptions of parties and relationships affect the dynamics of negotiations.

Neutrality of the Mediator

The initial perception of the neutrality of the mediator sets the stage and tone for the entirety of the negotiation and possible outcomes, including the techniques and processes used during the conflict resolution. Immutable neutrality of the mediator can be the best way to earn trust and achieve strong relationships with the stakeholders and in the representation of the environment. It is critical that “[a]ny method of negotiation... should improve or at least not damage the relationship between the parties”.⁴² The best way to guarantee neutrality as a mediator is to be aware of all participants and their purposes, the power dynamics that present themselves upon starting negotiations, and to allocate time equally among each representative to secure balance in their feelings of being heard and their issues being addressed. This can be challenging for environmental concerns and outcomes as much as it is for participants who are more cooperative than competitive. However, this can be overcome and effectively managed by an evaluation of each parties' style of negotiations and reframing the negotiation, “moving discussions toward a compromising or collaborative, integrative agreement”.⁴³ Without personal agendas or motives by the mediator, “[t]he goal is to minimize either side's ability to dominate the relationship”.⁴⁴ This can only be achieved once trust has been solidified between the mediator and all stakeholders.

BLM Bridgeport Land Sale Mediation

The BLM Bridgeport Land Sale Mediation stemmed from a lengthy dispute between the Bureau of Land Management, the Bridgeport Indian Colony, and the residents of Bridgeport in Northeastern California. The conflict arose from the Colony's desire to acquire forty acres of land adjacent to the city of Bridgeport in order to revive their economy through land development after a period of insufficiency. The Bridgeport Indian Colony received harsh reproach from the town residents concerned with the potential decline in their own local business economy, as well as tax and traffic increases, resulting from this land development. After two decades of unsuccessful attempts to secure the land from the Bureau, in 1998 the Colony initiated a direct sale under the Federal Land Policy and Management Act. Homeowners aggressively lodged formal protests and federal appeals, citing inaccurate environmental assessments and the unlawful right to sell from the Bureau of Land Management.

In June 2006, the Department of Interior's Board of Land Appeals, the convenor, approached the U.S. Institute of Environmental Conflict Resolution to attempt a negotiated agreement between the three stakeholders. A conflict assessment was conducted in February 2007, and after only three days an immediate call for mediation was recommended. Through a neutral third-party mediator, the three key stakeholders were called to participate in a mediation based on the understanding of skewed perceptions of each party that damaged relationships and elicited unwarranted mistrust. This information encouraged a willingness to participate, and all three parties agreed to the mediation.

With all grievances aired at the beginning of the mediation and no hidden agendas, a shift in the unbalanced power dynamics turned the perceptions of vulnerability, anger, and mistrust to feelings of equality and an understanding of each participants' desires and expectations. Within just three days, the participants came to a mutually satisfactory agreement. Each party stated they felt a renewed sense of trust and respect through the use of mediation, and that they would be willing to

work together again in the future. Environmental conflict resolution was able to mend decades of broken relationships and rebuild positive perceptions of each party.

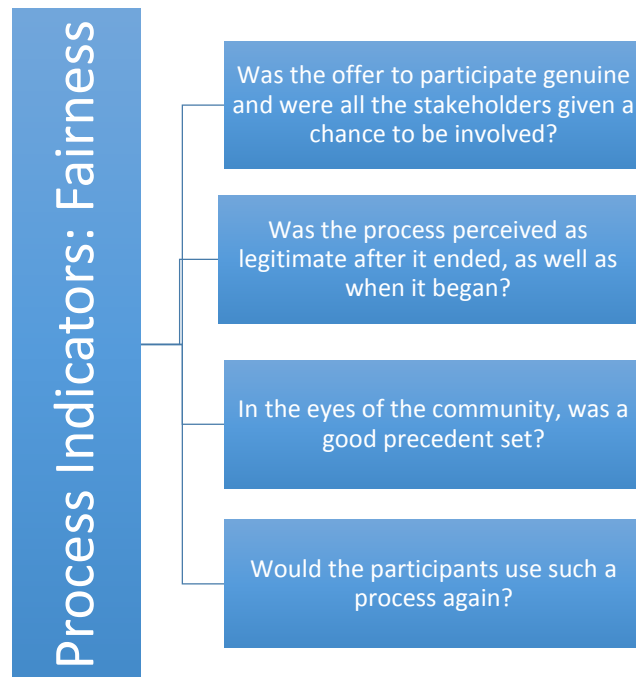
For more details on this case, see Case Study 4 in the Appendix.

Trust & Fairness

While the process of building trust must begin in pre-negotiations, it is easily broken or solidified when immersed in the negotiation process. Once a negotiation is in motion and the mediator is in a setting with all participant's and their varied interests involved, as opposed to the initial one-on-one meetings, the neutrality of the mediator becomes strained when attempting to reach an agreement. Though a formidable task, treating each stakeholder fairly can further develop trust that each of their respective goals and desired outcomes will be made as clearly known and considered as the next participant's. It is critical that all parties feel they are being represented fairly through the eyes of the mediator.

The best way to determine fairness is to "evaluate the attitudes and perceptions of the parties most affected".⁴⁵ Figure 3 lists a set of questions that mediators should ask to evaluate the fairness of the process. The potential effect of exhibiting bias in the negotiation can be immediate and irrevocable damage of the trust built over time. A dilemma is presented, however, in environmental conflicts as some support the "accountable mediator" model whereby mediators are not simply facilitators in this context, but advocates for the interests not represented in the negotiation, namely the environment.⁴⁶ In this line of thinking, mediators should demonstrate what may be perceived as bias in order to generate appropriate compromises that go beyond the parties' self-interests to promote the environment's interests.

Figure 3. Tests to Evaluate Fairness



Source: Susskind and Cruikshank as quoted in Todd (2001)

Balancing Power

One of the more challenging aspects of negotiations or mediation itself is to balance the power dynamics among and between stakeholders. Maintaining a balance of power allows the negotiations to progress in a manner that represents an equilibrium for all parties, which is important for those that are lacking in power and are underrepresented.⁴⁷ When this balance is achieved and maintained, mediators and stakeholders alike will “find that their deliberations proceed with greater ease and simplicity toward a mutually satisfying and acceptable outcome”.⁴⁸ However, if a participant starts to feel there is a power imbalance, this could cause a potential upset for the remainder of the process that affects not only the conflict at hand, but also future relationships.

It is the responsibility of the mediator to assess all participants’ attitudes, approaches and accessibility, as well as their willingness to participate, in order to effectively manage and engage the stakeholders involved in the process. Lewicki describes several frameworks for effective conflict management that have a strong normative value towards cooperation. Without proper mediation management, a successful outcome cannot be achieved due to lack of trust and imbalanced power dynamics, leading to an unwillingness to participate. Effective management of power dynamics is fueled by the trust and relationships established and maintained throughout the negotiation process.

Perceptions of Negotiation Tactics

The value of ECR “needs to be demonstrated in terms that go beyond easy-to-measure metrics, emphasizing instead when and how outcomes produced through collaborative processes can be most effective.”⁴⁹ Because relationships are important benefits of environmental conflict resolution,⁵⁰ it is imperative that all participants perceive the process “as fair, inclusive, relationship-building, and judicious in its use of time and money.”⁵¹ However, the use of deceptive tricks and tactics, in which one of the parties will use tools to try and manipulate the process for the most personally beneficial and favorable outcome, is still more prevalent than one would hope for.⁵² Unethical strategies are often displayed in this type of negotiation behavior and may even cross moral boundary lines. The intentions of using negotiation are to move away from these types of counterproductive strategies that elicit retaliation and breakdown communications over time. Relationships are not likely to be built with this technique, and more problems than progression are likely to develop. Parties who wish to maintain a lasting and working relationship should choose more collaborative approaches.

Integrative negotiation tactics create a “free flow of information,”⁵³ opening the path for the honest exchange of communication among parties involved in the conflict. This transparency allows for the establishment of trust between parties- instead of withholding information, this approach revolves around the idea that open communication will be the most efficient way to achieve an effective outcome. This is a key element for continuing relationships after the completion of a mediation and allows for an effortless pass to implementation. Ultimately, relationship outcomes of mediation and negotiation “fall into four categories: (1) new relationships (increased trust, decreased future conflicts), (2) new partnerships, organizations, and processes, (3) knowledge and learning (about issues, about others’ concerns and constraints, about new possibilities and problem frames), and (4) social, intellectual, and political capital”.⁵⁴

Relationship Building as Success

Success in conflict resolution is not always defined by a mutually satisfying outcome. Susan Todd poignantly explains:

*The word “success” generally denotes something unambiguous and near-perfect - an effort is either a successful or it is not, and there is little room to equivocate. The word “effectiveness,” on the other hand, is less black and white. It connotes something that is adequate and useful, but not necessarily perfect.*⁵⁵

An equal measure of meaningful success is building a strong, working relationship, amongst various participants.⁵⁶ When it comes to the environment, having working

relationships between environmental non-governmental organizations, large corporations and government agencies is crucial. When a partnership is established, there is more likely a satisfactory outcome for both parties involved. However, often in environmental issues, compromises can be rare. Gaining trust and open communications paves the way for an insightful and successful negotiation. "If ADR encourages the parties to share their views and to adopt problem-solving attitudes, it is likely that it will improve the working relationship between them".⁵⁷ In the beginning stages of the negotiation process, parties must clearly identify and state their main objectives and goals: an essential step during the initial proceedings. There will be a better perception of the parties once an assessment of each side has been established.

Allagash Wilderness Waterway

The Allagash Wilderness Waterway (AWW) is a pristine ribbon of riparian area in the northern Maine forest. This river has been under conflict since it's declaration as a part of the Scenic Rivers and Lakes System in 1966. The conflict stemmed from the differing visions of the waterway management. In 2002, the Governor elected to support a mediation effort between the two groups. The mediator selected 23 stakeholders to participate in a two-day (30 hours) long facilitated discussion on the AWW. The mediator was able to create a point of common interest by helping the stakeholders to realize that, between them, they had over 500 years of experience on the river way. They also discussed their favorite trips down the river and what made them so special. By establishing a common ground and framing the issue, they had a transformative moment in the negotiations which allowed them to move beyond positions. The mediator also cited "offline" and small group discussions were valuable techniques in the ability to reach a series of quick solutions. These small groups developed proposed solutions to the core issues. "Offline", or unofficial conversations, allowed for the opportunity to find out more about the other parties.

During the negotiation, the mediator moved the negotiations forward by allowing the parties to "agree to disagree" and postponed talks on deal breakers. This is a technique which works well as part of *logrolling* which allows parties to find points of commonality before addressing emotionally charged issues. Unfortunately, this negotiation failed to completely address important issues. The negotiation was also limited by the lack of communication between the Participants and the constituents which they represented. Overall, implementation

would have improved if it had included these additional portions of the negotiation process. While the strict time schedule allowed for focused attention on the development of relationships between the AWW stakeholders, the abbreviated timeframe also prevented a more in depth negotiation or critical issues.

For more details on this case, see Case Study 5 in the Appendix.

Notes

⁴² Fisher, Roger and William Ury. *Getting to Yes: Negotiating Agreement without Giving In* (3rd Edition). New York, NY: Penguin Books, 2011. Chapter 1; Page 4.

⁴³ Lewicki, Roy J., Bruce Barry, and David M. Saunders. *Essentials of Negotiations* (6th Edition). New

York, NY: McGraw-Hill/Irwin, 2015. Chapter 8; Page 183.

⁴⁴ Lewicki et al., Chapter 8, Page 183.

⁴⁵ Todd, Susan. "Measuring the Effectiveness of Environmental Dispute Settlement Efforts".

Environmental Impact Assessment Review, 21, 2001: 97-110. As quoted by Susskind and Cruikshank Page 100.

⁴⁶ Jennifer Gerada Brown, "Ethics in Environmental ADR: An Overview of Issues and Some Overarching Questions," *Valparaiso University Law Review* 34(2000): 418.

⁴⁷ Lewicki et al. discusses understanding levels of conflict between intrapersonal/interpersonal conflicts and intragroup/intergroup conflicts: Chapter 1, Page 19.

⁴⁸ Lewicki et al., Chapter 8, Page 183.

⁴⁹ Orr, Patricia J., Kirk Emerson, and Dale L. Keyes. "Environmental Conflict Resolution Practice and Performance: An Evaluation Framework". *Conflict Resolution Quarterly*, 25(3), 2008: 283-301. Page 294.

⁵⁰ O'Leary and Bingham, Foreword, Page xv.

⁵¹ Beck. "Defining and Evaluating Success in Environmental Conflict Resolution". In *Braving the Currents*, pp. 15-54. Springer US, 2004. Page 22.

⁵² Fisher and Ury, Chapter 8, Page 131-132. "Such tactics are illegitimate because they fail the test of reciprocity."

⁵³ Lewicki et al., Chapter 3, Page 61.

⁵⁴ Beck, Page 21.

⁵⁵ Todd, Page 99.

⁵⁶ Moore "Defining "Successful" Environmental Dispute Resolution: Case Studies from Public Land Planning in the United States and Australia". *Environmental Impact Assessment Review*, 16, 1996: 151-169. Page 151.

⁵⁷O'Leary, Rosemary, and Lisa Bingham. *The Promise and Performance of Environmental Conflict Resolution*. Washington, DC: Resources for the Future, 2003. Chapter 12, Page 260.

Negotiation Techniques for Environmental Conflict Resolution

By Elle Harmon and MaryKate Flanagan

Environmental conflicts involve many, diverse interests vying to resolve competing issues with or without a mediator. Resolving these conflicts involves environmental, economic, and social issues “that affect large ecosystems and include substantial economic and social implications”.⁵⁸ In the context of the negotiating process, the Environment can be seen both as a silent participant and also as an outcome, the successful result a mediator and other participants are negotiating toward.

Just as environmental conflict resolution (ECR) contains a variety of elements and potential outcomes to successful negotiation, improved environmental outcomes can be achieved using negotiating techniques broadly defined as distributive, integrative, and mixed. Some specific techniques can be used to engage participant aspirations and reach ECR goals; specific tools are listed to be used in this often ambiguous and uncertain ECR process.

Distributive Bargaining

In distributive bargaining, negotiating parties come to the table with demands to gain the largest share of the pie. The process is competitive, pitting one party against another. This approach is aggressive and involves an either/or, win/lose outcome. This structure of competitive or distributive bargaining is framed wherein parties seek their own advantage based on positions versus the interests-based approach of integrative negotiations. Distributive bargaining tactics can be advantageous when it is important to influence the other party’s beliefs about the range of possible solutions. They also can be used to learn as much as possible about the other party’s position, “particularly about their resistance points” that are set up to allow the parties to be firm in regard to what they want to achieve.⁵⁹ The “silent participant”, the environment, stands to lose the most from a distributive negotiating approach because it is often not represented or represented by parties that have less power in terms of resources and information.

Integrative Bargaining

Integrative bargaining stands in stark contrast to distributive bargaining. The parties work together, focused on issues rather than positions. The craft solutions to solve problems, rather than represent people.⁶⁰ An integrative strategy allows for “a high level of concern for both sides achieving their own objectives [and] propels a collaborative, problem-solving approach”.⁶¹

Table 1. Negotiation Techniques

DISTRIBUTIVE BARGAINING

“Distributive bargaining strategies and tactics are useful when negotiators want to maximize the value obtained in a single deal, when the relationship with the other party is not important, and when they are at the claiming-value stage of negotiations” (Lewicki et al.). In guiding negotiations, the mediator must keep in mind that these distributive techniques focus on differences and neglect shared interests.

- **Communication**
 - Concealing information
 - Attempting to mislead
 - Using manipulative tactics or actions
- **Information sharing**
 - Gathering information about the opposition and its positions
 - “Convincing members of the other party to change their minds about their ability to achieve their own goals” (Lewicki)
 - Constant monitoring of the other party’s reactions
- **Time and deadlines**
 - Careful planning with an inflexible BATNA
 - Strong execution
 - Setting opening, target, and resistance points
 - Defining a bargaining range “with each party working to obtain as much of the bargaining range as possible” (Lewicki)
 - Playing “hardball to pressure the other side to reach a quick agreement

INTEGRATIVE APPROACH

In contrast, the literature studied recommends an integrative approach to conflict resolution; and at minimum, a mixed approach. Here, “a high level of concern for both sides achieving their own objectives propels a collaborative, problem-solving approach” (Lewicki et al.).

- **Communication**
 - Focus on interests (integrative, not positions (distributive)
 - Focus on why, not what
 - Separate the people from the problem (depersonalize)
 - Communicate openly and accurately about what each wants in an effort to understand all needs (including the environment)
 - State the problem in a neutral way that is mutually acceptable to all sides (including the environment)
 - Explore differences, focus on commonalities, to identify shared interests and merge differing interests
- **Information sharing**
 - Create a free flow of information
 - Collaborate, not compete
 - Generate alternative solutions
 - All parties (including a representative fo the environment) evaluate and select the best alternatives
 - Identify interests and needs of all parties (including the environment)
 - Change the scope of the proposed agreement, by broadening the options or inventing options for mutual gain
- **Time and deadlines**
 - Break up the problem into smaller problems, to focus and move forward
 - Avoid stating solutions that favor one side or the other until problems are fully defined and alternative solutions examined
 - Collaborate to find best joint solution
 - ECR results in “more creative, satisfactory, enduring solutions” (Siegel)
 - Mediated discussions result in “faster resolution of issues [and] better environmental outcomes” (Siegel)

MIXED APPROACH

A mixed approach uses both distributive and integrative negotiation techniques which, depending on circumstance, may allow participants to reach the most advantageous outcomes.

- **Communication**
 - Clearly establish alternate BATNAs, by defining whether the current outcome is better than another possibility or different negotiating partner (the better the alternatives the more power) (Fisher & Ury)
 - Knowing your limits (including the environment) in setting resistance points
 - Assess the larger social context of parties and broaden impacts (including the environment)
 - Respond with offers instead of threats (Fisher & Ury)
 - Creative writing and storytelling can build relationships and produce unthought-of consensus
- **Information sharing**
 - Rank and prioritize issues
 - Determine if issues are linked or separate
 - Gather information about the other party (including the environment) – their issues, preferences, priorities, interests, alternatives, and constraints (Lewicki)
 - Build a relationship with the other side (Lewicki)
 - Formulate objective criteria based on firm positions, not pressures (Lewicki)
 - Explore tradeoffs or define fair procedures to settle differences (Fisher & Ury)
- **Time and deadlines**
 - Set specific parameters – limits, target points, opening bid, best deal, timeline – to know when reached goals or walkaway point (Lewicki)
 - “In complex negotiations, set a realistic timetable for changes that may span several complete negotiations” (Fisher & Ury)

An integrative approach has the potential to reach improved outcomes for participants and the environment. Multiple studies have shown that parties have better relationships and can more easily reach agreement when using integrative, rather than distributive, tools. Moreover, in the search for creative, collaborative solutions that serve the multiple interests of the parties involved, the environment is not comprised as it is in distributive bargaining where the game is zero-sum.

It is the contention, therefore, of this guidebook that integrative approach or mixed approach (using both distributive and integrative techniques) to environmental conflict resolution is ideal. It is difficult in environmental conflicts for the environment – or environmental interests – to win when pitted against dominant industries, economic interests, and/or community development. However, when the conflict is approached collaboratively, as with integrative or mixed techniques, the space opens for the environment and environmental interests to become part of the solution to the problem. Table 1 lists common techniques of each approach to distinguish between them, and the following discussion elaborates on integrative and mixed techniques for negotiation.

Techniques of Integrative Negotiation

Integrative negotiation techniques focus on collaboration and agreement. Parties agree to explore differences and focus on commonalities in order to identify shared interests. This requires that all participants embrace collaboration and reject competition. They agree to formulate a common goal, then define the problem. In this collaborative setting, a set of alternative solutions is generated. All parties then evaluate and select the best alternatives.

This begins with the technique on part of the mediator to identify interests and needs of all parties. A focus on problems rather than people is helpful here.⁶² It also requires the technique by participants to openly share information and agree to a free flow of information. In crafting solutions to the conflict, the mediator should seek to use a technique of broadening the options or inventing options for mutual gain. This may be facilitated by the technique of breaking up the problem into smaller problems, to focus and have the ability to move forward. Other techniques that may be used to reach resolution include: avoid stating solutions that favor one side or the other until problem is fully defined and alternative solutions are examined; and work for own needs and other's needs (including the environment) to find the best joint solution.

Techniques for Mixed Approach

Employing a mixed approach to environmental conflict resolution also has advantages to achieving successful outcomes. Taking positions, which is a distributive approach, “tells the other side what you want; it provides an anchor in an uncertain and pressured situation; and it can eventually produce the terms of an acceptable agreement”. An integrative approach can produce a wise agreement with added benefits of efficiency and amicable relationships.⁶³ A mixed approach of both distributive and integrative bargaining strategies

and tactics, includes specific tools of communication, information sharing, and time and deadlines.

In communication, a technique to clearly establish alternate BATNAs, by defining whether the current outcome is better than another possibility or different negotiating partner (the better the alternatives the more power), is helpful. Knowing your limits (including the environment), helps to set resistance points as does assessment of the larger social context the conflict is situated within. The technique of responding with offers rather than threats is a useful communication technique. In communication storytelling and reframing are techniques that can build relationships and produce consensus.⁶⁴

With information sharing using a mixed approach, it is important to first rank and prioritize issues as well as determine if the issues are linked together or are separate. Mediators should seek to define the underlying interests and needs of the parties (including the environment). Participants should gather information about the other party including their issues, preferences, priorities, interests, alternatives, and constraints. Participants should also seek to build a relationship with the other side and formulate objective criteria for conflict resolution based on firm positions, not pressures. It is helpful to use the technique of exploring tradeoffs to settle differences⁶⁵

In regards to time and deadlines, it is a useful technique for mediators and participants to set and keep track of specific parameters and their associated deadlines, including limits, target points, opening bid, and best deal in order to know when goals are reached. It is important to keep in mind that “in complex negotiations, set a realistic timetable for changes that may span several complete negotiations.”⁶⁶

Conclusion

Environmental conflicts are complex, involving multiple parties, interests, and implications. Choosing an appropriate strategy of negotiation depends upon the party involved and their interests as well as the conflict characteristics. It is important to keep in mind that integrative negotiation has benefits of improved relationships among parties, a sharper focus on issues at hand rather than positions, and enhanced problem-solving in crafting win-win solutions. And perhaps most importantly, integrative negotiation has the most promise for creating positive outcomes for the environment.

Notes

⁵⁸ E. Franklin Dukes, “What We Know About Environmental Conflict Resolution,” *Conflict Resolution Quarterly*, 211.

⁵⁹ Roy J Lewicki, Bruce Barry, and David M Sanders., *Essentials of Negotiation*, McGraw-Hill Education, 6th edition.

⁶⁰ Roger Fisher and William Ury, *Getting to YES Negotiating Agreement Without Giving In*, A Penguin Book, 2nd edition.

⁶¹ Lewicki et al. *Essentials of Negotiation*.

⁶² Fisher and Ury, *Getting to Yes*.

⁶³ Fisher and Ury, *Getting to Yes*.

⁶⁴ Rosemary O’Leary and Susan Summers Raines, “Lessons Learned from Two Decades of Alternate Dispute Resolution Programs and Processes at the Environmental Protection Agency,” *Public Administration Review* 61(2001).

⁶⁵ Fisher and Ury, *Getting to Yes*.

⁶⁶ Fisher and Ury, *Getting to Yes*.

The Process of Negotiation

By Laura Stearns and Emily Fucile Sanchez

Once a case has been assessed and determined suitable for mediation, the participants are identified, and the factual base is completed, parties are ready to begin negotiation. Stakeholders convene and, with the guidance of the mediator, issues are framed and interests are identified in order to ensure a productive mediation.⁶⁷ Participants come bearing in mind their best alternative to a negotiated agreement (BATNA) that will influence how willing that party is to continue on throughout the negotiation process.⁶⁸ Although participants can use any negotiating techniques as described in the previous section, the collaborative and information sharing nature of integrative bargaining best lends itself to mediated conflict resolution.

The Integrative Negotiation Process

Figure 4 represents the key steps in an integrative negotiation, including focusing on needs, interests and selecting alternatives with consideration to all participants involved.⁶⁹ Collaboration is fundamental to integrative negotiation, as opposed to distributive bargaining where the negotiation process is competitive. Integrative negotiation is emphasized by interests and problems rather than focusing on people or positions.⁷⁰ This allows for the parties involved to creatively craft and select solutions that meet the interests and needs of all.

Figure 4: Key Steps in the Integrative Negotiation Process³

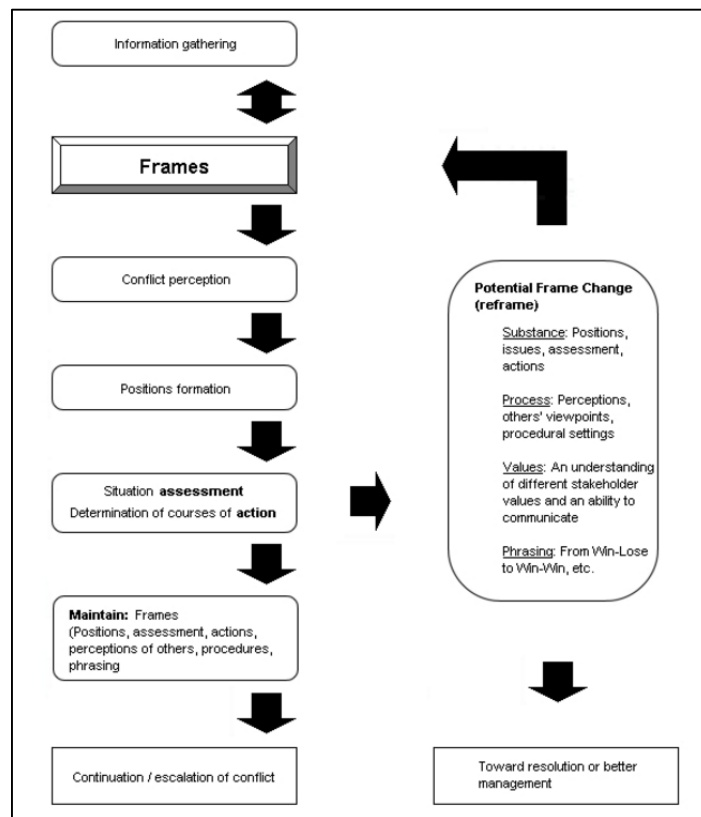


Mediator Role in Integrative Negotiations

The mediator's role throughout the process of negotiation is to encourage a collaborative dynamic that will lead to a better understanding among the parties and, ultimately, a mutual agreement. A mediator can do this by clearly defining and framing the steps to a

collaborative agreement.⁷¹ There are certain communication techniques the mediator should use to lead the conversation away from becoming polarized on certain issues. One such tactic is reframing, which shifts the language used when discussing a topic the parties cannot seem to agree on, allowing them to see it from a new perspective (see Figure 5).⁷² When the mediator guides participants to new understandings, transformations in the negotiation take place, which align interests and improve current and future relationships that will ultimately lead to collaboration.⁷³

Figure 5: Frames and Their Role in Conflict Development⁷⁴



Source: Kaufman, Elliott and Shmueli (2003)

Note: Figure 5 illustrates how a reframing may cause a shift in conflict development, including: substance (reframing that affects how one views the world today or potential future states), process (reframing that affects how one interacts with others in the dispute), values (reframing that allows parties to clarify the relationship between values and interests for both themselves and for other parties), and phrasing (the language used by disputants to communicate with one other).

Benefits of the Integrative Negotiation Process

Because the integrative processes used by mediators to guide the negotiation allow for new understandings, many feel the participants benefit from the process of negotiation in more

ways than just reaching an agreement.⁷⁵ Participants often feel the process of a guided negotiation is more time efficient and cost effective than alternative processes such as litigation. Additionally, by participating in mediation, many feel as though they are better prepared to resolve conflicts by negotiation in the future.⁷⁶ Future; by aligning interests, participants can improve relationships to allow for sustainable agreements that can adapt in the future.⁷⁷

In Consideration of the Environment

The process of negotiation often times is less favorable for the environment and those representing it. Biases against the environment are difficult to avoid throughout the process of negotiation. Although it is the goal of the mediator to create a power neutral atmosphere during a negotiation, because environmentalists often times have fewer resources, the power often leans towards the side of developers. This allows for representatives of the environment to be more easily swayed into giving more than other parties. There is also an inherent definitional bias against the environment. Based on the fact that negotiations are taking place, the ruling is inherently against the environment.⁷⁸ Because of these biases, and the ultimate goal of improving environmental quality, the mediator themselves must be more involved in representing environmental interests throughout the negotiation process.⁷⁹

Notes

⁶⁷ “Bureau of Land Management National Natural Resources Policy for Collaborative Stakeholder Engagement and Appropriate Dispute Resolution,” Bureau of Land Management, accessed November 15, 2016, http://www.blm.gov/style/medialib/blm/wo/Planning_and_Renewable_Resources/adr_conflict_prevention.Par.44228.File.dat/ADR.pdf

⁶⁸ Ibid., 12

⁶⁹ Ibid., 63-77

⁷⁰ Roger Fisher and William Ury, “ Chapter 3: Yes, But...” in *Getting To Yes: Negotiating Agreement without Giving In* 3rd Edition. (New York: Penguin Books).

⁷¹ “Bureau of Land Management.”

⁷² Linda L. Putnam, "Communication as Changing the Negotiation Game," *Journal of Applied Communication Research* 38(4): 325-335. Accessed November 15, 2016.

⁷³ Putnam 2004 pg. 276

⁷⁴ Borrowed from: Sanda Kaufman, Michael Elliott, and Deborah Shmueli. "Frames, Framing, and Reframing." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. September 2003.

⁷⁵ B Leonard G. Buckle and Suzann R. Thomas-Buckle, "Placing Environmental Mediation in Context: Lessons from "Failed" Mediations," in *Environmental Impact Assessment Review* 6 (1): 55-70, accessed November 16, 2016.

⁷⁶ *Ibid.*, 65-66

⁷⁷ Tony Foley, "Environmental Conflict Resolution: Relational and Environmental Attentiveness as Measures of Success," in *Conflict Resolution Quarterly* 24 (4): 485-501 accessed November 16, 2016

⁷⁸ Douglas J. Amy, "The Politics of Environmental Mediation," in *Ecology Law Quarterly* 11 (1): 1-19, accessed November 16, 2016.

⁷⁹ Jennifer Gerada Brown, "The Politics of Environmental Mediation," in *Ecology Law Quarterly*, 11 (1) 1-19, accessed November 16, 2016.

Phase 3: Implementation



Introduction: Implementation

By Paul Mullen and MaryKate Flanagan

From the beginning of negotiations and throughout the process, participants shift focus from simply reaching an agreement to long-term, sustainable impacts of how the agreement will be implemented in cultures, communities and the environment. Many environmental conflict resolutions fall apart during the implementation stage, despite constructing the terms of a mutual understanding with great thought and desire for successful execution. Sustainable implementation of the agreement must be the end goal, as its longevity and application is imperative to success, both for the participants and the environment. The agreement is just the beginning: conflicts are not fully resolved until the parties commit to continuing the implementation process beyond the negotiated terms to create intrinsic worth, tangible results, and a bequest value that reaches far beyond the scope of the mediation, and into future relationships.

Implementation: Aspects of Agreement and Time-Frames

By MaryKate Flanagan, Sandra Lee, Paul Mullen, and Jayton Rainey

Implementation involves carrying out the concrete agreements made in the negotiation process. These agreements include information on the timeframe of administration of the resolution, responsibilities of each party, and any other aspect which has a measurable and achievable goal to resolve the initial issue which brought the parties together. Compliance with implementation is “whether or not penalties and fines had been paid promptly; and whether or not other settlement conditions, such as restoration work or further studies, were completed as agreed to”.⁸⁰ While implementation is clearly an important stage in mediated negotiation, it does not always proceed in a defined way. There are a number of factors, including the binding nature of agreement, the emergence and maintenance of relationships in the negotiation process, the establishment of accountability, and the time frame for compliance. These factors shape the success of implementation.

Binding and Non-Binding Agreements

Mediators should be aware of the difference between binding versus non-binding agreements. The mediation decision must be made at the beginning and approved by the courts and the AEC (associate enforcement counsel).⁸¹ Binding agreements are contracts bound by rules and typically contain set consequences for actions. Non-binding agreements are more flexible and typically hinge on the need for more information.

Successfully binding agreements require active language and clearly delineated responsibilities in order to have action enforced by the other parties within the negotiation. Clear goals and objectives provide an individualized foundation for both long term and short term plans. Objectives should be specific and measurable to achieve the highest rate of implementation.⁸² These objectives typically involve a combination of environmental and economic concerns which can be increased incrementally over the years either through the use of percent increase/decrease or flat number per year. This type of agreement is more favorable for parties which cannot make instantaneous changes to the regulated activity.⁸³ For example, a process after mediation is required to decrease emissions by ten percent each year until they have reached the required level. This allows the company to make small changes and remain in business.

Agreements are not implementable if the following are not present in negotiation: (1) the participation of the persons in authority for each party are involved and are in agreement, (2) that all information was given in a transparent way, and (3) the agreement translates correctly to the situation. All of these characteristics fall under the understanding that the process of the mediation was trustworthy and approached in good faith for all parties. This

is established early in the process, beginning with the conflict assessment, and reinforced during the negotiation. Successfully reaching an agreement, therefore, depends considerably on the integrity of the conflict resolution process as well as the relationships that have been established in the process.

Coal Mining in the Black Warrior River Basin

Grandfather clauses in ECR agreement can improve or inhibit the implementation of the agreement. They allow some already functioning under a rule or regulation to be exempt when revisions are made to the rule. Grandfather clauses are helpful because they can allow an agreement to be implemented earlier while giving others a time period to catch up. However, they can also allow for an agreement to be implemented without restricting those that are harming the environment the most. This is the case in Alabama where the Black Warrior River basin is being harmed by coal mining operations. A Nationwide Permit 21 is a blanket permit used by the U.S. Army Corps of Engineers to allow coal mining operations to dump unlimited amounts of mining spoils in to streams without those operations being individually reviewed by the Corps. When the permit was revised to only allow half of an acre of stream to be filled due to mining, the USACE included a grandfather clause. This clause allowed over 40 mines in Alabama alone to continue filling the stream without a limit for an additional 5 years. This could allow the filling of up to 27 miles of Alabama's streams that lead into the Black Warrior River Basin, a water source for many Alabama communities including Birmingham and Tuscaloosa. In this case a grandfather clause was used to make it seem like a change was being made while allowing negative impacts on the environment to continue.

For more details on this case, see Case Study 6 in the Appendix.

Relationships and Power

A narrow view of the mediator's role might not view implementation of an agreement as part of the mediator's success. However, if the mediator's purpose in mediation is to reach a settlement which both of the parties are willing to sign, then mediator must understand the critical nature of the emerging relationships between parties. The mediator's success may have a purpose that is focused on the resolution of the issue; in which case, the issue is not fully addressed until the implementation is complete. At that point it becomes the part of the mediator's job to establish terms of agreement which are reasonable and

measurable. The terms should outline the responsibilities of each party in terms that are agreed upon. The mediator does not propose a specific solution or resolution, rather “[t]he terms of the agreement are limited only by the interests and creativity of the parties”.⁸⁴ Mediators should keep in mind that implementation (and settlement) can be affected by many factors directly under the mediator’s initial conflict assessment, including number of parties, power equality, and age of the case.⁸⁵ The mediator also has a significant impact on the implementation in cases where the mediator continues to do periodic checks on the participants after the completion of the mediation.⁸⁶

For participants, the focus to have the best outcome to their own interest (cost and time). This may mean that they do not want to bear any of the burdens of responsibility or that they want a ‘fair’ or minimized amount. The implementation is unlikely to occur if the negotiation aims of ‘being heard’ or if the process was not viewed as positive. Evaluations on the wisdom of an agreement effect the perception of the validity of the agreement thus decreasing the likelihood of implementation. The agreements must “balance specificity and flexibility” in order to achieve a successful compliance for participants.⁸⁷ In addition, the implementation of policies following multiple stakeholder participation is higher, regardless of the real or perceived level of power which governmental agencies allow the other parties to possess.⁸⁸

The relationships that are established during the course of the mediation are fundamental to the ability to successful implementation. The establishment of working relationships with previously adversarial parties has significant influence over the participants’ perspective over the success of the mediation.⁸⁹ The continuation of these relationships, if continued beyond the mediation setting allows for adaptability to changes over time in the agreed settlement. One of the most effective ways to maintain open lines of communication to address adjustments is the creation of associations of collaborative. The collaborative should meet in regular intervals in order to surpass future points of disagreement. Collaborative are not only important for enduring relationships past the negotiation but also for ensuring accountability of multiple stakeholders.

Accountability

While government creates the legal and institutional bounds by which a conflict unfolds including distribution of authority and the legality of binding solutions, it cannot fully monitor individual projects without the support of the local community. Active local community involvement increases the success of enforcement. These stakeholders have a strong incentive to have projects completed in a manner which takes into consideration relevant site specific information and permanently addresses an issue. Peter Gallagher suggests that we can create oversight by “allowing for citizen submissions to joint committees on environmental matters.”⁹⁰ Implementation is facilitated by the community’s involvement.

Timeframe

The timeframe for compliance established within the negotiation process largely affects the success of implementation in terms of outcomes, particularly environmental consequences. Not only must the terms of the agreement be met, but in order for the process to be effective, it must be done in a timely manner, executed in a manner that does not do further harm, and must be a permanent solution. These elements are required in order to support environmental sustainability. The likelihood of achieving such goals are difficult to assess and study for future reference. Granted, mediators and stakeholders in a negotiation should aspire to reach an agreement that can be implemented in a timely manner, but the reality of achieving such agreements takes a new level of understanding and purpose.

Moving Forward

There is a clear need for more research on implementation and the challenges faced in implemented agreements that result from environmental conflict resolution. This may include gap analysis or specific examination of the differences between planned requirements, scheduling, budget, communications, and deviations from the agreed upon plan. There is also a need for more awareness among parties involved and the broad public regarding the challenges of implementation so that they may be effectively addressed. More attention is needed to identify the results of implemented agreements so that the outcomes may align with party interests and benefit the environment. Only then we will see an improvement in bequest value outcomes.

Implementation of the San Jacinto River Waste Pits Environmental Settlement

After more than five years of study, including public participation, expert evaluations, and scientific investigation, the U.S. Environmental Protection Agency decided to fully remediate the San Jacinto River Waste Pits, a national Superfund site located near The Highlands, Texas. The EPA and Corps of Engineers would work together to implement cleanup of dioxins at the site, with contingency planning for storms, floods, and other meteorological events. The COE would remediate in sections with sheetpiles around the polluted areas, removing contaminated soil and backfilling. The EPA would monitor, measure, and report on environmental progress of the cleanup efforts.

Successful Environmental Conflict Resolution sets performance targets, measures them, and holds the parties accountable for timely implementation of the agreement. In this particular conflict, it would be valuable to bring in an independent evaluator or third party project manager to utilize methodologies in benchmarking, knowledge

management, and process improvement. Monitoring project performance serves as a reporting tool for the government agency and stakeholders. Tangible, measurable, quantifiable results report on the impacts of remediation.

After reaching a negotiated agreement, the implementation or evaluation phase begins with a post assessment report to identify ongoing issues to monitor, keep remediation on track, and communicate any adjustments or revisions of plan. Stakeholders should continually be consulted for their interests and experience. Interviews and surveys are among evaluation tools to consider when gauging views on implementation progress. Daily, weekly, or monthly reports on operations can determine “real-time” process changes during implementation. A formal review of remediation strategies should be conducted if structural issues arise that were not anticipated in the planning stages.

The focus of post assessment is a gap analysis, which examines the differences between planned requirements, scheduling, budget, and communications; as well as any deviations from plan, a timeline of events as they happen, and why modifications are necessary. Dissemination of information between stakeholders is essential throughout the entire implementation process.

A timeline for implementation of the remediation agreement would contain the following measures:

- Retention of an independent evaluator
- Defining the beneficiaries of the implementation project (including the environment)
- Continual data gathering via questionnaires, sampling, administration, and surveys
- Ongoing gap analysis throughout the remediation project: reviewing original objectives; documenting current performance indicators; comparing original objectives to actual results; documenting positive and negative results from stakeholder feedback and lessons learned; and recommending changes/improvements/alternatives

For more details on this case, see Case Study 7 in the Appendix.

Notes

⁸⁰ Neil G. Sipe, “An Empirical Analysis of Environmental Mediation,” *Journal of the American Planning Association* 64:3 (1998), 275-285

⁸¹ Frank P. Grad, "Alternative Dispute Resolution in Environmental Law," *Columbia Journal of Environmental Law* (1989), 14(1): 157-185

⁸² Samuel D. Brody (2008). *Ecosystem Planning in Florida: solving regional problems through local decision making*. Hampshire, England: Ashgate Press. p. 44

⁸³ Rosemary O'Leary and Susan Raines, "Lessons Learned from Two Decades of Alternative Dispute Resolution", *Public Administration Review* 61.6 (2001): 682-692

⁸⁴ Bureau of Land Management. (October 2009). *National Natural Resources Policy for Collaborative Stakeholder Engagement and Appropriate Dispute Resolution*. Retrieved from:
http://www.blm.gov/style/medialib/blm/wo/Planning_and_Renewable_Resources/adr_conflict_prevention.Par.44228.File.dat/ADR.pdf

⁸⁵ Sipe "Empirical Analysis", p.281

⁸⁶ Sipe "Empirical Analysis", p. 283

⁸⁷ Bonnie G. Colby, "Economic Characteristics of Successful Outcomes," in *The Promise and Performance of Environmental Conflict*, ed. Rosemary O'Leary et. al. (Washington DC: Resources for the Future, 2003), 301-328.

⁸⁸ Douglas J. Amy, "The Politics of Environmental Mediation," *Ecology Law Quarterly*. 11(1): 1-19.

⁸⁹ Leonard G. Buckle and Suzann R. Thomas-Buckle, *Placing environmental mediation in context: lessons from "failed" mediations*. *Environ Impact Assess Rev* 1986; 6 (3):55-70.

⁹⁰ Peter Gallagher and Yse Serret, "Implementing Regional Trade Agreements with Environmental Provisions: A framework for Evaluation." *OECD Trade and Environment Working Papers* (2011/06): 439-58. Accessed November 6, 2016. doi 10.1787/5kg3n2crpxwk-en

Sustainability of Agreements in Environmental Conflicts

By Emily Fucile Sanchez and Laura Stearns

Longevity of the agreement in environmental conflict resolution (ECR) is often overlooked yet critical to success. A sustainable agreement is a formal or informal agreement that combines the economic, social, and environmental aspects, with the purpose of supporting future business, fundamental rights, and environmental protection.⁹¹ Environmental conflicts are inherently complex, involving multiple layers and large time scales, and the longevity of an agreement must involve sustainability. Sustainability refers to “meeting the needs of the present without compromising the ability of future generations to meet their own needs”,⁹² and can be measured in three different ways: social, economic, and environmental. While the environment is an inherent stakeholder and its sustainability is a fundamental goal of ECR, successful resolution cannot be accomplished without encompassing social and economic longevity.⁹³

Sustainability

There are three aspects to consider when evaluating the longevity of agreements that resolve environmental conflicts. The first is *social sustainability* is to function at a defined level of social well-being.⁹⁴ One of the major reasons for using alternative dispute resolution (ADR) is because of its ability to create strong relationships among parties that lead to more lasting agreements. The process of ECR has been said to “empower individuals and groups to reclaim their voices, increase their self-esteem, democratize their neighborhoods, involve the disenfranchised in policy deliberations, and create new social or governing structures”. Agreements can result in “structural or institutional change” within society based on participation in an agreement.⁹⁵

Economic sustainability is the second sustainability dimension to consider is, which refers to the ability to support a defined level of economic production.⁹⁶ Economic accountability is the most critical aspect for reaching environmental sustainability. If the agreement fails to be financially feasible, then the environmental goals, cannot be accomplished.⁹⁷ This is why it is important that ECR “directs the use of public money and agency staff toward more effective dispute resolution.”⁹⁸ Within ECR, it is beneficial to use an economic advisor to model various scenarios and to estimate their costs, benefits, and financial implications. ECR has long been used in lieu of litigation because of its lowered financial responsibility. “After stakeholders solve a conflict through multi-party negotiations, one would expect

subsequent disputes to be solved with lower cost problem solving than would occur after resolving an earlier conflict through litigation.”⁹⁹

Environmental sustainability is the final and perhaps most critical dimension of sustainability. It refers to the use and enjoyment of our environmental resources in ways that do not compromise the ability of future generations to use and enjoy the same (or ideally improved) resources. This includes the ability to maintain rates of renewable resource harvest, pollution creation, and non-renewable resource depletion that can be continued indefinitely.¹⁰⁰ Environmental resources have multiple and at times conflicting, values depending on the perspective taken. They include, but not limited to, economic, social, ecological, and intrinsic value. The use of these resources and proper management can cause ethical dilemmas with regards to: popular sovereignty, equity, political equality, intergenerational equality, intergenerational fairness, and intrinsic values of nature.¹⁰¹ Governing the proper use of environmental resources, therefore, requires creative solutions to emerge from the conflict resolution process, which is possible with ECR. Environmental Conflict Resolution cases typically involve multiple parties; this creates more information by which “solutions can be more creative and synergistic.”¹⁰² Collaborative processes can produce better agreements that have more adaptive management ideas, and “scholars and mediators argue that inclusive, consensual solutions to environmental problems are more environmentally sustainable.”¹⁰³

Lakeview Biomass Oregon Solutions Project

The Lakeview Biomass project assisted local collaborators in achieving ecological restoration goals by creating the necessary relationships and supply agreements to support the development of a biomass power facility associated with the existing Collins Company sawmill in Lakeview, Oregon. The project also helped persuade the Collins Company to retool their sawmill to better handle the smaller-diameter timber that flows from restoration projects as well as creating a biomass facility for green energy and job creation.

Thoughts on sustainability and agreement longevity: This case encapsulates all criteria of agreement longevity and environmental sustainability. Because the Spotted owl had previously been put on the endangered species list many of Lakeview’s citizens lost their jobs. The forest was no longer being kept which was leading to disease and fire and there was an abundance of biomass created by harvesting the invasive Western Juniper. This project combated all of these problems successfully by taking into consideration the economy: by

creating jobs and a new energy source, the environment: by creating the Lakeview stewardship group to maintain the forest and the biomass plant to reduce their carbon footprint, and society by thinking about long term intergenerational effects of excess carbon as well as establishing lasting relationships with federal and local governments, business and private citizens. This agreement also took into consideration future needs and made the agreement flexible with plans to continue meeting and collaborating.

For more details on this case, see Case Study 8 in the Appendix,

Agreement Flexibility

To create agreements that will last into the future, not only must the multiple aspects of sustainability be considered, the adaptability of the agreement is critical. Agreement flexibility refers to “the ability of the dispute resolution outcome to withstand changing conditions and unexpected events.”¹⁰⁴ Decisions made regarding natural resources, must be able to adapt to changing conditions in order to be environmentally sustainable. Because ECR involves multiple parties, more information can be acquired and shared, allowing for more environmentally informed decisions. Also, because parties are exposed to collaborative processes throughout negotiations, they are more likely to agree on adaptive management techniques.¹⁰⁵

In Consideration of the Environment

Although the environment is a key stakeholder in ECR, it has a tendency to be underrepresented.¹⁰⁶ Dispute resolution tends to favor business interests because they are tangible. Some may even argue that there is an ethical dilemma in ECR purely by coming to the table because environmental stakeholders are initially willing to give up intrinsic (non-instrumental) value through negotiations. This makes the scope of environmental sustainability within ECR a difficult concept to gauge. How do we ensure that the environment is fully represented? How do we give a voice to those who cannot speak for themselves?

“If the parties involved in environmental mediation reach an agreement, but fail to maximize the joint gains possible, environmental quality and natural resources will actually be lost. If the key parties involved in an environmental dispute reach an agreement with which they are pleased, but fail to take account of all impacts on those interests not represented directly in the negotiations, the public health and safety could be seriously

jeopardized. If the key parties to a dispute reach an agreement, but selfishly ignore the interests of future generations, short term agreements could set off environmental time bombs that cannot be defused”¹⁰⁷

Some argue that mediators cannot be neutral in environmental conflicts.¹⁰⁸ However, they must be the champion for our ecosystems, diverse biological species, and future generations. Critics contend that it is incumbent on environmental groups and the public to support and defend environmental causes when conflict arises. Regardless, it is certain that the stakes are high. We must find ways to creatively engineer solutions to environmental conflicts that do not silo interests into social, economic, and environmental domains. We must begin a cultural shift in thinking where the environment is integrated into our society and economy in ways that promote environmental sustainability and longevity of ECR agreements. This would ensure true success of environmental conflict resolution.

Notes

⁹¹ Yann Queinnec, Sustainable Contracts. Accessed from: <https://business-humanrights.org/sites/default/files/reports-and-materials/Sherpa-on-sustainable-contracts-Jan-2010.pdf>

⁹² Report of the World Commission on Environment and Development. United Nations. 1987. Accessed from: <http://www.un.org/documents/ga/res/42/ares42-187.htm>

⁹³ Queinnec, Sustainable Contracts, 4

⁹⁴ “Today’s Challenges: Sustainability,” Walker Industries, accessed November 16, 2016

<https://www.feicanada.org/ajaxfilemanager/uploaded/2016%20Conference/Tim%20Murphy%20Walker%20Industries.pdf>

⁹⁵ Juliana E. Birkhoff and Kem Lowry, “Whose Reality counts,” in *The Promise and Performance of Environmental Conflict Resolution*, ed. Rosemary O’Leary and Lisa B. Bingham (Washington: Resources for the Future, 2003) 31

⁹⁶ Young-Seuk Park and Sovan Lek, “Global challenges and sustainable ecosystem management,” in *Advanced Modeling Techniques Studying Global Changes in Environmental Sciences*, ed. Young-Seuk Park et al. (Amsterdam: Elsevier, 2015), 2

⁹⁷ Bonnie G. Colby, "Economic Characteristics of Successful Outcomes," in *The Promise and Performance of Environmental Conflict Resolution*, ed. Rosemary O'Leary and Lisa Bingham (Washington: Resources for the Future, 2003) 308

⁹⁸ Colby, "Economic Characteristics of Successful Outcomes," 302

⁹⁹ *Ibid.*, 311

¹⁰⁰ Belarus Minsk, *Glossary of Life-course Terms: WHO European Ministerial Conference on the Life-course Approach in the Context of Health 2020* (UN City: WHO Regional Office for Europe, 2015), 7

¹⁰¹ Heidi Wittmer, "How to select instruments for the resolution of environmental conflicts?," *Land Use Policy* 23(2006): 3

¹⁰² Juliana E. Birkhoff and Ken Lowry, "Whose Reality Counts?" in *The Promise and Performance of Environmental Conflict Resolution*, ed. Rosemary O'Leary and Lisa B. Bingham (Washington: Resources for the future, 2003), 32.

¹⁰³ *Ibid.*

¹⁰⁴ Bonnie G. Colby, "Economic Characteristics of Successful Outcomes," in *The Promise and Performance of Environmental Conflict Resolution*, ed. Rosemary O'Leary and Lisa B. Bingham (Washington: Resources for the Future, 2003), 309.

¹⁰⁵ Colby, "Economic Characteristics of Successful Outcomes," 310

¹⁰⁶ Douglas J. Amy, "The Politics of Environmental Mediation," *Ecology Law Quarterly* 11(1983): 3

¹⁰⁷ Lawrence Susskind, "Environmental Mediation and the Accountability Problem," 6 *VT. L. REV.* 1,7-8 (1981).

¹⁰⁸ Amy, Douglas, "The Politics of Environmental Mediation." *Ecology Law Quarterly*, 11(1): 1-19 (1983).

¹⁰⁰ Susan Todd (2001). "Measuring the Effectiveness of Environmental Dispute Resolution." *Environmental Assessment Review*, 97-110.

Concluding Thoughts

By Emily Fucile Sanchez and Bobbye Leigh Morgan

Success in Alternative Dispute Resolution has consistently been unclear in literature and case studies, considering its relative infancy in its inception. The aim of this Guidebook was not to define success, but rather to show the steps for achieving a successful negotiation process. Each position, participants, mediators, and the environment, must cooperate in an effective and efficient manner while adhering to the case-specific outline and the discussed negotiation standards of this review. The problem of a win/lose situation that is typical to litigation is that the environment is rarely taken into account or is merely a by-product of the court's ruling. Environmental Conflict Resolution is considered to be successful in this light, given ECR allows for an equal voice for this underrepresented participant.

A successful Conflict resolution is often case dependent, however facets of Environmental Conflict Resolution such as a pre-negotiation conflict assessment, collaborative fact-finding, and building relationships make mediation more effective. Although a mutually beneficial agreement and sustainable implementation is ideal, according to Susan Todd, an expert in measuring the effectiveness and success of ECR posits that:

The word "success" generally denotes something unambiguous and near-perfect - an effort is either a successful or it is not, and there is little room to equivocate. The word "effectiveness," on the other hand, is less black and white. It connotes something that is adequate and useful, but not necessarily perfect¹⁰⁰

While this guidebook takes into consideration many authors points of views, research, and the opinions and knowledge of its authors, it is important to continue research and further comprehension of successful and effective steps for Environmental Conflict Resolution.

References

- Beck, Connie J. A. "Defining and Evaluating Success in Environmental Conflict Resolution." In *Braving the Currents*, edited by Tamra Pearson d'Estree and Bonnie G. Colby, 15-54. New York: Springer, 2004.
- Birkhoff, Juliana E. and Kem Lowry. "Whose Reality Counts?" In *The Promise and Performance of Environmental Conflict Resolution*, edited by Rosemary O'Leary and Lisa B. Bingham, 27-52. Washington: Resources for the Future, 2003.
- Brody, Samuel D. *Ecosystem Planning in Florida: solving regional problems through local decision making*. Hampshire, England: Ashgate Press, 2008.
- Brown, Jennifer Gerada. "Ethics in Environmental ADR: An Overview of Issues and Some Overarching Questions." *Valparaiso University Law Review* 34(2000): 403-421.
- Buckle, Leonard G. and Suzann R. Thomas-Buckle. "Placing environmental mediation in context: Lessons from 'failed' mediations." *Environmental Impact Assessment Review* 6(1986): 55-70.
- Bureau of Land Management. "National Natural Resources Policy for Collaborative Stakeholder Engagement and Appropriate Dispute Resolution." Accessed November 15, 2016. Retrieved from: http://www.blm.gov/style/medialib/blm/wo/Planning_and_Renewable_Resources/adr_conflict_prevention.Par.44228.File.dat/ADR.pdf
- Bureau of Land Management. "Bureau of Land Management National Natural Resources Policy for Collaborative Stakeholder Engagement and Appropriate Dispute Resolution." Accessed November 15, 2016. Retrieved from: http://www.blm.gov/style/medialib/blm/wo/Planning_and_Renewable_Resources/adr_conflict_prevention.Par.44228.File.dat/ADR.pdf
- Colby, Bonnie G. "Economic Characteristics of Successful Outcomes." In *The Promise and Performance of Environmental Conflict Resolution*, edited by Rosemary O'Leary and Lisa Bingham, 301-328. Washington: Resources for the Future, 2003.
- Douglas, Amy J. "The Politics of Environmental Mediation." *Ecology Law Quarterly* 11(1983): 1-19.
- Dukes, E. Franklin. "What We Know About Environmental Conflict Resolution: An Analysis Based on Research." *Conflict Resolution Quarterly* 22(2004): 191-220.
- Elliott, Michael L. Poirier. "The Role of Facilitators, Mediators, and Other Consensus Building Practitioners." In *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement*, edited by Lawrence E. Susskind and Sarah McKearnen, 199-238. Thousand Oaks, CA: Sage Publications, 1999.

- Emerson, Kirk, Tina Nabatchi, Rosemary O'Leary, and John Stephens. "The Challenges of Environmental Conflict Resolution". In *The Promise and Performance of Environmental Conflict Resolution*, edited by Rosemary O'Leary and Lisa B. Bingham, 3-26. Washington, D.C.: Resources for the Future, 2003.
- Fisher, Roger and William Ury. *Getting to Yes: Negotiating Agreement without Giving In* (3rd Edition). New York, NY: Penguin Books, 2011.
- Gallagher, P, and Y. Serret. "Implementing Regional Trade Agreements with Environmental Provisions: A framework for Evaluation." *OECD Trade and Environment Working Papers* (2011): 439-58.
- Grad, Frank P. "Alternative Dispute Resolution in Environmental Law." *Columbia Journal of Environmental Law*, 14(1989): 157-185.
- Karl, Herman A., Lawrence E. Susskind, and Katherine H. Wallace. "A Dialogue, Not a Diatribe: Effective Integration of Science and Policy through Joint Fact Finding." *Environment: Science and Policy for Sustainable Development* 49(January/February 2007): 20-34.
- Kramer, Roderick M. and David M. Messick. *Negotiation as a Social Process*. Thousand Oaks, CA: Sage Publications, 1995.
- Lewicki, Roy J., Bruce Barry, and David M. Saunders. *Essentials of Negotiations* (6th Edition). New York, NY: McGraw-Hill Education, 2015.
- Minsk, Belarus. "Glossary of Life-course Terms." *WHO European Ministerial Conference on the Life-course Approach in the Context of Health 2020* (2015): 7.
- Moore, Christopher W. *The Mediation Process: Practical Strategies for Resolving Conflict* (4th Edition). San Francisco, CA: Jossey-Bass, 2014.
- Moore, Susan A. "Defining 'Successful' Environmental Dispute Resolution: Case Studies from Public Land Planning in the United States and Australia". *Environmental Impact Assessment Review*, 16(1996): 151-169.
- O'Leary, Rosemary, and Lisa Bingham. *The Promise and Performance of Environmental Conflict Resolution*. Washington, DC: Resources for the Future, 2003.
- O'Leary, Rosemary and Susan Summers Raines. "Lessons Learned from Two Decades of Alternative Dispute Resolution Programs and Processes at the U.S. Environmental Protection Agency." *Public Administration Review* 61(2001): 682-692.
- Orr, Patricia J., Kirk Emerson, and Dale L. Keyes. "Environmental Conflict Resolution Practice and Performance: An Evaluation Framework". *Conflict Resolution Quarterly* 25(2008): 283-301.

- Park, Young-Seuk and Sovan Lek. "Global challenges and sustainable ecosystem management." In *Advanced Modeling Techniques Studying Global Changes in Environmental Sciences*, edited by Young-Seuk Park, 2. Amsterdam: Elsevier, 2015.
- Peck, S. *Planning for Biodiversity: Issues and Examples*. Washington DC: Island Press, 1998.
- Priscoli, Jerome Delli and Aaron T. Wolf. *Managing and Transforming Water Conflicts*. New York, NY: Cambridge University Press, 2009.
- Putnam, Linda L. "Communication as Changing the Negotiation Game." *Journal of Applied Communication Research*, 38(2010): 325-335.
- Queinnec, Yann. "Sustainable Contracts." Accessed December 11, 2016. Retrieved from: <https://business-humanrights.org/sites/default/files/reports-and-materials/Sherpa-on-sustainable-contracts-Jan-2010.pdf>.
- Report of the World Commission on Environment and Development. United Nations. Accessed December 11, 2016. Retrieved from: <http://www.un.org/documents/ga/res/42/ares42-187.htm>
- Siegel, Joseph A. "Alternate Dispute Resolution in Environmental Enforcement Cases: A Call for Enhanced Assessment and Greater Use." *Pace Environmental Law Review* 24(2007): 187-209.
- Sipe, Neil G. "An Empirical Analysis of Environmental Mediation." *Journal of the American Planning Association* 64(1998): 275-285.
- Susskind, Lawrence. "Environmental Mediation and the Accountability Problem." *Vermont Law Review* 6(1981).
- Susskind, Lawrence E. and Jennifer Thomas-Larmer. "Conducting a Conflict Assessment." In *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement*, edited by Lawrence Susskind, Sarah McKearnan, and Jennifer Thomas-Larmer, 99-136. Thousand Oaks, CA: Sage Publications, 1999.
- Todd, Susan. "Measuring the Effectiveness of Environmental Dispute Settlement Efforts". *Environmental Impact Assessment Review*, 21(2001): 97-110.
- Wittmer, Heidi. "How to select instruments for the resolution of environmental conflicts?" *Land Use Policy* 23 (2006): 3.
- Wondolleck, J. M., & Yaffee, S. L. *Making collaboration work: Lessons from innovation in natural resource management*. Washington, D.C.: Island Press, 2000.

Appendix: Case Studies



Case Study 1: Virginia Transportation Reformation Projects

By Elle Harmon

Conflict History

As we know, growth of any kind is pretty much inevitable at this point. Virginia is trying to come up with a plan for “Action” introduced by SLEC (Southern Environmental Law Center) to completely alter the way people use transportation. There are several main goals, one being to prevent wasteful transportation projects that could potential further destroy natural habitats and resources. There is also the desire to implement more public, cleaner and more efficient transportation as well as to improve current structures. They would also like to provide an incentive for people to use efficient vehicles and incentivize exploration for cleaner fuel sources.

SLEC has acknowledged the inadequately planned developments and other constructional road projects that are an enormous threat to scenic landscape as well as quality of life that southern states have grown so accustomed to. Another main objective is to avert urban sprawl and make sure the city expands in an intelligently sustainable and manageable way. This displays real world and real time issues that future generations will be having to face more frequently as the human population only continues to grow. SLEC has come up with their own version of a pre-negotiation assessment that clearly identifies their main objectives for a plan of action.

This case has many intricate parts but has revolves around working with the community and stakeholders. SLEC is aware that there is a terrible problem with traffic congestion and the citizens of Virginia, and the surrounding areas, may be willing to work with this proposal since it would reduce traffic, improve air quality and minimize the risk for health hazards. According to the report, the “Commonwealth and the federal government are conducting Tier 2 environmental impact statement (EIS), a study is underway in cooperation with North Carolina to complete the Tier 2 EIS for high speed rail between Richmond and Raleigh, and the Tier I EIS for high speed rail between Richmond and Hampton Roads is being finalized.” If Virginia and North Carolina, in conjunction with the VA/NC High Speed Rail Compact, recently chaired by Senator John Watkins, continue to build out their intercity rail as planned, this will create an estimated 228,000 jobs and generate \$30 billion back in to the Virginia economy. In 2011 when the issue started to surface, there was a significant challenge on how to get the funding for this project. The plan is stated as, “Over the next six years, Virginia needs \$119 million to continue the operation of its six roundtrip regional trains, and for passenger rail infrastructure improvements in the current plans.” This up and coming year will mark the final lap for

Virginia on trying to collect funding. Hopefully the state will start to see actual progression and implementations for these regional passenger trains can get underway.

Characteristic of the Conflict

In a press release from October of 2013, SLEC made a point to address the effects and potential destruction of the Highway proposals and “Outer Beltway” projects that are a threat to rural piedmont. Some of the potential effected areas include: damages of up to 450 acres of wetlands; storm runoff compound pollution from the Chesapeake Bay compound pollution problems in the Chesapeake; Increased exhaust and pollution from excess vehicles in the area that are already in violation with federal air quality standards.; Vital historic resources such as the Manassas National Battlefield Park and the Fredericksburg and Spotsylvania National Military Parks; and lastly it is a heavy threat on the quality of the drinkable water supply for the Northern Virginia area. SLEC has come up with several thoughts on how to proceed in an efficient manner on solving the Route 29 traffic and air quality issues.

There was significant opposition from SLEC as well the Federal Highway Administration about the Charlottesville Bypass, which was revived in 2011. Additional environmental assessments needed to be conducted since the bypass did not meet the needs of the current Route 29 corridor. As of February 19th, 2014, the most recent update on this specific transportation issues in the state of Virginia, SLEC released another statement about the Charlottesville Bypass stating “With the County's opposition once again made clear, and with the federal government raising serious doubts about whether the proposal makes sense, the only rational decision for the state now is to nix the proposal once and for all and move forward with better solutions.” (Charlottesville Bypass) This is the last press statement that was released about the Charlottesville Bypass issue. The future and prosperity of Virginia is linked to effectively reducing the effects of traffic congestion as it hinders to the needs of the community and provides only obstacles for local citizens.

SLEC has come up with a myriad of better solutions for the Washington D.C and Virginia's Outer Beltway Projects, however, the one downfall to their solutions is that they lack a specific time-frame. The proposals in this case focus more about what the problems truly are and what needs to be fixed however, as discussed, these are the important beginning stages for any negotiation process. The topics on transportation matters for Virginia are not directly linked to one source, but instead encompass several important issues. Environmental conflict resolution has is a working system that has many parts that has the potential ability to lessen the harmful anthropogenic environmental impacts.

Application to ADR Tenets

Defining the key problems can be a challenging task and SLEC has laid out their main goals as well as their next steps and plans for actions. This case sets up for an initial conflict assessment, negotiations, information and fact finding, and a sense of trust between the

communities that the project spans. Incentivizing is an excellent way to get the community involved and provide transportation and land use planning to incentivize smarter population expansions and the prevention of urban sprawl. More people are likely to find alternatives to driving as the rural areas start to develop. Passenger rails in Virginia can maximize the energy efficiency and boost the internal economy. This case exemplifies the potential timelines in environmental conflict resolution, however, litigation is likely to be more time consuming.

By establishing train routes and alternate transportation solutions, the community has been able to come together by collaborating on the project, especially with the use of a public forum where individuals are able to express their concerns and opinions regarding the project. Using ECR is a way to include different groups and stakeholders in the decision-making process, making it more socially applicable than litigation. It is crucial, when dealing with multiparty environmental negotiations, that each party concisely defines their major issues. This case epitomizes environment conflict resolution because it creates a blueprint for timelines, relationship building, environmental, social, and economic impediments.

References

1. "Improving Route 29 in Charlottesville | Southern Environmental Law Center." Southern Environmental Law Center. Accessed December 06, 2016. <https://www.southernenvironment.org/cases-and-projects/charlottesville-29-bypass-va>.
2. "Transportation Reform in Virginia | Southern Environmental Law Center." Southern Environmental Law Center. Accessed December 06, 2016. <https://www.southernenvironment.org/cases-and-projects/transportation-reform-in-virginia>.
3. Daniel Plaugher, and Trip Pollard. "The Case for Virginia's Regional Trains." Funding Passenger Rail. Accessed November 22, 2016. https://www.southernenvironment.org/uploads/publications/VA_Regional_Trains_Final_011912.pdf.
4. "Charlottesville Bypass Dealt Heavy Blow | Southern Environmental Law Center." Southern Environmental Law Center. Accessed December 06, 2016. <https://www.southernenvironment.org/news-and-press/press-releases/charlottesville-bypass-dealt-heavy-blow-1>.
5. Daniel Plaugher, and Trip Pollard. "The Case for Virginia's Regional Trains." The Foundation for the Future. Accessed November 22, 2016. <https://www.southernenvironment.org/uploads/publications/varegionaltrains.pdf>

Case Study 2: Oil and Fishing Industries Negotiate: Mediation and Scientific Issues

By Paul Mullen

Conflict History

In the early 1980's new oil reserves were being discovered off the coast of California. In 1983 as the offshore exploration industry grew, conflict arose between the oil industry and the local commercial fishermen. The conflict was over increased water traffic in the area and acoustic signals, produced by the seismic exploration vessels which the fishermen claimed to disperse fish, and damage eggs and larvae. Oil exploration involves seismic testing vessels to conduct very fine grid-like patterns, daily charter for these seismic vessels often exceed \$35,000. While the seismic testing vessels are conducting surveys often times the fishermen are trawling. If a seismic vessel is on its predetermined course and a fisherman is also on the same course there may be a problem. The problem is that the seismic vessel is on a very strict course and its being paid a large amount of money for the survey, if the seismic vessel alters course it may not collect the required data, which could result in costing the oil company more money. If the fisherman alters his course he might not catch fish thus costing him valuable time and opportunity. If the seismic vessel and the fishermen intersect course the fishermen risk damaging or losing their fishing gear and losing valuable fishing time, the seismic vessel risks damaging valuable acoustic equipment or valuable testing time.

Offshore supply vessels tending to the oil rigs off the coast often take the shortest and most direct course to the rig to save time and fuel however, by taking the most direct course the supply vessels would cross productive fishing sites. As the supply vessels crossed productive fishing sites they would scare away the fish for the fishermen.

The local fishermen observed that there were changes in the fishery and thought that the changes were due to the acoustic testing methods used by the exploration vessels. The fishermen claimed that acoustic testing methods dispersed schools of fish, damaged eggs and larvae thus destroying the future of the fishing industry.

Characteristics of the Conflict

The parties involved were Morro Bay Commercial Fishermen's Association, California Coastal Commission, California State Lands Commission and Oil companies (ARCO, Champlin, Chevron, Exxon, Getty, Gulf, Occidental, Pennzoil, Phillips, Texaco, Union and Shell).

Initially a public meeting was held for the oil industry and the fishermen however, the meeting was unlikely to contribute to the settlement. Two mediators Jim Arthur and Alana Knaster suggested that the two parties arrange a private meeting where they could deal

directly with each other. Over a course of three months the mediators managed to get the two industries to agree upon a process, place and agenda in order to conduct a negotiation.

After the first day of negotiations three people from each industry were selected to represent their industry in a joint committee. The committee addressed at sea issues, drafted up a design to facilitate communication between the industries and formed a seismic subcommittee to consider research needs regarding the impact of seismic testing of the fishery.

To address the vessel traffic in the area a liaison office was formed where fishermen could tell the office where the best fishing locations were without the liaison office telling other fishermen where the best fishing areas were. Similarly, for the oil industry, they could tell the liaison office where they anticipate to find oil without giving away valuable information to other oil companies. “The Vessel Traffic Agreement” was drafted which established specific routes for supply vessels in the Santa Barbara channel. As a result of “The Vessel Traffic Agreement” loss of gear and interference with unpredicted boat traffic has nearly been eliminated.

The seismic subcommittee agreed that they needed more information in order to determine if seismic testing was a problem. A two-step process was put in place, first, they would see if it was possible for seismic testing to disperse fish and if so more research would be conducted. To conduct research a science panel was formed of highly recognizable scientists. The scientists agreed that more research was required as low frequency sound waves could possibly disperse fish. A separate committee called “The Eggs and Larvae Committee” was established to determine if acoustic signals impacted the eggs and larvae of commercial fish species. The scientists concluded that more research was also required for that study too.

Application to ADR Tenets

In order to satisfy the participants involved in the dispute, the well-being of the environment and to help the mediator conduct an efficient and cost effective dispute, a system needs to be put in place where the policy makers and the general public can use the specific scientific data collected in the best interest of the stakeholders freely. To ensure the best option for the environment and the participants is achieved a process called ‘Joint Fact Finding’ can be used. This involves the collaborative exchange of scientific analyses that are undertaken within the conflict resolution process and benefits all parties involved in the process. A well-designed, high-quality joint fact finding process ensures accessibility to all forms of knowledge by all stakeholders, thereby building trust—an essential condition for people to work together successfully.

In this particular case the joint committee and Liaison office worked together and built a relationship between the oil industries and the fishermen that allowed them to accept that they must live with each other. Since it was the conclusion of jointly appointed, well-respected scientists, the oil industry accepted the possibility of an impact, and agreed to

further research. The reputation and credibility of the scientists involved also helped legitimate both the research design and the findings. As a result of using scientific experts for joint fact finding, the best result for all parties are taken into consideration as parties cannot exploit the uncertainty in the data. To be effective and useful, scientific analyses should not be undertaken independently of the policymaking process.

As a result of the negotiation and fact finding the industries were able to come to an agreement and settle the conflict. The success of this dispute was largely due to the mediators Jim Arthur and Alana Knaster who helped the parties define their issues prior to negotiations. As a result the industries can work in harmony rather than hatred.

References

Cormick, Gerald W., and Alana Knaster. "Oil and Fishing Industries Negotiate: Mediation and Scientific Issues." *Environment*, December 1986, 6-15, 30.

Ehrmann, John R., and Barbara L. Stinson. "Joint Fact-Finding and the Use of Technical Experts." *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement*: 375-400. doi:10.4135/9781452231389.n10.

Herman A. Karl, Lawrence E. Susskind, and Katherine H. Wallace, "A Dialogue, Not a Diatribe: Effective Integration of Science and Policy through Joint Fact Finding," *Environment: Science and Policy for Sustainable Development* 49, no. 1 (January/February 2007): doi:10.3200/envt.49.1.20-34.

Case Study 3: The Coeur d'Alene Lake Management Plan

By Jayton Rainey

Conflict History

Sediments containing zinc, lead, and other dissolved metals are located around the bottom of Coeur d'Alene Lake from upstream mining and increased urbanization. The United States Environmental Protection Agency funded the process of revising the current Lake Management Plan (LMP) in 1998 to address the issues related to metals located in the lake sediments. The Coeur d'Alene Tribe and the State of Idaho were unable to reach an agreement on updating the Lake Management Plan. In 2005, the United States Institute for Environmental Quality partnered with the Environmental Protection Agency's Conflict Prevention and Resolution Center to cooperate with representatives from EPA Region 10, the Coeur d'Alene Tribe, and the State of Idaho Department of Environmental Quality to renegotiate the current LMP status for the lake. After an assessment conducted by a third-party mediator the Coeur d'Alene Basin citizens agreed that protecting the lake was of great importance, but methods of obtaining that protection were not unanimous. A draft Lake Management Plan was created where the public could present their comments and offer necessary funding. The Institute for Environmental Quality and the Tribe reached an agreement on a LMP draft in 2008 through successful negotiations. The Lake Management Plan was later signed in 2009 after the draft document was released to the public on June 24, 2008. The Otter Tribe signed the final Lake Management Plan in April 2009 and was reported from "*News from Indian Country*" (Indian Country News, 2009). A 5-year review of the plan and monitoring of water quality conditions are upheld within the Lake Management Plan.

Characteristics of the Conflict

Parties involved with this conflict included the United States Institute for Environmental Equality, Environmental Protection Agency Conflict Prevention and Resolution Center, representatives from EPA Region 10, the Coeur d'Alene Tribe, the State of Idaho Department of Environmental Quality, and the general public. The conflict first arose in 1983 after cleanup efforts from a local mining complex within the Coeur d'Alene Lake Basin. Potential human health risks were reported leading to the development of a management plan. Negative water quality reports from the lake in the early 1990's ultimately finalized the need for a management plan. A management plan was developed in 1995 with the assistance from the Clean Lakes Coordinating Council, DEQ, the Tribe, and advisory groups. This initial plan did not meet the needs for the lake to become more clean, and after of 7 years nothing was done to change the regulations. In 2004, the EPA attempted their own draft of the lake management plan and was not approved by the Tribe.

The tribe attempted their own draft of the lake management plan two years later and was not approved by the EPA. The relationship between these two organizations were extremely hostile and nothing would be agreed upon. Finally, a mediator was brought in by the EPA to settle the dispute in 2006. Within a year, the mediator identified the key issues throughout all associated parties and developed a rough draft of the revised lake management plan in early 2008. Once the rough draft was complete, the mediator published it allowing public participation to provide comments and/or special interests. A year later, 2009, the final lake management plan was put into effect. The plan identifies actions and resources required for successful management of the Coeur d'Alene Lake and the hazardous chemical producing businesses within the lake basin. The plan maintained the original plan to update and revise every five years to assess the progress of implemented goals and objectives.

Application to ADR Tenets

This case study example shows how the initial resolution may have flaws and that it is sometimes difficult for multiple parties to come together and revise their original document. Relationship building between each party proves to be an essential component when in a negotiating setting. The mediator brought in the public because they needed to be complete unbiased approaches to this issue. Public input provided a new stakeholder into the negotiation and was beneficial towards implementing the final plan. The mediator built a new, more collaborative plan in less time than it did for two opposite stakeholders developing their own individually. Identifying key stakeholders, relationship building, and proper communication between all parties allowed the completion and successful implementation of this management plan. The negotiation process improved working relationships and developed trust between the associated parties. This improved relationship and trust allowed the parties to hold quarterly meetings with multiple counties addressing issues pertaining the protection of the lake. Since its new implementation in 2009, scientists and locals have commended the results of this plan and have stated that improvements have already been made to the lakes quality.

References

Coeur d'Alene Lake Management Plan 2005-2009, U.S. Institute for Environmental Conflict Resolution Project Case Study

<https://www.udall.gov/OurPrograms/Institute/ProjectCaseSummary.aspx?Project=914>

Coeur d'Alene Lake Management Plan. 2009. State of Idaho Department of Environmental Quality.

Kramer, Becky. "DEQ Monitors Lake Coeur D'Alene's Water Quality." Spokesman.com. Web. 19 Nov. 2016.

Otter Tribe Sign Lake Coeur D'Alene Plan. Indian Country News. Web. 19 Nov. 2016.

Case Study 4: BLM Bridgeport Land Sale Mediation

By Bobbye Leigh Morgan

Conflict History

The Bridgeport Indian Colony (BIC) is comprised of a general membership of 117 community members across the United States that descend from the Indian Tribes of the Paiute, Miwok, Mono, Shoshone, and Washoe tribes. The Colony became a federally recognized sovereign Indian Tribe of California on 17 October 1974, which established their constitution and by-laws through the state of California. The Tribe receives governmental assistance in funding from federal, state, and local agencies to help provide for the socioeconomically progressive programs and services offered throughout the Bridgeport Colony and in partnership with their beneficiaries. However, they proclaim self-governance under their own customs to ensure self-sufficiency, reliance, and determination “for the common good and well-being of the Bridgeport Indian Tribe”, promoting “preservation, protection, conservation, assistance in health, education, welfare, and tradition” for all BIC members. Nevertheless, the Colony experienced a period of deficiency and subsequently created a restructured and sustainable plan of necessity in order to help rebuild their economy, support the native community, respect cultural values, and create a foundational framework for future development.¹

The Bridgeport Paiute Indian Colony is a federally recognized Indian reservation; and, although some colonies are established on public land, the Paiute Tribe owns the land they are settled on. Located in the Eastern Sierra Mountain Range in Northeastern California, fifteen miles from the Nevada border, and just outside the city limits of Bridgeport in Mono County, the Bridgeport Indian Colony, like most, “is a settlement closely intertwined with the economy of a city”.² As such, to redevelop and rebuild their colony, the Tribe gained interest during the 1980s in forty acres of land adjacent to Bridgeport owned and managed by the Bureau of Land Management (BLM). Years of attempts at land acquisition through means other than purchasing it directly from the BLM, specifically through administrative transfer, or “land exchange”, Recreation & Public Purpose Act sale, and legislative conveyance, proved unsuccessful and ineffective.³

Characteristics of the Conflict

Supervised by the U.S. Department of Interior, the Bureau of Land Management “administers 264 million acres of public lands, and manages the associated natural,

¹ Bridgeport Indian Colony. (2012). <http://www.bridgeportindiancolony.com>

² Report of the Secretary-General on enhancing mediation and its support activities, [United Nations Security Council, Report # S/2009/189]. Case study summary by Mediators Beyond Borders: “BLM Bridgeport Land Sale Mediation”.

³ Acquisition attempts as quoted in the case study by mediatorsbeyondborders.org and the USIECR at udall.gov

historical, cultural, recreational, and economic resources.”⁴ The process of land management, jurisdiction, transfer, or purchases is drastically different when a Native American Tribe is involved.⁵ Administrative transfer involves authorization from the Department of Interior to transfer the land and jurisdiction from the Bureau of Reclamation to the Bureau of Indian Affairs, in accordance with the approval from the Bureau of Land Management.⁶ Legislative conveyance of small tracts of land does not require the preparation of an environmental assessment or environmental impact statement under NEPA, with a categorical exclusion for those with no significant effect on the human environment.⁷ However, with the Tribe’s desire to develop the land with numerous community structures, they did not qualify for this exclusion and, therefore, were unable to receive legislative conveyance. Furthermore, “when concerns about Indian gaming issues related to the 40-acre Bridgeport parcel threatened passage of the entire bill, the Tribe pulled the Bridgeport transfer request”.⁸

With all other options of obtaining the land without financial burden were exhausted, in 1995 the Bridgeport Indian Colony showed genuine interest and intent in purchasing the land outright from the Bureau through the required direct sale under the Federal Land Policy and Management Act. Initiating a direct sale process under the FLPMA requires an amendment to the existing Resource Management Plan, which, in turn, requires an environmental assessment due to the aforementioned lack of categorical exclusion. Through this process two protests were received, one for the direct sale and one for the amendment, with one dismissed and the other addressed.⁹ An environmental assessment (EA) was performed for the forty-acre plot in 2003; after a finding of no significant impact (FONSI), a proposed decision designating the forty acres available for sale. The final Record of Decision (ROD) was passed in 2005 and amended into the BLM’s Bishop Resource Management Plan.⁹

The first legitimate offer with the land available for sale, submitted in 1998, created tensions and unrest among the residents of Bridgeport, California. Doubling the size of the Bridgeport Indian Colony, the economic land development plan included the addition of a “gas station/mini-mart/gift shop, an RV park and a community center... [that] would include an indoor swimming pool, a small theater, indoor basketball court and other

⁴ Mediators Beyond Borders. “BLM Bridgeport Land Sale Mediation”. <https://mediatorsbeyondborders.org/wp-content/uploads/2012/10/MBB-Climate-Change-Project-Case-Summaries.pdf?3284fd>

⁵ Bureau of Land Management. “Managing the NEPA Process – Bureau of Indian Affairs”. The BLM is required to go through the Bureau of Indian Affairs and the National Environmental Policy Act of 1969 when transferring land through any method to a Native American Tribe. Found in the DOI Departmental Manual on supplementary requirements for BIA implementation.

⁶ U.S. Department of Interior: Office of Congressional and Legislative Affairs. “OVERSIGHT HEARING ON H.R. 2120, S. 2494, S. 1080, H.R. 2963 AND S. 531”. After thorough research, it was found that this DOI/DIA example conveys the most concise, yet accurate, process of administrative transfer, as the exact process for the BIC cannot be found due to lack of cooperation.

⁷ Small Land Tracts Conveyance Act. 114th H.R. 2324 (2016). <https://www.congress.gov/bill/114th-congress/house-bill/2324>

⁸ OMB/CEQ. *Analysis of FY 2007 ECR Reports*. <https://www.udall.gov/documents/ECRReports/Analysis07ECRReportsfinal.pdf>

⁹ NEPA. “Environmental Assessment, FONSI, and Proposed Decision”. *Amendment to Bishop Resource Management Plan*.

amenities.¹⁰ A casino was not being considered”.¹¹ The residents took action; with an initial concern for the potential sociopolitical and environmental impacts on their town and local businesses, they blocked the sale and sent sixteen formal protests to the State BLM Director. The homeowners’ lodged a series of complaints, ranging from insufficient notice of sale, the use of direct sale through the FLPMA rather than competitive, the accuracy of the EA, as well as an attack on the plan’s economic practicality and the validity of the Tribe’s statutory eligibility to purchase the land. Though the complaints regarding the sale of the land outside of a free market system were found to be unjustified, the local citizens continued to lodge appeals to the Interior Board of Land Appeals¹², ultimately escalating to a federal appeals process in the 9th Circuit Court. While the IBLA dismissed the claims, affirming the Bureau of Land Management’s right to sell the land, the appeals remained pending, open cases.¹³

However, in June 2006 “the Department of Interior's Board of Land Appeals asked the U.S. Institute to conduct an assessment to see if some type of negotiated settlement might be possible”.¹⁴ By February 2007, the USIECR had two a non-biased third party mediator conduct a conflict assessment lasting three days of the three major stakeholders: the Tribe, the Bureau, and the Town. All three voluntarily participated in the mediation that was held for another three days. After years of dispute and unrelenting determination from all sides, relationships were rebuilt with a swift resolution by way of mediation; in just six days total, the Town, the Bridgeport Indian Colony, and the Bureau of Land Management settled on and entered into a legally binding agreement and purchase price for the 40 acres of California land, and the lingering claims in the 9th Circuit Court of Appeals were rescinded. The use of mediation ended a conflict spanning nearly a decade.¹⁵

Application to ADR Tenets

The three participants from this case study benefited from mediation in very specific ways, beginning with a three day mediation and six day cost of only \$19,000, as well as improved relationships among them for the future. However, some glaring benefits are mentioned from the participants themselves, as well as more inconspicuous but equally important revelations. Mediation helped the parties “negotiate a binding, legally enforceable agreement... and think outside the box, which resulted in an innovative solution to the conflict”, avoid a “costly and divisive legal dispute...that allowed them to more effectively address the conflict”, and, lastly, realize “mediation would be their tool of choice if faced with a similar type of conflict in the future”.¹⁶ Implementation was fully reached in 2010

¹⁰ Mediators Beyond Borders. “BLM Bridgeport Land Sale Mediation”.

¹¹ Gaming was taken off the agenda completely when the Bridgeport Indian Colony Land Trust, Health, and Economic Development Act of 2012 was passed. With several revisions and amendments in 2010 - 2012 through the 112th Congressional House of Representatives, H.R. 611 states that H.R 2467 prohibits class II or III gaming from being conducted on such lands.

¹² U.S. Department of Interior: Office of Hearings and Appeals. *About the Interior Board of Land Appeals*. (2016).

<https://www.doi.gov/oha/organization/ibla> A look into the process, power, and connection to the IBLA in this case study.

¹³ Mediators Beyond Borders. “BLM Bridgeport Land Sale Mediation”.

¹⁴ USIECR Project Case Summary; <http://www.udall.gov/OurPrograms/Institute/ProjectCaseSummary.aspx?Project=1076>

with the House of Representatives passing the Congressional Bill “to take certain Federal lands in Mono County, California, into trust for the benefit of the Bridgeport Indian Colony”.¹⁵

Moreover, this case was groundbreaking as the U.S. Department of Interior’s Collaborative Action and Dispute Resolution Office (CADR) enlisted the help of the U.S. Institute to build capacity for, and use of, environmental mediation within the Interior Board of Land Appeals (IBLA). This task involved establishing a Pilot Mediation Referral Program within the IBLA. The program is now being used to screen and mediate cases such as the Bridgeport dispute.¹⁶ One final interesting fact about this case is its use for mediation examples worldwide. On a Scottish Government website, it was found to be top ranked in their “Guide to the Use of Mediation in the Planning System in Scotland”. They discuss the breakdown in trust and cooperation between the parties and how mediation achieved a quick and successful outcome of a long-standing dispute. They use what they believe to be the best examples of mediation to “illustrate ways in which mediation can be adopted to increase community involvement, attempt to narrow disputes and resolve deadlock, and help accelerate the planning process.”¹⁷

Per the USIECR, the use of mediation is what allowed for the conflict to be brought to a successful and innovative solution. The mediator’s initial conflict assessment fostered a sense of trust between the stakeholders and the mediator. Furthermore, the mediation itself developed a previously lacking sense of trust or willingness to participate between the tribe and BLM, which allowed for a collaborative resolution for this dispute as well as any potential mediation efforts in the future.¹⁸

Conflict Resolution Process Timeline

1980 – Paiute Indian Colony interest in 40 acres of BLM land adjacent to the Indian reservation

1995 – Tribe’s first attempt to acquire land by administrative transfer, Recreation & Public Purpose Act Sale, and legislative conveyance

1998 - The proposed Bridgeport purchase was integrated into land transfer legislation developed by various California tribes.

¹⁵ Bridgeport Indian Colony Land Trust, Health, and Economic Development Act. 112th Congress. *H.R. 5468, 2467, & 611*. These bills also discuss the severity of need for the BIC plan in the first place and how the Tribe and the Town will specifically benefit.

¹⁶ OMB/CEQ. *Analysis of FY 2007 ECR Reports*. <https://www.udall.gov/documents/ECRReports/Analysis07ECRReportsfinal.pdf>

¹⁷ Scottish Government. “Examples of Mediation in Planning”. *A Guide to the Use of Mediation in the Planning System in Scotland*. (2009). <http://www.gov.scot/Publications/2009/03/10154116/4>

¹⁸ *Partners for the U.S. Department of Interior*: Elena Gonzales, Director: *Office of Collaborative Action and Dispute Resolution & Sara Greenburg, ADR Specialist: Office of Hearings and Appeals, Interior Board of Land Project Lead for USIECR: Cherie- Shanteau-Wheeler, Senior Mediator/Senior Program Manager: U.S. Institute for Environmental Conflict Resolution, Morris K. Udall Foundation. *Project case summary provided by ECR.GOV and UDALL.GOV*

1998 – Tribe made offer to BLM to buy land outright

2000-2004 – Sale blocked stemming from town residents’ concern regarding tribe’s commercial development

2004 – Federal appeal process

2003 – Final environmental Assessment with FONSI and proposed action

2005 – ROD and amendment to BLM’s Bishop Resource Management Plan

June 2006 – U.S. DOI’s Board of Land Appeals asked USIECR to conduct a conflict assessment for possible mediation implementation

February 2007 – 3 day conflict assessment conducted to reveal possibility of negotiated settlement

February 2007 – 3 day mediation ended appeals and land sale moving forward after compromise and written settlement, with a cost of only of \$19,000

2010-2012 - Bridgeport Indian Colony Land Trust, Health, and Economic Development Act. 112th Congressional House of Representatives H.R. 5468, H.R. 2467, & H.R. 611

References

- Bridgeport Indian Colony. (2012). Retrieved 22 November 2016 from <http://www.bridgeportindiancolony.com>
- Bridgeport Indian Colony Land Trust, Health, and Economic Development Act. 112th Congress. *H.R. 5468, H.R. 2467, & H.R. 611*. (2012). Retrieved 27 November 2016 from [https://www.congress.gov/congressional-report/112th-congress/house-report/“#”](https://www.congress.gov/congressional-report/112th-congress/house-report/)
- Bureau of Land Management. “Managing the NEPA Process – Bureau of Indian Affairs”. *Department of the Interior Department Manual: Environmental Quality Programs*. (2011). Retrieved 27 November 2016 from https://www.blm.gov/wo/st/en/prog/planning/nepa/webguide/departmental_manual/516_dm_chapter_10.html
- Gonzales, Elena, Sara Greenburg, and Cherie Shanteau-Wheeler. United States Department of Interior & U.S. Institute for Environmental Conflict Resolution. *Udall Foundation*. Retrieved 3 November 2016 from

<https://www.udall.gov/SupportFiles/CaseBriefings/pdf/Bridgeport.pdf> &
<http://www.udall.gov/OurPrograms/Institute/ProjectCaseSummary.aspx?Project=1076>

Mediators Beyond Borders. "BLM Bridgeport Land Sale Mediation". *Case Studies Demonstrating the Use of Mediation, Consensus Building and Collaborative Problem Solving in Resolving Environmental and Climate-related Conflicts*. (2009). 3-4. Retrieved 3 November 2016 from <https://mediatorsbeyondborders.org/wp-content/uploads/2012/10/MBB-Climate-Change-Project-Case-Summaries.pdf?3284fd>

National Environmental Protection Agency. "Environmental Assessment, FONSI, and Proposed Decision". *Amendment to Bishop Resource Management Plan*. (2003). Retrieved 27 November 2016 from https://www.blm.gov/ca/pdfs/bishop_pdfs/eadocs/Bridgeport_PlanAmendment_EA.pdf

Office of Management and Budget & Council on Environmental Quality. *Analysis of FY 2007 ECR Reports Submitted by Federal Departments and Agencies Pursuant to the OMB/CEQ Joint Memorandum of November 28, 2005*. (2008). Retrieved 27 November 2016 from <https://www.udall.gov/documents/ECRReports/Analysis07ECRReportsfinal.pdf>

Scottish Government. "Examples of Mediation in Planning". *A Guide to the Use of Mediation in the Planning System in Scotland*. (2009). Retrieved 17 November 2016 from <http://www.gov.scot/Publications/2009/03/10154116/4>

Small Land Tracts Conveyance Act. 114th Congress. *H.R. 2324* (2016). Retrieved 27 November 2016 from <https://www.congress.gov/bill/114th-congress/house-bill/2324>

U.S. Department of Interior: Office of Congressional and Legislative Affairs. "OVERSIGHT HEARING ON H.R. 2120, S. 2494, S. 1080, H.R. 2963 AND S. 531". *Indian Affairs Issues Statements*. (2008). Retrieved 27 November 2016 from <https://www.doi.gov/ocl/hearings/110/S1080HR2120S2494HR2963andS20531>

U.S. Department of Interior: Office of Hearings and Appeals. *About the Interior Board of Land Appeals*. (2016). <https://www.doi.gov/oha/organization/ibla>

Case Study 5: Allagash Wilderness Waterway

By Sandra Lee

Conflict History

At the turn of the previous century (1890's) the Allagash was used as agricultural land and a timber. The area was intersected by several railroads which transported both timber and people in the area. During this time the area was nearly decimate ecologically by human disturbances. There was only a single stand of old growth trees, Big Reed Forest Reserve; all other stands were new growth or second growth forest. From 1931 to 1970, the state changed its management practices to include new concepts of conservation biology. Maine in general has had phenomenal success in the recovery of its state forest. Originally (1600) the forest was covered by 18.2 million acres of forest, this dropped to 20% in the 1850's. However, now the forest covers 17.7 million acres, or 90% of Maine's total area. ¹

It wasn't until 1966 when the Allagash was listed as protected through the Water Ways Act (state) then the national Wild and Scenic River System program that the forest truly began to recover. Though called a wilderness, in reality there remained a damn, several old farm houses and broken locomotives, as well as temporary logging bridges crossing the river(1). Nor does it take into consideration that logging could take place just outside of the 500 ft "beauty barrier" that followed the edges of the river. In 1970, the government established several roads and 16 access points to increase the accessibility to the river. This was met by strong criticism by more experienced canoers that used the river for weeklong trips in the wilderness. Their concerns that the use of the river would dramatically spike was well founded, the number of people on the river spiked from approximately 1,000 per year to 4,000 per year.²

Characteristics of the Conflict

The 23 stakeholders where invited to participate in a mediation to form a consensus on several management issues including access. These stakeholders included "northern Maine residents, wilderness camp owners, sportsmen's groups, Maine guides, environmental organizations, legislators and state and federal agencies".³ While the legislative representatives attempted to address the concerns of all parties, they tended to drive legislation toward the day-trip sportsmen's favor. This included adding bridges and access points which was what drove the conflict toward litigation. The focus toward shorter more frequent trips also has economic implications which cause the Park service to find ways to increase use. The wilderness sportsmen noticed that there was an increase in trash and

¹ Andrew M. Barton, Alan S. White, Charles V., The Changing Nature of the Maine Woods

² Gil Gilpatrick , Allagash: A Journey Through Time on Maine's Legendary Wilderness Waterway

³ Jonathan W. Reitman (2003), The Allagash: A Case Study of a Successful Environmental Mediation

pollution in the river in areas which catered to the day-trippers. Additionally, the access points and bridges detracted from the “wilderness” aesthetic of the river.⁴

For 30 years, the Allagash waterway was subject to litigation and controversy. In 2002, one of section of the system received media attention as an endangered river due to overuse. The argument came to a peak when a new boat access point was suggested at John’s bridge. The environmentalist and the sportsmen established firm positions on critical issues. The conflict continued until a new governor asked for a formal mediation of the issues. The extended duration of the conflict lead to the belief that it was “ripe” for mediation.⁵

Application to ADR Tenets

The neutral mediator published a summary of the techniques used, and which factors helped in the collaboration. Several years later, the mediator published a follow up report. This provides a unique view of the mediation success over time. It allows for a critical analysis of “success” and how the perception of that success changes over time. The detailed description of the negotiation process is a vital part of understanding where the switch occurred from successful to unsuccessful.

The initial step that the mediator took was to establish a conflict assessment⁶ and interviews. The mediator stated that stakeholders were reluctant to participate and were highly skeptical of any attempts. He was able to get participation of even these disbelieving participants by acknowledging their concern and welcoming their participation. The mediator met individually with the majority of participants before entering into the mediation. This allowed him to “discern where there were areas of commonality which could serve as the basis for Agreement” and “which issues should be postponed for later in the retreat, because of the ‘heat’ they would generate”.⁷

The mediator was able to create a point of common interest by helping the stakeholders to realize that, between them, they had over 500 years of experience on the river way. They also discussed their favorite trips down the river and what made them so special. By establishing a common ground and framing the issue, they had a transformative moment in the negotiations which allowed them to move beyond positions. The mediator also cited “offline” and small group discussions were valuable techniques in the ability to reach a series of quick solutions. These small groups developed proposed solutions to the core issues. “Offline”, or unofficial conversations, allowed for the opportunity to find out more about the other parties.

During the negotiation, the mediator moved the negotiations forward by allowing the parties to “agree to disagree” and postponed talks on deal breakers. This is a technique which works

⁴ Gilpatrick, “Journey Through Time”

⁵ Reitman, “Allagash Case Study”

⁶ Reitman used preparatory assessment which is similar the guidebook’s term conflict assessment. The terms were switched to limit confusion.

⁷ Reitman, “Allagash Case Study”

well as part of logrolling which allows parties to find points of commonality before addressing emotionally charged issues. The group was successful in achieving a signed agreement (River Drivers Agreement). The process took approximately 30 hours and was completed in one extended session.

Unfortunately, this negotiation failed to return to mediation to address the most “heated” issues fully. The negotiation was also limited by the lack of communication between the stakeholder representatives and the constituents which they represented. Overall, implementation would have improved if it had included these additional portions of the negotiation process. While the strict time schedule allowed for focused attention on the development of relationships between the AWW stakeholders, the abbreviated timeframe also prevented a more in depth negotiation or critical issues. The timeframe used for the negotiation also prevented adequate time for the stakeholders to realize the implications of the agreements to which they agreed.

Later evaluation by the University of Maine found that the plan lacked adaptability which caused problems within a few years that required legislation to address and resolve the issues. Problems arose from missing stakeholders, lack of communication between leaders and constituents, and failure to address future concerns. However overall, the mediation was still viewed as successful.⁸ Its most successful aspect was the ability to move stakeholder past the barrier of unresolvable conflict towards potentially solvable. The mediation became to first steppingstone to reconciliation.

Beyond Mediation

In January 2007, the suggested management plan included the creation of an AWW Advisory Council. This Council would have representatives from the National Park service, a member of the public, a representative private land owner, and experts on wilderness creation, natural resource planning, fisheries and wildlife conservation, and historical preservation.⁹ The group was established in late 2007 after the recommendations were signed into law, and continues to meet to maintain the strategic plan for the area.¹⁰

Litigation continues to go on regardless of the attempts to resolve issues outside of court however. In 2008, the one issue was ruled on in federal appellate court regarding the addition of eleven access points and the approval to make six bridges permanent.¹¹ The case

⁸ Diane Kenty, Ann R. Gosline, and Jonathan W. Reitman. "Public Collaboration in Maine: When and Why It Works." *Maine Policy Review* 19.2 (2010) : 14 -30, <http://digitalcommons.library.umaine.edu/mpr/vol19/iss2/5>.

⁹ Allagash Wilderness Waterway Working Group, "Allagash Wilderness Waterway Working Group on Structure, Management and Oversight: Choosing Common Ground and Moving Ahead" (2007). *Maine History & Policy Development*. Paper 2.

¹⁰ Allagash Wilderness Waterway Advisory Council, accessed 11/30/2016, http://www.maine.gov/dacf/parks/get_involved/advisory_councils/allagash_wilderness_waterway.shtml

¹¹ The case was originally brought before the courts in February of 2007 and was dismissed August of 2007. The ruling was confirmed in district court in February of 2008 before the appeal was filed. The final dismissal of the case by the court of appeals was December 5th, 2008. The ruling decided that since the bridges in question had been in place from the time that the area was declared a Wilderness Area, the designation of the bridges as permanent structures did not materially change the character of the AWW.

was dismissed and the Maine director of Parks and Land was found to be within his authority.¹²

For now, not much has changed in the feel and appearance in the AWW in the last 50 years. Use of the river has decreased to half of its peak in the 1980s. A complete trip down river takes approximately seven days. There continues to be an increase in request for shorter weekend trips and day trippers. The area however is more of a corridor than an actual wilderness since it is surrounded on both sides by logging and agriculture. However there has been significant wildlife population recovery.

Conflict Timeline

1890's- Allagash woods were agricultural resources

1966 –Allagash Waterway is recognized as a protected water way

Late 1966- Added to the National wild and Scenic Rivers System

2002 – Allagash was named an endangered waterway

2003- “The River Drivers Agreement” was signed after 30hrs of mediation

2006 – Maine Legislature voted for new alterations to AWW

Jan 2007 – AWW working group created a new management plan (published)

Feb 2007 – New lawsuit against state statue

Late 2007 – Creation of the AWW Advisory Council

Dec 2008- appellate court ruling in favor of State Park and Land Service

¹² Judge Lynch, 1st Circuit Court of Appeals, December 5, 2008, *Fitgerald et al v William Harris*, No. 08-1306

Case Study 6: Coal Mining – A Threat to Alabama Waters

By Laura Stearns

As one of regions producing the most coal in the South, mining spoils have heavily polluted the watershed of the Black Warrior River in Alabama, a water source for Birmingham, Tuscaloosa, and other cities in Alabama, for many years. In response to extensive oversight by both the Alabama Department of Environmental Management (ADEM) and the United States Army Corps of Engineers (USACE), Southern Environmental Law Center (SELC), a non-profit legal firm defending the environment, along with other environmental groups, has taken legal action to protect and improve the water quality of this area. However, a “grandfather” clause included in revisions made to an already lax permit use by the USACE allowed unregulated stream filling by preexisting coal mines to continue for at least five additional years. While conditions to an agreement, such as a grandfather clause, can improve the efficiency of implementation, they can also weaken the positive impact an agreement can have on the environment.

Conflict History

Starting in 2008, SELC filed a lawsuit against the ADEM for carelessly issuing wastewater discharge permit to a proposed mining operation without notifying the public and without ensuring the proper prevention and mitigation plan. The SELC again challenges a permit given to a mining operation by the ADEM, in 2009, for ignoring federal and state water quality regulations. These two cases were just the beginning of SELC’s fight to defend the Black Warrior River from coal mining pollution.

In 2013, SELC continued its fight to protect the integrity of this watershed by challenging the irresponsible permitting of mining operations by the USACE. Before then, in 2010, the USACE suspended the use of Nationwide Permit 21 in the Appalachian region due to the detrimental impacts it allowed on water quality. The permit was significantly revised in 2012 only allow up to half an acre of stream to be filled due to coal mining. However this revision included a grandfather clause that allowed 41 mines to fill streams and wetlands, without a limit, until 2017.

SELC, on behalf of the Black Warrior Riverkeeper and the Defenders of Wildlife, filed a suit against the USACE in response to these revisions, specifically the grandfather clause. By 2015, the Eleventh Circuit Court of Appeals had found that the USACE had wrongfully concluded the permit how result in minimal environmental impacts. The court ordered the Corps to reanalyze the impact the revised Nationwide Permit 21 would in Alabama. Based on this new study, the USACE again determine the permit would have harmful cumulative impact on the environment. Since then, SELC, with Black Warrior Riverkeeper and Public

Justice, against the Drummond Company, September of this year, for violations at one of its mining sites that led to the complete filling of a tributary to the Black Warrior River.

Characteristics of the Conflict

SELC is a non-profit environmental law group that has been defending environmental issues in the Southeast for the last 30 years. They take on cases in Alabama, North Carolina, Tennessee, Georgia, South Carolina, and Virginia. In this case, SELC filed a suite along with Public Justice, representing Black Warrior Riverkeeper and Defenders of Wildlife. Public Justice is a public interest advocacy group that works along with private attorneys throughout the country. Black Warrior Riverkeeper is a nonprofit, citizen-based group dedicated to protecting the integrity of the Black Warrior River watershed. Finally, Defenders of Wildlife is a national conservation group concerned with protecting wildlife and their habitat. Together these groups came together to preserve not only the quality of the Black Warrior River but also the species it provides habitat for.

In their original lawsuits regarding this issue, in 2008 and 2009, SELC challenged the ADEM's permitting of coal mining operations along the Black Warrior River. The ADEM is the environmental authority in the state of Alabama that is dedicated to assuring a "safe, healthful, and productive environment" for all citizens. Starting in 2013, SELC challenged the permitting by USACE in the same region. The Corps has many responsibilities throughout the country but states that it acts with environmental sustainability as a "guiding principle." Both of these government organizations have allowed filling and polluting of the Black Warrior River and its tributaries by coal mining operations.

The Black Warrior River was added to the list of America's Most Endangered Rivers in 2011 due to the filling and polluting. These permitted actions not only threaten the quality of water in this watershed, but also the supply it provides to major Alabama communities including Tuscaloosa and Birmingham. The detrimental impacts these permits allow also threaten the species that inhabit and depend on the Black Warrior River Watershed. Because of claims, made by SELC, describing these impacts the Nationwide Permit 21 has on water quality and aquatic life, the Corps has suspended the permit again to consult with the U.S. Fish & Wildlife Service.

Application to ADR Tenets

As mentioned above, the major revisions the Corps made to Nationwide Permit 21, in 2012, contained a grandfather clause allowing the unlimited filling of streams by existing coal operations. The 41 operations that would not be regulated because of this clause could fill up to 27 miles of stream just in Alabama. However, grandfather clauses are not always used to allow harmful behavior. They are often used as a tool in an agreement to allow existing operations that would be affected by new requirements of the agreement, to meet new standards within a reasonable time period, while requiring all new operations to abide by the new regulation. This type of condition can also make it more likely for all involved

stakeholders to come to a collaborative agreement when one party will experience more regulations than the others.

While this could have been the case in the Black Warrior River watershed, the extreme environmental impact this clause would allow could negate any impact caused by new mining operations. This amount of impact allowed by the Corps is unacceptable and could go on indefinitely if they continue to revise the permit, extending the term of the clause. In this case, the grandfather clause is a dangerous condition within the agreement, allowing the very behavior the regulation is meant to prevent. To improve the use of this clause, the USACE should set tapering regulations the existing operations would have to meet each year up to the deadline to abide by the same rules as new operations.

The integrity of the Black Warrior River watershed and the communities it serves has been threatened for years by the coal mining industry in the area. Because of a lax Nationwide Permit 21, granted by the USACE, permits for mining operations within the watershed are not individually reviewed. The finding that this permit led to negative cumulative impacts on the environment led to revisions in 2012, however an included grandfather clause resulted in little change coming to the regulation of existing operations. Because the ADEM and USACE continue to allow essentially unregulated polluting and filling of the Black Warrior River and its tributaries, the SELC and the organizations it represents have taken action. While this case may not specifically use Alternative Dispute Resolution methods, it is a classic example of conflict between industry and environment that highlights the issues in agreements made using litigation.

References

- "About -- Headquarters U.S. Army Corps of Engineers." U.S. Army Corps of Engineers. Accessed December 10, 2016. <http://www.usace.army.mil/About/>.
- "ADEM Sued for Permitting Coal Mine That Poses Risk to Birmingham Drinking Water | Southern Environmental Law Center." Southern Environmental Law Center. December 22, 2008. Accessed December 10, 2016. <https://www.southernenvironment.org/news-and-press/press-releases/adem-sued-for-permitting-coal-mine-that-poses-risk-to-birmingham-drinking-w>.
- "Alabama Department of Environmental Management." Alabama Department of Environmental Management. Accessed December 10, 2016. <http://www.adem.state.al.us/default.cnt>.
- "Black Warrior Riverkeeper." Black Warrior Riverkeeper. Accessed December 10, 2016. <http://blackwarriorriver.org/>.
- "Clean Water Groups Challenge Massive Coal Mine in Alabama's Black Warrior Watershed | Southern Environmental Law Center." Southern Environmental Law Center. November 20, 2009. Accessed December 10, 2016.

<https://www.southernenvironment.org/news-and-press/press-releases/clean-water-groups-challenge-massive-coal-mine-in-alabamas-black-warrior-wa>.

"Environmental Groups Take Rosa Coal Mine Fight to Court of Appeals | Southern Environmental Law Center." Southern Environmental Law Center. January 20, 2011. Accessed December 10, 2016. <https://www.southernenvironment.org/news-and-press/press-releases/environmental-groups-take-rosa-coal-mine-fight-to-court-of-appeals>.

"Mission and Vision." Defenders of Wildlife. 2013. Accessed December 10, 2016. <http://www.defenders.org/mission-and-vision>.

"Who We Are." Public Justice. Accessed December 10, 2016. <http://www.publicjustice.net/who-we-are/>.

Case Study 7: Remediation of the San Jacinto River Waste Pits Superfund Site

By MaryKate Flanagan

The United States Environmental Protection Agency held a formal public request for comments at the Highlands Community Center on October 20, 2016, midway through the open public comment period of September 28 through November 28, 2016. After lengthy discussions and data gathering in consultation with the U.S. Army Corps of Engineers, the Agency had decided to fully remediate the Superfund Site. Two critical factors under consideration were 1) the City of Houston draws 20 percent of municipal drinking water from the San Jacinto River; and 2) the River comprises an integral part of the 24,000 square mile Galveston Bay watershed. Dioxins from the Superfund site are continually released downstream into Upper and Lower Galveston Bay and attendant tributaries, bayous, marshes and wetlands, ultimately flowing out into the Gulf of Mexico. “The important relationship between the bay waters and the surrounding landscape cannot be overstated: the estuary’s physical, chemical, and biological quality is directly impacted by the quantity and quality of freshwater draining from its watershed.”¹

Case History

The San Jacinto River runs through eastern Harris County from Lake Houston to Galveston Bay. In the 1960s, Champion Paper Company, since acquired by International Paper Company, disposed of waste from the paper mill at two sites along the San Jacinto River where the Interstate 10 bridge is now located. This slurry was barged from Champion’s paper mill at the Highlands and dumped in open pits on land that jutted out into the River. This sites were not stable, and the River continued to wash away the containment walls of the pits so that most of the site is now underwater.

Characteristics of the Case

Human and Animal Health Consequences

A by-product of milling paper is an extremely hazardous chemical called dioxin. The World Health organization has determined that the specific type of dioxin dumped in the waste pits—2,3,7,8-TCDD—is a human carcinogen. The substance is known to cause a severe skin disease called chloroacne (or chloracne), as well as liver damage and changes in hormonal levels, among other health impacts. “Human exposure to dioxins and dioxin-like substances has been associated with a range of toxic effects, including immunotoxicity, developmental and neurodevelopmental effects, and changes in thyroid and steroid hormones and reproductive function. Developmental effects are the most sensitive health end-point, making children...the

¹ <http://www.gbep.state.tx.us/discover-galveston-bay/>

population most at risk. Dioxins and dioxin-like substances are persistent organic pollutants (POPs) and can travel long distances from the emission source and can bioaccumulate in food-chains.”² The residents of the Highlands had been swimming, fishing, and drinking this water for more than four decades. Many people confirmed similar medical symptoms in themselves, family members, and pets.

Remediation Goals

As the pit containments failed and became inundated with water, dioxin was released into the River. The dioxin levels in the River are many times higher than the safe amounts. Overall, the EPA determined remediation goals are to reduce dioxin contaminants to 200 parts per trillion at the Northern Waste Pits and 240 parts per trillion at the Southern Impoundment. EPA officials propose to reduce toxins in soil and sediment to 30 parts per trillion at both areas. Remediation goals for surface water are 7.97×10^{-5} ppt of dioxin pollutants.

Elements of Remediation Design

To prevent new releases of dioxins, the Army Corps of Engineers would work in sections with sheetpiles around the contaminated areas. The COE would plan for storms, floods, and other meteorological events as possible. The Corps and EPA would monitor, measure, and report on environmental progress of clean up.

Considered Alternatives

Representatives from the EPA stated they had considered other alternatives to full remediation, but that these alternatives were not reliable, especially in the case of any major storm or hurricane events. The Agency had considered:

- taking no further action;
- upgrading caps or containments to the sites;
- partial solidification or stabilization; and
- partial removal alternatives.

Preferred Alternative Rationale

Based on two years of gathering scientific data for the Highlands area as well as input from residents and ecology groups, the EPA concluded the dioxin waste at the Highlands site is highly toxic with a persistence of hundreds of years. Given the history of poor containment and cap maintenance and the high threat of repeated storms and the constant river flow against these man-made features, it was impossible to avoid a catastrophic release in this un-controlled situation.

² <http://www.who.int/ipcs/features/dioxins.pdf>

Summary of Preferred Alternatives

EPA objectives included corrective actions to:

- prevent releases from the former waste impoundments;
- reduce human exposure to dioxins from consumption of fish caught in the San Jacinto River and downstream into Galveston Bay and the Gulf of Mexico;
- reduce human exposure to dioxins from the contact with contaminated materials;
- reduce exposures of aquatic animals, such as clams and crabs, to dioxin poisoning.

The EPA summarized a preferred plan to remediate the Northern Waste Pits by proposing to remove 152,000 cubic yards of waste for disposal offsite and replace the remediated areas with clean fill. The Agency planned to prevent any additional releases of toxic substances during removal and construction. The estimated remediation cost is \$87Million, with construction time taking 19 months.

The preferred alternative to remediate the Southern Impoundment Area included removing 50,000 cubic yards of waste to offsite disposal, backfill with clean soil, and reestablish vegetation. The Agency would also remove and replace the existing building and slab structures. The cost is projected to be \$9.9Million with a construction time of seven months.

Implementation of the San Jacinto River Waste Pits Remediation Plan

While the EPA has agreed in principle to full remediation of the San Jacinto Waste Pits, the Agency has not addressed an implementation timeline. The EPA's proposed plan would not even begin until 2020, and there are no definite benchmarks or accountability measures to ensure remediation operations would be concluded. Any delays of transitioning the remediation plan into an action plan would continue to expose the public to additional long-term health risks and economic loss. Without a performance agreement, any resolutions gained during conflict negotiations become valueless.

Successful Environmental Conflict Resolution sets performance targets, measures them, and holds the parties accountable. Bringing in an independent evaluator or third party project manager would be valuable to utilize methodologies in benchmarking, knowledge management, and process improvement. Monitoring the project and performance serve as a reporting tool for the government agency and stakeholders. Tangible, measurable, quantifiable results report on the impact of remediation.

After reaching a negotiated agreement, the implementation or evaluation phase begins with a post assessment report to identify ongoing issues to monitor, keep remediation on track, and communicate any adjustments or revisions of plan. Stakeholders continue to be consulted for their experience. Interviews and surveys are two tools to consider when gauging views on implementation progress. Daily, weekly, or monthly reports on operations might serve to determine "real-time" process changes. If structural issues arise that were not anticipated in the planning stages, a formal review of the remediation should be conducted.

The focus of post assessment is a gap analysis which examines the differences between planned requirements, scheduling, budget, communications, any deviations from plan, and what actually resulted and when and why. Dissemination of information between stakeholders is key throughout.

A timeline for Implementation contains the following measures:

- Retention of independent evaluator
- Define who are the beneficiaries of the implementation project
- Continual data gathering via questionnaires, sampling, administration, and surveys
- Conduct gap analysis throughout the remediation project:
 - (i) Reviewing original objectives;
 - (ii) Documenting current performance indicators;
 - (iii) Comparing original objectives to results;
 - (iv) Document positive and negative results from stakeholder feedback and lessons learned;
 - (v) Conduct ongoing Cost-Benefit Analyses to measure environmental benefits and implementation of results.³
 - (vi) Examine economic and financial aspects of outcome quality resulting from implementation after negotiation.

Application to ADR Tenets

Implementation of an agreement is not a document or a settlement or, as in the case of the EPA and the Highlands Waste Pits, a proposal. The outcome of a negotiation is “the value produced once the parties have done what they agreed to do... That value comes not from a signature but from real work performed long after the ink has dried.”⁴

³ Colby, B. G. “Economic Characteristics of Successful Outcomes.” In R. O’Leary and L. B. Bingham (eds.), *The Promise and Performance of Environmental Conflict Resolution*. Washington, D.C.: Resources for the Future, 2003.

⁴Ertel, Danny. “Getting Past Yes: Negotiating as if Implementation Mattered”. *Harvard Business Review*. November 2004 issue.

References

“San Jacinto River Waste Pits Superfund Site”, U.S. Environmental Protection Agency, <https://www.epa.gov/tx/sjrwsp>.

“History of the San Jacinto River Waste Pits”, U.S. Environmental Protection Agency, www.sanjacintoriverwastepits.com/history-of-the-wastepits/.

<http://www.sanjacintofacts.com/>

Kelsey Davis, “A Tale of Two Sites”, *Texas Monthly*, April 2015, <http://www.texasmonthly.com/articles/a-tale-of-two-sites/>.

Case Study 8: Lakeview Biomass Oregon Solutions Project

By Emily Fucile Sanchez

Forests in the Western United States are much drier and at a greater risk of wildfire, especially because of excess biomass on the forest floor from the canopy. These forests have also been at high risk of disease, and drought. Encroachment by the western juniper also degraded thousands of miles of grasslands, with their removal being fairly costly the material was being disposed in the forests and burned, degrading the air quality, and releasing significant amounts of carbon into the atmosphere. Along with this the Spotted Owl was designated endangered in the 1990 which put a heavy strain on the lumber industry. The Lakeview Biomass project effectively engaged collaborators in environmental conservation by creating longstanding relationships between parties leading them to agree to the creation of a Biomass plant in Lakeview Oregon. The creation of the biomass plant led to an increase in environmental sustainability in the Town as well as a growth in jobs. From this process the Collins Sawmill company was also able to construct a small diameter mill in order to accommodate the needs of the plant, this led to the further creation of jobs as well as an increase in forestry stewardship.

Case History

In 1994 the Sustained-Yield Forest Management Act allowed for the creation of stewardship units which led to the creation of the Lakeview Oregon Stewardship Unit in the 1950's. This unit helped influence the way in which the surrounding forests would be utilized and managed.

In 1990 the Spotted Owl, which resides in Oregon forests, was put on the endangered species list which halted logging in Oregon. Over the next five years four out of the five mills in Lakeview closed putting 25 people out of work. The only mill that remained open was the Collins mill, which had previously applied for FSC certification, even with this green initiative it was at risk of closing.

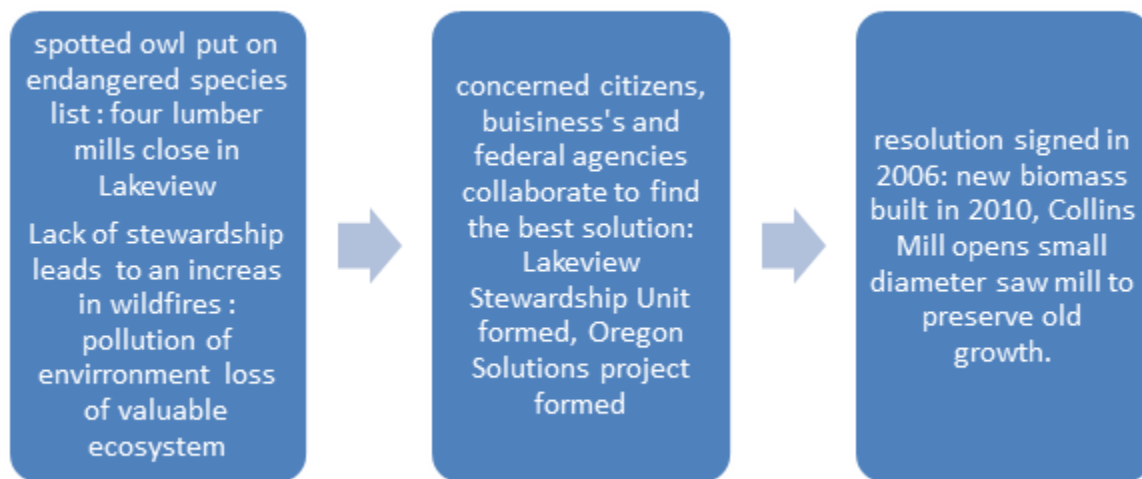
In 1998 in an attempt to get FSC certification for federal lands representatives met for the first time with stakeholders which included; scientists, environmentalists and Forest service officials. This meeting led to the formation of the Lakeview Stewardship Group which consisted of both private and public stakeholders with a joint interest in sustaining the forest.

In 2002 large forest fires swept through the unit and the issue of salvage wood harvesting was brought to the forefront, at this point many more parties became interested and the Chewaucan Biophysical Monitoring Team (CBMT) was formed.

Finally eight years after applying the Collins mill was granted FSC certification. With the increase in stakeholders and issues the Ford Foundation steps in to assist in leadership training in order to bring stakeholders together.

At this point a change in Tax credits makes the idea of a biomass plant viable and a study is conducted for the next two years. Over the next year stakeholders in the Oregon Solutions project met four times to discuss management goals and create an agreement which satisfied the interests of all stakeholders.

The agreement was finally signed to create a new biomass plant in 2006 and a ten year Stewardship contract was signed with the forestry service to assure adequate supplies of lumber and biomass. Construction of the Biomass facility began in 2010 and by 2012 Lakeview became a net exporter of renewable energy.



Characteristics of the Conflict

The Lakeview Biomass Oregon Solutions Project was a multi-stakeholder, community based effort. Stakeholders were identified during a pre assessment. The project used a Community governance model and a neutral forum was used where stakeholders could actively voice their opinions, this allowed for more participation within the community. Stakeholders included: local government, the state, federal agencies, business, nonprofits, and other interested locals.

Objectives of the process included:

1. The development of a biomass-based, renewable energy resource.
2. Improving the quality of the watershed, improved fish and wildlife habitats, and resiliency to drought, insects, fire and invasive species; re-establishment on natural ecosystem processes including restoring fire's natural role in forest and rangeland ecosystems.
3. Reduction in threats to forest and rangeland values, property, and human lives from fire; reduction in future costs of fire suppression

4. Understanding of the role of forest and rangelands, forest and rangeland products and biomass energy as mitigation for carbon dioxide emissions.
5. Creation of forest-based jobs and wealth for long-term residents of rural communities; improved economic resilience of the regional lumber mills
6. Improved efficiency and efficacy of state and federal agencies to carry out their missions
7. Enhanced social capacity to solve problems in ways that build and sustain desired environmental, economic and community conditions.
8. Identification of partners and investors to develop “intermediate” small diameter processing capacity, to derive maximum value and to assist in paying for the transport of biomass material from the woods to the biomass power site.

After six months of negotiation the Declaration of Cooperation was signed by all parties. This declaration included the plans for a 13 megawatt biomass facility that while running would consume 250,000gT of biomass, and create 60 jobs in the town. Construction of the Facility began in 2008 and commercial operation began in 2010. As of 2015 there is a CFLR Monitoring plan, and a Social and Economic Monitoring for the Lakeview Stewardship Collaborative Forest Unit.

Application to ADR Tenets

This case is an excellent example of effective conflict assessment, relationship building, the process of alternative dispute resolution, agreement implementation, and overall environmental sustainability. A conflict assessment was used in order to identify relevant stakeholders at the time a neutral forum was also used in order to receive input for the community. During the negotiation stage the project had four large meetings, and with the use of a mediator was able to come to an agreement in which all parties interests were met to some degree. The agreement signed effectively covered a variety of issues: environmental pollution, forest fires, loss of jobs, and management of the forests. The agreement was implemented four years after signing.

This project combated all of these problems successfully by taking into consideration: the economy through creating jobs made possible with the expansion of the Collins Mill and a new energy source; the environment by creating the Oregon Solutions group to maintain the forest and the biomass plant to reduce their carbon footprint; and society by thinking about long term intergenerational effects of excess carbon as well as establishing lasting relationships with federal and local governments, business and private citizens. This agreement also took into consideration future needs and made the agreement flexible with plans to continue meeting and collaborating.

References

1. Students at Portland State University, Lakeview, Oregon: The Little Town That Collaboration Saved (Portland, Oregon: Oregon Solutions, 2011), 5-7

2. Mediators Beyond Borders, Case Studies Demonstrating the Use of Mediation, Consensus Building and Collaborative Problem Solving in Resolving Environmental and Climate-related Conflicts
3. Amy Markus et al, Lakeview Collaborative Forest Landscape Restoration Project and Monitoring Plan (University of Oregon, 2015)
4. Lakeview Biomass Energy Facility: An Oregon Solutions Project January 12, 2006 Declaration of Cooperation: <http://orsolutions.org/wp-content/uploads/2011/09/LakeviewBiomassDOC.pdf>

Guidebook Contributors

Editors

Bobbye Leigh Morgan, Chief Editor

Sandra Lee, Assistant Editor

Paul Mullen, Layout Editor

Writers

Authors listed in alphabetical order.

MaryKate Flanagan

Emily Fucile Sanchez

Elle Harmon

Sandra Lee

Bobbye Leigh Morgan

Paul Mullen

Jayton Rainey

Ashley Ross

Laura Stearns