



Case Study #5

**US Army Corps
of Engineers**

**Alternative Dispute
Resolution Series**



GOODYEAR TIRE AND RUBBER COMPANY

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The Corps Commitment to Alternative Dispute Resolution (ADR):

This case study is one in a series of case studies describing applications of Alternative Dispute Resolution (ADR). The case study is part of a Corps program to encourage its managers to develop and utilize new ways of resolving disputes. ADR techniques may be used to prevent disputes, resolve them at earlier stages, or settle them prior to formal litigation. ADR is a new field, and additional techniques are being developed all the time. These case studies are a means of providing Corps managers with examples of how other managers have employed ADR techniques. The information in this case study is designed to stimulate innovation by Corps managers in the use of ADR techniques.

These case studies are produced under the proponency of the U.S. Army Corps of Engineers, Office of Chief Counsel, Lester Edelman, Chief Counsel; and the guidance of the U.S. Army Corps of Engineers Institute for Water Resources, Fort Belvoir, VA, Dr. Jerome Delli Priscoli, Program Manager.

For further information on the ADR Program and case study contact Program Manager:

*Dr. Jerome Delli Priscoli
Institute for Water Resources
Casey Building
7701 Telegraph Road
Ft. Belvoir, VA 22060-5586
Telephone: (703) 355-2372
Fax: (703) 355-3171*

Goodyear Tire and Rubber Company

Alternative Dispute Resolution Series

Case Study #5

Endispute Analysis

Lawrence E. Susskind
Principal Investigator

Susan L. Podziba
and
Eileen Babbitt
Co-Investigators

Endispute, Inc.
955 Massachusetts Avenue
Cambridge, MA 02139

Neutral Advisor Analysis

Richard C. Collins, Ph.D.
Director

Institute for Environmental Negotiation
University of Virginia



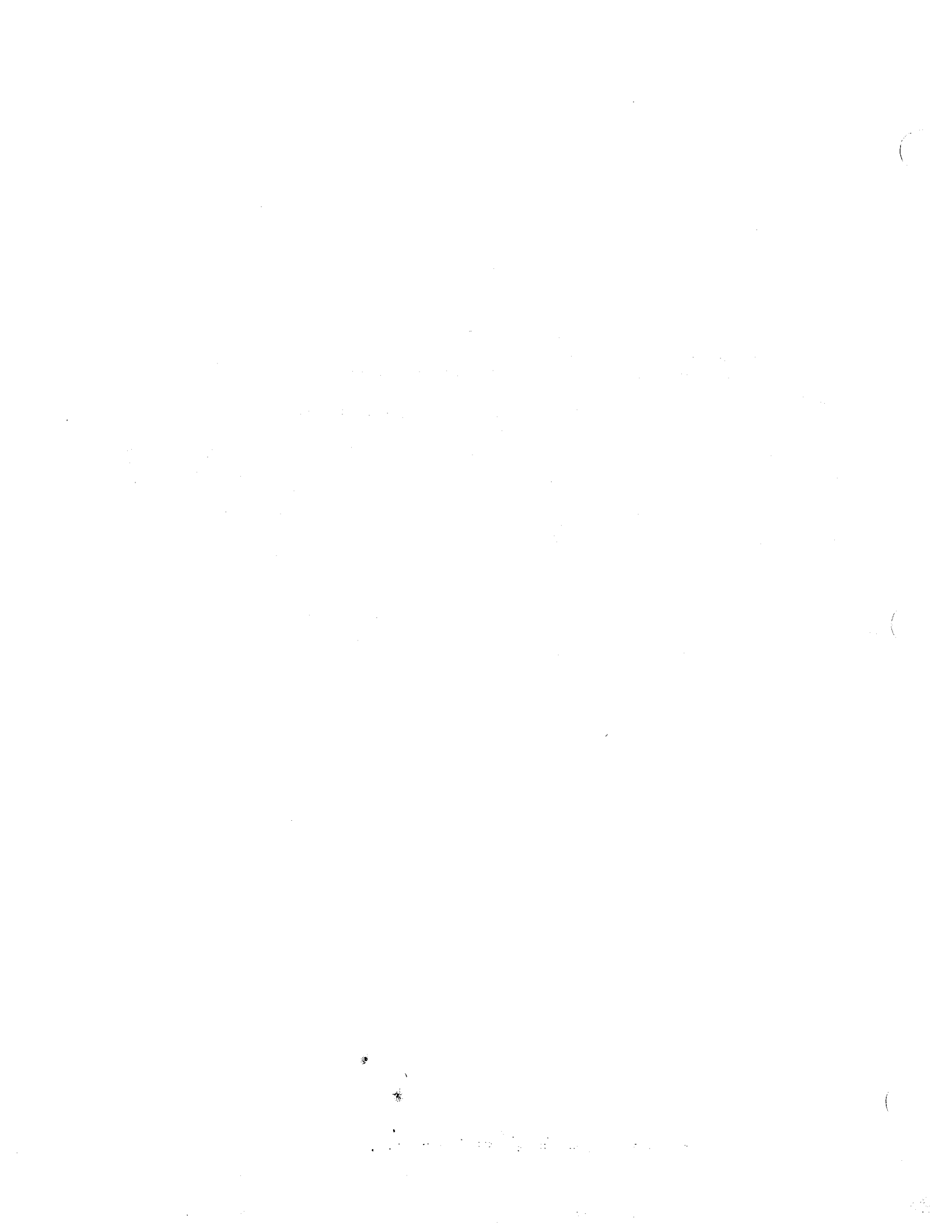
Foreword

The following two studies describe and analyze the same case: The Phoenix-Goodyear Airport (PGA) Superfund Site. A mini-trial was used to resolve the relative responsibility of Potentially Responsible Parties (PRP's): the Department of Defense (DOD) and Goodyear Tire and Rubber Company. The case could prove to be an important illustration of how ADR generally and the mini-trial specifically could apply to Superfund clean-ups.

While each analysis deals with the same case, they do so from different perspectives and experience. The Endispute analysis is a post-facto examination based on interviews with the principle parties. Dr. Collins was the neutral advisor in this mini-trial and his analysis is written from that perspective and experience. Contrasting and comparing the perspectives contained in these analyses should enrich the understanding of the actual practice of ADR.



Jerome Delli Priscoli, Ph.D.
Institute for Water Resources



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Goodyear Tire and Rubber Company:
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by

Lawrence E. Susskind
Principal Investigator

Susan L. Podizba
and
Eileen Babbitt
Co-Investigators

Endispute, Inc.
12 Arrow Street
Cambridge, MA 02138



GOODYEAR TIRE AND RUBBER COMPANY: ENDISPUTE ANALYSIS

The Phoenix-Goodyear Airport (PGA) Superfund site is located approximately 17 miles west of Phoenix, Arizona. The southern half of the site consists of adjoining properties: the Phoenix-Goodyear Airport, formerly the Litchfield Park Naval Air Facility, now owned and operated by the City of Phoenix; and the Loral Corporation plant on land owned until 1986 by Goodyear Tire and Rubber Company through a then subsidiary, Goodyear Aerospace Corporation.

The adjoining Navy and Goodyear facilities had been established during World War II to modify, repair and service Navy aircraft. After the War, Goodyear left the site and the Navy stayed on to preserve decommissioned military aircraft. When the Korean War broke out, Goodyear returned to its former site and manufactured airplane parts, largely under government contract, until the facility was sold in 1986. The Navy operated its facility until 1968, when it was transferred to the City of Phoenix.

In 1981, Goodyear and the Arizona Department of Health Services discovered volatile organic compounds (VOC), principally trichloroethylene (TCE), in the groundwater and soils at the PGA/Litchfield site. (TCE is a human carcinogen.) EPA added the site to the Superfund National Priorities List in 1983.

From 1983-1987, EPA conducted a Remedial Investigation and Feasibility Study (RI/FS) at the site. Following the Study, Special Notice Letters were delivered to the Department of Defense and the Goodyear Corporation identifying them as Potentially Responsible Parties (PRPs) in the cleanup of the site. The U.S. Army Corps of Engineers, through its Omaha District Office, was assigned by DOD the responsibility of acting for DOD in the investigation and negotiations. In September of 1987, EPA issued a Record of Decision (ROD), calling for remediation of the groundwater problem as the first phase in cleaning up the site. The ROD triggered a regulatory timetable for remedial actions by the PRPs. They then had 60 days to respond to EPA with a proposal for financing and undertaking the necessary remedial action. By request of the parties, this was extended to 90 days. During this time, the first attempts to negotiate a settlement were made.

THE ISSUES IN DISPUTE

The major issue in contention was the relative responsibility of each of the PRPs (DOD and Goodyear) for the TCE contamination. The resolution of this issue depended upon determination of the source and timing of the contamination. Each side conducted extensive investigations of its own, but the results were controversial and inconclusive. There were also few witnesses still available. Little detailed documentation remained, because the site was used for military purposes and some of the records had been destroyed or "sanitized" by Naval Security after World War II.

NEGOTIATIONS BEFORE ADR

When the ROD was issued in September 1987, the Corps and Goodyear attempted to negotiate an agreement. Their different assessments of their respective responsibility kept them far apart on a cost-sharing formula. At the expiration of the extended 90-day period, the two sides could not reach an agreement. Goodyear submitted its own remediation plan to EPA. The Corps, as agent for DOD, observed but did not participate in the negotiation between EPA and Goodyear, pending resolution of the cost-sharing dispute. DOD knew there was a possibility of an EPA administrative order if it did not participate in the cleanup. As a result of negotiations and a desire to forestall future litigation, the parties discussed the possibility of using ADR. EPA agreed to extend the Consent Agreement deadline until May 25, 1988, to allow DOD and Goodyear to explore ADR.

POSITIONS OF EACH SIDE PRIOR TO ADR

The Corps' evaluation was that their relative responsibility for clean-up was small. In fact, their initial offer to Goodyear when negotiations began was that the Corps would pay only 6% of the clean-up cost. They did increase their offer during the negotiations, but still maintained that the Corps responsibility was much less than 50%.

Goodyear argued that, because they were operating as contractors to the Navy and proceeding according to government specifications, the government should share equally in the responsibility for the contamination. Because of this, Goodyear claimed that they and the Corps should split the costs 50/50. But they also felt their position was weak because "the government is the government"; i.e., even though DOD is not EPA or DOJ, they are all "the government" and by definition on the same side. This put Goodyear at a disadvantage, or so they thought, in any battle with DOD.

DECISION TO USE ADR

RAISING THE OPTION OF ADR

The idea of using ADR was first suggested to Goodyear by its outside legal counsel, Multinational Legal Services of Washington, D.C. Specifically, Jim Tozzi of MLS, a strong proponent of ADR, suggested to Goodyear that it might be applicable in this case. Jack Mahon, the Corps Senior Counsel for Environmental Restoration, who was involved in the Goodyear negotiations, moved swiftly to gain acceptance within DOD of an ADR initiative. He knew that Lester Edelman, the Corps Chief Counsel, would be a strong supporter. Goodyear was negotiating directly with Corps Headquarters at the time and so wanted to conduct an ADR process with personnel at that level.

The Corps, however, felt strongly that negotiations should take place at the District level. This was where they felt they had the strongest technical capability. Colonel Steven West, the Omaha District Engineer who took the lead role for the Corps, had recently concluded a mini-trial with the Bechtel Corporation. He had worked with Gary

Henningsen, an attorney in the Omaha District office, on the case. This was the same team the Corps proposed to use with Goodyear.

The Corps Chief Counsel made it clear to DOD that Colonel West would have to have total authority to settle in order for ADR to work. While District Engineers have unlimited authority in contract settlements, such authority had never been granted in the area of toxic waste clean-ups. Because DOD felt Colonel West had the experience and skill to handle this case, they delegated the required authority in this instance.

PROS AND CONS OF ADR: THE CORPS

Concern was focused on avoiding long term litigation associated with contribution actions by Goodyear. EPA/DOJ showed little inclination to go against the Corps. However, the Corps recognized that if EPA moved against Goodyear with a consent decree or an administrative order, the ability to settle would be taken out of the Corps' hands. Their assessment was therefore that an ADR procedure left them more in control of the outcome than any other available process.

On the "con" side, the technical staff at the District level were not initially in favor of ADR. They felt that their case was strong and that an ADR procedure would reflect dissatisfaction with their analysis and force the Corps to make concessions that were inappropriate. They eventually supported the ADR process.

PROS AND CONS OF ADR: GOODYEAR

When negotiations broke down in late 1987, Goodyear assessed their alternatives as follows:

- Cooperate with EPA and sue DOD
- Do not cooperate with EPA, even if DOD refuses to come in as a PRP. This would require EPA to litigate, issue an Administrative Order, or perform the clean-up and come back to Goodyear for reimbursement.

The lawyers for Goodyear felt they were in a no-win situation with EPA. The Superfund statute put all the weight on EPA's side in any confrontation. Goodyear's lawyers felt an ADR process was their best choice, given the options.

Goodyear itself, however, was "restive" about the whole process, according to Richard Berg of MLS. They felt put upon. In their view, all of the contamination was a result of government contract work. Given that the facts were hard to ascertain, they felt a 50/50 split was the only fair outcome. In addition, they were upset with what they saw as EPA's "Gestapo-like" search procedures as the Agency sought evidence of who caused the contamination. In their view, EPA was likely to be biased in favor of DOD. However, legal counsel was able to convince Goodyear that ADR provided their best chance of generating an acceptable outcome.

THE PRE-ADR MEETING

Colonel Steven West, the District Engineer for the Omaha District, was the principal representative for the Corps. Dr. Robert Hehir, Vice President for Government Environmental Safety and Health Assurance Programs, represented Goodyear. Colonel West called Dr. Hehir to set up a meeting to discuss the details of the proposed ADR process. The Colonel felt strongly that the elements of a successful process would include the decision-makers having the ability to make final commitment and having the willingness to settle. When he called Hehir, West made it clear that he had the authority to settle and that Hehir must have the same. In West's view, mini-trials or other forms of ADR are merely variations on existing decision-making procedures for managing complex disputes.

At the first meeting, each made an assessment of the other. Hehir felt that West was "forthright, intelligent, trustworthy, knowledgeable, and respectful of technical ability." West saw Hehir as "decisive, positive and substantive." For both men, this was decisive in going forward and proceeding with the ADR arrangements. As West remarked, he took the "commitment to proceed... [as] a desire to settle."

CHOICE OF ADR PROCEDURE

At this meeting, West suggested the use of a mini-trial. He had experience with this procedure and felt that it fit the situation. His primary concern (and that of Hehir's as well) was that the technical and business people remain in control and not turn the reins over to the lawyers or others. In the mini-trial, the principals could maintain a high level of personal involvement and did not delegate the decision to anyone else.

Both men also felt confident that their staff people could competently present each side of the dispute. They also felt that, as principals, they could be open to new agreements.

They agreed on a three-day mini-trial procedure. West and Hehir would preside as the "decision-makers." Gary Henningsen would be the attorney presenting the Corps' case. Henry Diamond, of Beveridge and Diamond, Washington, D.C., would present the Goodyear case. (Richard Berg, Senior Counsel of Multinational Legal Services, also advised Goodyear.)

On each of their first two days, one side would lay out its case in the first three hours. West and Hehir would then use the rest of that day to ask questions of the presenters. The third day would be for deliberation of the principals and for making a decision. The men also decided, however, that they would meet "as long as it took" to settle. They backed the three days up against a weekend so as to give themselves the flexibility of more time if they needed it.

STRUCTURE OF ACTUAL ADR AGREEMENT

The formal ADR agreement was drafted during February and March of 1988. David Schwartz from MLS, a retired claims court judge, did the drafting on the Goodyear side. Gary Henningsen worked on the Corps side.

The amount and timing of discovery was a critical issue. Goodyear requested more discovery than the Corps thought appropriate and also expected Corps staff to travel to locations around the country to search for documents. The negotiators finally agreed to limit themselves to 10 Interrogatories and 10 Requests for Admissions on the other party, and that the Corps would be obligated to provide only those records over which it had control.

The parties agreed to depose no more than five persons on the other side and to follow these up by written statements. They also agreed to a schedule for document requests and for responding to Interrogatories.

The structured agreement was difficult to hammer out; there were two written drafts by each party and one face-to-face meeting between the lead negotiators, as well as numerous phone calls. It took the intervention of the principals to finally bring about an agreement on the process.

In addition to issues of discovery, two other elements emerged as sticking points:

The scope of the mini-trial: Goodyear wanted the scope to be broad enough to encompass anything they felt pertinent to their case. The Corps wanted to limit the scope to evidence on the contamination. Henningsen finally conceded this point and allowed the scope to include any and all issues.

The specific costs that the allocation formula would apply to: The parties agreed that, rather than deal with this as a part of the ADR agreement, they would defer this to a sidebar negotiation to take place at a later time. In fact, this sidebar became extremely important and continued throughout the mini-trial itself.

The final terms of the mini-trial agreement included the following:

- the Principals participating "would have full authority to settle the dispute"
- the mini-trial would be a nonbinding hearing process designed to inform the Principals of the position of the respective parties "on the dispute and the underlying bases of each"
- the scope of the hearing was confined to the "operable unit" set out in the EPA ROD
- the date, time limits, and location of the hearing were agreed upon and each party agreed to "exert their best efforts to reach a settlement before June 1." If no agreement was reached by that time, the ADR would be ended.
- the agreement specified that a "sidebar" agreement between the two parties would be developed to determine what specific costs were to be covered by a cost allocation agreement.
- a neutral advisor would be in their common interest and agreed to jointly approve a neutral by April 1
- limitations on the use of discovery were set, and the parties agreed to assist each other in interviewing and deposing witnesses
- the rules of evidence would not apply and informality would be the rule
- time limits and schedules for presentation were agreed upon
- each side agreed to provide a "statement of contention" as a position paper of not more than 25 pages
- there would be no transcript or recording made of the hearing, and all material was to be "a part of a settlement conference for purposes of the rules of evidence in any court, State or Federal"

SELECTION OF THE NEUTRAL

Both sides agreed to submit names of a person to play the neutral role. Hehir and West agreed it should be someone with considerable technical expertise, as well as credibility and professional standing. Goodyear proposed Dr. Richard Collins, Director of the Institute for Environmental Negotiation at the University of Virginia. The Corps did not develop their own list, and after investigating Dr. Collins' credentials, agreed to retain his services. Collins was known to Dr. Jerry Delli Priscoli, who recommended him to the Chief Counsel, Mr. Les Edelman.

Goodyear was looking for someone with maturity and judgement. Dr. Collins met their criteria as well.

Hehir and West wanted the neutral to play a facilitative role, keeping things moving but not offering his advice unless asked. Collins ended up asking many questions during the actual proceedings, playing devil's advocate during the deliberations of the principals, and talking them through stalemates.

The process of identifying and confirming the neutral took about 60 days.

PRIOR EXPERIENCES WITH ADR

Colonel West had conducted a mini-trial with Bechtel on a contract claim but had no ADR experience with toxic waste, as this was a new area in which the Corps was using ADR. Henningsen likewise had worked on the Bechtel case.

The MLS attorneys (Richard Berg, Dave Schwartz, Bill Hedeman), had ADR experience. However, MLS hired a trial attorney (Henry Diamond) to present the case. His previous experience had been primarily in structured negotiations of construction disputes and in non-settlement negotiation.

Dr. Hehir had not had ADR experience. He was briefed by Dave Schwartz of MLS before meeting with West.

ADR PROCEDURE

The mini-trial was held-May 19-21, 1988 in Phoenix, Arizona. On the first morning of the proceedings, the principals and the neutral advisor had breakfast together. It was the first time the three of them had met and they discussed ground rules for the proceedings and the role for the neutral during the mini-trial. Both West and Hehir were clear with Collins that they did not want him making judgments. What they wanted instead was a facilitator, someone to keep the proceedings moving and on target in a highly visibly, chairman-like way.

In the course of the mini-trial, Collins' role became very important. He became the one to ask most of the questions, as West and Hehir tried to remain distant and listen evenly to both sides. In fact, West and Hehir kept themselves quite separate from the other participants throughout the proceedings, taking meals together (with Collins) and

consciously avoiding caucusing with their respective teams. They did this in an effort to be impartial and carefully consider all the information. And they let Collins play the role of devil's advocate, asking the difficult questions both during the mini-trial and in their private deliberations.

Collins contributed in another major way as well. At the end of the second day, the disagreement of the expert testimony from each side was still hard to reconcile. Collins suggested that the experts from both sides discuss the technical information (primarily the hydrology of the site) before the principals as a panel, without the interference of Counsel. This allowed Collins, West, and Hehir to focus attention specifically on these different viewpoints and have the experts themselves explain their disagreements.

At one point in the proceedings, the principals felt it was important to visit the site and see if that disclosed any information useful to the decision. According to Collins, this visit provided visual evidence that strengthened the Corps' case and may have led to Hehir's willingness to compromise later in the discussions.

Many of the participants commented on the difference in style between the two presenting attorneys. Diamond took the words "mini-trial" literally and conducted his presentations as if in a courtroom. In his own words, he felt it to be "litigation in miniature." His approach was to refute the Corps' case through cross-examination and rebuttal.

Henningsen, on the other hand, approached the mini-trial as a problem-solving opportunity. His presentations (at first) were more like briefings, in which he tried to illuminate as much about the site as possible. The Corps had done a tremendous amount of technical preparation on this case and wanted all of the data to be shared so that the most equitable solution could be found. As the mini-trial progressed, however, Henningsen adopted more of the trial-like methods employed by Diamond. Both men agreed that it was a hard-fought case.

THE SIDEBAR AGREEMENT

The mini-trial proceedings focused on the allocation question and the percentage of cleanup costs that each party should pay. A secondary, but very significant, issue was determining exactly what costs were to be split.

The discussions had begun months before the mini-trial itself. The Corps, with help from the DOJ, had prepared a draft agreement, but Goodyear couldn't agree to it. They responded with a revised text. Representatives of both parties met in Omaha, Nebraska on May 19, to try and work out the differences, and the negotiations were moved to Phoenix on May 20.

The deliberations continued in Phoenix, concurrently with the mini-trial but in a different room of the hotel. An entirely different set of players, all attorneys, were involved in these negotiations. They included Jack Mahon from the Corps' Office of Chief Counsel, Bill Hedeman and Dick Berg from MLS, Willy Ido from Goodyear, and Steve Calvarese from the Missouri River Division Office. By Saturday morning, after a very late session on Friday evening, most of the issues had been resolved. There were, however, still some sticking points. The negotiators turned these over to the principals in the mini-trial and they made the final decision on these last issues.

Several participants commented on the importance and uniqueness of these negotiations. To their knowledge, they were operating in the dark, with no model of how this kind of negotiation should proceed. Goodyear took a strong position that the sidebar had to be settled before they could agree to any share of costs. This put on a lot of pressure to work through these parallel negotiations quickly, so as to be completed before the conclusion of the mini-trial.

A significant piece of these negotiations were the issues left unresolved until the end. There was much uncertainty in the data being used to identify costs, and where the uncertainty was too great, the negotiators passed the decision on to the principals. They folded these last critical decisions into their deliberations on Saturday, May 21.

THE SETTLEMENT

The presenters gave their summary statements on Friday afternoon, May 20. On Friday evening, West, Hehir, and Collins met together to begin their deliberations. They were not able to reach any agreement that evening; they spent most of that time reviewing the presentations and steered clear of putting any numbers on the table.

They convened early the next day. Collins played a critical role in these discussions by providing a critique of each side's case. After several hours, they were still far apart, and it was not clear that agreement was going to be found. Each principal "took a walk" with the neutral, to test out perceptions and possible percentages before proposing them to the other side.

Late in the day, West and Hehir reached an agreement. In Hehir's words, they both recognized this to be a "business decision," in which it was "better to do something rather than nothing." Hehir had been willing to give in a bit on the issues in the sidebar agreement, and this may have helped set the tone for agreement on the cost allocation. The final decision was for the Corps to pay 33% of the costs, and Goodyear to pay 67%. The agreement was contingent on Goodyear agreeing to the consent decree with EPA, which they were willing to do.

EVALUATION

All of the participants felt that the outcome of the mini-trial was acceptable. Each was, of course, hoping for more. After hearing all of the information presented at the mini-trial, each party and attorney felt that the settlement was within a reasonable range of their desired outcome.

Everyone was also satisfied with the process. The principals in particular both felt that the procedure had worked well. They each felt the other had discharged his responsibility admirably and that the resulting decision was the very best that could have been achieved. The relationship between the principals was an important element in this mini-trial, and many of the participants felt that this was the most important ingredient in the procedure's success.

The Corps staff were also satisfied. They were a bit disappointed, however, in their dealings with Goodyear. They had hoped for a more cooperative relationship. The

Goodyear people, with the exception of Hehir, were adversarial and therefore the negotiations at the staff level were harsh.

The neutral, Rich Collins, also got high marks from all of the participants. They felt his questioning during the proceedings was rigorous and on target, his facilitation of the sessions was handled with appropriate authority, and his critical thinking in the private sessions with the principals invaluable in helping them break through the stalemate and reach a decision.

The participants drew several very important and interesting lessons from this case:

- The time commitment of the principals is significant. While a mini-trial procedure can be useful in many kinds of cases, it should be employed selectively in situations in which executive time is truly limited.
- It is critical that the principals have the authority and the capability of making decisions on behalf of their group.
- The principals should meet beforehand and assess whether or not each feels he can "do business" with the other. This includes an assessment of each person's commitment to settle.
- The business and technical people should retain control of these decision processes and not hand them over to attorneys.
- Both principals should feel comfortable with the neutral, both personally and procedurally. The neutral should take direction from the principals and exercise control only to the extent that they allow.
- A neutral with technical expertise is invaluable, if he/she does not overstep boundaries and offer opinions that are not requested.
- This kind of process provides great insight into one's own organization; how the groups present their cases indicates how they organize information and deal with problems.
- The structure of the ADR procedure is very important. The more that can be ironed out at this stage, the better.
- Even with compressed deadlines, there are savings in money and time over litigation.
- The most important ingredient is the supportiveness of the principals and their willingness to settle. This sets a tone that permeates the proceedings and can overcome adversarial relations between the presenters and staff. If the principals don't have the will to settle, or don't communicate it to their staff, the process can unravel.
- Mini-trials are most appropriate for cases which:
 - have a high potential for settlement, or for which the Corps is not convinced it has a strong case;
 - would have a high cost if they went to trial;
 - have multiple claims;
 - have difficult factual, rather than legal issues.



Goodyear Tire and Rubber Company:
Neutral Advisor Analysis

by

Richard C. Collins, Ph.D.
Director

Institute for Environmental Negotiation
University of Virginia



GOODYEAR TIRE AND RUBBER COMPANY: NEUTRAL ADVISOR ANALYSIS

A mini-trial is a structured dispute resolution process with a catchy if somewhat misleading name. The U.S. Army Corps of Engineers defines a mini-trial as:

a voluntary, expedited, and nonjudicial procedure whereby top management officials for each party meet to resolve disputes.

In a mini-trial, top management officials are brought together for a brief, intense process during which the parties give presentations of their best case to the officials. These top management officials after hearing the presentations attempt to negotiate a settlement.

A key characteristic of a mini-trial is that the top management officials possess on the spot authority to make decisions based on their assessment of the respective cases and their negotiations. Another key element is that the presentations are directed to the top management officials and not to a third party with authority to independently recommend or render a decision on the merits.

Although a neutral advisor may be--and often is--involved in a mini-trial, the advisor's role is defined by the parties and is generally directed to assisting the top management officials to get a useful, understandable, and expeditious body of information. Later, the neutral might be asked to assist in the negotiations among the top management officials.

While mini-trials can vary in format and are tailored to meet the needs of a particular situation, they share certain common characteristics. They all offer parties the opportunity to avoid litigation and replace it with an informal, confidential, less expensive process in which they can control the agenda through mutual agreement.

This case illustrates the use of a mini-trial by the U.S. Army Corps of Engineers and the Goodyear Tire and Rubber Corporation to resolve a Superfund cost allocation issue. The Army Corps of engineers served as a representative of the Department of Defense and the Department of the Navy which was designated, along with Goodyear, as a "potentially responsible party" (PRP) on a Superfund site near Phoenix, Arizona. This site involved two properties adjacent to each other. One property was owned and operated for a relevant period of time by the U.S. Navy. The other was owned by Goodyear which worked closely with the U.S. Navy on aircraft stationed at the Navy base during a relevant period of time.

A PRP is the term which is used by EPA to describe a party who has some association with the site and hence has some potential legal responsibility for cleaning up

the site. The adverb "potentially" may be misleading to the layman. In reality, to be designated "potentially responsible" is to be caught in a net that is very difficult to escape. Thus, "potentially" responsible understates the full impact of being designated as such.

The legal complexities of the Superfund law and the management of those legal aspects by the EPA can powerfully affect the urgency to resolve a dispute between potentially responsible parties. It is appropriate, therefore, to describe the context in terms of the Superfund issue before advancing to a discussion of the mini-trial itself.

Alternatives to a Negotiated Agreement in the Superfund Context

Alternative Dispute Resolution processes, including the mini-trial, are an option available to parties in dispute. These options are mainly directed to avoiding the costs and uncertainties associated with a court suit. The mini-trial is an option weighed against the other alternatives to resolve the dispute. A mini-trial may be an attractive option to parties in many different kinds of disputes; in superfund cases like the Litchfield case described here, the mini-trial may be a dramatically more attractive option than in other types of cases.

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) is an unusual environmental law. It allows for a direct action program to clean up a contaminated site if the parties responsible for it are unidentifiable, or if identified are unable, or unwilling to accept responsibility for the remediation. There can be, as there was in this instance, financial, legal and management advantages for potentially responsible parties to agree on their respective share of the financial responsibility for remediating a site. If the parties can agree to their respective shares of responsibility they can present a third party--the U.S. Environmental Protection Agency--with a cleanup plan that they can pay for with their own funds and manage directly.

The advantages the parties gain by an agreement include a less costly cleanup process, and the removal of the threat of legal action by the EPA if they fail individually or jointly to undertake the required cleanup.

The Superfund law imposes strict, joint and several liability on parties who are identified as potentially responsible parties. This means that there is no defense from the liability on the grounds that the party did not act negligently. Also, a single party may be held responsible for all of the cleanup even if their individual contribution to the contamination was fractional.

There are many good reasons to undertake an ADR or specifically a mini-trial to resolve disputes. Many of these reasons have to do with joint gains to the parties by a more timely and less expensive and acrimonious resolution of an issue. But in this case, the motivation to undertake a mini-trial was increased by the presence of a third party--the EPA--which has the power to adversely impact the parties in the absence of an agreement between them.

The Superfund law is quite vague about what legal standards should govern the allocation of financial responsibility for cleanup costs among different parties. Generally, it is assumed that such things as toxicity, volume, leachability, and other factors related to the risks created by identifiable parties are relevant, but there is very little settled case law. The EPA has generally taken the position that the various parties should handle the question of how to allocate the related costs among themselves. The EPA is not eager to try and determine what shares are appropriate as long as they can find a way to remediate and recover costs from at least one party.

The PGA/Litchfield site is typical in that the alleged contamination occurred thirty or forty years before the Superfund law was passed. Thus, at the time the contamination may have occurred, the parties were not necessarily aware of the risk to the environment or public health associated with the materials or practices employed at the time.

Given these conditions and uncertainties, potentially responsible parties have an incentive to work out their cost allocations. In ADR terms the best alternatives to a negotiated agreement (BATNA) are decidedly unattractive. An agreement on cost allocation between the Corps and Goodyear would mean that both parties might cooperate in cleaning up the site with the potential for large savings over what an EPA contracted cleanup might eventually cost them.

Additionally, and perhaps even more importantly, an agreement with EPA removes the cloud of uncertainty surrounding EPA's legal options and the uncertainty, expense, and publicity of an EPA action.

In the absence of an agreement between the parties the EPA could sue parties for the full costs related to the investigation, studies and remediation. Or, it could sue just one party for the entire cost and leave that party to sue the other party for their share. It could even assert that one or both parties should pay treble damages for failing to comply with EPA's orders. Obviously these alternatives are unattractive to the potentially responsible parties.

A mini-trial involving a cost allocation of a Superfund cleanup makes the EPA position critical to the BATNA of the parties. The policies of the EPA, the role of their regional officials, and various "forums" within the agency can influence the parties eagerness to agree on their respective shares of a cleanup.

Another uncertainty associated with a Superfund cleanup is the type of cleanup that will be required and the cost associated with it. If, as in this case, the EPA recommends pumping water out of the ground, removing the offending chemicals and then reinjecting it, the duration and cost of the cleanup is unknown.

A final factor that shapes the parties' attitudes toward a negotiated settlement is the potential public reaction to an EPA action. Understandably, Superfund sites are subjects of intense local and even national, interest. There is always the fear among potentially responsible parties that attention directed to a Superfund site for any reason may bring an unwelcome comparison with public images of Love Canal or the Valley of the Drums.

This publicity, although unwelcome by all parties, may concern a private firm with a brand name product more than a government agency. Such a firm is extremely sensitive to its public image and to the effects a negative image might have on its market position.

Thus, in Superfund cases it appears that potentially responsible parties can have a strong mutual interest in a cost allocation agreement because of the uncertainty and potential consequences created by an impasse. The likelihood of the parties achieving substantial gains through litigation with the EPA or between themselves are remote and unlikely. The lack of an attractive BATNA for the parties adds strength to the other forces that discourage litigation and encourage a negotiated settlement.

This is the context which the parties involved in the PGA/Litchfield Superfund site faced as they evaluated the use of the mini-trial option. It will be important to keep this context in mind as we review the chronology of the case and decisions to go to a mini-trial.

Chronology of the PGA/Litchfield Conflict and Mini-trial

It will be useful to begin the discussion of the PGA/Litchfield case with a chronology beginning with the discovery of the contamination at the site through the conclusion of the mini-trial. While it will remove any suspense that might otherwise be there regarding the outcome of the case, it provides the reader with a better framework for understanding the narrative.

1981: Solvents, principally trichloroethylene (TCE), were discovered in the groundwater and soils at the PGA/Litchfield site by the Goodyear Corporation and the Arizona Department of Health Services. TCE is considered a "potential human carcinogen." EPA initiated investigation of the site under its Superfund authorization.

1983: The EPA investigation process led to the PGA/Litchfield site being placed on the Superfund National Priority List. This listing signifies that the site has a high risk evaluation in a comparison with sites throughout the U.S. This list is public and it assures that a site listed will be given priority for cleanup under the Superfund law.

1983-1987: EPA undertook a Remedial Investigation and Feasibility Study (RI/FS) for the site. The Department of Defense (DOD) and the Goodyear Corporation were identified as the "Potentially Responsible Parties" (PRP's). The fact that these were the only major potentially responsible parties is significant, since many Superfund sites have many more potentially responsible parties.

September 1987: A Record of Decision and a Special Notice Letter were sent by EPA to the Department of Defense and the Goodyear Corporation. The EPA then gave the parties 90 days to make a "good faith offer" which according to EPA includes: a statement of the parties' willingness to conduct or finance the remedial action; a demonstration of technical and/or financial capability to do this; and a schedule for completing the remedial action. If

the good faith offer is accepted, a consent agreement may be reached which, in effect, allows the parties to conduct the cleanup on agreed terms and under court supervision.

September 1987-February 1988: Goodyear and the Department of Defense (represented by the Corps) engaged in negotiations to try and develop a cost allocation agreement based on their assessment of their respective shares of responsibility for the contamination of the site. These negotiations were unsuccessful. When the negotiations broke down, Goodyear pursued the possibility of making a good faith offer to EPA on their own without an agreement with DOD on their respective shares of the total cost.

January and February, 1988: Goodyear had second thoughts about proceeding independently with the good faith offer which might conclude with the signing of a consent agreement. The Corps, which did not participate in the Goodyear good faith offer, attended sessions between EPA and Goodyear. The Corps wanted to avoid litigation with either Goodyear or the EPA.

February 1988: The time given the parties by EPA to sign a consent agreement expired. At this point, the EPA had a number of options available. Those options included a lawsuit against the parties and the potential for penalties up to three times the cost of the cleanup. If Goodyear and the Corps could not agree on an apportionment, they would also eventually have to go to court for a determination of their respective shares of financial responsibility.

January-March 1988: The parties began to discuss ADR options and finally agreed to a mini-trial. EPA reluctantly agreed to extend the consent agreement deadline until May 25 based on this last effort to try to resolve their differences.

March-May 1988: An agreement was reached between the parties to undertake a mini-trial. Preparation for the mini-trial included negotiations on the "rules of the game" or mini-trial agreement.

May 1988: The mini-trial took place on May 19 and 20. While the mini-trial was being conducted, parallel negotiations were also taking place to define the base of costs to which any mini-trial apportionment would apply. On May 21 a cost allocation agreement was reached by the parties providing a successful conclusion to the mini-trial.

Let us now turn our attention to examining in greater detail the various stages in the process that led up to the mini-trial, its design, and outcome.

Getting to the Table

We have seen that in this case the potentially responsible parties have a strong motivation to achieve a satisfactory agreement on their relative share of the cleanup costs. This is not to say that both parties are equally vulnerable or perceive the risks identically.

Goodyear was more apprehensive than the Department of defense about the range of possible consequences that they might suffer if an agreement on the respective shares was

