US Army Corps
of Engineers

Case Study #8

Alternative Dispute
Resolution Series

BASSETT CREEK WATER MANAGEMENT COMMISSION

January 1992

IWR Case Study 92-ADR-CS-8

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.

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Bassett Creek Water Management Commission

Alternative Dispute Resolution Series

Case Study #8

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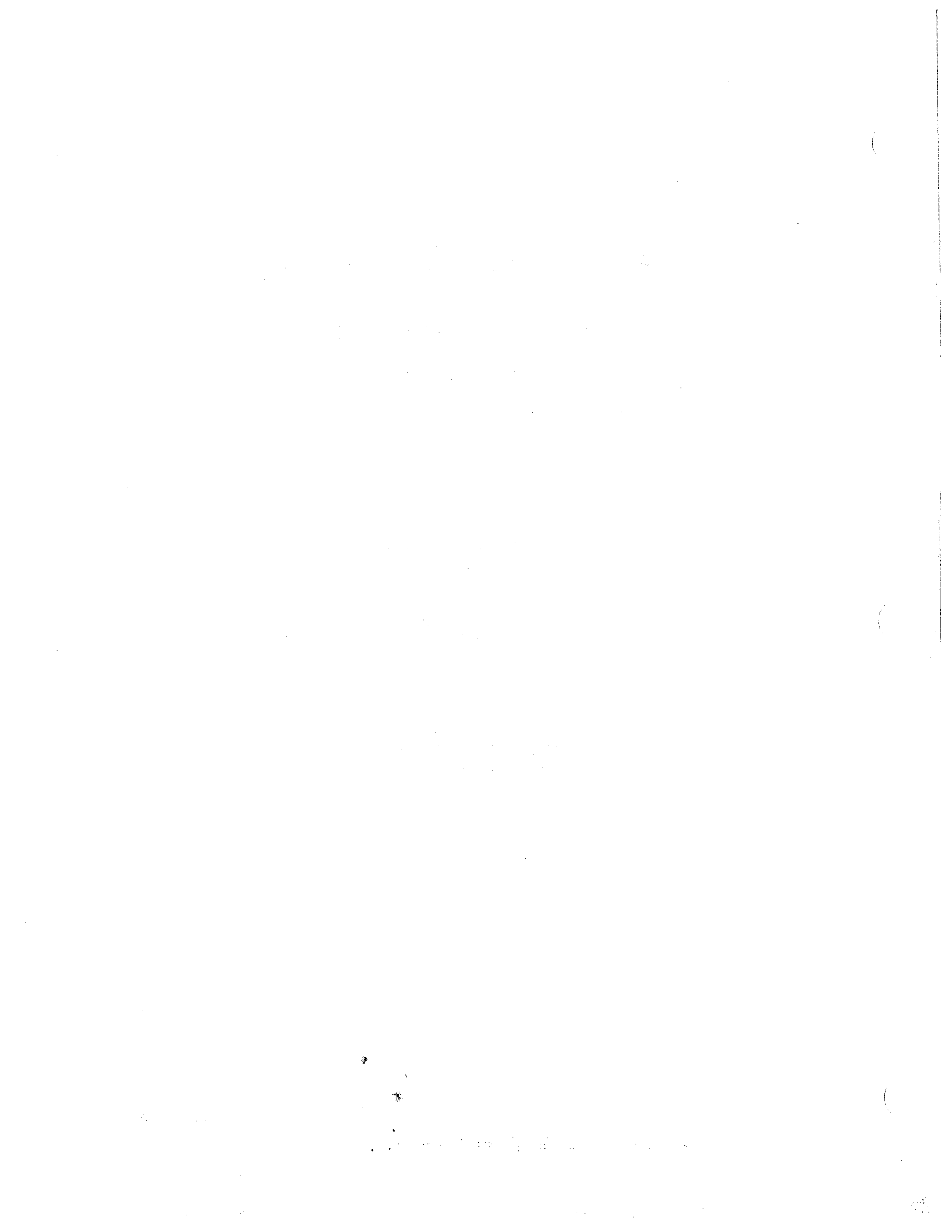

INTRODUCTION

This case study is one segment in the second phase of a project, initiated by the U.S. Army Corps of Engineers in 1986, to document how Alternative Dispute Resolution (ADR) can be used by Corps District offices to minimize the enormous costs associated with disputes that arise between Corps District offices and private corporations. By publishing and distributing pamphlets about different types of ADR processes as well as about past cases in which ADR has been used successfully, the Corps' Office of Chief Counsel has been encouraging its use since 1984.

The first set of case studies examined five different cases: Tenn Tom Constructors, Granite Construction, Olson Mechanical and Heavy Rigging, Bechtel National, and Goodyear Tire and Rubber. Key findings in those cases were that: 1) ADR was used when the anticipated cost of litigation was high; 2) mini-trials were preferred over non-binding arbitration when Corps managers wanted direct involvement in settlement negotiations; 3) ADR techniques could be useful at different stages of a dispute's evolution; 4) it was helpful for neutrals to have substantive expertise in the area of the dispute; 5) strong support for ADR from the Chief Counsel contributed to its increased use throughout the Corps; 6) Corps attorneys played key roles in the ADR processes; and 7) Corps managers were satisfied with the results and would use ADR techniques again.

The three cases in this second set of studies -- Bassett Creek, General Roofing, and Brutoco Engineering and Construction-- provide an up-to-date view of the growing use of ADR in the Corps of Engineers. They reflect a growing sophistication about the design and implementation of ADR processes. Several general lessons, of potential use to other Corps Districts contemplating using ADR, might be noted:

Bassett Creek. The St. Paul District Corps of Engineers used non-binding arbitration to resolve a real estate appraisal dispute with the Bassett Creek Water Management Commission. The Corps and the Commission were collaborating on a flood control project, and they disagreed over how much credit should be granted by the Corps to the Commission for land parcels contributed to the project. The case study highlights: 1) the pros and cons of conducting negotiations without counsel present; 2) the importance of having an expert in the substantive area of the dispute serve as the neutral; and 3) the value of having an ADR clause written into initial agreements.

General Roofing. The Louisville District Corps of Engineers used a tailored mini-trial to resolve three construction contract claims with General Roofing of Pittsburgh, PA. After hiring General Roofing to put a new roof on an Army Tank Command building, several claims arose over responsibility for delays and cost overruns. The case study highlights: 1) the advantages of "package" settlements that tie several issues together as compared to "piecemeal" settlements that deal with each issue separately; 2) the value of having a skeleton ADR agreement drawn up prior to the ADR process, with appropriate areas left blank; 3) the benefit of conducting lower-level negotiations on sub-issues while the principals are negotiating larger claims; and 4) the usefulness of tailoring an ADR procedure to best meet the special needs of the parties.

Brutoco. The Sacramento District Corps of Engineers used mediation to resolve a disputed construction claim with Brutoco Engineering and Construction of Fontana, CA. While working on the construction of a bypass channel for a flood control project, Brutoco claimed delays due to differing site conditions. The claim was resolved in a one-day mediation for 37% of its initial value. The case study highlights: 1) the value of mediation in resolving difficult disputes quickly and inexpensively; 2) the benefits, under certain circumstances, of keeping the negotiating teams separate during an ADR process; and 3) the value of developing a "global" settlement package that addresses all outstanding matters in dispute.

In general, these cases highlighted several key points. First, there are clear benefits to developing "global" or "package" settlements that address multiple issues together. Second, negotiations can sometimes be conducted more fruitfully in the absence of counsel. Third, it is very useful to have preexisting ADR clauses in agreements, and to come to ADR proceedings with a "skeleton" agreement prepared. Fourth, there are a variety of ADR processes available to the Corps, each suitable for different situations. Fifth, it is very helpful to use a neutral who has experience in the substantive area in dispute. Finally, it may sometimes be useful to keep parties separate during an ADR proceeding.

Although the above points emerged specifically from these new cases, the cases also confirm past lessons about ADR: it saves time and money, reduces risk, increases control, and preserves relationships. The Corps has clearly benefitted immensely--and stands to benefit further--from its emphasis on ADR

CASE STUDY #1
BASSETT CREEK WATER MANAGEMENT COMMISSION

THE PROJECT AND CLAIM

SUMMARY

Non-binding arbitration was used to settle a real estate appraisal dispute between the Corps and the Bassett Creek Water Management Commission (BCWMC), based outside of Minneapolis, Minnesota. The Corps and the Commission were collaborating on a flood control project. The Corps disputed a Commission-sponsored appraisal of a tract of land whose value was to be applied as credit toward the Commission's contribution to the project.

Brad Bjorklund served as the arbitrator, and Colonel Roger Baldwin, St. Paul District Engineer, and Peter Enck, chairman of the Bassett Creek Water Management Commission (BCWMC) were the decision-makers for the Corps and the BCWMC.

The main points illustrated by this case are: 1) the pros and cons of conducting negotiations without counsel present; 2) the importance of having an expert in the substantive area of the dispute serve as the neutral; and 3) the value of having an ADR clause written into an initial agreement.

BACKGROUND

In June, 1986, a Local Cooperation Agreement (LCA)[1] was signed between the Corps and the City of Minneapolis, which was designated by the BCWMC as the local sponsor for a flood control project. According to the 1986 Water Resources Development Act, a local sponsor must provide 25% of the project's total cost, and the portion of that contribution paid in cash cannot be less than 5% of the total project cost. The remainder can be composed of lands, rights-of-way, and easements.

Prior to the execution of the LCA, one of the cities that had established the BCWMC had acquired certain easements which were necessary for the project's completion. The LCA provided that the fair market value of the easements would be determined by an independent and mutually acceptable appraiser. The appraisal would be obtained by the City and reviewed and approved by the Corps. The Commission engaged William Schwab to appraise the lands in question, and Schwab submitted his appraisal on May 18, 1988. The total amount of the Schwab appraisal was $347,000.[2]

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[1] Since 1988, the model LCA provided to the Corps' regional offices by headquarters has included an ADR clause, which later became the catalyst for the ADR procedure used to resolve this dispute.

[2] The method used to appraise the easements in question entailed multiplying the value per square foot of the land parcels by the portion of the land affected or damaged by the project (the "impact percentage"). The Schwab appraisal assumed 100% damages.

Upon review, the Corps review appraiser, Eugene Brummel, determined that the appraisal was inadequate. He "...found serious problems in the appraisal--lots of verbiage and many exaggerations. The average residential lots values were applied to the back-lot creek bed without adjustment. Since one can't build on the land, such an application is unreasonable."[3] Brummel felt that the appraisal did not conform to federal appraisal standards, which specify the permissible range of land values and impact percentages usable for different types of parcels. In response, Schwab argued that the disagreement was over a matter of professional opinion, and that an objective standard would be difficult to find because of the scarcity of comparable sales. Schwab complained that "[t]he problem we are faced with is that Mr. Brummel is stating his opinion but is not supporting it. The burden is on us and all he has to continue to say is, 'I don't agree.'"[4]

CHRONOLOGY OF THE CLAIM

Upon receipt of the Schwab appraisal, Brummel corresponded several times with both Schwab and the Commission attorney, Curtis Pearson. After several letters back and forth, Brummel officially reported his dissatisfaction with the appraisal to the BCWMC on October 28, 1988: "In general I do not agree with most of the contents of the report particularly with the parcel valuations which in my opinion are excessive in amount."[5] Although there was some discussion of further negotiations, they did not materialize in the subsequent weeks. Finally, the Corps recommended to headquarters in January that the appraisal be rejected, and the rejection was confirmed in February, 1989.

The Commission was very distressed by the rejection. Several further meetings were held during the spring of 1989, attended by Pearson, Schwab, Brummel, John Roach (counsel for the Corps) and Billy Cabe (Chief of the Corps' Real Estate Office), in an effort to reach an agreement about the appraisal. According to Cabe, several of these meetings became quite heated: the Corps felt that the Commission was being intransigent, and the Commission felt that the Corps was being unreasonable. Once it became clear that further meetings would be unproductive, Cabe obtained verbal authorization from his superiors to order a second appraisal. This second appraisal was performed by an appraiser of the Corps' choosing, Dennis Taylor, who was also approved by the BCWMC. Taylor's appraisal, dated July 1, 1989, came in at $116,000.[6] The Corps officially notified the BCWMC and the City of Minneapolis that $116,000 of credit was being granted for the land in question.

The negotiations soon reached impasse, because neither side could convince the other of the validity of the basis for its appraisal. The parties decided to use the ADR clause in the LCA. This simple clause stated that "[b]efore any party to this Agreement may bring suit..., such party must first seek in good faith to resolve the issue through negotiation with the other party or through other forms of non-binding alternative dispute resolution."[7]

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[3]Personal interview, Eugene Brummel, 14 March 1991.

[4]Correspondence, Schwab to Pearson, 11/3/88.

[5]Correspondence, Brummel to Pearson, 10/28/88.

[6]The Taylor appraisal, though its per-square-foot values were as high as or higher than Schwab's, produced a lower total value because it assumed damages not exceeding 25%. Schwab, in contrast, had assumed 100% damages.

[7]LCA, 1986. This clause is a standard part of all of the Corps' Local Cooperation Agreements.

MAJOR ISSUES IN DISPUTE

The major issue in dispute was the valuation of the 58 parcels of land that the BCWMC had contributed to the flood control project. There were, however, several possible methods by which to appraise the parcels, and the different methods yielded highly discrepant final figures. Although there was a limited amount of disagreement over the per-square-foot values of the land, there was much more disagreement over the "impact percentages"--the percentage of any given parcel affected by the project. In addition to the relevant methods, there were two types of parcels: individual property lots and "street" parcels. A settlement had to develop a rational assessment of both types of land.

The Corps has no specific interest in the ultimate dollar value of the appraisal. Rather, it needed the appraisal to be performed carefully and the result to be justifiable. Therefore, although the dollar amount was of paramount importance to the Commission, the rationale behind it was more important to the Corps.

POSITIONS OF EACH SIDE PRIOR TO ADR

Prior to the ADR process, the Corps adopted the Taylor appraisal as its position, arguing that the land was worth $116,000. The Commission entered the ADR process with a position of $431,000, which exceeded the Schwab appraisal of $347,000. The higher figure was obtained by combining the highest components of the Taylor and Schwab appraisals (Taylor's per-square-foot values and Schwab's 100% impact percentages).

DECISION TO USE ADR

RAISING THE OPTION OF ADR

By the fall of 1989, the Corps had reviewed and approved the Taylor appraisal, and had agreed to grant $116,000 in credit to the Commission. Therefore, it was up to the Commission to label the situation a dispute and to take steps to resolve it. Since ADR was explicitly mentioned in Article VII of the LCA signed by the parties, Pearson first raised the idea on behalf of the Commission. The Corps replied that only the local sponsor (the City of Minneapolis) had the authority to invoke the ADR clause. The Corps needed to know that whoever invoked the ADR clause had the authority to do so. It required an official request from the mayor of Minneapolis. The process of getting the mayor's signature took three or four months; a motion authorizing the mayor to invoke the ADR clause had to be passed by City Council, and a great deal of red tape was involved in getting the issue onto the Council agenda.

PROS AND CONS OF ADR: THE CORPS' PERSPECTIVE

Roach, Cabe, and Col. Baldwin hoped that by implementing and participating in a successful ADR process, they would be able to resolve a thorny problem quickly and inexpensively (compared to litigation). Since easement credits represented a small piece of the entire project, the dispute did not block progress on the project as a whole. Since the parties had to work together on a regular basis, however, a non-adversarial process would help to preserve working relationships.

PROS AND CONS OF ADR: THE SPONSOR'S PERSPECTIVE

Pearson and Enck expressed similar concerns and interests to those of the Corps regarding an efficient resolution and their continuing relationship. In addition, they saw the ADR process as a possible means of increasing the amount of credit they would be granted. In a sense, they had nothing to lose.

FORMAL AGREEMENT TO USE AN ADR PROCEDURE

During the spring of 1990, Ed Bankston, St. Paul Chief Counsel, Roach, and Pearson negotiated extensively over the nature of the ADR process, for they had differing conceptions of how it would work. Their discussions produced an ADR agreement with several stipulations. First, although Pearson had hoped to have a mini-trial, the Corps wanted to avoid excessive formal debating and persuaded the Commission to agree to non-binding arbitration. Second, the parties would have thirty days after the execution of the agreement to submit evidence, position papers, and briefs about the case. Third, the neutral had to be a qualified appraiser who would review all of the materials in the case, perform any necessary outside research, and render a decision on a reasonable amount of credit to be granted. Fourth, a meeting was to be scheduled between the principals and the arbitrator after a decision was rendered, and they would use their best efforts to negotiate a final settlement. The agreement further stipulated that the principals had the authority to settle the case for their respective organizations, and that the two parties would split the cost of the neutral.

Selection of the Arbitrator

The Corps and the Commission informally exchanged names of appraisers whose expertise, professionalism, and objectivity they trusted. Both legal and real estate expertise played a role in this process. Roach, Cabe, and Brummel helped develop the list, as did Pearson and Enck. The candidates were well enough known to the decision-makers that there was no need to list their qualifications. From the initial list of five names, three were people with whom both parties were comfortable. Of those three, Brad Bjorklund was the top choice of both parties, and he was subsequently selected.

Bjorklund was an interesting choice because he had prior ties to both organizations. On the Corps side, he had been asked for a fee quote on the appraisal job that was eventually given to Dennis Taylor. Thus, he had some familiarity with the properties involved. He had also done some appraisal work for the Corps in Rochester, MN. In addition, he had done appraisals in 1978 for three of the property owners whose land was affected by the project. The Corps assured him, however, that those parcels were not included in the disputed area. On the Bassett Creek side, he had done some appraisal work for the city of Crystal, Minnesota.

Prior Experience with ADR

None of the participants in this case, including Bjorklund, had any direct experience with ADR. Bjorklund had had some helpful interactive and managerial experience in political organizations, but had never been involved in ADR processes previously. Enck had a great deal of prior negotiation experience through his work with insurance claims, and had referred some cases to ADR, but he had had no personal involvement with ADR.

ADR PROCEDURE

PARTICIPANTS

The participants in the ADR process itself were Col. Baldwin, Corps District Engineer, Peter Enck, chairman of the BCWMC, and Brad Bjorklund. Pearson, Roach, Bankston, and Cabe were available for consultation with their clients, but they were not allowed in the conference room. This was a ground rule suggested by the neutral.

SCHEDULE

In preparation for the negotiations, Roach and Pearson drew up position papers supporting their claims. These papers were sent to Bjorklund within thirty days after the execution of the pre-ADR agreement, as stipulated by the agreement. The Commission also submitted numerous briefs, documents, and pieces of evidence. Bjorklund was provided with copies of the Schwab and Taylor appraisals. Meanwhile, Enck and Col. Baldwin were prepared by their respective staffs. They were given factual, substantive, and historical background by their attorneys and appraisers.

Bjorklund read the voluminous material he was sent. In addition, he visited the properties in question. He requested in writing some clarifications of discrepant facts, a corrected map of a particular parcel, and a draft of an agreement whose form would be acceptable to the Corps. Two weeks before the negotiations, he sent the principals some ground rules, indicating the schedule for the day and requesting that counsel remain outside the conference room for the duration of the ADR process. He chose, however, not to issue his own opinion in advance on a "reasonable" value for the easements. He felt that it would be more productive for him to help the principals to develop an approach to valuing the easements. Although he was prepared to provide a number (or a range) if negotiations broke down, Bjorklund felt that the parties would be more likely to accept the settlement if the principals had come up with a settlement figure themselves, rather than having it imposed upon them.

The negotiations took one full day, on July 10, 1990. The principals emerged a couple of times for consultations with their attorneys, and once for lunch. In the late afternoon, Bjorklund proposed a settlement figure of $270,000, which they discussed with their attorneys. Both parties decided to accept Bjorklund's recommended settlement.

SETTLEMENT NEGOTIATIONS

Bjorklund orchestrated the negotiation process. It consisted of five separate stages. First, he had the parties introduce and describe themselves on a rather personal level. All three of them discussed their families and backgrounds. He urged them to do this because he wanted to set up a friendly atmosphere, and because he wanted each to understand that the others were human beings. Bjorklund then urged each party to try to look at the situation from the other's point of view, and helped them to reach an agreement on how per-square-foot values and impact percentages should be computed and combined to yield land values. In the second round, he suggested that 31 of the parcels could be grouped together and that one parcel in particular, #10, exemplified those grouped parcels. Together, they reviewed both appraisals of parcel #10 carefully and agreed upon a methodology for evaluating similar parcels that incorporated elements of each appraiser's

techniques. They applied this methodology first to parcel #10, then to the other 30 in the group.

Round three dealt with nine parcels that, because they were unique in different ways, had to be considered individually. Round four dealt with street parcels. Round five consisted of a number-crunching session, in which the total dollar value was generated by applying the agreed-upon impact percentages to the agreed-upon values per square foot. Bjorklund ended up doing many of the calculations himself; the principals were quite fatigued.

Bjorklund was able to break down the underlying disagreement by relying on both the parties' judgment and his own superior expertise in the area of appraisals. He invoked industry standards and then asked the parties to rely on their senses of fairness and their common sense. He did not impose his own sense of justice in the matter, except to say that each of their opening positions was too extreme and he wouldn't allow either one to prevail. He explained why this was the case and why the best answer was somewhere in between. According to industry standards, both 100% and 25% would be considered extreme in assessing the portion of each parcel damaged by the project. Bjorklund asked questions like "How would you feel if you lived here?" The parties agreed readily using this framework. As abstract issues such as fair market value and percent damages were defined, Bjorklund insisted that the calculations be left to the end because they were then in "agreement mode."

An impasse was reached only once, when fundamental disagreements arose over the street parcels. Enck felt that the Commission should be granted credit for them because they represented land contributed to the project, and as such had real value. The Colonel did not have a great deal of substantive background with which to counter this claim. Bjorklund felt, however, that Enck's request was unreasonable. He invoked his real estate experience to explain why. Bjorklund argued that street easements deserve compensation only if they are abandoned and can be sold privately for profit. He argued that actually streets are never abandoned and never revert to their original owners. Enck was unable to provide a counterexample. On a more abstract level, Bjorklund also argued that the federal and city governments must work together, and that it was not right for the city to charge the federal government for that land.

EVALUATION

PROCESS

The participants were quite satisfied with the ADR process. They felt that it had helped them solve the problem more quickly and less expensively than litigation, while preserving the relationship.[8] The substantive expertise of the neutral helped the parties focus on the substance of the disagreement more than litigation would have. Also, the process was made more efficient by the parties' diligence in immersing themselves in the details of the case before the facilitated negotiations began.

Another distinct advantage of ADR over litigation was the parties' ability to justify the final dollar amount, based on reasoning that was developed jointly by the principals. In that regard, the principals found Bjorklund's focus on the underlying rationale rather than numbers especially helpful. It allowed them to explore and justify the basis for the settlement, and helped them to craft an outcome that both thought was fair. Most of the individuals involved concurred that the final dollar amount was comparable to what would probably have been awarded in court.

There was some after-the-fact feeling of concern about Bjorklund's prior involvement with the parties. Brummel felt that Bjorklund's ties to both organizations may have impaired his impartiality. He suggested that, in such complex and controversial cases, a neutral from out-of-town might do a better job of guaranteeing impartiality.

Several of the participants had suggestions regarding future ADR procedures. Roach and Cabe felt that high and low boundaries should have been established for each side's opening position, equivalent to the final offer made on each side. The Corps felt that such a stipulation would have prevented the Commission from raising their opening position from $347,000 to $431,000 and thereby manipulating the bargaining range to their advantage. This objective could have been achieved very simply by specifying in the ADR agreement that the final dollar amount had to fall between the two initial appraisals.

The principals were quite satisfied with the decision to exclude counsel from the facilitated negotiations. Col. Baldwin felt that the fewer people in the room, the better; it is harder to listen and reflect when too many people are talking. Enck felt that the principals and the neutral knew the relevant material well enough to obviate the need for lawyers. Both felt that having counsel present could have made the process unnecessarily adversarial. In addition, each held the other in very high regard. Personal credibility contributed to the success of the process.

The principals found it crucial to have a neutral who was knowledgeable about real estate appraisals. It gave them some basis for evaluating one another's claims, and guaranteed that the final settlement would be justified according to objective standards. As for the neutral, Bjorklund felt, in retrospect, that it was not necessary for him to be as exhaustively prepared as he was. He also emphasized the importance of having written ground rules before beginning the process.

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[8] Each side estimated that the ADR process had saved roughly $20,000 to $25,000 in legal and other expenses.

Finally, although the process was tedious, the existence of an ADR clause in the LCA expedited things somewhat. The parties were aware all along that if all else failed, they could always resort to ADR. This knowledge was reassuring, and the parties' prior agreement to use ADR avoided a potential conflict over whether ADR would even be attempted.

QUANTUM

The Corps was satisfied with the settlement amount. To the extent that Cabe and Roach both saw the final result as a compromise between opening positions, there was some dissatisfaction over the Commission's "inflated" opening figure.[9] Nevertheless, the ADR process enabled the Corps to see the justification for the settlement (based on Bjorklund's explanation of the standards developed in the negotiations). This was important to them.

The Commission was also satisfied with the dollar figure. When Enck consulted with Pearson about accepting the final proposal, Enck told Pearson that the Corps had made some convincing arguments for lowering the appraisal, which Pearson did not feel qualified to evaluate. Although the Commission would have liked to have been granted more credit, they felt that the amount fell within the range of what they might have been awarded in court.

POSTSCRIPT

The flood control project is not yet over. The decisions over land contributions to the project represented an early phase of a continuing project. The parties are in the next phase, and the Commission has hired a new appraiser who they hope will satisfy all concerned. The relationship between the institutions seems virtually intact, and both parties are relieved to have the dispute behind them.

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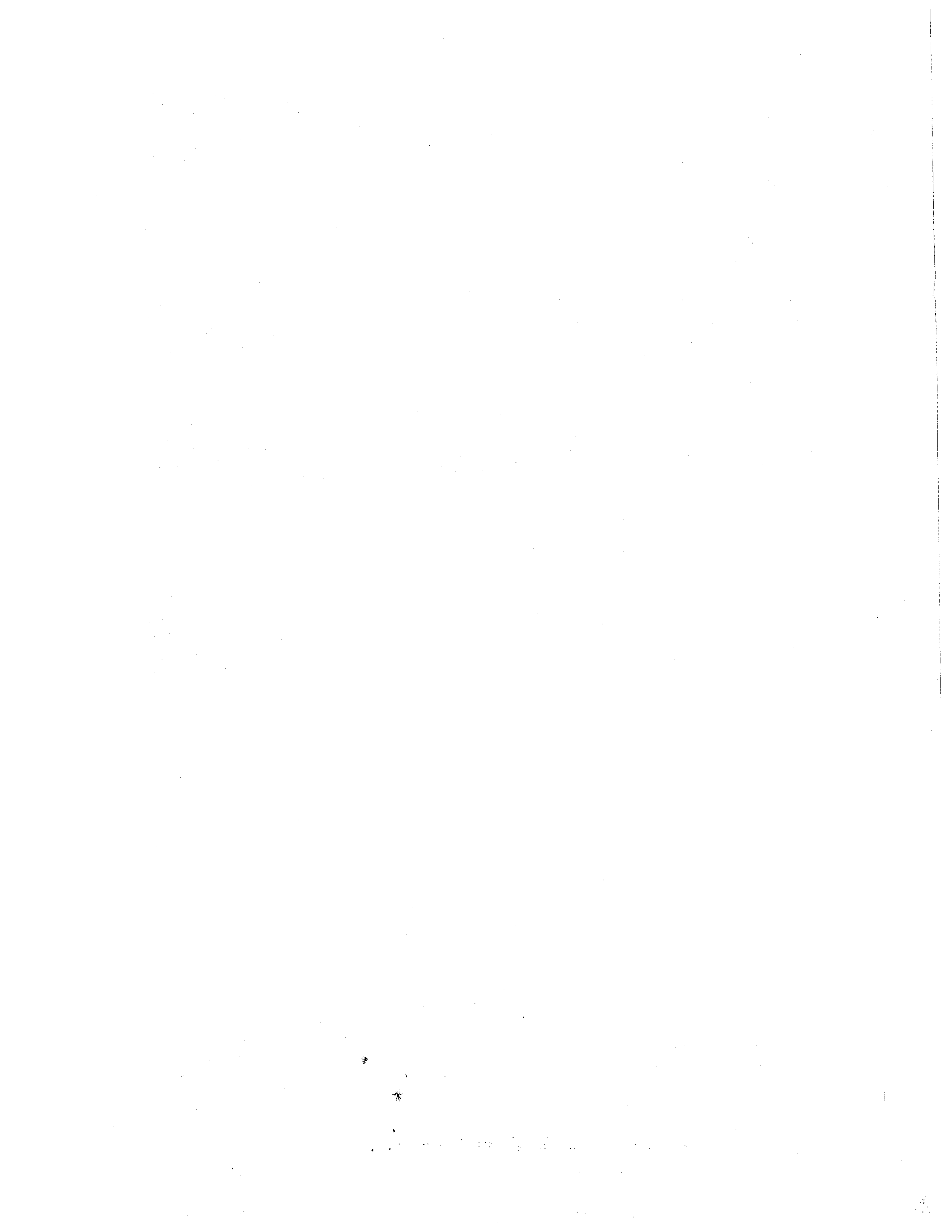
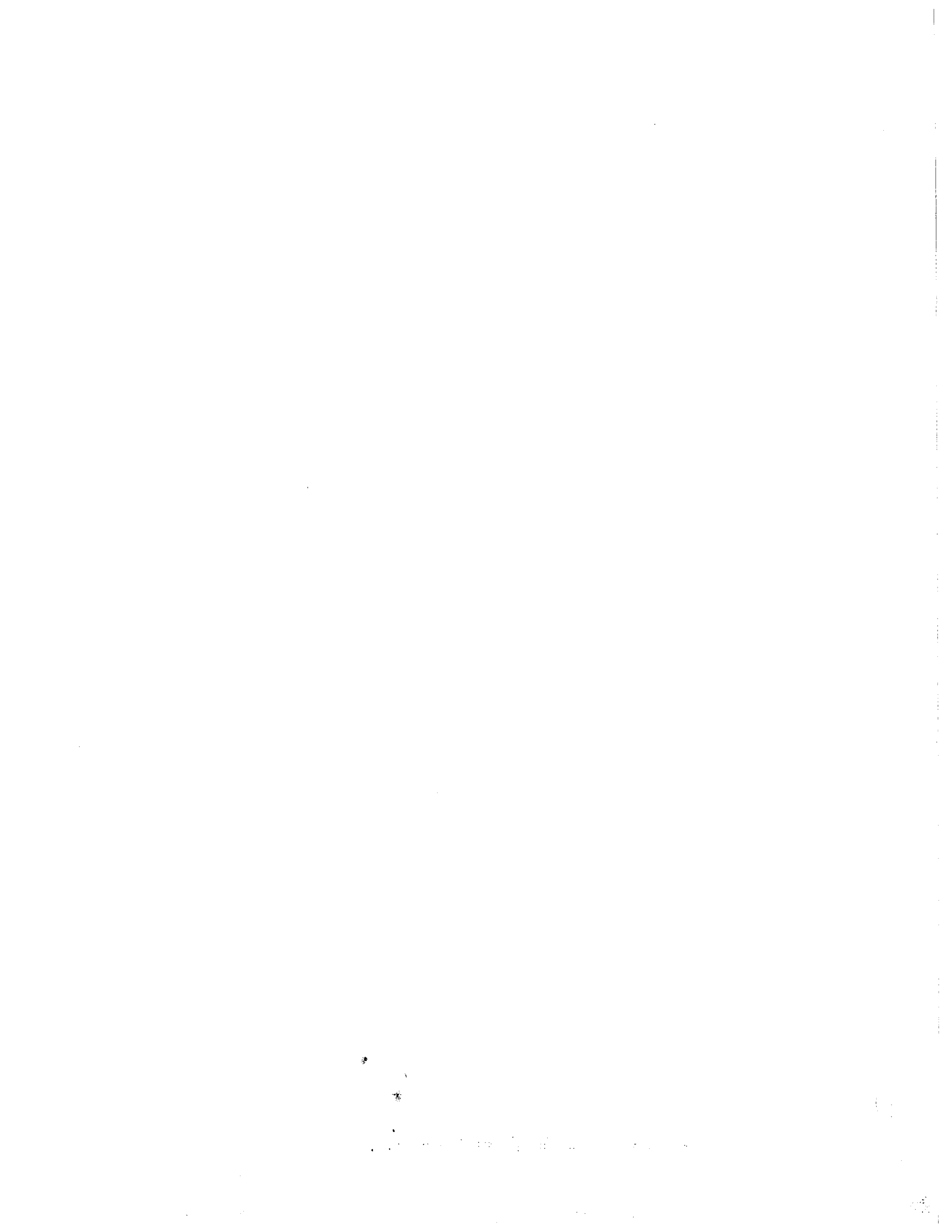
[9]Some individuals observed that the final settlement figure was very close to the figure that would have been obtained by "splitting the difference" between the two opening positions. Apparently, this was a coincidence; Bjorklund did not even realize it when the number was calculated. Had he noticed the coincidence at the time, he would have pointed it out to the parties and reaffirmed with them that their negotiated valuation process, not a mathematical average, had been the actual basis for the settlement.





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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. These case studies are a means of providing Corps managers with examaples 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.

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