ALTERNATIVE DISPUTE RESOLUTION
IN THE UNITED STATES CORPS OF ENGINEERS:
OPPORTUNITIES AND BARRIERS

by

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B.S., Huxley College of Environmental Studies
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Submitted to the Department of Urban Studies and Planning
in Partial Fulfillment of the
Requirements for the Degree of
Master in City Planning

at the

Massachusetts Institute of Technology

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ABSTRACT

The United States Corps of Engineers is experimenting with
methods of alternative dispute resolution (ADR) in order to
better manage conflicts with those involved in its projects,
procurement, and regulatory decisions. This report, initiated by
Corps personnel, analyzes historical and prospective use of ADR
in contract claims, environmental regulatory decisionmaking, and
civil works projects. Interviews were conducted with key Corps
personnel and others who are knowledgeable about the Corps’ ADR
initiative to assess the opportunities for, and barriers to,
greater use of ADR by the agency. The results of this research
indicate that the Corps is poised for greater use of ADR in a
variety of contexts. Barriers to ADR are smaller than expected.
Recommendations are offered to assist the Corps in determining
the next steps in its ADR initiative.

Thesis Supervisor: Lawrence Susskind
Title: Professor of Urban Studies and Planning
This thesis endeavor was a unique challenge. The opportunities for interesting analysis were in constant battle with the barriers to timely completion. My touchstone for the proper balance was my primary facilitator in life, Barbara. The man who pushed me to analyze in spite of my other inclinations was Larry Susskind. The group who bound me to my sense of greater community included Scott Cassel, Steve Johnson and Jennifer Nash. I am indebted to all these people. I also owe my appreciation to the Corps staff who offered their assistance at crucial junctures of my research: Jerry Priscoli, Frank Carr and Sabrina Simon. The key to my success, however, was the support team of Nikko and Gabriella. Thank you all.
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I. RESEARCH STRATEGIES AND ASSUMPTIONS
I. RESEARCH STRATEGIES AND ASSUMPTIONS

INTRODUCTION

The United States Corps of Engineers ("the Corps"), a large federal agency, maintains a diverse array of important missions including water resource provision, environmental regulation and military project construction. The Corps issues some 14,000 regulatory permits annually, enters into thousands of contractual agreements each year, and is engaged in hundreds of military and civil works projects at any given time. In the course of fulfilling its missions, the Corps encounters disagreements with many interest groups and individuals, including: its contractors; the regulated community; local government sponsors of civil works projects; other government agencies with overlapping missions; and environmental advocates.

Conflict is, of course, a fact of life for government agencies. Members of the public, the regulated community, and other government bureaus commonly disagree with the way that an agency conducts its business. In recent years, several federal agencies have examined their methods of resolving disputes, in an effort to improve. The Corps, in particular, is striving to better manage its conflicts. The organization is responding to pressures for reform, both internal and external. The Chief Counsel for the Corps and his staff seek to reduce the costs associated with the conventional methods of dispute resolution. They are especially concerned with the expense of litigation; both in financial resources and in the increased burden on
management. External critics of the Corps say that the agency does not respond well to conflict. They complain that the Corps is ill-equipped to settle many important disputes. For example, companies that do business with the Corps complain that when a contract problem arises, the disagreement moves too quickly into the judicialized contract appeals system where resolution can be delayed for years.

These criticisms are not focused exclusively on the Corps of Engineers. Indeed, government contractors, the regulated community and environmentalists complain that various federal agencies do not respond adequately to their concerns. Several agencies, ranging from the Environmental Protection Agency (EPA) to the Federal Maritime Commission, are actively experimenting with various forms of alternative dispute resolution (ADR) in efforts to improve management of conflicts and better address critics' concerns. The Corps of Engineers is one of the leaders in this trend. In particular, the Corps is experimenting with: minitrials and nonbinding arbitration to resolve disagreement with private contractors; regulatory permits based on the consensus recommendations of developers, environmentalists and interested agencies; and, various forms of ADR for handling conflicts with local governmental sponsors of water resources projects.

This report analyses the opportunities and barriers to greater use of alternative dispute resolution in the Corps of Engineers. Some of the conclusions may be applicable to other
public agencies. However, the applicability may be limited by the distinctive characteristics of the Corps.

The Corps of Engineers is unique among federal agencies in its history, mission and organization. These distinctions help explain the obstacles as well as the special opportunities for change in the Corps' methods of handling conflict. The Corps has been in existence for over two hundred years. The agency traces its origins to the Continental Army. Official status was granted in 1802 when President Jefferson signed the Congressional bill formally establishing the Corps of Engineers. The organization was devoted exclusively to military projects until 1824 when a federal civil works Board of Internal Improvements was created to plan a national land and water transportation system. President Monroe appointed a majority of army engineers to the board. This national transportation board evolved into today's Directorate of Civil Works.

The agency has sought to preserve its sense of history. There is a better institutional memory here than in most other, younger, federal agencies. The archival office employs several full time historians. A long history and the absence of major scandals over the years is a source of pride to many of the Corps' personnel. (1) Pride, and the desire to maintain its self-image of good engineering and political integrity may make the agency more sensitive to critics of its work and decisionmaking style. Moreover, the Congressional funding mechanism makes the agency especially concerned with elected
federal representatives’ attitudes towards the agency. These factors of self-image and dependency on Congressional funding for each project may make the Corps particularly responsive to criticism. On the other hand, the Corps’ longevity may lend a conservative bent to its style. These countervailing forces of responsiveness and conservatism may result in a resistance to dramatic changes, but also lead to a greater inclination to accommodate critics through reform (Mazmanian, 1979).

The Corps of Engineers has broad, practical missions. The list of Corps responsibilities is extensive. It constructs air force bases, federal hospitals, and housing for military families. In its civil works mission, it builds and operates dams, channels and levees for flood control, and as the federal navigation agency, maintains ports, inland waterways, locks and dams. 35% of the nation’s hydropower is generated from over 70 Corps facilities. While there are various other responsibilities such as regulatory and resource management functions, many of the Corps’ historical and contemporary activities involve planning, constructing and operating physical facilities. The agency has a large capacity to alter and build on the physical environment. The engineering/construction perspective is different from the more legal/regulatory mission of other federal agencies. This may cause the Corps to adopt different approaches to problem-solving and to have a different set of conflicts to solve.

The structure of the Corps is also distinctive. It is highly decentralized, with Division (regional) and District (local)
offices operating with substantial autonomy from the Washington, D.C. headquarters (Office of the Chief of Engineers, OCE). For example, most of the Corps' approximately 500 attorneys work in the District and Division offices (field offices). Thus new dispute resolution programs established by OCE may be more difficult to implement throughout the organization than in the legal branch of an agency that is centralized.

While differences in history, mission and structure may mean that the dispute resolution experience of the Corps is in some ways not directly applicable to other agencies, other aspects of any Corps of Engineers ADR initiative should be relevant to other agencies. Most notably, the administrative framework for contract dispute resolution is the same for all federal agencies. (2) While various agencies have their own Boards of Contract Appeals, all have experienced the problems of expanding dockets and extended delays in the final resolution of contract disputes (Crowell, 1988). Thus, the Corps' experiment with the use of ADR for contract claims may be particularly interesting to other agencies considering similar initiatives.

Environmental regulation may be another area for transfer of ADR experience because of the similarities between the Corps' programs and the programs of other agencies. For example, in EPA, the Fish and Wildlife Service and analogous state agencies regulate some of the same activities as the Corps, pursuant to its responsibilities under Section 404 of the Clean Water Act. Often, the Corps and other agencies will each have permitting

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responsibilities regarding the same proposed activity. Even where their functions differ, experience gained by one agency in settling environmental regulatory disputes can be applied by others.

Thus, while some of the results of this report may be inapplicable to other agencies because of distinctive characteristics of the U.S. Corps of Engineers, aspects of this study are relevant to the dispute resolution activities of other agencies. In particular, the Corps' experience with the use of ADR for contract claims, and the extent of the barriers encountered, is important information to the other federal agencies who are interested in applying ADR to contract disputes. The findings and recommendations regarding contract claims must be considered in the context of the Corps' unique decentralized structure, but many of the issues related to this program are common to contract claims settlement in general.

This study of the opportunities for, and barriers to, greater use of alternative dispute resolution is of current practical importance to the Corps. The agency is now planning its next steps in the development of the ADR initiative. This study may also interest those engaged in theoretical dispute resolution research.

RESEARCH STRATEGY

This effort to examine the barriers to greater use of ADR effort was initiated by the Corps to respond to the need for improved methods for settling contract claims. (3) In the view
of the Chief Counsel's office, the existing appeals system established by the Contract Disputes Act has proved inadequate. To assess the ADR program and, specifically, the barriers to greater use of ADR for contract disputes, I identified key agency personnel who are knowledgeable about the organization and important in the development of Corps policy. The respondents were selected because of their important roles in the Corps or because of their personal experience with Corps minitrials. They were not chosen as a representative sample of attitudes in the agency. Indeed, the extensive involvement of many of the respondents in the ADR initiative and their current employment at OCE rather than in a field office, suggests that their views may well differ from those of the District and Division staffs. Chief Counsel, Lester Edelman, supported this research by encouraging OCE staff to agree to be interviewed.

I developed a set of assumptions regarding the barriers to greater use of ADR in the Corps. These were based on initial conversations with two Corps attorneys who coordinate the contract claims ADR program and with a policy analyst at the Corps' Institute for Water Resources (IWR). This individual works on various Corps dispute resolution initiatives and has trained Corps personnel in public participation skills. I drafted a questionnaire which was used to focus the interviews and to gather some standardized information from the interview respondents. The questionnaires were sent or delivered to the respondents and completed prior to the interview.
Interviews, ranging from one half hour to three hours in length, were conducted with the Corps' Chief Counsel, Deputy Chief Counsel, Chief Trial Attorney, Senior Assistant Chief Counsel for Legislation and General Law, Assistant Chief Counsel for Environment and Legislation, and two Trial Attorneys. Three other Corps attorneys attended two of the interviews at the request of the primary respondent. These three respondents were not asked to complete a questionnaire.

I interviewed two Administrative Judges of the Corps of Engineers Board of Contract Appeals. One is the Chairman of the Corps of Engineers Board of Contract Appeals; the other, a former Corps Division Counsel, represented the agency in a prominent minitrial. Other Corps respondents included the Chief of the Construction Division, the Chief of the Regulatory Branch, the Chief of Operations and Readiness, and a Senior Policy Analyst at the Institute for Water Resources. I interviewed four respondents who are not employed by the Corps: the Army Chief Trial Attorney, a law professor who served as neutral advisor in two Corps minitrials; a former vice president of a major construction company who represented the company in a Corps minitrial; and the company's attorney for that minitrial. The former vice president and the contractor's attorney did not fill out a questionnaire. The Corps' principal in that minitrial responded to the questionnaire but was not interviewed. He was a Division Engineer at the time of the minitrial and currently is Assistant Chief of Engineers for the Corps.
All but three of the interviews were conducted in person. Some respondents were phoned for follow-up questions. The findings of this report are based on my interpretation of what these key Corps personnel and informed observers said in the interviews and questionnaire responses.

RESEARCH ASSUMPTIONS

I began this research with several assumptions about barriers to greater use of ADR in the Corps. These assumptions were based on my initial conversations with three Corps employees: two who have played central roles in instituting the Corps' use of ADR for contract disputes, and a third who has promoted ADR for various applications in the Corps. The assumptions I formed at the outset revolved around contract disputes, though some assumptions may also apply to use of ADR in other agency activities.

First, I assumed that Corps personnel do not embrace ADR procedures because they are satisfied with the Corps’ current methods for handling disputes. If, as I expected, established conflict resolution procedures, such as the contract claims appeals process, are seen by field office personnel as functioning adequately, they have less reason to endorse the use of new procedures. While other forces might still motivate Corps employees to try ADR, such as encouragement from Chief Counsel’s office if they are, on the whole, satisfied with current practices, then they would show little enthusiasm for the
experiment.

Similarly, I assumed that some opposition to ADR arises from dissatisfaction with the results of the Corps' experience with ADR. Some technical staff have criticized the results of at least one contract claim minitrial, saying that the government was wrong to settle the case. (4) I expected that disappointment with the outcome of the first ADR efforts might be widespread, thus causing staff to resist any further use of the new procedures.

I assumed that another barrier to ADR in the Corps arises from the relationships among personnel at different levels of the organization. I expected that management and staff would oppose ADR procedures resulting in management overruling decisions of their subordinates. The first several minitrials conducted by the Corps took place at the Division level of the organization. The Division Engineer who handled the case settled a claim which had earlier been denied by the contracting officer (CO). In effect, the Division overruled the District CO. The conventional contract claim process has judges reviewing and sometimes overturning CO decisions. In some cases, the attorneys for the government and contractor negotiate a settlement. In either case, a professional legal specialist is handling the settlement, rather than a management superior to whom the CO reports. I predicted that management and staff, would resist this change in the way contract disputes are handled.

In a related assumption, I predicted that the Corps personnel
oppose ADR procedures which empower Division management to resolve disputes which could be handled better by District level employees. This expectation was also related to some internal criticism made of the Division minitrials. Specifically, after the settlement of a multi-million dollar "differing site condition" claim through a minitrial, some Corps' technical staff reportedly felt that the settlements "gave away the store" because the government's principal, a Division Engineer, did not understand the issues as well as the District staff who had earlier rejected the claim. (5)

Another assumption related to attitudes about review and criticism of decisions arises from the Tenn-Tom case. I expected the Corps personnel to resist greater use of ADR because of a belief that engaging in experimental procedures will increase the risk of critical review from oversight offices such as the Department of Defense Inspector General (DOD IG). The IG investigated the Tenn-Tom settlement following a complaint from Corps technical staff. I assumed that Corps personnel might view minitrials and other ADR settlement techniques as risky since they might bring on further investigations from the IG or other oversight bodies.

My final expectation at the outset of this research was that Corps personnel oppose greater use of ADR because they believe it will increase their workload. Some of the minitrials have involved two or three days of hearings and negotiations. The time investment can be difficult for Corps management because
they are already fully occupied with other responsibilities. I assumed that concern with additional work would be pervasive, causing personnel to resist the new procedures. One of the Corps employees I spoke with in formulating these expectations suggested that any new activity is likely to be seen as an additional burden regardless of whether it will, in fact, increase the workload. (6)

After I formed these ideas, I drafted the questionnaire to include questions related to the assumptions to ensure that some information would emerge relevant to each of them.
CHAPTER I - FOOTNOTES

(1) This observation and the following comments regarding the unique nature of the Corps, are the author’s interpretation of information conveyed in personal communications with Jerome Delli Priscoli.


(3) A senior staff analyst with the Corps’ Institute for Water Resources, Jerome Delli Priscoli, informed the author that the Corps might benefit from a review of its alternative dispute resolution efforts.

(4) Internal criticism of contract ADR has focused on the Tenn-Tom case.

(5) The Tenn-Tom minitrial is discussed in detail Chapter III, Findings.

(6) Other barriers to greater use of ADR have been suggested by my respondents, only some of which I discuss in this report. Two purported barriers not discussed are 1) constraints arising from legal barriers, such as a prohibition against the use of binding arbitration for claims against the government, and 2) constraints due to the attitude among Corps personnel that settling claims with contractors who perform poor work is a threat to the Corps’ professional integrity.
II. THE CORPS AND ORGANIZATIONAL INNOVATION
II. THE CORPS AND ORGANIZATIONAL INNOVATION

The U.S. Corps of Engineers, an agency known for constructing dams and straightening rivers, is now building a reputation for innovative methods of handling conflict. The Corps has been particularly creative in handling disagreements with private companies over compensation for contract work. The Corps is exploring alternative methods of dealing with disputes over environmental regulation and anticipating conflicts over implementation of civil works projects. There is a spirit of innovation in the Corps that coexists with its reputation as a bureaucracy of "staid, old engineers primarily interested in building things." (1) To assess the prospects for translating the spirit of innovation into significant and lasting change in the Corps’ conflict management style, this chapter compares the current ADR initiative with the agency’s earlier shift regarding environmental concerns and public participation.

CRITICISMS OF THE CORPS’ CONVENTIONAL METHODS FOR HANDLING CONFLICT

Dissatisfaction With The Corps’ 404 Regulatory Program

The Army Corps of Engineers is responding to demands for reform with serious efforts to improve its ways of handling conflict. Complaints about the Corps’ activities are widespread. (OTA Wetlands Report, 1984). (2) Environmentalists, in particular, complain that the Corps’ regulatory program under Section 404 of the Clean Water Act gives short shrift to their concerns. The regulated sector is critical of costs and
uncertainties suffered as a result of the program. Costs of 404 regulation to the permit applicant include those incurred from permit processing, modifications to the application, and delays. (OTA Wetlands Report, 1984). Congress’s Office of Technology Assessment and state resource agencies have also joined the fray. In a 1984 report, OTA notes the complaints of several state agencies regarding COE’s narrow view of its jurisdiction to regulate, inadequate efforts to publicize the regulatory program and generally lax enforcement and monitoring.

In many areas of the country, the Corps’ 404 program is the only government program controlling the use of wetland resources. In the geographic area covered by a general permit (GP) recently issued by the Vicksburg, Mississippi District, the Corps processes about 200 applications each year dealing with hydrocarbon drilling (Priscoli, 1988). Case-by-case reviews consume a large amount of the District’s staff time, produce delays to the applicants and often lead to litigation. The situation would be improved if the Corps adopts a different approach to permitting that would reduce delays and attendant costs while protecting the environment to the satisfaction of advocacy groups and resource agencies.

The Corps has experimented with a new approach for regulating 404 activities. The Vicksburg District issued a general permit in 1987 for oil and gas exploration in certain wetlands of Arkansas, Louisiana and Mississippi. General permits are not a new regulatory devise. (3) In fact, the 1987 general permit replaces
an earlier one which had expired. What is different about the Vicksburg District’s latest general permit is that it was based on a consensus recommendation of industry, environmentalist and government agency representatives.

The affect of this general permit is that individual permit requests which meet the terms and conditions of the general permit will be issued more quickly. The expedited processing responds to the concerns of the regulated community and the conditions of the permit are designed to meet the interests of the environmental community and participating agencies for protection of the sensitive wetland ecosystems. The Vicksburg general permit limits the scope of hydrocarbon drilling activity and requires that upon completion of the drilling, the permittee return the area to its original contours and replant all disturbed areas with native species. Each permit applicant must also participate in a "wetlands conservation initiative" by contributing $200 to an agency or organization for 1) purchase of wetlands; 2) purchase of easements to protect wetlands; or 3) projects designed to accomplish restoration or enhancement of wetland values (Department of the Army, October 31, 1986).

The Corps’ interest in negotiating a general permit with representatives of all affected interest groups responds, in some measure, to the criticisms of the regulatory program. In Vicksburg, expedited processing of individual permit requests which meet the conditions of the general permit means that the oil and gas industry can gain authorization to drill within two
weeks of application (Priscoli, 1988). The Corps and other agencies can reallocate the staff time that would otherwise be tied up in reviewing 200 individual permits each year. The environmental interest groups know what level of protection will be included in each individual permit and can devote their limited resources to other battles. Corps staff believe that the Vicksburg GP is stronger and technically more completed than what the Corps could have generated internally (Priscoli, 1988). Moreover, a well-conducted general permit negotiation, including more public education and greater public involvement in writing the permit conditions than is typical for Corps regulatory activities, results in an improved public image for the Corps (Priscoli, 1988; Rosener, 1981).

Dissatisfaction With The Corps' Conventional Methods of Contract Claim Resolution

There is a great deal of dissatisfaction in the government contracting community with the established methods for handling disagreements between federal agencies and their contractors (ACUS, 1988). The current system, which evolved within the statutory framework of the Contract Disputes Act of 1978, is characterized by a large number of cases being appealed by contractors from the agency field level to various Boards of Contract Appeals, and the U.S. Claims Court. Overloaded dockets and judicialized procedures cause resolution to be delayed for years. The Corps is experimenting with minitrials and non-binding arbitration in contract disputes in a response to these
delays and the attendant rising costs of contract litigation, and disruptions to management in defending litigation (Carr, 1988). The minitrial procedure is a "voluntary, expedited, and nonjudicial procedure whereby top management officials [principals] for each party meet to resolve disputes" (Edelman and Carr, 1987). After a presentation by attorneys or other representatives of each party, the principals meet to negotiate a settlement. Often a neutral advisor, jointly retained by the two sides, helps manage the process and advise the principals of the strengths and weaknesses of each position (N&C Report, February 1987). In non-binding arbitration, the parties make a presentation and submit relevant documents to a neutral expert retained jointly as arbitrator. After studying the materials, the arbitrator issues a recommended settlement to the principals who then meet to negotiate a settlement (Carr, 1988). Both procedures allow either party to withdraw from the process at any time and return to litigation without prejudice.

The Corps is using ADR procedures to reduce costs and delays and to respond to criticism from government contractors who are "[l]argely unsatisfied with the present contract claim settlement system." (Crowell, 1987). The Corps is one of several public agencies with major contract claim resolution problems, but it stands out in its willingness to try new methods for handling the disputes.
The New Civil Works Cost Sharing Arrangement Holds Potential For Conflict

The Water Resources Development Act of 1986 initiated a new feature to the relationships between the federal, state and local governments. (5) Virtually any civil works project within the Corps’ jurisdiction must be constructed in cooperation with a non-Federal sponsor who will shoulder twenty to sixty percent of the project’s cost. "Legally required cooperation" or mandatory cost sharing creates the likelihood of intergovernmental disputes. (6) Thus, the Corps has proposed a clause in each contract providing that the parties must resolve disputes through non-binding ADR prior to legal action. The clause states that "Before any party to this Agreement may bring suit in any court concerning an issue relating to this Agreement, such party must first seek in good faith to resolve the issue through negotiation or other forms of non-binding alternative dispute resolution mutually acceptable to the parties. (7) Several dozen agreements with project sponsors now contain the ADR provision. (8)

State and local governments need the expertise and funds of the federal government to build projects but as it was put by one of the Corps’ attorneys for Legislation and General Laws, "if communities start hearing of other communities who are in litigation with the Corps over our agreements, it is bad for the government." (9) The Corps’ experiment with ADR in this area is different from those in contract disputes and the environmental regulatory program - the water resources experiment is not so much a response to demand for change as a recognition by
leadership of the Corps that the new relationship might lead to conflicts that can be better resolved by ADR than litigation. It also differs from the section 404 and contract disputes initiatives in that there has not yet been an opportunity to use the ADR approach.
A casual observer might view these ADR activities as a surprising and unprecedented change in approach for an organization some have called the "most bureaucratic of bureaucracies." (Rosener, 1981). A closer look reveals that these changes, while still quite modest, are nonetheless consistent with the way the organization changed in the past. A review of the extent and dynamics of past change in the Corps may help predict how the Corps will carry out its current efforts at change.

During the late 1960s the Corps was criticized for its closed decisionmaking and lack of responsiveness to environmental concerns (Drew, 1980). As with the current complaints about the contract claims system, the Corps was not the only federal agency attacked for its unresponsiveness to the needs and views of the public. The Corps, however, was one of the agencies that made an effort to meet the criticism.

Mazmanian and Nienaber studied the Corps' civil works activities in the 1970s to assess the extent to which the Corps was able to alter its mission and style (Mazmanian, 1979). While recognizing that more time was needed to draw solid conclusions about the course the Corps would follow, Mazmanian found that several years after the Corps set out to change its decisionmaking and incorporate environmental values, "the agency moved expeditiously and rather successfully to accommodate itself to a changing social and political environment." (Mazmanian,
Mazmanian's findings were based on four indicators of significant organizational change: setting new goals, reorganization, changes in output and changes in decisionmaking procedures. He found that the Corps had indeed begun to alter its mission and style. In particular, the Corps responded to pressure for public participation and greater attention to environmental quality by adopting new goals; making structural and personnel changes; and modifying its decisionmaking process. These alterations seemed to effect the design of Corps projects. The question, then, is whether the Corps is once again remolding itself with the adoption of ADR and making organizational changes that represent a significant alteration in direction and style.

Four Indicators of the Extent of Organizational Change in the Corps

Setting New Goals. When an organization sets new goals it declares its aspiration for organizational change. The leadership of the Corps made extraordinary proclamations in 1970 and thereafter, indicating that they intended to increase the involvement of the public in civil works project planning and to incorporate environmental concerns. For example, in February, 1971, the Chief of Engineers declared that:

In the past we have conducted our planning activities with a relatively small percentage of the people who have actually been concerned, primarily federal, state, and local government officials of one kind or another. Today there are, in addition, vast numbers of private citizens who, individually, or in groups and organizations and
through their chosen representatives, are not only keenly interested in what we are doing with the Nation's water resources but who want to have a voice and influence in the planning and management of those resources...we cannot and must not ignore [these] other voices...I consider public participation of critical importance to the Corps' effectiveness as a public servant. It is ...an area I won't be satisfied with until we can truly say that the Corps is doing a suburb job (Dodge, 1973).

Other aspirational statements were issued by Corps leadership regarding the need to be more sensitive to environmental concerns in project planning, design and implementation. These goals, if implemented, would take the Corps in a new direction. Historically, the Corps indicated little interest in environmental values and exhibited a tendency to invite real and potential project opponents into the planning process only after the agency was largely committed to the proposal. The new pronouncements by the Corps' leadership met the first criterion of organizational change: setting new goals.

In the last several years, the Corps has begun to set new goals regarding ADR. Surprisingly, leadership in this area has come from the Chief Counsel's office. Chief Counsel Lester Edelman has prominently proclaimed the virtues of ADR -- for contract dispute resolution, for the new cost sharing relationship with local civil works sponsors, and for environmental regulatory disputes. Frank Carr, the Chief Trial Attorney speaks regularly to field office counsel about the contract dispute ADR initiative. Both have written articles on the subject and are active in encouraging other agencies to use ADR through the Administrative Counsel of the United States. Mr.
Edelman encouraged drafters of the model Local Cost Sharing Agreements (LCAs) to include the ADR provision and has urged other Corps policymakers to use ADR for environmental regulatory disputes.

New goals regarding ADR are being expressed primarily by the leadership of the legal branch of the Corps but other top offices are supportive, as well. The Assistant Secretary of the Army for Civil Works has reviewed and signed all the local cost sharing agreements and approved of the ADR clause. A recent guidance letter from the Office of the Chief of Engineers offers qualified support for ADR use in regulatory actions. It says that ADR has the greatest potential for regional permits but that "as a general rule the ADR process does not appear to be suitable for use on individual permit decisions." (Department of the Army, April 14, 1987).

The Corps is setting new goals for using ADR as evinced by leadership pronouncements for both internal and external consumption. These statements are not as far-reaching as those of the early days of the public participation program but in both cases they do meet the first criterion of organizational change. However, while new objectives and promises of new programs are a necessary first step, they are of limited importance unless accompanied by other evidence of organizational change.

Restructuring and Modifying Personnel Responsibilities. Reorganization and changes in the roster and responsibilities of personnel are an important indicator of long term organizational
change. Reorganization and the infusion of new personnel can be the mechanism for implementing substantive change announced by the leadership's statements of new goals.

The Corps modified its structure in the early 1970s. The Chief of Engineers created an Environmental Advisory Board, composed of citizens to, among other things, examine Corps policies, and programs. In each Corp District, an environmental unit was formed. The new units were located in the planning department, if one existed, or the engineering division. The environmental units were primarily responsible for writing Environmental Impact Statements. Most district offices instituted citizen advisory groups in the first few years of the citizen participation/environmental value initiative. Many new employees with non-engineering perspectives were hired. The number of Corps employees from nonengineering backgrounds surged from 75 in 1969 to 575 in 1977 (Mazmanian, 1979). The importance of new personnel should not be underestimated. Social scientists, biologists and others from the nonengineering sciences bring with them their different training and values. As new employees, they have less vested interest in traditional practices and may be more inclined to introduce unorthodox ideas.

Only some of the 1970's reorganization lasted beyond the first years of the decade. The Environmental Advisory Board was dissolved early on. In the Districts, the citizen advisory units were virtually disbanded a decade ago. Other structural and personnel modifications in the Corps survive. The District
environmental units are still providing environmental input into the Corps planning process. Today there are still hundreds of employees of nonengineering background. Moreover, the Corps continues to train its personnel in public participation skills through classes offered by the Institute for Water Resources. The "basic" public involvement course, begun in the early 1970s, is now supplemented with an "advanced" class and an "executive" course for the agency's leadership. (12) These courses are popular and, according to one of the trainers, constitute "massive public involvement training."

The Corps, in its civil works function, continued as a construction-oriented agency notwithstanding NEPA, more environmentally-oriented employees, and a new organizational objective of protecting environmental quality. The traditional mission still dominated though environmental quality was introduced as an auxiliary function. Given this limitation on change, it can still be concluded that the Corps made a considerable effort to incorporate the new policies by creating the required organizational capacity.

A much smaller degree of structural modification is now under way in the Corps regarding the ADR initiative. There have been no agency-wide hiring or reorganizational steps to implement greater use of ADR. Instead, a small but significant alteration in responsibilities of existing personnel is under way. Like the expression of new goals, the Chief Counsel's office is leading the agency in this indicator of organizational change. The OCE
(headquarters) legal branch has recently reorganized for purposes not directly related to the ADR initiative. (Department of the Army, November 6, 1988). (13) One of the results of the reorganization is the grouping of the headquarters lawyers in teams, according to substantive legal specializations. The organizational chart represents the teams as five circular groupings for 1) Contract Appeals, 2) Litigation, 3) Procurement, 4) Legislation and General Laws and 5) Legal Services Policy and Programs. The change of importance to the Alternative Dispute Resolution initiative is that Chief Counsel has appointed an "ADR specialist" in each of the substantive area "circles." (14) The ADR specialists report to the Chief regarding ADR activities in their circles.

This assignment of ADR specialists in the Corps headquarters legal office is a significant step because it can be the beginning of an infrastructure that will support greater use of ADR in the Corps. It is appropriate that this focus comes from the legal division since attorneys play an important role in most of the Corps disputes with external parties. However, in the context of a large decentralized agency, this structural change is tiny. The legal and technical divisions in the district and divisions have not made similar structural changes. Neither have any steps been taken to establish an advisory body to critique the agency like the Environmental Advisory Board of the early 1970's. (15)

While beginnings of structural changes are visible in the
Chief Counsel’s office, the agency as a whole has not taken major steps to reorganize its structure or personnel to implement its ADR initiative. Thus, this second criterion of change in the Corps has not yet been met.

Modifying Decisionmaking Procedures. Open decisionmaking processes may be linked to a public agency’s commitment to change (Mazmanian, 1979). When an agency opens its doors to those previously ignored, this indicates that it is serious about adopting new missions or otherwise altering its usual patterns of behavior. In the absence of open decisionmaking, traditional constituencies will prevail. Through case studies, Mazmanian found that the Corps has ample capacity in this area. Whenever the Corps made a substantial effort to open the planning process to the public, a greater balance between environmental and economic considerations was achieved. The Corps developed a greater appreciation of the diversity of interest in the communities in which it engaged in open planning and the process enabled new and previously ignored interests to press their demands and in some instances to contribute previously overlooked alternatives. This modification in the Corps decisionmaking process was substantial, where adopted. Overall, though, the evaluation on this measure was mixed in the field depending on District initiatives and local demands.

This limited indication of change regarding greater use of an open decisionmaking process in the civil works function of the
Corps is further confined by Mazmanian’s finding that "the present coolness of the agency to its experiences with open planning raises the serious question of whether the Corps will make a major effort to continue with it agency-wide."

The current ADR initiative involves some modifications in the Corps decisionmaking processes. The contract claim ADR program brings new players into settlement discussions: the principals for the Corps and the contractor. The neutral advisor, when used, adds an objective viewpoint to the deliberations. The procedure is designed to get more information into the decisionmaker’s hands than the conventional contract dispute resolution methods. While these adaptations in decisionmaking procedures are significant, they do not represent the kind of opening of the decisionmaking process that indicates major organizational change. The contract disputes settlement process is not opened up to new interests. Rather, the ADR methods are a reform designed to improve the management of contract claims by designating different representatives of the disputants and creating a setting that gives them information they need for settlement negotiations.

Similarly, the ADR clause in local cost sharing agreements does not yet involve an opening of the process to real and potential critics of the civil works projects. Here, however, lies strong potential for a new opening of the process. The Corps has the opportunity, as it molds the new federal-local relationship, to incorporate greater participation for
representatives of interests beyond the governmental sponsors of the project. A vigorous public involvement program that builds on the Corps experience with public participation, could begin with broad participation in planning and continue through implementation of projects. Then, representatives of all affected interest groups would be invited to join project implementation committees that work with the Corps and the local sponsors as the project is completed. Problems that require dispute resolution would be tackled under the ADR clause with the involvement of all the represented interests. This tack, not currently contemplated by the Corps, would open civil works projects to a broader level of public participation and would certainly indicate organizational change regarding ADR.

The current environmental regulatory ADR initiative is still limited to a single negotiated general permit. If expanded, the approach could represent another sign of organizational change through the opening of decisionmaking to interests not otherwise included. The general permit experiments have brought together developers, environmentalists and agency representatives to negotiate the conditions of a Section 404 regional permit for wetlands activities. Normally, public opponents to 404 permit applications may comment on proposed permits but have little direct influence over whether a permit will be issued, or if issued, what conditions will be attached. The negotiated general permit empowers environmental and other community interests to negotiate alongside representatives of the regulated community
and the relevant state and federal agencies. The general permit issued by the Vicksburg District after this process, was based on recommendations reached consensually by all the participating representatives. This approach, if applied more widely by the Corps would be a strong indication of institutional change as measured by changes in the decisionmaking process.

**Altering Organizational Output.** This final criterion of organizational change is, in a sense, the "bottom line" of agency activity - the productive output of the organization. The question here is what effect the changes in structure, personnel, and procedures has had on Corps projects. Mazmanian, in applying this criterion to the Corps' activities of the early 1970s, noted two factors that make such evaluations difficult (Mazmanian, 1979). First, since the Corps' civil works projects take from years to decades to complete, the work load of the agency during the study was composed of projects already under way and in various stages of completion. The effect of new programs such as those to expand public participation and environmental consideration, are not fully seen in such ongoing projects. Second, it is difficult to make a causal connection between personnel and structural changes and specific changes in agency policy or specific projects.

Given these qualifications, Mazmanian found examples of changes in ongoing projects that were identified by agency personnel as direct results of the commitment to an environmentally sensitive policy. One measure of altered results
is the number of civil works projects which were modified as a result of environmental review. Reportedly, a large number of projects were modified as a result of the NEPA review process. For example, in the San Francisco District, the Sonoma Creek project, created to improve flood control, was designed with an "overflow bypass" feature instead of channelizing the creek. Acreage was set aside on either side of the creek to allow an overflow into a greenbelt area during floods. This is an example of the incorporation of nonstructural solutions into flood control projects -- an approach urged by many in the environmental community.

Mazmanian's conclusions regarding different output due to the organizational efforts studied are strongly qualified. He notes "promising indications that the agency is translating the environmental mission into new programs" and found that "old projects have been modified and more environmentally sound and socially sensitive ones are on the drawing board."

In recent years, there has been a reduction in the number of structural water resources projects, but this can be explained, in part, through a Congressional stalemate that lasted from the late 1970s to the passage of the Water Resources Development Act of 1986. The Corps civil works projects go through public review more extensive than before the 1970s but the extent of public participation is closer to information sharing than power sharing. (16) The public participation in the environmental regulatory program is limited to comment on proposed permits. The
prime instances of power sharing with environmental interest groups in recent years is the Vicksburg general permit (GP) negotiations -- not an impressive result for an organization that issues about 14,000 permits a year. On the other hand, even this single negotiated general permit is significant. The consensus-based GP drew only a few comments during the public comment period and no one requested a public hearing. The Vicksburg District expects about 200 individual permit applications under the GP each year. If the GP operates as anticipated for its five year duration, about 1,000 permits may be processed much more quickly, with less government review required and a reduction in subsequent litigation. (17)

The current ADR program is open for mixed review of its altered output as compared with the conventional conflict resolution methods. Ten contract claims have been resolved with minitrials and related ADR settlement procedures out of thousands that were appealed to through the conventional system during that period. The environmental regulatory program has taken the first step towards use of ADR. The civil works cost sharing arrangement may soon prove to be a field of extensive ADR activity but, as yet, offers only a promise of improved resolution of civil works disputes. The extent of the Corps' ADR activity is, so far, modest. The program is just beginning and it is too early to evaluate the results of the Corps' use of ADR. There isn't yet enough data to judge whether settlements reached with ADR were "better" than what would have resulted from a conventional
Conclusions Regarding the Extent of Organizational Change in the Corps.

There were signs of significant change in the style and mission of the Corps in the 1970s. The agency announced dramatic new missions of public participation and greater attention to environmental values, and underwent a substantial degree of structural change to accomplish the new priorities. To a lesser extent, the agency modified its decisionmaking process. The products of the Corps' planning and construction seemed to be different than before this period of evolution.

Applying these four indicators to the Corps current move towards Alternative Dispute Resolution, I conclude that the agency is again beginning to change itself. However, the change is even more tentative than that noted in the early 1970s. Some of the Corps' leadership, particularly in the legal branch, are expressing new goals regarding how the agency deals with various forms of conflict. Some reassignment of responsibilities is under way by Chief Counsel though this can hardly be called reorganization. In the instances when the Corps used ADR, it experimented with different ways of making decisions. It is too early to evaluate whether the output of these altered decisionmaking approaches is substantially different than from conventional processes.

In the early 1970s, the Corps showed signs of organizational change but is not clear that the new approaches resulted in a
permanently transformed agency. Similarly, in the late 1980s, the Corps is once again showing signs, albeit tentative, of change. This nascent move towards ADR can not yet be described as a deep and lasting change in the mission and style of the Corps. However, these beginnings may be the seeds of a significant reform in the way the Corps handles conflict with businesses, public and private organizations and individuals.

The most important effect of the Corps' greater incorporation of public participation and environmental considerations in the civil works program of the 1970s may be an improved image (Mazmanian, 1979; Rosener, 1981). This was perhaps the clearest reward for the agency in the five civil works cases studied by Mazmanian, and the two regulatory cases of expanded participation public participation examined by Rosener. A current Corps employee who trains COE personnel in public participation skills concurs that a better public image is a primary affect of his program. (18)

Legitimacy is particularly important to public agencies. Public participation and flexible, nonadversarial modes of conflict resolution can be means to that end. Measures to achieve greater legitimacy imply a response to pressure for such change.

How extensive was the pressure for change in the Corps in the 1970s and is there a commensurate pressure on the agency to adopt ADR at this time?
PRESSURES FOR ORGANIZATIONAL CHANGE IN THE CORPS

In the late 1960s and early 1970s, numerous federal and state agencies were sharply criticized for the content of their programs and the decisionmaking process for design and implementation of agency initiatives. Segments of the population traditionally excluded from public policy decisions sought a broadening of participation to create programs more responsive to their needs.

Environmental issues were among the concerns that activists pushed onto the national agenda. The deteriorating quality of the natural environment was decried by a broad segment of the citizenry. Congress responded to the environmental movement and translated some of its objectives into federal legislation. The National Environmental Policy Act of 1969 (NEPA) was the most far-reaching of these statutory initiatives in terms of its impact on the procedures of federal agencies. It required, among other things, that agencies contemplating major federal actions, consider the environmental consequences of their action.

Environmental legislation and strong public concern alone are, of course, insufficient to bring about major programmatic changes. Even with presidential directives and pronouncements from agency leaders, policy may or may not be effectively implemented. It is at the operating levels of government, within the agencies and departments, that policy changes succeed or fail. Government bureaus not only administer the programs mandated by the elected representatives but write the regulations
and interpret the policies which mold the legislative initiatives into their day to day form.

The Corps changed, to some degree, in response to these public pressures. The pressure on the Corps went beyond generalized criticism of public agency decisionmaking. The Corps, because of its numerous and high profile civil works projects was directly criticized. Local groups dissatisfied with the Corps' projects began to effectively oppose specific plans. For example, in 1967, three faculty members of the University of Illinois organized local opposition to a planned flood control project for the Sangamon River in central Illinios (Mazmanian, 1979; Findley and Marlin, 1971).

In the early 1950s, civic leaders in the town of Decatur, Illinois grew concerned about the city's water supply. The local reservoir, Lake Decatur, was filling with silt. They formed an advisory committee which recommended to the City Council the construction of a dam and reservoir at Oakley, Illinois, on the upper end of Lake Decatur. Coincidentally, the Corps already had a plan to build a reservoir at Oakley to provide flood control along the Sangamon River. The City Council negotiated with the Corps and by 1961 they agreed on the construction of a multipurpose dam and reservoir to provide water, flood control and recreational opportunities. Sponsors secured Congressional authorization in 1962. During the subsequent final design and engineering stage (between 1962 and 1966) water quality control was added as a feature of the project. The Oakley dam would be
increased in size to store more water needed to dilute effluent from the Decatur sewage treatment plant. This modification, designed to increase the reservoir's storage capacity, required an extension of the reservoir from the originally authorized 10-mile length up the Sangamon, to 25 miles. The extended Oakley lake would cover parts of Allerton Park, a woodland preserve owned by the University of Illinois. The university administration initially objected, then decided not to fight the host of local, state and federal proponents of the project. The three faculty members took up the battle and in 1967 organized the Committee on Allerton Park.

The committee organized a team of engineers and scientists to counter the Corps' expertise, retained counsel and recruited local support. They drafted a counterproposal which rebutted each point the Corps used to justify the project. They argued that there was little need for additional water supply, asserted the likelihood of nitrate pollution and demonstrated that the recreational and flood control benefits were overstated. They recomputed the Corps' benefit-cost figures, a calculation central to the justification for any civil works project. The committee proposed an alternate plan to achieve most of the Oakley Project's purported benefits by treating the upper Sangamon watershed for erosion control, developing a greenbelt, and using well water for Decatur.

The Committee on Allerton Park succeeded in killing the Oakley Dam Project. By 1975 the Corps' Chicago District declared
the project inactive, ostensibly because of inadequate economic justification. The group stopped the Corps of Engineers using economic and engineering expertise to buttress the less tangible values of aesthetics and conservation. Many other battles between the Corps and project opponents followed.

In the following years, the Corps found itself in a defense posture to which it was unaccustomed. The pressure of public complaints felt by the federal bureaucracy during that period, was particularly focused on the Corps and its highly visible projects.

There is not now a commensurate outcry for the Corps to change its dispute resolution procedures. Surely, there is widespread criticism of how the Corps handles conflict, as noted in the introduction to this chapter. However, the contemporary pressure for change in the Corps is much weaker than in the 1960s. An full assessment of the current pressures for change is beyond the scope of this study. (19) It is important, though, for advocates of greater use of ADR in the Corps' to consider the extent of the forces pushing for this change and ways to increase the pressure. Without a substantial increase in the demand for change, organizational inertia and the interests of the status quo will likely prevail.

Modest change in dispute resolution procedures is occurring in the Corps at this time. The pressure for such change is less than what the Corps experienced in the comparative period of the 1960s and 1970s. However, pressure for change is a dynamic force.
It ebbs and flows over the years. Light pressure and moderate change can build to extensive and organized demands for basic reform. However, pressure alone does not bring about change. Countervailing forces constrain the impact of demands for change. The following chapter examines some of constraints and barriers to greater use of ADR in the Corps.
CHAPTER II - FOOTNOTES

(1) Interview with John Elmore.


(3) As provided by regulations printed in the Federal Register on July 22, 1982, as amended in the October 5, 1984 Federal Register, general permits may be issued for a category or categories of activities when: 1) those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or 2) the general permit would result in avoiding unnecessary duplication of the regulatory control exercised by another Federal, State or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal.

(4) Chapter III, Findings of this report includes an extended discussion of the reasons for and depth of dissatisfaction with current contract dispute resolution methods.

(5) Public Law 99-662.


(7) Ibid.

(8) Interview with Ron Allen.

(9) Ibid.

(10) Interview with John Elmore.

(11) Mazmanian's work is controversial in the Corps. It has been criticized, in particular, for its narrow scope. It includes five case studies from the early years of the public involvement program and considers only the civil works function of the Corps (personal communication with Jerome Delli Priscoli). While this report compares the organizational change examined by Mazmanian with current change regarding ADR, it does not attempt to systematically critique or revise the earlier findings with new data.

(12) Interview with Jerome Delli Priscoli.

(13) The reorganization has shifted attorneys responsibilities to give individuals with subject matter expertise more independence and responsibility. The former "straight-line hierarchical structure" has been modified to "create [an]
environment for creative thinking and leadership." The attorneys are now organized as teams with common areas of legal expertise.

(14) Interview with Sabrina Simon.

(15) The Office of the Chief Counsel is currently seeking an infusion of ADR ideas by using the IPA program to hire one or more academic experts in the field to advise counsel on a temporary basis.

(16) Interview with John Elmore.

(17) The general permit negotiations represent an evolution from public participation program to ADR. Both initiatives seek to improve agency decisionmaking by involving more people in the process and encouraging non-adversarial problem solving. The Vicksburg GP could be considered the latest step in Corps public participation or the beginning of a new ADR effort.

(18) Interview with Jerome Delli Priscoli.

(19) Discussion in Chapter III, Findings, regarding satisfaction with dispute resolution procedures is pertinent to the subject of pressure for change.
III. FINDINGS
III. FINDINGS

INTRODUCTION

This research identifies some of the barriers to greater use of alternative dispute resolution (ADR) in the U.S. Corps of Engineers. A better understanding of constraints against greater use of ADR will help the Corps' leadership determine the next steps in its efforts to improve its management of conflict. The focus of this research is the Corps' experience with ADR to settle contract disputes. The Corps also applies ADR to other conflicts, notably in environmental regulation disputes and in the local cost sharing agreements with local sponsors of water resource projects. I offer my observations about these important new applications of ADR in the Recommendations Chapter of this report. This Findings Chapter focuses on the Corps' use of ADR for contract disputes. My findings on this subject are divided into three sections corresponding to the three themes which emerge from this research.

In the first theme I discuss my findings about the Corps' and other parties' satisfaction with contract dispute resolution procedures. I apply the data to my assumption that Corps personnel are satisfied with the current procedures and are disappointed with the initial ADR experiments. In the second section of this chapter I review the data relevant to my expectation that limited resources in the agency constrain the application of ADR to contract disputes. In the last portion of the findings I discuss the importance of the organizational level
at which contract dispute resolution takes place in the Corps and
the affect of oversight on the attitudes of agency personnel. I
apply the data to my three initial expectations: Corps personnel
oppose contract ADR because it results in management overruling
staff decisions; Corps personnel oppose contract ADR because it
empowers Division-level management to resolve disputes which
should be handled at the District; and, Corps personnel oppose
contract ADR because they think that engaging in experimental
procedures increases the risk of critical review from oversight
offices.

The data regarding these three themes offer interesting and
sometimes surprising insights into my assumptions and form the
basis for my recommendations.
SATISFACTION WITH CONVENTIONAL AND ADR CONTRACT DISPUTE RESOLUTION

Overview

User satisfaction with methods for resolving disputes is a key measure of their success (Susskind, 1987). If, for example, the officials and field staff of a federal agency believe that established administrative procedures for resolving differences with contractors work well, they will have no reason to seek a change. Similarly, if the personnel feel that experiments with new methods of dispute resolution have yielded unsatisfactory results, than they will oppose further experimentation. Two of my initial assumptions mirror these expected attitudes.

I assumed that Corps personnel do not support alternative dispute resolution (ADR) initiatives because they believe that the agency is already handling conflicts in a satisfactory manner and that they oppose greater use of ADR because they are disappointed with the results of the Corps’s experience with ADR. My data indicate that neither hypothesis is correct. In fact, interviews and questionnaire results suggest the opposite conclusions. My respondents are not satisfied with current Corps procedures for handling conflict and they are pleased with the results of the agency’s use of ADR, to date.

Most respondents believe that current Corps dispute resolution mechanisms are not working as well as they should and that new techniques should be tried. Most of those filling out the questionnaire (10/12) did not agree that “ADR is unnecessary because current Corps mechanisms for handling disputes are
satisfactory." In fact, most disagreed strongly. All believed that "ADR techniques are a useful supplement to traditional methods of resolving disputes," and that "The Corps should use ADR more often." (1)

Dissatisfaction with current dispute resolution methods is clearest in the area of contract disputes. 10/12 of the questionnaire answers asserted that the Corps should expand its use of ADR in handling contract claims. Interviews corroborated this evidence. The bulk of the Corps’ experience with ADR has been in the contract claim area and most of my interviews focused on this subject. Consequently, this chapter deals primarily with contract dispute resolution. It explores the reasons for the low level of satisfaction with the conventional methods for resolution of contract disputes and the attitudes of Corps personnel and other interested observers towards contract claim ADR. (2)

For over a century, the government has used quasi-judicial administrative bodies to resolve disagreements that could not be settled under informal regulations (Shedd, 1966). During the Civil War, Secretary of War Simon Cameron appointed a federal board to hear claims regarding ship construction contracts. In the following years, government contracts commonly authorized contractors to appeal a government contract officer’s decision to the agency head. A formal appeal board was established in 1918 and in a period of four years it and its successor disposed of over 3,000 cases. A Navy Board was set up in 1942 which was
ultimately subsumed into the Armed Services Board of Contract Appeals in 1949.

After World War II, the number and size of government contracts grew along with the roster of government agencies with their own contract appeals boards. Even without authorizing legislation, at least ten agencies created boards by the early 1960's. These efforts were directed at lightening the burden on top officials and giving contractors an option of avoiding the cost and delay of the courts (Crowell, 1988).

By today's standards, the early contract appeals boards held informal and expeditious hearings. Little discovery was permitted and cases were generally presented in a condensed manner. The contractor knew that if the case were lost at the board, the U.S. Court of Claims would allow a full-blown de novo trial on the merits. That is, until 1963.

Board decisions took on greater import after the U.S. Supreme Court held, in United States v. Bianchi, that the findings of fact by the boards of contract appeals are final and binding regarding disputes arising under the contract. (3) Such determinations are subject to review by the Court of Claims only on the administrative record. Thus, de novo hearings on the merits were no longer available under the remedy-granting clauses of a contract. The boards of contract appeals thereafter played a more powerful role in resolving contract disputes.

The government contractors' bar, concerned with procedural due process, brought pressure in the 1960s to reform board
procedures to allow discovery and more extensive hearings. This "judicialization" of board procedures caused disputes to become more heavily "lawyered" as dockets filled and backlogs increased. (Spector, 1971)

The boards were finally given a statutory basis with the passage of the Contract Disputes Act of 1978 (CDA) (4). The Contract Disputes Act was intended to make the resolution of government contract claims more consistent, fair and efficient. (Crowell, 1988) (5) Under the CDA, all federal agencies employ the same basic procedure.

A contractor’s claim, if not resolved informally, is first presented to the contracting officer (CO), an agency employee whose function is to enter into and administer government contracts. The CO, who represents the governemnt as a party to the contract, also make the initial decision on the dispute. (6) If the CO decides against the contractor, a written statement is issued which includes the reasons for the decision and an explantion of the contractor’s appeal rights. The contractor may appeal either to the agency board of contract appeals or to the U.S. Claims Court. An adverse decision at either forum can then be appealed to the Court of Appeals for the Federal Circuit. (7)

The contracting officer is obviously a key player in the contract dispute resolution process. The CO is empowered to negotiate and settle most contract claims. In the Corps of Engineers, the CO is a District-level employee. The established process is aimed at early settlement of disagreement. One
respondent called it a "claims avoidance system."

The system is set up for settlement. The CO is a negotiator. It is set up as a claims avoidance system in the first instance. The CO's job is to deal with problems as they occur. The only time we have a claim is when the administrative system breaks down.

The CO can settle a disagreement with the contractor. If unsuccessful, the contractor can informally appeal to officials in the Corps district or division. Alternatively, the contractor can go directly to the Corps of Engineers Board of Contract Appeals.

The main point is that when talking about disposing of government contract disputes, you must discuss the whole process. How do you maximize the possibility of settling at each stage. There will be some small residue of cases that will have to go to the Board.

Satisfaction With Conventional Contract Dispute Resolution

Civil works contract cases not settled at the district level of the Corps can be appealed by the contractor to the Army Corps of Engineers Board of Contract Appeals. (8) 10/12 of the questionnaire respondents expressed their dissatisfaction with conventional contract resolution mechanisms by indicating that the Corps should expand its use of ADR for contract claims. However, one Corps respondent, the Chief of the Civil Construction Division, would remedy the Board backlog problem by expanding the size of the Board before developing new procedures for contract claim settlement. (9) His view is that the established system is better than the minitrial procedure, specifically when the minitrial is conducted at the Division-
level of the organization where there is less relevant expertise. (10, 11)

One attorney I spoke with is satisfied with the current government contracts disputes procedure. (12) As Deputy Chief Trial Attorney for the U.S. Army, he oversees the government’s case preparation for appeals to the Armed Services Board of Contract Appeals. (13) This respondent asserted that the settlement activities in which his attorneys engage are much like ADR.

This office has settled more cases than any of the other branches. We settle approximately 65% - 70% of the cases that come to us. That is ADR if you like. We’ve never done a minitrial. We don’t have any cases for which it is suitable. I’m not opposed to minitrials. Nobody I’ve talked to in the Army is opposed to minitrials.

While assuring that he is not opposed to ADR, and emphasizing that he is not criticizing the Corps of Engineers for its contract dispute resolution experiment, this supervising attorney expressed satisfaction with the Army’s current dispute resolution methods. As an example of their successful methods, he described a custodial contract case that was settled before trial at the Board, but after docketing. The company which was providing custodial services for a government facility had received numerous deficiency reports for providing substandard services. Relations between the contractor and the government’s representatives deteriorated during the course of the contract as the CO documented the poor custodial work. The CO invested a lot of time in preparing the case and complained of harassment by the contractor and the contractor’s attorney. The
contractor was adamant and claimed that the CO was being unfair.

The government sought liquidated damages under the contract which was "in effect, a penalty" against the contractor. Army counsel assigned to the case discussed the matter with the contractor’s lawyer and agreed that damages should be set "somewhere in the middle" (between no penalty and the amount sought by the government.) There were several unsuccessful negotiation sessions with the lawyers and the principals. The attorneys urged settlement but the principals resisted. Finally, the ASBCA judge assigned to the case met with the parties at the request of counsel. He successfully "encouraged" the principals to settle.

My respondent offered that the process that led to settlement of the custodial contract dispute "could have been formalized, structured and called ‘alternative dispute resolution.’" Indeed, it is not uncommon for attorneys and judges to consider settlement conferences a form of ADR. (14) However, it is oversimplifying to lump together settlement conferences presided over by a judge assigned to hear the trial and a minitrial settlement procedure conducted by the principals and held earlier in the dispute. While a settlement conference is undoubtedly a useful way to encourage resolution prior to hearing, it does not offer all the advantages of a minitrial or related procedures. The minitrial discussions are controlled by the parties to the dispute. The attorneys present their arguments to the principals. Experts and the neutral advisor (if used) also serve
to give the principals the technical and legal information they need to hold settlement negotiations. The principals focus the proceedings on the information they deem important.

A judicial settlement conference, on the other hand, offers the principals a chance to hear the judge's assessment of the case but does not typically generate new technical information. Moreover, by the time the judicial settlement conference occurs, the parties have expended more time and money preparing the case. This resource investment may make the principals and their attorneys less willing to settle than if a settlement procedure had taken place earlier.

The custodial contract case, described by my respondent, might have been a good candidate for a minitrial or a nonbinding arbitration. The CO and the contractor had battled to the point of generating bad blood. This may have contributed to their unwillingness to settle. The government and the contractor could have scheduled a minitrial choosing representatives who had not previously been involved in the conflict. While even a minitrial requires a significant investment in preparation by the lawyers and principals, the facts and documents assembled will be needed anyway, in case of trial. Moreover, an earlier deadline alone can expedite settlement as it forces the parties to focus on the strengths and weaknesses of both positions. (15)

Second-guessing how an earlier settlement might have been achieved is a speculative venture. It is impossible to know, without a much more detailed inquiry, whether the custodial
contract case could have been successfully settled with a minitrial. However, it seems the potential was there. An earlier and equally satisfactory settlement might have been reached if the parties could have stepped back from their personal clash, assigned fresh representatives as principals and used a procedure to place all the relevant information in the principals' hands. The investment in the procedure seems worth the cost - even if settlement was not reached, most of the work would assist the disputants in pursuing their case before the Board.

As in the Corps, the Army counsel conduct discovery after a contractor appeals a case to the Board. If information surfaces which indicates that the government's case is weak than "those cases are easy to settle," my Army respondent told me. Elaborating on the type of approach used in the custodial case, he explained that if the government department against whom the claim has been made is hesitant to settle "we have used the Board [judges] to cajole our clients to settle." Drawing a further comparison to ADR, this respondent said:

ADR is designed to put the facts in front of the decisionmakers. It is important to do that and we have done that. We've gone to headquarters and told them "we've got a loser but the people down there [in the field offices] don't agree." So we persuade the higher authority to make a decision to settle. That's all ADR is.

Providing senior officials an assessment of the weaknesses of the government's case does give them useful information. In a factually simple case, where field personnel refuse to settle
primarily because of interpersonal issues, the approach may be successful and efficient. However, if the strength of the government's position is not so clear-cut, or if senior officials are already inclined to support their subordinates, a meeting between counsel and management may not be adequate. In such a case, a minitrial may surface more of the information that the decisionmaker needs to make a decision overruling his or her subordinate.

For instance, in a hypothetical case of a long-simmering dispute between a CO and construction contractor over a requested contract modification, the respective organizations have become alienated. The case is complicated, revolving around whether the government, in issuing bid specification for an ammunition depot, adequately informed the contractor of the likelihood that the water table would be reached at a twenty foot depth at the construction site, rather than the expected thirty foot level. The government included in the bid information, all hydrogeologic charts available at the time. As the bid was being prepared, the contractor's staff interpreted the charts to indicate a lower water table than was subsequently discovered. The government now maintains that the charts could have been interpreted to correctly predict the actual conditions. If the contract is not modified to allow the contractor more compensation, the company will lose several hundred thousand dollars on the project.

The CO has remains adament in refusing to modify the contract. Because of the size and importance of the contract, he
keeps his superiors informed of the dispute throughout the two years of the construction. They have supported his position. The contractor appeals to the Board and government counsel review the documents. After reading the report of an independent hydогeologist, counsel decide that the government's case is weak. The CO and his superiors refuse to change their position. Higher management, unсonvinced by counsel or the technical report that their earlier position was incorrect, refuse to compromise. While not certain that the government will win, the officials are more comfortable deferring the decision to the Board than trying to figure out the complexities of the case. Government counsel in this hypothetical, must proceed to prepare the defense. At trial, the opposing counsel will challenge one another’s experts and seek to obscure from the judge, any information damaging to their client’s position. This technical dispute was initiated in the context of animosity between the parties and ends with a judicial decision based on discovery documents and the arguments of two attorneys. It took years to resolve and the conclusion may or may not be as wise as one the parties might have designed. If the government loses, it must pay interest from the time the appeal was filed.

Had a non-binding arbitration procedure been chosen instead, the principals on both sides would have been presented with an assessment of the case from one or more neutral experts. This process would have boiled the data down to its essentials for the decisionmakers and provided both sides the basis both for a wise
settlement. If the government position was deemed incorrect, the arbitrator's report would provide adequate justification for the government principal to overturn the denial of the claim. The procedure could have taken place as soon as the dispute was ripe, perhaps months or years prior to the Board's decision. A negotiated settlement, following this sort of ADR procedure might result in an improved relationship between the government and the contractor compared to the BCA process. Moreover, if the procedure did not result in settlement, the Board hearing would have occurred as scheduled.

Lawyers, of course, carefully consider their settlement strategy for all cases. My Army counsel respondent explained that a determination is made of the likelihood of losing and the probable cost of losing versus settlement. That calculation is at the center of the settlement strategy.

When we assess a case we make an estimate of what we will definitely lose and what we will possibly lose. That spread is the settlement area. If the spread is narrow (say $50,000) the litigation costs are more significant. If the spread is $4 million, the litigation costs are not so important [in the settlement determination.]

This attorney, then, does not see litigation costs as an important disadvantage in the appeal of major contract disputes when the government has a strong case.

We need to continue to look at cases. Continue to direct attention to settle cases in the best interest of the clients. But the cost of litigation are not the most important cost in a dispute. Losing is the biggest cost.

While the procedures of the Contract Disputes Act apply to disputes handled by the Corps counsel and the Army Chief Trial
Attorney’s offices alike, there is an important difference between the organization of the two legal branches. All of the Army counsel reside at headquarters, in Washington D.C. The structure of Corps counsel’s offices, on the other hand, is decentralized in the field offices around the nation. When the District or Division Engineer has a legal problem, he walks down the hall to discuss it with his lawyer. This closer relationship may affect the attitude and advice of counsel. For example, according to one Corps attorney, a district attorney might be "afraid to tell the engineer that he is barking up the wrong tree."

On the other hand, being close to the day-to-day activities and personnel of the field office gives counsel access to informal information that can be useful in assessing and proceeding with a dispute. To prepare for contract claim, Corps District personnel assemble a technical analysis and a legal analysis. A former District counsel explained that the engineering staff who are preparing the packet don’t always compile all the relevant information. "Sometimes the engineering and construction people might not be willing to go back to the contractor" to gather more information than is provided by the Corps project engineer. Also, as the case is prepared, "people naturally tend to filter facts" based on their judgment of what is important and helpful for the government’s case. Since the Corps attorneys who prepare the case are at the District, they can easily discuss a matter with a technical staff person.
knowledgeable about the dispute or quickly access the documentation if any gaps in the case become apparent.

A disadvantage of the closer relationship engendered by the Corps' decentralized legal function is the psychological affect on Corps counsel of defending against a claim that his or her associates have already denied. There may be an increased tendency to adopt the position taken by the client in a way that would cloud an objective analysis of the case. My Army counsel respondent, while not criticizing the Corps on this point, did explain that unlike the Corps

Only two of my 19 respondents expressed much satisfaction with the established system of contract dispute resolution. One of them, the Army Deputy Chief Trial Attorney believes that the conventional contact claim system results in a high settlement of Army cases and that ADR procedures offer no advantages for cases within his jurisdiction. The Army's trial function is centralized while the Corps of Engineers attorneys are mostly located in the field offices. This may partially explain the Army respondent's higher level of satisfaction with conventional procedure compared to the Corps' legal counsel. The Corps respondent most satisfied with the conventional contract dispute resolution procedure, is concerned about the relative disadvantages of ADR; namely, that Division-level minitrials may not lead to wise resolution of contract claims. This issue is taken up later in this chapter. Other respondents, while not suggesting that the conventional system be abandoned, are eager
to develop supplements to the system to allow more cases to be resolved outside of the judicialized administrative process.

A large proportion of Corps and private sector professionals involved in government contracting agree that the traditional appeals process has become too costly, and too time-consuming. Corps officials, contractors and their respective counsel believe that the process of resolving disagreements needs reform. This has led the Corps Chief Counsel’s office to experiment with minitrials, non-binding arbitration, disputes resolution panels and other settlement techniques. (Edelman and Carr, 1987)

Interest in improving resolution of contract disputes has risen steadily since the early seventies. (Crowell, 1988) In 1972, the congressionally-created Commission on Government Procurement recommended informal conferences be held prior to appeal of a contracting officer’s decision. Other recommendations followed and a variety of contract dispute resolution experiments have ensued.

Notwithstanding delays and the growing backlog before the Corps of Engineers Board of Contract Appeals, many contract dispute cases are settled by the lawyers prior to the Board hearing. Law Professor Ralph Nash, an expert in government contracting, pointed out that settlements often take place prior to formal hearings.

Even without ADR, a half of the cases docketed for the Board get settled. Why? When the parties docket their case they don’t even know what their case is about. After some discovery, they settle.

Non-judicial settlement occurs quite often. The Corps of
Engineers does not keep statistics on settlement rates but Professor Nash’s estimate of half of docketed cases settling before trial seems reasonable. Army trial attorneys (a distinct organization from the Army Corps of Engineers’ legal branch) settles approximately two-thirds of the over-two hundred cases it handles each year. Yet, delays and backlogs grow.

The docket of the Corps of Engineers Board of Contract Appeals (COEBCA) grew from 169 in March 1982 to 243 cases in September 1987, an increase of over 43%. The Armed Services Board of Contract Appeals (ASBCA) docket expanded even more during that period, swelling from 201 case in 1982 to 364 last September. The U.S. Claims Court, which has concurrent jurisdiction with the the Boards, is not exempt from the problem. Their load has more than tripled, 23 cases were waiting to be heard by the Court in 1982, 81 were on the docket in September, 1987. While a contractor has a right to take a contract dispute to a BCA or the U.S. Claims Court, the choice is between two essentially "equal forums embued with equal disadvantages."

A prominent member of the government contracts bar says that the Boards and Claims Court both offer resolution of claims in "the same time," with "the same expense," and the same "generally unsatisfactory" procedure.

Those involved in Corps contract disputes are dissatisfied with the current state of affairs. This report turns now to further consider the problems with the conventional contract claim system and the degree of satisfaction with ADR procedures.
developed to respond to the problems.

Problems With Conventional Contract Dispute Resolution
As noted in the beginning of this chapter, my initial expectation that Corps personnel are satisfied with current contract dispute resolution procedures is not supported by my findings. An important reason for the dissatisfaction is that the District contracting officers too often do not resolve disagreements that with contractors.

Several of my respondents criticized this early stage of the contract dispute settlement process. One complaint is that the COs do not hear the contractor's perspective prior to issuing the decision. A Corps official acknowledged what might be a critical flaw in current procedures, the absense of early face to face discussions between representatives of the parties to the dispute; the government and the contractor.

Some COs haven't been fully exposing themselves to the contractor's side of the issue. They don't meet with the contractor. Contractors have complained that the CO decision was written without their side ever being heard. They thought they could have gotten resolution if they had an opportunity to present their side. I believe the CO has an obligation to hear the other side.

This problem might arise as a contractor performs almost any sort of government contract. For example, a contractor building a complex of Army barracks substitutes high grade plastic plumbing fixtures for the porcelain variety specified in the contract after his original supplier notifies him that labor trouble will delay delivery of the toilets well beyond the
project completion date. The contractor makes the substitution believing that the new fixtures are within the specifications of contract. During a routine review of several completed buildings, the Corps' project engineer notices the plastic bowls. He immediately informs the contractor's project manager that the fixtures do not meet the specifications and will have to be torn out and replaced with the porcelain variety. The project manager explains that the fixtures are adequate for the job and that waiting for the original order will cause a several month delay and financial penalization of the contractor for late performance. They argue but do not resolve the issue. The project engineer leaves, believing that the contractor is trying to squeeze extra profit by the substitution. The engineer also suspects that the plastic fixtures will not be as durable. He informs the contracting officer of the situation. The CO reviews the contract which does not specify the material that the fixtures must be made. He is disturbed, though, that the contractor did not clear the change with the project engineer or any other Corps official. After conferring with district counsel, he issues a decision penalizing the contractor under the liquidated damages clause of the contract.

Meanwhile, the project manager relates the story to his employer, the contractor, who calls the Corps' district office to make an appointment with the CO. The contractor is informed that the CO has just issued his decision and that it is on the way to the contractor via registered mail. The contractor and counsel
meet with the CO but no progress is made so the contractor’s lawyer files an appeal with the Corps of Engineers Board of Contract Appeals. Poor communication and the availability of the administrative appeal system result in another case added to the BCA docket.

If COs commonly neglect to discuss the claim with the contractor prior to issuing a decision, it is not surprising that many CO decisions are appealed to a judicialized board (which protects the contractor’s opportunity to be heard.) With thousands, or millions of dollars at stake in a single claim, contractors are justifiably concerned with procedural due process.

Other respondents mentioned the "fear of scrutiny" by the Inspector General or congressional offices as discouraging COs from risking close calls or making what might turn out to be politically sensitive settlement decisions. For example, if a CO grants a request for a million dollar supplemental payment under a ten million dollar construction contract, a congressional critic of military spending might open hearings to judge whether the army is "giving away the store" to the multinational construction company. This concern with adverse publicity and potentially embarrassing review might lead a CO to deny the claim even if it appears to be justified. After all, a plausible CO denial, issued in the name of protecting the public treasury, is not going to cause the CO great embarrassment even if overturned by the COEBCA three years down the road. (21)
There are psychological and sociological aspects to the way contract disputes are currently handled. One attorney in the Chief Counsel's office stressed what he called a "cultural" element as a partial explanation for the large number of contract disputes that are not settled by the CO or others at the district level.

The CO and others in the engineering and counsel staff, take an early position. Then they see their position as right and the contractors as wrong, virtually to the point of defending their honor. This happens very early. Then things proceed in a formalistic and legalistic way. Once people have taken a stand, there is no process for overcoming [their inclination to stay with that position.] They put their feet in concrete too soon.

Contracting officers have the power to settle but often choose to not exercise that power. A newsletter of government contracting reported on this phenomenon in its review of a meeting of professionals in the field:

members of the audience expressed the view that COs frequently do not fulfill their responsibilities of settling disputes but rather make a final decision as a means of passing the problem up to the board of contract appeals for decision. (22)

The Administrative Conference of the U.S. in its 1988 report on government contract appeals discusses the "[i]ncreasing incidence of contract controversies that remain unresolved between the parties." (Crowell, 1988) The report notes "a reduced willingness or ability to exercise responsibility by contracting officials, and increased doubt in some quarters that they truly act to serve the government's best interest." While agency boards, procedures and caseloads vary:
the unhappiness among many contractors, lawyers, and agency officials is based upon accurate perceptions that these disputes often are unnecessarily contentious and their resolution needlessly complex and drawn out and, therefore, very costly to both sides. (Ibid)

Most cases which are not settled at the District-level of the Corps are appealed by the contractor to the Army Corps of Engineers Board of Contract Appeals. (23) My respondents report that a small portion of claims are settled in the field offices when a contractor informally appeals to the CO's superiors. Unfortunately, the Corps does not collect statistics on district settlement of contract disagreements. Whatever the frequency of settlement between the parties at the District, and between the attorneys prior to Board decision, my respondents agree that there is a need for change in the way the Corps handles its contract disputes. Most see ADR as the right way to bring about the needed change. Even my Corps respondent most supportive of the current procedures said that he "agreed somewhat" that the Corps should expand its use of ADR for contract claims. Two thirds of the questionnaire respondents "strongly agree" that the Corps should use ADR for contract claims more often than it is now. No one disagreed.

All the evidence and the weight of informal opinion suggest there is a low level of satisfaction with the established contract dispute resolution procedures and a strong interest in an alternative approach. Some respondents want to change the adversarial "culture" that has evolved in the field offices. This, however, is a long range objective. In the immediate term,
the use of ADR supplements for contract disputes is seen as the best way to enhance the established procedures.

**Satisfaction With ADR For Contract Disputes**

I have found strongly positive attitudes towards the use of ADR for contract claims. Most of the Corps' experience with ADR for contract claims has been with the minitrial and non-binding arbitration procedures. As noted above, 10/12 of the questionnaire respondents agreed that "the Corps should expand its use of ADR [for] contract claims." Most agreed strongly. The only two respondent who did not agree, marked "don't know." There was stronger support for expanded use of ADR for contract claims then for any other application.

The Corps of Engineer Chief Counsel's Office began the contract dispute ADR program in the fall of 1984. (24) Lester Edelman, Chief Counsel, assigned two of his staff to organize the effort: Frank Carr, Chief Trial Attorney and Sabrina Simon, Trial Attorney. Carr identifies three sources of dissatisfaction with the conventional contract dispute resolution procedures which cause the Corps (and other government agencies) to consider ADR: the costs of litigation; delays in obtaining decisions from the Boards of Contract Appeals and the U.S. Claims Court; and the disruptions to management in defending litigation. (Carr, 1988) The Corps headquarters attorneys drafted a minitrial procedure after reviewing how minitrials had been used in the private sector and in the single public agency experience with a
minitrial. (25) NASA was the first federal agency to use the minitrial. A multi-million dollar contract dispute between the agency and TRW was settled with the ADR procedure in 1982. (Johnson, Masri and Oliver, 1982) Headquarters counsel then held a three day meeting with selected District and Division counsel to revise the procedure. (26) Chief Counsel subsequently circulated recommended minitrial procedures to the District and Division offices around the country. (27) The procedures are not rigid, headquarters encourages the field offices to tailor the minitrial according to the dispute.

The Corps defines minitrial as "a voluntary, expedited, and nonjudicial procedure whereby top management officials for each party meet to resolve disputes." (28) The term "minitrial" is a misnomer. Rather than a "shortened, adversarial judicial proceeding" that the term implies, a minitrial is a structured negotiation process that blends elements of traditional negotiation, mediation and arbitration. (29)

The essence of the minitrial technique is a short presentation by each party of the key elements of its case to management officials of the parties who have the power to settle the case (the "principals"). The principals should have the general technical expertise to understand the problems underlying the dispute. Following the presentation, and any questions or discussion of the facts and issues, the principals meet to negotiate a settlement. The presentations typically involve the extensive use of expert witnesses. The informality of the
minitrial facilitates the flow of information from the experts and lawyers to management officials (attorneys usually make the presentations although technical staff have filled that role in at least one case.) The formal rules of evidence are not applied and cross examination is limited. Witnesses are allowed to present their testimony in narrative form. Each party is permitted to present its argument uninterrupted by the other side. The principals may interject with their questions at any time.

After the hearing, which may take a day or several days in a very complicated case, the principals meet to negotiate a settlement. In some of the minitrials, the principals met intermittently during the hearing to determine what additional information they needed prior to negotiations. One of the advantages of the process is that the principals do not have to agree on all points to achieve settlement. (30) After the areas of disagreement are identified and narrowed, the negotiations can focus on the dollar settlement. If the principals are unable to settle the case, the formal appeal to the Board of Contract Appeals of the U.S. Claims Court may proceed. However, the content of the minitrial may not be used in the litigation. No transcript of the hearing or negotiations is produced and neither party may use what is said by the opponent in the hearing as evidence of an admission in subsequent litigation. The agreement to conduct the minitrial is strictly voluntary. Either party may
withdraw at any time without prejudicing its position in litigation.

An interesting element of the minitrial is the use of a neutral advisor to assist the principals in assessing the merits of the claim. If the parties decide to use a neutral advisor, the advisor's role is clarified in a written minitrial agreement, which specifies all the pre-hearing and hearing procedures and schedules. Like other aspects of the minitrial, the parties have considerable flexibility in fashioning the role of the advisor. The parties to the Corps minitrials which used a neutral advisor have hired law professors or judges experienced in government contracting. The advisor can preside over the hearing although this may be a minimal role, due to the informal process. Often, the parties want the neutral advisor to share his or her expertise by probing the critical issues during the hearing. (31) They may also assign the advisor the responsibility of providing an assessment of the strengths and weaknesses of the two positions. The advisor has, in some cases served as a mediator between the principals by meeting privately with each of them to ascertain their positions and communicate them to the other side. (32)

The Corps has settled nine cases using ADR procedures. Six used minitrials, and three were with a non-binding arbitration procedure. The nonbinding arbitration has not been the focus of as much attention as the minitrial in the Corps or in government contracting circles generally. Compared to what they knew about
the minitrial procedure, my respondents were less knowledgeable about non-binding arbitration and the Disputes Resolution Panel recently established by the Corps, but not yet utilized. I have chosen to focus this report on the minitrial efforts in the Corps. (33) A seventh minitried case was concluded with an agreement in early May, 1988 but had not been finalized at the time of this report.

The Corps' minitrial experiment has received much attention inside the Corps and more generally in government contracting circles. (34) Notwithstanding this support, however, the minitrial experiment has its detractors. In particular, technical staff in the field offices have reportedly criticized the procedure in at least one high-profile case. The focus of criticism is that minitrials conducted with Division management as the government principal, do not take advantage of the technical and contracting expertise of the District. The lack of expertise and the desire to resolve the case, may lead to settlements that are not in the best interest of the government. The question of what level of the organization is most appropriate for contract claim ADR procedures is discussed later in this chapter.

In the questionnaire, I asked whether "Corps personnel are opposed to greater use of ADR because of the disappointing results, to date." Six of the twelve questionnaire respondents disagreed, one agreed strongly with the statement and five answered "don't know" or were neutral. This reflects lack of consensus at OCE (headquarters), where most of my respondents
work, as to the attitude of field personnel regarding satisfaction with the minitrial.

My respondents, from the Corps and the private sector, are strongly supportive of the Corps’ use of ADR for contract claims. Next, this report turns to the Tennessee-Tom Bigbee minitrial, the most controversial contract ADR case, to date.

Tennessee-Tom Bigbee Minitrial. Of the nine contract disputes the Corps had settled using ADR procedures, one has caused the greatest controversy. (35) The dispute arose out of the construction of the Tennessee Tombigbee Waterway an eleven mile navigational connection the Corps built between the Tennessee and the Tombigbee rivers.

In March 1979 the Nashville, Tennessee district of the Corps of Engineers entered into a contract with a joint venture known as Tennessee-Tom Contractors. (36) The primary work under this contract was the excavation of of 95 million cubic yards of earth to construct a waterway between the Tennessee River and the Tombigbee River. The joint venture was the successful bidder and received a fixed price contract for $270.6 million.

The bid solicitation package issued by the Nashville district included the results of geologic tests made to predict the conditions that the contractor would encounter. One of the test results incorporated in the bid solicitation package was from a sample excavation of a 1,500 foot wide section in the area where the contract work would be performed. This data would emerge as central to the dispute.
Soon after beginning the excavation work, the contractors realized something was wrong. The ground wasn’t responding as represented in the bid document. It was much more resistant to the bulldozers and other heavy equipment than anticipated. The greater rolling resistance caused equipment to break down, resulting in higher maintenance costs. The contractor began to monitor and document the problem with written reports and videotapes of the work underway and the conditions encountered. Tenn-Tom contractors formally notified the Corps of the "differing site condition" problem in August 1980 and again in April 1981. The contractors submitted several claims during this period, asking for additional compensation to cover cost increases they attributed to the difference between the actual soil conditions and what was described in the bid solicitation. The last of these claims was for $42.8 million.

The Nashville staff established a task force to study the problem and hired consultants to further evaluate the merit of the differing site condition allegation. Notwithstanding good on-site rapport between the Nashville and Tenn-Tom management teams, the respective organizations differed on their view of the claim for equitable adjustment to the contract. In August, 1984 the District office issued a contracting officer’s decision denying the claim. The Contract Disputes Act allows 90 days for appeal to the Board of Contract Appeals. Tennessee-Tom Contractors filed their appeal with the U.S. Army Corps of Engineers Board of Contract Appeals (COEBCA) in October 1984.
When the contractors filed their appeal to the COEBCA, they knew it might be years before the Board would hear the case. The COEBCA was in the midst of a (still continuing) trend of a steadily growing docket. This claim was not eligible for the Board's Rule 12 accelerated procedures since the amount at issue was over $50,000. (37) The average nonexpedited case before the various boards of contract appeals takes two to three years from the date of filing to date of decision. In a complex case it is not unusual for three to four years to elapse before the board issues a decision. (Edelman and Carr, 1987) Thus, when outside counsel, Stan Johnson, suggested to his client the idea of an alternative forum for resolving the claim, the joint venture was receptive.

Johnson was counsel for TRW in the 1982 minitrial with NASA, the first reported use of the procedure by a federal agency. That multi-million dollar dispute, dealing with a technically complex satellite tracking and data relay system, had been well into discovery by the time the minitrial was held. The pleadings were filed in late 1979 and early 1980, followed by the kind of massive discovery which is typical of complex litigation. By September 1981, the parties collected over 100,000 pages of one another's files and several thousand pages of deposition transcripts. Concerned with the rising costs of the litigation and continuing delays in the scheduled hearing date, the parties decided to attempt settlement with the minitrial process. They agreed on minitrial procedures and to stay the litigation. If no
settlement were reached, the litigation would resume. A one day hearing and two days of face-to-face negotiations culminated in settlement of the claim as well as other outstanding disputes. The total settlement was over $100 million.

Because of his experience with the NASA-TRW minitrial, Johnson was "favorably disposed to the process as a way to serve my client efficiently." Thus, when he read in a construction engineering periodical that the Corps’ Chief counsel had launched a minitrial program, he thought of nominating the Tenn-Tom case. The parties had been unable to settle at the CO level, there was at least $45 million at stake and Johnson knew his client was willing to compromise.

The willingness to compromise is a key element in determining whether a case is amenable to ADR resolution. If one party is already unwilling to engage in the give and take of bargaining, a minitrial and subsequent negotiation sessions are liable to be a waste of time. An exception would be if the resistant party is unrealistically confident of a legal victory because of a wholly inaccurate assessment of the strength of their legal position. In such a case, the information surfaced in the minitrial might cause them to realize the likelihood that they would lose at trial, thereby creating a willingness to compromise.

Johnson’s client was interested in pursuing the minitrial even though they believed their case was strong. Jack Lemley, Vice-President for Morrison-Knudson told me that his company "immediately viewed the idea as positive. If we could short-cut
the litigation, that's good." The joint venture was willing to compromise even though they believed they had a strong case. If fact, Lemley told me that "We had no concern about winning. We knew we would ultimately win. This was the cleanist differing site condition claim I’ve seen in thirty years." The contractors were confident because they had thoroughly documented the difference between the soil conditions predicted by the government and those encountered on site. There were no unsettled legal principles to raise doubts about liability. If Tenn-Tom could demonstrate that the conditions encountered by the contractor differed materially from those represented in the the bid document, they would recover. Why then were they willing to compromise? "Because of the time and expense of litigation" according to Lemley. Another reason for attempting settlement is even if Tenn-Tom demonstrated a changed condition, they would still have the burden of quantifying the damages. Such a determination requires a lot of data and is open to interpretation.

The Nashville District is a subordinate command to the Ohio River Division of the Corps. The Tenn-Tom case was being handled by Wesley Jockisch, Ohio River Division (ORD) Counsel. ORD was already aware of the contract claims ADR initiative, having attended the meeting on the subject held by Chief Counsel in 1984. Jockisch and the Division Commander, Brigadier General Peter Offringa were receptive to the minitrial approach. Jockisch also believed that he had "a very strong case," and would have
tried the case without hesitation if it hadn't settled. He noted that the central issue of whether there was a differing condition came down to a yes or no answer. There is "no way to say there was a partially changed condition." He saw the results of a Board trial as less certain than did Lemley. Jockisch explained that each side had "experts with fine credentials" and "equally good position papers." His view was that "neither side felt 100% certain of winning [at the Board] though both were interested in an earlier resolution than the established procedure would provide.

ORD and Tenn-Tom contractors agreed in April 1985 to attempt to resolve the claim with a minitrial. Richard Solibakke, the COEBCA Chairman who was assigned to the case was "delighted to allow the minitrial." He has emphasized his support of various ADR initiatives to help deal with the backlog and delay problem. Sollibake's view is that "No BCA has a vested interest in hanging on to its cases; you don't have to worry about hurting our feelings." ORD Commander Peter Offringa was designated as the government's principal and the contractors chose Morrison-Knudsen vice president Jack Lemley as their representative. The parties agreed to locate a neutral advisor to assist the principals and to split the cost of compensating that person. They believed that an advisor with expertise in government contracting could help the principals assess the cases as presented by the attorneys, nkeep the focus on the relevant issues and assist in the settlement negotiations. Lemley sees that "it is imperative to
have a neutral advisor who has a good deal of experience with federal procurement law, and the law generally." Johnson underscored the importance of the neutral advisor as helping the parties define the appropriate bases for decision. He said "the neutral advisor contributes to the opportunity for rational settlement." Jockisch agreed that a neutral advisor is essential for the minitrial procedure to help the parties in sort the issues and to facilitate the subsequent negotiations. He believes in the value of the outside unbiased expert to the extent that "I would not agree to a minitrial without a neutral advisor." For this minitrial, the parties retained George Washington University Law Professor, Ralph Nash.

Professor Nash spoke with the principals as they were planning the minitrial. He and General Offringa agreed to Lemley's suggestion that they meet for dinner the night before the minitrial was to begin. This meeting helped to establish a rapport between the three men who would be presiding over the hearing and engaging in settlement negotiations.

The minitrial was held in Cincinnati, Ohio on June 12-14, 1985. Prior to that date, all interested parties agree that any final settlement arrived at in the minitrial would include all subcontractor claims. The parties presented their cases on consecutive days, with a third day devoted to presentation of evidence concerning quantum (the amount due, if liability is established) and for remaining questions. Nash, at the request of the principals, fully participated throughout the process,
including asking questions of the attorneys and their experts. He briefed the principals on the legal issues and offered his analysis during the hearings and negotiations. One of his roles was to challenge the attorneys to back up their assertions. Nash explained in reference to Tenn-Tom and another minitrial for which he was a neutral advisor:

the fact that questions were asked by me - as a neutral advisor - protected the principal from the adverse side from having to ask the question and risk losing the appearance of impartiality which would later be helpful in arriving at a settlement. This is not to say that the principals are actually impartial but, rather, that they lose some of their ability to negotiate if they regularly attack the witnesses for the other party.

After the hearings, the principals met to negotiate. Nash was present. He reports that one of the principals was "very nervous" and unwilling to settle at that point. Nash was not convinced that more information, as such, would help them reach an agreement but he saw that the principal needed the process to continue before he would be ready to settle. "In every minitrial I’ve done, at least one of the principals has been skitish. This cautiousness is understandable given the newness of the procedure and the large sums involved. Nash handled the situation in this case by "constructing an expedient to keep him in." They decided to hold an additional hearing to give the contractor an opportunity to put in more information regarding conditions encountered during a certain time period.

According to Stan Johnson, he and opposing counsel Wes Jockisch "were resistant when the principals asked for more
minitrial." Johnson reported that "I felt like I'd been invited to a dance and nobody would dance with me." He speculates that the hesitant principal needed more time to accept the idea of settling based on the risk of losing a Board trial.

In the renewed hearing, on June 27, 1985, the parties agreed to Nash's suggestion that they organize the expert testimony differently. Instead of one expert answering a series of questions at a time, the experts were put up as witnesses simultaneously. One witness would answer a question on a point of controversy and then the other was asked to respond. The first witness then responded to the second and so forth. This process successfully narrowed the differences between the witnesses and thus between the positions of the parties.

Negotiations resumed after the second round of hearings and the principals reached agreement. The $55.6 million claim was resolved for $17.2 In my interviews with the two attorneys and one of the principals, all were satisfied with the agreement. The other principal, General Offringa, who I was not able to interview, indicated his satisfaction indirectly, through his responses to the questionnaire. He agreed that the Corps should use ADR more often and in particular should expand its use of ADR for contract claims. He elaborated, in the questionnaire space for respondent comments that "I am, through experience and inclination, a strong supporter of ADR."

Jockisch explained that the Corps attorneys from the district were also pleased with the minitrial. However, the technical
staff did not share in the support for the procedure and resulting settlement. A district technical staff member called the Department of Defense Inspector General Hotline to anonymously complain that the settlement was not justified. This person’s view, which some of my respondents believe is widespread among the technical staff, is that the General "gave away the store." The technical staff who opposed the Tenn-Tom outcome believe that in the zeal to reach a resolution, an ill-advised settlement was made.

After an investigation, the Inspector General (IG) found that the resolution was "in the best interest of the government" because "the Government had sufficient liability to justify a $17.25 million settlement." The IG report supported the minitrial procedure more generally, as well. It concluded that "the minitrial procedure, in certain cases, is an efficient and cost-effective means for settling contract disputes." The single criticism in the report was that the Corps did not adequately document how the "settlement amount was reached and the basis on which it was allocated to the contractor." This is an important criticism. If settlements (reached by any means) are going to withstand the review of oversight offices, the press and the public, adequate documentation of the reasons for the particular agreement must be prepared. This serves as a check on the negotiators and also provides information useful to later compare the results of various settlement techniques.

Three of my respondents who support ADR procedures for
contract claims emphasized the "momentum for settlement" created when the parties agree to conduct a minitrial. Stan Johnson, Tenn-Tom's attorney called this momentum the "most important" aspect of the minitrial. "People set their sights on settlement, put an effort into it, and they don't want it to fail." While these respondents see momentum as a positive force, it might pressure a principal to settle a case that should not be settled. However, this does not indict the procedure. Rather, it suggests that the parties must carefully review each case considered for ADR to determine if it is an appropriate candidate. The assessment is familiar to any attorney considering settlement strategy. Factors that go into the determination include: the likely outcome of each procedure for resolution under consideration, and the costs of each procedure including the affect on relationships between the parties and the ancillary effects of each procedure (e.g. precedent, public impact.)

**Conclusion Regarding Satisfaction**

My initial expectations regarding my respondents satisfaction with contract dispute resolution procedures are not supported by the evidence collected in this study. I assumed that Corps personnel are satisfied with current procedures for resolving contract disputes and that they are dissatisfied with the agency's experience with ADR, to date. Interviews with key Corps employees and observers knowledgeable about government contracting indicate that there is strong dissatisfaction with the agency's conventional approaches to contract dispute
resolution. Disagreements between the Corps and its contractors are often not resolved by the contracting officer or other District staff, and are instead appealed to a Board of Contract Appeals or the U. S. Claims Court. Backlogs at Boards and Claims Court are growing causing long delays and increased costs for the government and its contractors. My respondents agree with the consensus of the government contracting community that the system is not working well.

I also expected that Corps personnel are disappointed with the results of the ADR, so far. My interviews and questionnaire results do not support this assumption. To the contrary, there is strong evidence that the ADR experiment is viewed positively by key Corps personnel and the contracting community. However, some respondents report that field staff have not yet accepted the ADR program. They are reportedly concerned that minitrials conducted at the Division-level of the Corps do not take advantage of the District’s expertise and may result in settlements that do not adequately protect the government’s interests.

Satisfaction with current procedures does not appear to be a barrier to greater use of ADR for contract disputes. Disappointment with Division-level minitrials may be a cause of some resistance but more information is needed to measure the importance of this concern.
RESOURCE CONSTRAINTS AS A LIMIT TO THE USE OF ADR FOR CONTRACT CLAIMS

Without an adequate allocation of funds and staff time even the most brilliant program initiatives will fall flat. More likely still, an innovative approach to an old problem will be difficult to implement if it requires or seems to require resources already slated for other purposes. Staff can not be expected to embrace program initiatives that require a significant time investment if they already feel overburdened. It is this last notion that caused me to assume that Corps personnel oppose greater use of ADR because they believe it will increase their workload.

My findings tentatively support this assumption. The limited availability of Corps management for new activities, such as serving as minitrial principals, has emerged as a concern of those involved in the contract claim experiment.

I asked respondents whether they agreed that "ADR increases the workload for management and staff." The questionnaire responses were split on this question: three of them agreeing somewhat, three strongly disagreeing and one disagreeing somewhat. Four respondents gave a neutral response and there was one "don't know." Interviews clarified that some who disagreed thought ADR can conserve agency resources by bringing about a more timely and efficient resolution of disputes. Hence, respondents as a group were more in agreement with the assertion that "greater use of ADR in the Corps may increase overall Corps
efficiency." Two thirds (8/12) of the questionnaire respondents agreed that ADR would probably lead to more efficiency; three respondents disagreed and one was neutral. I will discuss the efficiency question later in this section.

The Corps' Division Engineers are responsible for selecting cases for minitrial according to the policy adopted in 1985. (38) This initial Corps policy on minitrials, identifies the Division Engineer as the appropriate principal to represent the government. The contractor's principal is usually a senior management official with settlement authority. Contractors often designate vice presidents with responsibility for government contract activities. The Corps' division engineers are generals (39).

One of my respondents, who was Division counsel for 15 years, described the expanding demands on a Division Commander's time and the additional burden that a minitrial places on the Commander.

ADR is time consuming. It is a major time commitment for management. [In one mintrial it took] 2 weeks from the general's schedule. These folks [division engineers] are very busy. They meet with state officials. They do a lot of public relations. When you take a week out of [a Division Engineer's] time, its a big commitment. Plus you have to count the preparation time - taking briefing books home. It used to be that the Division Commander was heavily into the contracting function. But now he has so many other functions. This has been a dramatic change in the last 15 years. Its a shift in Corps programs. In the 60s we had little regulatory or environmental programs. There wan't much in the way of hazardous waste or fish and wildlife issues. Now the Corps has these expanded responsibilities, but still only one Commander. Also the staff has not expanded commensurate with the responsibilities.
Not only does a Division minitrial pressure the Division Engineer, but his limited availability can affect the ease with which minitrial logistics can be worked out. Corps counsel for one of the minitrials told me that the general’s limited availability required rescheduling one session eleven times (40).

The answer may lie in modifying the procedure so that others besides the division engineer serve as principal for the government. As one respondent put it, "Until we get to the point where we get more principals, there will be a constraint on the number of minitrials we can do." The U.S. Administrative Conference has made a similar observation about minitrials in federal agencies:

Recognition that top management’s time is at a premium will be especially important if minitrials become more common. Agencies can meet this concern by tailoring the rank of the manager-principal to suit the magnitude of the case, by encouraging use of ADR earlier in the case (e.g., the CO level), or by bringing in auditors or others occasionally as principals. (Crowell, 1988)

The Corps has taken the steps to increase the availability of principals by beginning to experiment with District-level minitrials. Four of the five most recent minitrials were conducted in Corps Districts with COs or District Engineers serving as principals for the government. For example, the Corps’ Norfolk District arranged a minitrial with the W.G. Construction Corporation to handle a dispute regarding their contract for the construction of the Visitor’s Center for the Morris Hill Recreation Area in Gathright, Virginia. The minitrial was
conducted at the District with the contracting officer as the government's principal. Claims totalling $764,783.12 were subsequently settled for $288,000.

Chief Counsel's office seems to have found an appropriate balance between, on the one hand, offering guidance to the field offices regarding how the minitrial and other ADR procedures can be structured and, on the other, allowing the Districts and Divisions to modify the procedure according to their views. This approach permits the offices with available management resources to take the lead in ADR experimentation within the Corps while not forcing other offices, which believe they can not afford to use the procedure, to try ADR against their will. This is consistent with the Corps' historical OCE/field office relationship. The regional offices have always been semi-autonomous in many respects. (Mazmanian, 1979) The flexible guidance approach of Chief Counsel has allowed the Districts to volunteer to experiment with minitrials after the Corps gained experience with the procedure at the Division level. Now the trend may be with the Districts, which, among other benefits, opens a much larger pool of principals and permits settlement efforts to take place closer to where the dispute arose.

Holding minitrials at the District level of the Corps is one way to increase the number of available government principals. Another approach is to look to others besides top management to represent the government for the ADR procedure. The government's representative in contract negotiations must have authority to
settle the claim if agreement is reached. In the Corps, that authority, called a "contracting warrant" is normally vested in a contracting officer in the district. However, for the purpose of settlement, the contracting warrant for a particular contract can be assigned on a temporary basis to any one of a number of qualified COE employees in the district or division. (41) The Corps, by compiling a list of personnel eligible to receive the contracting warrant, can begin the process of expanding the pool of contract ADR principals. Of course, other criteria must also be applied to determine appropriate government representatives for settlement negotiations.

Effective principals must be able to take an objective look at the issues, and not feel bound by the positions taken by the COs who denied the claims. They need to have the technical expertise to quickly grasp the issues. The principal in a given case must be comfortable making decisions about the amount at issue and at ease dealing with the stature and style of the company's representative. One way to handle these potentially competing qualifications is to tailor the rank of the principal to suit the magnitude of the case. (Crowell, 1988) For example, the government principal for a $70,000 differing site condition case could be a district technical staffperson while an army general serving as Division Engineer might be the most appropriate principal for a multi-million dollar claim of precedential or political import (42).

While my respondents suggested that COE personnel from
various levels of the organization might appropriately serve as contract ADR principals, sentiment is strong that the pool should not include legal staff. One attorney views lawyers as an impediment to settlement. Lawyers, he said, "are trained to win, not to reach settlement. They are trained to put everything in the best light. They are trained, in a sense, to prevent settlement." While this observation may accurately characterize lawyers and legal education generally, it does not apply to all members of the profession or all attorneys in the Corps. Corps attorneys have successfully settled thousands of contract claims over the years. A number of the attorneys in Chief Counsel's office and some in the field offices are leading players in the agency's move to ADR. Most of my Corps respondents are lawyers and their comments throughout this report demonstrate a capacity for self-criticism and an inclination to innovate. Yet notwithstanding their own support of non-adversarial dispute resolution, my attorney-respondents support a smaller role for lawyers in the ADR process than lawyers currently play in the conventional contract claim system.

Chief Counsel, Lester Edelman notes the irony that while lawyers are "trained to have an insatiable appetite for information," when it comes to dealing with a conflict "we use all our training to exclude information from the decisionmaker." Perhaps lawyers will act differently if given the role of principal but none of my respondents suggest that it be tried. Edelman and his Chief Trial attorney, Frank Carr, wrote last year
that minitrials will be more successful if "management decide the dispute, rather than attorneys and judges, [thus enabling] the parties to use management skills and policies to resolve a dispute that is heavily fact-oriented." (Edelman and Carr, 1987)

This issue of who in the agency are the most effective principals in minitrials will be better understood as the Corps continue to experiment with different procedures, roles and organizational locations for contract claim ADR. It is clear, though, that limited management time now constrains the expansion of minitrials conducted at the COE’s division level.

The limited time of Division Engineers is a barrier to greater use of ADR for resolving contract disputes. The Corps has already begun to address this constraint by experimenting with minitrials and non-binding arbitration in the Districts. If more ADR settlements are reached with District Engineers and contracting officers serving as government principals, as has already occurred on a small scale, than the limited availability of Division management will no longer constrain the further use of ADR.
ORGANIZATIONAL LEVELS FOR CONTRACT DISPUTE RESOLUTION AND THE "OVERRULING PROBLEM"

Overview

At the outset of this research I expected to find several barriers to greater use of ADR flowing from the relationships among the different levels of the organization and between the organization and oversight offices. Specifically, I assumed that management and staff would oppose ADR procedures resulting in management overruling decisions of their subordinates. Overruling of District contract claims decisions occurs, for example, when a Division Engineer, sitting as principal in a minitrial rejects a contracting officer's decision on a claim and negotiates a settlement with the contractor. My findings do not clearly support or disprove this expectation.

I also assumed that Corps personnel oppose ADR procedures which empower Division management to resolve disputes which the personnel believe could be handled better by District-level employees. Like the first assumption, this expectation is related to the early contract claim minitrial procedures which were held at Corps Divisions. My findings neither support nor disprove this expectation.

Finally, I expected that Corps personnel oppose greater use of ADR for contract claims because they think that engaging in experimental procedures will increase the risk of critical review from oversight offices such as the Department of Defense Inspector General. This assumption was not supported by the
evidence. Surprisingly, I found that concern about oversight instead, may be one of the causes of the low level of conventional contract disagreement settlement.

The Corps of Engineers is a multilevel organization. Some conflicts, must be addressed at the OCE (headquarters) level, such as a disagreement with U.S. Fish and Wildlife Service over how the respective agencies should interpret their Clean Water Act Section 404 responsibilities. Other kinds of disputes are most appropriately resolved by a field office. For example, a debate between sports fishermen who want the Corps to maintain the water level in a reservoir and white water kayakers who want more outflow is probably better addressed by the District office then by the Corps’ Washington, D.C. staff. Many types of conflict, however can be addressed at various levels of the organization. A review of how the Corps can better manage its disagreements should include some consideration of where, within the organization, various kinds of conflict should be handled. This discussion focuses on resolution of contract claims. A similar sort of analysis would be useful for other kinds of conflict.

As described earlier in this chapter, a contracting officer (CO) is responsible for entering into and administering any Corps contract. A claim arising out of the contract must be presented to the CO. If not satisfied with the CO’s decision, the contractor can appeal to the appropriate Board of Contract Appeals or to the U.S. Claims Court. Before or after filing a
formal appeal, the contractor may informally contact the CO’s superiors in the District or Division office in an effort to settle the disagreement.

The Corps resolves disputes with its contractors in different ways and at different levels of the organization from the District CO to the Division Commander to the COE Board of Contract Appeals. At the District level, informal negotiations settle most disagreements. Typically, a Corps project engineer oversees a construction job for the government. The contractor on the project will have its own supervisor. As problems arise, the contractor’s representative will try to work it out with the Corps’ project engineer. The Corps project engineer is authorized as the CO’s representative and can alter the contract up to a specified amount. The CO will get involved if the two on-site supervisors are unable to handle the problem or if a large sum is at issue. The CO may resolve the problem with the contractor and not have to issue a formal ruling. However, if the CO and the contractor do not agree, the CO will issue his or her adverse ruling in writing. If the contractor chooses to appeal, the Corps’ attorneys get involved. Depending on the size of the claim and the procedures of the Division, either a District or a Division attorney will represent the government. (43) A small number of disagreements with contractors are settled when a Division or District Commander responds to a request from the contractor. This is an unusual situation as Commanders generally support the decisions of their COs.
Settlement can also result from attorneys for the Corps and contractor negotiate a resolution after the appeal has been docketed at the Board. For example, a bakery is financially penalized for making a late delivery of supplies on a food service contract. The CO, who has had problems with this bakery in the past, decides to punish the supplier by ordering the maximum damages allowed under the liquidated damages clause of the contract. The bakery requests the CO to reconsider, explaining the it has had recurring labor problems only recently resolved with a new agreement with its union. The request is denied and the bakery appeals to the Corps of Engineers Board of Contract Appeals. The district attorney recognizes the settlement potential and is eager to reduce her own slate of BCA cases. She contacts the contractor’s attorney and they work out an agreement whereby the penalty will be reduced by 50%. The bakery pledges to make greater efforts to meet its delivery schedule and to arrange for an alternate supply if it is unable to deliver on time.

Even without hard statistics, it can be safely said that the large majority of problems with contractors are resolved without resort to formal administrative or legal procedures. Nonetheless, as discussed earlier in this chapter, an increasing number of contract disputes are moving up the chain to the Boards of Contract Appeals and to the U.S. Claims Court. Dissatisfaction with current procedures is widespread. Ten out of twelve of my questionnaire respondents agreed that the Corps should expand its use of ADR for contract claims. In interviews, several of my
respondents explained that communication between representatives of the government and contractors often breaks down early in the development of the disagreement and the parties remain estranged even when the representatives change. A trade journal reports the view of some in the industry that

COs frequently do not fulfill their responsibility of settling disputes but rather make a final decision as a means of passing the problem up to the Board of Contract Appeals for decision (44).

Opportunities for informal resolution are missed and the case is handed off to the judicialized administrative process. For example, in a typical scenario, the Corps hires a contractor for major improvements to an army base. (45) The prime contractor (prime) hires a subcontractor (sub), on January 1, to fabricate a steel fuel oil tank according to specifications. The sub got the job by submitting the lowest bid. The Corps needs the tanks installed by December 1 so that the next phase of work can begin promptly. It generally takes ten months to fabricate such a specialized tank and one month to transport and install it. To save some money, the sub decides to fabricate the tank in sections and assemble it on-site. In late October, the sub ships the tank in three parts. The pieces arrive at the base on November 10th. A government inspector notices the activity as the sub is beginning the assembly. He tells the prime contractor's manager that the Corps contracted for a tank made of continuous steel and will not accept the tank assembled from pieces.

The prime calls the District office and points out that the contract specifications require a certain thickness and grade of
galvanized steel but does not refer to the form of construction. The Corps' project engineer points out that the contract incorporates by reference the industry standard for such tanks which is for continuous steel. The sub wants to assemble the tank since the final delivery date is approaching, but the Corps project engineer orders the crew off the base.

The prime contractor will be charged liquidated damages on a daily basis if the tank not installed on time. The prime can send the sub back to the factory to build a tank of continuous steel or seek out a new supplier. The sub informs the contractor that it has just built a tank at the plant that meets the specifications but it was special ordered by another customer. The sub agrees to send the tank to the Army base and it arrives on December 8th, one week past the delivery deadline. Because of a mix-up, the base military police have not been authorized by Corps officials to admit the tank or the installation crew, and it is several more days before that is straightened out.

The sub has incurred increased costs from 1) the second, unscheduled, rush delivery, 2) storing the second tank during the time when the sub was not authorized to re-enter the base, 3) building the three piece tank that is not readily saleable, and 4) finding its other customer a replacement tank. The sub charges the prime contractor for all these costs. The prime, on advice of counsel, pays the sub and seeks reimbursement from the government under the claims clause of the contract. The contractor asserts, among other things, that the requirement of a continuous steel
tank was a change in the contract justifying increased compensation. The Corps' project engineer makes an initial denial of the claim and charges the contractor for late delivery of the tank.

The project engineer forwards the claim to the District office for review by the technical engineers. The technical staff see that the tank specification issue could have been decided either way but after discussions with the project engineer they decide to support his initial position. The claim is forwarded to District counsel who says that while the case is not legally clear-cut, there is enough support for the government's position to defend against the claim at the Board. The Chief of the District's Construction Division is briefed and calls the contractor to notify that the claim is denied. He informs the contractor of the right to meet with the contracting officer (CO.) The contractor requests the meeting. The CO has not yet been directly involved with the dispute. He is, however, aware of the problem from informal conversation around the office and is inclined to agree with his colleagues.

The CO listens to the contractor's story and asks some questions. He promises to have an answer on the contractor's appeal within 48 hours. He then meets with the technical staff and after a review of the facts, confirms that he agrees with the government's position. District counsel drafts the formal denial of the claim and the CO signs it. The denial is sent by certified mail, return receipt requested, to document the date of
notification of the denial. The contractor now has 90 days to file an appeal before the Board of Contract Appeals (or a year to file at the U.S. Claims Court.) The contractor can informally request a reconsideration or review from senior District or Division officials but as one of my attorney respondents put it "the wheels move too slowly for reconsideration to happen within 90 days." More likely, the contractor's lawyer files the appeal with the Board.

After the claim is docketed at the Board of Contract Appeals many months or even years can pass before the dispute is closely reconsidered by the attorneys. The lawyers on both sides know that there will be a long wait and will work on other projects that demand immediate attention. The discovery process will slowly gear up, with depositions, interrogatories and requests for various, often voluminous, documents. As the trial date approaches, the attorneys will take a closer look at the case. At that time, the attorneys may or may not have before them all the relevant facts, though the discovery process is designed to elicit as much information as possible. In this hypothetical, 18 months have passed since the appeal was filed and the trial date before the Corps of Engineers Board of Contract Appeals is 6 months away. According to this Division's procedure, Division counsel is handling the defense. Counsel has all the documents gathered by District counsel and the transcripts and copies of additional documents secured from the contractor through discovery. The Corps' project engineer for the case is recently
deceased. Counsel pieces together the story by skimming the file and talking to the CO and District counsel over the phone. The Division attorney and the contractor's lawyer meet to discuss the case but can not find much room for a settlement. Both are adamant about the validity of their client's position and neither is under pressure to settle. So, the case goes to the Board.

Two years after docketing, the Board hears the claim but is likely to not settle the disagreement altogether. According to a judge of the Corps of Engineers Board of Contract Appeals, 95% of Board decisions are on entitlement rather than quantum. (46) The Board decides whether the contractor is entitled to receive money for the various aspects of the claim. It is left to the parties to negotiate and settle the actual dollar amounts. If the parties, through their counsel, are unable to reach agreement on quantum, they may return to the judge. Either side may appeal the Board decisions to the U.S. Court of Appeals for the Federal Circuit.

Disputes of this sort begin at the Corps District where the contract was performed and all too often move up and away from that location and from the original players. This, despite the fact that as one observer put it "The system is set up for settlement...It is set up as a claims avoidance system...The only time we have a claim is when the administrative system breaks down." It seems that the system is breaking down on a regular basis.

Chief Counsel, Lester Edelman and his staff are among those
seeking improvements. Since contract disputes can be resolved in a number of organizational locales, one question they are considering is where in the Corps emphasis on settlement should be made. They are encouraging stronger settlement efforts, earlier in the dispute and lower in the organization. This seems a wise approach. Information is lost when a dispute is placed on the back burner as it moves up the system. The essence of the disagreement can be blurred by the mass of documents gathered in the effort to assemble the data needed to try the case. The original parties to the conflict lose control of the dispute as the lawyers take over. The attorneys, who are trained in adversarial conflict resolution, may not recognize and take advantage of opportunities to settle the disagreement. Meanwhile expenses mount for both sides as the litigation process continues. In some cases, the relationship between the government and the contractor may deteriorate as outstanding claims remain unresolved.

It is appropriate then, that the Corps is seeking through its ADR experiment to resolve disputes in a non-adversarial setting, earlier in time and a recent modification of the minitrial, closer to the source of the original disagreement.
Resistance to Contract Claim ADR Procedures in which Management Overrules Staff

The question of where within the structure of the Corps, settlement efforts should occur is affected, of course, by relationships among the different offices of the organization. Two of my initial assumptions deal with this issue. The first is about Corps employees' attitudes regarding minitrials in which management may overturn the CO's contract claim decision. I expected that Corps personnel would resist the use of minitrials and other ADR procedures because they do not want to support a procedure in which Corps management may reject the positions taken by their staff.

Results of my interviews and questionnaires do not provide clear evidence to prove or disprove this hypothesis. Half of the questionnaire respondents (6/12) agreed that "Minitrials may require Division management to reject positions taken by District offices." Two respondent disagreed, one was neutral and three answered "don’t know." Interviews clarified that the questionnaire responses indicate moderate agreement with the objective proposition that when a minitrial is conducted with a Corps Division Commander serving as principal, the CO decision on the claim may be overturned. Furthermore, some respondents believe that this is a source of concern for some field staff.

One respondent acknowledged that the minitrial procedure involves management of the Corps, in effect, overruling their subordinates. He noted that this process could lead to "some husbanded ill feelings." However, he said:
The Division Commander has the command authority, and this being a military organization, [a person with hurt feelings will] salute and move on.

However, a former review procedure reportedly caused some problems. Prior to passage the Contract Disputes Act of 1978, the Corps used a procedure where District contract dispute decisions were automatically reviewed by Division personnel. The contractor was afforded the opportunity to meet with Division staff and the record was reviewed. As many as 50% of District CO decisions were overturned at the Division. According to one former District counsel who also worked as counsel for a Division, the review process had both positive and negative results. On the one hand, the review allowed information to surface which had not emerged at the District because of narrow perspectives taken by those handling the claim. Division review corrected the District problem of not always being able to "see the forest for the trees." On the other hand this respondent pointed out that the results of the review were sometimes perceived as criticism, albeit informal.

Under the Division review process, there was never any official criticism. But if I was not pleased [with the District action] I'd call and ask "how could you let this thing come up here?" They would say "there was such a conflict we just couldn't get together..." Calls would go up and down through the green suit chain, the construction engineer chain or the attorney chain. We also would get a chain call up the line "How could you do this? You understood our position, had all the information and our feedback..."

Reflecting further on his experience with Division review, this respondent explained that in his Division there was "little
reluctance to resolve" an issue differently from the way it had been handled at the District. When such an action took place, "the District attorney wouldn’t have to hear it third hand." Rather, Division counsel would call and explain the decision. However, this respondent had heard of other Divisions showing reluctance to overturn their colleagues below. He went on to clarify that the respect for others in the organization is a good institutional trait of the Corps.

In the Corps there are professionals up and down the line. Accountants, attorneys, engineers, career military. The reviewer, albeit at higher organizational level, is not necessarily of higher professional status. He is not somebody who is obviously in a superior position. There is likely a basic equality in academic and professional credentials. Thus [a review at the Division can lead to] overturning somebody who is, in most respects, a peer. Respect and hierarchy are the part of the Corp philosophy. It's an institutional trait of the organization. You do support the people below. It's a good institutional trait. But one that can hinder the organization.

It does seem then, that based on the experience with the Division review procedure, there is some concern about overruling of those lower in the organizational structure. That could be a factor in contract dispute resolution processes though it does not emerge as an important theme of my interviews. However, interviews with a sizable and geographically diverse sample of field personnel might yield more information on this point.

The possibility of overruling of District-level contract claim decisions by Division-level staff does not now appear to act as an important constraint on holding ADR processes at the regional level of the Corps. However, another factor plays a
larger role in the determination of where ADR settlement should occur. That is the question of where the relevant organizational expertise is located.

**Resistance to Contract Claim ADR Procedures Which Settle Cases at the Division**

My second assumption regarding relationships within the Corps pertains more directly to the question of where within the organization contract dispute should be handled. I expected that Corps personnel oppose ADR procedures that empower division-level management to resolve disputes which the personnel believe could be handled better by District-level employees who are experts in the subject matter and experienced with contracting procedure.

This assumption was aimed at the minitrial procedure as it has been conducted by the Corps in the first several cases. The evidence neither proves nor disproves the expectation. Respondents were split on the questionnaire assertion that "Minitrials empower Division-level management to resolve disputes which District staff are better equipped to handle." Two agreed, three disagreed, three were neutral and four answered "don't know."

Those respondents who believed that contract disputes were better handled in the district felt that typically the District has more expertise relevant to contract dispute resolution than the Division. One Corps respondent critical of Division-level minitrials explained that "the institutional knowledge of the specific dispute is at the District." It is the District
personnel who observed performance of the contract and they were the ones to first discuss with the contractor the problems that ultimately lead to a claim. In contrast, "the Division engineer and his staff aren't as conversant on the issues." This respondent saw a practical detriment to the Corps of having a less qualified person conducting settlement negotiations. In at least one minitrial

We really got taken. A principal of a large construction firm against our Division Engineer. The Division Engineer got completely snookered.

None of my other respondents were as critical about Division level minitrials. However, several did note that experimentation with minitrials in the District is a good idea.

The trend in recent minitrials has been to hold the procedure at the District with the CO or District Engineer as principal. This is a positive development for several reasons. First, as noted earlier in this chapter, locating at least some of the minitrials at the District level expands the pool of principals appreciably since there 38 Districts, each with several potential principals, more than three times the number of Divisions. This reduces the constraint against ADR of limited Division Engineer management time. Secondly, a District level procedure takes place closer to the physical location of the disagreement, where the players and relevant information can be more easily found. Moreover, encouraging the people who generated the dispute to resolve it themselves can improve their relationships so that future conflict will be better handled.
Corps Deputy Chief Counsel William Robertson agreed that the District is the place with the salient contract dispute expertise. He further emphasized that the District is where the parties to the conflict first set their positions. Robertson, the second in command of the "legal stovepipe" advocates adapting the minitrial procedure to the District.

The minitrial at the division is better than the status quo. But it needs to be adapted to the District level activities in the Corps. It should have happened in the District. That is where the positions are established and the expertise and the people are. There are opportunities to use it more often.

Robertson sees the trend to District level ADR as a supplement to the existing Division procedure. He emphasized that "I'm not saying we should abandon the minitrial at the Division level."

Another reason to try to settle cases lower in the organizational structure and earlier in the genesis of the dispute is that positions may become increasingly solidified as time goes on. One of my private bar respondents offered an explanation for the opposition of the Corps district staff to the Tenn-Tom settlement.

The greatest bias or vested interest is loyalty to what you do. They had been on one side for the three years the contract [performance] took. They wanted to win. They were partisans. They could not [accept] the realistic chance that they might lose [if the case was taken to the Board.]

Good communication between the contractor and District staff, during the early days of a dispute may help avoid the positioning and exaggerated assessment of the strengths of ones case that can
characterize the partisan litigation process.

Some respondents made points about the attitudes of Corps personnel who are responsible for negotiating with the contractor. One said that attitude is the most important aspect of the contract resolution reform effort. He explained that

Our officers leap to the side of taking a position and duking it out. The immediate reaction is that the contractor is trying to rip us off...There is no mechanism yet to reward another strategy. Its easier to reward a strident position.

Considering these criticisms of the established contract dispute system, it is no wonder that contractors so often chose the formalized procedures rather than invest much time in informal negotiations.

A member of the Corps of Engineers Board of Contract Appeals suggested that even attorneys deeply involved with contract claim appeals appreciate the value of trying to settle a claim early. Unfortunately there doesn't yet appear to be the proper mechanism to encourage early settlement:

I had a case in Denver last month. I read the papers and told them "you should not be before this board, you're arguing primarily about dollar amounts. There is not much in the way of legal issues. They conferred and settled. One of the parties thanked me for suggesting they confer and said "I wish we had done it three years earlier." Sometimes they need to have somebody in authority give a push. This helps the lawyers save face. They don't appear to be backing down. They are not flinching first.

Others say that the prominence of lawyers in the process is itself a major part of the problem. They would minimize the role of lawyers by encouraging the COs to settle more claims and by using non-lawyers in ADR settlement procedures. This has
already occurred in at least one case. A contract settlement between the Corps and the Granite Construction company was reached last year after a non-binding arbitration procedure where non-lawyers presented the government and contractor positions on a differing site condition claim. The neutral advisor prepared a written recommendation to the District CO and the contractor’s representative. The $1.8 million claim was settled by the principals for $725,630 (47).

One respondent expressed his views about attorney involvement in the minitrial in no uncertain terms:

Got to get the lawyers out. [Replace them with] regulators, planner and engineers. The procedure is too structured. Get the attorneys out of the loop. That was done in Mobile [in the Granite Construction case.] The independent expert heard the presentation by the engineers. The expert made his recommendation to the principals.

Given the positive result of the experiment with an ADR procedure conducted without lawyers and the sentiment that attorneys are often not helpful, the Corps should continue to encourage the field offices to try settlement procedures that do not involve counsel in a leading role. This is not to say that lawyers should be banned from settlement processes. In fact, counsel should be trained and supported in making greater non-judicial settlement efforts. However, lawyers are not needed for every case. In particular, disputes revolving around technical disagreements rather than legal distinctions may be best handled by technical rather than legal experts.

Many respondents recognized that earlier resolution of
contract disputes, with or without the involvement of attorneys, would be more efficient and could lead to better resolution. More settlement at the District level would take better advantage of the resident expertise and reduce the flow of claims up the chain. It would free division staff for other functions and allow the Board of Contract Disputes to hear the cases remaining cases more expeditiously. Given the recent criticisms the adversarial approach to contract claims taken by District personnel, the question remains: can a higher level of District settlement be reached?

Part of the answer to that question lies in creating the climate for problem solving. This in turn would require a higher degree of objectivity by District staff. The Chief of the Construction Division of the Corps is confident the "the staff can be impartial." He explained that the "The COs have a professionalism and intensity for their work." Still, additional negotiation training and institutional incentives may be required to maximize the potential for higher CO resolution of contract disputes.

Even with all the right conditions, the COs will not be able to settle all disputes. In fact, there may be an inherent inconsistency in their dual role as representative of the government and initial decisionmaker on the validity of contract claims. Moreover, even with improvements in relations between complaining contractors and District staff, there will be always be instances of soured relations. As one former District employee
The current process allows people who are most emotionally involved to handle the dispute [resolution mechanism.] We need someone to look at it in a new light -- without all the baggage.

Any new strategy must assume that people involved in disputes will accumulate "baggage" and that there should be others available to "look at [the dispute] in a new light."

A District-level minitrial offers the promise of a "fresh look" procedure at an institutional location close to the place and the people about which the disagreement pertains. Deputy Chief Counsel Robertson described how the procedure might be organized:

The District Engineer can sit as principal as opposed to the District staff person. The District Engineer is not involved in the day to day decisions regarding the contact. Now, typically the staff takes the dispute to the District Engineer after the positions are set. So the District Engineer already is in a quasi-judicial status with his own staff. We can establish the minitrial procedure at the District with procedural protections to the parties that would guarantee fairness.

One procedural protection would be for the ADR procedure to take place prior to the CO decision. One respondent suggested that would help ensure that the District Commander (i.e. District Engineer) brings an objective and fair perspective to a district minitrial.

It will work if the District Commander is away from the issue. It has to be before the CO decision. Once the decision has been rendered the District Commander is brought in. Before that time there may be a value there. But if the CO denies the claim the contractor has a right to meet with the Commander to discuss it. The Contractor may get success at that step but I wouldn't bet on it. The Commander has his people. The contractor comes in with
his. It's not a "let's reason together" scene. If the Commander can have people in who have not been involved and the contractor can have someone to evaluate his claim than it might work.

This respondent thought that the potential for the District minitrial would be enhanced with the involvement of a neutral advisor as has been the case in most of the Division minitrials, to date.

I'm very strong on this. You need a neutral advisor. The neutral advisor can offer objective advice. If you can do that at the district level it might work. [I emphasize that] it would be better if the minitrial procedure is done early. By the time of the CO decision, the District has bought in. When I wrote CO decisions, when we got to the point of writing the decision, we had all bought in; the District Commander, attorney and CO.

The Corps' contract dispute ADR program is moving in the right direction. After initial experience with Division level minitrials, they have recently expanded the use to the Districts. This takes advantage of the ground-level expertise, allows for settlement earlier in the genesis of the dispute and expands the opportunity for more frequent use of the procedure. The Division minitrial has not been abandoned. It is appropriate for certain cases, such as those the Districts are unable or unwilling to resolve. The ADR program has also used a non-binding arbitration procedure which is not studied here. An interesting aspects of one of the arbitrated cases was that attorneys were not involved. This allows people with technical and management expertise rather than legal skills to present the information to the party or parties judging the case. This approach should be expanded to include future minitrials.

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While my findings do not demonstrate conclusively whether the Division-level ADR procedures are encountering widespread resistance, there are sufficient independent reasons supporting the Corps' recent use of District-level ADR.

**Resistance to Contract Dispute Resolution Due to Oversight Concerns**

Oversight of Corps activities is performed by various offices, both inside and outside the agency. The Corps of Engineers has its own oversight and audit offices and is occasionally investigated by the Department of Defense Inspector General. Congress is an important source of federal agency second-guessing, and one to which the Corps is especially sensitive since the Corps relies on Congress for funding of specific projects as well as overall agency operations. Finally, settlement decisions made by the Corps can be subject to review and criticism from the press and public advocacy groups (Crowell, 1988).

I assumed that Corps personnel would shy away from ADR because they would view it as experimental and likely to draw criticism from oversight bodies. If it is true that Corps employees, particularly those at the field office level, are afraid to experiment with ADR, than further initiatives might better be organized around higher level staff or specific individuals unconcerned about such criticism. Moreover, if fear of criticism is a constraint, it may be necessary to address the causes of the fear or the substance of the oversight critiques.
As it turns out, I have not found a high degree of concern about oversight of ADR activities. Oversight does not seem to constrain ADR in the Corps. Only one ADR settlement has been reviewed by an oversight office and the resulting report was generally positive. There is no indication that the press or Congress has criticized the Corps for its ADR program. To the contrary, some Congressional representatives are looking to the Corps as a model for implementing ADR in other agencies (48).

Surprisingly, oversight may impact conventional contract resolution more than ADR methods. There is evidence that concern with oversight is actually a cause for the growing docket of contractor appeals to the COE Board of Contract Appeals. It seems that in recent years contracting officers have grown fearful of negotiating settlements with contractors because of the likelihood of second-guessing by their superiors or others outside the agency. This finding is pertinent to the question of where to focus settlement efforts because it indicates that concern about oversight inhibits COs from resolving many contract disputes at the District, and encourages contractors to file for administrative appeal.

Evidence that my expectation regarding oversight as a barrier to ADR is incorrect includes the questionnaire results. Only four of the twelve respondents agreed that "the use of ADR may increase second-guessing of decisions by oversight offices such as the Department of Defense Inspector General." An equal number disagreed; one respondent was neutral; and three answered "don’t
Follow-up interviews clarified that most respondents felt that concern with second-guessing is not an important factor in the attitude of Corps personnel towards ADR. One respondent, who served as Corps Division counsel for a minitrial indicated that:

Risk of oversight is not a critical barrier to greater use of ADR. If, however, every time an ADR process took place there would be another inspection by an investigatory group, it would have a tremendous negative impact. It would be devastating if second-guessing [of ADR resolutions] truly criticized.

Apparently, such criticism has not occurred. The only investigation of a minitrial settlement was conducted by the Department of Defense Inspector General in 1986. This review of the Tenn-Tom settlement found that the process "reasonably settled" the dispute "in the best interest of the Government." (49)

The DOD IG report was not without criticism of the Corps procedure. It disapproved of the lack of documentation of the bases for the settlement figure. The findings reported that:

Based on the interviews we conducted and a review of the available "mini-trial" documentation, we believe the Government had sufficient liability to justify a $17.25 million settlement. The use of the "mini-trial" process, in this situation, appears to have been valid and in the best interest of the Government.

We did, however, find a distinct lack of supporting documentation showing how the $17.25 million settlement amount was reached and the basis on which it was allocated to the contractor. We recommend that the U.S. Army Corps of Engineers review its 'mini-trial' procedures with regard to documenting prenegotiation objectives and contract settlements."

Chief Counsel indicates that the Corps has been working on the documentation issue. (50) It is not yet clear whether the
field offices are documenting their ADR settlements differently than before the IG report. Indeed, there may not have been a documentation problem except in the Tenn-Tom case. Chief Counsel's Office does not have a central file with the various documents related to each ADR settlement. However, the results of the IG report are widely known in the Corps and in government contracting circles. There has been no further IG criticism.

The IG report concluded with a positive assessment of the minitrial procedure for contract dispute resolution:

> We believe the "mini-trial" procedure, in certain cases, is an efficient and cost-effective means for settling contract disputes. The procedure, however, is relatively new to the military, and we believe its use should be carefully considered on a case-by-case basis. The Tennessee-Tom Bigbee claim appears to have been a valid claim and reasonably settled in the best interest of the Government.

Notwithstanding the IG's qualified support for minitrials and strong encouragement from chief counsel's office, there may be some belief that engaging in minitrial settlement efforts is risky. Two respondents speculated that field office staff might be hesitant to experiment with ADR because of the earlier investigation even though the respondents themselves were not concerned about oversight. It is difficult to assess whether there is significant concern on this issue in the field without more data from the District and Division offices.

**Conventional Settlement Constrained By Oversight Concerns**

While not appearing to be a major constraint regarding the
use of minitrials, concern with oversight may be one of the reasons that more contract disputes are not settled with conventional methods by the COs. The Administrative Conference of the U.S., in a recent report, identified oversight concern as a factor in the increased incidence of contract "controversies remaining unresolved between the parties." (Crowell, 1988, p.9) The report says that:

Increased oversight by many congressional sources may discourage contracting officers or their supervisors from risking close calls, taking on politically sensitive cases, or handling "hot potatoes." (Ibid.)

The report also asserted that:

The establishment (or expansion) of intra-agency audit offices and inspectors general, and statutes or rules enhancing their authority, inhibit settlement of disputes and limit decisional flexibility. (p9)

Several respondents agreed that COs and other District personnel are less willing to settle cases because they fear second-guessing. Professor Nash describes a situation "where management seems willing to throw their difficult problems into the litigation mill rather than work them out at a management level." (Nash, 1985)

Another respondent believes that fear of second-guessing provides a partial explanation for the unsatisfactory level of district contract claim settlement. This respondent is pessimistic about improvements in the procedure:

Unless a mechanism can be found to provide a reason for the COs to say "yes," I don't see any way to improve the situation. We have such a litigious environment out there. Auditors second-guessing everything...
While more information is needed, there are indications from informed observers and Corps staff who formerly worked in the field offices, that oversight is a constraint on the free exercise of district level settlement authority. If this observation is correct, than without a change in either field office attitudes regarding oversight or changes in actual oversight activities, it may be difficult to expand settlement efforts in the field. (52)
CONCLUSION

Several of my assumptions about the barriers to greater use of ADR for contract claim settlement are not supported by the findings. One is tentatively supported by the data. Two are neither clearly supported nor disproved.

I assumed that Corps personnel are satisfied with established procedures for resolving contract disputes; they are not. There is strong dissatisfaction with current procedures. Disagreements between the Corps and its contractors are often not resolved expeditiously or efficiently. Backlogs at the Boards of Contract Appeals are growing and the parties often wait years for the Board to resolve their disagreements. I expected to find disappointment with the results of the Corps' early ADR efforts, but instead, most respondents are satisfied with the results. They encourage greater use of ADR in the future. Neither satisfaction with established procedures nor dissatisfaction with ADR are a barrier to greater use of ADR for contract claims.

I assumed that resource constraints act as a barrier to any expansion of ADR for contract disputes. This assumption is tentatively supported by the data. The time of management personnel is the resource limit that emerged from this research. Specifically, Division-level minitrials are seen by respondents as demanding a significant time investment from Division Engineers who are already fully occupied. However, the trend towards District-level ADR for contract claims will moot this concern.
My assumption that Corps personnel oppose ADR for contract disputes because they are concerned about the risk of critical review from oversight offices is not supported by the evidence. Only one case settled with ADR has been investigated and the results of that report were generally supportive of the procedure. There is some evidence, however, that fear of oversight is important in forming the responses of District personnel to conventional contract disputes resolution. District staff may be more likely to deny a potentially controversial claim because of fear of criticism from oversight offices. This increases the flow of claims into the administrative and court review system.

The findings neither support nor disprove my assumption that Corps personnel oppose ADR procedures which empower Division management to resolve disputes which could be handled better at the District Level. There is some support for this assumption but more information is needed to determine how important it is as a cause of resistance to ADR. Similarly, the data provide some support for my expectation that Corps personnel oppose ADR procedures that result in management overruling decisions of their subordinates. Though my findings on are not clear, both of these potential constraints to greater use of ADR for contract claims seem less important because of the trend towards conducting ADR procedures in the Districts.

The barriers to ADR are considerably less important than expected. The Corps’ contract claim ADR program seems poised for
growth. However, minimal barriers are only part of the story of organizational change. The pressure for change must be sufficient to overcome institutional inertia and the power of the interest groups that benefit from the status quo. At present, it is not clear whether the forces supporting broad adoption of ADR are powerful enough to make the ADR initiative more than a minor adjustment in the way the Corps does its business.
CHAPTER III - FOOTNOTES

(1) My data are drawn from interviews with 18 respondents and questionnaires completed by 11 of them. See appendix for a list of respondents. A 12th questionnaire was answered by a respondent who was not interviewed due to scheduling problems. A total of 14 interviews were conducted with the 18 respondents. 3 interviews were with more than one respondent. In those cases, the targeted respondent invited a colleague or two to participate in the interview.

(2) Respondents said in their questionnaire responses that the Corps should expand its use of ADR in the following situations 1) disputes with environmental groups (9/12); 2) disagreements over implementation of Local Cost Sharing Agreement for civil works projects (8/12); 3) COE's responsibility for cleanup of Superfund sites (8/12) and; 4) the issuance of [environmental regulatory] permits (7/12). These views indicate support for the Corps nascent efforts to use ADR in its regulatory program and to resolve disagreements that will arise in course of its new relationship with local sponsors of water resources projects. (see: Chapter 2, The Corps and Institutional Innovation).

The strongest disagreement with the expanded use of ADR was about dealing with disagreement within the agency. 3 of 12 questionnaire respondents opposed greater use of ADR for drafting of particularly controversial internal COE regulations and 5 of 12 oppose ADR for other controversial internal Corps matters such as reorganization. Not more than 2 respondents disagreed with the greater use of ADR by the Corps for any of the other situations listed.

Regarding each of the questions about expanding Corps use of ADR, between one and six respondents answered "don't know" or marked "3" on the agree/disagree scale indicating a "neutral" response. These answers are, of course, counted as neither agreement nor disagreement with the question.


(5) The term "claim," while not defined by the CDA includes disagreements about contract performance, such as interpretation of the terms and equitable adjustments to the contract price as well as breach of contract. The CDA procedure does not cover bid protests or the disbarment or suspension of government contractors.

(6) This dual role may be a cause of differing views about how
the CO should handle contractor claims.

(7) The Court of Appeals for the Federal District was established by the Federal Courts Improvement Act of 1982, Pub, L. No. 97-164.

(8) As explained above, the contractor may appeal to the U.S. Claims Court which is similar in most respects to the BCA except that the contractor has one year to file the appeal rather than 90 days.

(9) This respondent doesn't outrightly oppose ADR for contract claims, though he criticizes minitrials conducted at the division level of the Corps.

(10) This issue is discussed further in the Findings section dealing with the appropriate organizational level for dispute resolution.

(11) The Chief of Construction believes that if the Corps made the internal commitment to expand the Board, Congress could be persuaded to appropriate the necessary funds. Other respondents considered it unrealistic to expect the permanent funding increase necessary to expand the Board, even if agreement is reached that expansion of the current mechanism is the solution.

(12) Interview with Ron Kienlin, Deputy Chief Trial Attorney, U.S. Army.

(13) Contract claims arising from military work such as construction of an Air Force base are appealed to the Armed Services Board of Contract Appeals, even if the contract is let by the Corps of Engineers. The Corps of Engineers Board of Contract Appeals has jurisdiction over civil works contracts for activities like dredging, or flood control. For either type of case, the contractor has a second option, the U.S. Claims Court.

(14) One of my COEBCA judge respondents, has instituted what he considers an ADR procedure. He presides over mandatory settlement conferences between the parties to all cases assigned to him. In a different forum, The US Claims Court issued General Order No. 13 on April 17, 1987, establishing a system for voluntary use of settlement judges and minitrials in which the "ADR judge" functions as a "neutral advisor." (Nash and Cibinic Report, July, 1987).

(15) Interviews with Wesley Jockisch, Ralph Nash; personal communication with Peter Adler, Director of the Hawaii Program on Alternative Dispute Resolution.

(17) Interview with Ron Kienlin, Deputy Chief Trial Attorney, U.S. Army.

(18) Statistics from personal communication with Frank Carr.


(20) Ibid.

(21) The oversight issue is further discussed in the section of this chapter regarding where in the Corps a dispute should be settled.


(23) A division review process of CO decisions was abandoned after it was deemed to be in conflict with the Contract Disputes Act.

(24) The history of the contract disputes ADR program was related in a personal communication with Sabrina Simon.

(25) The minitrial procedure was created in 1977 to resolve a complex patent infringement case between Telecredit and TRW and has been increasingly used since then, particularly by large companies in conflict with parties with whom they have ongoing commercial relationships. (ABA Report, 1986).

(26) Several of the lawyers attending this meeting were among the first in the field offices to use the new ADR procedures.


(28) Ibid.

(29) The creators of the procedure called it an "information exchange," but a New York Times headline writer in August 1978 found "mini-trial" to be more descriptive of the TRW/Telecrdit settlement process and the name stuck. (Harter, 1986).


(31) Ibid.

(32) Ibid.

(33) Typical of the nonbinding arbitration cases was the Grantite Construction Co. dispute, settled in March, 1987. Nonlawyers presented the government's and the contractor's positions on a $1.8 million "delay" claim to a arbitrator who was also not an attorney but who had substantial technical expertise. Like the
minitrial procedure, each party made an informal presentation of the facts and its position. The arbitrator prepared a written report which was presented to the two principals. The arbitrator also made an oral report to the explaining his findings and recommendations. Within a day, the principals negotiated a $725,630 settlement in accordance with the arbitrator’s recommendation. (Corps Memo, March 30, 1987) For more information about the Corps’ use of non-binding arbitration and Disputes Resolution Panel see Carr, 1988).

(34) See ACUS Sourcebook.


(36) The joint venture was composed of three companies: Morrison-Knudsen, Brown & Root and Martin K. Eby, Inc.

(37) Rule 12 requires the Board to hear claims below the $50,000 threshold within 90 days of filing.

(38) Corps Engineering Circular No. 27-1-3, (September 23, 1985).

(39) The minitrial policy was not intended to be a mandatory procedure. The field offices were encouraged to adapt the the minitrial to their own situation (interview with Frank Carr, 1988). In fact, four of the minitrials conducted since January 1987 have been held at the District level rather than at the Division as originally recommended.

(40) One respondent suggested that the perception that a new procedure will increase demands on Corps personnel may be an important constraint even if there is no real increase in responsibilities. This respondent pointed out that anything new encounters some resistance in the organization simply because of the fear that it will add new tasks.

(41) Corps of Engineers Federal Aquisitions Regulation -- Supplement.
Expanding the pool of principals beyond the Division Engineer and District Engineer may be complicated by the traditional partition of agency responsibilities between military and civilian employees. While 95% of Corps personnel are civilian, the command positions in each Division and District are held by military officers.

The Chief Counsel's office does not compile statistics on how many claims are settled by what procedure at which level of the organization.


This hypothetical is based on an account of a typical contract dispute conveyed to me by Sabrina Simon.

Interview with Judge Wesley Jockisch.

Department of the Army, memo, November 25, 1988.

Interview with Jerome Delli Priscoli, 1988.


Interview with Sabrina Simon.

This research was not designed to examine the effect of oversight on conventional contract settlement. Consequently not enough data was gathered to make definitive conclusions on this point.
IV. RECOMMENDATIONS
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INTRODUCTION

The U.S. Corps of Engineers has pioneered the use of minitrials and non-binding arbitration in federal contract claim settlement. They experimented successfully with environmental dispute resolution and consensus-building with historically estranged groups. In civil works projects, the Corps incorporated dispute resolution techniques into cost sharing agreements with sponsors of local projects. Indeed the Corps is on the verge of implementing a comprehensive alternative dispute resolution program. Such a move is consistent with the agency’s past response to public criticism regarding the need for greater public participation and increased environmental awareness. These are the first important steps towards addressing criticisms of the Corps’ methods for handling disputes; and more opportunities exist.

I offer a series of recommendations focusing on possible improvements in the contract claims settlement, environmental regulatory disputes resolution and negotiated relations with local sponsors of civil works projects.

EXPAND CONTRACT CLAIMS ADR EXPERIMENT

The Corps’ contract settlement initiative was launched in 1984 to address dissatisfaction with procedures for handling disagreements with contractors. The dissatisfaction was directed towards the contract claim system which is used by most federal agencies. The Administrative Conference of the United States has
studied the federal contract claims system and concluded that "[m]ost knowledgeable government officials, contractors and attorneys agree that government contract appeals have become too onerous, too expensive and too time-consuming." (ADR Report, January 7, 1988) My findings corroborate this conclusion regarding the Corps. The Administrative Conference supports ADR for government contract dispute resolution and in December, 1987, adopted recommendations to expand the use of ADR to settle government procurement litigation. Several of their recommendations are directed to Congress, the President and the Office of Federal Procurement Policy and are beyond the scope of this report. Others, addressed to federal agencies, apply directly to the Corps. Some of these following recommendations overlap with the ACUS recommendations; others are distinct.

The contract claims system established by the Contract Disputes Act of 1978 (CDA) is not operating efficiently. A constant stream of appeals and judicialized procedures at the Boards of Contract Appeals is causing an ever-increasing backlog. The contract disputants commonly must wait two or more years for a decision. Litigation costs are high for the government and the contractors. An adversarial nature climate is typical of the conventional contract claim system and begins at the District level of the Corps where early positioning and an unwillingness to compromise are all too common. The dispute, even when about technical rather than legal matters, is lest to attorneys who argue the positions to a judge rather than negotiating an
effective resolution of the issues between technically expert management officials.

The Corps' contract claims ADR program addresses these problems. The minitrial and non-binding arbitration procedures place the conflict in the hands of representatives of the disputants who are generally better qualified to determine an appropriate resolution than the judges and lawyers. A neutral advisor can assist the principals in accurately assessing the issues and in focusing on the essential matters of the dispute. ADR procedures can bring about quicker resolution. When held at the District level of the Corps, ADR allows the conflict to be settled close to the people and place where the disagreement arose. This leads to quicker and more efficient settlement of contract disputes.

**Build a Contract Claims ADR Database**

Currently, the results of ADR cases are reported informally to an attorney in the Chief Counsel's office. Periodically, a brief summary of cases is given to the Chief and to others in and outside the Corps. One early case which was the subject of a Department of Defense Inspector General's report has been analyzed in detail. Another is the subject of an article by one of the Corps attorneys involved with the case (Page, 1987). Other than these two references there is no systematic collection and analysis of information about minitrials or non-binding arbitration. Headquarters staff and field personnel would benefit
from more information about the actual cases. In particular, the Corps should collect more information regarding the ADR procedures used; the attitudes of the participants before, during and after the procedure; the criticisms from others involved with the case; and comparisons between cases settled with ADR and those resolved with conventional processes.

I recommend that Chief Counsel’s Office create a data base of all contract cases in which ADR procedures were applied. The data should include detailed information regarding the nature and history of the dispute; the settlement procedures used and the reasons those procedures were chosen; the results of the process; the attitudes and satisfaction of the participants; and recommendations of the participants for improving the process. If the number of ADR cases grows substantially, this data base can be computerized for easy access and statistical analysis.

Corps staff involved with the case can collect and record much of this information. However, an objective assessment is also needed. An independent office in the Corps or consultants should be assigned the responsibility of interviewing the parties to the dispute and others involved with the case. To encourage forthright criticism, interviews should be conducted on a confidential basis. The independent analysts should compile the results of their research and offer their own assessment of the strengths and weaknesses of the procedures used.

The information available indicates that the minitrial experiment of the Corps has been successful. The 9 claims
resolved under the program were settled earlier than they would have been without the ADR procedure. Money was saved. However, speed of resolution and transaction costs are only two measures of the efficacy of the ADR mechanisms. Other measures include: satisfaction of the parties; effect of the process on the future relations between the parties and between the Corps and other contractors not party to the settled disputes; the wisdom of the settlement terms relative to the likely BCA or U.S. Claims Court decision; the precedential effect of the settlements, and the impact of the settlement approach and the terms of the settlement on the employees of the Corps and the settling contractors. Anecdotal evidence suggests that minitrials are a very useful supplement to conventional contract disputes settlement. However, detailed examination and analysis is needed to assess the quality of the settlements reached through ADR as compared to claims resolved with conventional procedures.

Information collected in a central contract ADR database would not only assist OCE (headquarters) policymakers in modifying the use of ADR for contract claims, but would also provide useful information for Division and District staff considering ADR experiments. The data should be shared with other government agencies which already look to the Corps' ADR leadership for contract claims settlement innovations.

In the absence of better information about the Corps' experience with ADR procedures, the initiative is proceeding on the basis of impressions that that ADR is an improvement over the
conventional system. The strongest supporters, predictably, are those who have been involved in developing and implementing the program. While critics of the ADR initiative are not prominent, the field offices have yet to embrace the new techniques. A systematic collection of more information about how ADR is working, including criticisms, could ground its supporters in verifiable data and empower them to respond to critics with more than mere anecdotal evidence. Moreover, more complete information would contribute a wise evolution of the procedures. For example, since all agree that the conventional system will be retained, the Corps needs to more clearly identify the characteristics of cases that should be channeled into each available dispute resolution procedure.

Headquarters also needs to better understand the nature and extent of resistance to ADR in the field offices. This report finds that some of the purported attitudinal barriers are not as great as anticipated. However, these conclusions are based primarily on interviews with headquarters staff. More research should be conducted to ascertain the attitudes of field personnel at the District and Division levels. Given the independence and distribution of the offices, I recommend a large sample drawn from a broad cross-section of offices.

**Encourage Innovation - Keep the Procedures Flexible**

One of the strengths of the Corps' contract claims ADR program is the flexibility with which it has developed. Chief Counsel has encouraged the field offices to experiment with ADR...
and allows them to structure the procedures according to their own needs. The continuation of field office discretion as to whether to use ADR, and the opportunity for Districts and Divisions to formulate their own procedures may lead to greater use of ADR than if a strict structure is applied. Moreover, varying the process provides a larger data base of procedural options and their respective degrees of effectiveness.

All respondents agreed that the procedures should not be overformalized. Several mentioned the proclivity of government agencies to place too much structure on new activities. If the Corps were to write regulations that required a specified and detailed contract claims settlement process, the parties would lose the advantage of being able to mold the process to their own needs. For example, the parties in one case may want the neutral advisor to convene and facilitate the minitrial and subsequent settlement negotiations. Another set of principals may prefer the advisor to play a more passive role, allowing the principals to run the proceedings with the advisor sharing his or her views only when requested. In a third dispute, the principals may decide that no advisor is needed because the disagreement is straightforward and there are no communication problems between the parties.

**Encourage Greater Use of ADR in the Divisions and Districts**

The Corps needs more experience with ADR to assess its value as a supplement to conventional contract claim resolution
procedures. While a voluntary approach seems appropriate, particularly at this early stage, headquarters should consider setting goals for greater use of the new procedures.

I recommend that the Corps continue to experiment with ADR for contract claims by encouraging all divisions and districts to try the procedures. Specifically, more minitrials should be conducted in the District offices. This approach has the advantage of keeping settlement discussions closer to where the differences arose. The district personnel hold more expertise regarding the circumstances and personalities of a particular case and are experienced in contract issues and settlement, in general. A further advantage of District level ADR is that it removes a constraint to greater use of the ADR at the Division level, namely that Division management may not have the time to conduct many minitrials.

A District level contract ADR initiative could be an element of a larger effort to improve dispute settlement rates at the District both before and after contracting officers make final decisions on claims. The Administrative Conference made such a recommendation. They suggested that "[a]gencies should tailor the ranks of principals to suit the magnitude of the case and encourage use of ADR earlier in the case (e.g., at the CO level)"

The ACUS also recommended that federal regulations be amended to "encourage COs, before issuing a decision likely to be unacceptable to a claimant, to recommend to the parties and their representatives that they seek to explore the use of ADR to
resolve their differences."

I recommend that Corps headquarters set specific objectives for greater use of contract ADR in the coming period. To achieve a broader agency experience with ADR, Corps leadership should consider encouraging each division and each district to conduct at least one ADR settlement effort within a year.

**Encourage Increased Sharing of Contract ADR Experience**

More experience with ADR and the development of an accessible database will improve the Corps knowledge of the advantages and disadvantages of ADR. But, written data does not provide the whole story. Neither can it directly build consensus within the agency as to the proper way to proceed. Face-to-face discussions can serve those functions.

I recommend that Chief Counsel's office convene a contracts dispute resolution conference in the near future. Division and District engineers, their counsel and a select group of COs should meet to discuss their experience and concerns regarding contract ADR and contract disputes in general. Such a conference would allow the field leadership who are skeptical about the new procedures to hear the experience of those who have tried it. Frank discussions would further educate headquarters about the barriers to greater use of ADR. Various contract settlement policy options should be explored in the conference. Headquarters could experiment by making the conference itself a consensus-building experiment. This would provide headquarters and field office personnel with valuable first-hand experience with a
consensus-building technique they might apply to various sorts of conflict resolution. If successful, this kind of gathering could be held annually. Moreover, division engineers may choose to hold meetings in their regions with a similar agenda, perhaps also including negotiation and dispute resolution skills building exercises.

EXPAND 404 PERMIT NEGOTIATION EXPERIMENT

The Army Corps of Engineers has had a positive experience with negotiating Clean Water Act Section 404 general permits (Priscoli, 1988; Rosener, 1981). (1) Notwithstanding the positive appraisal by participants and observers, and headquarters guidance encouraging greater use of ADR for regulatory permit negotiations, the experience seems to be limited to the Sanibel and Vicksburg cases. Yet, the potential in this area is enormous, particularly if individual as well as general permits are considered in the pool of possible cases for ADR. The Corps processes some 14,000 regulatory permits annually (Hall, 1983). Some 97% of permit requests are granted (OTA Wetlands Report, 1984). About a third are modified before issuance including required mitigation measures. Permits are issued more quickly since regulatory reform of the early 1980s but respondents indicate that the burden of this program on the Corps is growing. (2,3) Moreover, problems are not necessarily settled with permit issuance. Disgruntled parties may continue their battles in other arenas.
While the average processing time for individual permits is down, controversial permit decisions take much longer. According to the Radford Hall, Chief of the Permits Section of the San Francisco District, about one third of permit applications are controversial (Hall, 1986). While there is no precise definition of "controversial," Hall finds that most fall in this category because of objections to the application submitted in response to public notices on the proposed action. The most controversial applications may require an Environmental Impact Statement (EIS) which can add a year or more of additional processing time (some applications take three years or more - Hall, 1986).

Controversial permit applications often bring into conflict the Corps, other federal and state agencies, the applicant, and environmental advocacy groups. The Office of Technology Assessment reports that some Corps Districts exhibit a mediation style to handling such contention.

Some districts play an active role as mediator in disputes between applicants and resource agencies with wetland-protection concerns. Resource agencies are positive about this approach in districts where it is used. Although it can be time-consuming, there is general agreement by the agencies that better decisions and better working relationships have resulted. In fact, one Corps regulatory chief commented to OTA that regulatory reform measures that limit the time available for this kind of decisionmaking may result in more permits being denied. Other districts suggested these time limits would result in more "rubber-stamp" approvals of permit applications (OTA Wetlands Report, 1984).

When the Corps adopts a passive role instead, the applicant is directed to work out the objections of agencies and advocacy groups on their own. In these cases, OTA found that applicants
face problems of conflicting recommendations from different agencies. They also have difficulty finalizing agreements. The results of meetings between objecting agencies and permit applicants are often interpreted differently, especially if the agency making the ultimate decision is not present to verify compromises or changed permit conditions (OTA Wetlands Report, 1984).

These problems may be addressed with a consensus based permit decision process such as recently conducted by the Vicksburg District for a general permit. If all the relevant agencies, and likely opponents to the application agree to the permit conditions, subsequent disagreements are less likely. The consensus building process may also be applicable to controversial individual permit decisions.

I found less agreement regarding the value of ADR for environmental regulation than in the contract disputes area. All of my respondents who commented on the subject support more use of ADR for negotiating general permits though one key policymaker believes that the public shouldn't necessarily be involved in such negotiations (just the applicant and the interested agencies). Views are split as to whether ADR is appropriate for individual permit decisions. Obviously, these opinions are based on limited experience.

I recommend that the Corps experiment further with ADR and assess the appropriateness of dispute resolution procedures for the environmental regulatory program. Specifically, the Corps
should begin a Regulatory Dispute Resolution pilot program. Encourage the field offices to identify appropriate regional disputes for general permit negotiations and controversial individual permits for site-specific permit negotiations. One criterion would be the likelihood that a permit would be particularly controversial. Another, that all affected parties are willing to negotiate. Further guidance from headquarters is needed to assist the divisions and districts in determining which cases are appropriate. This headquarters support should include detailed criteria for identifying disputes appropriate for ADR and technical support to carry out dispute resolution activities.

The Corps may not yet have the capacity to carry out environmental regulatory dispute resolution on a large scale. On the other hand, the organization's nearly 20 years of experience with an active civil works public participation program can be applied to this area of conflict. In the last decade and a half, hundreds of environmental controversies have been handled with ADR techniques. (4) The regulatory dispute resolution pilot project should include neutrals experienced in environmental dispute resolution and knowledgeable about the structure and culture of the Corps. Internal resources should also be identified. The Institute for Water Resources and the Corps' training center in Huntsville should play a prominent role in providing in-house conflict resolution training.
Prepare to Implement LCA's with Training and Broader Participation

Water resource projects are a common source of conflict for the Corps. Indeed, the Corps' public participation program was a response to complaints that important interests were excluded from the planning and implementation of these civil works projects. Contention continues regarding new projects, notwithstanding the Corps' greater sensitivity to environmental concerns. The agency was wise to anticipate problems with local sponsors by incorporating the ADR clause in the Local Cost Sharing Agreements. I recommend that the Corps take ADR an extra step and include representatives of other interests in any water resources dispute resolution efforts. This already occurs to some extent with the existing public participation program. (5) The public is invited to comment on proposed civil works projects and participate in hearings designed to gather their views. However, these efforts typically do not include sharing of decisionmaking authority with members of the public.

This report does not include data documenting problems caused by the limited extent of public participation in the Corps' water resource mission. Instead, the author recommends an experiment with broader public participation as an opportunity to extend the Corps' laudable goal of collaboration with governmental sponsors to include consensus building with other non-governmental interests. I recommend, then, that the Corps identify a group of new water resource projects where the local sponsor is also
interested in a bold public participation experiment. For those projects, the Corps and the local sponsor would hold a consensus-building process similar to the one used in the Vicksburg general permit negotiation. If a consensus agreement is reached on how to proceed with the project, the LCA could include a provision for continued participation of the non-governmental representatives alongside the Corps and local sponsor. This effort, if successful, might result in a better relations and closer cooperation within the sponsoring community and between the community and the Corps. The likelihood of litigation or other project delaying tactics would be reduced and the image of the Corps would be enhanced.

Regardless of the scope of participation that the Corps chooses for its future water resources projects, the agency should carefully consider its negotiations strategies. This research has not found evidence of problems in the negotiations conducted to date. However, interviews revealed that there is not a consistent approach to negotiating the LCAs. The agreements negotiated thus far have been supervised by headquarters. The Assistant Secretary of the Army for Civil Works has signed all the agreements although future agreements may be negotiated by the Corps’ field office with independence. Before the field offices are granted more independent authority, the agency should clarify for the negotiators where they will have negotiating flexibility and where there is no room for compromise. Furthermore, the agency should consider developing a training
course specifically for the agency representatives who will be negotiating the LCAs.

FOOTNOTES - CHAPTER IV

(1) A senior analyst at the Corps' Institute for Water Resources explained that there is no system for collecting information about general permit negotiations. There may be other cases where negotiations with all interest groups has led to a general permit based on consensus recommendations. It seems there is a need for more complete information regarding field activities in environmental regulation as well as contract dispute resolution.

(2) Interview with Bernie Goode.

(3) The average processing time for Corps permits has dropped from over 140 days in 1981 to 70 days in 1984 (Hall, 1986).

(4) See Susskind, Bacow and Wheeler, 1983, for seven documented cases of environmental regulatory negotiation; also see Bingham, 1986, for documented examples of 161 cases of environmental dispute resolution.

(5) Interview with Jerome Delli Priscoli.
APPENDICES
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MIT QUESTIONNAIRE

INSTRUCTIONS:
CIRCLE ONE

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ADR techniques are a useful supplement to traditional methods of resolving disputes. 1 2 3 4 5 d.k.

The Corps should use ADR more often. 1 2 3 4 5 d.k.

In particular, the Corps should expand its use of ADR in the following situations:

- contract claims (e.g. contract interpretation, differing site condition) 1 2 3 4 5 d.k.
- disagreements over implementation of Local Cost Sharing Agreements for civil works projects 1 2 3 4 5 d.k.
- disagreements over cost-shared feasibility studies for civil works projects 1 2 3 4 5 d.k.
- drafting of particularly controversial external regulations 1 2 3 4 5 d.k.
- drafting of particularly controversial internal COE regulations 1 2 3 4 5 d.k.
- other controversial internal Corps matters (e.g. reorganization) 1 2 3 4 5 d.k.
- disputes about civil works operations and maintenance 1 2 3 4 5 d.k.
- disputes about COE real estate activities (e.g. acquisitions, sales) 1 2 3 4 5 d.k.
- COE's responsibility for cleanup of Superfund sites 1 2 3 4 5 d.k.
- the issuance of civil works program permits 1 2 3 4 5 d.k.
- other disputes with environmental groups 1 2 3 4 5 d.k.
- disputes related to the MILCON program 1 2 3 4 5 d.k.
The use of ADR may increase second guessing of decisions by oversight offices such as the Department of Defense Inspector General.

ADR is unnecessary because current Corps mechanisms for handling disputes are satisfactory.

Corps personnel are opposed to greater use of ADR because of the disappointing results, to date.

ADR increases the workload for management and staff.

ADR procedures tend to be too formal, they reduce flexibility in handling conflicts with outside parties.

Greater use of ADR in the Corps may increase overall Corps efficiency.

Corps personnel should be provided more information about ADR so that they will be better able to decide when and how to use ADR procedures.

There are legal constraints to greater use of ADR in the Corps.

Mini-trials may require division management to reject positions taken by district offices.

Mini-trials, empower division-level management to resolve disputes which district staff are better equipped to handle.
OTHER QUESTIONS

How many years have you worked at the Corps?

What is your job title?

What is your educational background?

What previous employment have you had, outside the COE?

Briefly outline your responsibilities in the Corps.

What other positions have you held in the Corps?

How would you rate your experience with ADR?  
1 2 3 4 5  
extensive none

How would you rate your knowledge of ADR?  
1 2 3 4 5  
extensive none

Your Comments:
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