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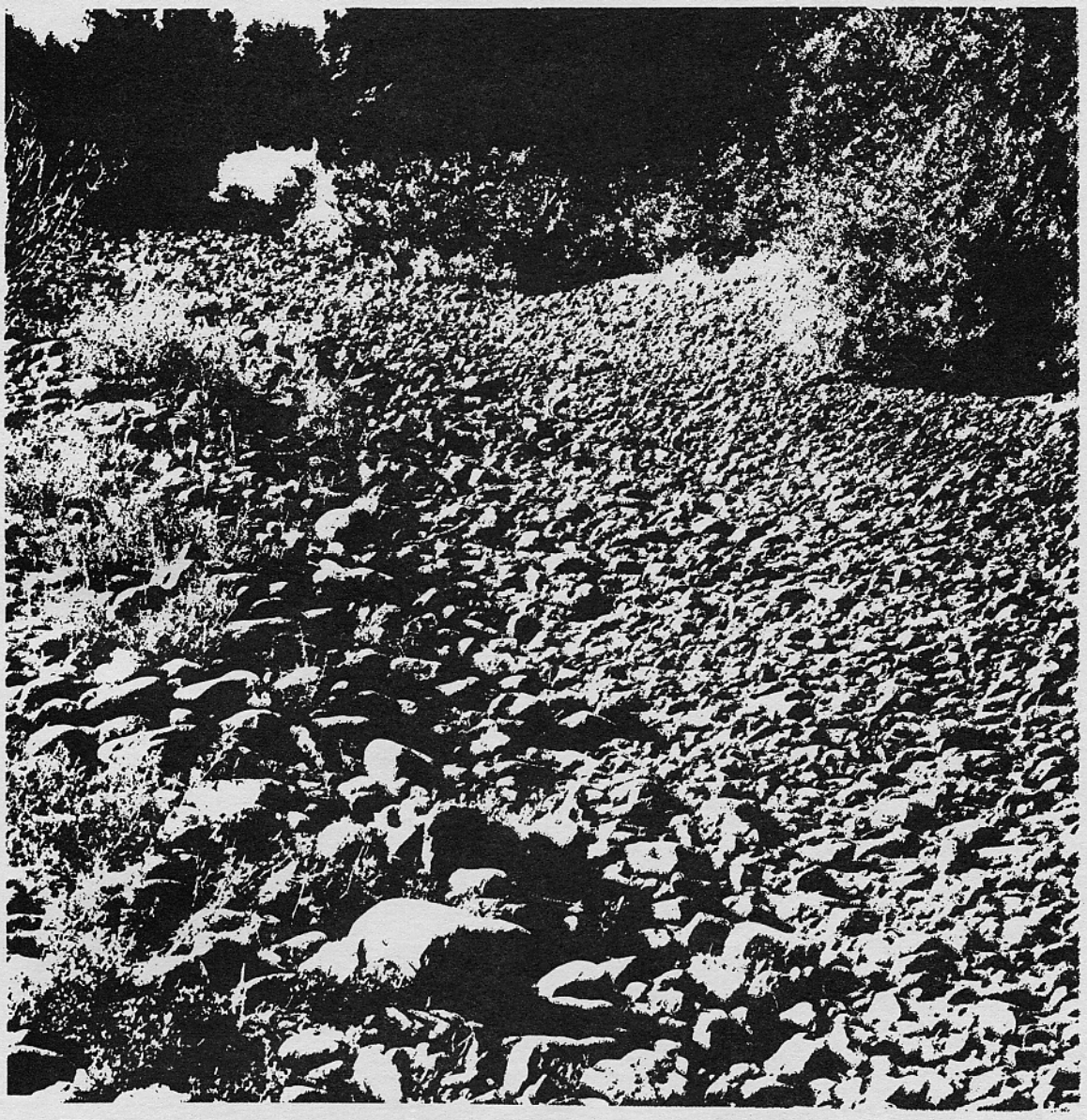
INSTREAM FLOW NEGOTIATION: REVIEW OF PRACTICES



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INSTREAM FLOW NEGOTIATION: REVIEW OF PRACTICES

by

Mary Ray White
50 South Steele
Denver, Colorado 80209

Felix D. Valdez
Valdez and Valdez
Post Office Box 62
La Jara, Colorado 81140

Michael D. White
Hall & Evans
2900 Energy Center
Denver, Colorado 80202

Berton L. Lamb
Project Officer
Cooperative Instream Flow Service Group
Western Energy and Land Use Team
Water Resources Analysis Project
Office of Biological Services
Fish and Wildlife Service
2625 Redwing Road
Fort Collins, Colorado 80526

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DISCLAIMER

These materials were prepared pursuant to a contract between Valdez and Valdez, La Jara, Colorado, and the Office of Biological Services, Fish and Wildlife Service, United States Department of the Interior. The primary author is Mary Ray White, Esq., a Denver natural resources lawyer. Co-authors are Messrs. Felix D. Valdez, Esq. (La Jara), and Michael D. White, Esq. (Denver).

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SUMMARY

This review summarizes research, findings, and recommendations of researchers and practitioners in the art of negotiation, and applies them to negotiations undertaken to preserve and protect instream flows.

It covers the steps in preparing for negotiation of instream flows, including development of a position, fall-back positions, preparation for questioning by the opponent, and assessing the opponent's case.

It analyzes the various types of negotiations and discusses the structural components of negotiation which the negotiator may change to his advantage, such as the number of parties, availability of third parties, and the issue components and conduct of negotiations.

Negotiation tactics listed include those tactics recommended for the negotiator and those he may meet and should be prepared to defend himself against, such as the pattern of concessions, commitment, and opening moves.

The review summarizes some lessons to be learned from past negotiations of instream flows, and includes a bibliography.

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INSTREAM FLOW NEGOTIATION: REVIEW OF PRACTICES

INTRODUCTION

The management of water resources has always been a volatile and complicated problem, especially in the West. Except, perhaps, for water quality matters, no other water resources issue has been more difficult to deal with than instream flow -- the retention of stream flows in amounts and qualities necessary to protect and enhance fish and wildlife habitat. The instream flow issue has caused a remarkable amount of negotiation because of the natural tension between those who want to leave water in streams for such purposes and others who have historically diverted and impounded water for consumptive uses. If negotiations fail, then issues can be resolved by the courts or arbitration.

When a dispute has reached litigation or arbitration, the result is not always predictable or controllable by the participants. However, if a dispute can be settled by negotiation, each party retains some control over the result and saves time and money.

Fortunately, the lessons learned from early failures can still be profitably applied. The first flurry of instream flow litigation has had one good effect: the rough scope and extent of stream flows have been preliminarily defined by the courts, State and Federal regulations, and inter-agency negotiations. All segments of the water resources community now have preliminary notions of those situations in which instream uses legally

exist, thus it is increasingly possible to negotiate the specific amount, quality, and timing of those flows.

Negotiation will be an increasingly attractive means to resolve disputes because of this framework for considering instream flow issues. Opportunities for negotiations generally occur at three different times: First, the bulk of Federal agency negotiations occur in the day-to-day process of developing operating plans for projects; in the States the majority of the work involves negotiations over applications for instream flow water rights, the setting of base (or minimum) flows, or placing conditions on State-awarded water rights. Second, these same negotiations can be conducted to avoid litigation arising from these issues. Third, negotiations may arise to resolve these issues while they are being litigated. In essence, these negotiations could be viewed as a hierarchy, e.g., there may be three negotiations under increasingly formal and pressure-filled circumstances. The purpose of this handbook is to encourage adequate preparation for all these negotiations, with emphasis on the conduct of negotiations arising in the face of litigation.

Negotiation of instream flows, for many persons involved in water resources analysis and management, is a new and disturbing approach to dispute resolution, an approach long thought to be the sole province of politicians, administrators, lawyers, and the courts. Physical scientists and biological field personnel express discomfort with conflict and confrontation, which are a far cry from the calm consideration of observable facts. The point to remember, however, is that the decision may be made in the courts, if the opportunity to negotiate is missed, producing unpredictable results that may be completely out of line with the factual approach and philosophy of those in the fish and wildlife scientific community.

THE FIRST STEP: PREPARATION FOR NEGOTIATION

Practically every experienced negotiator and researcher emphasizes the importance of preparing for a negotiating session by collecting facts about the issues. The instream flow negotiator needs to know precisely what the limits and results of his proposals are. He should be able to answer every possible "If this change is made in the stream, then what effect on the habitat, recreation values, or project operation?" question that the other side may raise. He also needs to have a firm grasp of the needs and limitations of all the other parties. Before the negotiations begin, he must be able to analyze what the other negotiators need, where their bottom line probably lies, what issues they are able to make concessions on, and what they would like to have that would cost him little. How much water, where, for how long, and when do the other parties need it? What other sources exist? What degrees of change can the proposals permit? Without these basic requirements, the negotiator is working in the dark, and will probably do more harm than good to his cause.

The negotiator must be technically prepared to evaluate any proposal which an opposing side might offer. This might include many combinations of timing, source, quantity, and quality of water. The negotiator must be ready to argue for or against those proposals, and he must have convincing, concrete reasons for accepting or rejecting them. Without rational support for his position, he cannot hope to retain the confidence of either his agency or the other side. He must recognize the effects of any concession made by his side or any other party in such matters as flow, quality, temperature, timing or

other qualities of the water under discussion. He should be able to exploit the requirements of competing uses for the water, such as dead storage or the time, place, and consumptive nature of various uses.

In the back of his mind, the negotiator needs a list of items that are expendable, throw-aways which he can use at crucial moments in a negotiation to increase good will and to get concessions from the other side. The negotiator who is factually prepared has every other party at a disadvantage.

It is often true that development agencies are interested in project operation information, and commonly have these data available to them, while environmental agencies are interested in biological criteria and standing crop-type information. Both types of agencies tend to propose solutions which meet their own criteria but do not address the values of the others. For example, environmental agencies often do not consider the alternatives realistically available to project operations but rely on "crusading" techniques instead of thoughtful bargaining. This technique does not work well with development agencies, which are accustomed to marketplace-type bargaining. (Doerksen and Lamb 1979). The lesson is to study the stream from your opponent's point of view.

A basic requirement for preparing to negotiate is to separate your premises and data, and those of your opponent, into as many finely divided units as possible. After they are separated, it is possible to make a searching examination of their truth, importance, and relative weight. This process lets you analyze the issues and positions and establish your objectives and alternatives, before the negotiation, so that you are comfortable with them.

Although there is no best overall strategy in negotiations, experience consistently emphasizes the necessity of thorough, diligent preparation by the instream flow negotiator. The pattern of concessions, for instance, is directly affected by the negotiator's knowledge of his opponent's payoffs and requirements, which he should have developed beforehand. A hard initial offer by a negotiator usually results in a more favorable final offer by an opponent who does not have information about the negotiator's payoffs. Small concessions by the opponent also usually result in a more favorable final offer by a negotiator, especially if he does not have information about the opponent's payoffs or is under substantial time pressure (Druckman 1977).

Books and articles by experienced negotiators are full of stories about business negotiations in which the unprepared engineer, accountant, lawyer, purchaser or seller is taken to the cleaners, such as the negotiation between Hughes Aircraft and Starmatic for power generating equipment for the first unmanned space vehicle to the moon. Starmatic's bid was $450,000. After one day's negotiating, in which Starmatic was pressed to justify its figures, the contract was signed for $220,000. When the Hughes team arrived at the conference:

> "We soon learned that the opponent's team was in greater disarray than our own. Their chief engineer was not conversant with the original proposal and felt obliged to apologize for his lack of detailed knowledge. The supplier's contract administrator and controller indicated that they had not reviewed the proposal prior to the conference and asked for a short delay in order to do so.
>
> We requested accounting justification for the $450,000 bid and were pleased that the controller lacked this. He left the room and returned almost thirty minutes later with an armful of messy workpapers.
>
> We continued to insist upon accounting justification and began to realize that the estimating base was not likely to be found in the books. Starmatic's cost system was no better than that of the rest of the industry.

> As bargaining went on the chief engineer left the room several times in order to be present during critical acceptance tests. It was apparent that he preferred to solve technical problems rather than discuss price. The contract man was also interrupted a number of times with urgent questions from subordinates relating to other proposal work being done." (Karras, 1970:7.)

The Starmatic Company threw away nearly half its original bid, largely because the negotiators saw themselves as engineers rather than as negotiators. If the negotiator had realized that negotiation, not engineering, was his job at the moment, his company would have made twice as much. The same holds true, of course, for other professionals (such as fishery biologists). After the biology is done, put on the negotiator's hat.

Examples of what the negotiator might want to research as part of his preparation for negotiation are listed below:

1. Could the other parties to the negotiation take their water requirements in increments rather than all at once?

2. Could water be put in storage and later released for the use of the other parties?

3. Who has the capacity, desire, and financial resources to monitor the stream during and after a project to ensure compliance with the agreement?

4. Can other agencies monitor the monitor?

5. What provisions should be made for re-negotiation or change of recommendation if new conditions or data are uncovered?

Some negotiators, especially lawyers, use the technique of "acting out" or role playing in preparation for an important negotiation or trial. The principal negotiator takes the part of himself, his opponent, an assistant, or the mediator, while his associates take the other parts. They then play out the upcoming negotiation. This method gives the negotiator the chance to try something without the fear of failure. It allows him to focus on important elements he may have overlooked and it helps correct his preparation by letting him see things from the other side.

In researching and preparing for a negotiation, always re-examine the <u>ground rules of the negotiation</u>. Even informal meetings have rules, stated or implicit. Reviewing what the rules are should cover at least the following points:

1. What penalties are involved in this negotiation, such as a penalty for bluffing or giving false information.

2. Whether you are aware of all the interested parties to the negotiation, and whether they have been notified. Whether there are downstream private water rights which will be affected.

3. Time limits on the negotiation, artificial or natural.

4. The party to be benefited by the status quo and the party who would prefer to change it.

5. Costs of a stalemate.

6. Means of communication between the parties.

7. Number and types of items that may be introduced to the negotiation and their timing.

DEVELOPMENT OF AN AGENCY POSITION

The agency itself must resolve any internal disagreements well in advance of outside negotiation. Although the procedures for reaching a firm position vary from agency to agency, the person who is authorized to make final approval of the agency positions (including fall-back positions) should do so before outside negotiations, or the negotiator will have little credibility.

Selection of an agency negotiating position may be the most important strategy decision to be made during the entire negotiation process. Perhaps the most common shortcoming of the proponents of instream flows is that they bend over backwards to appear reasonable. That results in a barebones instream flow recommendation (or opening negotiation position) from which it is difficult to retreat.

If at all possible, the agency should develop at least two positions: its opening position, asking for more than it hopes to actually get, and a bottom-line position, beyond which it is unwilling to go. In addition, the agency should develop various intermediate fall-back positions which are responsive to the needs of the other negotiating party and which can be used to gradually retreat to the bottom line.

The foundation for successful negotiation is <u>research</u>. The good negotiator will amass a wealth of material to take advantage of breakthroughs or new developments in the negotiations. The more important the negotiation, the more extensive the research. When President Kennedy was preparing to go

to Vienna for his first meeting with Premier Khruschev, he made a point of studying all of Khruschev's speeches, public statements, his preferences in breakfast food, and his taste in music. This is an extreme example, but the importance of that conference warranted the detailed preparation. The average negotiator, preparing for instream flow negotiation, should be careful to inquire into the needs, duties, obligations, and past history of each of his potential agency opponents. He should look at previous transactions and negotiations each agency has been connected with. He should investigate why past negotiations failed or succeeded. He must know who needs what water, and why.

If you can pinpoint the reasons why a particular decision was made in a past negotiation, you may get a good understanding of how your opponent thinks, his method of negotiating, and his psychological approach. This understanding will give you clues to his needs and prepare you to better negotiate with him. Review the history of the agency and the behavior of individuals you believe you will be negotiating with. You may discover precedent, or a pattern of behavior you had overlooked before, which can be used to your advantage.

Concurrently with (and perhaps after) development of the agency's various positions, the agency representative in outside negotiations should prepare in two ways: (1) an intensive review of the data, analysis, and conclusions upon which the agency recommendations or opening position, interim or fall-back positions, and bottom-line positions are based, and (2) a detailed analysis of the other party's proposal, in order to familiarize himself with their needs and anticipated bottom line, beyond which they will not go.

FORMULATION OF AGENCY RECOMMENDATION AND FALL-BACK POSITIONS

The agency's negotiator must be able to describe succinctly and accurately (either spontaneously or in response to questions) his qualifications, the data which were used to develop his recommendations, the analysis of that data, and the conclusions reached by that analysis. To prepare for the negotiations he must carefully study the data, analysis, and conclusions and, if possible, subject himself to merciless questioning about them (and his own qualifications) by a friendly, but skeptical, interrogator from within his own agency.

PREPARATION FOR QUESTIONING

Qualifications

If all of the negotiators know one another, their individual qualifications may already be known to and accepted by one another. If there is a stranger at the negotiating table, however, he may be curious about or even demand to be told the qualifications of the agency negotiator. In general, you should be ready to respond to inquiries about your present position, authority to speak, previous professional experience, educational background, and previous involvement in similar negotiations or litigation, or both. Do not let these questions throw you off stride or make you resentful.

Methodology

An instream flow advocate must be well prepared and informed about the technical aspects of a stream to succeed in negotiation. You must have believable methodologies to support your recommendations and your predictions of what will result from various alterations in the stream regime. Your opponent at the negotiating table will be in a position of strength if he cannot be persuaded that the methodology is reliable.

The negotiator must not only know what the present and preferred flow regime is, but must also know the result of any proposed change to that regime, and be prepared to counter a proposal made by the opponent with these responses:

1. The predictable results of that proposal, and

2. A counter-proposal which will help protect the instream flow while giving the opponent as much of his request as the negotiator wishes.

Fluctuation in water flow may be essential for a particular stream because many fish and invertebrates have evolved in response to fluctuation. Experience shows that such recommendations as a flat flow, without backup positions for a stream, do not allow the negotiator to present alternatives, and take away the flexibility required for effective negotiation to protect the stream. Any opponent, recognizing that the water is flexible while the flat flow recommendation is inflexible, may reject even a minimum flow when it is presented as flat flow (Wassenberg, V, et al., 1979).

The negotiator will be able to identify his management objectives, specify the critical periods of time for the use in question, and address the project release schedule directly if he can recommend a flow regime which permits variation in both quantity and timing of water releases to meet seasonal and life stage needs of the fish and wildlife using the stream. This approach permits real negotiation rather than the exchange of ultimatums between opposing parties.

Depending on the intra-agency situation, a strong negotiator may want his written recommendations on a regime to be reviewed by as many parties and agencies on the instream flow team as possible, to avoid unintended omissions, to increase reliability, and to cover his position.

> "The recommendation made by an agency is the first formal statement of its position on the proposed project, its first 'offer' in the negotiations; as such, it should be a comprehensive, forceful, self-explanatory statement of the environmental problems and possibilities of the project. The course of action suggested in a recommendation should be reasonable, considering the amount of water available and the competing demands for its use. In addition, proposed operating procedures to effectuate the recommendation should be noted. At later stages compromises must be made, but an agency cannot merely say that a certain flow is required; they must also suggest a way of managing the available water to maximize project benefits and minimize costs. The agency's recommendation should implicitly suggest a feasible manner in which trade-offs may be made." (Wassenberg, et al., 1979: 25.)

Including procedures for other agencies to follow reinforces the recommendation in their eyes and also may, by doing some of their work for them, make them more likely to agree with the recommendation (Wassenberg, et al., 1979).

The data, analysis, and conclusions presented by the agency are, of course, dependent on the methodology used. The agency negotiator should be thoroughly prepared to discuss the rationale behind the methodology used and to explain why other methodologies are inappropriate or less appropriate than the methodology chosen by the agency.

Data

Normally, the agency's data, analysis, and conclusions (opening position) will have been reduced to writing and submitted to other parties well before the actual negotiations. Even if this has been done, the agency representative should be prepared to give a short (3 minute) narrative description of each: data, analysis, and conclusions -- on the off chance that other negotiators have either not had time to review the prior submissions or do not understand them. Having mastered the short summary, the negotiator should be prepared to answer detailed questions.

The short descriptions assume greater importance if written materials have not been submitted previously. The ability to respond to detailed questions, of course, remains very important.

Those detailed questions will vary widely depending on the methodology selected. For example, if the incremental methodology is used, the friendly interrogator within the agency will question the agency representative on how the data relate to watershed equilibrium, food, water quality, shape of the stream channel, and flow regime. With other methods, other specific characteristics of the method used will shape the questions. The key point is

to ensure that the data collected relate to the conceptual framework of the method used.

Conclusions

In presenting the agency's conclusions or negotiating positions, the agency negotiator should be prepared to demonstrate how each position provides for the following points:

1. Satisfaction of downstream and upstream water rights.

2. The offset of instream consumptive uses.

3. The actual production of biomass or fish, rather than merely a supply of attractive, but empty, habitat.

ASSESSING THE OPPONENT'S CASE

One of the most effective approaches to negotiation is the "what if" question: What if instream flows were reduced during some months but increased during other months, can you live with that? After the question is asked, the well-prepared negotiator can then demonstrate exactly how his opponents can live with his "what if" proposal.

Unless you anticipate the needs of your opponents, you cannot adequately prepare for "what if" negotiation. It is necessary to understand your own facts but, unless you also understand the needs of the opposition, you cannot anticipate the give and take of "what if" negotiation.

There are two times to learn about the opposition: before the negotiations or during the negotiations themselves. Unless you are very fast on your feet, it is difficult to respond to that knowledge when it is brought up during the heat of negotiations. Consequently, a liberal amount of advanced detective work and analysis will avoid surprises during negotiations and help you set up the "what if" proposals.

You can obtain pre-negotiation information about the opposition openly or by informed speculation. If at all possible, try to exchange as much information as possible with the opposition before the negotiation. If the other side is hiding its cards, however, you must simply put yourself in the opposition's shoes and make your best guess of what the other side's bottom line might be. Only by making such estimates can you suggest alternatives

which will safeguard adequate instream flows and yet be acceptable to the opposition.

PLANNING FOR INTERAGENCY NEGOTIATIONS

It is profitable to give some thought to a variety of matters which individual negotiators may be able to influence even though it is impossible to prepare a script or plan every detail of outside negotiations.

TYPES OF NEGOTIATIONS

It appears that outside negotiations can be divided into three types:

Distributive bargaining: common in instream-flow negotiation, this is characterized by competitive behavior, aimed at influencing the division of limited resources or resolving pure conflicts of interests. This is represented in research by fixed-sum or zero-sum games, in which A's gains and B's losses add up to zero.

Integrative bargaining: this is problem-solving behavior, and other activities that increase the joint gain available to both sides; i.e., one side's gains do not equal another side's losses.

Attitudinal bargaining: these are activities within a negotiation that affect the basic relationship between the parties, including trust, friendliness, hostility, respect, cooperativeness, and competition.

Any combination of these kinds of negotiating may take place during the negotiation of an instream flow, and the negotiator should not be surprised at having to turn from distributive bargaining with a development agency to attitudinal structuring, perhaps even within his own agency.

Intra-agency bargaining: Because agencies often lack internal consensus and are made up of different groups with varying politics, needs, and requirements, the negotiator often finds himself forced to change the wishes of his agency while appearing to bargain hard for it. He may need to momentarily ignore the organization's expectations. Various negotiators and researchers have suggested tactics for doing this, including these actions:

1. Prevent your agency's expectations from becoming firm until the opponent's position is clear, by limiting who can formulate proposals, by adopting an explanatory approach, and by explaining the feasibility of your approach early.

2. Persuade the agency to revise its expectations by letting an officer who is balking handle the difficult negotiations himself, by using your own personal or political power, and by being as persuasive as you can.

3. Manipulate the bargaining situation so that the need to alter expectations seems to come from the situation rather than from your own arguments.

4. Rationalize a later-discovered discrepancy between the agency's position and your own. Obscure or minimize the level of this discrepancy by keeping issues complicated.

5. Use tacit signals to tell the opponent your behavior is not serious (wink, smile).

6. Limit opportunities for surveillance by others in your agency; people who are working on "what is right" may need to be isolated from the persons working on getting a real agreement.

7. Silently drop an issue.

8. Exaggerate minor victories.

STRUCTURAL COMPONENTS OF NEGOTIATION

Before any outside negotiations, it may be possible to influence the negotiation process with respect to both structural components and issue components.

All social orders, from war to family life to geriatric wards, are negotiated orders. Negotiation is also always found with other processes or ways of getting things done, such as coercion, persuasion, or manipulation. Because negotiations always take place within social settings, the settings affect the actions of the negotiating parties, the aims they pursue, their

tactics, and finally the outcome of the negotiation itself. Structural components of a negotiation setting include social, physical, and issue characteristics of the negotiation. Bargainers can increase their long-term gains by using these structural components for common gain rather than for personal gain (Strauss 1978).

Several structural elements affect negotiation of instream flows, such as relative power and how the issues arise. Negotiation of instream flows is often influenced by the type of use at issue; for instance, some uses seem to cause more conflicts, such as irrigation conflicting with fish habitat. The type of statutory authority for the agency also strongly influences the bargaining. If an agency has central regulatory authority, and will in fact make the final decision, it has a great deal more power than another agency with merely advisory or review authority. Instream flow negotiation context is also influenced by whether the conflict falls between State and Federal agencies, within the state alone, within the Federal government alone, between a Federal or a State agency and a local government, between an agency and private industry, or in some other combination. As a rule, the stronger the statutory mandate for an agency to make a decision, rather than study and make recommendations, the greater will be that agency's power and involvement in the negotiation. The body with the physical power to regulate the flow, to turn the water off and on, will also have power in the negotiation beyond its apparent statutory mandate. On the other hand, a great amount of public support for the goal or responsibility of a relatively weak agency can increase its powers in negotiation, through the obvious influence such public support may have on future legislation (Beckett and Lamb 1976).

Conditions

Some structural contexts are conditions of the negotiation itself, and may include (1) the number of negotiators, their relative experience in negotiating, and whom they represent; (2) whether the negotiations are one-shot, repeated, sequential, or linked; (3) the relative balance of power between the parties; (4) the nature of the stakes; (5) the public visibility and importance of the negotiations; (6) the number and complexity of the issues; and (7) the options to avoiding or discontinuing negotiation, i.e., what alternative modes of action are available. Most of these variables can appear in instream flow negotiations at different times.

Three structural components appear particularly important: the presence of audiences, the participation of non-negotiator third parties, and the number of bargainers invoved.

Audiences

Audiences can be present physically or psychologically; they can be mere observers or a constituency which depends on the outcome of the negotiation; they may or may not offer feedback to the negotiator. Sometimes even the opposing party is seen by a negotiator as an audience.

One observed effect of audiences is that an audience (even if only psychologically present, as when a negotiation is reported in the press) motivates the bargainers to seek praise and recognition of their work.

An audience to which a negotiator is accountable controls him through two mechanisms:

1. His need for positive evaluation by the audience; and,

2. Potential sanctions (he may be replaced or demoted).

Because of these mechanisms a negotiator performing before an audience to which he is accountable may display more demanding behavior than one who is not.

A negotiator working in the presence of an audience which is dependent on his efforts will often find that his own degree of loyalty, commitment, and advocacy is greatly increased. The bargainer may be unable to recognize good ideas in the opposing position. His commitment may limit his awareness of alternatives and his ability to make choices; it may have a "blinding" effect. Because of this process, the best negotiators are often those who are less committed to their group's position.

Because of the psychological importance of an audience, a publicly humiliated negotiator will retaliate, even if this involves considerable self-sacrifice. Consequently, exploitation of the opposite side in a negotiation is likely to lead to retaliation and revenge. On the other hand, retaliation is likely to be less if both parties know of the cost and self-sacrifice involved in the retailiation. Very seldom does exploitation or humiliation produce beneficial results for the exploiter.

Researchers have identified three causes for this pattern of exploitation leading to retaliation:

1. Americans are under cultural pressures to seem competent, strong, and effective;

2. Bargaining is perceived as an aggressive form of social encounter; and,

3. Bargaining is a visible, spot-lighted kind of activity.

These social pressures lead to a dilemma: the concessions necessary for agreement may be seen by the opposing side as weakness and lead to exploitation by him and possible retaliation by the party making the concessions. To avoid the dilemma, any negotiator making a concession should be aware of these possible reactions within the opponent and within himself (Rubin and Brown 1975).

Availability of Third Parties

Third parties may be available formally, such as an arbitrator, a mediator, a fact-finder, or a conciliator; they may also be available informally, such as a special envoy or an intermediary who simply happens to be present (an office worker, a visiting administrator). Formal third parties, if impartial and authoritative, generate pressures toward agreement before and after the third-party intervention (this process is frequently seen in litigation in which the expectation of trial often leads to settlement).

As a result, if an impasse will lead to the introduction of a formal mediator, bargainers may actually seek an impasse.

The pressures that third parties generate toward agreement seem to depend on three functions:

1. The knowledge of the presence of the third party by the negotiators;

2. The personality and reputation of the third party; and,

3. The degree of intervention by the third party.

The third party reduces the pressures on the bargainers to appear tough and increases the pressure to be fair. Even minimal intervention may work because the third party operates as a face-saving device for the negotiators.

Some of the kinds of assistance that a third party may offer include these points:

1. Reducing irrationality, by providing the parties with an opportunity to vent their feelings to him, by keeping personal remarks out of discussions, and by drawing the attention of the parties to the issues in dispute and to the consequences of conflict.

2. Reducing nonrationality, by enabling the parties to clarify their own intentions and their expected gains and costs.

3. Exploring alternative solutions by recasting issues into less rigid terms.

4. Providing opportunities for graceful retreat or face-saving in the eyes of the adversary, the public, and the audience, by (a) removing concession-making from face-to-face situations, or (b) taking responsibility for concessions, or (c) controlling the pace at which concessions are made.

5. Acting as a go-between or providing opportunities for informal communication.

6. Regulating the costs of conflict by threatening to bring wrath down on the negotiators' heads from the public, their allies, their constituencies, or other agencies.

7. Regulating public intervention and interference.

8. Identifying and promoting the use of additional resources not initially apparent to the parties; and,

9. Establishing and keeping rules of procedure (Rubin and Brown 1975).

Number of Parties Involved

Generally, an increase in the number of parties leads to an increase in the number of problems, such as the length of time to agree, the number of issues, and the tendencies among the parties to form coalitions.

Coalitions arise from the desire of parties to increase their power. They favor weaker parties by excluding and thereby weakening stronger parties. Coalitions do not form when the parties perceive them as useless, when they are blocked by another coalition, or when they are blocked by external conflict (enemies seldom form coalitions).

Physical Components

These components often express or reflect the less tangible sources of contention in a negotiation. They involve the following elements:

Location. Home territory gives a negotiator a definite psychological advantage. The negotiator on his own turf is likely to have increased assertiveness and to gain better outcomes in the substantive negotiation. The guest may view himself as a subordinate and be deferential. Negotiating on your own home turf has these other advantages: immediate approval of the agreement may be available; the other side may be prevented from leaving; in idle moments work on other matters can go on; and it saves time and money.

On the other hand, negotiating on your opponent's territory means that you can give your full time and attention to negotiation without any interruption from your own office; you can withold information which is "unavailable"; you may be able to reach persons higher in your opponent's organization than would travel to your office; and, to some extent, the burden of preparation for the negotiation is on your opponent (Nierenberg 1973).

Openness to Public View. This may be used if one or more of the parties hope that public reaction will affect the negotiations through audience pressure.

Physical Arrangements at the Site. These affect social interaction and reflect the character of relationship between the negotiators. Cooperative negotiators tend to sit side by side; competitive negotiators tend to sit face to face. An increase in distance between negotiators indicates a lessened wish to interact. Some researchers have speculated that it is more difficult to tell a convincing lie when you are being watched closely. Research on this aspect of negotiation has been carried to the point of indicating that flower vases and abstract sculpture lead to informality, while books and magazines do not (Rubin and Brown 1975).

Use of Communication Channels. Generally, free communication increases negotiating effectiveness, while isolation imposes constraints and promotes mistrust and suspicion. Cooperation appears to be greatest when the parties can both see and hear each other, and least when typewritten messages are used between parties. Because instream flow negotiations can be carried out in part by letters and memoranda, it is wise to try to meet and telephone as well.

Presence of Time Limits. Time pressures increase the likelihood of agreements and are manifested in reductions in the desires of the parties, demands made, and the amount of bluffing.

ISSUE COMPONENTS OF NEGOTIATION

Within a negotiation, substantive issues can be manipulated, reorganized, or restated to alter their importance and to make more alternatives available.

Saving Face

Sometimes manipulation of substantive issues is necessary because intangible issues such as public image or "face" can override the desire of the negotiators to agree. The negotiator should remember that intangible issues such as status, strength, and reputation are very important, as a review of any recent peace negotiations will show. When A perceives B as unjustly demanding, resistant, or punishing, then intangible issues of honor and face arise.

People fundamentally need to "save face" in negotiation. This has been explained by two theories (1) The basic paradox of negotiation, in which the negotiator is caught between yielding to reach agreement and not yielding to increase his outcome. The negotiator finds himself in a bind: he must be firm without seeming rigid and must be willing to yield without seeming weak. (2) Another explanation for the importance of face-saving in negotiation is that in our society we resist intimidation to avoid the loss of self-esteem and social approval which results from knuckling under. Third parties, such as mediators, may orchestrate face-saving efforts to increase the chances of agreement (Rubin and Brown 1975).

Defensiveness

Defusing defensiveness is important, because defensiveness on the part of one negotiator can sidetrack the whole process. Experience suggests a three-step program for reducing defensiveness. Defensiveness is the result of the negotiator's feeling that his adversary is not taking his views seriously; consequently the first step is to convey to the opponent that he has been heard and understood, for example, by restating your understanding of his position. Second, communicate to the other party that some part of his position is valid and can be accepted. Third, encourage the other person to take the same steps himself. Parents may recognize these steps from parent effectiveness training.

Number of Issues

The number of issues affects the negotiation by increasing time required to reach agreement. As a general rule, if a negotiation involves multiple issues, working with several issues at once (log rolling) leads to fairer results than working on one issue at a time. Because of this effect, a strict adherence to an agenda, with a one-by-one resolution of issues, may actually be inefficient and increase conflict between the parties. If the negotiation involves many or very large issues, it is generally better to separate them into smaller and more workable units. There is no solid research evidence on whether it is better to begin with the more important issues or to save them to the last, consequently, this question should be left to the personal style of the negotiator.

Concrete Presentations

An important finding of negotiation research is that a concrete presentation of the issues increases cooperation among the parties. As a result, the more prepared a negotiator is with concrete and demonstrable facts, requests, or results, the greater his likelihood of success. An instream flow negotiator with charts, pictures, and concrete graphic materials that show what he is talking about will favorably influence his opponents.

CONDUCT OF THE NEGOTIATIONS

During actual bargaining, negotiators must keep in mind a number of matters which can be used spontaneously.

Negotiators as Individuals

From the roughly 200 separate research studies on various aspects of this subject, the one clear lesson is that the successful instream flow negotiator does not have to be of a particular personality type; he only needs to fit the needs of the particular situtation. Some negotiations may require a cooperative negotiator, while others may require a competitive negotiator. The person putting together the negotiating team or choosing the negotiating individual must depend on his own sense of what the agency needs and who he has to choose from (Druckman 1977).

However, basic personality orientation does influence the effectiveness of bargainers. Researchers have divided the entire human reace into three general types: cooperative, individualistic, and competitive. A cooperative person, with a positive interest in the welfare of other people, is often a more effective bargainer than an individualistic person, who wishes only to maximize his own outcome. Either of these is a more effective negotiator than the competitive person, who chiefly wants to beat his opposite number (Walton and McKersie 1965).

Basic Patterns. The relationship between negotiators seems to derive from the orientation of the individuals (competitive/cooperative/individualistic), from beliefs about whether the other party should be negotiating at all, from trust in the other negotiators, and from the friendliness or hostility of the other negotiators. Relationship patterns appear to fall into the following categories, any one of which may be "best" for a particular negotiating session:

1. Conflict, characterized by distrust and denial of the legitimacy of the other negotiator;

2. Containment-aggression, in which suspicion prevails with grudging acceptance of the other negotiator;

3. Accommodation, with acceptance of the situation, some respect and limited trust of the other negotiators;

4. Cooperation, in which acceptance of the other negotiators, recognition of common interests, respect, and trust all promote negotiation;

5. Collusion, in which a third party (often the constituency of one negotiator) is exploited. In this relationship, the negotiators form a coalition for their common ends, possibly outside their legitimate interests as representatives of their constituencies. Although the negotiators trust each other, they always face the possibility of blackmail (Walton and McKersie 1965).

Changing Patterns. If the negotiator wants to change his opponent's attitude towards trust, cooperativeness, and friendliness, he can operate on one of the following theories:

1. "Balance theory" assumes that any person prefers consistence between his perceptions and his beliefs; consequently, if the negotiator introduces a new perception of himself, he will modify his opponent's present attitudes. Show him what a likeable person you are.

2. "Reinforcement theory" assumes that a person will behave in ways that are rewarded, and that he can be trained to act more cooperatively. It has been suggested that an opponent can be moved toward cooperativeness if the negotiator creates likenesses between himself and his opponent: by sharing likes and dislikes, defining a common problem, focusing on a mutual success or a common view of outsiders, and by de-emphasizing differences between the parties. The negotiator may emphasize common needs, pressures, backgrounds, or interests. He may associate himself with something the opponent likes by working on a substantive problem of the opponent, or strengthening his opponent's position within his own organization.

Sanctions. Because we dislike those we harm, the negotiator should remove himself from any harm his opponent does to him, and avoid accusation and blame. (It does not bother me, just my agency.) Sanctions or punishment should be institutional and not personal if it is necessary for a negotiator to use them; they should be limited, specific, and made only in return for a

conscious and deliberate act by the opponent. Even with these restraints, sanctions can be destructive to the entire negotiation. Rather than using sanctions, the negotiator may remind the opponent of his role (we did not expect that of you), or may link failure of the negotiation with a weakness in the opponent's competence.

NEGOTIATION TACTICS

The exchange of information about the bargainers' preferences, intentions, and perceptions is a fundamental purpose of negotiation. This exchange conditions the moves of the negotiators and the patterns of their offers and counteroffers.

Team-Individual

Should the negotiator be an individual or a team? A team can include specialists and thereby more technical knowledge. It can offer a pool of judgments. It can field a larger opposition, and permit buck-passing. However, the use of a single individual to negotiate means that there are no weaker members on the team. All the responsibility, and therefore all the incentive to succeed, falls on one person. The negotiator will be able to make on-the-spot decisions if they are necessary because there are few differences of opinion on a one-man team.

If a team negotiation approach is used, it may be wise to minimize clues to the opponent by using a single spokesman. In some instances, a negotiating

team may even use a person of "calculated incompetence" for their chief negotiator. Senator Sam Ervin was an expert at this "country boy" tactic.

In a long negotiating session, the side with fewer representatives will tire more quickly and be less able to control the discussion. There also is a tendency in negotiations to reach a solution evenly balanced among the views of all participants, regardless of their team membership, so the active presence of additional bargainers materially affects the substantive outcome; each one may be unconsciously considered as having an additional "vote."

Opening Moves

There are two different approaches to making your opening move:

1. Early cooperation promotes trust and a mutually beneficial cooperative relationship; early competition, on the other hand, leads to suspicion.

2. Bargainers generally reach higher and more satisfactory final outcomes, however, when they begin with extreme demands rather than moderate demands. This strategy allows them more time to get information about the other negotiator's intentions and preferences, it tells the other side not to exploit the negotiator, and it avoids being too "generous."

If minor issues are discussed first, the negotiator is able to make concessions, which will lead to goodwill, which may characterize the entire

negotiating session. In contrast, if major issues are discussed first, there will be sufficient time to explore them thoroughly and reach genuinely beneficial solutions. Experienced negotiators recommend not revealing your minimum position early if your opponent needs to show the other persons in his organization how hard he worked in the negotiation.

No single strategy or type of tactic is superior in all situations, or against all types of opponents in any given situation. However, generally, a "soft" approach to bargaining, where steady concession-making takes place, leads to more mutually satisfactory agreements in most situations. It pays to be "tough," however, in the following situations: (1) when the negotiator has a long time to reach agreement, (2) when he is more interested in "winning" than in reaching a mutually satisfactory agreement, or (3) when he is bargaining against an opponent with low aspirations.

Pattern of Concessions

The negotiator who makes positive concessions in a systematic way, and seems reasonable about dividing up the water, is more likely to get cooperation from his opposite than one who makes no concessions. Because a negotiator wants to believe he can influence the other side's behavior, concessions by A may tell B that A sees him as a worthy opponent, and may increase the likelihood of B's making positive concessions in return.

Occasionally, however, the party that makes the first concession in a negotiation receives no substantial returns. This result may be based on our social expectation that one concession deserves another, a pattern which is

often ignored in negotiations. The negotiator should be extremely careful never to compromise on any point without thinking ahead to the possible consequences of that concession.

Making a concession has several effects: it reveals something of what the negotiator thinks is the strength of his position, it invites reciprocal concessions, and it allows him to test his assumptions about his opponent.

Commitment

Many researchers and experienced negotiators have noted that it can be helpful for a negotiator to persuade his opponent that he is committed to a certain position, beyond which he will not go. To persuade your opponent of the strength and truth of your commitment, you may wish to use: a public statement by the agency, a negotiator who cannot exceed his authority, forthcoming negotiations with other agencies in which your reputation will be an important issue, continuous or further negotiations with this opponent, general principles, and precedent. Precedent can include: any past negotiations in which your agency has been involved, using this opponent or another opponent; any other instream flow negotiations you know of; or, other negotiations in which your opponent was involved.

The negotiator can make an explicit or implicit pledge to possible future action to reinforce his commitment. President Kennedy took this kind of step when he went to the public with the disclosure of the Russian missiles in Cuba. If a party can visibly and irrevocably commit himself to a position near his opponent's resistance point, he may be able to claim virtually all of

the settlement range in the negotiation. He does, however, run the risk of losing his own flexibility in the process (Walton and McKersie 1965).

Every concession implies commitment to stand firm at some point, therefore, the negotiator must find a method to communicate where his firm point is. Credibility can be created by behavior that makes retreat difficult, such as a public announcement. It is possible to phrase words of the commitment so that it sounds final but permits retreat. The elements in a statement of commitment can be varied to permit this possibility. (1) The content, referring precisely to what is covered by the commitment, can be made narrow. (2) Firmness can be calculated to vary the certainty with which the final action will be taken. (3) Consequences, the final action, can be specific or vague. (4) Time of the final action referred to in the commitment can be made specific or uncertain. When a response is analyzed in terms of content, firmness, consequences, and time, what sounds like a firm rejection may in fact permit further negotiation and compromise.

Threats and Promises

Threats act as a kind of commitment, but one that must be handled carefully. They are of two sorts: (1) Communication of what you will do because your own incentives require it, such as an agency's commitment to its own mandated tasks. (2) The promise of harm for the sake of deterrence alone. If there is no incentive for the threatener except his desire to fulfill his threat, the threat is likely to be a bluff. To make a bluff work, the threatener needs to find a way to commit himself to the threat, such as involving his reputation, using a committed agent, or breaking his threat into steps and then taking the first steps.

Both threats and promises convey information about the negotiator's preferences and transmit his perceptions of the other side. They are likely to be used when the negotiator cannot influence his opposite number in other ways. In research situations, promises tend to be used more often than threats. Threats, and to a lesser extent promises, increase the likelihood of immediate compliance and concession-making. Over the course of a negotiating relationship, the use of promises tends to promote a good opinion of the promiser, while use of threats leads to hostility (Rubin and Brown 1975).

The use of promises also increases the likelihood of a mutually favorable agreement, while the use of threats reduces it. When the conflict of interest is large, both promises and threats are destructive of a mutually favorable solution and should not be used.

If it is necessary to make a threat, the negotiator may reduce the offensiveness of the threat by being off-hand or humorous in order to minimize it. To underscore the threat, the negotiator or someone on his team may overtly prepare to fulfill it.

For the person threatened, some potential defenses depend upon knowing that a threat is coming. The person threatened may act before the threat is possible, or irrevocably commit himself to act, as by publicly announcing that he is going to act; he can also cut the communication channels between himself and the threatening negotiator until the danger of threat has passed (Schelling 1970).

Coercion

Coercion may mean use of court orders or law enforcement agencies, illegal strike tactics, sabotage, physical force, and personal threats. Some negotiators see coercion as a useful tactic, but in instream flow negotiations it may not be available. Bargaining is usually a rule-laden situation in which the participants submit to mutual constraints to reduce the probability of serious losses. Coercion is usually one of the strategies prohibited and avoided by both parties. This makes coercion a measure of last resort and, consequently, a high-risk gesture that carries with it the dangers of retaliation and revenge. Coercion is more likely to result when normal behavior is ignored, conflicts are intense, issues of face or honor are raised, or one side feels itself treated badly.

Because it is a dangerous tactic, coercion must be used carefully. Coercion can be seen as defensive and nonaggressive, and thus not create retailiation, if it appears to be unintentional, not meant to punish or to be used for selfish purposes, or to be justified. After using coercive tactics, a negotiator will often attempt to defuse his opponent's response by expressing guilt or self-criticism. The negotiator who is the victim of coercion faces a dilemma. By retaliating, he runs the risk of escalating the conflict; by not retaliating, he runs the risk of being seen as weak and inviting further aggression.

Assertiveness

Negotiators, because they need to feel comfortable with the idea of establishing and defending a position, are often directed to books on assertive behavior. These books offer techniques for recognizing assertive, non-assertive, and aggressive behavior, and for controlling these behaviors. Assertiveness training may facilitate genuine expression and discussion of proposals. Assertiveness training also helps a negotiator recognize and utilize unspoken communication, such as subtleties of posture and expression.

Symmetry

The psychological phenomenon of the principle of symmetry has been noted by many researchers and experienced negotiators. It most often occurs in tacit bargaining although sometimes it will appear as an issue in negotiation. It happens when one side offers a solution which is a "focal point" and is conspicuous, unique, and recognizable because of some obvious characteristic that compels agreement between the parties.

The solution may be obvious for its mathematical simplicity, because it is part of a precedent, because it preserves the "status quo ante," or the previous situation, because it is unique in the situation (the only river on the map), or because of some other clue or signal that it offers to both negotiators. Splitting the difference, rounding off, and evening up are all examples of this phenomenon.

The focal point has some qualitative difference from the other alternatives which gives it a magnetic attraction. The data are used to focus the question, thus making preparation of the data that much more important. An intuitive recognition of focal points of this sort is essential for a successful negotiator. The symbolic significance of these focal point solutions coordinates the expectation of all the ngotiators. The solutions seem to raise the question "If not here, where?" (Schelling 1970).

Techniques You May Encounter

Some techniques listed here, like the use of the "whipsaw," are true conscious techniques, while others, like anger, listening, or inscrutability, are characteristics of personal behavior. These are drawn both from academic research and from works by experienced negotiators. They are not all equally useful, nor are they all equally honest. Whether or not you use any of these techniques, you should be prepared to meet and counter them in the course of the negotiation. Identifying a remark or a series of moves as part of an identifiable technique is one way you can keep yourself from reacting to it on a personal level and can deal with it effectively.

Remember that your responsibility is to find your opponent's settling point and that the possibility always exists that the opponent has evaluated his own case as weaker than you have. For this reason, avoid at all costs revealing your own settling point. If it is possible, you have a responsibility to change your opponent's position. Many of the following techniques are aimed at discovering the opponent's settling point, persuading him to move it downward, or enabling you to resist moving your own settling point.

1. Anger, real and artificial. This technique is frequently encountered. If you begin to rethink your position in response to your opponent's anger, you are doing exactly what he wants.

2. Irrational behavior. A rational plan may include irrational behavior at times. It is not necessarily always wisest to be intelligent, skillful, or unimpeded; obstinancy, resolution, and weakness can be useful weapons.

3. Inscrutability. Disguising your reactions, an extremely important capacity for a negotiator, generally means silence. The negotiator who is talking is not learning from the other side. Silence in the presence of other people causes anxiety, which must be deliberately resisted.

4. Questions. It is usually a good practice to explain the reason for asking a question. Use affirmative statements when possible and avoid questions that offend or put the other person on the spot. Questions should not put a person on the defensive, because defensive people withhold information and distort what they say. People enjoy answering questions about themselves and their work; they enjoy sounding off even is some of the material is unpleasant. Generally, it is wise to ask a question you have even when it appears to be personal or ridiculous. You may get a better answer than you expected or learn from a negative response.

If you are asked questions, it is important to remember that not all questions need to be answered; some questions are not intended to be answered. Remember that a negotiation is not a classroom nor an opportunity to please the person who is questioning you. Your answers should be framed in terms of your overall strategy and not in terms of the questioner's needs. Questions during negotiations often reveal a lack of strategic planning and preparation. Do not give your answer if it will violate your long-range objectives.

5. First offer, large demand. Because each wants the opposing side to make the first realistic offer, both parties will push the other side to expose itself first. If your opponent requires you to make the first offer, the best response is to give a large demand, even if it is outrageous, simply to get the negotiation going, unless such a demand may kill the negotiations entirely.

6. Fake demand or false issue. This technique is available only in situations with numerous side issues, some of which the negotiator does not care about. It consists of pretending to care about certain issues in order to inflate your demands and give yourself something to throw away later.

7. Whipsaw. Playing off a strong opponent or agency against a second real or imagined strong opponent requires a third-party alternative who may be called in to the negotiations or who is a possible competitor or superior to the opponent.

8. Br'er Rabbit approach. By his pleas not to be thrown into the briar patch, Br'er Rabbit persuaded Br'er Fox to do the very thing he wanted. The technique is, of course, limited: it requires a smart rabbit and a not-so-smart fox. It also involves the danger that the fox will be persuaded that it would be unfair to throw the rabbit into the briar patch after all, leaving the rabbit in a very difficult position.

9. Expose the jugular. Some negotiators have suggested that some opponents will not drive as hard a bargain with a meek, submissive person as with a fighter. The submissive negotiator invokes a moral or ethical inhibition on the part of the stronger, perhaps by stating his belief in the stronger negotiator's fairness, justice, equity, honesty, and general good behavior. This technique is useful only to a person with a weak negotiating position to begin with.

10. Boulwareism. This "take it or leave it" approach is named after Lemuel R. Boulware, a negotiator for General Electric, who began the technique in the 1940's. Under his guidance, General Electric, on the basis of its own research and evalution of union demands, determined what was "right" for its employees, and then made a fair and firm offer to the employees without holding any material back for later trading or compromising. The effect of this technique was to prevent the union (the real opponent) from saying to its members that it had successfully bargained for anything. The danger of this approach is that it is seldom used. Few negotiators believe, at

least the first few times around, that your first offer will consistently be your last offer.

11. Negotiator without authority. If the agent doing the negotiating must seek authorization from his agency superiors to make a settlement, he gains time for study of his opponent's offer while psychologically committing his opponent to the offer made. There are two defenses to this: (a) retain some room in your final offer; (b) refuse to deal with someone without authority.

12. Draft final and intermediate agreements yourself. This technique is a rule for many successful negotiators. It permits the negotiator who does the drafting to put the most favorable interpretation upon the agreement, to resolve minor unsettled questions in his favor through the language of the agreement, and to keep in control of the ongoing negotiation.

13. Establish the agenda. The agenda for a negotiation can shape a message and reflect the power of the parties and the importance of the issues in a negotiation. It can clarify motives, establish rules, permit digressions, introduce the best arguments at the most important points, and help the drafter's strategy. Listing a large number of issues helps the drafter discover whether his opponent is interested in all the points. The opponent may also have his expectations dampened by a long list of issues.

The best organization for an agenda is to put problems where they can most easily be solved. This may mean putting the easy problems first to generate an atmosphere of success. Sometimes special, difficult problems can be dealt with more easily in a separate negotiation, perhaps between different negotiators. The timing of the entire negotiations can be useful. An upcoming holiday can shorten a negotiation session for the negotiator who wants quick work.

Timing within the negotiation is also crucial. A late evening concession looks much more important than the same concession at 10 in the morning. A caucus following an insignificant point can give that point increased weight.

14. Inoculate against influence. Researchers have generally agreed that a person's resistance to persuasion can be raised by thorough preparation for the negotiation. A negotiator who develops arguments to support his own case, and prepares responses to the arguments against his case, is much less likely to make inappropriate concessions than the person who thinks only of the positive arguments for his own side or who thinks only of the arguments against it. Consequently, for every planned negotiation, it would be wise to appoint a devil's advocate to inoculate the negotiator against any defects in his arguments. The best defense to persuasion, however, is an effective and high level of self-esteem, a personality characteristic that is difficult to change overnight (Karrass 1970).

NON-VERBAL COMMUNICATION

Although psychologists have not figured out the phenomenon of non-verbal language, it appears to exist, and to be far more subtle and communicative than simple frowns and blushes. Researchers seem unable to explain how non-verbal communication can be learned, but it can obviously be practiced. Take every opportunity in all negotiations, professional, family, or social, to read the opposing party's non-verbal statements. Your ability to use and recognize facial, postural and other non-verbal communications will be extremely helpful, because you will be able to read your opponents, and increase your ability to control your own non-verbal transmissions.

The main non-verbal signals used by man seem to include the following elements:

1. Bodily contact: There is a great deal of cultural variation in the extent and frequency of bodily contact, from shaking hands to slaps on the back.

2. Proximity: Again involves great variation in cultures and situations.

3. Orientation: The angle at which people sit or stand in relation to each other.

4. Appearance: Many aspects of personal appeance are under voluntary control and are used as a kind of self-presentation about the person's intentions, social status, occupation, personality, and mood. How does your opponent dress? Is he put off by your clothes?

5. Posture: Within a single culture, the different ways of standing, sitting, and moving can signal status and emotional state.

6. Head nods: These can be very important in connection with speech and usually act as a reinforcer or as part of a grant of permission to speak.

7. Facial expression: Much facial expression of emotion appears to be universal, throughout all cultures, and independent of learning, perhaps because some facial expressions are very difficult to control, such as expansion of the pupils, perspiration, and the fleeting expression of concealed feelings.

8. Gestures: These can actually replace speech, and hand gestures are extremely expressive when coordinated with speech.

9. Looking: People generally look at one another twice as much while they are listening as while they are talking; looking sends the message that interest is being taken in the speaker.

10. Non-verbal aspects of speech: These can include pitch, stress, and timing, tone of voice, accent, speech errors, and patterns.

Some persons are far better able to understand non-verbal communication than others. Women are reliably better at this skill than men, although male actors, psychologists, teachers, and other men in occupations that require expressive behavior are better than men in such professions as engineering. Non-verbal sensitivity appears to be independent of general intelligence and can be improved with practice.

LESSONS FROM PAST INSTREAM FLOW NEGOTIATIONS

Under the management of the Western Energy and Land Use Team, the FWS Western Water Allocation Project has sponsored studies to develop recommendations to improve methodologies aimed at determining instream flow requirements for fish and wildlife. Seven reports which have resulted are listed at the end of this summary. The extensive case studies involved in this project permitted thorough analysis of the effectiveness of field investigations before submission of instream flow recommendations, the institutional arrangements involved in establishing the instream flows, and identification of various problems and constrains on preservation of instream flows. The conclusions speak to the negotiation process and to making recommendations on methodology. The use of case histories permits recognition of distinct patterns of bargaining, failure, and success. For example, of 109 instream flow sample cases, bargaining failed to reserve sufficient instream flow in 40% of the streams. Some of the recommendations resulting from this extensive study include: use a more detailed methodology to support flow requests; present flow requests before the project begins; and, use such requests as "outflow-equal-to-inflow" and seasonal flow regimes.

The authors of these studies have reached some conclusions of great interest to all instream flow negotiators:

> "Most flow requests have resulted in a flow reservation; however, only a little over half of the requests have obtained outright acceptance without some modification. While less detailed methodologies have promoted more chance of acceptance, <u>more detailed methodologies</u> have increased chances of a modified flow amount. Correspondingly, less demanding biological objectives have obtained more reservations of minimum flow.

Timing and amount of requested instream flows had significant effects on bargaining. Flow requests made after the project began operating usually resulted in poor bargaining success. Requests for smaller amounts of minimum flow have improved the chance of acceptance.

Certain forms of flow requests such as 'outflow-equal-to-inflow' and seasonal flows have contributed to favorable bargaining. The 'outflow-equal-to-inflow' recommendations were accepted almost twice as often as all other requests. Requests for a seasonal flow regime were always accepted -- with or without modifications." (FWS/OBS-76/28: 7-8) (emphasis added).

The studies indicate that preparation for negotiation of instream flows needs to be better than it is now. For instance, the report for California indicates that the study of alternatives is neglected by instream flow advocates because the fisheries' agencies lack authority, technical expertise, and funding for research into allied areas that might offer solutions to instream flow problems. Many projects, such as the Beaver Creek Diversion in Colorado, emphasize the importance of doing adequate field work to support instream flow recommendations (FWS/OBS-76/30).

In California, at present, projects are usually evaluated and negotiated on a case-by-case basis resulting in a State Water Resources Control Board or FERC decision generally to maintain a minimum instream flow for fish and wildlife. All project data for evaluations are supplied by the project sponsor. Very little information was found that pertains to obtaining instream flows by other means; e.g., purchase of water rights, project alternatives not supplied by the project sponsor, water trades among projects, pumping groundwater into streams, wastewater reclamation, project abandonment, or fisheries and wildlife engineering (FWS/OBS-76/32).

The case studies showed that downstream water rights are an influence in bargaining which should be considered by instream flow advocates. The case studies identified two further opportunities for bargaining: renewal of an FERC license and renegotiation of a reservoir storage contract. Investigation of alternatives need not be exhaustive; merely raising the possible use of privately purchased water rights may be sufficient.

Substantive requests during the negotiation process affect later compliance with the final agreement. The very poor implementation record of Bureau of Reclamation Projects and irrigation projects (as contrasted with projects authorized under State permit systems) should alert the instream flow advocate to include follow-up studies or monitoring of stream gauge records by an outside agency in Bureau of Reclamation and irrigation projects. Compliance with the agreed-upon instream flow usually occurs where stream gauge records are monitored by an outside agency.

It is important that both recommendations and final agreements contain specific terms. Such projects as the Baker project on the Powder River in Oregon demonstrate the ineffectiveness of such terms as "somewhat lower flows" and "short water years" in an agreement (FWS/OBS-76/31).

Important immediate remedies to the monitoring problem are believed to include four steps. First, when formulating instream flow recommendations, determine the availability of hydrologic information so that flow provisions can be attuned to the locations and features of existing streamflow gauging stations or other monitoring devices, and new stations or devices may be proposed in the flow request as a project cost. Next, include as part of the

recommendation that, if it is modified by the sponsor agency, such as by inserting an "outflow-equal-to-inflow" provision, adequate gauging devices be installed to meet the monitoring requirements of the modified flow reservation. Also, when requesting instream flows, specify the exact stream reach to which the flows are meant to apply. Finally, review the water rights situation affecting the concerned stream reach, and tie the requested flows to the amounts appropriated in various segments of the reach (FWS/OBS-76/28).

Patch-up work can sometimes be done long after a project is completed. For instance, in the Holter project on the Missouri River in Montana, informal bargaining and controlled flow experiments in a follow-up study after 50 years of project operation, produced an informal agreement to augment low flows. There has been substantial compliance with the informal agreement although no license stipulation was involved (FWS/OBS-76/30, M1).

Agencies involved in instream flow negotiations are subject to legislative, judicial, fiscal, regulatory, administrative, strategic, and political influences and constraints, which vary with the parties involved and with the passage of time. In reviewing these constraints, the studies summarize the results of the strategy of beginning with a high request, in which the original flow requests were highly ambitious, leaving enough room for the agencies to bargain. None of the projects studied produced a deteriorated fishery whenever <u>high</u> flow recommendations were successively reduced in amount to promote their formal adoption (FWS/OBS-76/29).

Timing of negotiations is critical. For example, in the negotiations involving instream flow below the Granby Dam of the Colorado-Big Thompson

Project in Colorado, the FWS "offered their recommendations two years after initial operations and many years after the United States and the local water conservancy district had negotiated the repayment contract. Because of the strong legal position of irrigation interests, the FWS recommendations were not agreed to despite extensive studies employed in formulating the recommendations" (FWS/OBS-76/30).

REPORTS SUMMARIZED

1. FWS/OBS-76/28

Assessment of Effects of Altered Stream Flow Characteristics on Fish and Wildlife: Part A: Rocky Mountains and Pacific Northwest: Executive Summary

a. Inclusive States: Arizona, Colorao, Montana, Utah, Wyoming, Idaho, Oregon, and Washington

b. Availability of the report: available on request from the Cooperative Instream Flow Service Group*

2. FWS/OBS-76/29

Assessment of Effects of Altered Stream Flow Characteristics on Fish and Wildlife: Part A: Rocky Mountains and Pacific Northwest: Final Report

a. Inclusive States: Arizona, Colorado, Montana, Utah, Wyoming, Idaho, Oregon, and Washington

b. Availability of the report: available on request from the Cooperative Instream Flow Service Group, and from NTIS** (refer to NTIS No. PB263470/AS, PC:A07/MF:A01) at a charge of $10.00 for a paper copy.

3. FWS/OBS-76/30

Assessments of Effects of Altered Stream Flow Characteristics on Fish and Wildlife: Part A: Rocky Mountains and Pacific Northwest: Rocky Mountain Region Case Studies

a. Inclusive States: Arizona, Colorado, Montana, Utah, and Wyoming

b. Availability of the report: because of its length, this report has not been widely distributed. Single copies have been sent to each of the Fish and Wildlife Service Area Offices in the inclusive States, to the State fish and wildlife departments, and to selected libraries within the region. Copies may be ordered from NTIS** (refer to NTIS No. PB263471, PC:A16/MF:A01) at a charge of $19.00 for a paper copy.

4. FWS/OBS-76/31

Assessment of Effects of Altered Stream Flow Characteristics on Fish and Wildlife: Part A: Rocky Mountains and Pacific Northwest: Pacific Northwest Region Case Studies

a. Inclusive States: Idaho, Oregon, and Washington

b. Availability of the report: because of its length, this report has not been widely distributed. Single copies have been sent to each

of the Fish and Wildlife Service Area Offices in the inclusive States, to the State fish and wildlife departments, and to selected libraries in the region. Copies may be ordered from NTIS** (refer to NTIS No. PB263472, PC:A18/MF:A01) at a charge of $21.00 for a paper copy.

5. FWS/OBS-76/32

Assessment of Effects of Altered Stream Flow Characteristics on Fish and Wildlife: Part B: California: Executive Summary

a. Inclusive State: California

b. Availability of the report: copies are available on request from the Cooperative Instream Flow Service Group*, or from NTIS: PB263352 (PC:A02/MF:A01), $5.00.

6. FWS/OBS-76/33

Assessment of Effects of Altered Stream Flow Characteristics on Fish and Wildlife: Part B: California

a. Inclusive State: California

b. Availability of the report: the report is available on request from the Cooperative Instream Flow Service Group*, and from NTIS** (refer to NTIS No. PB263245, PC:A04/MF:A01) at a charge of $7.00 for a paper copy.

7. FWS/OBS-76/34

Assessment of Effects of Altered Stream Flow Characteristics on Fish and Wildlife: Part B: California: Case Studies

a. Inclusive State: California

b. Availability of the report: because of its length, this report has not been distributed widely. It has been made available to the Fish and Wildlife Service Area Offices in California, the Central Office and the Regional Offices of the State Department of Fish and Game, and to selected libraries within the State. It can be obtained from NTIS (refer to NTIS No. PB263246, PC:A99/MF:A01) at a charge of $16.25 for a paper copy.

* Cooperative Instream Flow Service Group
U.S. Fish and Wildlife Service
2625 Redwing Road
Fort Collins, CO 80526

** National Technical Information Service
5285 Port Royal Road
Springfield, VA 22161
(703) 557-4690

BIBLIOGRAPHY OF SELECTED MATERIALS ON NEGOTIATION

Alberti, Robert E., and Emmons, Michael L., 1975, Your Perfect Right: A Guide to Assertive Behavior, Impact Publishers, 118 pages with bibliography. Books on assertiveness training are useful for anyone involved in bargaining because the first requirement for a negotiator is feeling positive about asserting his position and establishing his position without threatening the other side. Techniques to develop these attitudes are described and taught in books on assertive behavior. These books can help the reader to recognize assertive, non-assertive, and aggressive behaviors, to control these behaviors, and to use various diagnostic techniques.

Beckett, Paul L., and Lamb, Berton L., 1976, Establishing Instream Flows: Analysis of the Policy Making Process in the Pacific Northwest, Report, Project A-077-WASH. NTIS No. PB256-575. This study of how instream flow decisions are made now is immediately applicable to the Fish and Wildlife Service or governmental agency negotiator because of the insight it offers into how his agency or group operates. It emphasizes that decisionmaking is characterized by bargaining between agencies and by muddling through an organizational process or routine at the group level. As individuals, agency representatives often align with others of the same profession involved in negotiations.

Doerksen, Harvey R., and Lamb, Berton L., December, 1979, Managing the Rippling Stream: A Model of Decisionmaking in Natural Resource Administration, Water Resources Bulletin. This short analysis of decision-

making in agencies which administer water points out that agencies generally fall into three types of behavior: 1. Bargaining among agencies on policy; 2. decisionmaking based on habitual data-gathering and traditional patterns of procedure, and 3. incrementalism, adding new decisions to old ones to create gradual changes.

Druckman, Daniel, ed., 1977, Negotiations: Social-Psychological Perspectives, California, Sage Publications, 416 pages. This is a collection of 15 essays, including the most popular academic perspectives on negotiation. These are theoretical, the views of academicians, not the reflections of negotiators. This book makes an excellent companion to the Rubin and Brown volume, although many of the chapters duplicate the Rubin and Brown approach of summarizing research studies and reviewing the literature. The chapters include extensive bibliographies. In some instances, like most psychological analyses, the essays present a careful and detailed explanation of the obvious. The book is well worth reading, however, because of the breadth of approaches, methods, settings, and kinds of negotiation examined. The aspects of negotiation examined include:

> Motivational orientation; strategy; expectation for the other's behavior and outcome preferences; cognitive structure of conflict; nature of tasks, positions on issues; incentives and outcome preferences; ideologies and positions on issues; context for negotiation; bargaining tactics; bargaining strategies; type of bargainer and bargaining situation; information exchange; heuristic trial and error; bargaining of rhetorical aspects; role reversal; phases of negotiation; forms of coercion; contingent/non-contingent threats, offensive/defensive threats; types of punishments; commitment tactics; eight personality variables; type of negotiating dyad; situational regulators of face-saving, including monitoring/feedback from consitutents and other audiences, role-obligations, and third-parties; open vs. secret negotiations; stresses and tensions; number of parties, from bilateral to multilateral conferences; complexity; size of situation and uncertainty of information; alternative mediational mechanisms.

Edwards, Harry T., and White, James J., 1977, The Lawyer as a Negotiator: Problems, Readings and Materials, St. Paul, Minnesota, West Publishing, 484 pages. This widely available, readable text book for law school classes on negotiating draws on various sources, including sociologists, expert negotiators, mock negotiations and games, and summaries of labor negotiations. The chapters are necessarily a mixed bag, but the selections are fair representations of the authors' works, and the editors have made a thorough search of the available materials. The textbook format includes questions at the end of each chapter and suggestions for class projects and study techniques. Some of the chapters have good bibliographies.

Karrass, Chester L., 1970, The Negotiating Game, New York, World Publishing, 244 pages. This book distills 20 years' experience in negotiation, mostly buying and selling for Hughes Aircraft. It is written simply, with practical suggestions, in the tone of a feet-on-the-desk pep talk. In three sections, it covers an experiment conducted on professional negotiators (a mock lawsuit), an analysis of power, and the strength of powerlessness and aspiration for negotiation. It includes a review of Maslow's hierarchy of needs: survival, safety, love, worth, self-actualization. Karrass recommends inoculating negotiators against influence by practicing the arguments of the other side and by making commitments to one's own side before negotiations.

Karrass, Chester L., 1974, Give & Take: The Complete Guide in Negotiating Strategies and Tactics, New York, Crowell Publishers. This is a book of one-liners with one- or two-page stories to back them up. This collection of good advice based on experience and intuition is homey, easy to read, but unsystematic.

Nierenberg, Gerald I., 1971, Creative Business Negotiating, New York, Hawthorne Books. This book contains most of the same examples, quotations, and points found in Fundamentals of Negotiating, with some additional emphasis on these responsibilities of a negotiator: establishing objectives and alternatives; choosing the negotiating individual or team depending upon the skills or functions needed; defining the subject matter of negotiating long before the negotiation; fact-finding and breaking your premises and your opponent's premises into as many finely divided units as possible; and, analyzing the issues and positions of all parties.

Nierenberg, Gerald I., 1973, Fundamentals of Negotiating, Hawthorne Book Publisers, New York. This simple, clear book by a lawyer-negotiator, offering lots of quotations and good examples, is not a research text but a summary of gained experience. It points out that negotiation is neither a game nor war, with neither definite rules nor a set of values, and is difficult to control. Negotiation does not involve pure competition, but is a cooperative process, the result of cumulative efforts by all sides which are rewarded. Negotiation has no definite end, and is similar to the French definition of love, "cooperative egotism." Nierenberg reviews motivational needs at length, emphasizing the human traits in negotiation, and warns negotiators about them: rationalization, projection, displacement, repression, reaction formation, self-image development, role-playing, and "rational" behavior. The advice on tactics is useful and reinforced with examples.

Rubin, Jeffrey Z., and Brown, Bert R., 1975, The Social Psychology of Bargaining and Negotiation, New York, Harcourt Brace Jovanovich, 350 pages, 40-page bibliography. With Daniel Druckman's Negotiations, this is the most

important work available on negotiation. It is a summary of the findings of all social psychology research done before 1975 on negotiation and bargaining, and thoroughly reviews all of the academic, theoretical game strategy and other research available in English. The authors cover the general occurrence of bargaining and negotiation, characteristics of bargaining relationships; the chief research tools used by social psychologists in studying negotiation, the structural components of bargaining situations, including social, physical, and issue characteristics; negotiators as individuals; the interdependence of opposing negotiators, social influences on the process, and various strategies. The style is clear and understandable without being condescending, and the authors appear to have no personal commitment to any one mode or area of research that would distort their summaries. The text is mercifully free of quasi-mathematical or formula-generating therories. The most impressive things about the book are its extreme thoroughness and, in those areas susceptible to checking by the reviewer, its accuracy and freedom from bias.

Schelling, Thomas C., 1970, The Strategy of Conflict, Harvard. This series of essays in game theory covers areas of negotiation in which both a common interest and conflict between the negotiators appear, such as negotiations, war, distributive bargaining, and extortion. Five of the essays deal with international strategy, while another five have direct applicability to instream flow bargaining. Schelling assumes some sort of rationality motivates all human behavior, but includes irrational behavior in this category. Throughout, Schelling relies on prisoners' dilemma games for most of his examples, although he recognized that games are of little assistance in non-zero sum situations, where conflict is mixed with dependence. Schelling also discusses commitment, threat, and promises.

The most interesting point of this book is Schelling's elaboration of the principle of symmetry or obviousness, especially as it is used in tacit bargaining situations. Schelling explores thoroughly this phenomenon, in which a precedent, a physical thing, a mathematical or financial point, becomes an agreement point which is recognizable and unique. These focal points offer a clue or a signal to the bargainers because of their comprehensibility, mathematical simplicity, or unexplained attraction.

Southwester Legal Foundation, 1966, Negotiating and Drafting International Commercial Contracts, Matthew Bender. This collection of 11 papers about negotiating between parties of different nations is included here as representative of a number of similar works. This book consists of discussion of common law-civil law differences in perspective and practice, with a few tidbits of information, largely derived from experience rather than academic study, about negotiation. This volume stresses the importance of preliminary investigation and study and suggests that piecemeal negotiation is better than dealing with an entire agreement at once because the negotiator can begin with an agreement in principle on fundamental issues.

A number of books on the shelves with the word "negotiation" in their titles are really about another subject. This sort of book is useful if the particular substantive field is the one the reader is interested in; otherwise, the few nuggets of information the reader can transfer to his area of work are not worth the trouble of plowing through the book. For informational purposes, here is a list of some of the books of this sort in other subject areas:

1. Perry, Charles R., and Wildman, Wesley A., 1970, The Impact of Negotiations in Public Education: The Evidence From the Schools, Worthing, Ohio, Charles A. Jones Publishing Co., 250 pages, 3-page bibliography.

2. Glaser, William A., 1978, Health Insurance Bargaining: Foreign Lessons for Americans, New York Gardner Press, 260 pages. Reviews negotiations in establishment and administration of health services overseas.

3. Reed, Gregory J., 1978, Tax Planning and Contract Negotiating Techniques for Creative Persons, Professional Athletes & Entertainers, With Checklist and Forms, Detroit, New National Publishing.

4. Simkin, William E., 1978, Mediation and the Dynamics of Collective Bargaining, Bureau of National Affairs, 400 pages, no bibliography. Third-party mediation in labor relations.

Strauss, Anselm, 1978, Negotiations: Varieties, Contexts, Processes, and Social Order, San Francisco, Jossey-Bass, 275 pages. This book presents the "negotiated order" theory. While it has little practical assistance to offer the negotiator, this is a very interesting philosophical approach to negotiation as a central activity of all human experience. Strauss believes that all social orders are negotiated, including such diverse activities as the corruption of judges, the Nuremberg trials, and geriatric wards. He stresses the sub-processes of negotiation, such as trade-offs, kick-backs,

paying off debts, and compromising towards the middle. Strauss feels the structural context of a negotiation is the most important thing about it and affects everything that happens in the negotiation. Negotiated order theory downplays the notions of organizations as fixed, rather rigid systems which are highly constrained by strict rules, it emphasizes the fluid, continuously emerging qualities of the organization, the changing web of interactions woven among its members, and suggests that order is a goal for which the members of the organization must constantly work. Consequently, conflict and change are just as much a part of organizational life as consensus and stability. Organizations are thus viewed as complex and highly fragile social constructions which are subject to numerous temporal, spatial, and situational events both internal and external.

Walton, Richard E., and McKersie, Robert B., 1965, A Behavioral Theory of Labor Negotiations, McGraw Hill, 463 pages. This classic text on labor negotiation is useful for the student of negotiation in other complex long-lasting relationships simply because types of behavior are the same in various sorts of negotiations. Walton and McKersie find four types of activity in all labor negotiations: distributive bargaining, integrative bargaining, attitudinal structuring, and intraorganizational bargaining. Their work is based on their own study of the literature in labor negotiation, careful observation of actual labor negotiations, psychological games, and various aphorisms by such men as Ghandi. Labor negotiations always involve the possibility of strike, an atom-bomb-type weapon which instream negotiators may not have. Walton and McKersie offer close analysis of various types of negotiation and practical suggestions on both strategy and tactics. Their analysis of relationship patterns among negotiators is cited throughout the

literature of negotiation. Although to some extent it suffers the social psychologist's fault of reinventing the wheel, such as in recommending that a negotiator should make an effort to find personal points in common with his negotiating opponent, this book deserves its wide reputation. It includes an extensive bibliography.

Wassenberg, P.S., and Olive, Stewart, and DeMott, Janet L., August, 1979, Elements in Negotiating Stream Flows Associated With Federal Projects, FWS/OBS-79/03, Fort Collins, Colorado. This paper includes a general introduction, a review of myths about instream flows, evaluation of the types of recommendations and types of flow regimes which are available to negotiators, and two examples of the progress and results of negotiating situations, one successful and one less successful. This paper will prove useful to FWS negotiators.

CONCLUSION

Negotiation is a method of social decisionmaking, consisting of choices involving another party, accomplished by persuasion and haggling. Negotiators may choose between clearcut alternatives, but more often must balance and weigh values on the way to an agreement. Negotiators may or may not (a) define the issues in the same way, (b) gradually converge toward a compromise situation, (c) agree on the value of issues, and (d) agree on relative bargaining power. Most negotiations involve both bargaining and debate. Negotiators cooperate to increase their common interest; this generally leads to an increase in their individual interests. It is difficult to find a single standard by which to judge negotiations, negotiators, or outcomes. Bargaining reputation is extremely important, and face-saving is a powerful motive in negotiation. Negotiators are reluctant to yield or concede a point and are unwilling to acknowledge concessions they have made. For this reason, concessions may occur only in the context of a "this for that." Negotiating behavior is shaped by the context for negotiation, including the issues, their complexity, the team structure, and the team style.

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Mary Ray White, Felix D. Valdez, Michael D. White

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Valdez and Valdez
P. O. Box 62
LaJara, CO. 81140

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Negotiation is a method of social decision-making, consisting of choices involving another party, accomplished by persuasion and haggling. Negotiators may choose between clear-cut alternatives, but more often must balance and weigh values on the way to an agreement. Negotiators may or may not (a) define the issues in the same way, (b) gradually converge toward a compromise situation, (c) agree on the value of issues, and (d) agree on relative bargaining power. Most negotiations involve both bargaining and debate. Negotiators cooperate to increase their common interest as well as their individual interests. It is difficult to find a single standard by which to judge negotiation, negotiators, or outcomes. Bargaining reputation is extremely important, and face-saving is a powerful motive in negotiation. Negotiators are reluctant to yield or concede a point and are unwilling to acknowledge concessions they have made. For this reason, concessions may occur only in the context of a "this for that." Negotiating behavior is shaped by the context for negotiation, including the issues, their complexity, the team structure, and the team style.

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