An Interest-Based Approach
To
Dispute Resolution
In The Field Of
Environmental Restoration

By: James Chicanot
#9700789
For: Don Eastman
Date: April 6, 2000
ER 390 Final Project
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Introduction – Project Overview

Restoring degraded and/or impacted natural systems has finally been recognized as a crucial part of responsible land stewardship and management. However, there also needs to be a way that differences and problems can be resolved in the restoration field that provides the greatest opportunity for all parties involved to emerge satisfied that their objectives have informed any solution that is reached. Essentially, we should be after a win-win situation. This may sound extremely unlikely in the face of intrinsic value differences that govern various ecological restoration priorities and management strategies. Keeping this challenge in mind, my project will demonstrate how one Alternative Dispute Resolution technique may be used to address conflict in the field of restoration.

This paper will outline, “An Interest-Based Approach for Dispute Resolution in the Field of Environmental Restoration”. It will include the following:

- Establishing the restoration context and its inherent disputes
- A review of conflict theory and its relationship to environmental restoration
- An introduction to “Interest Based Negotiation” (framework and philosophy)
- An application of “Interest Based Negotiation” to work through a restoration dispute (case study - videotaped live)
- Conclusions and recommendations
- Reflections and comments from the project sponsor (ADR Education Ltd.)

Essentially, this paper aims to mix both the theoretical and practical aspects of a dispute resolution framework that would be most suited to the field of ecological restoration. The particular emphasis of the study will be to demonstrate a negotiation skill-set that can enhance communication and dialogue between the various people that restoration practitioners are likely to encounter in their work. It will illustrate the use of a staged process to handle manifest conflict by negotiating based on Interests rather than on Positions. Philosophically, this study is based on the notion that effective negotiations are characterized by the ability to satisfy each parties’ objectives without substantial compromise, giving-in or giving-up. My belief is that restoration practitioners are in need of skills that will also enable them to help restore the social fabric that forms the backdrop of environmentally related disputes.
Establishing the Restoration Dispute Context

Ecological restoration means different things to different people. The fact that these differences exist is natural and to be expected. However, when these differences are played out in a restoration project or initiative, problems frequently arise. Some might ask, “Why should these problems exist if we all want to restore a particular habitat that was degraded by human activity?” The simple answer is that many of us do have different ideas, objectives, and expectations about what and how things should be done to bring about ecological restoration. I believe that the field of restoration is particularly prone to these differences and that they are in fact inherent to most if not all related activities.

What leads me to make such a claim about a profession that is so valuable and beneficial to the wellbeing of our natural world? In part it rests on the notion that many of us feel extremely strongly when it comes to matters relating to the environment. These strong emotions inform our points of view in relation to the restoration/reclamations of impacted natural habitats. Not to mention the logistical issues (budget/funding, authority, public consultation etc.) that frequently act as stumbling blocks in various restoration projects. How do these features act to increase the likelihood and intensity of restoration related conflicts?

Restoring degraded/impacted ecological systems often involves the collaboration of various people’s expertise and input. In addition, stakeholder involvement and public consultation open the door for many others to express (or protest) restoration objectives. This frequently leads to ‘career adversaries’ with fundamental value based differences (First Nations, loggers, environmentalists, government, developers etc) ‘facing off’ over contentious issues such as:

- The fate of logged watersheds
- Cattle grazing in ecologically sensitive areas
- Mine reclamation in valuable wildlife habitat
- Tourism development in pristine natural habitats

These are but a few circumstances where significant differences among multi-party interest groups would impact the objective of restoration.
More Specific Examples

After speaking with some restoration practitioners and project coordinators, it didn’t take long to generate some material to illustrate some typical disputes associated with restoration initiatives. The following examples provide a very brief overview of some typical problems or issues that feature in this field:

The Horsefly River Restoration (sources: Robert Mills, Michelle Arcan).

Conflicts in this project were focussed around what measures should be taken with the limited budget to achieve the ‘maximum rehabilitation’ results. Various people had different (and strongly held) opinions. Some thought anchoring more large woody debris, others advocated up slope stabilization and there were some who thought bank protection (riparian restoration) was the way to go.

This project also featured significant problems with local farmers who’s cattle were grazing on the supposedly protected part of the Horsefly River where the restoration work was taking place.

Slope stabilization (erosion control) in the Squamish River Valley (sources: Jack Blair – Brinkman & Associates, Jamie Chicanot)

This was the first restoration project I was involved in and we were experimenting with wattle fencing on severely eroded hill slopes to prevent the exposure of underground gas pipe lines. In this case, there were differences between the project coordinator and myself about how to actually build the fences (since I had no idea and he had a moderate understanding of the process) and where they were to be placed to maximize protective cover for the pipe lines. There was also conflict between the project coordinator and a BC Hydro representative. These differences concerned; the pace of the work, the hydrological conditions required to make the fences root and act as erosion barriers and again where to best place the fences in order to realize the restoration objectives (reduce erosion and protect the underground pipe lines from being exposed).

Indian River Restoration (sources: Chris Knight – chief negotiator for the Tlawatuth First Nations, including reported information about the condition of the entire watershed generated by the Band and outside agencies – DFO, Ministry of Environment and reviewed by the writer).

This First Nation has embarked upon a massive initiative to restore the entire Indian River Watershed, which occupies a significant portion of their lands. It is located remarkably close to Vancouver (in the Port Moody area) and has suffered as a result of extensive logging in the past.
I was contacted to review, advise and subsequently facilitate the Band’s discussions with other stakeholders about how to proceed with this project. Unfortunately due to budgetary and other constraints, I was unable to do more than just review the documentation and talk with the Band’s negotiator.

A project of such enormous proportions is understandably full of conflict. According to the information I obtained, significant differences existed around who was responsible (among the multi-stakeholders) for the various prescribed restoration activities identified in the plan. There were also disputes over project funding, government involvement, cultural expectations, and work order (prioritization), to name but a few.

The preceding brief synopsis is merely intended to illustrate some typical dispute contexts that often characterize the field of ecological restoration.

**Understanding Conflict and its Relationship to Environmental Restoration**

After having set the ‘conflict scene’ for the field of ecological restoration, let’s look more closely at this thing we call conflict. The previous discussion used words like, differences, disputes, problems and issues to describe what went on in typical restoration projects. How do these terms relate to conflict, and what is it anyhow?

Conflict is simply a “divergence of expectations, goals, values or objectives”.
(adapted from Folberg and Taylor, 1988)

**Examples:**

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<th>If you and I have different expectations or ideas about the most efficient strategy for reclaiming an old mining road - we are in conflict.</th>
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<td>A project coordinator and hydrologist disagree about the most effective work order (bank stabilization versus sidechannel construction) to restore the upper reaches of a watershed – they are in conflict.</td>
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<tr>
<td>When a subcontractor hires a restoration student to do surveys and compile data and the two have different values concerning the allocation of funds for the work – they are in conflict.</td>
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A conflict becomes a DISPUTE when it has become particularized over an issue or set of issues. In other words, manifest conflict is the same as a dispute. Disputes may be addressed or resolved in numerous ways. These methods can be represented on a continuum. (pg. 5)
DISPUTE RESOLUTION CONTINUUM

VIOLENCE (fight)
NON-VIOLENT DIRECT ACTION
LEGISLATION
LITIGATION
ARBITRATION
MEDIATION
CONCILIATION
NEGOTIATION
INFORMAL PROBLEM SOLVING
AVOIDANCE (flight)

To apply these methods to the field of restoration, I will give examples of restoration type disputes and show how the different strategies could be applied:

*VIOLENCE: An individual pulling broom from a mountain park has a physical confrontation with a person taking firewood.

*NON-VIOLENT DIRECT ACTION: Blockading a logging road to prevent clear cutting of old growth forests.

*LEGISLATION: Injunction against protesters blockading a logging road.

*LITIGATION: Suing a mining company because during their reclamation activities they destroyed significant amounts of over wintering habitat for Coho salmon.

*ARBITRATION: Going to adjudication to convince a third party decision maker that the measures you took to stabilize an eroded river bank did not negatively impact the water quality in an adjacent farm.

*MEDIATION: A neutral (non-biased) third party being used to assist in a restoration contractor’s negotiations with a fisheries biologist with whom there is a dispute over services rendered and the fees attached to those services.
2. **Whether or not** there is excessive erosion, and **Either** you pay the tab or we do, and **Whether or not** the company is willing to face the public and issue a press release. Example two is clearly set up as a win - lose, zero sum game.

Interest-based negotiators use framing the issue (example 1) to help the parties see the potential for joint problem solving in a collaborative process. Once the issue is framed and all parties agree with its "repackaging", its time to find out what underlies and informs the positions that the parties take around issues.

**Stage III - Interests:** This is the time that the interest-based negotiator must employ a rigorous skill-set to facilitate the uncovering and articulation of interests. Essentially there are two broad methodologies for achieving these objectives; **Questions and Reflections.** The questions however are of a particular type. In Stage III, **open questions** are used to probe beneath positions and uncover interests. **Open** simply means cannot be answered Yes or No. The reason for this is that **closed (yes/no)** questions tell the parties very little about what is truly important to each of them and why? "Open questions are inductive and thus are risky, in the sense that the questioner cannot safely tell in what direction the conversation will go.. Unstructured, open questions encourage answers which provide unanticipated information, reveal interests, give clues to more hidden elements of a bargaining agenda and provide clarity." (Sloan, 1999)

The four types of open questions most commonly used in interest-based negotiation are:

**Probing Questions**

**Purpose:** To invite further comment, elaboration, and detail.

**Examples:**

(Note the underlined "lead-ins" in each type of question which aim to achieve the purpose mentioned above)

"I'd like to hear more about how you generated the logging plan for the upper reaches of the watershed?"

"Can you tell the Restoration Committee a bit more about site access?"

"What was it like when mining operations were shut down overnight?"
Stage III should not be misunderstood as solely a questioning exercise. It is true that the interest-based negotiator uses questions to uncover the objectives of the other parties, but she must also reveal her own interests (by way of disclosure) to ensure that her objectives are also on the table. In practical terms, Stage III is a discussion punctuated by not only questions and revelations but also with reflections.

**Reflective Skills**

The use of open questions is enhanced and reinforced by "feeding back" or reflecting answers to those questions, thereby completing the communication cycle. The purposes of reflections include:

1. Ensuring comprehension of the speaker's information
2. Demonstrating the quality and accuracy of the 'reflectors' listening ability
3. Acknowledging the importance of what is said
4. Repetition of the speaker's comments so other participants may hear it again
5. Fractionalizing the communication cycle to allow an interest to be isolated and repeated
6. Putting the speaker directly in touch with what he just said to allow it to "sink in"

Several reflective communication skills are recognized below:

**Restating:** Repeating/feeding back what the speaker has just said, being true to its content without parroting/copying word for word.

**Examples:**

1. (Speaker) "We wouldn't let just any group of environmentalists advise us on this matter, that's for sure."

   (Listener) "So you don't want to take suggestions from some arbitrary group of people."

2. (Speaker) "I don't care what the final cost is, as long as it is acceptable to my crew and this thing gets solved once and for all."

   (Listener) "So it's not the dollar figure attached to this issue that particularly matters, but your desire for finality in this dispute and your crew's support."
**Paraphrasing:** Restating plus editing - feeding back the speaker's statement tidying up its content, reading between the lines, emphasizing or suggesting an interest.

Examples:

1. (Speaker) "It's impossible to satisfy the restoration contractors, they are always wanting us to go the extra mile, it's typical 'green' behaviour."

   (Listener) "So you're used to being asked to do even more than you think is warranted in this project." (note - the cleaning up of the accusatory reference in this example)

2. (Speaker) "The stewardship committee can't be trusted. They break their promises routinely which leaves us in the hot water with the Department of Fisheries."

   (Listener) "You're concerned that promises have to be kept so people can rely on what's said and you want to be on good terms with Fisheries." (note - naming two interests explicitly)

**Summarizing:** Periodically gathering longer pieces of information (particularly interests) that have been identified and reflecting them back to the parties to remind them what they have both said and accomplished (emphasizing common ground and progress).

So why bother focussing on interests in a negotiation? The simple answer is that it provides a much greater opportunity to generate solutions. Interests act as the qualities that inform any solution. Stage III is therefore all about questioning to generate interests, reflecting them back, gathering them up, and then taking them as the raw material for which any solution or agreement is to be built. "Solutions are only as good as the extent to which they meet interests". (Gifford, 1989)

**Stage IV - Solutions:** At this point, the disputants have realized and been able to articulate their objectives (interests) and are often ready to explore ways to settle the problem that take these qualities into account. Various strategies are often used, these include; brainstorming and other forms of listing, suggesting quick fixes, generating objective criteria or indicators against which options can be measured, reality testing ideas, visioning exercises, and others. Some important things to keep in mind in this stage are; to encourage the use of creativity and imagination, select agreeable objective standards to measure potential options and make sure that solutions maximize mutual gain and are based on the interests of the parties' in conflict.
Application of Interest Based Negotiation to a Restoration Dispute

After laying the theoretical foundations for interest-based negotiation, establishing its relevance in the area of environmental restoration, and explaining a framework, an illustration of how it works is required. In order to demonstrate this application, a “live negotiation” (recorded on video) is included in this study. This negotiation will aim to resolve the restoration dispute outlined on the following two pages (17&18). This conflict situation is based on a variety of issues that are endemic to the practice of environmental restoration today. It is intended as a working case study to demonstrate the skills of interest-based negotiation and how they might be useful in a real situation. It will be demonstrated (on video) as a roleplay between two disputants; a Restoration Practitioner (played by Gordon Sloan) and a Farmer/Landowner (played by Jamie Chicanot). Mr. Sloan will be clearly demonstrating the interest-based skills as discussed in this paper to facilitate a collaborative solution with Mr. Chicanot. He will be following the model closely and illustrating the activities of each stage to help bring about an interest-based resolution to their problem. The following notes provide a description of the issues/problems between them and outlines the context and details thereof:
**Restoration Perspective** (represented by Gordon Sloan) You are the project coordinator for all watershed restoration initiatives undertaken by “Habitat Revival”, a not-for-profit environmental agency you work with as a volunteer. You have just received funding for a community-based creek rehabilitation project. The objectives of this project are to study, make recommendations and carry out restoration measures on a quasi-urban stream system. *Lakota Creek* runs mostly through public lands and eventually drains into the Town’s main reservoir. You plan to study and work on a particular section of the stream that lies adjacent to intensive small-scale farms.

After completing some initial surveys and mapping, your team discovers that some of the reach you intend to rehabilitate crosses into private farmland. As it turns out, almost one third of your intended study area is on private agricultural lands! All of a sudden access has become a major issue. The funding agency for this project is clear about where this work should take place and does not permit any deviations from “Habitat Revival’s” original proposal. Compounding this discovery is the fact that the section of *Lakota Creek* that runs through private property is quite impacted (riparian damage, bank erosions, lack of woody debris etc.) and would likely require the some measure of intensive restoration work. You can’t believe that this was overlooked during the initial funding proposal. Without access to this part of the creek you will almost certainly lose the funding and the project may fold altogether.

After discussing these findings with the project sponsors and “Habitat Revival’s” steering committee, you are advised to do “whatever you can to engage the landowner/farmer” to negotiate cooperation and access. It was also pretty clear from the meeting that unless you are able to do this, the funding (as suspected) will be withdrawn. Loosing this project would be a significant setback for “Habitat Revival”. *Lakota Creek* restoration could also represent an opportunity to partner with landowners and stakeholders in the area. Admittedly, you are quite skeptical about your chances of obtaining permission to work on private farmland. There is a history of mistrust between “farmers” and “environmentalists” in this district.

The farm is owned by a family who have been settled in this area for several generations. After some initial inquiries you learn that the day to day operations have been taken over by the eldest son of the owner (who’s now in his late 70’s, but still has the final say in all important farming matters). You have spoken to both the owner and his son who were very reluctant to discuss anything about their land, much less the idea of you “trespassing” onto it. Their distrust of “environmental types” was blatantly clear over the phone. After pleading with them to at least meet in person and hear you out, they agreed to give you an hour, but were clear that this by no means indicates a willingness to cooperate on their part.

Despite these odds, you are hoping to negotiate access to the creek on their land and be able to work there as the need arises. You need their cooperation and support, otherwise this thing is dead. You realize your chances of success may be slim and that your interest-based negotiation skills will be put to the test.
Farmer/Landowner Perspective (represented by Jamie Chicanot)  You have been wondering who all the people were that have been “snooping around” the farm for the last few days. You have seen small groups of them taking photos, writing notes and collecting various samples along the creek. You were ready to call the cops if they so much as put a foot on your property. You are now running the place with your Dad advising from the sidelines. He is quite ill and likely will not live too much longer. You will eventually assume entire control of the farm after his death. This farm was started by your grand father in the early thirties and it has been a true “family operation” ever since. Your family is extremely proud of what they have built and guard it very closely from anyone trying to interfere. It sounds like these “environmentalists” you heard from last week are trying to do just that.

You were quite surprised and also a little angry that you weren’t contacted before they “all of a sudden realized” that the creek crosses onto your property. You don’t trust these “environmental crusaders” who are usually out to get anybody trying to make an honest living from the land. This is your family’s land and you won’t let anyone tell you how or what to do with it. Besides you know much more about your land than any of them could with their cameras, shovels, test tubes, and university degrees. If they think that they can just walk onto the farm and start “fixing” the creek, they have another thing coming. Yet there is part of you that is quite fascinated by this “ecological repair stuff” as they call it, and have noticed some changes in the creek system over the last several years.

Your father told you to make whatever decisions you wanted at the meeting as long as the farm isn’t negatively impacted or burdened in any way financially. He made it clear that by him not being there, the task of protecting the farm from “intruders” is in your hands. You are glad to be able to call the shots on this one but you think things will probably remain the same unless this “environmental guy” has some impressive things to tell you. You don’t know much about the group “Habitat Revival”, and are quite curious as to what they intend to do with Lakota Creek and how they would propose carrying it out. Although you don’t know any details of their proposal, you get the sense that the section of creek on your property is crucial to their plans. You recall the last time a farm nearby allowed scientists to study it and the scathing report they generated afterwards. Whatever happens, you call the shots on your land and nobody is going to start screwing with your creek!

This stream plays a critical role in your farming operations. Every farmer knows the importance of fresh clean water. You would be the first one to improve Lakota’s condition if need be, but it has been fine so far, so why start meddling now? Whatever “Habitat Revival” decides to do, they must respect the value of this creek to your farm. Working with them seems extremely unlikely, but you told the guy you would hear him out, which will also give you a chance to set things straight for these so-called “reclamation experts”.
Conclusions and Recommendations

This project has studied the conflict context that exists in many, if not most restoration issues. It has discussed negotiation theory and demonstrated the application of interest-based negotiation to a restoration dispute. The demonstration (video) showed the use of process and skills to facilitate a solution based on the objectives (interests) of the parties involved. As my final project in the restoration program, I hope it will contribute positively to the understanding and resolution of conflict in the field of ecological restoration. As I mentioned at the outset of this study, restoration practitioners also need skills to effectively deal with disputes and thereby help to address the differences that exist in many projects. Interest-based negotiation is an invaluable technique for doing so.

I recommend that interest-based negotiation become a feature in the training of restoration practitioners. People in this field are in dire need of skills to help them deal with conflict in their work. Ecological restoration is inherently riddled with conflict. It must be addressed productively so the task of repairing/rehabilitating natural systems can continue efficiently. Interest-based negotiation will be useful in:

- Helping restore relationships
- Enhancing understanding between stakeholders
- Fostering trust between opposing interest groups
- Creating awareness of value-based differences
- Encouraging a collaborative approach in dealing with ecological issues
- Solving problems to the satisfaction of all involved

It has been a pleasure to extend my Alternative Dispute Resolution expertise to the area of environmental restoration. I hope that the Restoration of Natural Systems Program will consider my recommendations and explore the possibility of offering interest-based negotiation training to restoration students in the future.

Sincerely,

Jamie Chicanot
April 3, 2000

University of Victoria,
Restoration of Natural Systems Program,

Attention: Prof. Don Eastman

Dear Sir:

Re: Restoration Negotiation Project – Jamie Chicanot

By way of introduction, I am attaching a Biographic Note about me. My company, ADR Education Ltd. is involved in training and providing mediation and negotiation service to a quite diverse array of groups across Canada. I teach in the UVic Dispute Resolution Masters program administered by the Institute for Dispute Resolution located at the Law School and am an interested follower of the Restoration program.

I have been employing Jamie Chicanot full time as a trainer and administrator in this company’s programs since September, 1999. I have reviewed his project paper on Interest Based Negotiation of restoration problems.

I have been particularly interested in this project for its value in demonstrating a well proven negotiation system in an unproven context – that of habitat and natural restoration situations. I have also been interested in seeing the negotiation model used in the paper applied to a negotiation scenario on video.

The paper makes a convincing case for the use of interest based negotiation in these kinds of problems. The applications are legion – from access problems to multi-party disagreement over application of scarce resources to restoration and reclamation problems. Likewise, I think the video demonstration tape sets out how the negotiation model can be used to conclude a principled agreement which seeks to maximize the interests of both negotiators.

The paper will be useful in the work of this company. We are increasingly turning our attention to work in the environmental arena in B.C. and elsewhere. That is particularly the case where First Nation claims intersect with environmental/development interests. Already our work in Alberta includes development and preservation interests in planning
problems, the Special Places (protected areas) project and with the Department of Resource Development. The video will also be a useful demonstration tool.

Please do contact me with any further information you may need about ADR’s impressions of this work or, for that matter, any way in which we might be of assistance in the work of the Restoration of Natural Systems Program. I am highly supportive of the University’s initiative in starting the program and would be glad to see it continued.

Yours very truly,

[Signature]
Gordon Sloan
ADR Education Ltd.
Gordon B. Sloan

Biographical Note

Gordon Sloan is a mediator and lawyer engaged in general mediation practice and dispute resolution training. His degrees are in Religion and Law. A graduate of the University of British Columbia and Osgoode Hall (1975), Mr. Sloan practiced law for 12 years concentrating in civil litigation and commercial law before restricting his practice to mediation and conciliation in 1988.

Mr. Sloan is recognized in Canada and the United States as a general Civil and Commercial Mediator, Family Law Mediator and a Victim/Offender mediator in Criminal matters. He has conducted hundreds of civil mediations. He intentionally maintains a general mediation practice, from bilateral disputes in the midst of litigation to complex multi-party matters.

Gordon Sloan has extensive experience in process design and mediation of larger matters, including the facilitation of public policy, resource, land claim and environmental conflicts. These include land use problems, conflicts within churches, First Nation communities, governments and other large organizations. He has facilitated a number of national and provincial forums.

Mr Sloan is an accomplished dispute resolution lecturer and trainer. He has designed and conducted hundreds of training programs and workshops in negotiation, conflict resolution, mediation, consensus building, conciliation, problem solving and advanced mediation techniques. Sessions have included training of Provincial and Supreme Court judges, Native groups, Provincial and Federal Ministry Personnel, Provincial boards, councils and panels, facilitation with the Special Joint Committee on the Canadian Constitution, University faculties and departments, professional groups, industry and labour.

He has conducted conferences and workshops throughout Canada and a number of American states and has provided dispute resolution training in the fields of Law, Industry, Provincial Local and Federal Government, Education, Social Services and among the general public.
References


