

Adversity Within the Federal Government

David Allen's team members became faithful to one another by facing adversity together. They always faced long odds and highly dedicated opponents — from the paper companies and Wisconsin, but also from bureaucrats in the team's own agencies, who often worried about the consequences of the case.

On July 11, 1995, Frank Horvath gave Allen a dangerous Washington, D.C. assignment related to the Fox River Group of paper companies and the larger Fox River Coalition. Allen and Horvath had just spent weeks aligning U.S. Department of the Interior (DOI) managers to take a formal position against joining the Fox River Coalition, despite mounting pressure from Gov. Thompson, the Wisconsin Department of Natural Resources, the Fox River Group, and local elected officials. They had a draft letter to be signed by the Secretary of the Interior Bruce Babbitt, but senior agency officials wanted to give Senator Russ Feingold a preview to keep from blindsiding him. His environmental staffer, Mary Frances Repko, had been working for weeks to find a compromise that might be acceptable to DOI and the Fox River Coalition. Allen drew the short straw to inform her of DOI's position.

Allen left his field uniform behind and wore his best suit to the nation's capital. It was sunny and hot on his walk from DOI, across the National Mall, to the Senate office buildings next to the Capitol, but he tried not to sweat. He found his way to Senator Feingold's office and waited in the lobby. It was a busy place, and many people there treated him like he was an actual Washington insider, not a field biologist from the sticks.

Finally, Repko emerged from her office and greeted Allen. He did not waste any time and handed her the draft letter. She recognized it instantly, gave him a look of utter distress, collapsed into a chair, and said, "I can't believe you're going to do this to me." Allen thought, "Just great; my career is over." He said, "Why don't you read it. I don't think it's as bad as you fear." They then had a pleasant conversation, and she either agreed that the letter was workable or decided it was not worth cashing in many chips for the Fox River Coalition and against the Democratic administration.

Allen called everybody on his team, and they congratulated him for surviving relatively unscathed. They would continue this pattern for many years to come. They would work together to find credible positions that advanced their case, and one of them would deliver the news to audiences, some of them unhappy, as long as the team agreed with the substance of their positions.

Another obstacle emerged after 1996, when the Green Bay case became DOI's highest funding priority for any damage assessment in the U.S. For several years, Region 1 of the U.S. Fish and Wildlife Service, headquartered in Portland, Oregon, had been receiving most of DOI's funding for damage assessments, especially for the Coeur D'Alene mining case in Idaho, so they focused intently on Green Bay funding requests and began to demand that Allen and his team explain themselves. The Region 1 concerns were justified because their cases were quite important, even compared with Green Bay, and they had considerable experience with many issues that could help at Green Bay. Furthermore, they wanted to prevent Green Bay from setting any precedents that might hurt their cases. Still, it was easy to see that they also wanted to keep most of the DOI funding for themselves, regardless of the importance of the Green Bay case or the ability of Allen's team to make legitimate progress that could even help Region 1 with its own precedents.

In May, the Portland managers for the U.S. Fish and Wildlife Service and attorneys for DOI demanded that Allen fly to their offices with his attorney. At the U.S. Department of Justice

(DOJ), Susan Schneider suggested that Allen take DOJ's attorney Leslie Lehnert so that they could "sit at the feet" of Roger Helm, Dick Pedersen, and Don Steffeck from U.S. Fish and Wildlife Service Region 1, and their DOI attorney Barry Stein.

Allen took the opportunity seriously, partly because Region 1 really did have considerable experience and expertise in damage assessments, and partly to reassure his own legal team. However, he was also prepared to face potentially unfair complaints from his budgetary competitors. Pedersen and Steffeck were quite helpful, even supportive. They asked relevant and penetrating questions about Allen's case and offered insights about how they had collected credible evidence for their case. Helm seemed more suspicious that Allen's team might be naive and unnecessarily endangering his budgets. Nevertheless, he acknowledged that Green Bay was making legitimate progress.

Near the end of a couple of days in Portland, Barry Stein took over by treating Allen like a hostile witness in front of his real audience, Leslie Lehnert from DOJ. He asked Allen a series of questions about potential defenses that the paper companies might use, such as statute of limitations, federally permitted releases, and injury causation. When Allen tried to include context in his answers, Stein admonished him to simply answer his specific questions and nothing more. Stein was a good attorney and clearly well versed in damage assessments. On the other hand, it was obvious that Stein was trying to paint a picture of great litigation risk to influence Allen's DOJ attorney. It was also clear that Stein was more interested in painting that picture for Lehnert than helping Allen devise strategies for addressing potential arguments that might be advanced by paper company attorneys. So, Allen played along until Stein gave a knowing and satisfied look to Lehnert.

When Stein seemed to conclude, Allen asked him, in his most innocent tone, if he had answered all of Stein's questions to his satisfaction. Since yes, Allen explained that he would next offer a more complete picture about how his team was confronting statute of limitations, federally-permitted releases, injury causation, and the other issues Stein had raised. Of course, Allen had already discussed all of these issues with his entire legal team, but he wanted to paint a picture for Lehnert that was even more moving than Stein's. Allen suspected that Stein would have to give him a fair hearing, to avoid appearing unjust in front of Lehnert. Allen tried to show command of the details most relevant to Stein's legal questions without being defensive and without exaggerating. He wanted to acknowledge that his team also expected paper company arguments on these issues, that Allen's team had many facts and opinions on their side, and that they were following an assessment strategy aimed at addressing these exact issues credibly.

The Portland meetings were successful in an immediate sense. Lehnert and Allen maintained harmony about the issues Stein raised and about how their Portland colleagues were simultaneously helpful and likely to try to undermine Green Bay budget requests. They would need to arm Frank Horvath for the coming budgetary fights within DOI.

Frank Horvath represented the team at DOI's annual meetings where damage assessment funding was decided for the entire U.S. Every case team prepared detailed proposals each year. Then, representatives from every U.S. Fish and Wildlife Service region and every DOI bureau gathered in Washington, D.C., along with the leaders of DOI's Natural Resource Damages and Restoration Center, to determine priorities and allocations. As Green Bay came to national prominence, Allen's team increasingly became the target of bitter complaints about budget requests, as well as the underlying case. For years afterwards, Horvath and Allen referred to two of these meetings as "knife fights."

The first knife fight was in October 1996. Horvath was highly successful, with Green Bay ranking first in the country and receiving \$1.8 million for the year. However, he said that it was

one of the most unprofessional and discouraging interactions he had ever faced within government. A room full of bureaucrats in a metaphorical bare-knuckled fist fight to see who could win the most money for their region or bureau. DOI's Natural Resource Damages and Restoration Center and U.S. Fish and Wildlife Service's headquarters seemed wholly unsympathetic to substantive arguments from anyone, preferring to find transactional deals that would simply silence the controversy quickly. Green Bay's success was largely attributable to the fact that DOI's attorneys, Pete Raynor and Shelly Hall, both of whom sat in the center of DOI's damage assessment program, had taken the Green Bay case as their own, even if Horvath also had to provide credible justifications to survive.

Then, a year later in October 1997, just as Green Bay assessment activities and funding were peaking, the second knife fight occurred. Joan Goldfarb had replaced Shelly Hall as the DOI attorney for Green Bay, and Hall was now excited about her new case at Whitewood Creek, South Dakota. Hall claimed an extremely pressing issue related to statute of limitations. Plus, Hall enjoyed the involvement of multiple DOI bureaus and native American tribes. She also remained central to DOI's damage assessment program and now had dozens of DOI staff across multiple bureaus to help her spread the word. Unfortunately for Hall, experts in DOI Research, as well as damage assessment consultants, both began calling Allen to express alarm about proposals being advanced by the Whitewood Creek team to hire them for work they could not support in good conscience.

On October 8, 1997, Frank Horvath told Allen that the previous day's budget meeting in DOI had been disastrous. Shelly Hall had convinced the damage assessment center to give Whitewood Creek \$700 thousand, after a sustained attack on nearly every line of Green Bay's detailed budget and its case strategies by Hall, other DOI operatives, and U.S. Fish and Wildlife Service Region 1. Region 1, in particular, had carefully crafted arguments based on Allen's earlier meetings with them, and Hall even attacked the very economics strategies she had helped develop when she was on Allen's team. The DOI budget managers continued their transactional approach of funding whoever might otherwise cause them the most trouble.

Allen spent the rest of the day arranging an emergency meeting in Washington, D.C. Horvath and Allen would bring their experts to meet with Hall and DOI, but they would also make sure that DOJ was present, including Bill Brighton, DOJ's leading national expert on natural resource damage assessments. Furthermore, Allen launched a series of pointed emails requesting that his Regional Director, Bill Hartwig, immediately receive the basis for funding decisions for Green Bay and Whitewood Creek. On October 9, Frank Horvath's boss in the regional office told Allen that DOI's damage assessment chief had warned that Allen better "back off" if he wanted to avoid disciplinary action. Allen guessed he had hit a nerve, which meant he was exactly on the right track.

On October 15, Allen learned that Bill Hartwig was meeting about their funding with Fish and Wildlife assistant director Jamie Clark, plus Shelly Hall's supervisor Pete Raynor and unit chief Ben Fisherow in DOJ's Environmental Enforcement Section. Horvath's boss also followed up with Allen and said, "Never mind." On October 21, Horvath, Allen, and their experts traveled to Washington to meet with a large room full of their DOI detractors, but their main audience was Bill Brighton from DOJ. Hall pressed Allen at length about whether his team was following regulations. Allen and his experts answered in harmony. Allen guessed that Hall had not expected Allen's team to be so unified and so conversant with the exact same regulations. Allen and his team then explained how they were measuring recreational fishing damages and total values linked to restoration costs, and how they intended to integrate them, and how they would approach litigation, if needed. The meeting basically ended soon after Brighton opined that the Green Bay team had a sound strategy for using economics and following the regulations. On October 30, Horvath told Allen that Bill Hartwig had met with DOI, and Green Bay was receiving its full funding.

Frank Horvath continued to contend with DOI year after year for Green Bay budget requests. Between 1992 and 2001, Green Bay received a total of about \$7.5 million from the DOI Revolving Fund, plus another \$2.5 million from the U.S. Fish and Wildlife Service. Allen's team would not have succeeded on the case if Horvath had not led the way to win and maintain their budgets, with the full support of the team.