

CASE STUDY ON DISPUTE RESOLUTION FROM THE “BIG DIG”

IBA Annual Meeting Dublin, Ireland
3 October 2012

Joint Session of Mediation and International
Construction Projects Committees



AGENDA

- I. Introduction (JPM) (4 minutes)
- II. “Big Dig” Overview (KLD) (8 minutes)
- III. Case Study: “The Big Leak Dispute” (JRD) (8 minutes)
- IV. Mediation Process (KLD/JRD/JPM) (8 minutes)
- V. Lessons Learned (Discussion) (5 minutes)
- VI. DRB and Mediation Comparison (Discussion) (27 minutes)



I. INTRODUCTION

CASE STUDY PRESENTERS

Kurt L. Dettman

- Big Dig: Chief Counsel
- Principal: Constructive Dispute Resolutions (www.c-adr.com)
- Transportation Committee: Dispute Resolution Board Foundation (www.drb.org)

John R. Dingess

- Big Dig: Outside Counsel
- Managing Partner: Dingess, Foster, Luciana, Davidson & Chleboski LLP (www.dfllegal.com)

John P. Madden

- Big Dig: Mediator
- Principal: Madden Mediation and Arbitration, Ltd. (www.maddenmediation.com)



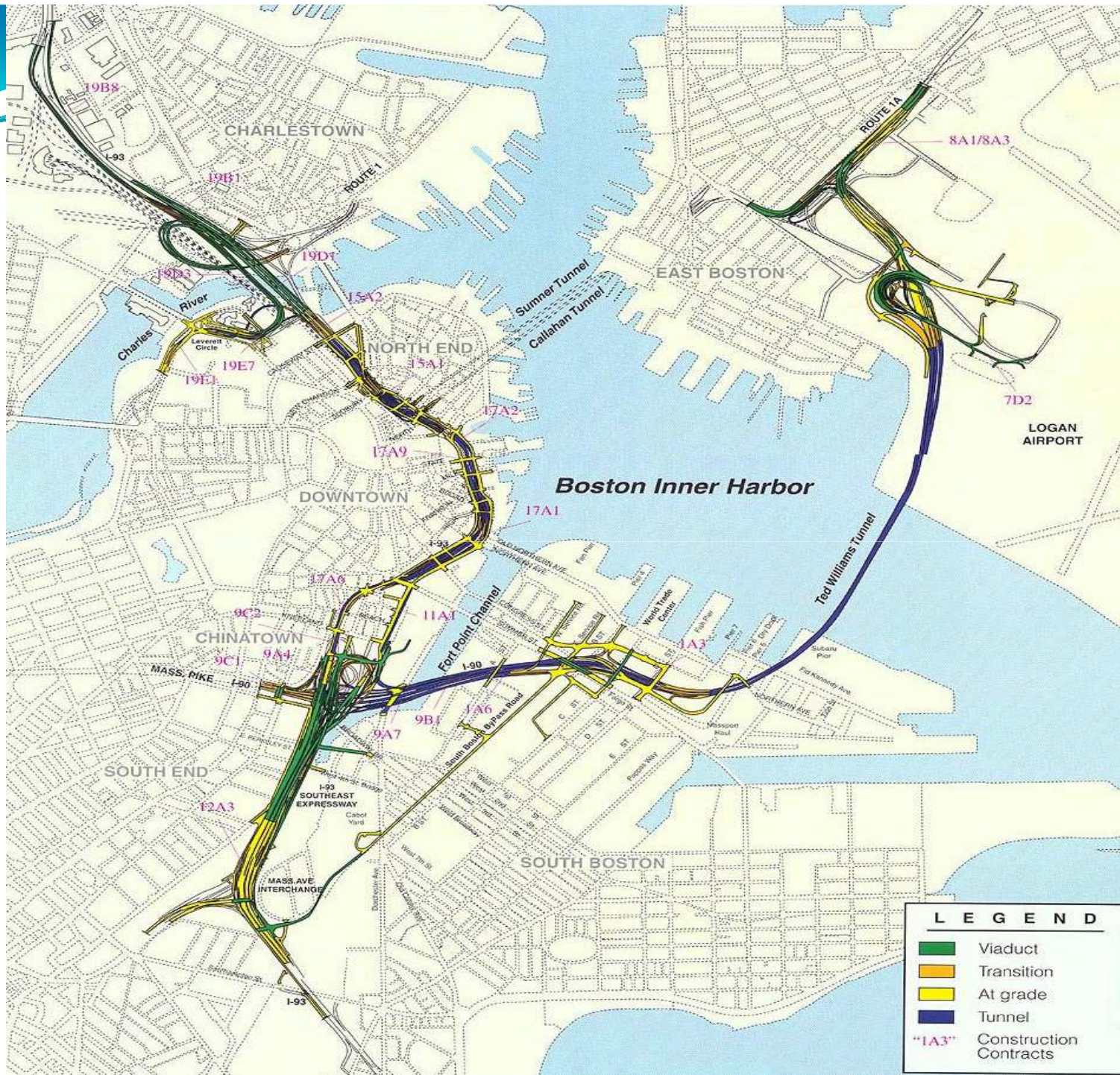
II. “BIG DIG” OVERVIEW

- General Big Dig Characteristics:
 - Urban Mega-Project: Scope, Time & Cost
 - Several Engineering and Construction Firsts
 - 50 Designer Packages; 124 Prime Constructor Packages
 - Shrouded in Controversy
 - Fraught with Politics (5 Governors; 4 Presidents)



Overview (cont'd)

- Intense scrutiny (audits, reviews, investigations):
 - Federal: FHWA, DOT, DOT IG, US GAO, SEC, DOJ, FBI and NTSB
 - State: Governor, Legislature, Administration and Finance, IG, AG and State Auditor
 - Professional: National Research Council (NRC), NRC's BICE and TRB and the National Academy of Engineering
 - Others: The Boston Globe and other media, bondholders and citizens watch groups



Overview (cont'd)

- General Scope
 - 7.8 highway miles
 - 161 lane miles (approx. ½ in tunnels)
 - 4 major highway interchanges
 - World's widest cable-stayed bridge
 - The Leonard P. Zakim Bunker Hill Bridge
 - 2 Immersed Tube Tunnel (ITT) Crossings (I-90)
 - Boston Harbor: The Ted Williams Tunnel
 - Fort Point Channel
 - 1½ miles of tunnels under the footprint of the old Central Artery (I-93)
 - The Thomas P. O'Neill, Jr. Tunnel



Overview (cont'd)

- Final Cost
 - Approximately \$15 billion

- Final Duration of Construction
 - 15 years (1991-2006)

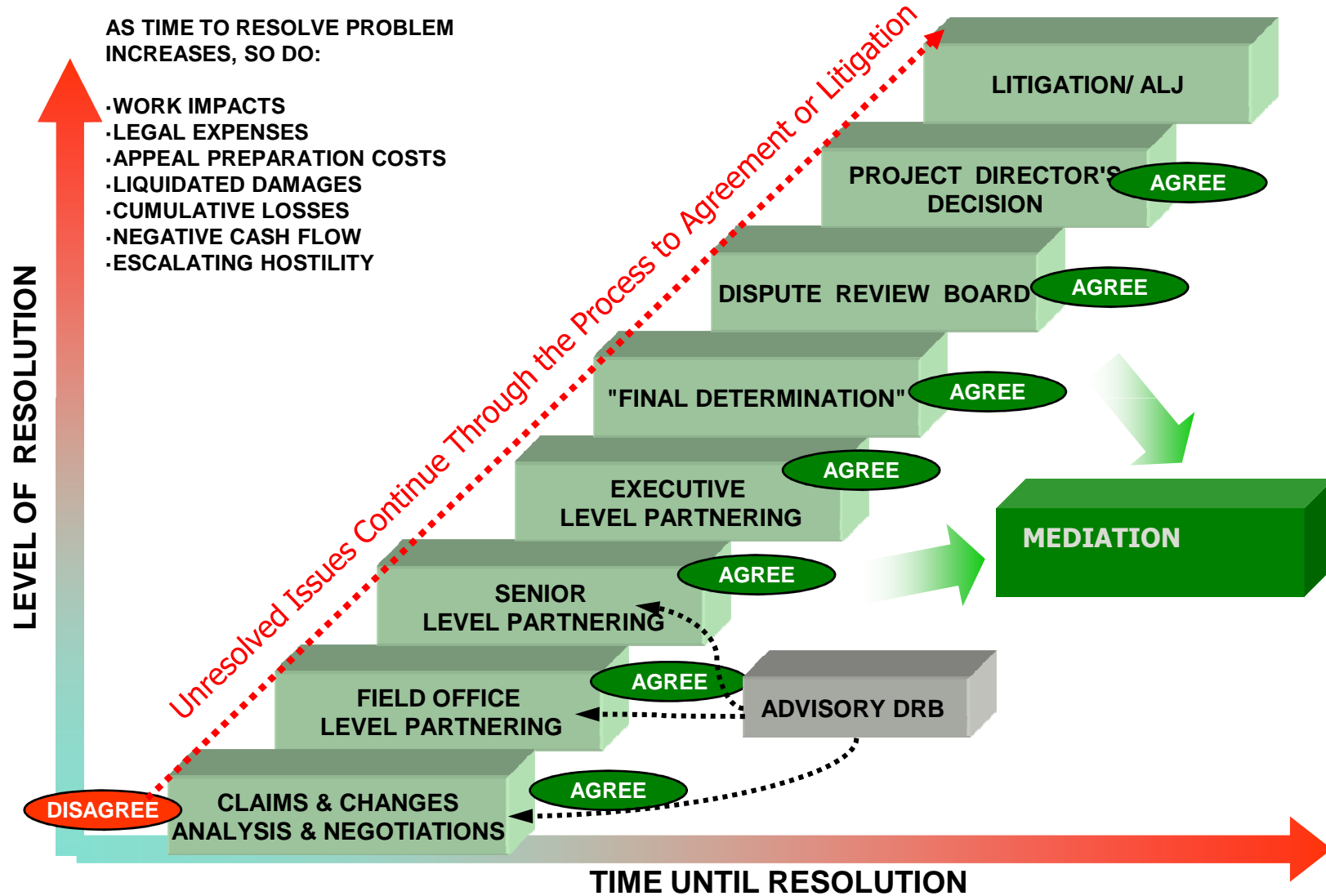


The ADR Program

- Goal: “Stay Out Of Court”

- Solution: Claim Filtering Process
 - Partnering/Negotiations
 - Claim Elevation (“Issue Resolution Model”)
 - Dispute Review Boards

Steps in Dispute Resolution Process



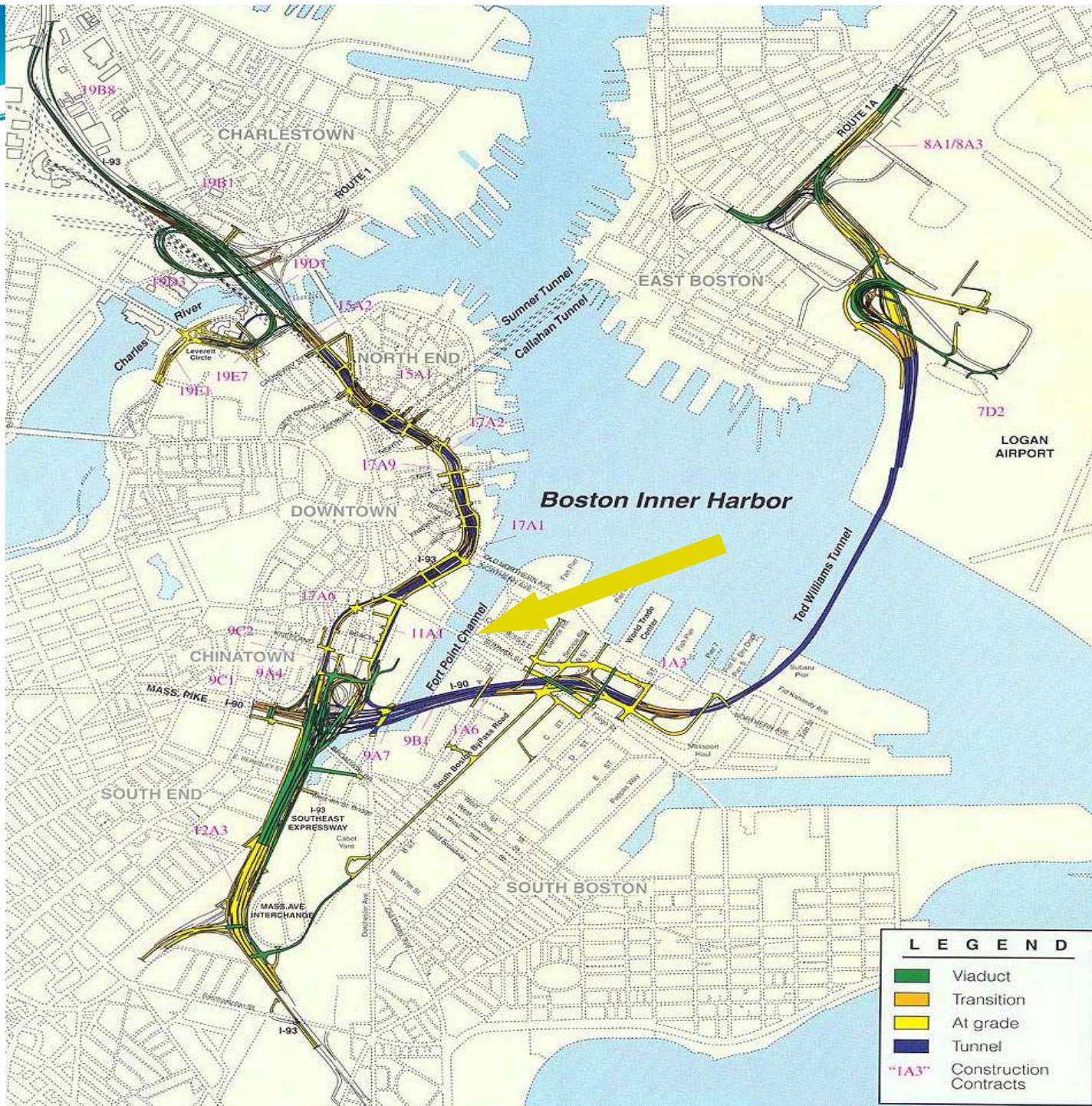


III. CASE STUDY: “THE BIG LEAK DISPUTE”

“THE BIG DIG’S BIGGEST CHALLENGE”

“The Fort Port Channel crossing is certainly the most technically challenging piece of the Big Dig. The channel, once a little-noticed backwater, divides downtown from South Boston. The 1100-foot-long, 11-lane-wide tunnel through it is costing over \$1,500,000,000 making it the most expensive highway per mile anywhere in the world.”

THE BIG DIG by Dan McNichol (Silver Lining Books 2000)





charlestown

east
boston

downtown

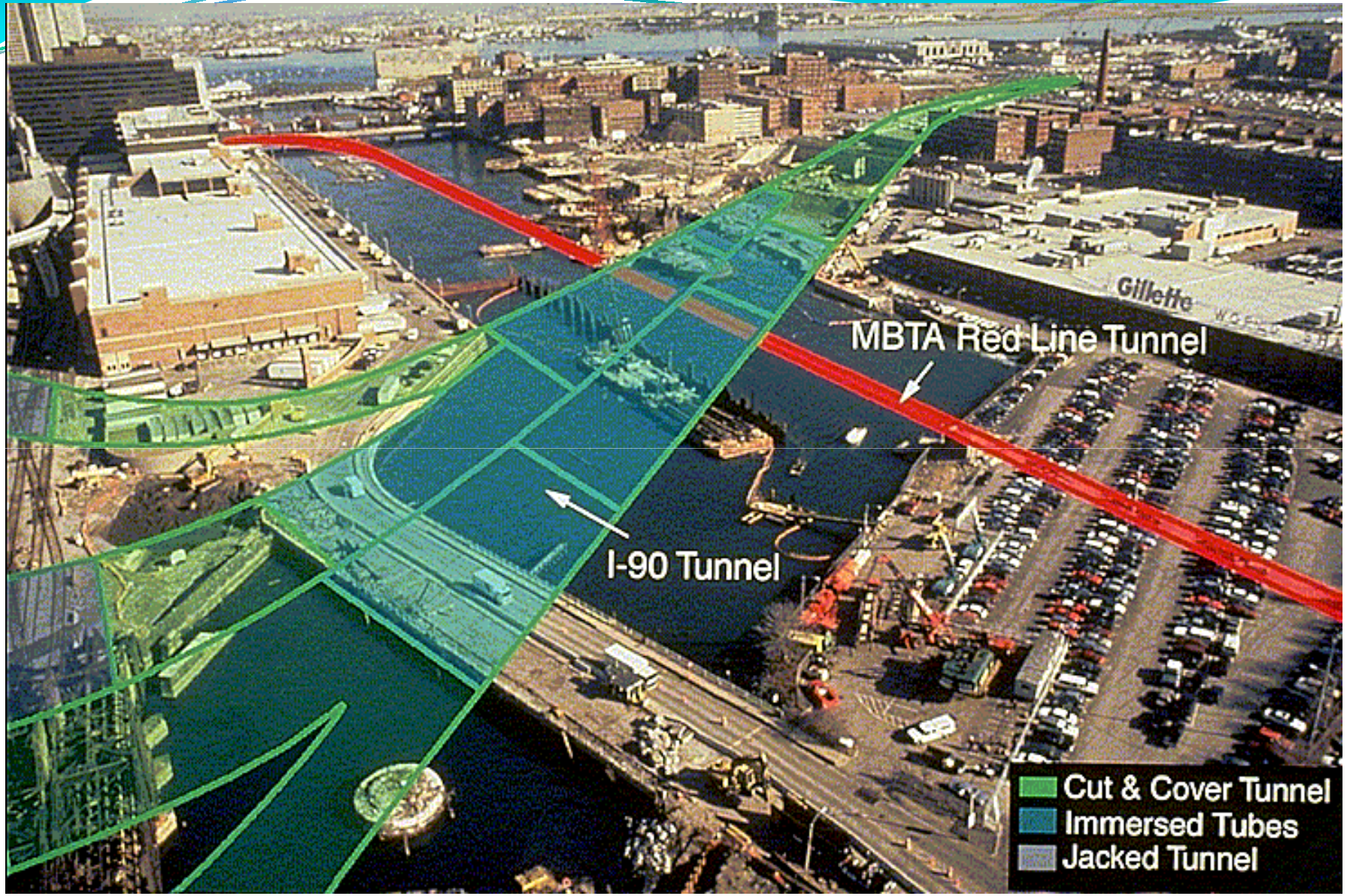
south
bay

south
boston

Interstate 90

Fort Point Channel Crossing









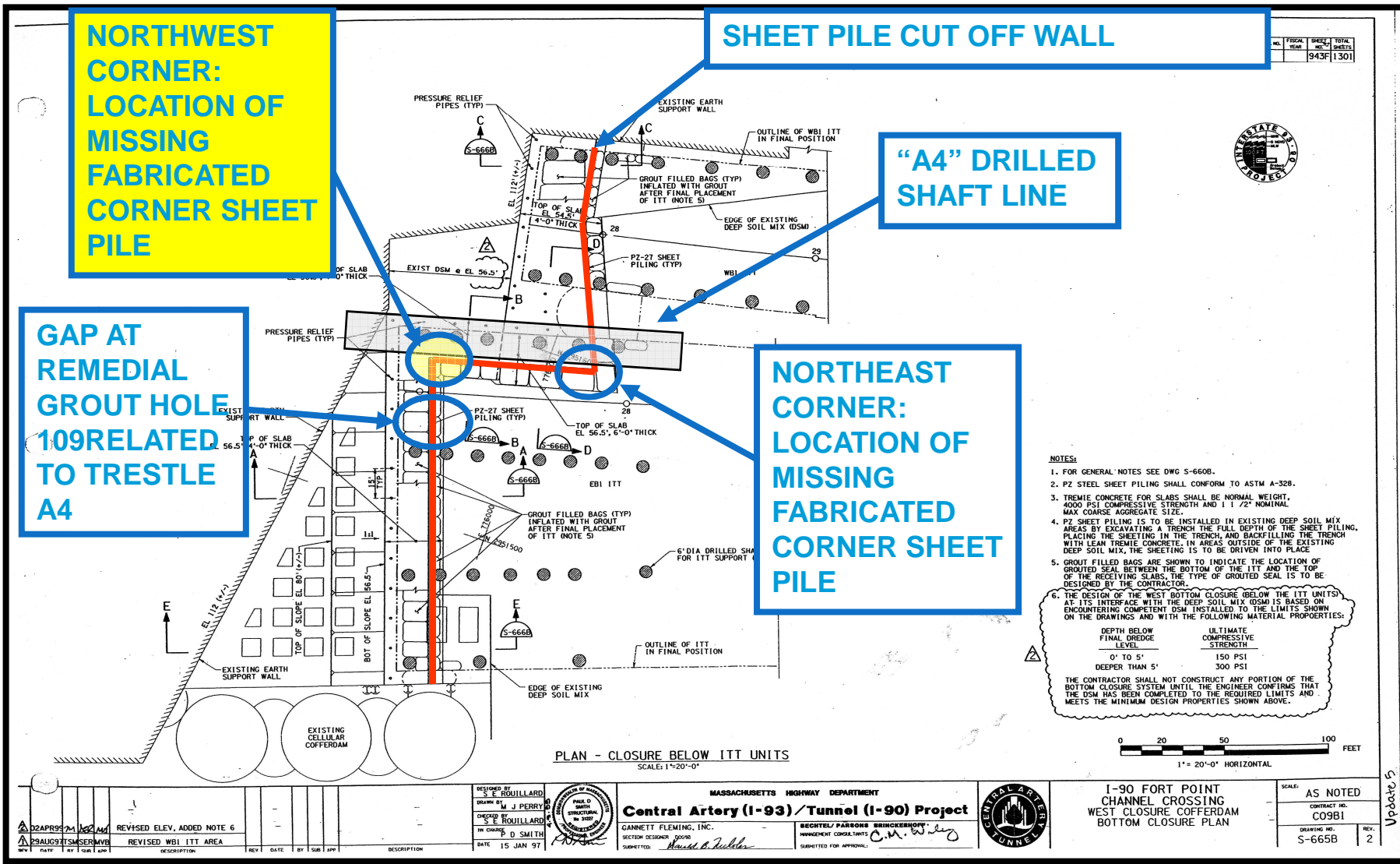
Case Study: “The Big Leak Dispute” (cont’d)

- On September 21, 2001 a 70,000 gpm leak erupted on the West Side of the FPC Crossing
 - Water pressure on the West Side threatened to move ITT’s off of drilled shafts
 - West Side bulkhead opened to relieve differential pressure flooding the East Side
 - Project was brought to a virtual standstill
 - Leak remediated by January 2002
 - We were engaged by the MTA in November 2001 to investigate cause of the leak and over \$100 million of claims both leak and non-leak related issues

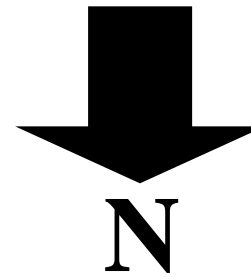
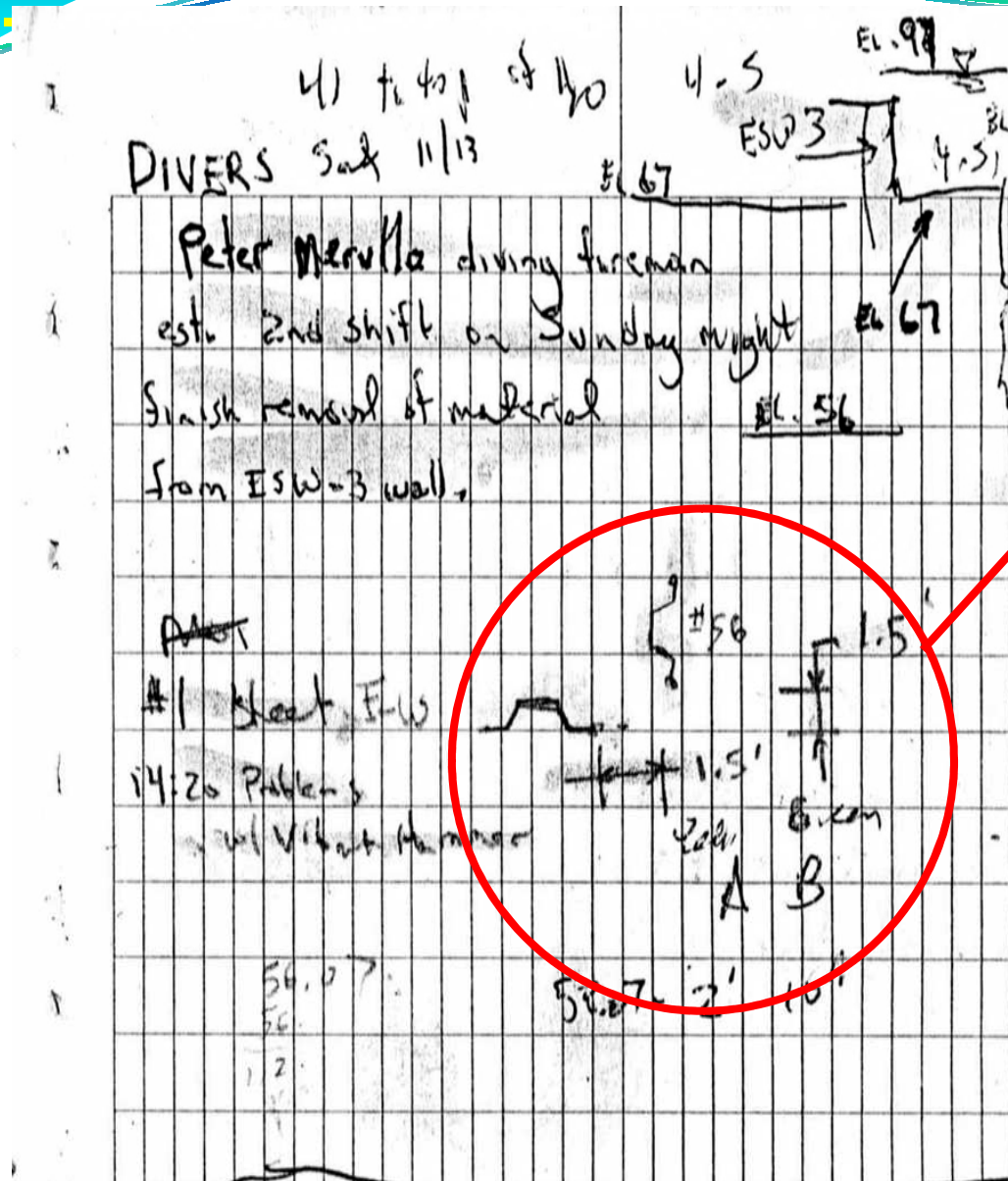
September 21, 2001 Leak



The Sheet Pile Cutoff Wall (Gaps at Corners)



Enlargement of 11/13/99 Sketch



Presence of two 1.5 foot gaps confirmed by recent interview of Field Engineer who prepared sketch of gaps.



Case Study: “The Big Leak Dispute” (cont’d)

- 2001: “The Perfect Storm”
 - Mass IG 2001 report issued alleging that:
 - In 1994 the Governor, the Project Director, B/PB and local representatives of the FHWA were all aware that the project estimate had grown to \$14 billion but cooperated to continue the “fiction” that it was “on time and on budget” at a cost of \$8 billion
 - The Commonwealth issued bonds intentionally withholding the true estimated project cost
 - The project had destroyed or withheld relevant project documents



Case Study: “The Big Leak Dispute” (cont’d)

- Project General Status as of Year 2001 (cont’d)
 - SEC securities law investigation
 - The Governor fired 2 of the 3 members of the MTA Board
 - Largest contractor had cash flow issues
 - Claim resolution log jam
 - Project at a virtual standstill



IV. MEDIATION PROCESS

- Positions On Cause of the Leak
 - Owner: Defective sheet pile water cut-off wall
 - Contractor: Defective deep soil mix
- Other Claims
 - Contractor claims for acceleration, delays, disruptions and scope changes
- Periodic Settlement Meetings
 - After 6 months of negotiations, parties at a stalemate
- Mediation
 - The Chairman and Judge from the Armed Services Board of Contract Appeals (ASBCA) agreed to act as mediators

Mediation Process (cont'd)

- Mediation (cont'd)
 - Multiple mediation sessions, including principals, consultants and others
 - Venue outside of Boston at a mutually agreed conference center
 - Cost information, estimate and other information exchanged
 - Mediators provided evaluative feedback
- Global Settlement Reached
 - Leak dispute catalyst to global settlement
 - “Reasonableness” statement of proposed settlement issued by mediators
 - Contractor accepted full responsibility for leak and related costs

Mediation Process (cont'd)

- Global Settlement Reached (cont'd)
 - Contractor reserved rights to pursue insurance coverage through Project OCIP
 - Claims on 10 other contracts resolved
 - Separate contract modifications negotiated for each contract
 - Obtained consent of sureties on each contract plus ratification of sureties' obligations
 - Releases obtained from Contractor for past, present and future claims
 - Global settlement and contract modifications signed December 31, 2002



Mediation Process (cont'd)

- Results of Global Settlement on Fort Point Channel
 - This became the Dispute Resolution Model for all outstanding major disputes and most were resolved
 - The Contractor had sufficient financial wherewithal to complete the last major portion of the Big Dig



V. LESSONS LEARNED

- ADR Process Was Overwhelmed
 - Multiple Contracts and Issues
 - Project Completion Push
 - Time and Complexity of Claims
 - Public Scrutiny



Lessons Learned (cont'd)

- DRB Process Would Not Work
 - Extremely Complex Claims
 - Would Require Weeks of Hearings and Attendant Costs
 - Example: Federal Reserve Bank DRB
 - Very Unlikely Either Party Would Accept an Adverse Recommendation
 - DRB Process Could Be Left in Place as an Option



Lessons Learned (cont'd)

- Mediation Offered Global Resolution
 - Team of Highly Qualified Mediators
 - Involvement of Senior Executives
 - Scorecard Issue Information Exchange and Negotiation Technique
 - Independent Evaluations
 - Auditable Outcome



Lessons Learned (cont'd)

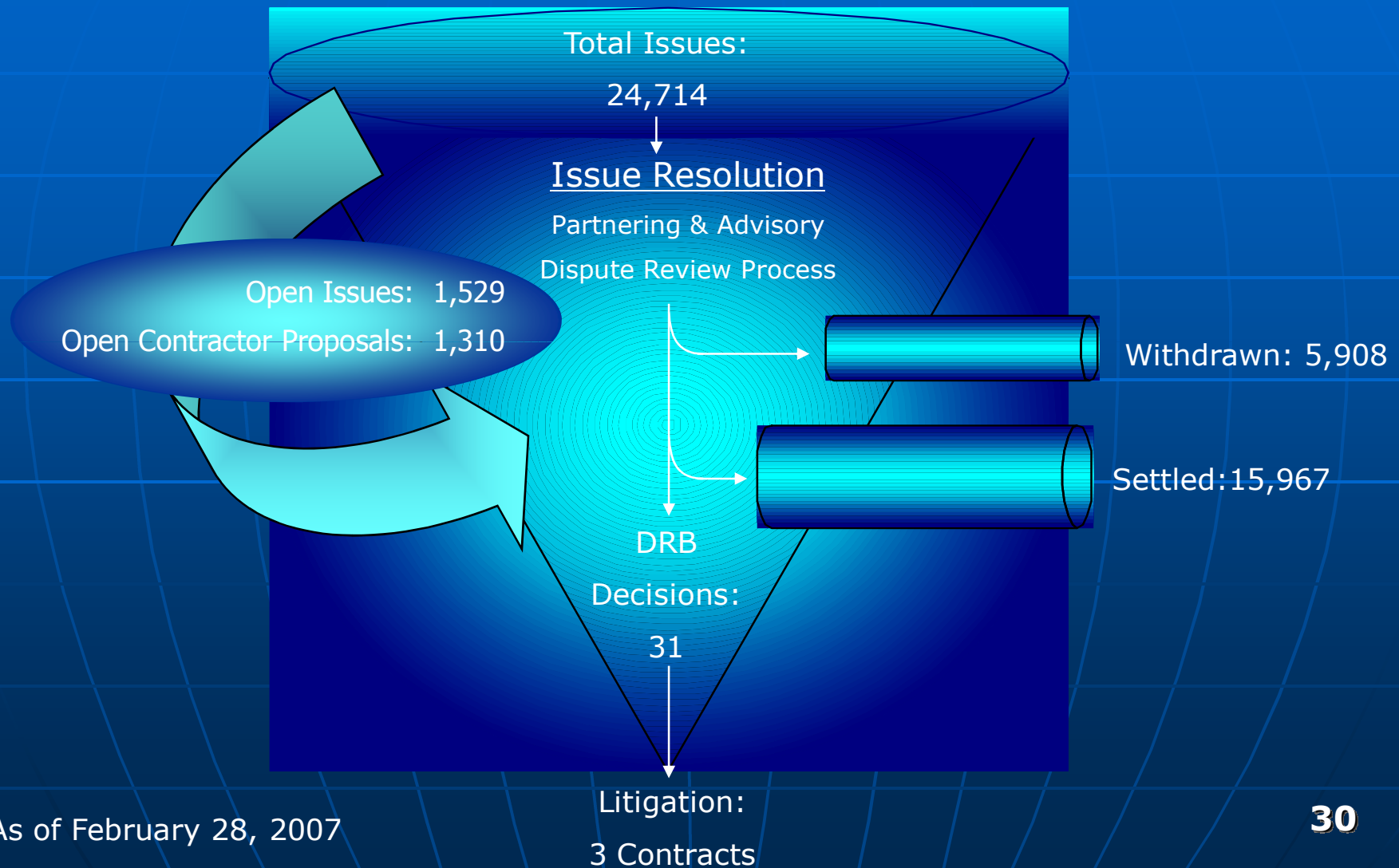
- Mediation Challenges
 - Co-Mediators
 - Many Players and Moving Parts
 - Lengthy Process With Multiple, Complex Claims
 - Process Coaching Was as Important as Substantive Negotiations



Lessons Learned (cont'd)

- ADR Creativity and Evolution
 - All Types of ADR Methods Used
 - Circumstances Required Re-thinking the Approach
 - A Hybrid ADR Technique: “Fit the Form to the Fuss”

CAT PROJECT CHANGES AND CLAIMS



The Zakim Bunker Hill Bridge (One Feature of the Big Dig)





VI. Discussion

DRB and Mediation Comparison

- Mauro Rubino-Sammartano, Moderator
- Kurt L. Dettman
- John R. Dingess
- John P. Madden
- Session Attendees