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thesis entitled

STATE INSTITUTIONALIZED ENVIRONMENTAL MEDIATION IN MICHIGAN: APPROPRIATE OR INAPPROPRIATE?

presented by

Nicholas P. White

has been accepted towards fulfillment
of the requirements for

M.S. degree in Resource Development

Major professor

Date 12-15-93

STATE INSTITUTIONALIZED ENVIRONMENTAL MEDIATION IN MICHIGAN: APPROPRIATE OR INAPPROPRIATE?

BY

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A THESIS

Submitted to
Michigan State University
in partial fulfillment of the requirements
for the degree of

MASTER OF SCIENCE

DEPARTMENT OF RESOURCE DEVELOPMENT

1998

ABSTRACT

STATE INSTITUTIONALIZED ENVIRONMENTAL MEDIATION IN MICHIGAN: APPROPRIATE OR INAPPROPRIATE?

By

Nicholas Paul White

Some states have institutionalized environmental mediation as one way of addressing complex natural resource conflicts. This thesis explores the question, "Is it appropriate for Michigan to institutionalize an environmental mediation program?" Every state is different in its political, economic, social, and environmental character. The variance among states makes it impossible to generalize how well a program might work from one state to the next. Hence, the question of appropriateness of having an institutionalized environmental mediation program will be studied through an exploratory analysis with the following criteria: cost effectiveness, time efficiency, existence of champions or adversaries, stakeholder perception of environmental mediation, stakeholder support or opposition to institutionalization of environmental mediation, funding availability, availability of skilled environmental mediators, and review of current literature. A survey and focus group are used to ascertain each identified stakeholder's private and public position regarding appropriateness of institutionalizing environmental mediation in Michigan. If a champion emerges in the future, the research indicates that institutionalization of environmental mediation by the state of Michigan would be appropriate.

For those that have the courage to work for resolution.

ACKNOWLEDGEMENTS

I wish to express my gratitude to family and friends who provided moral support throughout my pursuit of this master degree.

Thank you to my committee members, who each played different roles in the formation and completion of this thesis. Dr. Witter's continued faith in my ability helped me to endure this process.

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Definitions

Alternative Dispute Resolution (ADR) refers to theories and processes used to address conflicts that are different from traditional dispute resolution mechanisms (litigation, administrative appeal, and political influence). Examples of ADR techniques include mediation, facilitation, arbitration, consensus building, and policy dialogues.

Mediation according to Bacow and Wheeler is "one of several mechanisms available to disputants who wish to use a neutral third party to assist in achieving settlement. These mechanism are differentiated by their degree of procedural formality and the role played by the neutral third party in influencing the final settlement." (1987, p. 156) Mediation is a process that utilizes a neutral third party to promote communication and resolution by the disputing parties. In contrast to mediation, a judge (neutral third party) is bound by law and makes a ruling that is binding. A mediator does not make a ruling, but assists disputants in a resolution process. Typically the mediation is not bound by legal precedent, but by the rules that the parties and mediator agree upon.

Arbitration is a process where disputants agree to present their conflict (testimony and evidence) to a neutral third party and abide by the arbitrator's decision. Though the arbitrator's decision is normally legally binding, the decision is not necessarily based on law. Issues of equability and "wise decision" are usually incorporated into the decision process.

Environmental mediation refers to mediation processes and techniques as applied to natural resource conflicts. Though the term includes mediation, a specific form of ADR, environmental mediation is also used loosely to refer to facilitation, consensus building, and policy dialogues. In this paper environmental conflict management will be

used to refer to ADR techniques as applied to natural resource conflicts. Environmental mediation refers to the specific process of mediation as applied to natural resource conflicts.

For the purpose of this study, ***Institutionalization*** of environmental mediation refers to the creation of a formal program sanctioned and receiving at least partial funding from the State of Michigan. Other states have institutionalized environmental mediation by either creating an official office housed in the Governor's office, in a state court system, in a state agency such as the Department of Environmental Quality (DEQ), or an office within a state university.

Chapter 1

Introduction

Traditional conflict resolution through the judicial system has proven to require vast economic resources and time to address natural resource conflict problems (Bacow and Wheeler, 1987). Industry and environmental organizations face large economic barriers to fund litigation, while taxpayers money is spent to litigate cases that are brought by the state, counties, and local government to enforce regulations. Taxpayers also have litigation costs when the government is sued and must defend newly enacted regulations that other parties feel are too strict or violate their rights. Finally, taxpayers must pay litigation fees when the government is sued by another party for not enforcing regulations. In contrast, institutionalized environmental mediation has been shown to cost less and successfully resolve environmental disputes (Sipe and Stiftel, 1995).

In the United States, three methods for dealing with conflict have been developed. The first is the judicial system (file a lawsuit); second is to ask a government agency to address the conflict (engaging in administrative appeals within the agency); and third is to use political power to have local, state, and federal laws enacted or changed to resolve the dispute (Susskind and Cruikshank, 1987). These traditional ways of dealing with conflicts have been effective and appropriate much of the time. However, there have also been times when traditional conflict resolution techniques have not been effective. One such example is the Storm King dispute. This natural resource conflict utilized all three forms of traditional conflict resolution. For nearly fourteen years, the involved parties were engaged in their dispute with no resolution expected in the near future. It was not

until the parties used alternative dispute resolution techniques that a mutually agreed upon resolution was achieved (Talbot, 1983).

The last few decades have given rise to an alternative to traditional dispute resolution commonly referred to as Alternative Dispute Resolution (ADR). ADR techniques are now being used in many different fields: divorce mediation, labor conflicts, resolving internal staff conflicts, agricultural mediation, victim offender programs, community development, and natural resource disputes. As a result of dissatisfaction with the traditional ways of dealing with conflict the field of ADR has continued to grow (Folger & Jones, 1994).

ADR in the United States can trace its roots to the field of international diplomacy (Beckenbaugh, 1997). For over two centuries Americans have been experimenting and refining negotiation and dispute resolution techniques to deal with international conflict. With the industrialization of the United States and the resulting conflict between factory owners (management) and workers (unions) ADR techniques were applied domestically to labor negotiations and arbitration (Kressel, Pruitt & Associates, 1989). Today, many Americans have heard of mediation (one type of ADR) because of labor disputes. Recently, the news media frequently references federal mediators assisting with United Parcel Service and General Motors strike negotiations.

Since labor mediation and international diplomacy have been used in America for many years there is a fair amount of scholarly literature and research available. However, this thesis will focus on a newer field, commonly known as environmental mediation. Environmental mediation is a form of ADR that can be traced back to the 1970's (Crowfoot and Wondolleck, 1990). Since this field is still relatively new there is a

limited amount of literature. The literature that does exist has predominately been driven by practitioners.

Problem Area

One reason the field of ADR and environmental mediation has grown is the dissatisfaction with the inability of traditional dispute resolution techniques to address conflicts. It can take years and even decades to resolve complex natural resource disputes through the judicial, legislative, or administrative appeals process. In addition to requiring time, monetary costs can be high due to legal fees and increased project costs due to inflation delays in production and construction. Finally, there are times when traditional dispute resolution, such as a lawsuit, is not capable of creating a resolution. The United State's judicial system is designed to make rulings based on points of law and judicial precedent, not to look for a solution that is mutually beneficial for the litigants. In contrast, environmental mediation has been designed to allow parities to seek mutually beneficial solutions if they so choose. Additionally, environmental mediation can result in saved time and money (Susskind, 1987).

Based on the benefits that mediation has produced, individual states began to formalize the process of environmental mediation. This formalization of environmental mediation resulted in the institutionalization of environmental mediation by state governments. Susskind (1987); Sipe and Stiftel (1995); Kressel, Pruitt and Associates (1989) have shown that state institutionalized environmental mediation programs have been beneficial. Since 1984, state programs have lasted through multiple gubernatorial administrations, changes in party control of legislative bodies, and an economic

recession. The longevity is an additional indicator that state mediation programs can be effective and are valued by states.

Michigan

Like other states, Michigan has struggled with balancing industrial growth and natural resource management. Michigan has approximately 88 superfund sites in Michigan (DEQ, 1997). The second largest revenue in Michigan is agricultural production, yet Michigan has lost approximately 1,000,000 acres of agricultural land in the last decade (Michigan Department of Agriculture, 1997). Michigan is surrounded by the world's largest source of fresh water yet the United States Environmental Protection Agency (EPA) has issued a human consumption advisory for fish caught in the great lakes (EPA, 1997). Michiganders have traditionally relied on Michigan government to resolve natural resource conflicts; Department of Environmental Quality (DEQ), Department of Natural Resources (DNR), and Michigan Department of Agriculture (MDA). Over the last few decades both environmentalists and industrialists have expressed frustration with Michigan's traditional way of dealing with natural resource conflicts.

Michigan's executive and legislative bodies are politically split. The Governor is a second term Republican, seeking a third term. Both the Democrats and Republicans generally view the Governor as a powerful individual. In the past, Governor Engler has not been afraid to engage in political battles in order to accomplish his goals. The Michigan Senate is also controlled by Republicans, 22 to 16. The Michigan House of Representatives is under Democratic control, 57 to 53. This political division makes Michigan unique politically.

In 1995, Governor Engler split the then DNR into two separate agencies, DNR and DEQ. This resulted in pollution management and most regulatory divisions (DEQ) being separated from flora and fauna management (DNR). The Governor touted this split as an action that addressed complaints of inefficiency and a slow permitting process. Environmental groups said it was a political maneuver to weaken environmental protection and enforcement. Currently industry and environmental groups are dissatisfied over the amount of regulation and the amount of time and resources it takes to resolve regulation conflicts.

"In 1986 the Michigan Citizens Commission to Improve the Courts recognized Alternative Dispute Resolution methods and encouraged the courts to support such services. The Community Dispute Resolution Program (CDRP) was established by 1988 PA 260 to help fund community dispute resolution centers which provide conciliation, mediation, or other forms and techniques of voluntary dispute resolution to persons as an alternative to the judicial process." (Michigan Mediation Training Manual, 1994). However, community dispute centers do not have staff trained to address environmental conflicts or the mandate to do so. Hence, the institutionalized community mediation program addresses neighborhood, school, human service agency, business, and court referred disputes.

Problem Statement

Even though environmental mediation has been institutionalized by some states (FL, HI, and MO are reviewed in this research), it is not clear if it is appropriate for the State of Michigan. Every state is different in its political, economic, social, and

environmental character. The variance among states makes it impossible to generalize how well a program might work from one state to the next.

Since the State of Michigan's traditional natural resource conflict management methods have not resolved some current and pending conflicts, this thesis studies the question, "Is it appropriate for Michigan to institutionalize an environmental mediation program?" As stated earlier, research has shown that institutionalized environmental mediation programs have resulted in savings of time and money. Hence, the question of appropriateness will be analyzed with the following criteria: cost effectiveness, time efficiency, existence of champions or adversaries, stakeholder perception of environmental mediation, stakeholder support or opposition to institutionalization of environmental mediation, funding availability, availability of skilled individuals mediators, and review of current literature. The political, social, and environmental complexities involved in the question of appropriateness prevent this study from providing a definitive answer. However, this study will "fill a knowledge gap" that currently exists.

Literature

The United States has seen an increase in ADR for addressing conflicts. "In the past ten years, there has been a quiet revolution in the field, and formal mediation now plays an increasing role in virtually every significant area of social conflict." (Kressel, Pruitt, & Associates, 1989, p. 2) Since domestic mediation has grown quickly, traditional research centers (universities) were not generating theory proportionate to the growing need. A few academicians from various fields, such as urban planning and natural resource policy have initiated research programs. The result of the theoretical void is a

field driven by practitioners. In the last decade there has been an increase in scholarly research, yet this research is still coming from a variety of fields; communication, urban planning, public policy, natural resource policy, and resource development.

General Mediation Theory

New Directions in Mediation, edited by Folger and Jones (1994), reviews the increased use of mediation and ADR process in America. "Mediation and ADR are becoming institutionalized. For family and marital disputes several states now require mediation for all custody issues in divorce cases." (Folger & Jones, 1994, p. viii) The increased use of mediation is attributed to social changes, support by bar associations, and increased public awareness from high profile international and labor interventions.

The contextual nature of mediation is explored in New Directions in Mediation, particularly how different communication techniques can influence the outcome of disputes. The concept that contextual factors are crucial to mediating the mediation process outcome has influenced the design of this study, resulting in a contextual paradigm. A strictly quantitative approach could provide beneficial insight, but it would ignore the importance of the context in which institutionalization of mediation occurs.

Even though New Directions in Mediation does not discuss environmental mediation, the studies and conceptual frameworks are appropriate for environmental mediation. The judicial system is a structured system that allows disputes to be addressed in a predictable manner, yet this can prevent the opportunity for exploration of creative resolutions. In particular, the judicial system typically is bound by legal precedent and law, making judgment for one party and against another. As Folger and Jones discuss, mediation allows the parties to search for new possibilities and explore resolutions that

may not exist under the judicial system. This is particularly appropriate for natural resource disputes. Many natural resource disputes have complex scientific, social, economic, and policy implications. A court ruling usually focuses around a particular law; was an environmental impact statement done, appropriate public input allowed, or did a natural resource regulating agency act arbitrarily and capriciously. The rulings do not necessarily address the social, economic or policy implications of the conflict. Mediation can allow parties to explore the substantive issues that created the conflict.

Environmental Mediation

In Environmental Dispute Resolution, the authors use multiple case studies to explore the nature of environmental conflicts, practical experiences of mediators, opportunities and obstacles for environmental mediation, and theory (Bacow and Wheeler, 1987). Through discussion of the case studies it is shown that resolving environmental conflicts with the judicial system can be financially costly and a time consuming. Though environmental mediation is not a panacea, it can provide resolution to some environmental conflicts while saving time, money and addressing the concerns of all disputing parities.

Susskind and Cruikshank (1987) in Breaking the Impasse outline theory and practice of dispute resolution. They outline traditional dispute resolution (judicial, administrative appeal, and political change) and alternative dispute resolution (facilitation, mediation, arbitration, consensus building). Additionally, they look at the appropriate and inappropriate circumstances in which to use mediation.

Sipe and Stiftel (1995) use an empirical framework to analyze environmental mediation. Their study focuses on questions of time and monetary efficiency, as well as a

"better quality settlement" (Sipe & Stiftel, 1995, p. 140) in comparison to litigation and administrative hearings. Florida has institutionalized environmental mediation in two different programs; circuit court mediation program (since 1987) and a pilot program in the Department of Environmental Protection. A total of 19 cases were examined, with a 73.3% settlement rate. A survey of the disputants showed that $75,000 (median) was saved per party. Respondents (89.9%) indicated very or moderate efficiency in terms of time savings. Sipe and Stiftel's article is one of the few pieces of research using quantitative methods in the environmental mediation field.

Institutionalization of Environmental Mediation

Currently the available literature on institutionalization of environmental mediation is limited. Occasionally a chapter or short article addresses the issue. In The Mediation Process: Practical Strategies for Resolving Conflict Christopher Moore (1996) focuses on the process (structure and implementation) of mediation. However, Moore concludes his book with an analysis of the future challenges for the field of mediation. According to Moore, one area of change is the continued movement of mediation from an ad hoc basis to an institutionalized basis. Moore feels that the process of institutionalization has been assisted by the more formalized training that mediators have been receiving, but "mediation must become more highly institutionalized." (Moore, 1996, p. 374) The increased institutionalization will allow the broader public to benefit through increased accessibility. Finally, Moore identifies areas that he feels need advancement and which will continue to grow, conflict management and the global environment is one such area. Moore specifically identifies transboundary conflicts, such as air pollution and limited water resources (1996, p. 378).

Research Design

The Michigan Legislature and the Governor are constitutionally charged with creating state policy and law. State agencies such as the DEQ, DNR, MDA are charged with implementing the policies and laws. The legal profession (lawyers, judges, Attorney General) interprets the laws when questions arise. Through direct and indirect pressure environmental organizations, Michigan Chamber of Commerce, Michigan Chemical Council, and other organizations have an ability to influence lawmakers. All of the aforementioned groups are stakeholders in the question of the appropriateness of institutionalizing environmental mediation in Michigan and will be studied because of their stakeholder status.

Each stakeholder group has the power to implement laws or influence the implementation of laws. Their public and private position is crucial in determining the appropriateness of institutionalizing environmental mediation in Michigan. The private position of stakeholders will be studied by using a confidential purposive nonprobability survey (Appendix A). Purposive nonprobability surveys involves identifying the population and purposefully surveying specific members of the population, in this case the leaders and public representatives of the population.

Public position of the stakeholder groups will be ascertained by using a modified focus group. Cost and time prevent using the standard 6-10 person focus group, replicated 3-4 times. Instead the focus group will be composed of one representative from the legislative body, one representative from the DEQ, one representative from the legal community, one representative from the environmental organizations, and one representative from the industry. The intent of the focus group is not for one person to

represent the entire community. However, each representative has the potential to begin a public debate of the appropriateness of institutionalizing environmental mediation. With a diverse group, the public debate has the potential to raise new concerns and ideas specific to Michigan, issues that would not be raised by the survey, allowing a more thorough analysis.

Contributions of the Research

The purpose of this study is to examine the appropriateness of institutionalizing environmental mediation in Michigan. If it is shown that environmental mediation is appropriate then taxpayers, industry, environmental community, and state agencies could save time and money that can be used to address other problems. If it is shown that environmental mediation is inappropriate then taxpayers and state agencies could avoid wasting time and money by investing in a program that would not be beneficial. Additionally, industry and the environmental community will not waste their time participating in a program that would not be as effective as currently available resolution techniques.

This research provides other states that lack institutionalized environmental mediation programs with a better understanding of the issues to consider when deciding on the appropriateness of such a program in their state. "Development (dispute resolution) on the legislative, executive, and judicial fronts are generally occurring faster than the research can advance to offer guidance and direction." (Kressel, Pruitt & Associates, 1989, p. xiii) Since there is very little research literature on the appropriateness of institutionalizing environmental mediation by states, this research shall contribute to the scholarly knowledge base and society.

Organization of Thesis

This thesis is organized into six chapters. They are Chapter 1 Introduction, Chapter 2 Literature Review, Chapter 3 Michigan, Chapter 4 Research Methods, Chapter 5 Findings, Chapter 6 Conclusions & Recommendations.

Chapter 2

Literature Review

As was stated in the introduction, the field of Alternative Dispute Resolution (in particular environmental mediation) has grown quickly in the last few decades. As such, the amount of available scholarly literature is limited in comparison to more established fields. However, this characteristic of a practitioner driven field is changing as more research and theory emerges.

Background

During the late 1960's and 1970's the federal government created new environmental laws such as the National Environmental Policy Act (1969), Endangered Species Act (1973), and Clean Water Act (1972). These laws not only provided government agency with enforcement authority but provided individuals and organizations with new methods of addressing environmental concerns. Some have argued that federal and state environmental laws are too restrictive, while others have argued that the environmental laws are too lax. Regardless of ones point of view regarding environmental regulation, it is clear that over the last 30 years the courts have become increasingly involved with environmental conflicts.

In Breaking the Impasse, Susskind and Cruikshank (1987) argue that our society and public leaders are at an impasse. This impasse exists with environmental conflicts and other public policy issues.

> "Four out of every five times the Environmental Protection Agency (EPA) issues new regulations, its lawyers wind up in court fending off industry's claims that the agency is being to tough on them, or fighting environmentalists' charges that it is not being tough enough. Other agencies also find that their judgments are constantly challenged, in many instances by groups with minimal technical capacity." (Susskind & Cruikshank, 1987, p. 3.)

Susskind and Cruikshank also provide the examples of other impasses such as: sighting problems for prisons, low-income housing, power plants, and hazardous waste treatment facilities. A prime local example is Michigan's inability to decide on a location for a low-level radioactive waste facility.

Due to the structure of the judicial system, many environmental suits are decided on the basis of legality as opposed to the substance of the environmental dispute. "Unfortunately, the courts are often unwilling (and in many instances, unable) to fashion remedies that meet the needs of all sides. Simply put, the court's purpose is to interpret the law, not to reconcile conflicting interests." (Susskind & Cruikshank, 1987, p. 9) Additionally, even when a court renders a verdict, an appeal can extend the legal process.

As a result of litigation costs, some agencies and parties have attempted to compromise. However, in the past the compromise process used was to find a resolution that only met the involved parties minimum needs. This form of compromise results in minimal support of the compromise and makes implementation difficult. Often the parties will end up back in court because they are unsatisfied with the results or the compromise process breaks down. Yet, compromise does not have to mean that minimum needs are met, compromise can mean that the parties strive for achieving the

highest goals that are acceptable to all parties. Mediation is one method of striving for the highest goals that are acceptable to all parties (Susskind and Cruikshank, 1987).

In light of the "impasse" that Susskind and Cruikshank argue, they put forward that there are other options besides litigation, administrative appeals, lobbying, and weak compromises. Several alternative dispute resolution processes are discussed: negotiated approaches to consensus building, facilitation, mediation, and nonbinding arbitration. Throughout the book, case studies of relevant conflicts are woven into the text to provide practical examples. This approach allows the authors to outline benefits and costs of ADR and illustrate when ADR may and may not be useful. The authors point out that there are times when the judicial system may be more appropriate than an alternative method. One such instance is when "fundamental constitutional rights are at stake" (Susskind and Cruikshank, 1987, p. 16). Society and individuals typically benefit when the court system addresses questions of constitutionally such as: abortion, the right to die, and free speech.

Although Fisher and Ury (1991) do not specifically address environmental mediation in Getting to Yes: Negotiating Agreement Without Giving In, their work is useful to look at when considering ADR due to its clarity and level of use. Getting to Yes (1991) is probably the most widely read (by practitioners and non-practitioners) ADR book. One of the critical issues looked at in the book is positional bargaining vs. principled negotiation. The authors state that arguing from a position allows people to loose sight of their underlying interests. At the same time, compromising between positions also tends to result in agreements where no one is satisfied. Instead, it is

suggested that the reader explore his/her interests, that is, explore how those interest can be met, and explore the Best Alternative To a Negotiated Agreement (BATNA).

Fisher and Ury (1991) put forth a way of judging negotiations that is useful for this thesis.

> "Any method of negotiation may be fairly judged by three criteria: It should produce a wise agreement if agreement is possible. It should be efficient. And it should improve or at least not damage the relationship between the parties. (A wise agreement can be defined as one that meets the legitimate interests of each side to the extent possible, resolves conflicting interests fairly, is durable, and takes community interests into account.)" (p. 4)

Fisher and Ury's contribution goes beyond providing a succinct book on negotiation. As a result of the level of readership of their book, Fisher and Ury have begun to change the way American society views conflict and the techniques used to address conflict.

Results of ADR

An overwhelming majority of the literature that deals with environmental mediation has relied on qualitative case studies as evidence for the past, current, and future success of environmental mediation. This thesis was strongly influenced by the qualitative analysis and case studies of such authors as Susskind, Bacow, Wheeler, Talbot, Moore, Wondolleck, and Crowfoot. Even though the aforementioned authors are leaders in the field of environmental mediation research, the qualitative method of case study for environmental mediation has been questioned. "The literature in this area has been criticized as biased because it is often written by professional mediators or by activists interested in promoting its use ... that the environmental mediation literature is one of advocacy." (Sipe & Stiftel, 1995, p. 140) The nature of the research, human and

environmental conflict, can make quantitative research difficult. However, in light of the criticism of qualitative methods, both qualitative and quantitative research will be examined.

In Mediating Environmental Enforcement Disputes: How well does it work? Sipe & Stiftel (1995) examined "the claims that mediation leads to quicker, cheaper, and better quality settlements than litigation or administrative hearings." (p. 140) This research not only provides quantitative research, but is also of particular interest for this thesis since Sipe & Stiftel draw part of their environmental mediation cases from Florida's institutionalized environmental mediation program. The research examined 19 mediated cases, 14 (74%) settled and 5 (26%) did not achieve a settlement with mediation. The cases were: 5 dredge and fill, 4 air pollution, 3 domestic waste, 3 hazardous waste, 2 groundwater contamination, and 2 solid waste. The researchers used mail surveys to collect their data, 65 (71%) response rate.

Multiple criteria were used to evaluate the mediation settlement. The criteria that received the highest rating was *efficiency in terms of cost*, 94.9% responding in the "very" and "moderate" categories. *Efficiency in term of time* received 89.8% while *how practical and workable* received 87.2%. In regard to the role of a mediator, 84% of the respondents rated moderately or very helpful for: facilitating group discussion, assisting parties in stating interests, and helping parties establish rules for reaching decisions. Only 28 (43%) of the respondents answered how much money was saved by not going to court (staff, legal, and consultant costs). "The median estimated savings was $75,000 per party. With at least two parties per case this amounts to a median estimated savings of $150,000 per case." (Sipe & Stiftel, 1995, p. 146)

The final area of analysis was an evaluation of the environmental mediation institutional support unit. This analysis has particular relevance since the question institutionalization is the focus of this thesis.

> "For four of the six tasks: (1) explaining what mediation is; (2) arranging for mediation selection; (3) arranging the premediation meeting; (6) arranging the mediation, the CRC (state institutionalized provider) received rating of moderately or very helpful by at least 85% of the respondents. The two tasks that received the lowest rating were (5) assisting in contractual issues and (4) helping to evaluate the potential for using mediation, which received ratings of moderately or very helpful by 62.5% and 71.4% of the respondents, respectively." (Sipe & Stiftel, 1995, p. 147)

Sipe & Stiftel's research shows that environmental mediation can be useful. The 74% settlement rate of mediation in itself is a strong indicator that environmental mediation is a useful method of dispute resolution. The positive evaluation by the participants in the mediations provide additional evidence that the mediations were worth while. Finally, the estimated cost savings provide a strong economic argument for mediation, particularly in a time when many state governments are trying to do more work with fewer personnel. (Sipe & Stiftel, 1995)

Although the Sipe & Stiftel study puts forth a convincing argument for the use of environmental mediation, their study is neither conclusive for Florida's mediation program nor completely transferable to Michigan. The authors admit that one weakness of their study is the limited number of cases studied. The number does not negate their findings, but it does prevent clear conclusions from the statistical analysis performed in the study. Of particular importance to this thesis is that, "investigators have begun comparing the research results of mediation in varied settings and have found some similar findings but also some that are contrary, which leads them to the conclusion that

some results may be situation specific." (Sipe & Stiftel, 1995, p. 154) Even though Sipe & Stiftel's study does not mean that environmental mediation would be appropriate in Michigan, the results seem to warrant serious exploration of the appropriateness of environmental mediation.

In Resolving Environmental Disputes (1986) Gail Bingham studied 161 environmental disputes. The cases were drawn on a national level. However, in twenty-nine of the cases the parties had the objective of improving communication, not finding a resolution. In the other 132 cases the parties had the objective of reaching a decision or reaching a recommendation that could be forwarded to the decision-makers. The 132 cases were analyzed in order to determine the success of environmental dispute resolution. These dispute resolution cases were all voluntary, parties met face to face, a mediator was involved, and had a goal of reaching a resolution that was acceptable by both parties. Reaching agreement was defined as a signed written agreement or a verbal agreement where the parties could articulate the terms of the agreement. The analysis showed that 78% (103) of the mediated cases reached an agreement.

Implementation of an agreement is a crucial factor to consider when evaluating environmental mediation. Implementation was broken down into: fully implemented, partially implemented, and unimplemented. For 32 of the 103 cases, the researcher did not know if implementation occurred. This left 71 cases with known implementation results. Full implementation was reported in 70% (50) of the 71 cases. Partial implementation occurred in 14% (10) of the cases. Unimplemented cases accounted for 15% (11) of the cases.

Unfortunately the comparative data for other settlement methods was not included in Bingham's book. Though a direct comparison cannot be made with litigation, it is unlikely that 78% of litigated environmental cases result in a decision that is mutually agreeable to both litigants. Additionally, since 70% of the mediated cases were fully implemented, there is a positive attribute associated with mediation. Beyond agreement and implementation rates, mediation typically has other benefits that litigation can lack. Mediation typically includes improved communication or at a minimum, a better understanding of the issues by the parties involved.

Bingham goes on to look at different criteria in relationship to the level of successful agreements. Some of the criteria include: issue in conflict, whether a lawsuit had been filed, mediations with and without deadlines, and number of parties involved. In addition to the statistical analysis, the book has qualitative analysis via case studies. In looking towards the future Bingham suggest some forms that ADR could take: continue on an ad-hoc basis, expansion of court related programs, government agencies could hire or assign staff to provide mediation, or hybrid such as university systems providing mediation (1986, p. 150). Bingham concludes with "The first decade of experience with voluntary dispute resolution alternatives has demonstrated that they often are successful options for settling many environmental disputes ... Over the next 10 years, additional case experience, paired with the creation of institutional mechanisms to encourage the appropriate use of environmental dispute resolution processes, will provide a stronger basis for assessing how significant theses processes can be ... concerning difficult environmental issues." (1986, p. 167)

Institutionalization

Mediation Research by Kressel, Pruitt and Associates (1989) devote a chapter to the question of institutionalization of mediation. One of the co-authors of the chapter, Gerald W. Cormick, has been an active researcher and practitioner of environmental mediation for many years. The authors state that their studies suggest that the ADR community's perception of a need for institutionalizing mediation is higher than the perception of a need among policy makers and the general public. This has serious implications for institutionalizing environmental mediation in Michigan. If stakeholders do not perceive a need for institutionalized mediation, regardless of the benefits, it may not be appropriate to institutionalize mediation in Michigan.

The Mediation Research chapter illustrates that the authors believe that something needs to shift stakeholders from the status quo (judicial system) in order for them to take the risk of a new conflict resolution method. This issue will not be the sole determinant of appropriateness in Michigan, but it will be a factor. Other factors discussed include:

> "the interests must be represented by key leadership figures who can effectively and realistically represent their constituents and who can vouch for any system that is agreed upon ... there is a need for a strong champion, with the stature to bring together the key actors and represent the effort to legislative and other affected interests ... the process by which the dispute settlement system is developed should be dominated by principles." (Kressel, Pruitt, & Associates, 1989, p. 162-163)

Finally, the authors assert that "those considering the development systems should resist the temptation to import dispute settlement systems that have been successful elsewhere under similar circumstances or to use theory off the shelf." (Kressel, Pruitt, & Associates, 1989, p. 164) Hence, there is a need for research to determine if Michigan is an appropriate place to institutionalized environmental mediation. The authors warn

"institutionalized use of mediation and negotiation is a potentially beneficial public policy tool, but one not easily implemented." (Kressel, Pruitt, & Associates, 1989, p. 165)

Lawrence Susskind looks at some of the earliest institutionalized state mediation programs in Statewide Offices of Mediation: Experiments in Public Policy (Dec., 1987). Hawai'i, Massachusetts, Minnesota, Wisconsin and New Jersey all created statewide mediation programs in 1984. The article reviewed the programs three years after their creation. Even though these programs were not created for the sole purpose of institutionalizing environmental mediation, it is worth reviewing the article. The two issues raised in the article that are of interest to this research are the different ways of institutionalizing the mediation programs and the discussion on replication of the institutionalized programs.

The New Jersey program was created in the Department of Public Advocate's Division of Citizen Complaints and Dispute Settlement with an advisory board that provided guidance. The initial staff consisted of an attorney/mediator and two mediators.

> "The center has served as a special master appointed by the state court and has helped to settle several complex public disputes, including a ten-year legal battle over the establishment of a regional sewage treatment facility. The staff has also helped initiate policy dialogue (involving public officials, citizen action groups, and industry leaders) on siting solid waste disposal facilities ..." (Susskind, Dec. 87, p. 3).

The resolution of the above mentioned sewage treatment facility conflict resulted in the savings of $50 million in construction costs.

The Massachusetts program was created in the Executive Office for Administration and Finance with an advisory board to provide guidance. The initial staff consisted of two full-time employees, who mediated multiple conflicts including

Superfund site clean-up and hazardous waste disposal. In addition to mediations, the program has also focused on working with state agencies that were considering alternative dispute resolution.

The Minnesota program was created in the State Planning Agency with an ad hoc advisory board. The initial number of staff was described as small. Examples of the program work include:

> "The office has helped develop and implement the nation's first farmer-lender mediation program within the Department of Agriculture Extension Program. In its first year, the program has received over 5,000 requests for mediation from farmers and lenders which have resulted in over 1,500 mediated settlements. The office has played a key role in brokering the use of mediation in a state-wide herbicide spraying dispute and has mediated a sewage treatment dispute between two cities." (Susskind, Dec. 87, p. 3)

The Hawai'i program was created in the Office of the Administrative Director of the Courts. The program focused on civil court cases and "a major effort to divert complex civil litigation concerned with public policy into court-sponsored mediation." (Susskind, Dec. 87, p. 3) One critical public policy issue that the program played a facilitative role in was the redrafting of the states "politically sensitive" (Susskind, Dec. 87, p. 3) water code.

The state of Wisconsin used a uniquely different approach for institutionalizing mediation. Wisconsin's Secretary of Labor, Industry and Human Relations (Howard Bellman) chaired an informal screening panel with two other cabinet members from the Governor's office. The panel was responsible for screening which conflicts could be addressed with alternative dispute resolution techniques. "In 1985, through Bellman's intervention, two major statewide disputes between the Department of Natural Resources

and Indian tribes over fish and game regulations were mediated. (Susskind, Dec. 87, p. 13) However, when a new Governor took office and a new person was appointed Secretary of Labor, Industry and Human Relations, the state no longer utilized mediation.

The second area of interest in the Statewide Offices of Mediation: Experiments in Public Policy (1987) article is the question of whether or not to replicate the above mentioned programs in other states. Though aforementioned question was only briefly discussed, some salient points are worth highlighting. The location of a mediation office within a state government organizational structure can influence the level of interaction and what form that interaction takes with the public and within state government. The importance of location when looking at institutionalization is demonstrated by Wisconsin's experience.

Two common elements of the institutionalized programs that the article felt were worth replicating were the basic goal of serving both public and state dispute resolution needs and undertaking an educational role. The educational role was not focused just on the general public, but also within state government. Even though Susskind's article does not provide clear answers to the question of the appropriateness of institutionalizing environmental mediation, the article along with the other literature provides the framework for an analysis of the question of appropriateness.

Recently, the Society of Professionals in Dispute Resolution (SPIDR) Environmental/Public Dispute Sector Critical Issues Committee published a report titled Best Practices for Government Agencies: Guidelines for Using Collaborative Agreement Seeking Processes (1997). Even though this report does not directly address issues of institutionalizing environmental mediation it can serve as a useful resource for any state

government that is exploring the appropriateness of institutionalizing environmental mediation. The report provides recommendations that would "help ensure successful use of collaborative processes for decision-making." (SPIDR, 1997, p. 3) Some of the key recommendations are explained below.

"An agency should first consider whether a collaborative agreement-seeking approach is appropriate." (SPIDR, 1997, p. 6) Will an ADR method help the agency reach its goals and is the method suitable for the conflict? This first recommendation raises the crucial question; is the agency willing to share in the decision making process and resolution of the conflict. An internal decision must be made by the agency to determine if the particular conflict could be resolved most effectively with traditional methods or ADR methods.

"Stakeholders should be supportive of the process and willing and able to participate." (SPIDR, 1997, p. 7) For any ADR process to have credibility, the parties that would be impacted by the decision must participate or not object to the process. "If some interests are not sufficiently organized or lack resources and these problems cannot be overcome, the issue should not be addressed through collaborative decision-making." (SPIDR, 1997, p. 7)

"Agency leaders should support the process and ensure sufficient resources to convene the process." (SPIDR, 1997, p. 7) Participants in the ADR process must have the support and decision making authority of the agency leaders in order to engage in a substantive process. Additionally, adequate resources should be provided from pre-negotiation assessment through the final stage of signing an agreement.

"The sponsoring agency should ensure the facilitator's neutrality and accountability to all participants." (SPIDR, 1997, p. 9) This ties in with the first recommendation that an agency must decide if it is willing to share in the decision making process. An ADR resolution that does not develop mutual ownership by all participants is likely to fail, even if an agreement is reached. To ensure neutrality, some state institutionalized mediation programs maintain a list of non-government mediators that can be called upon as needed.

"Policies governing these processes should not be overly prescriptive." (SPIDR, 1997, p. 11) SPIDR argues that if participants are forced into an ADR process, this will create a disincentive for parties to participate and the effectiveness and flexibility of ADR will be diminished. "Therefore, when legislation, rules and guidelines are developed concerning these processes, they should be limited to encouraging the use of collaborative agreement seeking processes, and setting broad standards for their use." (SPIDR, 1997, p. 11)

Experiences of Other States

This chapter will review Florida, Hawai'i, and Montana's institutionalized mediation programs. The aforementioned states were chosen for four reasons. First, each state has institutionalized mediation in a different way. Second, all three programs are involved with environmental mediation. Third, the states are a diverse representation of the United States of America. Fourth, the combination of the three states represents both old and new programs. As discussed earlier, it is not appropriate to simply transfer a program from one state to another. However, a review of other state programs can

provide useful insight into the different forms of institutionalization of environmental mediation.

Florida

In 1985, the state of Florida enacted growth management legislation. The subsequent year the Growth Management Advisory Committee recommended that the state create a conflict resolution center. The Legislature appropriated $125,000 in 1987; the appropriation resulted in the creation of the Conflict Resolution Consortium (state institutionalized mediation program) at Florida State University (1988). The first mediation occurred in 1989. Since those first few years, the Conflict Resolution Consortium (CRC) has established two regional offices in an effort to provide better statewide coverage. The CRC's mission "is to bring Floridians together to build cost-effective solutions for growth management and community problems through the use of mediation, facilitation and other collaborative problem-solving approaches." (Florida Conflict Resolution Consortium Progress Report, 1992-94, p. 8)

The CRC is housed out of the Florida State University system. The director of the CRC has stated that "Florida State University's leadership and support for the CRC by, providing a *neutral* home for its service, education and research initiatives, has been critical to our continuing successes." (Florida Conflict Resolution Consortium Progress Report, 1992-94, p. 4) The placing of the CRC in the University system has allowed the state government to fund the CRC, allowed the CRC to build on already existing resources and infrastructure, and the CRC can act as a neutral organization even when dealing with conflicts that involve state government. The CRC's programs are guided by an advisory council with a membership of: city officials, citizens, state general counsels,

county officials, lawyers, federal officials, university staff, private industry, and environmental organizations.

The CRC list its services in six categories: public involvement; collaborative planning; training, education & evaluation; process design & conflict assessment; facilitation; and mediation. In addition to long term projects, the CRC will enter "into contractual arrangements for special projects with various public agencies" (Florida Conflict Resolution Consortium Progress Report, 1992-94, p. 19). In 1990, the CRC and the Florida Department of Environmental Regulation initiated a pilot mediation program to use mediation and other ADR tools to resolve environmental enforcement disputes. The CRC reports that 76.9% had an agreement and that survey respondents reported a high level of satisfaction. Additionally, "Mediation saved an average $325,000 per case in staff, legal and consultant costs expected if the case had gone to court." (Florida Conflict Resolution Consortium Progress Report, 1992-94, p. 13) In the literature review chapter the article, Mediating Environmental Enforcement Disputes: How Well Does it Work? (1995), by Sipe and Stiftel was reviewed. The article draws its environmental mediation cases in part from the aforementioned CRC pilot program. There are not enough cases in the CRC pilot program to formulate any concrete statements. However, the results of the study are positive and indicate, at a minimum, that environmental mediation has had a positive impact in Florida.

One thing that has probably helped the CRC to grow in Florida is the relationship that the CRC has with state government agencies and individuals. In 1992, the Governor of Florida stated:

> "I support the Consortium's focus on negotiated solutions and helping the state and its citizens make use of problem-solving negotiation processes to serve a growing population, preserve the quality of life in Florida's communities and protect our state's unique environment. The Consortium serves as an example of the leadership role the University System can take in helping our state and its citizens meet the many challenges ahead." (Florida Conflict Resolution Consortium Progress Report, 1992-94, p. 7)

Other people that have gone on record for the CRC include the President of the Florida Audubon Society, Deputy General Counsel for Florida Department of Environmental Protection, University Faculty and the President, and state and federal Legislators.

In the July 1997, Leadership Letter, the "Recent CRC Ventures" section reported the following activities: South Florida and the Everglades, Governor's Building Codes Study Commission, Lake County Visioning, Ocean Strategy Roundtable, Southern Environmental Enforcement Network, Big Cypress Bay, Leon County Development mediations, Haitian dispute resolution. Upcoming ventures: North American Electric Reliability Council, Department of Business and Professional Regulation Negotiated Rulemaking Assessment, Affordable Housing Study Commission, Volusia County Manatee Protection, Key West Base Re-Use Public Involvement, Florida DEP Marine Patrol, and International Initiatives.

The level of activity of the CRC, continued monetary support, and public support indicate that the CRC is providing a service that is beneficial for the state of Florida. There appears to be multiple reasons for the success in the institutionalization of CRC. The neutral location in the university system provides CRC with two crucial advantages.

CRC can work with diverse groups that are in conflict while operating from a neutral base, even with high profile public controversies. Additionally, CRC's neutral location allows it to receives crucial state funding while mediating conflicts that involve state agencies. The last point is a crucial issue since the size and jurisdiction of state government usually means that state agencies are involved with many conflicts within the state. The CRC's educational outreach has been another factor contributing to its institutionalization. Finally, the CRC sites its advisory council as crucial in its success. Having a diverse council not only brings public legitimacy but provides sound guidance for strategic direction, leadership, and refinement of programs.

Hawai'i

In 1989, the Judiciary's Center for Alternative Dispute Resolution was created by state statute. The mission of the center "is to provide the people of Hawai'i with neutral alternative dispute resolution (ADR) processes that provide opportunities for early, party-driven, efficient, and fair resolution of conflicts." (Center for Alternative Dispute Resolution Annual Report, 1996-1997, p. 1) The four functions of the center are as follows:

> "assist in designing dispute resolution systems for all three branches of government at the state and county levels ... to directly assist the Judicial, Legislative, and Executive Branches in mediating and facilitating lawsuits, complex litigation, and public policy disputes ... to oversee the state of Hawai'i's Purchase of Service contract with the community mediation centers ... to systematically promote ADR by providing training in ADR techniques, and educating government and community decision-makers and the public about ADR and the available ADR options in Hawai'i." (Center for Alternative Dispute Resolution Annual Report, 1996-1997, p. 1-2)

The center is housed in the Office of the Administrative Director of the Courts. This places the center under the governance of the Chief Justice of Hawai'i's Supreme Court. The center also has a board of advisors consisting of: Circuit Court Judge, Attorney General, Native Hawai'ian Legal Corporation, County Council member, State Senator, City Council member, University of Hawai'i professor, Director of the Department of Commerce & Consumer Affairs, lawyer, private mediator, and Hawai'i Business Roundtable.

Hawai'i has created more statutes and rules to foster mediation and other forms of ADR than any other studied state. The statues and rules are broken down into the following general areas:

> Executive & administrative departments; state risk management and insurance administration; county organization and administration; public agency meetings and records/boards: quorum, general powers; public lands, management and disposition of; conservation and resources; planning and economic development; multistate tax compact; transportation and utilities; social services; labor and industrial relations; Hawai'i employment relations act; code of financial institutions; corporations and partnership, insurance, professions, and occupations; trade regulations and practice; uniform commercial code; property; miscellaneous; courts and judicial proceedings; civil remedies and defenses and special proceedings; Hawai'i penal code-forfeiture; rules of the supreme court; Hawai'i appellate conference program; rules of the circuit court; court annexed arbitration program; family court rules; probate rules; local rules of practice for the U.S. District Court (Hawai'i); Hawai'i state bar association; and Hawai'i administrative rules. (Hawai'i – ADR related Statues & Rules)

The above areas constitute over 200 statues and rules. Part of the reason for so many statues and rules is that Hawai'i has incorporated ADR into all levels of the state court system: district, family, circuit, and appellate. In relation to environmental conflicts the above statues and rules allow:

> The Governor or designee perform the Department of Land and Natural Resources mediations; arbitration of solid waste disposal contracts; arbitration of any lease controversies involving the Board of Land and Natural Resources; use of mediation by State Water Commission; arbitration of mining and mineral rights; mediations for coastal zone management; use of ADR for hazardous waste management; mediation of contested cases involving the Department of Land and Natural Resources; and mediation for issues involving waste, pollution diversion, withdrawal, impundment, or consumptive use of water. (Hawai'i – ADR related Statues & Rules)

The result of the statues and rules has been an extensive institutionalization of mediation in the state of Hawai'i. Currently the opportunity exists for parties to seek mediation in everything from small claims issues, child custody issues, too natural resource disputes. The success and extent of the mediation programs is due to cultural norms and a supportive court system. The current Director of the center indicated that Hawai'ian culture tends to focus more on relationships than mainstream American culture (Kent, 1998). This cultural observation is supported by two local words, Ho'oponopono and Fa'alealeiga. "Ho'oponopono, a Hawaiian dispute resolution process, means to set right, to make right, to correct, to restore and maintain good relationships among family, and supernatural powers." (Center for Alternative Dispute Resolution Annual Report, 1996-1997, p. 12) "Fa'alealeiga, a Samoan dispute resolution process, is a healing process, which means to make things whole or to mend relationships. It is

typically used between family members or families. The neutral may be a chief, parent, or respected elder." (Center for Alternative Dispute Resolution Annual Report, 1996-1997, p. 22)

In addition to cultural norms that promote a successful mediation program, the court system has been supportive of mediation. The center's Director indicated that one reason for the continued success of the program has been the support from multiple State Supreme Court Chief Justices (Kent, 1998). The current State Supreme Court Justice, Ronald Moon, describes himself as a "student and proponent of alternative dispute resolution (ADR) for the past thirty years" (Moon, 1996). Moon goes on to say

> "My commitment to ADR began soon after graduation from law school in 1965 when I was fortunate to clerk at Hawaii's United States District Court for then Chief Judge Martin Pence, an artful, skilled mediator, that is, a master of settlement judge. During my tenure with Judge Pence, I observed ADR principles in action and at their best. I learned to appreciate the process as an invaluable tool in resolving disputes outside the traditional litigation track. Since then, ADR has been an integral part of my life as a private practitioner, trial judge, and supreme court justice." (Moon, 1996, p. 475)

Clearly the years of formal and informal ADR in Hawai'i have played a role in the success of the institutionalized program. Additionally, the cultural norms are also likely to have played a role. Like Florida, the Hawai'i program is housed in a neutral location, the court system. It also seems that both Florida and Hawai'i have had multiple strong champions. All of these factors have seemed to play a role in Hawai'i's mediation program's growth, continued support, and success.

Montana

The Montana Consensus Council (MCC) was created in 1994 by an executive order of the Governor. MCC is governed by a board of directors, representatives include: Montana Power Company, Montana Audubon Council, Wolf Point High School, Sagebrush Outdoor Gear, Montana Environmental Information Center, Democratic State Senator, Republican State Representative, Governor, Northern Light Institute, Montana Farm Bureau, and Communities for a Great Northwest.

> "The mission of the Montana Consensus council is to promote fair, effective, and efficient processes for building agreement on natural resources and other public policy issues important to Montanans. As an organization dedicated to building understanding and agreement, the council is designed to supplement, not replace, the work of existing institutions to shape and implement public policy." (Montana Consensus Council: Building Agreement on Natural Resources and Public Policy 1995-1996 Biennial Report, p. 1)

Since MCC was created by an executive order, it is housed under the Office of the Governor for administrative purposes. The first two years of funding were provided "by a two-year grant from the state's Renewable Resources Development Program, which is funded by a state tax on oil, gas and mineral development." (Mckinney, 1997, p. 237) In 1996, MCC received funding from: one-third state's general fund, one-third fees for service, and one-third contributions.

In an effort to ensure that MCC could effectively serve the state on a long-term basis the board of directors looked at five different organizational models: "state office model, the not-for-profit model, the university based model, the public-private partnership model, and the public corporation model" (McKinney, 1997, p. 238). Four criteria were used when looking at different organizational models (1) maintain and

enhance relationships with existing arenas, (2) build and improve private sector relationships (includes general public), (3) maintain MCC's flexibility to address new issues, (4) diversify and stabilize funding. (McKinney, 1997, p. 237-238)

The public-private model was chosen with the goal of the private side being able to focus on funding issues and the public side focusing service to the public. The public-private model is not without critics in Montana. Since the private side of the MCC can charge fees for service, some people feel that MCC is competing with the private sector. The critics feel that a government agency (MCC) should not charge a fee for service and that MCC has an unfair advantage over the private sector since it is partially funded from the state's general fund (McKinney, 1997, p. 239). MCC feels that it can work with the private sector to define its role and together they can explore options for funding.

MCC has had success in helping Montana address natural resource issues, however, funding has been a major organizational issue and time intensive area for the staff. MCC is 4 years old, the seed money is gone, and MCC is still in the process of demonstrating a long-term record of success. In the above context, it is not unusual for MCC to be struggling with funding. The decision to use the public-private partnership model was partly based on funding. The goal was to diversify the funding sources, allowing MCC to provide a stable long-term service to Montana.

A few of the services that MCC has provided include: Working Group on Helena's Subdivision Review Policy, Big Hole Watershed Committee, Negotiated Rulemaking on Game Farms, Land Stewardship Policy Dialogue, Bison Management in the Greater Yellowstone Area, numerous consultations with individuals, private groups, and government agencies.

In an effort to address the perception of being a special program of the Governor, MCC attempted to establish itself as a statutory entity. The Senate approved by over a two-to-one vote. However, the statutory recognition failed in the House due to a 50-50 vote (majority needed). Institutionalization of MCC by the Governor allowed MCC to be created quickly, in comparison to the time-frame of institutionalizing a program by a legislative mandate. The quick institutionalization provided MCC with the opportunity demonstrate the services that it can provide to Montana. Yet, as demonstrated by the legislative vote, Governor institutionalized programs do not necessarily receive legislative support.

Unlike Wisconsin's unsuccessful attempt at institutionalizing mediation, MCC appears to be stabilizing itself by branching out beyond its government origins with the public-private partnership model. This public-private partnership model may allow MCC to avoid the same scenario as Wisconsin when a new Governor is elected. However, the current MCC model does seem to have one problem that Florida has avoided, the issue of neutrality. Even if "neutrality" does exist for MCC while under the umbrella of the Governor's office, the perception of being a special program of the Governor is problematic. In the arena of consensus building, perception is reality for parties involved in a mediation.

Chapter 3

Michigan

Mediation

In 1988 the Legislature passed Public Act 260 which created a statewide Community Dispute Resolution Program (CDRP). The CDRP is structured on a community-based model, each county can have a community dispute resolution center. Funding was provided by a $2 increase in the filing fee for civil cases. Since sparsely populated counties do not generate enough revenue based on their civil court caseload, some dispute resolution centers are multi-county. In 1995 there were 30 community centers for 82 of Michigan's 83 counties (Mika, 1996). The State Court Administrative Office of the Michigan Supreme Court provides the statewide administration of the community dispute resolution program.

During the first six years of operation, over 30,000 Michigan residents resolved disputes using the local dispute resolution centers. "Where parties to a dispute agree to utilize the services of a center, approximately 80 percent reach a satisfactory resolution to their problems. Monetary settlements over the six program year of CDRP have exceeded $6,540,000." (Mika, 1996) A statewide survey found "Eighty-four percent of respondents say they would use the process again, 88 percent say they would recommend the process to others, and 84 percent agree, or strongly agree, that they are satisfied with how their problem was handled." (Mika, 1996, p. 17)

The type of cases varies from center to center; the most common cases are landlord/tenant, neighborhood issues, breach of contract, and consumer/merchant disputes. Since each center focuses on local issues additional programs have been

implemented in different centers: mediation in work place, education and awareness, real estate mediation, school mediation, special education mediation, victim offender mediation, adult probation communication workshop, and agricultural mediation.

The community-based model has both advantages and disadvantages in Michigan. Currently some of the centers are struggling with funding. Many of the less populated counties, outside of the Detroit – Metropolitan, area do not have the civil court caseload to generate sufficient funding through the $2 filing fee. Mika sights a lack of sufficient funding as a major issue when looking at program performance. Even though the community-based model has led to varying levels of service from region to region, the model has one distinct advantage. Each center is grassroots based in almost every aspect. Funding, board of directors, volunteer mediators, and disputes are controlled locally. This grassroots emphasis has allowed each center to tailor its programs to the needs of the local communities. The flexibility of the centers is an important characteristic since Michigan is distinct from region to region (Metro-Detroit, Outstate, Thumb, Upper-Lower Peninsula, and Upper Peninsula).

Currently the centers do not have the mandate or training to deal with natural resource disputes. The closest program that the centers have is the agricultural mediation program, which is sponsored by the United States Department of Agriculture. The primary focus and use of the program is to assist the USDA and Michigan farmers in resolving loan disputes. The program does provide for mediation disputes dealing with agricultural wetland determinations.

The continued use of the community dispute resolution centers by small claims courts, police agencies, schools, and individual citizens of Michigan is an indicator that

the mediations and other ADR services provided by the centers are addressing existing problems in Michigan. This leads to the question, when looking at the appropriateness or inappropriateness of institutionalizing environmental mediation, are there existing problems in Michigan that need to be addressed?

Natural Resources

One current statewide natural resource issue in Michigan is the loss of agricultural land to development. Michigan has lost approximately 1,000,000 acres of agricultural land in the last decade (MDA, 1997). The current projection for agricultural land is the loss of "about 2 million acres in the next 20 years." (Michigan in Brief, 1998-99, p. 48) Compared with other Great Lakes states, Michigan is losing farmland at the greatest rate (Michigan in Brief, 1998-99, p. 46).

Air quality is another issue that Michigan is struggling with. Recently the southeast portion of Michigan (Ann Arbor/Detroit) and Grand Rapids were found to be within the acceptable level of ozone air quality. The regions had been in nonattainment status for many years. However, there are still six counties in Michigan that do not meet the EPA standards. Additionally, the EPA has proposed new air quality standards that could dramatically impact Michigan standards (Michigan in Brief, 1998-99, p. 60). Intense debates have already begun as a result of the proposed air quality standards.

Public Sector Consultants stated "Overall, Michigan surface waters are of generally good quality--that is, pollution is relatively low, and the waters support the uses protected by law." (Michigan in Brief, 1998-99, p. 365) However, the term "overall" is a generalization. A United States-Canadian treaty created the International Joint Commission (IJC), the organization has the responsibility of making recommendations on

management and protection of the Great Lakes. The IJC has identified 43 areas of concern (having serious water quality problems), 14 of the areas are in Michigan. Additionally, over 10,000 areas in Michigan have been identified by the DEQ as having groundwater contamination (Michigan in Brief, 1998-99, p. 366). Recently, communities have begun to struggle with the environmental and fiscal problem of combined sewer overflow (CSO). In the city of Lansing, the CSO conflict culminated in the city council suing the city mayor.

Michigan's unique location as a peninsula in the Great Lakes has provided economic development, recreation, revenue, and the responsibility of partial management. Since the Great Lakes generate $3.3 billion annually through boating and fishing it is important for Michigan to ensure the quality of the Great Lakes ecosystem. Michigan continually must deal with conflicting interests in order to foster economic growth and a healthy ecosystem. These conflicts are both intrastate and interstate for Michigan.

In 1996 the Natural Resource Division of the Michigan Attorney General's Office opened 251 court cases. It is unclear how long it will take to close the 251 case; in 1996 131 cases were closed from 1995 and earlier years. During the same year the Natural Resource Division had to argue against 36 administrative appeals. The Attorney General's Office acts as an in house council for the DEQ, DNR, and MDA. In addition to the above cases each agency addresses many disputes without the involvement of the Attorney General's Office. Within each agency there are various enforcement units that utilize warnings, fines, negotiations, and direct final orders in an effort to address natural resource conflicts. Unfortunately each unit maintains their own records and they currently are not administratively capable of clearly reporting the number of cases to the

public. Conversations with multiple agency personal all indicated that the number of cases that are sent to the Attorney General's Office are a small percentage of the total number of natural resource conflicts in Michigan. Additionally, there are natural resource conflicts that are addressed in Michigan's circuit court system, lawsuits between private parties. Again, neither the State Court Administrative Office (statewide jurisdiction) nor Ingham County Circuit Court is capable of reporting the number of civil environmental cases to the public. All of the aforementioned government agencies either had computer systems that are not capable of reporting the numbers or do not have the staff and time to create a program that could generate the data.

Michigan Environmental Protection Act (MEPA)

Throughout most of Michigan's history the natural resources of the state have provided the foundation for Michigan's economic growth. The years of trapping, lumbering, farming, and fishing have left a legacy of a highly utilitarian view of Michigan's natural resources. "the history of environmental politics in Michigan has not been balanced in the way that state policies so routinely are. Until recent decades, the balance emphasized resource use and environmental neglect." (Browne & VerBurg, 1995, p. 276) The balance did not shift due to any one specific factor, however, two factors did play a key role in establishing the current balance of resource use and protection. In 1963 Michigan's new constitution included a "clear environmental mandate to the legislature." (Browne & VerBurg, 1995, p. 278)

> "In 1970, in a far more significant move, the legislature followed the constitutional mandate by adopting the Michigan Environmental Protection Act (MEPA). The heart of this brief, yet revolutionary, act is contained in the following paragraph: 'The attorney general, any political subdivision of the state, any ... agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action ... for the protection of the air, water, and other natural resources and the public trust therein from pollution, impairment of destruction.' With this act, the general adversarial relationship between advocates of economic development and those of environmental protection became institutionalized in Michigan." (Browne & VerBurg, 1995, p. 278-279)

Before the enactment of MEPA, individuals could only sue to protect the environment if they could show direct economic or personal injury that would provide legal standing in court. MEPA not only allowed individuals to protect the environment in court, it forced the state to involve citizens in natural resource planning (Browne & VerBurg, 1995).

> "The legislation also institutes court procedures to settle disputes. These procedures are designed to identify the critical issues behind a complaint and to resolve them without sentiment or prejudice to either side. Because the adversaries in environmental disputes were seen to be unusually determined foes, with full intentions of carrying out extensive campaigns, the legislature chose the courts as arbiters. Advocates of MEPA feared the consequences of either the normal routine of negotiated compromises or of gridlock in the legislature or the administration." (Browne & VerBurg, 1995, p. 280)

"MEPA created a legal procedure for settling environmental disputes because activists who supported the law were suspicious of the state's tradition of depending on negotiated policy settlements." (Browne & VerBurg, 1995, p. 279) Before MEPA, an "activist" that engaged in negotiations and did not have standing in the court was negotiating with a disadvantage. MEPA has partially leveled the playing field for "activists," thus MEPA allows "activists" to more effectively engage in mediations.

Michigan has addressed many community disputes over the last ten years with the institutionalized community dispute resolution centers. It is evident that the State of Michigan utilizes the courts to deal with many natural resource disputes every year. Currently it is not clear if it would be appropriate or inappropriate to institutionalize environmental mediation in Michigan in order to address the natural resource disputes. Chapter 4 reviews the research design that was developed in response to the aforementioned question. Chapter 5 will state the findings of the research. Chapter 6 will provide an analysis of the findings and present the conclusions.

Chapter 4

Research Methods

This research is an exploration of the question "Is it appropriate or inappropriate to institutionalize environmental mediation in Michigan?" In order to deal with the complex questions of policy, natural resources, and environmental conflict resolution a qualitative approach was used. The principle of triangulation (Creswell, 1994) was used in the research design to increase the validity of the analysis. The first position of triangulation was taken with a survey. The second position was created by the use of a focus group, and the literature review created the final position of analysis. The use of any one of the above analysis methods could result in a valid analysis. However, by looking at the research problem with different tools of analysis the clarity and validity of the analysis was improved.

Survey

Typically, surveys rely on probability sampling, randomly surveying members of a population. In Survey Research Methods Earl Babbie discusses the advantages of probability sampling over nonprobability sampling. However, Babbie goes on to state that there are times when certain factors result in the use of nonprobability sampling instead of probability sampling. "Situations in which probability sampling would be prohibitively expensive and/or when precise representativeness is not necessary." (Babbie, 1990, p. 97). Since both of the above situations applied to this research, nonprobability sampling was utilized.

Even though probability sampling has many advantages, it was not an appropriate method for this survey. The large and diversified stakeholder population groups (148 Legislators, Governor, 3 state agencies with thousands of employees, entire legal community, environmental organizations, industrial organizations, business organizations, and citizens) that this thesis looks at are cost and time prohibitive for probability sampling. Additionally, certain stakeholders, such as Legislators, tend to rely on group leaders and specialists when dealing with low profile policy questions such as the appropriateness of institutionalizing environmental mediation. A comprehensive survey of Michigan Senators and Representatives would be appropriate for high profile policy questions such as abortion, taxation, assisted suicide, or public assistance programs. However, it is not out of the ordinary for Legislators to rely on committee members for guidance on low profile policy issues that involve in depth knowledge and have no public constituent support or opposition. The above statement is based on the author's experience from working in a district office and capitol office of a Michigan legislator.

The two House of Representative committees that would have oversight over institutionalization of environmental mediation would most likely be Judiciary (17 members) and Conservation, Environment and Recreation (19 members). The two Senate committees would be Judiciary (7 members) and Natural Resources and Environmental Affairs (5 members). Hence, these committee members were part of the purposive nonprobability survey. Additionally, Legislators rely on their respective policy staff (Democrat & Republican), both were surveyed.

The environmental and natural resource advisor to the Governor received a survey. State agencies (DEQ, DNR, and MDA) were represented in the survey by management and staff in each enforcement unit. Additionally, the executive offices of each agency was surveyed (a policy analyst and the legislative liaison). The above four state agency groups (executive office, managers, staff, legislative liaison) all play a role in new policy implementation, hence it is important that they are surveyed since institutionalizing environmental mediation would create new policies.

The legal profession was represented by the legislative liaison of the Michigan Bar Association and the Justice Association. Additionally, the Natural Resource Division of the Michigan Attorney General's Office and the Michigan Supreme Court State Court Administrative Office was surveyed. Since environmental mediation can involve legally binding agreements, the legal community would play a role in developing or blocking an institutionalized mediation program.

Environmental organizations were represented by the legislative liaison from Michigan United Conservation Clubs, National Wildlife Federation (Great Lakes Office), Michigan Sierra Club and Michigan Environmental Council. The legislative liaison from the state Chambers of Commerce, Lansing Chamber of Commerce, Michigan Chemical Council, and Michigan Manufacturing Association were surveyed as representatives of the industry stakeholder group. Michigan Farm Bureau's legislative liaison represented their organization in the survey. Just as previously mentioned organizations would play a role in the debate of institutionalizing environmental mediation, environmental and industrially oriented organizations would play a role in a debate, hence their inclusion in

the survey. Since Public Sector Consultants has played a strong policy research and information role in Michigan, they were included in the survey.

In order to increase the response rate, surveys were hand delivered and picked up when possible. The hand delivery method was used for all Legislators, this resulted in four outcomes: immediate survey response, a date set for survey pickup, survey returned by mail, or no response. Hand delivery was facilitated by the fact that Michigan State Legislators are housed in four centrally located buildings. All other survey recipients were spread out over a larger area and were less accessible due to organizational structures/obstructions. When possible the surveys were hand delivered. When hand delivery was not possible, the surveys were mailed or faxed depending on the recipient's desire. If the recipient did not have a preference, the survey was faxed in order to shorten the response time. All mailed and faxed surveys resulted in mailed returns or no response.

In an effort to increase the response rate for non-hand delivered surveys, the recipients were contacted by phone before sending the survey. Follow-up calls were placed after three weeks if no response was received. In order to maintain uniformity in the survey implementation, the survey questions were not discussed with the recipients until the survey had been returned. One exception does exist to the aforementioned statement. At the request of a thesis committee member, a member of the Michigan Supreme Court State Court Administrative Office assisted in the development of question 15. The consulting individual was included in the survey due to the relevant position held in the Michigan Supreme Court State Court Administrative Office.

The first half of the survey (Appendix A) was designed to provide insight into the stakeholder's perceptions, level of knowledge, and experience with natural resource conflicts in Michigan. The second half of the survey focused on the stakeholder's perceptions, level of knowledge, and experience with environmental mediation in the context of state institutionalization. The first half of the survey questions not only provide valuable background information for this research but also prompted the stakeholder to reflect on environmental conflicts in Michigan before answering questions on environmental mediation in Michigan.

The design of the survey, just as the thesis, is not to generate quantifiable results. The survey is designed to assist in analyzing the perceptions of the stakeholders. Currently, no data exists that could answer the question, is institutionalization of environmental mediation appropriate of inappropriate in Michigan? The triangulation method allowed for integration of the survey, focus group and literature review, this integration not only allows for a more dynamic analysis but also increases the validity of the analysis.

Focus group

Market researchers have utilized focus groups for many years. More recently, the years of market research experience and the application of systematic procedures by qualitative academic researchers has resulted in the utilization of focus groups by academic researchers, non-profits, and other organizations (Krueger, 1994). Richard Krueger states "Focus groups produce qualitative data that provide insights into the attitudes, perceptions, and opinions of participants." (Krueger, 1994, p. 19) The focus group process was utilized in this thesis for two reasons; as a tool for triangulation and

generation of public debate. The surveys were filled out by the stakeholders in isolation from other stakeholders, while the focus group provided a forum for stakeholder interaction. "The focus group presents a more natural environment than that of an individual interview because participants are influencing and influenced by others—just as they are in real life." (Krueger, 1994, p. 19)

Typically focus groups range in size from 6 to 10 people, and are replicated 3-4 times to detect patterns and trends. The relatively small size of the stakeholder population and the costs associated with focus groups resulted in a single focus group for the study. The lack of replication in this study is not an issue since the intent of the focus group is not for one person to represent the entire community. Each representative has the potential to begin a public debate of the appropriateness or inappropriateness of institutionalizing environmental mediation. With a diverse group, the public debate has the potential to raise new concerns and issues specific to Michigan, issues that would not be raised by the survey, allowing a more thorough analysis.

The focus group was designed to be composed of one representative from the legislative body, one representative from the DEQ, one representative from the legal community, one representative from the environmental organizations, one representative from the industrial community, and one representative from the private sector. When possible an individual was picked randomly from each community to participate in the focus group. Due to scheduling conflicts numerous people were contacted before all of the communities were represented. Additionally, emphasis was placed on having a mix of views (based on questions 10-13) in the focus group. The variances involved with field research resulted in a schedule change for the environmental organizational

representative, resulting in an absence. Two additional legal community representatives were present due to an interest in learning about the research.

The design of the focus group was based on Krueger's (1994, p. 54) outline of focus group questions. The general format used was: opening questions, introductory questions, transition questions, key questions, and ending questions (Appendix B). The above format allowed for the generation of group common knowledge (opening and introductory questions). Transition questions allowed the group to move into the general area of research, with key questions focusing the group on the research question. Ending questions allowed closure for the group and an opportunity for participants to reflect on comments and summarize. (Krueger, 1994)

At the conclusion of the focus group each participant was asked to fill out another survey. This allowed a comparison with the pre-focus survey, providing insight into the impact of public discussion on the question of institutionalization of environmental mediation. It should be noted that even though Appendix B provides the outline used to conduct the focus group, the focus group also provided direction and emphasis. The focus group participants generally controlled the pace of discussion, when the group discussion naturally ended the moderator would move onto the next question. There were two times that the moderator directed the group and moved onto the next question due to time constraints. The author of this thesis acted as moderator.

The combination of the survey and the focus group will allow a more accurate analysis. The survey will help to determine stakeholders' current level of knowledge, view on the role of government in conflicts, and view on institutionalizing environmental mediation. The focus group will help to determine the issues that concern stakeholders,

see if there are any changes on the view of environmental mediation after a public dialogue, and allow the question of appropriateness to be explored publicly. A survey provides specific insight, but isolated insight. Policy decisions do not occur in an isolated vacuum, but are debated publicly and privately. The focus group will add to the isolated insight by moving the analysis into a publicly debated arena.

Confidentiality

Many of the individuals that were surveyed were either public officials or worked for an organization that required concern over issues of publicity. In order to have an effective survey and focus group it was necessary to provide confidentiality for the survey and focus group participants. Even though all of the organizations that were contacted were listed, this thesis does not reveal which organizations or individuals did or did not respond. Additionally, confidentiality was preserved since the results of the survey are only attributed to the community, not individuals. Since some communities had a 100% response rate it was necessary to group several communities together to ensure confidentiality.

Chapter 5

Findings

This chapter will report and discuss the findings of the survey and focus group.

Survey

The survey (Appendix A) was distributed to 85 individuals, 62.35% responded. One of the respondents returned a letter in lieu of a survey. The letter addressed the survey questions with broad responses. The legislative community had a response rate of 52.17%. The DEQ, DNR, and MDA had a combined response rate of 62.35%. Since some communities had a 100% response rate it was necessary to group several communities together to ensure confidentiality (legal community, industrial community, Farm Bureau, Governor's Office, environmental community, private sector, and political party policy staff). The aforementioned groups had a combined response rate of 83.33%.

Question 3. of the survey asked *To what degree do you feel that citizens and organizations in MI are currently involved in natural resource and/or environmental conflict?* The findings are shown in Table 1. This question was answered by 94.23% of the respondents.

Table 1

Extensive conflict	Above average	Average	Below Average	Little conflict
2.04%	34.69%	42.86%	20.41%	0%

Question 4. of the survey asked *To what degree do you feel that citizens and organizations in MI will be involved in natural resource and/or environmental conflict in the future?* This question was answered by 94.23% of the respondents (Table 2).

Table 2

Extensive conflict	Above average	Average	Below Average	Little conflict
4.08%	55.10%	28.57%	12.24%	0%

Question 3. and 4. were designed to provide insight into the respondents' view on natural resource and/or environmental conflict in Michigan. A baseline for comparison is provided by question 3. It is worth noting that respondents felt the future would bring an increase in natural resource and/or environmental conflict, the category of "above average" went from 34.69% to 55.10%. The percentage changes for "average" and "below average" also indicate that the respondents felt that conflict would increase in the future. Interestingly, no respondents choose "little conflict" in the present or future questions.

Question 5. of the survey asked *To what degree do you feel that MI state government should play a role in addressing natural resource and/or environmental conflict?* This question was answered by 96.15% of the respondents (Table 3).

Table 3

Extensive	More than current level	Current level	Less than current level	Minimal
22.00%	52.00%	26.00%	0%	0%

Surprisingly, in a time when there is a trend in Michigan of reducing state government size and involvement, nearly three quarters of the respondents felt that Michigan State government should increase its role in addressing natural resource and/or environmental conflict. None of the respondents felt that Michigan State government should reduce its role.

Question 6. of the survey asked *Please rate the MI court system's ability to address natural resource and/or environmental conflict.* This question was answered by 88.46% of the respondents (Table 4).

Table 4

Very satisfied	Moderately Satisfied	A little dissatisfied	Very dissatisfied
8.70%	32.61%	45.65%	13.04%

The respondents were split over the court system's ability to address natural resource and/or environmental conflict, slightly more than half (58.69%) had some level of dissatisfaction. The dissatisfaction was discussed again in the focus group when some participants articulated that many environmental conflicts are settled before going to courts. The reasoning for avoiding the courts was that the courts lack of expertise and background in environmental issues, resulting in questionable judgements.

Question 7. of the survey asked *Has your organization been involved in a natural resource and/or environmental conflict?* This question was answered by 90.38% of the respondents (Table 5).

Table 5

Yes	NO
82.98%	17.02%

Question 8. of the survey asked *Have you been involved in a natural resource and/or environmental conflict?* This question was answered by 96.15% of the respondents (Table 6).

Table 6

Yes	NO
70.00%	30.00%

A large percentage of organizations or individuals have been involved in environmental conflicts. The extensive experience with environmental conflicts adds to the value of the research. A survey administered to individuals with little environmental conflict experience would not provide as much insight into the question of appropriateness.

Question 9. of the survey asked the respondents to indicated if they had heard of any of the following 9 items: Alternative Dispute Resolution (ADR), Arbitration, Labor Mediation, Community Mediation, MI's Community Mediation program, MI's Agricultural Mediation program, Community Dispute Resolution Act 260 of 1988, Environmental Mediation, Natural Resource Conflict Management. This question was answered by 92.31% of the respondents (Table 7).

Table 7

# of items heard of:	1	2	3	4	5	6	7	8	9
%	2.1%	6.3%	10.4%	18.8%	16.7%	16.7%	6.3%	10.4%	12.5%

Surprisingly, over half of the respondents (62.6%) had heard of 5 or more of the terms. However, having heard of a term does not constitute an understanding of the term, yet, the 62.6% is unusually high since most people have not heard of the terms or only one or two terms at most.

Question 10. of the survey asked *In general, do you feel that environmental mediation is a valid method to address some natural resource and/or environmental conflicts?* This question was answered by 84.62% of the respondents (Table 8).

Table 8

Yes	NO
90.91%	9.09%

Question 11. of the survey asked *In general, do you feel that environmental mediation is a valid method to address some natural resource and/or environmental conflicts in MI?* This question was answered by 80.77% of the respondents (Table 9).

Table 9

Yes	NO
90.48%	9.52%

Question 10. and 11. have incredibly high percentage responses for a dispute resolution method that is still relatively new. The results shift the question of appropriateness of institutionalization of environmental mediation from the validity of environmental mediation to the validity of institutionalization.

Question 12. of the survey asked *Should MI government institutionalize environmental mediation (create a staff and office)?* This question was answered by 78.57% of the respondents (Table 10).

Table 10

Yes	NO
48.48%	51.52%

At first glance the responses to question 12. are surprisingly low in the context of the respondents' strong support for environmental mediation (question 10. & 11.) and support for Michigan government to play more of a role in environmental conflicts (question 5.). This apparent contradiction may not be as strange as it appears. It is worth noting that question 12. has the second lowest response rate, 78.57%. Eight of the

questions on the survey had a response rate of 90% or greater. The focus group revealed that there were many definitions of mediation and institutionalization. The earlier questions that had high response rates had much less ambiguity in comparison to questions 12. As was discovered in the focus group, the term "institutionalization" can be an ambiguous term, this could explain the low response rate. This would also explain the apparent contradiction, if people were unsure of what institutionalization entailed, they would understandably be unwilling to choose institutionalization. Clearly, the response could also indicate that 51.52% feel that institutionalization is inappropriate. However, then it would be expected that the responses to question 15. (below) would have a high percentage choosing the earlier options (minimal institutionalization), the majority choose the later options (most extensive form of institutionalization).

Question 15. of the survey asked *If environmental mediation was institutionalized in MI, to what degree would you want the institutionalization to occur?* The findings are shown below. This question was answered by 67.92% of the respondents.

5.56% 1) A list of available mediators is maintained.

19.44% 2) In addition to 1; Legislation allowing state agencies and private parties to use mediation.

16.67% 3) In addition to 1 & 2; The DEQ, DNR, and MDA each have a staff person that assists the agency with mediation.

8.33% 4) In addition to 1, 2 & 3; Creation of an office that provides training, information, and coordinates mediation services.

50.00% 5) In addition to 1, 2, 3 & 4; Creation of legislation that encouraged the use of mediation by state agencies, courts, and private parties.

It is interesting to note if institutionalization occurred, 50% of the respondents would choose the most extensive form of institutionalization. The strong preference for the more extensive form of institutionalization brings into question the results of question 12. As mentioned before, the discrepancy can be explained by the ambiguous term "institutionalize" in question 12. while question 15. removes some of the ambiguity by clearly stating different forms of institutionalization. Future research should focus on clarifying the apparent conflict between question12. and 15.

Focus Group

Eight individuals were scheduled to participate in the 1-hour focus group. These individuals were drawn from the legislative body of Michigan, the DEQ, the legal community, the environmental community, the industrial community, and the private sector. The day of the focus group, the participant from the environmental community schedule changed, resulting in a no show. The group was reminded that

> "no one is speaking on behalf of an organization or agency, but from experience working in a respective field. You are not expected to speak for your respective field. The purpose of this focus group is to bring your knowledge and experience, from your field, to bear on the research question. Other people in your field have filled out a survey, however, the surveys were completed in isolation. Hopefully by bringing individuals from the different fields together, issues that were not brought out by the survey will be brought out today."

Definitions were provided to the focus group in an attempt to provide a common reference point during the discussions (Appendix C).

The initial round robin questions provided insight into the participants' background. Five of the seven participants indicated that they have been involved in

mediations and/or facilitations. The other two participants indicated that they had been involved on the periphery of mediations and/or facilitations.

Two of the seven participants have been involved in a natural resource or environmental dispute. In both cases, the disputes lasted longer than 1 year. One of the two participants stated that one of natural resource disputes was a multi-state dispute over water rights involving Lake Michigan. When a mediator was brought in the focus group participant thought that the mediation was "a waste of time," but by the end the participant felt the process was "very valuable." The second participant stated that when natural resource disputes occurred they tried to address them at lower levels in the organization (state regulatory agency). The participant's experiences have been that when lawyers become involved, the dispute will take more than one year to address.

Unless noted otherwise, the following questions were put to the focus group as open ended question for free flow discussion.

Do you feel that environmental mediation is a valid method to address some natural resource and/or environmental conflicts?

There was consensus among the focus group participants that environmental mediation is a valid method to address some natural resource and/or environmental conflicts. However, there were challenges involved in the process. The concern that was raised most often by participants was the issue of who pays for mediation. Tied into the concern of payment was the issue of neutrality of the mediator and process, both real and perceived neutrality.

The other major concern expressed was a lack of incentive for parties to utilize mediation. Several of the participants felt that the courts were not the best place to

address complex natural resource disputes. The court system's lack of natural resource expertise and past record of non-rational rulings was cited as the reason that most environmental conflicts are resolved before the hearing date. Without the pressure of a court case it was feared that disputants would not utilize mediation. It is unclear why the focus group members did not believe that disputants might try mediation instead of the current method of negotiations conducted by lawyers.

One focus group member stated "time is a critical concern, delay tactics " in mediation are a concern if one party is not interested in a resolution. Other focus group members agreed that the delay potential was a concern.

Who pays?

Several ideas for supporting mediation were put forth in the focus group. Most of the ideas were in the context of creating a system that provide a neutral mediator and equity in cost sharing. There is "disparity of resources between groups, if industry pays 100% (environmental groups may not trust the mediator), perception is reality." Some of the ideas were:

- Part of court fees for litigated cases should be set aside
- Tax on potential polluters, if potential polluters upgrade equipment then they receive a tax break, if potential polluters do not pay for upgrades then the taxes goes into a pool
- As tax revenue increases from industrial growth rate, the state should adjust priorities and designate some of the new money for mediation
- It 's not hard to find companies that will pay, need other outside money to match (maintain neutrality), set up a pool funded by private foundations where company funds are matched by the pool funds
- Part of mediation settlements should go to a fund

- If mediation demonstrates a proven track record of a good quality program, then the state and departments would likely fund a program

- Individual agencies should allocate their money if they want mediation, the Office of Special Education was cited as an example, the office knows that they will spend $30,000 to deal with a contested hearing rule, mediation is a cost saving option for them

Could the case be made that environmental mediation in Michigan could work?

Consensus was reached by the focus group that environmental mediation could work in Michigan. There were clearly questions and issues that would need to be addressed, such as the concerns discussed in the validity question. One member of the group stated that mediation is more viable in Michigan now than 5 years ago because of changes in Act 307. Act 307 is Michigan's version of CERCLA, empowering government agencies to identify, inventory, and deal with contaminated sites that are not being addressed. Then the government can bill the liable parties for the costs associated with the cleanup of the site. In the past, status liability was the standard; any owner or operator of the contaminated property was liable, regardless if they were involved in the contamination. The changes in Act 307 have resulted in a causation standard, a connection must be shown between the accused polluter and their past action that resulted in contamination. Under the old system, the state automatically won in court against the owners, no room for mediation. Incentives for mediation have increased since it is unclear who would win in court. Also, mediation could be utilized for determining how the potentially responsible parties would split up the costs of the clean up.

Another issue that was raised is that court rules reduce frivolous claims since a judge can throw cases out. There was concern that mediation would tie up peoples' time with numerous conflicts that would be considered frivolous under the court system. One

focus group participant suggested that the cost of mediation is not all bad since that may reduce frivolous disputes. It is unclear why the focus group participants did not discuss the fact that since mediation is normally voluntary, a party could avoid what they perceive as frivolous disputes by only engaging with the disputants in the court system. Other issues discussed were:

- Agencies can create a staff position to screen cases, and then contract outside for a mediator
- Institutionalization provides accountability as opposed to a mediation program outside state government
- State has vested interest, some funding must come from elsewhere
- Locate environmental mediation in courts, helps with neutrality issue; another participant agreed, institutionalization in court addresses the hired gun problem (it is hard to find a mediator that both parties can agree to on short notice)

One member indicated skepticism during the pre focus group survey and in the beginning of the focus group, but after reflecting and listening, believes that there are enough benefits to mediation "that it would be a worthwhile process to work on developing."

What concerns you most about institutionalizing environmental mediation and what do you see as the greatest benefit, if any?

The above two questions were the last questions asked in the focus group, and were presented in a round robin format, with each participant being asked to keep their response succinct. Unanimously, the responses were very positive about the potential benefits for the state of Michigan if institutionalize of environmental mediation occurred. However, as expressed earlier, in order to successfully utilize institutionalization of environmental mediation there are some issues that would need to be addressed.

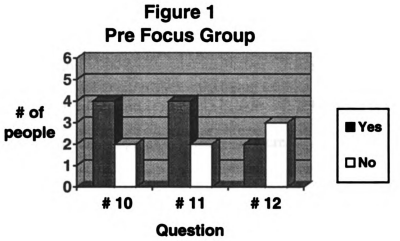
Expressed concerns:

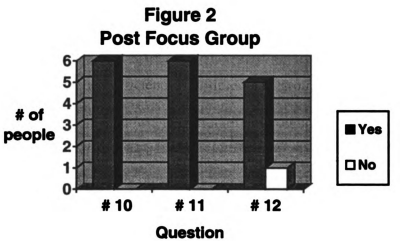
- Vehicle for citizen involvement needed
- Address federal liabilities, in some cases a federal agency such as the EPA has to sign off on environmental agreements
- Need common definition of mediation and proper mediator training
- Need common definition of institutionalization
- Need to avoid mediations being utilized as time delay tactic by disputing parties
- Clear goals and measurable accomplishments needed to build a case for program
- Must ensure mediation process is neutral and perceived as neutral
- Find balance between manageable mediation group size and operating within the law that allows for all citizens to be involved
- System must be fair and clear so that parties know what they can expect, some level of certainty

Expressed benefits:

- Mediation would save time and money for all involved
- Involving disputants in the resolution of the conflict usually results in disputants that are happier as compared to traditional methods of resolution
- The more disputants that take the responsibility for resolving disputes, the better
- Mediation "moves things along"
- Mediation allows the client's lawyer to encourage a settlement based on a neutral process, some clients do not trust deals negotiated exclusively by lawyers

It is worth noting that many of the participants indicated agreement with the benefits stated by other participants that spoke before them. Participants continuously reiterated time and monetary cost savings as a benefit of institutionalization of environmental mediation.





It is worth noting that the one individual that chose "no" for question 12. wrote in "Not in term of office ... but otherwise yes." The seventh focus group participant is not included in the pre and post survey graphs since only the post survey responses are available. The seventh individual stated yes for questions 10-13 in the post survey.

It is clear from the pre and post focus group surveys (Figures 1 & 2) that the focus group participants changed their views on questions 10-13. This research was not designed to explore the correlation between focus groups and change in view on institutionalization of environmental mediation. However, the pre and post focus group survey appear to support the commonly held belief that as people learn more about mediation, the level of support for mediation increases.

Chapter 6

Conclusions & Recommendations

This thesis has shown that the question of the appropriateness of institutionalizing environmental mediation in Michigan has complexities on many levels. In order to deal with the complexities that the research question raised, several criteria were utilized: cost effectiveness, time efficiency, existence of champions or adversaries, stakeholder perception of environmental mediation, stakeholder support or opposition to institutionalization of environmental mediation, funding availability, and availability of skilled environmental mediators. In order to increase the validity of the analysis, triangulation was utilized with the criteria. The three sources for triangulation were the literature review, survey, and focus group results. The application the criteria will not result in a definitive answer of the research question. The reality of public policy and institutionalization questions is that the research can provide guidance and insight, but the influence of multiple variances of the world prevents a definitive answer.

Cost & Time Effectiveness

Any state government acting in the best interest of its citizens strives to provide the most cost effective government programs possible. Hence, the question of cost effectiveness needs to be applied to the question of institutionalization of environmental mediation in Michigan. Sipe & Stiftel's (1995) research found that Florida's institutional environmental mediation program had median savings of $75,000 per party, in comparison to the costs of a court resolution. Since environmental conflicts tend to involve multiple parties, $75,000 savings per party is a substantial amount of money. The

Florida research also had participants rate different factors, including the efficiency in terms of cost of the mediation. Cost efficiency received the highest rating, 94.9% of the respondents picked the categories of "very" or "moderate." Although Sipe and Stiftel's (1995) research is worth noting, experience has shown that a successful program in one state does not have the same impact in all states. However, multiple focus group participants stated that they felt institutionalization of environmental mediation would result in cost savings for Michigan.

Again, Sipe and Stiftel's (1995) research reported that participants rated mediation in terms of efficiency of time, 89.8% (very & moderate categories). The saving of time as opposed to engaging in litigation contributes to the monetary cost savings associated with mediation.

As in monetary efficiency, multiple focus group participants felt that time savings would result with the institutionalization of environmental mediation in Michigan. One participant expressed that his experience has been that when lawyers become involved in environmental disputes, the dispute will take more than one year to resolve.

This analysis indicates that the initial review of cost and time effectiveness does not demonstrate any barriers to implementing environmental mediation in Michigan, in fact, the initial review provides an incentive for institutionalization.

Existence of Champions or Adversaries

The question of institutionalization entails changing the status quo, something that does not occur easily for individuals or state institutions. Kressel, Pruitt & Associates (1989) state that "there is a need for a strong champion, with the stature to bring together the key actors and represent the effort to legislative and other affected interests." (p. 162-

163) No "strong champion" or strong adversaries emerged during the research. The lack of a strong champion is clearly an indication that institutionalization would be very difficult.

The survey results showed that there was approximately an equal amount of advocates and adversaries of the idea of institutionalizing environmental mediation in Michigan. Since many of the survey participants are individuals in a position of influence (legislators, lobbyists, managers and upper management in state agencies) the potential exists for a champion to emerge. However, even though the survey and focus group results were positive towards environmental mediation, institutionalization requires more than positive views. When dealing with a large institution, such as state government, successful institutionalization requires a champion willing to expend energy and skill in order to create change in a change resistant organization. If a champion does not emerge, institutionalization of environmental mediation would not be appropriate.

Stakeholder Perception of Environmental Mediation

The survey results show that the stakeholders have overwhelming positive perception of environmental mediation. In response to the question "In general, do you feel that environmental mediation is a valid method to address some natural resource and /or environmental conflicts?" 90.91% of the respondents choose "yes." In response to the question "In general, do you feel that environmental mediation is a valid method to address some natural resource and /or environmental conflicts in MI?" 90.48% of the respondents choose "yes." This level of support for environmental mediation is exceptionally high. Suspiciously high, except for the fact that the focus group results corroborate the high level of positive perception of environmental mediation.

Neil and Stiftel's research found similar positive stakeholder perceptions, "participants indicated that they were very satisfied with the mediation process, the final agreement, and the mediator" (1995, p. 139). Clearly, the application of the stakeholder perception criterion to the research indicates the appropriateness of environmental institutionalization.

Stakeholder Support or Opposition to Institutionalization of Environmental Mediation

In response to the question "Should MI government institutionalize environmental mediation (create a staff and office)?" 48.48% of the respondents choose "yes." As noted in the discussion of the findings chapter, it is unclear if the results indicate that a majority feel institutionalization is inappropriate or if the ambiguity of the term "institutionalization" created the response. The uncertainty arises from the fact that the focus group felt that institutionalization was not clearly defined and that in question 15. the majority of survey respondents choose the most extensive forms of institutionalization over less institutionalized forms of environmental mediation. If the face value results of question 12. were taken, then it would be reasonable to expect that a majority would choose the less institutionalized form of environmental mediation in question 15. It is worth noting that the pre and post focus group surveys showed that public discussion resulted in changes, some participants who opposed institutionalization changed to supporters.

Kressel, Pruitt and Associates (1989) suggest caution when discussing institutionalization since the ADR community's perception of a need for institutionalizing mediation is higher than the perception of a need among policy makers and the general

public. The survey results are unclear, the focus group indicates support for institutionalization, and the literature cautions against zealousness for institutionalization. Further exploration of stakeholder support would be beneficial, at this time the criterion does not clearly indicate appropriateness or inappropriateness of institutionalization. Review of the current research as applied to this criterion seems to warrant tentative institutionalization.

Funding Availability

When exploring the question of institutionalization, discussion of funding for the related creation and changes inherent to institutionalization is crucial. Even though institutional of environmental mediation has the potential to reduce the costs associated with environmental conflicts, there would clearly be "start-up" costs. One member of the focus group felt that the issue was not finding funding, many larger organizations could easily afford the cost of mediation. The problem was finding funding that maintained the neutrality of the mediation process. Having a single funding source would clearly create a problem of perception of neutrality when the funding organization is utilizing the mediation process.

The experiences of Florida, Hawai'i, and Montana (see Literature Review) indicate that funding is an important issue. The neutral location of Florida (university) and Hawai'i's (court) mediation programs allow them to receive state funding while still engaging in disputes that involve government. Montana's mediation program has had to expend time and resources in the continuous search for funding due to their limited state funding.

The crucial part of the funding question for this research is "Will funding availability impact the appropriateness of institutionalization?" If the research showed that there was clearly, no source of funding, then institutionalization of environmental mediation would be inappropriate. The focus group discussion indicated that the funding question would need to be addressed but the discussion did not indicate that the funding question resulted in institutionalization being inappropriate. The current research appears to indicate that institutionalization is appropriate in the context of the funding question.

Availability of Skilled Environmental Mediators

The availability of skilled environmental mediators is a serious issue when reviewing the question of institutionalization of environmental mediation. The literature (Susskind and Cruikshank, 1987; Kressel, Pruitt and Associates, 1989; and SPIDR report, 1997) discussed the importance of a neutral and skilled mediator in dispute resolution. The focus group discussed the importance of an institutionalized program creating a positive track record in order to be successful and secure future.

Within the State of Michigan there is currently a very limited number of skilled environmental mediators. However, the limited number of mediators does not mean that institutionalization is inappropriate. It is unlikely that any initial program would require a large number of mediators. The State of Michigan does have a pool of trained and experienced community mediators that could, with additional training, create a larger pool of environmental mediators to draw on. Additionally, there is a national pool of environmental mediators that can be drawn on. Currently the Environmental Protection Agency is in the process of creating a list of "qualified" mediators that federal agencies

will be able to draw on. Since skilled environmental mediators would be available, this criterion indicates that institutionalization would be appropriate.

Question Raised by Literature Review

Kressel, Pruitt and Associates (1989) felt that something must shift stakeholders from the status quo in order for stakeholders to take the risk of utilizing a new conflict resolution method. The survey showed that a majority of the respondents felt that the future would bring an increase in environmental disputes (#4). Additionally, a majority of the survey respondents indicated dissatisfaction with the Michigan court system's ability to address environmental disputes (#6). Currently, there is dissatisfaction with the status quo and this dissatisfaction will not be helped by the potential for increasing conflicts.

As discussed earlier, the survey questions regarding institutionalization do not provide a clear mandate for or against institutionalization. The focus group resulted in participants stating that they felt institutionalization was worth exploring further due to the potential benefits.

Clearly there is not a crisis providing the motivation for change, however, there does seem to be a level dissatisfaction that is motivating some stakeholders to advocate exploring institutionalization of environmental mediation.

Recommendation

Based on this research, outreach (creation of public forums) and research of different institutionalization options should be conducted. The public forums need to further the process of exploration and debate that occurred in the focus group. The outreach should be conducted in a way that allows all participants to share their

experiences and express concerns. The focus group was composed of individuals from different stakeholder communities, the diversity of environmental, legal, institutional, economic, and mediation knowledge provided a rich environment in which the participants could explore potential problems and answers. Future public forums should have participants with diverse backgrounds to allow full exploration of questions and encourage thorough debate.

The public forums will serve two functions, determine if a champion exists and provide information for future research. The pursuit of more public forums would expand the number of people involved and provide the time for those involved to reflect and decide on their level of support for institutionalizing environmental mediation. The additional time will help provide a more definitive answer to the question; does a champion(s) exist?

The next level of research should focus on the different forms of institutionalization that would be appropriate in Michigan. Institutionalization questions could be addressed with an organizational analysis of the environmental and legal government structures of Michigan. However, organizational analysis alone would not be sufficient. The review of state mediation programs conducted by this research should be expanded on and future public forums should be utilized as another source of Michigan specific information. Some of the specific questions that future research and public debates should address are: what forms of environmental mediation are appropriate, organizational structure of environmental mediation program, location of program, funding of program, scope of disputes addressed, role of program in relation to other state

programs, development of evaluation criteria, relationship of program with court system, and public participation in disputes involving government.

APPENDICES

APPENDIX A

SURVEY

Name _____ Date _____

Organization _____ Sex: M F

Position _____

Party Affiliation (only for Legislature): Dem. Rep. Indp.

Committee (only for Legislature): Senate Jud. House Jud. Senate Env. House Env.

Education Level: H.S. Bachelor Master J.D. Ph.D. Other:

1. Please rate your knowledge of judicial issues (court system, laws, strength/weaknesses) in MI; compared to the average citizen.

Extensive knowledge Above average Average Below average Little knowledge

2. Please rate your knowledge of natural resource and environmental issues in MI; compared to the average citizen.

Extensive knowledge Above average Average Below average Little knowledge

3. To what degree do you feel that citizens and organizations in MI are currently involved in natural resource and/or environmental conflict?

Extensive conflict Above average Average Below average Little conflict

4. To what degree do you feel that citizens and organizations in MI will be involved in natural resource and/or environmental conflict in the future?

Extensive conflict Above average Average Below average Little conflict

5. To what degree do you feel that MI state government should play a role in addressing natural resource and/or environmental conflict?

Extensive More than current level Current level Less than current level Minimal

6. Please rate the MI court system's ability to address natural resource and/or environmental conflict.

Very satisfied Moderately Satisfied A little dissatisfied Very dissatisfied

7. Has your organization been involved in a natural resource and/or environmental conflict?

Yes No

8. Have you been involved in a natural resource and/or environmental conflict?

Yes No

9. Have you heard of:

Yes	*No*	Alternative Dispute Resolution (ADR)
Yes	*No*	Arbitration
Yes	*No*	Labor Mediation
Yes	*No*	Community Mediation
Yes	*No*	MI's Community Mediation program
Yes	*No*	MI's Agricultural Mediation program
Yes	*No*	Community Dispute Resolution Act 260 of 1988
Yes	*No*	Environmental Mediation
Yes	*No*	Natural Resource Conflict Management

What can you tell me about the terms that you have heard of?

10. In general, do you feel that environmental mediation is a valid method to address some natural resource and/or environmental conflicts?

Yes No

11. In general, do you feel that environmental mediation is a valid method to address some natural resource and/or environmental conflicts in MI?

Yes No

12. Should MI government institutionalize environmental mediation (create a staff and office)?

Yes No

13. If MI government institutionalized environmental mediation, where should it be housed?

14. Who should pay for it? How?

15. If environmental mediation was institutionalized in MI, to what degree would you want the institutionalization to occur? (circle one)

1) A list of available mediators is maintained.

2) In addition to 1; Legislation allowing state agencies and private parties to use mediation.

3) In addition to 1 & 2; The DEQ, DNR, and MDA each have a staff person that assists the agency with mediation.

4) In addition to 1, 2 & 3; Creation of an office that provides training, information, and coordinates mediation services.

5) In addition to 1, 2, 3 & 4; Creation of legislation that encouraged the use of mediation by state agencies, courts, and private parties.

APPENDIX B

FOCUS GROUP

August 3rd, 1998
12:00

Introduction

- Who I am (Nick White, RD, MSU, Master Thesis).
- My research looks at the question is it appropriate or inappropriate to institutionalize environmental mediation in MI?
- This is 1 of 2 data collection methods, earlier surveys were given to a larger number of people.
- There are six stakeholder fields represented here (legislative, judicial, environmental, industry, state regulating agencies, and private sector).
- I would like to remind everyone that no one is speaking on behalf of an organization or agency, but from experience working in a respective field.
- You are not expected to speak for your respective field. The purpose of this focus group is to bring your knowledge and experience, from your field, to bear on the research question. Other people in your field have filled out a survey, however, the surveys were completed in isolation. Hopefully by bringing individuals from the different fields together, issues that were not brought out by the survey will be brought out today.
- Define Facilitation, Mediation (Neutral, non-binding, voluntary), Arbitration, Alternative Dispute Resolution (ADR).
- Define institutionalization (formalization of mediation by the state of Michigan).

12:10

Round Robin

- RR will give us a brief background and take 5-10 min.
- Have you ever been involved in a natural resource or environmental dispute? Have any lasted more than 1 year? If so, how long?

Identify one person, ask that person to briefly summarize the dispute.

If that person does not articulate, ask them to articulate $ cost, time cost, organization cost, productivity result of conflict.

- Currently what methods are available to address environmental conflicts?
- Have you ever been involved in Facilitation/Mediation/Arbitration, if so which?
- Have you ever been involved in Facilitation/Mediation/Arbitration for environmental conflicts, if so which?

Open Questions to the Group

- Do you feel that environmental mediation is a valid method to address some natural resource and/or environmental conflicts?
- Do you feel that environmental mediation is a valid method to address some natural resource and/or environmental conflicts in MI?
- Should MI government institutionalize environmental mediation?
- If MI government institutionalized environmental mediation, where should it be housed?
- Who should pay for it?

Round Robin

- What concerns you most about institutionalizing environmental mediation?
- What do you see as the greatest benefit, if any?

12:50 Ask members to fill out second page of survey before they leave at 1:00

APPENDIX C

FOCUS GROUP DEFINITIONS

Facilitation was defined as a process that involved a neutral third party that focused on promoting communication, while not participating in the substantive part of the discussion. Mediation was defined as a process that involved a neutral third party that focused on promoting communication and could become involved in substantive discussion if it promoted communication between disputing parties. Both of the above processes were defined as voluntary and non-binding, unless the disputants freely entered into a contractual agreement as part of the resolution. Arbitration was defined as a process that involved a neutral third party where the disputants presented their arguments and the arbitrator made a decision, could be binding or non-binding. Institutionalization of environmental mediation was defined as formalization of mediation by the state of Michigan.

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