

Report Card on Environmental Dispute Resolution in Utah—Grade: Incomplete but Showing Promise

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INTRODUCTION

A Brief History of Environmental Dispute Resolution Nationally

The first case referred to as “Environmental Dispute Resolution”¹ (EDR) started in 1973 when mediators were invited to help resolve a multi-year and multi-party dispute regarding damming of the Snoqualmie River for flood control.² In the ensuing years, the successful use of mediation to resolve the Snoqualmie case has grown into a field with at least one trade association,³ a cadre of hundreds of private practitioners,⁴ and innumerable institutions seeking to promote the use of EDR.⁵ The types of cases in which EDR has been used span the full range of environmental, natural resource, and energy issues.⁶ Federal agencies are encouraged to use EDR through statutory and policy mandates or incentives.⁷

¹ The terms “environmental dispute resolution” and “environmental conflict resolution” are used interchangeably in literature about the field and in practice. The term “environmental dispute resolution,” or EDR, is used in this article for consistency.

² GAIL BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* 14 (1986).

³ *Five Leadership Positions Open for EPP Section Leadership Council*, ASS’N FOR CONFLICT RESOL.: ENV’T & PUB. POL’Y SEC., <http://www.acepp.org/> (last visited Nov. 2, 2013).

⁴ The U.S. Institute for Environmental Conflict Resolution roster lists over 300 environmental mediators and facilitators in private practice. This includes neither the innumerable private practitioners who chose not to be listed on the roster or who do not have the minimum level of experience for listing, nor the many practitioners who are not listed on the roster because they work for governmental agencies. *Description of Services*, U.S. INST. FOR ENVTL. CONFLICT RESOL., <http://www.ecr.gov/howwework/services.aspx> (last visited Nov. 2, 2013).

⁵ See, e.g., *Mission and Vision*, WILLIAM D. RUCKELSHAUS CENTER, <http://ruckelshauscenter.wsu.edu/> (last updated Oct. 31, 2013); *Prevent, Collaborate, Resolve: Workable Solutions to Environmental Conflict*, U.S. INST. FOR ENVTL. CONFLICT RESOL., www.ecr.gov (last visited Nov. 2, 2013); CONSENSUS BUILDING INST., <http://www.cbuilt.org/> (last visited Nov. 2, 2013); MASSACHUSETTS OFF. PUB. COLLABORATION, <http://www.umb.edu/mopc> (last visited Nov. 2, 2013); U. VIRGINIA INST. FOR ENVTL. NEGOTIATION, <http://ien.arch.virginia.edu/> (last visited Nov. 2, 2013).

⁶ See, e.g., *Case Briefs*, U.S. INST. ENVTL. CONFLICT RESOL., www.ecr.gov/projects/projects.aspx (last visited Nov. 2, 2013) (providing sample briefs involving use of EDR); *Case Studies*, CONSENSUS BUILDING INST., www.cbuilt.org/case-studies (last visited Nov. 2, 2013) (providing EDR case studies).

⁷ See, e.g., Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§ 571–84 (2012); Negotiated Rulemaking Act of 1996, 5 U.S.C. §§ 561–70 (2012); Exec. Order No. 13,352, 69 Fed. Reg. 52,989 (Aug. 26, 2004); Memorandum on Environmental Collaboration and Conflict Resolution (Sept. 7, 2012), available at http://www.ecr.gov/pdf/OMB_CEQ_Env_Collab_Conflict_Resolution_20120907.pdf (jointly issued by the Office of Management and Budget and the Council on Environmental Quality).

Almost forty years after the first documented EDR process, efforts are underway to reflect on the field as a whole. The American Association for Law Schools (AALS) issued a Call for Papers to develop a “report card” from which professors and practitioners can “evaluate the strengths, weaknesses, ongoing challenges, and future possibilities of ECR.”⁸

The Utah EDR Context

Utah can be viewed as a particularly challenging case for implementing EDR and its promise. Politically, Utah is at the forefront of the Sagebrush Rebellion approach to environmental and natural resource issues.⁹ Rhetoric based on ideological positions is common, and many in positions of power refuse to talk to or negotiate with those who disagree with them.¹⁰ The scarcity of local environmental mediators and facilitators¹¹ may or may not accurately reflect the infiltration of EDR approaches to address environmental and natural resource issues in the state. Nevertheless, EDR processes—traditional mediation and multi-party collaborations—

⁸ Call for Papers, AALS Section on Alternative Dispute Resolution et al., Environmental Conflict Resolution (ECR): A Report Card, *available at* www.indisputably.org/wp-content/uploads/AALS_callforpapers_ECR.pdf (calling for submissions for the AALS Annual Meeting, January 4–7, 2013, in New Orleans, Louisiana).

⁹ The 2012 Utah Legislature passed a Joint Resolution on Federal Transfer of Public Lands, demanding that the federal government extinguish title to all public lands within the state of Utah and transfer title to the state on or before December 31, 2014. H.R.J. Res. 3, 59th Leg., 2012 Gen. Sess. (Utah 2012). The accompanying House Bill 148 enacts the Transfer of Public Lands Act and requires implementing legislation to be drafted. H.B. 148, 59th Leg., 2012 Gen. Sess. (Utah 2012). Utah is the only state that has taken this position. *See* Robert Gehrke, *Utah Alone in Sagebrush Rebellion After Arizona Governor’s Veto*, SALT LAKE TRIB. (May 15, 2012, 7:40 PM), <http://www.sltrib.com/sltrib/politics/54120702-90/arizona-bill-brewer-federal.html.csp>.

¹⁰ This statement reflects the author’s personal observations based on confidential interviews. More than one government decision-maker has told the author that he or she will not participate in collaboration (“sit at the same table with”) groups that “litigate against us” or if “that person” (someone who disagrees with him or her) is involved (even if “that person” is interested in collaborating). Likewise, more than one environmental representative has shared a similar perspective: “Why should I even try to talk to them [the decision-makers]? They’ll never change their minds.”

¹¹ Private bar attorneys interviewed stated that there are few, if any, Utah mediators with the right substantive background. The U.S. Institute for Environmental Conflict Resolution roster lists only three environmental facilitators in Utah, the author being one of them. *National Roster of ECR Professionals*, U.S. INST. FOR ENVTL. CONFLICT RESOL., <http://ecrroster.udall.gov/SearchRoster.aspx> (last visited Nov. 2, 2013) (select “Utah” from the “ECR Professional Location” drop-down menu).

have been used in Utah, but they have not been extensively analyzed or publicized.

As one of its first projects, the Stegner Environmental Dispute Resolution Program undertook an informal assessment of EDR in Utah. Over a period of five months, the author conducted over thirty confidential interviews with and received over eighty responses to a written survey from a cross-section of stakeholder interests involved in environmental and natural resource conflicts in Utah.¹² Both the interviews and the written survey documented past and present EDR efforts in the state and solicited the participants' opinions about which EDR approaches work well, which do not, and what barriers exist to expanding the use of EDR in Utah.

This paper assesses and assigns an informal "grade" to the concept of "Environmental Dispute Resolution," as reflected in its use to address environmental and natural resource issues arising in Utah. The author uses the term "Environmental Dispute Resolution" in its broadest sense to include a variety of processes and approaches to prevent, manage, and resolve conflicts and disputes related to environmental, natural resource, and energy issues. That range of processes includes traditional mediation (mediation of both cases in litigation and before litigation has been filed), arbitration, negotiated regulation, collaborative development of agency policy, place-based collaboration (both using an outside facilitator and un-facilitated collaboration), community-based advisory groups, and issue-specific work groups or task forces.

Based on the interview and survey results, as well as the author's professional experiences in Utah and elsewhere,¹³ the report card for

¹² Eighty-two individuals responded to the survey, with over sixty respondents answering every question. Stakeholder interests were heard—via survey responses and personal interviews—from all levels of government (federal, regional, state, and local), business, NGOs, community members, academia, private bar attorneys, and third-party neutrals. They work on a broad range of issues including air and water quality, land use, water law, energy, oil and gas, mining, and hazardous substances. Although the written survey results remain anonymous, there is no doubt that in some cases, the same individual was interviewed *and* responded to the survey. The author makes no claim that the interviews or survey results have any statistical significance. The survey questions are included in Appendix A of this piece. A summary of the EDR survey results is available from the author who can be contacted at michele.straube@law.utah.edu.

¹³ The author practiced environmental law for ten years as a state enforcement attorney, a utility consumer advocate, and a private practice attorney. She was a policy consultant to all levels of government and corporate clients for eight years. For the past fifteen years, the author has been an environmental mediator/facilitator, working on projects in Utah and the Mountain West. Her environmental mediation/facilitation cases have included Superfund,

Environmental Dispute Resolution in Utah should reflect a grade of “Incomplete but Showing Promise.” While this Article focuses specifically on the experience with EDR processes in Utah, the conclusions reached and areas for improvement identified may be instructive for the EDR field as a whole.

I ASSESSMENT OF EDR IN UTAH

A. Grading Rubric

The concept of EDR in Utah is being graded according to the following rubric:¹⁴

1. stakeholders’ understanding of the EDR concept (extent of Utah stakeholders’ knowledge about the existence of various EDR processes and how they work, as well as an understanding of the benefits of EDR);
2. application of the EDR concept to the facts (Is EDR being used at all in Utah? How, when, and why is EDR being used?);
3. whether legitimate answers are provided (correlation between the use of EDR and results perceived by the stakeholders as desirable);
4. quality of work (quality of EDR being conducted in Utah); and
5. experiential learning (the extent of documentation and evaluation of EDR processes in Utah).

B. Stakeholders’ Understanding of the EDR Concept

It is not enough to assume that if we build EDR capacity, stakeholders will come. In order for EDR processes to be used, potential conveners and stakeholders need to be aware of the existence of EDR and how it works, have the ability to participate effectively in those processes, understand the benefits of EDR, and be able to identify appropriate situations for the use of EDR. Our

grazing on public lands, climate change and air quality, watershed restoration, and environmental justice issues. She is a certified ADR professional (Utah), a master mediator (Utah state court roster), and has received a certificate in public participation (IAP2).

¹⁴ The standards used to assess each component are explained more fully in the following sections.

research suggests a range of understanding about EDR in Utah—from distrust to curiosity to great sophistication—with an unequal and shallow distribution across potential users of EDR processes.

A foundational confusion relates to EDR's definition: Which approaches should be included in the concept of "Environmental Dispute Resolution"? Is EDR simply an alternative to litigation (usually mediation and arbitration)? Does EDR include a variety of conflict prevention and conflict management strategies (e.g., problem-solving collaboration, collaborative NEPA processes, community advisory councils, etc.)? Or does EDR also include different approaches to governing (e.g., collaborative governance, deliberative democracy, etc.)? The academic literature and proliferation of non-profit organizations promoting EDR across the country offer a confusing multitude of terminology and theoretical approaches, many of which profess to be mutually exclusive but which in reality are conceptually overlapping. The core values or basic principles of various approaches often read like variations on a theme (e.g., Public Participation (P2), EDR, Environmental Collaboration and Conflict Resolution (ECCR), community engagement, deliberative democracy, and collaborative governance).¹⁵

Individuals involved in environmental and natural resource issues in Utah are generally aware of the existence of EDR processes, but there is a wide range of views about EDR's efficacy and a limited understanding of the variety of approaches available. Research showed that perspectives varied somewhat between lawyers and nonlawyers.

A small number of lawyers resist the concept of using alternatives to litigation such as mediation. That reluctance is motivated by self-interest ("mediation is not in a lawyer's best [financial] interest"¹⁶) or

¹⁵ See, e.g., NAT'L COAL. FOR DIALOGUE & DELIBERATION, RESOURCE GUIDE ON PUBLIC ENGAGEMENT (2010), available at http://www.ncdd.org/files/NCDD2010_Resource_Guide.pdf (core principles for public engagement in deliberative democracy); *Definition & Principles*, U.S. INST. FOR ENVTL. CONFLICT RESOL., <http://www.ecr.gov/Basics/Principles.aspx> (last visited Nov. 2, 2013) (environmental dispute resolution/environmental collaboration and conflict resolution basic principles); *What Is Collaborative Governance?*, POL'Y CONSENSUS INITIATIVE, http://www.policyconsensus.org/publicsolutions/ps_2.html (last visited Nov. 2, 2013) (key principles of collaborative governance); INT'L ASS'N FOR PUB. PARTICIPATION, <http://www.iap2.org.au> (last visited Nov. 2, 2013) (core values of public participation).

¹⁶ All quotations and references to individual statements in this article come from confidential interviews or narrative survey responses. As all interviewees were promised confidentiality and survey responses cannot be tied back to a specific respondent, individual citations will not be given.

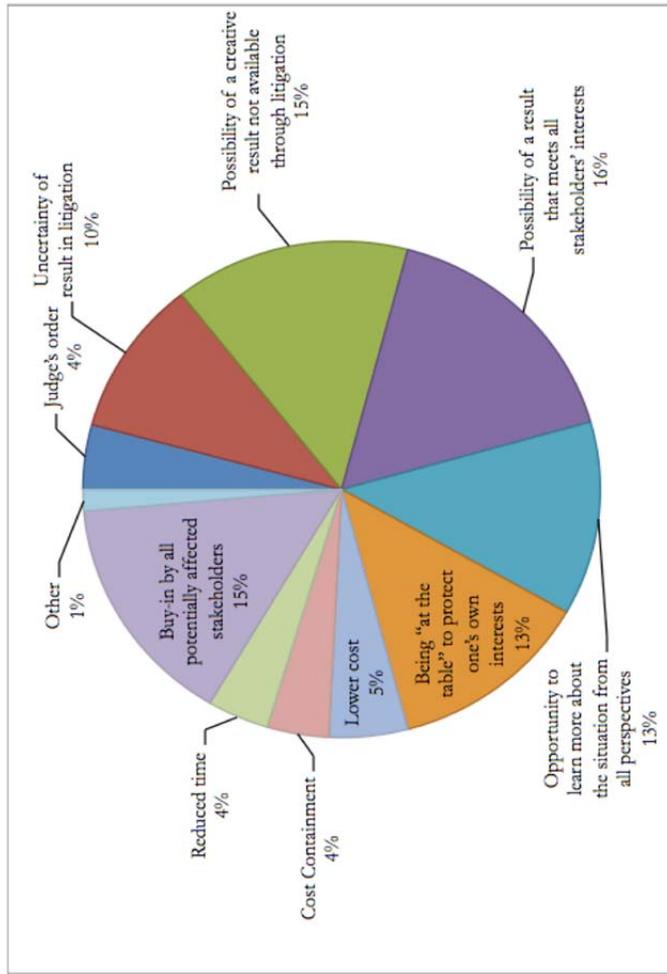
a disbelief in the value or power of interest-based negotiation (once litigation is filed, the company and/or their lawyers are “locked-in” to positions). A much larger proportion of lawyers were willing to consider mediation and listed some specific types of cases where it would be most applicable but commented that there were few if any local mediators with the requisite substantive expertise.

Nonlawyers who chose to complete the survey were aware of or had been involved in at least one EDR process. The author knows from personal communications, however, that several individuals chose not to take the survey at all because they did not have personal experiences on which to base their answers. The number of surveys started compared to the number of completed surveys may also suggest some lack of familiarity with EDR processes.¹⁷

The potential benefits of EDR appear to be well understood by those interviewed and surveyed in Utah, although some respondents expressed skepticism about the possibility of achieving these benefits. Figure 1 documents survey respondents’ opinions about what motivates them (or their clients) to participate in an EDR process. The most-cited benefits for lawyers *and* nonlawyers relate to inclusiveness and creativity in decision making, with reduced time and cost playing a significantly smaller role. This perspective about potential benefits may need to be tempered, however, by individual comments questioning whether some EDR processes are well designed or effectively implemented or whether significant stakeholder perspectives have been specifically excluded. Whether or not the comments are true, they reinforce a general awareness of the concept of EDR and its theoretical underpinnings.

¹⁷ Eighty-two individuals responded to the first survey question asking for their personal experience with EDR in Utah. Seventy-two individuals answered the next question asking which EDR process they found most effective, and over sixty individuals completed the entire survey.

FIGURE 1



What motivates you or your client to participate in an EDR process?

Source: Wallace Siegener Center Environmental Dispute Resolution Survey, June - July 2012

g-81

Note: percentages may not add up to 100 percent due to rounding

An understanding of the EDR concept seems to be relatively well distributed across stakeholder interests in Utah,¹⁸ but there is a question about whether that understanding has filtered down to all levels of the organizations involved and whether it informs day-to-day and on-the-ground approaches to environmental and natural resource issues. Several individuals interviewed mentioned the need to educate the “younger generation” who will be the “leadership in 20 years from now” about the value of collaborative approaches to decision making in environmental and natural resource issues. Several agency leaders at the state and federal level suggested that experiences with EDR have been limited to top management and a few individuals and that the “line staff” needs to become familiar with the opportunities that EDR offers for improved decision making.

We give a “sub-grade” of “Incomplete” for “Stakeholders’ Understanding of the EDR Concept.” Some Utah stakeholders have a good understanding of the EDR concept and recognize its benefits and potential shortcomings. A significant group of Utah stakeholders, however, have a more limited understanding, often due to lack of exposure to and experience with EDR processes.

C. Application of EDR Concept to the Facts

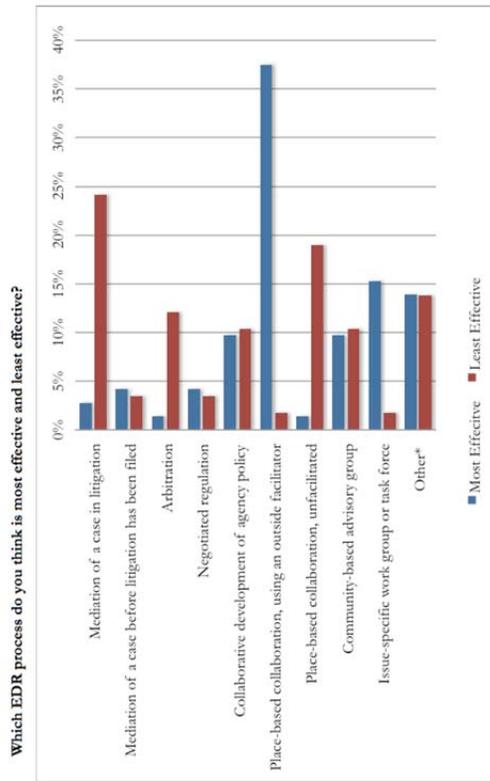
The grade assigned to the concept of EDR in Utah will depend both on whether stakeholders understand the concept and whether they use EDR (apply the concept to the facts). Interview and survey results reflect that multiple types of EDR have been used for environmental and natural resource issues in Utah, and participants have strong opinions about which are most and least effective. Respondents also identified many more issues they felt might be appropriate for future EDR.

The type of EDR process with which survey respondents had personal experience depended in part on whether or not they were practicing attorneys. Figure 2 summarizes the survey results on this question. Respondents who identified themselves as practicing attorneys were more likely to have participated in processes that are directly related to litigation and regulatory process, such as mediation

¹⁸ This conclusion is based on the broad range of stakeholder interests interviewed by the author, as well as the distribution of survey respondents across stakeholder categories. See *supra* text accompanying note 12.

Survey respondents and interviewees expressed strong preferences about which types of EDR they felt were most and least effective, with little noticeable difference between practicing attorneys and others. Figure 3 documents the quantitative answers given by survey respondents in evaluating different EDR approaches.¹⁹ Place-based collaborations using an outside facilitator were considered most effective by the greatest number of respondents, whereas un-facilitated collaborations and mediation of a case in litigation ranked as least effective.

FIGURE 3



Source: Wallace Siggel Center Environmental Dispute Resolution Survey, June – July 2012
 *Note: 13.4 percent of respondents identified the “other” category as both least effective and most effective.
 n=72 most effective, 58 least effective
 Note: percentages may not add up to 100 percent due to rounding

¹⁹ Note that approximately seventy-five percent of the respondents took the time to give their open-ended opinion about why they made their most and least effective choices, sometimes using strong language to express their opinions. Likewise, the topic of which EDR approach is more or less effective, and why, generated a lot of comment during the author’s interviews.

Several themes emerged from the narrative reasons given for why certain EDR processes are more or less effective.²⁰ The “early and often” theme was raised frequently as an attribute of successful EDR processes. Respondents pointed to the advantages of including all perspectives early in a decision-making process, *before* preferred alternatives are selected (i.e., *before* there is much to disagree with), with the purpose of the collaborative process being to identify common goals and reach consensus solutions. Many respondents also valued the use of an unbiased facilitator who was not affiliated with any of the participants or interests, claiming that this provided legitimacy and focus to the conversation. Finally, a significant number of respondents stated that a site-specific focus (place-based collaboration) had the highest likelihood of success because the participants were motivated to reach a workable result out of love for “the place,” as well as providing a very real focus for implementing policies and ideological concepts on the ground.

Many of the reasons articulated for why a particular EDR process was least effective had less to do with the process itself than with how it was implemented (a factor that will be assessed in more detail below in the “quality of EDR” section). Several respondents expressed concern that some stakeholders did not participate in good faith. Some expressed a related concern that decision-making agencies entered into the EDR process with an “agenda” (i.e., a desired end result) and did not stay open to different options suggested throughout the process. In other cases, potential opponents to an agency decision were perceived as equally uncompromising and prone to litigate unless their position was accepted without change.

Two specific processes were identified by some as least effective based on the possibility of bias and the lack of dialogue: arbitration and community advisory groups. Several respondents mentioned arbitration as unattractive because the parties do not control the outcome, which is usually a binding decision. Additionally, the arbitrator is sometimes perceived as biased. Community advisory groups, or task forces, were also cited as a less effective EDR option in Utah because state-sponsored groups were perceived by some to be less inclusive (i.e., opposing viewpoints were excluded) and not

²⁰ These themes are drawn from the EDR survey results but were echoed in the author’s interviews with stakeholders.

focused on problem solving. One respondent described the use of advisory groups and task forces in Utah as “window dressing.”²¹

While only one-third of survey respondents saw a need for legal or policy changes to facilitate or regulate the use of EDR processes in Utah, the suggestions for change that were made underscore those respondents’ perceptions that EDR processes are valuable and preferable to litigation. Many suggested that negotiation or mediation should be required before any litigation is filed in environmental and natural resource issues. Others suggested that the state set a goal to use collaboration in resolving these types of issues, thus modeling for all stakeholder interests that dialogue and problem solving are preferable approaches. Finally, a small number of respondents recommended “de-incentivizing” litigation by changing the federal Equal Access to Justice Act.²²

A final indicator that stakeholders in Utah can apply the concept of EDR to the facts lies in the long list of environmental, natural resource, and energy issues that survey respondents and interviewees suggested as EDR opportunities.²³ Included were interests in a water ombuds office, energy development-related siting disputes, land use issues, endangered species de-listing proposals, conflicts between user groups on public lands, state land management, mediation of Superfund cost allocation agreements, and many more.

Not surprisingly, individuals who had a positive previous EDR experience were ready to use such a process again and saw many

²¹ Controversy surrounding composition of the Utah Radiation Control Board is one recent example of this perceived bias in populating multi-interest groups. In response to a legislative change in the 2012 Utah General Session, reducing the number of seats on the board by a third (from thirteen seats to nine) and eliminating several “public” representative seats, Utah’s Governor recently selected an EnergySolutions representative to sit on the Board. Judy Fahys, *Radiation Board Overhaul, Appointment Draws Heat*, SALT LAKE TRIB. (Aug. 8, 2012, 1:34 PM), <http://www.sltrib.com/sltrib/politics/54650590-90/board-company-energysolutions-herbert.html.csp>. EnergySolutions is the largest (and virtually only) radioactive waste company regulated by the Board. *Id.* Note, however, that the Radiation Control Board is a regulatory entity, not an EDR process.

²² This suggestion may discount the valid role of litigation in some cases. If litigation is successful and sets a new precedent by clearly articulating applicable rules or standards, this may create a common goal that can form the basis for post-litigation collaboration. This was the case in the successful collaborations addressed later in this piece. *See infra* Part D.

²³ Survey respondents and interviewees together suggested over fifty specific conflicts or types of disputes they felt would benefit from use of EDR processes, rather than reliance on current decision-making approaches and subsequent litigation.

possibilities. Individuals who had a poor EDR experience, or none at all, were less enthusiastic or creative about identifying future cases or issues. Many respondents in both categories recognized, however, that the short supply of conveners and facilitators, as well as the reluctance of some stakeholders to participate, might affect the possibility of initiating an EDR process on many of the issues, as well as their likelihood of success.

We give a “sub-grade” of “Incomplete” for “Application of EDR Concepts to the Facts.” While many stakeholders recognize the possibility for the use of EDR, decision-makers at both the state and federal level are not regularly turning to EDR processes to prevent or manage conflict around environmental and natural resource issues in Utah.

D. Legitimate Answers Provided

EDR in Utah cannot be judged exclusively on the basis of the solutions agreed to by the participants. By definition, there is no “right” answer in mediation or collaborative processes—the “right” answer is a solution that all stakeholders can accept and will implement. There are also intangibles, short of or in addition to an agreement, that may be valuable and legitimate measures of an EDR process. Overall, perceptions about the correlation of EDR processes in Utah with desired results are somewhat mixed, often depending on whether the person speaking was included in the particular process or not.

There are a variety of measures that researchers might use to determine whether EDR processes are providing legitimate answers.²⁴ Some measures are more objective or directly measurable than others. Have otherwise intractable problems been resolved? Has the environment been improved? Have “better” decisions been made? Has the negotiated solution been implemented? Have long-term relationships improved? Has litigation been avoided or settled?

Survey respondents and interviewees offered EDR process examples that give both “yes” and “no” answers to these and other questions. These may not be the types of questions, however, that are

²⁴ Many researchers have attempted to evaluate EDR processes. See, e.g., THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION (Rosemary O’Leary & Lisa B. Bingham eds., 2003); Kirk Emerson et al., *Environmental Conflict Resolution: Evaluating Performance Outcomes and Contributing Factors*, 27 CONFLICT RESOL. Q. 27 (2009).

persuasive to Utah stakeholders or that motivate their participation in EDR processes. The narrative survey responses and interview discussions suggest that many stakeholders in Utah focus on three practical outcomes from EDR processes that they find legitimate and compelling.

First, project proponents value the ability to reach a workable solution that moves past roadblocks and allows projects and activities to begin or continue. Second, project opponents value the opportunity to pursue creative solutions that address the “real” issues, regardless of whether a court could issue a ruling on them. Third, many stakeholders appear to value the opportunity to build long-term relationships that carry over to future issues and help to prevent or manage future conflicts. As several individuals have told the author, “it’s all personal and comes down to relationships.”

The following are representative, but definitely not the only, examples of EDR processes in Utah that demonstrate these three outcomes:

- Two negotiated agreements among a variety of stakeholders that addressed environmental and land use impacts of proposed oil and gas development on public lands.²⁵ In each case, the developer was able to initiate oil and gas development without going through extensive litigation, while conservation and community interests were able to protect the wilderness and native art features they valued.²⁶ The parties continue to work together to implement the agreements.²⁷
- Collaborative development of a highway alignment, construction timing, and road design to address environmental and public

²⁵ See Robert B. Keiter & Kirstin Lindstrom, *Lessons from Nine Mile Canyon: Achieving Consensus over Energy Development on the Public Lands*, 57 ROCKY MTN. MIN. L. INST. 3-1 (2011) (discussing the negotiations between BBC and SUWA); Nick Snow, *Salazar Applauds Collaboration, Authorizes Eastern Utah Gas Project*, OIL & GAS J. (May 9, 2012), <http://www.ogj.com/articles/2012/05/salazar-applauds-collaboration-authorizes-eastern-utah-gas-project1.html> (discussing the negotiations between Anadarko Petroleum Corporation and Environmental groups). It should be noted that no agreement was reached in a third similar situation. See Paul Foy, *Feds Approve Gas-Drilling Project in Eastern Utah*, BLOOMBERG BUSINESSWEEK NEWS (June 18, 2012), <http://businessweek.com/ap/2012-06-18/feds-approve-gas-drilling-project-in-eastern-utah>.

²⁶ See *supra* note 25.

²⁷ Personal communications between author and stakeholders.

transit concerns.²⁸ The Utah Department of Transportation was able to build a road without additional litigation, while the original opponents' concerns about wetlands protection and mass transit were accommodated.²⁹ The parties worked together to authorize and design a subsequent extension of the highway involving similar environmental and transit planning issues, while also addressing public health concerns not raised in the first process.³⁰

- Consensus agreement between public land managers, ranchers, and environmental groups about grazing management practices and collaborative monitoring to reach desired future conditions.³¹ Grazing allotments were allowed to continue operation with management changes and reduced livestock numbers.³² The parties continue to work together to make needed infrastructure improvements and discuss adaptive management actions based on shared monitoring information.³³

Not all survey participants and interviewees share the positive reviews about EDR processes in general or about the specific EDR processes identified above. Some consider “creative solutions” to be excessive compromise. Others assert that not all significant interests were included in a given EDR conversation, leaving some issues unresolved or poorly resolved. Still others do not believe that the agreed-upon solutions will have the desired environmental benefits. Some concern was also expressed during interviews that solutions developed collaboratively under one political administration can be unilaterally changed or reversed by the next administration, making

²⁸ See Robert W. Adler, *In Defense of NEPA: The Case of the Legacy Parkway*, 26 J. LAND RESOURCES & ENVTL. L. 297 (2006). Note that collaborative discussions did not start until after highway opponents were successful in the Tenth Circuit and permits were remanded for additional NEPA review. *Id.* at 305–06; see also UTAH TRANSIT AUTH., UTAH DEP'T TRANSP., 1 MOUNTAIN VIEW CORRIDOR FINAL ENVIRONMENTAL IMPACT STATEMENT app. 3A (2008), available at <http://www.udot.utah.gov/mountainview/content/feis> (follow “3A - Growth Choices Study” hyperlink).

²⁹ See *supra* note 28.

³⁰ See *supra* note 28.

³¹ See MICHELE STRAUBE, U.S. INST. FOR ENVTL. CONFLICT RESOL., TUSHAR GRAZING ALLOTMENTS COLLABORATION FINAL REPORT (Apr. 2009), available at <http://projects.ecr.gov/tushar/pdf/finalreport050209.pdf>. Note that the collaboration was created as part of a settlement agreement in a NEPA appeal.

³² *Id.* at 49, 62–63.

³³ Personal communications between author and stakeholders.

participants question whether time invested in some EDR processes is worthwhile.³⁴

We give a “sub-grade” of “Incomplete” for “Legitimate Answers Provided.” EDR in Utah is providing legitimate answers in many cases, but it has not been generally accepted as an effective means of resolving conflict in environmental and natural resources.

E. Quality of Work

With no formal evaluation mechanisms for EDR processes in Utah, judgments about the quality of work can only come from the participants themselves. The “work” being assessed includes both how the EDR process is designed and how it is carried out.³⁵ The grade in this category therefore varies considerably, depending on an individual’s personal experience. The level of concern raised about potential bias, however, suggests that a universally acceptable quality of work has not yet been achieved.

Respondents expressed a general theme about the lack of local capacity for skilled neutral services, both mediators and facilitators. Several lawyers interviewed mentioned that while mediators are listed on the state court roster as specializing in environmental matters,³⁶ they generally look out-of-state to find the substantive expertise they expect in an environmental mediator (or forgo mediation due to the extra cost involved in going with an out-of-state mediator).

A similar supply issue exists for facilitators. As mentioned earlier, only three Utah facilitators are listed on the national environmental conflict resolution roster.³⁷ Federal public land agencies encourage

³⁴ This result is true for virtually any approach taken to resolve environmental and natural resource disputes and may not be a fair criticism of EDR. Results achieved through litigation can be reversed on appeal (though they are binding once appeals are exhausted and become subject to subsequent judicial enforcement), and legislative action can change the rules post-litigation. Results achieved through legislative action are always subject to change as political perspectives and representation change. Perhaps this critique of EDR processes challenges the level of certainty that a collaboratively developed solution will be implemented.

³⁵ The author acknowledges that the EDR processes she has designed or facilitated may be included in those negatively assessed by stakeholders. None of the collaborations specifically critiqued by interviewees or survey respondents were her projects.

³⁶ The Utah State Court roster includes twenty-nine mediators and arbitrators who have self-identified “environmental” as their area of expertise. *Areas of Expertise*, UTAH STATE COURTS., <http://www.utcourts.gov/mediation/roster/expertise.asp> (last modified Aug. 14, 2013) (select “Environmental” from the drop-down menu).

³⁷ U.S. INST. FOR ENVTL. CONFLICT RESOL., *supra* note 11.

the use of collaboration and have established offices to help identify facilitators,³⁸ but their services do not appear to be used regularly in Utah. Some state agencies dealing with environmental and natural resource issues have staff with facilitation training and experience whose services appear to be used sporadically. Some stakeholders have indicated concerns about the true neutrality of in-house facilitators, raising the question of whether this in-house resource helps or hinders the effectiveness of EDR processes. Survey respondents also found the lack of available or impartial facilitators a possible factor in preventing participants from reaching agreement in EDR processes.³⁹

Several survey respondents and interviewees perceived bias in Utah-specific EDR process design. Environmental advocates in particular gave examples of “sham” collaborations that did not include all significant stakeholder perspectives and cautioned that these kinds of process could “poison the whole EDR field.” EDR approaches that were not inclusive, did not solicit stakeholder participation early in the decision-making process, and did not seek common ground were described as a “crap shoot.” The allegations of bias cannot be confirmed without doing an objective evaluation of the specific EDR processes involved, but the fact that multiple respondents and interviewees shared this perception may be significant and may warrant further exploration.

We give a “sub-grade” of “Incomplete” for the “Quality of Work” for EDR in Utah. A failing grade is not deserved, despite the minimal supply of qualified mediators and facilitators and the concerns raised about perceived bias in process design and facilitation in some cases. There are many examples of successful process design and quality mediation and facilitation that form a strong foundation for improving the quality of EDR processes in Utah.

³⁸ See, e.g., *Natural Resources Collaborative Stakeholder Engagement and ADR*, BUREAU LAND MGMT., http://www.blm.gov/wo/st/en/prog/planning/adr/natural_resources.html (last updated Apr. 5, 2011); *Partnership Resource Center*, FOREST SERVICE, <http://www.fs.usda.gov/prc> (last visited Nov. 2, 2013).

³⁹ Sixty-four percent of survey respondents said the lack of impartial facilitators *sometimes* prevents participants in an EDR process from reaching agreement. Fifty-four percent said the lack of available facilitators is *sometimes* a reason that EDR processes do not reach agreement.

F. Experiential Learning

Mediations and collaborations on environmental and natural resources issues are taking place in Utah, but they are not being systematically documented or evaluated. The “homework” to demonstrate the use of EDR in Utah has not been turned in, making it difficult to assess what works well, what does not, and why. Learning from previous experience and drawing inspiration from EDR successes is not yet occurring.

Based on stakeholder interviews and survey responses, the author has accumulated a list of over fifty examples of completed mediations and collaborations in Utah representing a variety of stakeholders, process approaches, and substantive contexts, as well as over twenty examples of ongoing collaborations in the state. Yet, a common perception among potential stakeholders is that EDR approaches are neither welcome nor possible in the state.

Utah’s ongoing homework assignment should include developing case studies to celebrate completed mediations and collaborations (while respecting confidentiality) and to identify best practices and lessons learned to inform future EDR processes. Telling EDR stories will also raise awareness of available EDR processes and highlight their real-life benefits.

G. Final Grade

Using the above rubric, the author gives EDR in Utah an “Incomplete” grade but acknowledges the progress being made and the potential for improvement. In order for this potential to be realized, however, consideration should be given to the existing challenges and barriers for improving the grade (increasing the use of EDR in Utah).

II

CHALLENGES AND BARRIERS TO EDR IN UTAH

Survey respondents were asked to identify the obstacles to increased use of dialogue and consensus building on environmental, natural resource, and energy issues, especially in Utah. Figure 4 summarizes their responses, showing the similarities in and differences between responses by practicing lawyers and others. In general, the author’s interviews (conducted before the survey was

issued) and the narrative survey responses mirror the survey’s quantitative results.

FIGURE 4

What are the obstacles to increased use of dialogue and consensus building on environmental, natural resource and energy issues, especially in Utah?

Respondents who are not practicing attorneys	Never	Sometimes	Often	Always	Respondents who are practicing attorneys	Never	Sometimes	Often	Always
Lack of trust between participants	5%	10%	73%	13%	Lack of trust between participants	0%	11%	58%	32%
Lack of knowledge about collaboration or consensus-building	3%	38%	58%	3%	Lack of knowledge about collaboration or consensus-building	0%	39%	50%	11%
Lack of political support for dialogue	5%	30%	53%	13%	Lack of political support for dialogue	0%	42%	47%	11%
Lack of available facilitators	28%	48%	25%	0%	Lack of available facilitators	44%	50%	6%	0%
Lack of impartial facilitators	20%	60%	20%	0%	Lack of impartial facilitators	22%	67%	11%	0%
Inadequate time to let the process run its course	10%	36%	46%	8%	Inadequate time to let the process run its course	0%	76%	6%	18%
Inadequate funding	10%	20%	55%	15%	Inadequate funding	0%	50%	33%	17%
Unwillingness to compromise	8%	33%	50%	10%	Unwillingness to compromise	0%	37%	42%	21%
Federal Advisory Committee Act (FACA)	20%	67%	3%	10%	Federal Advisory Committee Act (FACA)	40%	53%	7%	0%

Source: Wallace Siggart Center Environmental Dispute Resolution Survey, June–July 2012

n=60 (19 practicing attorneys and 41 are not practicing attorneys)

Note: percentages may not add up to 100 percent due to rounding

Lack of trust between participants was the highest-ranked barrier to expanded use of dialogue and consensus-building, with a third of lawyers suggesting that lack of trust is *always* an issue and two-thirds of nonlawyers suggesting that it is *often* an issue. Specific examples given during interviews highlight the stereotypes and misconceptions about “the other”⁴⁰ that form one basis for this lack of trust. The following general stereotypes were asserted by individual interviewees: lawyers prefer to litigate rather than settle, “environmental groups” make money (gain membership) from taking hard-line advocacy positions, and politicians need to be uncompromising to be electable. Some interviewees also mentioned that trust is often specific to an individual, not an institution, so that trust may need to be rebuilt with every turnover in personnel.⁴¹

Many EDR processes, such as mediation and collaborative problem-solving, in theory should increase the trust between participants or provide ways for parties to communicate effectively despite a lack of trust. These processes focus on dialogue and mutual education. With the help of a neutral third party to promote communication (whether called a mediator or facilitator), they are designed to build trust and help participants find common ground. It is interesting to note, therefore, that lack of knowledge about collaboration or consensus-building ranked as a significant obstacle to the increased use of EDR in Utah, with over half the survey respondents suggesting that it was *often* a problem and another third thinking it was *sometimes* a barrier. Similarly, over half of the survey respondents cited the lack of impartial facilitators as *sometimes* affecting stakeholders’ willingness to participate in dialogue and consensus building.⁴² The lack of available facilitators was also cited

⁴⁰ “Othering” is a way of thinking about those we do not agree with (“the other”), which creates intentional separation (“us” versus “them”) without seeking to understand the other’s perspective. For an extensive analysis of “othering”, see *PORTRAYING THE OTHER IN INTERNATIONAL RELATIONS: CASES OF OTHERING, THEIR DYNAMICS AND THE POTENTIAL FOR TRANSFORMATION* (Sybille Reinke de Buitrago ed., 2012).

⁴¹ The rate of turnover varies significantly between government agencies. The author encountered examples of agency employees who have on-the-ground experience with the same permittees for over thirty years and other agency personnel who routinely change jobs (and sometimes geographic regions of the country) every two years.

⁴² There is an interesting difference between lawyers’ and nonlawyers’ opinions about the lack of impartial facilitators. Almost one-quarter of lawyer respondents thought the lack of impartial facilitators was *never* a problem, while a similar percentage of nonlawyers (which represents nearly double the number of respondents) found the lack of impartial facilitators to *often* be a problem. This may be explained by the nature of the

as a constraint, although it was a more significant factor for practicing lawyers than it was for nonlawyers.⁴³ Thus, the very things that could build trust between participants—the use of a well-designed collaborative process and neutral third-party assistance—are exactly the things that Utah stakeholders are unaware of or do not know how to find.

More than half of all survey respondents indicated that lack of political support for dialogue and an unwillingness to compromise were *often* obstacles to the use of EDR in Utah, with another third of all respondents feeling these were *sometimes* a problem. It is difficult to tell whether this reflects the “take-no-prisoners” attitude prevalent in our national political conversations⁴⁴ or whether there is a particularly strong opposition in Utah to dialogue about controversial issues. It may also reflect a lack of familiarity with alternative negotiation styles. In short, the use of EDR processes may depend on the value that politicians and agency decision-makers place on dialogue and the exchange of differing ideas as a basis for sound and implementable decisions.

EDR processes that engage potentially opposing views in dialogue can be time consuming, as strongly-held opinions and distrust of other stakeholders do not generally change overnight. It is particularly difficult to break down age-old barriers and build trust between historic opponents within the timeframe of one EDR process. The costs of these processes (e.g., paying for a mediator or facilitator to help keep the conversation constructive or delaying a decision until consensus can be reached) can grow as the time required for collaboration increases. Lawyer survey respondents, in particular, felt

processes each group participates in, with lawyers participating mostly in mediations and arbitrations and nonlawyers participating more frequently in place-based collaborations and advisory groups or task forces.

⁴³ This again may be due to the difference in EDR process experience. Mediations and arbitrations (lawyers’ primary EDR experiences) cannot occur without mediators or arbitrators. Other collaborative problem-solving processes (nonlawyers’ primary EDR experiences) can occur without a facilitator, although survey recipients and interviewees had strong opinions on whether this was an effective approach.

⁴⁴ Former Presidents Bill W. Clinton and George H.W. Bush were recently in Salt Lake City talking about civility and the benefits of bipartisanship. Jared Page, *George W. Bush and Bill Clinton Preach Civility on Visit to Utah*, DESERET NEWS (Aug. 13, 2012), <http://www.deseretnews.com/article/865560628/Bush-Clinton-visit-Utah-issue-call-for-civility-in-politics.html?pg=all>. Clinton and Bush also serve as the Honorary Chairs for the recently created National Institute for Civil Discourse at the University of Arizona, a nonpartisan center advocating for civil discourse. *Mission*, NAT’L INST. FOR CIV. DISCOURSE, <http://nicd.arizona.edu/> (last visited Nov. 2, 2013).

that there was *sometimes* or *always* inadequate time to let the EDR process run its course thus discouraging the use of mediation and collaboration but also *sometimes* preventing parties from reaching agreement. Over half of all survey respondents were concerned that lack of funding kept stakeholders from trying EDR processes as an alternative approach to addressing environmental and natural resource issues.⁴⁵

Every EDR process does not end up in agreement, which can also sour participants' interest in participating in a collaborative process again. The main reasons cited by survey respondents for not reaching agreement question the willingness and capacity of some stakeholders to participate in good faith. These include lack of political support for dialogue, lack of trust between participants, and unwillingness to compromise.⁴⁶ These challenges echo the reasons given by some stakeholders for their dissatisfaction with EDR and highlight the significance of political and individual attitudes as a foundation for the successful use of EDR.

The challenges and barriers identified by survey respondents and interviewees are daunting but not insurmountable. They can be overcome by increased awareness and personal experience with well-designed and implemented EDR processes. Opportunities for individual and group transformations will be created as stakeholders are exposed to the conceptual and real benefits of EDR processes.

III AREAS FOR IMPROVEMENT

Despite Utah's "Incomplete" grade for the use of EDR to address environmental and natural resource issues, the survey results and informal interviews suggest that many Utah stakeholders are interested in expanding the use of EDR in the state. Several specific

⁴⁵ This is ironic given the time needed for most litigation, especially when inevitable appeals are included. Perhaps the decision-making stakeholders prefer to take the risk that litigation will not be filed rather than sharing their decision-making authority in a collaborative process.

⁴⁶ Sixty-four percent of survey respondents said that the lack of political support for dialogue *often* prevents participants in an EDR process from reaching agreement; twenty-three percent said that it *sometimes* is a barrier. Fifty-eight percent said that unwillingness to compromise *often* prevents participants in an EDR process from reaching agreement; twenty-four percent said it *sometimes* is a barrier. Fifty-six percent said that the lack of trust between participants *often* prevents participants in an EDR process from reaching agreement; twenty-eight percent said it *sometimes* is a barrier.

areas for improvement to work toward that goal are suggested below. They are framed broadly (i.e., not just Utah-specific) to promote a larger conversation about where efforts to increase the use of EDR might focus.

A. Clarify and Communicate the Goals and Benefits of EDR

There is both a lack of awareness and an inconsistent understanding among stakeholders about what EDR is or can accomplish. The academic and practitioner community that thinks about and studies the field full time also uses many different names for the varying processes that comprise EDR.⁴⁷ The author has found a similar definitional confusion amongst those who use or hear the term “ADR” (alternative dispute resolution), the umbrella concept for environmental dispute resolution.⁴⁸

Semantics aside, EDR (and ADR) processes might be better understood if the language we used to talk about them clearly reflected their objectives. What is EDR (or ADR) and why should conveners and stakeholders participate?

What is it? The author suggests that, at least in the context of environmental and natural resource disputes, “ADR” is simply an initialism for “Additional Dialogue Required.” Given the complexity and highly controversial nature of the underlying issues, perhaps EDR can be thought of as “Even more Dialogue Required.” Dialogue is the ultimate purpose and benefit of most EDR processes, and creating an opportunity for dialogue is the work of EDR.⁴⁹ Stating that objective as part of the name used to describe the field might broaden perspectives and increase willingness to participate.

Why should conveners and stakeholders participate in EDR processes? A primary selling point for “Additional Dialogue Required” processes is their potential to create solutions that are well-

⁴⁷ See *supra* text accompanying note 15.

⁴⁸ Many members of the public don’t recognize the term “ADR” at all. Those who are familiar with ADR often cannot differentiate between mediation and arbitration and have never heard of collaborative problem solving (despite the term essentially being self-defining).

⁴⁹ Use of this new definition for the initialism can go far beyond the environmental and natural resource realm. It is applicable for public policy disputes that are resolved using processes other than litigation. The new definition can also work for most alternative dispute resolution mechanisms within the litigation framework (e.g., early neutral evaluations, joint fact finding, and summary trials can and should promote dialogue and settlement discussions). The initialism may not be equally applicable for processes that more closely resemble litigation, such as arbitration.

accepted by the full variety of stakeholder interests and that can be implemented without challenge. Efforts to expand the use of EDR might be most successful if they highlight the possibility (and, through case studies, the reality) of these worthy results.

B. Build EDR Awareness and Capacity

Many EDR-related teaching opportunities have been created across the country, but it is unclear whether they have built a constituency that will create the demand for use of EDR, or whether they will simply enlarge the supply of (as-yet-underemployed) EDR practitioners. In other words, there is some reason to believe that existing programs simply “preach to the choir.” Perhaps more attention can be paid to embedding the essential principles of EDR into various professional training programs, as well as creating opportunities for potential conveners and stakeholders to hear EDR stories so that our educational efforts support a culture change regarding our society’s and politicians’ approach to decision-making and problem-solving around environmental and natural resource issues. In certain areas of the country, Utah included, an increased supply of qualified third-party neutrals would also be helpful.

1. Embed EDR Principles Broadly

Several EDR certificate programs exist (with varying names but generally similar approaches and curricula).⁵⁰ Many training opportunities on specific aspects of EDR can be found.⁵¹ These opportunities, while extremely valuable, reach those who self-select to pay for this type of education and probably already believe in EDR. Without more information, we cannot reach any conclusions about the size of the newly educated or certificated population. These formal EDR education programs should continue, but they are not enough.

Many efforts are underway to raise awareness among agency staff and other potential stakeholders, although much more should be done. The U.S. Institute for Environmental Conflict Resolution has done an

⁵⁰ Natural Resources Conflict Resolution Program at University of Montana, Graduate Certificate in Collaborative Governance at University of Arizona, and Environmental Conflict Resolution and Collaboration Certificate at George Mason University provide a few examples.

⁵¹ U.S. Institute for Environmental Conflict Resolution, Collaborative Decision Resources (or CDR) Associates, and Vermont Law School Dispute Resolution Summer Session provide a few examples.

exceptional job of bringing the concept and skills of EDR to federal agencies involved in environmental and natural resource issues and providing a resource of case studies.⁵² Natural Resource Leadership Institute (NRLI),⁵³ which provides collaborative leadership training to a broad spectrum of stakeholder interests at the state level, has established programs in at least eight states,⁵⁴ with at least three more programs under development.⁵⁵ That leaves more than half the states (including Utah) without this capacity-building tool. Based on the author's experience in Utah, it seems unlikely that agency staff and community members will choose to participate in another state's NRLI because stakeholders in each state perceive their issues and political culture to be unique. New approaches to raising awareness about EDR options and building trust across stakeholder interests need to be geared to the history and culture of the place.

While much has been written about EDR, no comprehensive text gives a broad overview of the variety of procedural approaches in the context of different substantive issues.⁵⁶ EDR is not a subject offered regularly in most law schools or other professional programs (e.g., Masters of Public Administration, Planning, or Natural Resources Management). Indeed, the core concept underlying all EDR processes—interest-based negotiation⁵⁷—is not an essential skill for

⁵² See *Annual Report on Environmental Collaboration and Conflict Resolution*, U.S. INST. FOR ENVTL. CONFLICT RESOL., <http://www.ecr.gov/resources/federalecpolicy/annualecreport.aspx> (last visited Nov. 2, 2013) (providing the annual reports of federal agencies on the use of EDR); U.S. INST. FOR ENVTL. CONFLICT RESOL., *supra* note 6 (providing case briefs).

⁵³ *Resolving Conflict Through Leadership—Better Decisions Through Collaboration*, N. CAROLINA STATE U. NAT. RESOURCES LEADERSHIP INST., <http://www.ncsu.edu/nrli/> (last visited Nov. 2, 2013) (providing general information about the NRLI and its history); see also *Assisting the Development of State NRLI Programs*, U. VIRGINIA INST. FOR ENVTL. NEGOTIATION, <http://ien.arch.virginia.edu/projects-current/nrli-home> (last visited Nov. 2, 2013).

⁵⁴ NRLI programs have been set up in Florida, Alaska, Indiana, Maryland, Montana, North Carolina, Oregon, Virginia, and Wyoming. See *Other State Programs*, U. VIRGINIA INST. FOR ENVTL. NEGOTIATION, <http://ien.arch.virginia.edu/nrli/nrli-contact> (last visited Nov. 2, 2013).

⁵⁵ NRLI programs are in the process of being developed in Colorado, Ohio, and Texas. *Learn from New Programs in the Works . . .*, U. VIRGINIA INST. FOR ENVTL. NEGOTIATION, <http://ien.arch.virginia.edu/nrli/nrli-new-programs> (last visited Nov. 2, 2013).

⁵⁶ The author's informal review of publicly available EDR curricula suggests that each faculty member creates his or her own reading list and focuses on EDR approaches that are of greatest interest (or familiarity) to them.

⁵⁷ Parties using interest-based negotiation strategies base their negotiations on an exploration of each other's underlying interests or needs, from which they develop

graduation from any professional program. Based on the author's own experience teaching separate courses in EDR and Conflict Management in the University of Utah law school and Masters of Public Administration (MPA) programs, this one class is often law or MPA students' first (and, if they are graduating, their only) exposure to interest-based negotiation, consensus-based decision-making models, collaborative problem solving, conflict prevention/management approaches, and other alternatives to litigation.

2. *Share EDR Stories*

A conscientious effort to spread the word about what EDR can accomplish is one approach to increasing the knowledge about collaboration and consensus building and increasing political support for dialogue—two of the top challenges survey respondents identified for expanding the use of EDR in Utah.

EDR case studies can be found online⁵⁸ and in published compilations.⁵⁹ As with the certificate and training programs mentioned above, however, the audience for these case studies is primarily “the choir.” Several individuals interviewed by the author identified the challenge of getting case studies in front of those stakeholder interests who may be unaware of EDR or who are actively resistant to the concept. Suggestions included writing regular short articles for specific interest groups (e.g., local government league newsletters, business trade association newsletters, and bar association journals).

Creativity is needed to disseminate EDR case studies to the desired audiences. Case studies should also be used as a means of identifying lessons learned and developing best practices so that future EDR processes will be ever more successful.

multiple settlement options that create mutual gain. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 42–57 (Bruce Patton ed., Penguin Books 3d ed. 2011) (1981). This approach differs significantly from the traditional negotiation model, based on positions, where discussions generally involve an exchange of offers and counter-offers. *Id.* at 3–15.

⁵⁸ See *CONSENSUS BUILDING INST.*, *supra* note 6 (providing case studies).

⁵⁹ See, e.g., *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* (Lawrence Susskind et al. eds., 1999); *ENVIRONMENTAL DISPUTE RESOLUTION: AN ANTHOLOGY OF PRACTICAL SOLUTIONS* (Ann L. MacNaughton & Jay G. Martin eds., 2002).

3. Train More Local Neutrals

States like Utah may suffer from a “chicken and egg” problem. Is there a lack of awareness and limited experience with EDR processes because of the limited supply of qualified mediators and facilitators, or do the extremely small numbers of practitioners reflect a true lack of demand for EDR services? Have qualified mediators and facilitators not arrived in Utah because there is no funding for their services?⁶⁰

Based on the author’s informal interviews and the narrative survey results, the current demand for qualified third-party neutrals in the state is not being met. As with EDR processes, however, there is no one-size-fits-all type of EDR practitioner. Traditional mediators are needed who have an understanding of the relevant environmental and natural resource legal issues. Facilitators are needed who are impartial, and more importantly, will be perceived by all stakeholders as impartial. Facilitators are needed who are capable of making it safe to discuss strongly-held values and who can help all stakeholders open their minds to multiple viewpoints and creative solutions. These facilitators must also be able to understand the technical complexities of environmental and natural resources issues in enough depth to help all stakeholders reach a similar level of knowledge, without using their technical expertise to influence the decision. Building the third-party neutral capacity to fill these divergent needs offers a huge challenge.

C. Continue to Find New Examples for the Use of EDR

While there are EDR concepts that can be applied to most environmental and natural resource issues (e.g., interest-based negotiation and inclusivity of stakeholder perspectives), there is no cookie-cutter approach to fitting the process to the issue. There is no “usual” case. Some issues are appropriate for mediation, some issues are best resolved through a consensus-building process, some issues would benefit from extensive public participation short of consensus, and some are best addressed through a collaborative governance approach.

⁶⁰ The related circular problem is that few will want to enter the field as specialists if there is not enough work. One solution is to have mediators and facilitators develop a mixed practice, part EDR and part other substantive areas, to help “pay the bills.” However, this approach would provide fewer practitioners with the specialized expertise sought by the parties and may therefore be unsuccessful.

In order to create the most effective EDR process for any individual environmental or natural resource issue, conveners, stakeholders, and EDR practitioners will need to be open-minded about approach and may have to work across disciplines to find the best techniques.⁶¹ They cannot allow their imagination of what is possible to be constrained by the limitations of their personal experience.

Decisionmakers and practitioners should work together to identify environmental and natural resource issues that would benefit from an EDR process and work creatively to fund them so that they are well-designed and well-implemented. Resistance to the use of EDR will be overcome by proving its effectiveness through real-life examples. We need to tell the many EDR stories that already exist, but we should also be intentional about creating the EDR stories that need to be told. In Utah in particular, place-based conflicts may provide the best opportunities for raising awareness and building the desired capacity.

CONCLUSION

The environmental and natural resource professionals who will be in positions of power and influence for decades into the future are not being introduced to the core values and potential benefits of mediation, collaborative problem solving, community engagement, and the many other aspects of EDR as part of their graduate education. Decisionmakers and the stakeholders affected by their decisions are neither regularly made aware of the variety of available decision-making approaches, nor are they regularly reminded of success stories that exemplify something beyond “business as usual.” Participants in well-designed and well-implemented EDR processes become strong proponents of EDR. Unfortunately, the opposite can be true as well.

Educational institutions have an important role to play in creating increased opportunity and demand for the use of EDR. They can and should do more to teach the “Additional Dialogue Required” aspect of

⁶¹ There are many different professionals who might consider themselves to be EDR practitioners: public meeting and open house “facilitators” (public participation professionals); “facilitators” of consensus-building processes (potentially on the ECR roster); “mediators” of cases in or headed to litigation (often lawyers); and public administrators putting together a collaborative project (collaborative governance). The skills of these various professionals are overlapping, but one cannot necessarily do the other’s job.

ADR (interest-based negotiation and collaborative problem solving) so that stakeholders can use problem-solving skills in all contexts, regardless of whether they are involved in a recognized EDR process or not.

Academic institutions can and do serve as a neutral place where different stakeholder interests come together in dialogue on controversial issues. Opportunities can range from issue-specific conversations to multi-interest leadership training that focuses on EDR skills and opportunities. This is one way of building the library of case studies and creating the positive experiences with EDR and collaborative problem solving that will become the stories that persuade.

Educational institutions and others should do what they can to document EDR processes and tell the stories of what works well (and what does not) in a way that politicians, community members, agency staff, and other potential stakeholders can “hear” and understand.

There is no question that EDR can and does work, in Utah and beyond. The answers for when and how best to use EDR continue to evolve. The “Incomplete” grade for EDR in Utah should improve with an increased focus on building awareness and capacity for participating effectively in EDR, identifying appropriate EDR opportunities, and sharing stories that document solutions that are being implemented without challenge.

APPENDIX: EDR SURVEY QUESTIONS

Survey Introduction

The Wallace Stegner Center at the University of Utah S.J. Quinney College of Law has recently created an Environmental Dispute Resolution (EDR) Program. This survey is part of our effort to identify opportunities to expand the use of collaboration and dispute resolution around environmental, natural resource, and energy issues in Utah and the Mountain West.

You will be asked to share your experiences with collaboration and EDR and to offer your insights on what barriers exist to the use of collaboration and EDR on these issues. All survey answers will be kept anonymous (even if you give us permission to contact you at the end of the survey). General results from this survey may be used in a written report about the current state of EDR in Utah.

The survey contains 21 questions. Thank you in advance for sharing your thoughts with us by July 31, 2012.

Survey Questions

1. Which Environmental Dispute Resolution (EDR) processes do you have personal experience with in Utah? Please include any process related to environmental, natural resource, or energy issues. For each one, provide a scale: 0 times, 1 time, <5 times, 5-10 times, or >10 times.

- Mediation of a case in litigation
- Mediation of a case before litigation has been filed
- Arbitration
- Negotiated regulation
- Collaborative development of agency policy
- Place-based collaboration, using an outside facilitator
- Place-based collaboration, unfacilitated
- Community-based advisory group
- Issue-specific work group or task force
- Other (describe):

2. Which Environmental Dispute Resolution (EDR) process do you find MOST effective? Choose only one.

- Mediation of a case in litigation
- Mediation of a case before litigation has been filed

- Arbitration
- Negotiated regulation
- Collaborative development of agency policy
- Place-based collaboration, using an outside facilitator
- Place-based collaboration, unfacilitated
- Community-based advisory group
- Issue-specific work group or task force
- Other (describe):

3. Please describe why the type of EDR you selected was MOST effective?

4. Which Environmental Dispute Resolution (EDR) process do you find LEAST effective? Choose only one.

- Mediation of a case in litigation
- Mediation of a case before litigation has been filed
- Arbitration
- Negotiated regulation
- Collaborative development of agency policy
- Place-based collaboration, using an outside facilitator
- Place-based collaboration, unfacilitated
- Community-based advisory group
- Issue-specific work group or task force
- Other (describe):

5. Please describe why the type of EDR you selected was LEAST effective.

6. Please provide a name and/or brief description of specific EDR cases or projects you think would serve as a good case study to identify best practices and lessons learned.

7. What motivates you or your clients to participate in an EDR process? Check all that apply.

- Judge's order
- Uncertainty of result in litigation
- Possibility of a creative result not available through litigation
- Possibility of a result that meets all stakeholders' interests
- Opportunity to learn more about the situation from all perspectives
- Being "at the table" to protect one's own interests
- Lower cost

- Cost containment
- Reduced time
- Buy-in by all potentially affected stakeholders
- Other (be specific):

8. What are the obstacles to increased use of dialogue and consensus-building on environmental, natural resource, and energy issues, especially in Utah? For each possible answer, provide a scale: Never, Sometimes, Often, or Always.

- Lack of trust between participants
- Lack of knowledge about collaboration or consensus-building
- Lack of political support for dialogue
- Lack of available facilitators
- Lack of impartial facilitators
- Inadequate time to let the process run its course
- Inadequate funding
- Unwillingness to compromise
- Federal Advisory Committee Act (FACA)
- Other (be specific):

9. If you have any additional information regarding the obstacles identified above, please provide your comments below.

10. What challenges exist that prevent the successful completion of EDR processes (i.e., a collaboration or mediation that does not result in agreement)? For each possible answer, provide a scale: Never, Sometimes, Often, or Always.

- Lack of trust between participants
- Lack of knowledge about collaboration or consensus-building
- Lack of political support for dialogue
- Lack of available facilitators
- Lack of impartial facilitators
- Inadequate time to let the process run its course
- Inadequate funding
- Unwillingness to compromise
- Other (be specific):

11. If you have any additional information regarding hindrances to successfully completing what was identified above, please provide your comments below.

12. What opportunities do you see for increased use of collaboration and EDR in environmental, natural resource, and energy issues?

13. Do you see the need for legal changes to facilitate or regulate the use of EDR processes in Utah? Yes or no?

14. If you answered “yes” to question 13, please describe the legal changes you would recommend.

15. Please identify any additional individuals you think would provide useful information for this survey. Please include e-mail addresses.

16. Would you be willing to be interviewed with follow-up questions? Yes or no?

17. If you answered “yes” to question 16, please give us your name and contact information. Again, your answers to this survey will remain confidential and without attribution.

18. Please indicate your primary role with respect to environmental, natural resource, and energy issues. Choose only one.

- Attorney in private practice
- Federal government
- Regional organization
- State government
- Local government
- Academic
- Business sector. If you chose this role, which industry or business do you work in?
- Nonprofit organization—advocate
- Nonprofit organization—non-advocate
- Community member
- Third-party neutral (facilitator, mediator, etc.)
- Other (be specific):

19. Which environmental, natural resource, or energy issues do you primarily work on? Choose all that apply.

- Environmental protection (air quality, water quality)
- Fossil fuel energy
- Hazardous substances
- Land use
- Mining

- Oil and gas
- Renewable energy
- Water law
- Other (be specific):

20. Are you an attorney? Yes or no?

Survey Closing Page

Many thanks for taking the time to provide your insights on Environmental Dispute Resolution in Utah. We welcome any additional thoughts and suggestions you might have.

