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I: INTRODUCTION

"Mediation might resolve resource management conflicts, but not necessarily environmental problems."¹

Until recently the urge for economic development has been regarded as the crucial factor in social progress – it was "the means by which the lives of all members of society would constantly improve".² With purely libertarian thinking underpinning the development of society, concerns for the environment did not exist. It was the individual who was placed in the centre of all concerns. In the social arena, Thomas Hobbes adopted the idea of society comprised of nothing more than self-interested, atomistic individuals.³ This perspective on the importance of the individual became and remained the central tenet of liberalism.

John Locke suggested that in its natural state, 'nature' was almost worthless. He placed no more value on 'raw' land until it was improved.⁴ Kant⁵ and Nietzsche⁶ adopted the importance of individualism, as did

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³ Hobbes, Leviathan.
⁴ Locke, Two Treatises of Civil Government (1936) 42.
⁵ Kant, Critique of Judgment (1914). Kant suggests that man is the ultimate purpose of creation here on Earth.
⁶ Nietzsche, The Gay Science (1975) 115. He claimed that humanity was near "perfect" and that the position of humanity with regard to other animals had to be reconsidered.
contemporary philosophers such as John Rawls, Ronald Dworkin and Robert Nozick. Revolutionary advances in science paralleled these philosophical positions. Newton's mathematical system captured the intellectual world, as the rationalist approach was able to explain various extracted phenomena of the natural world. To see the world as the sum of its parts was inherent in scientific perception. For those philosophical, social and scientific perspectives nature remained valuable only for instrumental purposes, for development, exploitation and 'improvement', as it was without inherent value. Because of that anthropocentric outlook, nature has been seen as something to be controlled by humanity. The desire for mastery of nature is inherent in modern society.

A slowly increasing awareness and understanding of environmental problems, such as overpopulation and the finiteness of resources, has led to an unprecedented development of law relating to environmental protection and natural resource management. The problems affecting the environment are becoming of common concern. There are many distinct but interrelated and interconnected problems confronting humanity, including atmospheric and marine pollution, deforestation and desertification, elemental depletion of natural resources, climatic dislocation, and ecological and evolutionary disruption.

Although many of the forms of environmental protection are derived from some form of human self-interest, anthropocentric self-interest is restricted to the more specific idea that the survival and prosperity of humanity is linked to the health of the biosphere and its interdependent ecosystems. According to this view, humanity protects nature because nature protects humanity. Environmental law has emerged as a distinct specialty in legal practice and while its existence is no longer in doubt, the scope and efficiency of it are less certain. This uncertainty can be attributed to its constantly evolving, dynamic and complex nature.

The complexity of the natural environment and the lack of precise scientific information result in problems identifying the causal factors of environmental degradation. As it is difficult to establish links between cause and effect, it is almost impossible to predict accurately the outcome of specific actions. Owing to this imprecision, changing attitudes towards the impact of human development on the environment, the increasing

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9 Nozick, Anarchy, State, Utopia (1974).
10 Daly and Cobb, For the Common Good: Redirecting the Economy Towards the Community, the Environment and a Sustainable Future (1989) 111-113.
pressure upon finite natural resources and different perceptions of risk and uncertainty, environmental conflicts intensify. The uniqueness of the environment makes the resolution of these conflicts difficult.

A wide range of legislation dealing with the use, protection and management of various disparate aspects of the physical and biological elements of the biosphere has been enacted and has evolved in New Zealand and internationally in recent years. The litigious activity in the interpretation and enforcement of these statutory regimes and claims for judicial review of executive or administrative action has increased exponentially. Williams states: “Clearly, environmental law is a functional area of law, not amenable to the rigid legislative definition possible with more traditional legal subject areas.” In the same vein, Cole suggests that “[e]nvironmental law does not and cannot have the mutual exclusiveness which facilitates the ordered ‘pigeon holing’ of many areas of the law. It is a functional classification rather than an operative legalistic one.”

Environmental law does not always provide an appropriate basis to resolve disputes arising over environmental issues. It is fair to say that many resource management and environmental disputes might be better settled by agreement, rather than by judicial determination. This is not only because of the potential savings in cost and time, but also because the essence of sustainable management is that scarce natural and physical resources are to be shared to promote sustainability.

The object of this article is to investigate under what conditions and in what circumstances resource management problems may be settled appropriately by mediation. The question will also be asked whether the appropriateness of mediation applies only to the efficiency of the process in terms of cost and time, and if it provides only a tool for resolving resource management conflicts, rather than resolving environmental problems.

The following will include an explanation of the general approach of alternative environmental dispute resolution. An examination of the sources of environmental conflicts will be followed by a discussion of the advantages and limitations of environmental mediation. The legal implications of the Resource Management Act 1991 (the “RMA”) will also be discussed, as will the key elements of the environmental mediation process.

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12 See eg the Resource Management Act 1991 (“RMA”).
15 Williams, supra note 13, 169.
An introduction to the general definition of dispute resolution and mediation is necessary before a more thorough examination of the process can be embarked upon.

1. General Definitions

Private dispute resolution, as contrasted to the public court system, is the consensual attempt by disputing parties to resolve their conflict outside the public court system. Rules of procedure, the binding or non-binding nature of the decision and other design features are subject to the mutual agreement or acceptance of the parties to the dispute. Folberg and Taylor describe mediation as:

The process by which the participants together with the assistance of a neutral person or persons systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.

Mediation is based upon good sense and reason. Rather than being a process of coming to terms with the past depending on rigid rules, it focuses on the construction of reliable present and future conditions. The interests and individual views of the participants dominate over rigid positions. The opposing party is not necessarily the enemy to be defeated, but rather a partner with which conflicts are sought to be resolved for mutual benefit. The process is intended to be a fair, clarifying one, rather than a fight or a struggle for victory.

2. Goals of Environmental Mediation

The overall goal of mediation is the avoidance of the adversarial process by achieving a solution to a dispute. By resolving disputes through agreement between affected parties, the legal system can be relieved of part of its responsibility and the agreements achieved in alternative dispute resolution are more likely to establish long-lasting relationships between the conflicting parties, provide the parties with an

improved understanding of the issues and help them to recognise different perspectives on the dispute.

These outcomes may contribute to reducing court time by encouraging the withdrawal of appeals and avoiding further appeals and submissions, reducing costs incurred if the parties proceed with litigation, and promoting sustainability by managing scarce natural and physical resources effectively and efficiently.

3. Environmental Mediation: The Concept

Environmental mediation is defined broadly to incorporate environmental dispute resolution generally. This includes mere assistance from a neutral third party to the negotiation process, such as a mediator who works as a facilitator between parties. Jacobs and Rubino describe environmental mediation as: 18

A process whereby existing or potentially conflicting parties concerned with an environmental and/or land resource matter get together with a neutral third party to discuss positions with regard to the resource. It involves bargaining, sharing of information, and ultimately, compromising on original positions so as to achieve a solution ‘acceptable’ to all parties involved.

One of the core assumptions in environmental dispute resolution is that the parties involved are the best judges of what the real issues are and whether an adequate resolution has been achieved. The real outcome of a resolution process might only become visible after a period of time. Measures of success of environmental mediation can be defined in a number of ways. They range from the reaching of an agreement, to the implementation of an agreement, to the improvement of communication between the parties, or to the facilitation of the process itself. In theory these approaches allow greater attention to be paid to the issues because the parties themselves set the agenda and it is they who decide the terms of the agreement. 19

19 See Bingham, Resolving Environmental Disputes: A Decade of Experience (1986) 12.
4. Environmental Conflicts

In order to understand environmental disputes it is important to understand the causes of environmental conflicts. Bacow and Wheeler posit three causes of environmental consciousness. First, the environmental costs of development are often long-term and cumulative. It may take years, even generations, to appreciate fully the consequences of such developments. Second, peoples' values have fundamentally changed: "The recent environmentalism did not take place in an empty sea; instead it grew in a turbulent period of political ferment and change." Third, the passage of new legislation and the creation of precedent have not only empowered opponents of development in specific cases, but have also strengthened the environmental movement as a whole.

In recent years, as a result of increasing awareness, more proactive and preventative approaches have been utilised to deal with environmental protection, resource management and conflict resolution in a more integrated and coherent manner. The development of environmental awareness has also contributed to intensifying environmental conflicts.

Examples of environmental conflict include: the complex nature of the natural environment and the consequent lack of precise scientific information regarding the causes and effects of environmental degradation; the difficulty in establishing links between those causes and effects; the unpredictability of the outcomes of human action; the irreversibility of some impacts on the natural environment; disagreement over the distribution of costs and benefits; and appropriate levels of protection from environmental dangers. Conflict is characteristic of environmental issues and this integral relationship between conflict and environmental protection has ramifications for the selection of appropriate dispute resolution mechanisms.

5. The Adversarial Process

Disputes over environmental issues are so varied that no one dispute resolution process can successfully be applied in all situations. Depending on the circumstances, those involved may prefer to litigate, to

20 Bacow and Wheeler, supra note 2, 1-2.
21 Ibid 2.
lobby for legislative change, to seek help from an administrative body or to negotiate a voluntary agreement with one another.\textsuperscript{22}

Tillit suggests that a dispute arises when two or more people or groups perceive that their interests, needs or goals are incompatible, and seek to maximise fulfilment of their own interests or needs, or achievement of their goals.\textsuperscript{23} Burton suggests, more simply, that disputes usually involve negotiable issues.\textsuperscript{24} A conflict arises when two or more people or groups perceive their values as being incompatible, whether or not they propose at present or in the future to take any action on the basis of those values.\textsuperscript{25} Values are incompatible if one contradicts or opposes the other giving rise to conflict. Such conflict involves non-negotiable issues such as human needs and values.

Settlement is often used in disputes. Tillit, for example, says that the dispute is settled either by mutual agreement between the parties (often involving compromise), with or without the assistance of a third party or mediator, or is imposed on them by an external authority such as an arbitrator or court.\textsuperscript{26} The term resolution is used in relation to conflicts. Burton defines conflict resolution thus:\textsuperscript{27}

Conflict resolution means terminating conflict by methods that are analytical and get to the root of the problem. Conflict resolution, as opposed to mere management or ‘settlement’, points to an outcome that, in the view of the parties involved, is a permanent solution to the problem.

In the past, the adversarial model – involving judicial decisions – has been used to resolve environmental conflicts. This approach involves an impartial third party making an enforceable decision, after hearing arguments on the law and pertinent facts presented by the parties. The hearing is conducted according to formal rules of procedure. The adversarial model requires the disputes to be ‘fitted’ into the legal framework, which may as a result distort the issues where the issues do not fit the adversarial model.\textsuperscript{28} Concerns that ‘really matter’ to the parties may not be legally relevant and may necessarily be excluded from consideration. This approach tends to focus on the positions of the parties rather than the environmental issue itself. The problem therefore seems to be a focus on conflict of positions and legal rights. Parties are locked

\begin{thebibliography}{9}
\bibitem{22} Bingham, supra note 19, xvi.
\bibitem{24} Burton, \textit{The Role of Scholar Practitioner in Conflict Resolution} (1990) 3.
\bibitem{25} Tillit, supra note 23, 4.
\bibitem{26} Ibid.
\bibitem{27} Burton, \textit{Conflict Resolution as a Political System} (1988) 2.
\bibitem{28} Blackford, supra note 1, 1.
\end{thebibliography}
into their positions by stating legal arguments, bargaining and negotiation: “As more attention is paid to positions, less attention is devoted to meeting the underlying concerns or interest of the parties.”

Focusing on arguments of law can only result in a ‘win/lose’ situation. The adversarial process requires a decision as to which side should prevail. There are winners and losers because the judicial process does not offer opportunities for compromise. Decisions are handed down on the evidence and legal arguments adduced. As Rive notes, “it is likely a creative search for mutual gains is less a feature of the adjudicative process than a consensual one”.

Further criticism of the adversarial process is concerned with the limits of information imposed by the rules of evidence, especially scientific information. Judges tend to focus on the case as presented by the parties, which may prevent the judge from looking at the public values and interests that are not presented but are involved. As Blackford notes: “It is difficult for the courts to evaluate the trade-offs in situations involving a high degree of uncertainty.” These public values may involve matters of social equity, philosophical and ethical issues or policy questions. The question arises: “is it appropriate that the courts and other judicial bodies should become involved in the resolution of policy issues?”

A rational process that follows certain procedural rules and principles, such as objective evaluation and evidentiary standards of proof, cannot satisfactorily answer matters that are essentially value judgments.

A significant disadvantage of the adversarial approach is substantial time delay in the process. There are a large number of cases awaiting hearing in the Environment Court. Even though the number of cases pending was reduced during 2001, the waiting time for a hearing remains approximately one year. A proposed amendment to the RMA provides for a more efficient procedure to deal with the delays. The Environment Committee (a Parliamentary Select Committee) is “concerned that the workload currently before the Court is more than it can deal with expeditiously”.

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31 Blackford, supra note 1, 10.
33 Principal Environment Court Judge Allin, Speech at the Environment Court, 22 August 2001.
additional resources to allow the Environment Court to clear this backlog". Alternative dispute resolution methods may be a means by which these delays can be reduced.

6. Alternative Dispute Resolution Mechanisms

The term alternative dispute resolution applies to a number of different approaches, which may be classified into three categories: consensual mechanisms; adjudicative mechanisms; and managerial direction mechanisms.

The consensual mechanism approach refers to the dispute resolution process, in which the terms depend on the consensus or agreement of the parties to the dispute. The resolution may involve negotiation, bargaining and mediation. In all cases, the process is voluntary and the initiative to explore and reconcile differences is jointly held by the parties.

In addition to mediation, other approaches to dispute settlement involve negotiation and bargaining. While negotiation is a similar process to mediation, it is one that occurs without the use of a neutral third party. Bargaining is the least formal of these three resolution processes. By the time the parties come to seek neutral help to break their deadlock, negotiating or bargaining may have been exhausted without success. The neutral mediator facilitates the process and reviews the positions of the parties. The commonality of these approaches is that they are private dispute resolutions, as opposed to public adjudications. They are a "consensual attempt by disputing parties to resolve their conflict outside of the public system". The consensual nature of this approach implies recognition of the legitimacy of the demands of other parties and of the parties themselves.

In the environmental context, the adjudicative mechanism is used in public law to judicially review the conduct and decisions of government and its officials which affect the environment. The grounds of review must involve errors of law. The judiciary’s task is to review the conduct and decision of the executive arm of government, to ensure that it has exercised its powers within the scope established by legislation and the common law.

The managerial direction mechanism may be used in environmental disputes in instances where local councils grant or refuse resource

36 Ibid.
37 Johnston, supra note 16.
38 Bacow and Wheeler, supra note 2, 53.
consents, approvals, licences and permission to carry out activities that are likely to affect the environment or components of it.

Conscious of the wider range of dispute resolution mechanisms, this article will focus on environmental mediation as one aspect of the consensual mechanism described above.

III: CONCEPTS OF ENVIRONMENTAL MEDIATION

In contrast to the adversarial process, as outlined above, environmental mediation encourages a search for shared and compatible interests behind opposing positions. Mediation can provide conflict resolutions for environmental disputes that are far less expensive, in terms of time and money, than litigation. Moreover, environmental mediation can provide participants a greater sense of satisfaction, derived from their more active role and the degree of control they can maintain. "It allows the consideration of more creative environmental options than does litigation. Most important mediation promotes cooperation."39 By focusing on interests, underlying values held by the parties can be articulated and a solution consistent with those values sought. In this Part the potential benefits and necessary limits of mediation of environmental conflicts will be examined and the question will be asked about the extent to which the benefits outweigh the risks.

1. Advantages of Environmental Mediation

A former Minister for the Environment, Hon Marion Hobbs, considered environmental mediation "a smart solution for smart people",40 and referred to it as the "in-built-short-cut"41 within the legal system to find a mutually agreed solution, as opposed to heavily litigated outcomes. Successful mediation has been an effective tool for minimising the substantial time delays for hearings before the Environment Court, which is the major obstacle for resolving environmental disputes. In addition to the acceleration of the resolution process, there are several more basic advantages of alternative dispute resolution.

39 Folberg and Taylor, supra note 17, 220.
40 Hon Marion Hobbs, Minister for the Environment, Speech at the Environment Court, 22 August 2001.
41 Ibid.
One of the most often cited benefits of environmental mediation is that its problem-solving ethic leads eventually to a 'win/win result' or an 'all gain outcome' for the parties involved. As the parties are encouraged to see issues in terms of problem-solving, rather than a fight over stated positions, the problems are transformed from zero-sum and mutually exclusive positions, to a broader complementary set of conditions within the equation. As the objectives seek to cater for all interests, any agreement implies that all parties have achieved their objectives to a satisfactory level.

For environmental conflicts, mediation can achieve more expeditious and lasting outcomes than traditional litigation. It is more likely that parties move away from purely competitive bargaining and toward considering a wider range of positions and options than they were willing to initially. The mediation approach gives parties the opportunity to explore the rationales and needs of the other participants and to develop a greater understanding of their interests, which often leads to a result acceptable to all.

An additional beneficial aspect of mediation relates to the wide range of matters that can be taken into account by the parties to the mediation. "Whatever is seen by all or any of the parties as of concern is relevant to mediation of the dispute."42 For that reason, one of the most important outcomes of environmental mediation is that the participants develop a greater understanding of the interests of the other parties. As mediation encourages direct participation of the parties in the resolution and seeks to encourage recognition of opposing perceptions and concerns, it can significantly improve the relationship between the disputants, even where no agreement can be reached.43 In the mediation process it is possible for the underlying issues of the dispute to be addressed. These issues, such as values and policies, can be included in an agreement between the parties, an impossibility in a traditional litigation process. If this is done, there is greater potential for the agreement to be implemented with the support of the parties, and for the dispute consequently to be resolved.

Flexible and adaptable mediation processes are able to accommodate consideration of the underlying interests of the parties, third parties, a variety of individual perspectives, the rational scientific and technical considerations, as well as the legal and policy frameworks relevant to the resolution of the dispute. Such inclusiveness in the information base is intended to achieve a less distorted presentation of the issues, a better

43 Ibid.
balance on the making of value judgments, and result in imaginative solutions, designed to cater for all interests. Mediation processes are thought to achieve this by acknowledging the interests, values and views of all parties.

The flexibility of the mediation process also allows for the involvement of all those who see themselves as being affected by the outcome of the dispute. Direct involvement in designing, analysing, evaluating and influencing the formulation of a resolution provides the interested parties with a sense of ‘ownership’ of the outcomes. Mediation processes, therefore, produce outcomes that are more agreeable to the community at large, and therefore are able to be implemented more easily and are also more stable and durable.

Other advantages of the mediation process include the ‘face-to-face’ dialogue aspect that is an integral part of it. This approach may be appropriate in New Zealand’s unique cultural environment. The direct dialogue approach resembles the traditional Maaori decision-making process. It provides a forum similar to the marae, where cultural and spiritual values can be discussed and enables a consensus that takes those values into account to be reached. Mediation offers a forum for the expression of Maaori cultural and spiritual values that may not be available during the formal proceedings of the Environment Court.

A recent example of the appropriateness of the mediation process, in cases involving Maaori cultural and spiritual values, is *TV3 Network Services Ltd v Waikato District Council*. The Environment Court had to consider whether a television tower, which was to be installed by TV3 on a hill known as Horea, would offend the ancestral relationship of the tangata whenua (local Maaori) with that waahi tapu (place of significance). The Appellate Court (affirming the Environment Court’s decision) found the overall cultural uniqueness of Horea to be sufficient to outweigh the benefits of the technological activity proposed. In his conclusion, Judge Hammond acknowledged his awareness of an ongoing battle and the endeavour to avoid the recognisable clash of values. He stated, “[i]ndeed, the situation arising strikes me, with respect, as a classic case for an environmental mediation, prior to a further RMA application”.

The advantage of mediation is that where a dispute involves matters of cultural interest, processes can be developed that are sensitive to cultural values. This could include co-mediators with sufficient mana to

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45 Ibid.
provide legitimacy and credibility for the process.\textsuperscript{46} Although mediation appears to provide an attractive option for settlement of disputes where Maaori issues are involved, there are certain limits to its application. As Blackford and Matunga note, the fundamental power differentials that exist in the wider political, social and economic sphere cannot be eliminated from the dispute resolution forum.\textsuperscript{47} Governmental organisations and private corporations come to the mediation table with all the power and influence endowed by the existing political and economic systems. The authors also fear that:\textsuperscript{48}

When inexperienced negotiators face highly experienced and sophisticated opponents in the informal atmosphere of mediation, some parties may be seduced into compromising their values and accepting unjust settlements they might not have supported in a more adversarial setting.

Unequal access to scientific and technical expertise and information may also contribute to this imbalance of power and place some parties at a distinct disadvantage. Those who can best mobilise relevant expertise and research are likely to find themselves in a more powerful position at the mediation table.

Even where environmental disputes cannot be fully resolved by mediation, there may still be benefits from the process. These benefits may include the narrowing of the issue for judicial attention, prevention of stagnation, stimulation of interest and curiosity in the issue, and encouragement of examination of problems and solutions. As Preston has recognised:\textsuperscript{49}

Environmental disputes in the past, have not only had creative and constructive effects on those persons and groups involved directly in the campaigns for environmental protection, but also on society as a whole, particularly in developing environmentalism and environmental consciousness .... Environmental conflict resolution can also be seen to have another beneficial effect, in relation to the long term, progressive and principled development of environmental law and policy.

Taking an active role during a mediation process proves to be an effective tool for educating all parties involved.

\textsuperscript{46} Chart, supra note 42, 32.
\textsuperscript{48} Ibid.
Further benefits of mediation may include the maintenance of the confidentiality of the process and the avoidance of undesirable publicity and attention. In this way sensitive cultural or commercial information can be shielded. Additionally, because there are no time boundaries for mediation, the process can start any time after an appeal has been lodged. Additionally, mediation is often cheaper than appearing in court.

As much as the adversarial process possesses a number of important strengths, the alternative dispute resolution process also has certain inherent limitations, which shall now be discussed below.

2. Limitations of Environmental Mediation

In relation to the compromise-seeking nature of environmental mediation, the constraints of the mediation process apply to disputes that involve systemic grievances, legality of conduct, matters of national significance, the prosecution of an offence, or extreme irrationality inflicted by “conflict junkies”. 50

(a) Basic Values

Limits also apply to environmental disputes involving disagreements about basic values, morals or philosophical differences. The intractable nature of the most serious environmental conflicts involves fundamental moral conflicts, which are based on substantially different ethical perceptions of the environment. There is a basic dichotomy in the way humankind perceives its relationship with nature and the resulting value system that humans apply to it. The scale of ethics applied to nature ranges from a human-centred (anthropocentric) approach to a nature-centred (ecocentric) approach to the valuation of the environment. Jacobs and Rubino argue that on issues of basic values no substantive compromise is possible. 51

An anthropocentric outlook is one that regards humanity as the centre of existence. It is defined as humanity’s perception that it is separate from and superior to nature. This paradigm has been built up over thousands of years of human existence and in this context involves the core of beliefs that underpin the human relationship with nature. It is now widely recognised as the reason for human treatment of nature as simply a storehouse of resources, available for the use of humanity and our

50 Chart, supra note 42, 7.
51 Jacobs and Rubino, supra note 18, 2.
apparent disregard for the ecological reality. From the time of the industrial revolution the intensive use of land and fossil fuels, the increasing world population and the rising rate of energy consumption have caused the natural environment to become a very sought after and exploited resource. Bosselmann's criticism is that, "[E]ven at the peak of crisis for our survival, [the anthropocentric view] is still dominant and that it controls all our concepts for political action, constitutes the real scandal". An anthropocentric perception underlies the vast majority of human actions and leads to clashes with those who hold a different view.

The logical consequence of this prior human mindset is its reflection within legal systems, where a primarily human-centred definition of 'environment' is adopted. The RMA defines "environment" as including: ecosystems and their constituent parts, including people and communities; all natural and physical resources; amenity values; and the social, economic, aesthetic, and cultural conditions that affect them. By including elements such as "communities", "amenity values" and "social and cultural conditions", the concept of environment is again expressed at such a level that the expression "environment" may include almost anything and everything. A proposed amendment to the RMA seeks to remove the reference to social and economic conditions from the definition, in order to achieve a clear, unambiguous statement that is focused on the biophysical environment. Such a change would take the RMA in a more environmentally sound direction, but it seems more likely that the current definition will remain. The definition is clearly more anthropocentric than it is ecocentric.

Ecocentrism is concerned with 'wholeness'. Ecocentrism is not about 'nature' itself, as one could easily conclude, but it is against human 'egoism'. It is concerned with the relationship between nature and humanity which it seeks to redefine and reform. "Its main concern is to make people aware of ecological relationships and the necessary balancing of human welfare with that of nature." This approach is not based in a moral 'ought', rather, as Taylor states, "[i]t invites and inspires ... to include all human and non-human beings and ecological processes".

56 Local Government and Environment Committee, supra note 35, 6.
58 Taylor, supra note 52, 35.
There is a shared understanding, among those who support an ecocentric approach, that a new ecological moral philosophy would encourage humankind to change and develop its consciousness to one that recognises that humans are an integral part of nature. Upon that realisation people would be encouraged to place important limitations upon their actions, limitations that go beyond protection of human interests to include the interests of other species and nature. It would encourage the redefinition of decision-making processes, from those that focus on short-term, atomistic strategies, to those that focus on long-term, holistic and sustainable ones. Further, it may motivate the evaluation and resolution of conflicts between human and non-human environmental interests, by applying an ecological approach to decision-making, based on environmental ethics.

Environmental ethics draws deeply on the understanding of the values that could be attributed to the natural environment, to things other than human beings, living and non-living. Ecological wisdom requires judgment of the meaning of science and knowledge, and how best to apply them. It is essentially, "[r]espect for the boundaries of nature within which we are content to live and respect for the connections and the processes that allow life to continue".

The problem with mediating conflict between values is that the resolution involves making a judgment as to which of the incompatible values should prevail. Some commentators argue that consensual means of conflict resolution ought not be used when non-negotiable issues are involved, because it "distorts the environmental conflicts". The problem with this model, as Amy notes, is that it is amoral. "Many environmental disputes involve conflicts between basic values and principles, not just conflicting interests." However, mediators explicitly downplay the role of moral principles in environmental conflicts. They argue that conflicts are usually not a matter of one party being right and the other being wrong, but rather a matter of competing interests. Denying that there are any serious moral issues involved in environmental disputes promotes a kind of "moral irresponsibility", or as Fuller contends: "As between black and white, grey may sometimes seem an acceptable compromise,  

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60 Green Party of New Zealand, Submission to the Royal Commission on Genetic Modification (2001) 59.
63 Ibid 176.
64 Ibid 178.
but there are circumstances in which it is essential to work hard toward keeping things black and white.”

However, the nature of the mediation process results in trade-offs and compromises and it is anticipated that consensual mechanisms of conflict resolution may not successfully resolve disputes involving moral principles and values. The question remains whether the adversarial process is the better method for resolving those disputes.

‘Primary issues’ are those that are not bound to a certain proposal, but involve general matters, which are based upon “social equity or philosophical issues, or matters that call for what are essentially value judgments”. Although judges have indicated that a court is not the most appropriate forum to conduct a debate over ‘primary issues’, “[c]ourts play a vital role in fashioning norms and articulating values for the wider community, in the form of legal principles that operate as precedents”.

As courts are informed by societal ideals and principles, reflected in legislation and case law, determinations made in that forum therefore express those ideals and principles. In doing so, courts either reinforce societal standards or actively promote them. Common threads of ‘principles’ that can be applied are established and maintained through formal judicial processes. Currently, no such ‘principles’ exist or are being formulated in mediation. Each event is considered unique and distinct. It will be up to future research and data collection to determine whether the results of mediation processes can be considered ‘precedent settled’, or seen as describing principles applicable to later mediations. Consideration will also have to be given to the records taken of mediation processes, and whether they will be accessible for reference.

A similar limitation of mediation arises in cases where Maori cultural and spiritual values are relevant. The case *Huakina Development Trust v Waikato Valley Authority* provides an example of an issue inappropriate for mediation. The Court had to decide whether Maori cultural and spiritual values should be recognised in relation to a water right application. The decision had far-reaching precedent effect, a result that the mediation process could not have achieved. The absence of a judicial determination would have deprived the Court of an opportunity.

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67 Chart, supra note 42, 7.
69 (1987) NZTPA 129.
to render an interpretation and to set a precedent upholding Maaori values.

Because courts are reactive, rather than proactive institutions, they do not have the ability to make open judicial statements on interpreting Maaori cultural and spiritual values, but must wait for others to bring matters to their attention. A settlement through mediation deprives the court of an occasion to interpret Maaori cultural and spiritual values.70 Another consequence of avoiding the judicial process may be that justice is not being done. As Fiss notes:71

When parties settle, society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone .... Although the parties are prepared to live under the terms they bargained for, and although such peaceful co-existence may be a necessary precondition of justice, and itself a state of affairs to be valued, it is not justice itself. To settle for something means less than some ideal.

(b) Risk, Science and Uncertainty

Another limitation on environmental dispute resolution arises where the matter is scientifically technical and involves a high degree of uncertainty. Uncertainty might arise in relation to the environment itself (for example, if the area to be developed contains habitat of an endangered species), the proposed development or the impact of the development on the environment.

Environmental decisions are inherently based upon imperfect knowledge. Uncertainty becomes a predominant factor in creating the difficulties of resolving environmental disputes where certain types of development may pose irreversible ecological effects, such as species extinction or habitat destruction.

The problems of uncertainty and irreversibility have given rise to the precautionary principle, which is rapidly becoming one of the central concepts in environmental law and policy. The principle was adopted in the Rio Declaration, at the United Nations Conference on Environment and Development (UNCED) in 1992. Principle 15 of the Declaration states that:72

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70 Fiss, supra note 61, 1085.
71 Ibid.
In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The conceptual core of the principle ensures that an "[a]ctivity posing a threat to the environment is prevented from adversely affecting the environment, even if there is no conclusive scientific proof linking a particular substance or activity to environmental damage". In essence, that means this where there is unclear scientific evidence, decision-makers should take extra caution and not use that lack of evidence as a reason to act on an environmental activity.

By this reasoning, the principle should be a guiding one and:

[I]f the effect of the development is irreversible, then generally a decision-maker seeking to maximize the environment and avoid detrimental effects, should not approve the development that is currently profitable but will not be profitable in the future.

While courts are aware of the precautionary principle, and the value of nature in dispute resolution processes (where this principle is critical to decision-making), the precautionary principle may not be considered at all or, if it is considered, may create a barrier to settlement. In certain dispute resolutions, consideration of the principle may be altogether inappropriate. Much will be left to the capability of the mediator to trigger the precautionary approach in the mediation process and demand access to all information available concerning the project and the adverse environmental and social effects.


75 See eg McIntyre v Christchurch City Council (1996) NZRMA 289, where the Court recognised the existence of the precautionary principle; and Shirley Primary School v Christchurch City Council (1999) NZRMA 66, where the Court highlighted the risk assessment procedure required by the RMA.

76 See eg Waitakere Ranges Protection Society Inc v Waitakere City Council (19 July 2000) unreported, Environment Court, A89/2000.
(c) Power Imbalances

Sands notes that the conditions presented by some practitioners of mediation as necessary for a successful process, such as a balance of power, are rare in environmental disputes. Power imbalances can arise from the diverse cultural, social and economic interests that exist among the parties. “Often, local authorities or even central government are involved, matched against environmental groups or individuals.” The recognition of the power imbalances that exist within a society is important, but not always possible.

In same way that the adjudicative process attempts to achieve an environment where ‘all are equal before the law’, mediation attempts to address power imbalances internally. It can be anticipated that the participants, who voluntarily join a mediation process, have considered whether it offers a better opportunity to influence outcomes than other options. The criticism that the power imbalances that exist in society may continue in a mediation process may be valid, but is questionable whether these imbalances would be significantly ameliorated in a judicial process. It may be assumed that the imbalances will be present whatever the forum, and that a weak party is unlikely to do worse, and in fact may do better, in mediation than in adjudication. Rive suggests that:

[U]nless there was a situation where litigation was publicly funded and mediation not, an indigent party would have more difficulty in fighting a protracted court battle than in taking part in a mediation. In such cases, weak parties, or parties with weak cases, unless they wished to participate in a hearing for other reasons (such as political or ideological grounds) may well choose to take the crumbs offered to them at mediation rather than risk gaining nothing at the hearing, and being required to pay costs as well.

(d) The Public Interest

Another critical aspect of environmental mediation is the representation of the public interest. It is important to recognise that there is no one coherent public interest; rather, there is a range of interests expressed by various sectors of the community. One concern is that unrepresented interests might be cut out of the process when the issues taken into account are left solely to the bargaining parties.

77 Sands, Planners as Mediators (1993) 111 Planning Quarterly 18, 19.
79 Rive, supra note 30, 220.
Usually in environmental mediation there is at least one party claiming some public interest.\textsuperscript{80} Those wishing to conserve the environment may claim to represent the ‘environmental public interest’, while parties wishing to develop the environment may claim to represent the public interest in ensuring continued economic growth and prosperity and in reducing unemployment.\textsuperscript{81} Even though public interests might not be taken into account, the problem remains whether they should be considered and whether or not consideration can be provided for in dispute resolution. By identifying with the public interest, each party hopes to fend off political attacks, and to win popular support. Unfortunately, this tends to confuse and complicate, rather than illuminate the debate. As Susskind and Weinstein contend.\textsuperscript{82}

While environmentalists may feel that they represent the public interest because environmental protection is in ‘everyone’s best interest’, policy makers facing difficult environment-development trade-offs must balance a great many factors. Once a question is cast in terms of support for the public interest, rather than in terms of balancing or accommodating the interests of various publics, compromise becomes difficult.

This situation arises because the party claiming to represent the public interest perceives the dispute to be one of ‘right against wrong’. Accordingly, where claims of representation of the public interest are made, consensual means of dispute resolution may be inappropriate. The reasons are essentially the same as those given in relation to the resolution of value conflicts.

It has been suggested that there are approaches to alleviate these difficulties and ensure that broader public interest issues are not overlooked. As Judge Sheppard notes: “In cases before the Environment Court there is usually one party which is a public authority that can be taken to represent the general public interest.”\textsuperscript{83} Because the outcomes of mediations are delivered to the court by way of consent orders, requiring ‘endorsement’ by the court, an opportunity arises for judges to consider the public interest issues raised by the parties.

\textsuperscript{80} Susskind and Weinstein, “Towards a Theory of Environmental Dispute Resolution” (1980) 9 Boston College Environmental Affairs Review 311, 333-335.
\textsuperscript{81} Preston, supra note 49, 12.
\textsuperscript{82} Susskind and Weinstein, supra note 80, 334.
\textsuperscript{83} Judge David Sheppard, quoted in Rive, supra note 30, 216.
(e) Rights of Future Generations

Closely related to the matters of uncertainty and unpredictability are the ethical questions concerning intergenerational rights. This principle relates to the ‘rights of future generations’ and provides that each generation has the right to benefit from and develop the natural and cultural patrimony inherited from previous generations in a manner that it can be passed on to future generations in no worse condition than it was received. This requires conservation of non-renewable resources, of ecosystems and of life-supporting processes, as well as of human knowledge and art. It requires the avoidance of actions with harmful and irreversible consequences for natural and cultural heritage.

A growing number of international agreements, declarations, charters and United Nations General Assembly resolutions recognise the concern for future generations. For example, the Stockholm Declaration states, in Principle 1, that: “Man ... bears a solemn responsibility to protect and improve the environment for present and future generations”. In 1989, the United Nations General Assembly placed on its agenda the “[p]rotection of global climate for present and future generations of mankind”. The Bergen Ministerial Declaration on Sustainable Development echoed similar sentiments. The importance of future generations was at the forefront of considerations at the Earth Summit in 1992.

An example of the influence of this international impetus can be see in section 5(2)(a) of the RMA. Sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations is set as an element of sustainable management. Because the precautionary principle has been reflected in the legislation, a court is required to take it into account in the decision-making process, in achieving sustainable development. The same is not true for settlements derived from a consensual process. It is more likely that the rights of

86 Preamble, Bergen Ministerial Declaration on Sustainable Development in the EEC Region.
87 Principle 3 of the Rio Declaration on Environment and Development reads: “The right to development must be fulfilled so as to equitably meet the developmental and environmental needs of present and future generations.”
88 See RMA, s 5(2)(a), which in part states: “while sustaining the potential of natural and physical resources ... to meet the reasonable foreseeable needs of future generations”.
89 See RMA, s 5(1): “The purpose of the Act is to promote the sustainable management of natural and physical resources”. 
future generations will be recognised in an adjudicative process, than in mediation.

A landmark decision on the rights of future generations is that of *Oposa v Factoran, Secretary of the Department of Environmental and Natural Resources.* The petitioners were minors who asserted that they represented their generation as well as generations as yet unborn. The Court held that:

Their personality to sue on behalf of the succeeding generations can only be based on the concept of inter-generational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right ... considers the open ‘rhythm and harmony of nature ... Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little different [sic], the minors’ assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.

The Court’s decision is a practical illustration of the argument that judicial decision-making enables courts to give force to the values embodied in international and domestic law, authoritative texts and held by society. If such a dispute were to be settled by mediation, the potential to formulate policies to govern the exercise of decision-making powers, and to contribute to the development of environmental law and policy would be limited.

**(f) Further Limitations of Mediation**

Additional limitations are inherent in the mediation process. One of these is the distinct possibility that the final result may only have been to delay an adjudicative process. There is no guarantee in mediation of avoiding litigation. Issues raised in an unsuccessful mediation may still need to be revisited in court. Mediation is not necessarily a substitute for litigation. Time, effort and money spent in the mediation process may need to be spent again in an adjudicative hearing. Even a successful mediation process will require ratification by some official decision-making authority. The costs of preparing for mediation consent hearings and litigation will be similar, as an appropriate information base is required regardless of the process used. Payment of a mediator and for

90 *Oposa v Factoran, Secretary of the Department of Environment and Natural Resources* (30 July 1993) unreported, Supreme Court of the Philippines, GR No. 101083.
91 Ibid 7.
the attendance of participants may be as much as the cost of a lawyer. Increasing complexity causes increasing costs, therefore the absolute cost is not considered crucial. What is important are any additional costs, and whether they are offset by the benefits afforded by mediation.

A further limitation on the mediation process is the potential for the participation of the parties to be reactive if their needs, concerns, objectives and meeting procedures have not been clearly identified beforehand, and the parties are not properly prepared.

Mediation can also be enhanced or hampered by the skill, or lack of skill, of the mediator. The process relies heavily on the mediator, and inconsistencies can be created if a mediator is inadequately skilled or inappropriate for the specific dispute.

IV: LEGAL IMPLICATIONS IN NEW ZEALAND

The RMA provides for an Additional Dispute Resolution ("ADR") mechanism within the existing resource consent application hearing and appeal process. The RMA's framework establishes specific outlines for both formal administrative processes and judicial processes. Both section 99 and section 268 of the RMA allow for disputants to meet with any appointed mediator or facilitator and those with statutory authority, "for the purpose of clarifying, mediating and facilitating resolution on any matter or issue", or "for the purpose of encouraging settlement". The RMA clearly was intended to provide frequent opportunities for environmental disputes to be resolved outside of the formal judicial or administrative processes.

While private informal settlement may be inappropriate for some disputes under the RMA, this approach may assist in identifying and narrowing the issues in dispute and may encourage the formulation of 'grass-roots' solutions which address the issues and concerns of the interested parties directly.

This article focuses on ADR as the method of mediation provided for in the RMA that has been most frequently used, and which has received the most recognition. The growing significance of mediation is well illustrated by the increasing number of private mediators offering their services to interested parties. The Auckland Environment Court Mediation Centre, launched in September 2000, offers a free mediation

92 RMA, s 99.
93 RMA, s 268.
service, and the Ministry for the Environment has published an
information booklet entitled “You, Mediation and the Environment
Court”.

1. The Environment Court

The Environment Court was established under the RMA, and
subsumed the Planning Tribunal as the arbiter of environmental
legislation in New Zealand. The Planning Tribunal, and now the
Environment Court, have long played a crucial role in environmental
decision-making in New Zealand.94 The Court has the same powers as the
District Court and is a specialist forum made up of Environment Court
Judges and Environment Commissioners. It hears appeals against
decisions made by councils on resource consent applications, proposed
regional and district plans, and other administrative decisions such as
‘designations’ and ‘heritage orders’. After an appeal is lodged, the
Environment Court can initiate alternative dispute resolution of its own
volition, or at the request of a party.

The Environment Court is well aware of the advantages of alternative
dispute resolution as a tool to reduce the delays for hearings before the
Court and to narrow down the issues to be litigated.95 As a general
practice, the Court inquires as to the potential for settlement in any case
before it, and offers assistance wherever the parties consider that
mediation might be helpful. The Court is able to initiate alternative
dispute resolution, but can only proceed with the consent of the parties.
The Court actively encourages parties, where appropriate, to pursue
alternative dispute resolution. If the parties agree to mediation an
Environment Court Commissioner could be asked to act as a mediator for
the dispute and a mediation meeting can be arranged.

Most Commissioners are experienced in mediation and have taken
courses in alternative dispute resolution. Experience in alternative dispute
resolution is one criterion of eligibility for appointment as an
Environment Court Commissioner. The Commissioners ordinarily do not
have legal qualifications, but are likely to have experience which is of
particular relevance to resource management matters, for example within
local government or in a related profession such as engineering or

Management News 20.
95 Rural Management Ltd v Banks Peninsular District Council (1994) NZRMA 412; Burton v
Auckland City Council (1994) NZRMA 544; and McDonnel v Manukau City Council (19
September 1994) unreported, Planning Tribunal, A 80/94.
surveying, or areas relating to the Treaty of Waitangi or tikanga Māori.\textsuperscript{96} An Environment Court Commissioner acting as a mediator would not act as a decision-maker at any later stage, and cannot be involved in hearing the appeal if an agreement cannot be reached. If a Commissioner acts as a mediator, the parties would not be required to pay expenses, as the Environment Court provides mediation as a free service. Alternatively, the parties could agree to engage a private mediator. This would involve payment of the mediator's fees and expenses. A private mediator may be chosen because of a special skill or expertise.

If an agreement can be reached – either by private negotiation or through the facilitation of the Environment Court – the parties are supposed to write a draft consent order to spell out the terms of the agreement and submit it to the Court. The Court will keep a record of the consent order. However, in many cases the parties fail to provide this consent order. The draft consent order is reviewed and approved by the Court. The Court has the power and responsibility to ensure that a consent order is consistent with the purpose of the RMA, any relevant policy statements or plans, and the terms of the original appeal. The confirmation of the consent order by the parties is usually combined with at least the partial withdrawal of an appeal. A private contract can also be negotiated by the parties to provide for any aspects of the resolution that may not be enforceable under the RMA.

In the case that no agreement, or only a partial agreement is reached, the parties may proceed to litigation. In a subsequent hearing at the Environment Court all the issues originating from the dispute will be reviewed. It is assumed that the judge remains completely independent and unbiased in relation to the matters considered in the mediation process. The judge will not be aware of any details of the mediation and no prejudice will attach to a party for failing to reach an agreement.

2. Interpretation

It is important to emphasise that the RMA provides for ‘additional’ approaches to litigation in the Environment Court. Therefore, a primary objective of any alternative dispute resolution is to find a solution which accords with the purpose of the RMA, that being the promotion of the sustainable management of natural and physical resources.\textsuperscript{97} ‘Sustainable management’ is derived from the wider concept of ‘sustainable development’, defined in the World Commission on

\textsuperscript{96} RMA, s 253.
\textsuperscript{97} See RMA, s 5.
Environment and Development’s “Brundtland Report”.\textsuperscript{98} That document defines sustainable development as “development, which meets the needs of the present, without compromising the ability of future generations to meet their own needs”.\textsuperscript{99} Sustainability, in this sense, has a broad, global economic and environmental meaning. The Brundtland Report was concerned with an amalgamation of different problems: the ecological perspective of global environmental problems, the growing economic and social inequities between developed and developing countries, and the potential inequities between present and future generations.

Sustainable management, in the RMA, is a more narrowly focused concept. The Government sees sustainable management of natural and physical resources as only one component (albeit an integral one), of a national strategy for implementing sustainable development and integrating it into government policy-making processes.\textsuperscript{100} The purpose of the RMA, therefore, is to emphasise the environmental component of sustainable development, by promoting the sustainability of the natural environment (such as air, water, land and ecosystems). Social and economic considerations are relevant within the definition of “sustainable management”, but are limited in their scope and are supposed to be subject to ecological considerations. Being aware of the debate over the weight which ecological considerations are given over social and economic ones, and the broad approach adopted by the Environment Court where conflicts between these considerations arise,\textsuperscript{101} this article emphasises the application of the ‘environmental bottom-line’ approach to secure an ecologically sound outcome.

To ensure ecological sustainability, resource management must maintain and enhance the integrity of ecosystems. For practical reasons, the rule of thumb formulated by Aldo Leopold is suggested. Leopold, the founder of modern environmental ethics, states that: “A thing is right when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise.”\textsuperscript{102} The outcomes of mediation have to meet the environmental bottom line. If not, the

\begin{footnotesize}
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\item \textsuperscript{98} World Commission on Environment and Development, \textit{Our Common Future} (1987) [“The Brundtland Report”].
\item \textsuperscript{99} Ibid 8.
\item \textsuperscript{100} Ministry for the Environment, \textit{Sustainable Management of Resources} (1992) 3.
\item \textsuperscript{101} See \textit{North Shore City Council v Auckland Regional Council} (1 October 1996) unreported, Environment Court, A 86/96, where the Court held that all parts of the RMA, s 5(2) required consideration in a way that involved an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources.
\item \textsuperscript{102} Leopold, \textit{A Sand Country Almanac} (1949) 262.
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resolution will most likely be a trade-off between the cost to the environment, and social, economic and cultural considerations.

V: THE ENVIRONMENTAL MEDIATION PROCESS: MEDIATION IN PRACTICE

1. Key Issues

One of the core issues in the debate over mediation is whether the process should become a compulsory requirement, to be fulfilled before proceeding to litigation. While some commentators stress the advantages of compulsory mediation, it is also argued that this approach jeopardises the very nature of alternative dispute settlement. Supporters of compulsory mediation raise several arguments: that it would serve as a ‘marketing tool’ for the benefits and legitimacy of mediation (for potential parties, unaware of the advantages of mediation or who lack experience of it); and that the resulting regulation of mediation may provide more reliable statistics on the process. These arguments fail on the basis that they are a contradiction in terms.

Rive states that: “Mediation is a voluntary process: any attempt to force parties to mediate undermines the ethos of the process at a fundamental level.” Nonetheless, it is suggested that an amendment to the RMA, to require parties to consider mediation, would recognise the Environment Court’s obligation actively to encourage parties to pursue alternative dispute resolution. Ultimately though, this may not yield a different result from the existing practice.

To increase the likelihood of parties considering mediation, it may be effective to use incentives. Bacow and Wheeler state:

Parties are unlikely to negotiate unless they perceive that it is in their best interests to do so. They must also perceive benefits to themselves to ratify a possible settlement, to continue negotiating or to leave the bargaining table part way through the negotiations.

The free mediation service, provided by the Environment Court Mediation Centre, already offers a monetary incentive for preferring

104 See Rive, supra note 30, 223.
105 Bacow and Wheeler, supra note 2, 42.
mediation. To provide additional incentives, it is suggested that a fund should be set up to reduce party costs in procuring the services of a private mediator. The existing time benefits of the mediation process should also be promoted.

Another issue in the debate over mediation, is that of access to information; that is, which information, who injects it into the process, at what stage it is done, and who bears the cost of providing the information. Because power inequalities affect access to information, it is suggested here that consideration be made of an independent environmental impact assessment on shared costs. Such an assessment is especially relevant where sufficient evidence is not available, or where scientific aspects have to be taken into account, and would have the result of providing a sound basis for further negotiation, by crystallising the issues.

In most environmental disputes the problems are polycentric, in that they involve a complex network of relationships, with interacting points of influence: “Each decision made communicates itself to other decision centres, changing conditions, so that a new basis must be found for the next decision.”106 Therefore, it is essential that the parties reach an agreement as to the scope of the issues to be addressed. The narrowing down of relevant issues to settle the dispute remains a substantial part of the process.

2. Parties

One of the major problems faced by mediators is finding out about the parties. There are two major issues in relation to participants: determining who ought to participate, and the difficulties posed by situations where the number of participants is great.

All parties to an appeal before the Environment Court are entitled and encouraged to join the mediation process. This includes all appellants and respondents, the original applicant for the resource consent and – according to section 271A of the RMA – submitters to a resource consent application or a proposed plan or policy statement. In addition, any person or group representing some relevant aspect of the public interest can join the mediation process. Both submitters and interested parties must be notified by the Court of the mediation. The difficulty with determining the parties to be notified and entitled to participate is related to identifying the nature and scope of the environmental dispute. Drawing

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from the values derived from the many economic and ecological agendas, the question becomes not who is a party to the dispute, but rather who is not. The issues addressed by the dispute can be scoped and segmented in order to break the process into several subsets of mediation meetings. Through determining the scope of a dispute, it should be possible to identify those persons or groups of persons who ought to be involved in the process.

Nevertheless, it will remain difficult to ensure that all interested persons will be permitted to participate. In regard to power imbalances, as mentioned above, it has been argued by Amy that power may be the passport into the mediation process.¹⁰⁷

Mediators are often faced with the task of choosing which groups will participate in the mediation effort, and in order to maximize the chance of agreement, some mediators prefer to limit participation to as small a number as possible. Often the main criterion in choosing the participants is whether a group has enough power to block or subvert any final agreement. In environmental mediation, as in pluralist political theory, the assumption of neutrality and fairness in the decision making process rests largely in the presupposition that all interests have free and equal access to the process. The fulfilment of this requirement is in jeopardy when power serves as the passport to participation in mediation efforts.

Not all persons who may be affected by the environmental dispute have sufficient political and economic resources to insist that they be included as participants in the mediation. Local citizens and environmental groups especially have difficulties in gathering financial, technical, and legal resources to allow them to wage the prolonged legal and political battles necessary to establish themselves as powerful parties. Then the danger is that these people tend to be left out of the mediation, and this can skew the results of any settlement.

The second difficulty in relation to participants concerns the great number of people who are often interested in an environmental dispute. Increasing the number of participants will not necessarily decrease the manageability of the dispute resolution. The decision-making parties may afford all interested persons the opportunity to be heard and take their views into account when determining the dispute. Bingham, for instance, found no evidence among cases she studied that the number of parties involved in a dispute affects the reaching of an agreement. She found that the average number of parties for cases in which a resolution was not

reached was lower than the average number of parties in cases where agreements were reached.\textsuperscript{108}

The crucial factor in achieving agreement and implementing settlements is whether those with the authority to implement the decision participate directly in the process. Related to this issue is the question of "authoritative consent". It may turn out to be difficult to determine who can settle agreements to bind a party. While some organisations have formal procedures for identifying persons who are authorised to speak on their behalf, others do not. Personal conflicts may also undermine procedures. Groups may have a public identity and have their interests affected, but have no formal organisational structure and therefore no procedures for generating authoritative consent.

In regard to Māori representation, Professor J.E. Ritchie refers to the principle of rangatiratanga – the hierarchical organisation of authority in Māori society. He points out the need to deal with whanau, hapu or iwi to establish the appropriate representation.\textsuperscript{109} Furthermore, the concept of tino rangatiratanga (full authority), referred to in the Treaty of Waitangi, denotes the authority to participate in the mediation process by virtue of the tribe's authority within a certain tribal area.\textsuperscript{110} Taken collectively, these concepts provide the basis for Māori participation in environmental mediation. The concepts determine which parties have the right to be involved, the grounds on which that right is claimed, and the nature and scope of that right. In practice, there can be more than one person who collectively possess those rights and who may establish a mediation team.

3. The Environment as a Third-Party

Arising from the debate over environmental values and ethics is the question as to who, once a mediation involving environmental ethics is set up, can and should speak for the environment? The representation of the 'environment' as a party may require different forms of representation than are currently provided. A possible scenario is one where the dispute involves a value disagreement concerning non-human interests or interests of future generations, and those interests are to be represented by a third party or objective agent.

The rhetoric of dispute resolution points to some kind of moral standing of the environment itself and the consideration of non-human

\textsuperscript{108} Bingham, supra note 19, 99.
\textsuperscript{110} Blackford and Matunga, supra note 47, 198.
interests. Even though the judiciary may be required to consider the environmental effects of a certain development, previous cases show reluctance on the part of the court to treat public environmental concerns as a necessary consideration, let alone to grant locus standi directly to natural objects.

Stone’s conception of conferring rights upon the environment may help to solve the problem of standing. This conception avoids having to identify particular human interests, focusing instead on the environmental object itself, for example the habitat, a river, or a landscape. Stone argues that the concept of rights is valuable because it emphasises the political and moral importance of nature’s claims, and helps to change our attitudes to nature. He suggests that locus standi to challenge decisions that have adverse results for the environment should be afforded not only to those with affected economic interests, but also to affected natural objects.

There already exist models of extensions of locus standi to unaffected persons, as representatives of others who are deemed incapable of self-representation, or to represent corporations. Stone argues that it is just a matter of legal mechanisms to enable the extension of the concept of ‘rights’ to natural objects, by the appointment of a guardian to conduct the litigation on their behalf. He proposes that, “when a friend of a natural subject perceives it to be endangered, he can apply to a court for the creation of a guardianship”. Such guardians are in an advantageous position since unlike the council or the State, they do not have to balance the interests of competing groups, and they are able to focus on the represented party.

As a guardian, it might be given right of inspection to determine and bring to the court’s attention a fuller finding on the land’s condition .... Guardians would also be looked at for a host of protective tasks, e.g. monitoring effluents, and representing their ‘wards’ at legislative hearings on such matters as the setting of ... water quality standards.

While Stone’s arguments seem preferable to the current law, they are not implemented in legal systems, nor recognised by courts. They might, however, provide a valuable mechanism for representing non-human

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113 Ibid.
115 Alder and Wilkinson, supra note 111, 369.
116 Stone, supra note 112.
interests in mediation. The appointment of a special representative or guardian for environmental interests could help to establish a sound mediation process. It would allow for the consideration of environmental ethics and prevents tradeoffs between disputing parties arising from power imbalances, whereby the environment is the loser.

However, the question remains: who should act as an advocate for nature’s interests? Certainly, many interest groups claim a special relationship with environmental concerns. Some focus on particular geographical areas, while others focus on particular species for protection. The experience of direct involvement of these groups in problem-solving settings and discussions with environmental mediators suggest that many of the groups have fallen short of their professed focus on long-term ecological integrity.\textsuperscript{117} Alder and Wilkinson note that if environmental interest groups are to be guardians, they are likely to quarrel among themselves as to who should act in any particular case.\textsuperscript{118} It was observed that the programs of established environmental interest groups are sometimes less driven by the perceived need for environmental protection, than by demands of institutional imperatives. Pressures, such as the need for an increasing membership and attracting foundation or political support, combine to encourage compromise and competition for the scarce resources needed to alleviate the pressures.

Few environmental groups claim to speak for the non-human life forms themselves, which is an elaboration of the competing moral vision of the relationship between humans and the environment. Non-human interests are diverse and often incompatible among different species in the same habitat and among different individuals in the same habitat. The ‘environment’ is not static, nor is it unified, predictable or harmonious. ‘Pro-environment’ values are not singular, and are highly contentious issues that are debated by environmental activists and ethicists.

One way which seems to provide a more acceptable method for appointing guardians, is to include ‘resource’ representatives with expertise in key areas, who attend meetings but who do not participate in the decisions-making process.\textsuperscript{119} The local authority for instance, could appoint a Regional Resource Representative (“RRR”). The representative would be required to pass certain approval processes, such as expertise and knowledge, a focus on long-term ecological effects, and accountability. The parties or mediator might invite this special

\textsuperscript{118} Alder and Wilkinson, supra note 111, 370.
\textsuperscript{119} Stephens, Stephens and Dukes, supra note 117, 184.
representative to participate in the dispute resolution process. In this context the RRR could attend the mediation but would not participate in the decision-making process. This would require a mediator who is well versed in the scientific, legal and policy issues, and who understands environmental ethical foundations.

An additional alternative would be to provide an agency, such as the Department of Conservation or the Ministry for the Environment, as an advocate for non-human interests. The recently established Auckland Environment Court Mediation Centre may also potentially provide a non-biased, objective person or body to represent those interests.

4. Mediators

The skills and expertise of the mediator are significant to the success or failure of the mediation process. Mediating is a demanding task and requires a variety of skills. All Environment Court Commissioners are experienced in mediation and have taken courses in alternative dispute resolution.\textsuperscript{120} Training is particularly important because mediation deals with a variety of issues, which are often quite sensitive topics. Chart suggests that training, especially in the areas of conflict analysis, dealing with groups, and in ethics is desirable.\textsuperscript{121} A previously discussed, a mediator versed in scientific, legal, technical, and policy issues, local government, business culture and Maori protocol and who understands environmental ethical foundations and fault lines, will be better prepared to identify risk territory and to take steps to steer clear of them. The Ministry for the Environment suggests that sensitivity to these matters might be more important than demonstrated knowledge.\textsuperscript{122}

A mediator should assess the dispute prior to the commencement of the mediation process. He is responsible for clearly identifying and defining the issues, clarifying interests, eliciting necessary information from parties, and establishing protocols and procedures. A mediator should be able to lay out the costs and benefits of the mediation for each party, and to help them recognise some of the consequences if the matter is not resolved by mediation. Values have to be identified and different cultural perceptions clarified. This requires strong neutrality and impartiality on the part of the mediator. Especially in sensitive matters, the mediator must be able to ask the right questions and build trust among the parties.

\textsuperscript{120} Ministry for the Environment, \textit{You, Mediation and the Environment Court} (2001) 15.
\textsuperscript{121} Chart, supra note 42, 22.
\textsuperscript{122} Ministry for the Environment, supra note 120.
A major aspect of the mediator's role is to deal with the inequality of information and, in effect, the inequality of power. When dealing with large numbers of participants or issues, which requires scientific knowledge, it may be useful to use a team of mediators instead of a sole mediator. Members of this team may include specialists, such as scientists or ecologists, to help address issues that demand scientific expertise. If expert information is contradictory, the mediator may facilitate an agreement among the parties to undertake an independent environmental impact assessment, and devise a plan to finance it.

There is a pool of specialised private mediators. The choice of an appropriate mediator can be a major factor in the success of the mediation process.

5. Morals, Ethics, and Values in Environmental Mediation

(a) As between the Parties

The parties have the right to mediation and because the service offered by the Environment Court is free, there is a danger of overuse and exploitation of the right. Principal Environment Court Judge Allin compared the attitude of parties to the 'Tragedy of the Commons', as described by Hardin. As a free resource, many parties are willing to consider mediation superficially, without preparing for the process or seriously considering its consequences. The parties often waste the resources of the court, by failing to settle by a certain date or postponing agreed appointments. As much as the right to mediation is welcomed, the corresponding responsibilities are reluctantly acknowledged.

Judge Allin suggested four points of consideration for the parties in order to use the resources of the Court more effectively and efficiently.

First, in many cases it is clear the parties had never really talked to each other prior to the Environment Court hearing. Once parties begin communication, the possible solutions to a number of problems quickly become evident. Allin therefore suggests that parties should try to talk to each other before the hearing begins. Resolving the matters at stake among themselves may be possible if the parties show goodwill and identify their own positions and take account of opposing ones.

123 Principal Environment Court Judge Allin, Speech at the Environment Court, 22 August 2001.
Second, and related to the first, is the suggestion that if parties do communicate readily prior to a hearing, the Registrar of the Court can more easily set a date for a ‘call over’, which should be regarded as binding upon the parties. The experience of the Court so far has been that parties continually postpone these appointments, or do not show up at all.

Thirdly, the parties should also consider the location of the mediation, site visits and expenses independently, rather than relying on the organisational resources of the Court. Finally, it is the responsibility of the Court to approve the agreement reached in the mediation and to keep a public record. Often the parties fail to provide a consent order or to inform the Court of the outcome at all. It is important, as a matter of discipline, that the parties supply the consent order. The possibility of imposing fines for failure to do so is also suggested.

(b) Concerning the Mediator

Primarily, the mediator needs to familiarise him or herself with the issues in dispute. Only a mediator who is sensitive, able to focus on the party’s needs, able to gain respect, and to deal with any tense moments that arise, will be a successful facilitator. The mediator should focus on the underlying interests of the parties, rather than their stated positions. The ability of the mediator to satisfy those interests will determine the mediation process. As Fisher and Ury observe:124

The basic problem in a negotiation lies not in conflicting positions, but in the conflict between each side’s needs, desires, concerns, and fears.... Such desires and concerns are \textit{interests}. Interests motivate people; they are the silent movers behind the hubbub of positions.

When a mediator possesses the ability to determine the underlying objectives or interests in the dispute, it may be discovered that these interests are vastly different, perhaps so much so that they are mutually exclusive. If that is the case, an ability to find common ground is not necessarily an impossibility. It will be the skill of the mediator in finding interests in common, rather than positions in conflict that will resolve the conflict. However, if the mediator finds the dispute irresolvable, he or she will be required to advise the parties whether or not to proceed with the mediation or to turn to litigation.

124 Fisher and Ury, supra note 29, 40.
VI: CONCLUSION

Dispute resolution, as a field of study, is relatively new. Environmental dispute resolution, in the form of mediation, is even newer. It is perhaps to be expected therefore, that the body of knowledge and thoughts in the area of environmental mediation is in its infancy and will be further developed over time.

The mediation service provided by the Auckland Environment Court Mediation Centre may prove to be a cornerstone in the development of environmental mediation as a true and well-used alternative to litigation. As Principal Judge Allin noted, between the opening of the Mediation Centre and August 2001, approximately 320 cases had gone through a mediation process – either facilitated by the Centre or by private mediators – of which about 60 had been successfully resolved, and the Environment Court appeals withdrawn. 125

It can be concluded that mediation, while subject to some limitations, offers an alternative to the adversarial process and leads to the successful settlement of disputes. However, it is too soon to say whether mediation reduces the likelihood of litigation.

The purpose of this article was to analyse the inherent capabilities of mediation, not only to resolve environmental issues, but also to provide a sound basis for protecting the environment. Environmental conflicts arise through contrasting fundamental values. While developers may share an economic, human-centred perspective, environmentalists may claim to speak for the natural environment. To settle such conflicts always includes a trade-off and compromise of values and interests.

The question of representation remains. Who should represent the environment itself? Should there be an advocate for third-party interests, future generations, and the sustainability of natural and physical resources? While these questions remain unanswered, the environment may bear the ultimate loss. Mediation therefore, may resolve resource management conflicts – but not necessarily environmental problems.

It is suggested that an independent third-party – the Department of Conservation, the Ministry for the Environment, the Parliamentary Commissioner for the Environment, a RRR or a spokesperson for the environment – join the mediation table to ensure the consideration of the environmental bottom-line and compliance with it.

125 Principal Judge Allin, supra note 123.
A mediator with the necessary training and ecological experience, who is not required to give legal advice and who should remain a neutral facilitator, can only apply dispute resolution mechanisms in the hope of achieving sound environmental outcomes. What the mediator can ensure is the atmosphere of the mediation. That atmosphere should not serve to disarm environmentalists, neither should it allow the exertion of superior political or economic power to extract unfair environmental concessions. The mediation process should redefine environmental values in a way that favours sustainability and integrity of ecological resources, rather than prioritising pro-development interests. The mediator can also help and encourage parties to clarify their interests and needs, to better utilise the mediation process.

The existing limits on environmental mediation can, in part, be overcome by ecological education – not only of the disputants, but also of society as a whole. If the awareness and understanding of the increasing extent of environmental problems were to become an integral part of society, the economy, educational systems and research, the effectiveness of environmental mediation would be enhanced without compromising the natural environment.