

A review of environmental mediation: theory and practice

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ERRATUM

p.13, last paragraph, line 3.

Should read:

“However, the Resource Management Act (ss. 99 and 268) contains ... ”

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Summary

Introduction

One of the major outcomes of the Local Government Reform and the Resource Management Law Reform has been a devolution of some resource management decision-making power from central government to regional and territorial governments.

The Resource Management Law Reform has also made provision for a wide range of interests to be party to the decision-making process. A range of conflict resolution models appropriate to the circumstances of disputes are needed to assist in the resolution of resource management problems. The Resource Management Act makes provision for alternative conflict resolution approaches within the existing resource consent application hearing and appeal process.

In the past, the adversarial model has been used to resolve resource management and environmental conflict problems. This approach involves an impartial third party making an enforceable decision after hearing argument on the law and/or facts presented by the parties. This may result in a win/lose situation for the parties concerned where one side prevails at the end of the day. The model requires disputes to be "fitted" into a legal framework. Underlying concerns at the crux of the dispute may not be relevant in the judicial context and are therefore excluded from consideration by the third-party decision maker (Ministry for the Environment, 1988b).

This situation has promoted a search for alternative methods of dispute resolution. Environmental mediation emerged in the United States of America in the 1970s as an alternative approach for the resolution of conflicts over land and environmental resources, and the formulation and implementation of land use and environmental planning policy.

Environmental mediation is a process whereby existing or potentially conflicting parties concerned with an environmental and/or land resource get together with a neutral third party to discuss their 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. The final decision is in the hands of the parties. The outcome of mediation may or may not be an (enforceable) agreement. The aim is to achieve a 'win/win' or 'all-gain' outcome rather than the 'win/lose' outcome possible with the adversarial approach.

The objective of this study was to investigate the circumstances under which resource management problems might be more appropriately resolved by mediation than by judicial determination.

The approach adopted was:

- (i) prepare an overview of environmental conflict in resource management decision making in New Zealand within a broad general framework,
- (ii) assess the ability of traditional judicial conflict resolution approaches to deal with environmental conflict,
- (iii) review international literature on environmental mediation,
- (iv) outline the mediation approach to conflict resolution,
- (v) identify United States and Canadian examples of mediated conflict within the framework in (i),
- (vi) identify essential elements that increase the likelihood of 'success' in mediation.

The problem

The basis of contemporary environmental and resource management conflict can be traced to the emergence of an environmental paradigm in the 1960s. The impacts of development on the environment began to be questioned from a number of quarters. Pressure on finite resources has been increasing. Maori people have been renewing their demands for recognition of their rights to own and manage natural resources under the Treaty of Waitangi.

The unique qualities of the environment make conflict resolution difficult. Attitudes towards risk and uncertainty differ and there is disagreement as to which policies and values should take priority in resource management decision making, the use of fixed resources, and where the costs and benefits of development should fall.

Environmental issues that come before the courts can be categorised within three broad classes that correspond to specific levels of decision making (Sheppard, 1988).

General primary issues relate to questions of national policy on whether or not an activity should take place at all anywhere. These issues involve social equity or philosophical questions or matters which call for value judgements. Examples include issues such as should natural gas be produced for ammonia urea, synthetic petrol etc.; food irradiation; the adoption of nuclear power as an energy source and issues over resource ownership and management with regard to the Treaty of Waitangi.

Particular primary issues arise from a specific proposal, with its own site and neighbourhood, structures, inputs, operating methods, and impacts. Those issues do not usually raise the question of whether the proposed activity should be permitted at all, anywhere, but whether it should be permitted at the specific site, with the proposed inputs, structures and methods; and usually question whether the

impacts likely to be generated should be accepted, or at least whether they can and should be reduced. New Zealand examples include siting of the synthetic petrol plant at Motonui and the Clyde high dam.

Secondary issues arise indirectly from a proposed activity. An example is the issue that arose about the end-use of an aluminium smelter designed to use electricity generated by a proposed power station.

The judicial approach to conflict resolution has a number of important strengths. These include the taking of evidence under oath, and the public nature of the process. Perceived limitations of the approach include a tendency towards outcomes that produce winners and losers, and the possibility that third party interests might not be represented. The nature of the adversarial approach encourages a focus on positions rather than on the underlying concerns of the parties. The judiciary argue that they should not be required to make value judgements over general primary issues. They suggest that such matters are better dealt with by committees of enquiry or political decision makers who are accountable to the community. There is also debate as to whether the courts are the appropriate forum in which to resolve scientific and technical disputes.

The mediation approach

The potential benefits and limitations of an alternative dispute resolution approach, that of mediation, were examined. A major benefit is that in such a voluntary process where the parties set the agenda themselves, underlying concerns can be identified and debated. A trained mediator can encourage the parties to look at interests and not positions. Through a process of consensus building and joint problem solving parties attempt to come to an agreement that is mutually acceptable (Bingham, 1986).

Mediation processes can be designed that are appropriate to New Zealand's bicultural environment. The approach is flexible in terms of participation while offering a degree of control to the parties involved. It can improve relationships and communications between the parties.

Mediation does not resolve the basic differences that separate parties in conflict nor is it helpful where there are systemic grievances. Third party rights may not be addressed in the mediation process nor may mediated solutions be environmentally suitable or acceptable. It can not be used to establish a legal precedent.

Mediation practice

Three studies on mediation in the United States were briefly reviewed to gauge the relative success of mediation in practice. (The studies examined cases mediated prior to 1985.) Mediation has been used in cases involving land use, natural

resource management and use of public lands, water resources, energy, air quality, and toxics (*Ibid.*).

Measures of success can be defined in a number of ways: reaching agreement, implementing an agreement, improving communication, or in the process itself.

There was little difference between parties in their success at **reaching agreement** over policy and site-specific disputes. Reaching agreement was facilitated if those with decision-making authority were present at the negotiations.

Fewer policy agreements were implemented than site-specific agreements. The reasons for this were that parties active at the national or regional level are generally representative of the diverse interests concerned but not of specific interested parties. They also need to gain broad support from the wider community. As mediation practice has matured, its success in resolving policy disputes at the (United States) federal level has improved.

Disputes involving cultural values in site-specific disputes have been successfully mediated. Scientific and technical disputes were not able to be examined within the time-frame available. This area needs further research.

Litigation or mediation?

A decision to litigate or mediate depends on the particular circumstances surrounding a dispute. These include the applicable laws and regulations, the experiences and resources of the parties, as well as the parties' calculations of how well their interests would be served using a particular approach and an evaluation of the possible implications of going to the bargaining table (*Ibid.*).

Factors that may increase or decrease the likelihood of success were discussed. They included party-related factors, process- and context-related factors, and substance-related factors. Factors crucial to the mediation process were identification of all affected parties, appropriate representation, incentives to mediate, and the existing power balance. The number of parties involved did not appear to influence success, although mediators may have screened out disputes with a large number of potential participants. The types of parties present do not appear to influence success (*Ibid.*).

Substance-related factors are important. When designing a process for a particular dispute the mediator encourages parties to identify the issues that are important to them as well as attempting to gain agreement on the scope of issues and aspects of the facts of the case (*Ibid.*).

Conclusion

It is not possible nor proper to attempt to delineate a particular set of circumstances when environmental mediation might be **more appropriate** in the resolution of resource management problems than judicial determination.

No empirical evidence suggests that any single type of case is inappropriate for alternative dispute resolution processes. As a voluntary process, if the parties agree, any case can go to mediation. Because underlying substantive issues can be addressed more readily using non-judicial rather than judicial approaches, many environmental disputes have the potential to be resolved by mediation. As the mediation approach is based on consensus decision making it is not appropriate for situations involving deeply held, non-negotiable value positions.

The usefulness of mediation may be influenced more by the characteristics of a particular conflict at a particular time than on the 'category' of the case (Ministry for the Environment, 1988b). The decision to litigate or mediate is affected by the applicable laws and regulations, the experience of parties with alternative dispute resolution approaches, the resources of the parties, and how well their respective interests will be served by the approach in question. The likelihood of success depends on party-, process- and substance-related factors (Bingham, 1986).

Mediation seems to be particularly appropriate for site-specific disputes. Resource managers could find this a useful tool in the resource consent application process.

Mediation has the potential to be appropriate in disputes concerning cultural and spiritual values at the site-specific level. The approach may also be preferred by Maori people because face-to-face dialogue and consensus decision making practised on marae more closely resemble alternative dispute resolution approaches than does the judicial approach.

Policy can be developed through negotiation with affected parties. However, there are greater difficulties involved in getting all affected parties at the negotiating table and in ensuring that those responsible for implementing decisions are also present.

Mediation might resolve resource management conflict but not necessarily environmental problems. If there is no advocate for third party interests, for future generations, or for the sustainability of natural and physical resources, for example, then the environment may be the loser. It would be faulty to conclude that all mediated settlements are necessarily just or in the public interest (Amy, 1983).

Recommendations

1. A flexible, case-by-case approach to the use of environmental mediation should be adopted at this early stage. Experiments with more formal application of the process in specific issue areas may be a prudent course of action.

2. Documentation and monitoring of mediation efforts would allow policy and procedure to evolve in the light of what is learned from practice.
3. An investigation is required into the institutionalisation of mediation into resource management decision making at the resource consent application and appeal stages.
4. Research is required on establishing the role of the neutral mediator and how that could be funded. A sub-set of this enquiry should be mediator ethics and whether a mediator should be required to represent the interests of third parties not represented at negotiations.
5. Research is required into a mediation process that is appropriate for New Zealand's cultural environment.
6. Mediator training needs to be provided. This is crucial for all stages of the process but particularly for pre-assessment of the dispute.
7. Research needs to be carried out on whether mediation might be a more appropriate process for resolving scientific and technical disputes.
8. Research would be required into the specific nature of policy disputes as they are more complicated than site-specific disputes.

CHAPTER 1

Introduction

1.1 Scope and purpose of this publication

With provision being made for a wide range of interests and values to be party to decision making under the Resource Management Act 1991 there is a need for a range of methods and techniques for resolving conflicts that will inevitably emerge. With the accompanying devolution of some resource management decision-making power from central government to regional and territorial government there will be increasing pressure on existing dispute resolution institutions.

Disputes over environmental issues are so varied; no one dispute resolution process can be successful in all situations. Depending on the circumstances, those involved may prefer to litigate, to lobby for legislative change, to seek help from an administrative agency, or to negotiate a voluntary agreement with one another (Bingham, 1986, xvi).

Attempts to resolve conflicts using judicial processes may result in a win-lose situation for the parties concerned. "The adversarial model involves an impartial third party making an enforceable decision after hearing argument on the law and/or facts presented by (legal representatives of) the parties" (Ministry for the Environment, 1988b, p.5). At the end of the day one side prevails. Both the process and the outcome may exacerbate hostilities, impede implementation, and foster further conflict (*Ibid.*). Limited financial and technical resources may also be wasted (Gamman, J., Lecturer in Environmental Studies, University of California, pers. comm.).

This situation has promoted a search for alternative methods of dispute resolution. Alternative methods, based on dialogue and communication, have already been developed and applied in the areas of labour relations and family court disputes (in New Zealand) and international relations. The application of these methods to environmental conflicts has been successful for several years in the United States, but is still in the experimental stage in New Zealand.

The purpose of this study is to explore the appropriateness of non-judicial means of resolving resource management problems through the mediation process. A conceptual framework will be developed within which further research on an appropriate model for New Zealand, its institutionalisation, mediation processes, the role of a neutral (mediator), etc. can be carried out.

1.2 What is environmental dispute resolution?

One of the major assumptions inherent in alternative environmental dispute resolution approaches is that the parties involved are the best judges of what the real issues are and whether an adequate resolution has been achieved. In theory these approaches allow broader attention to the real issues because the parties themselves set the agenda and they also decide the terms of the agreement (Bingham, 1986, p.xx). It should be noted, however, that all affected parties must be involved for this assumption to be valid.

"Private dispute resolution, as contrasted to the public court system, is the consensual attempt by disputing parties to resolve their conflict outside of the public system ... Rules of procedure, the binding or non-binding nature of the result, the role, if any, of the law, and other designed features are subject to the mutual agreement or acceptance of the parties to the dispute" (Johnston, 1989, p.2).

Environmental mediation has been emerging since the 1970s "as an alternative approach for (1) the resolution of conflicts over land and environmental resources, and (2) the formulation and implementation of land use and environmental planning policy ... **Environmental mediation** is a process whereby existing or potentially conflicting parties concerned with an environmental and/or land resource get together with a neutral third party to discuss their 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" (Jacobs and Rubino, 1987, p.1).

Documented experience gained in the United States over the past decade highlights the range of resource use conflicts that can be addressed using the mediation technique. It has been used in cases involving land use, natural resource management, water resources, energy, air quality and toxics (Bingham, 1986, pp.32-33).

'Success' in mediating resource use conflict can be defined or measured in a number of different ways: whether agreement has been reached, the extent to which the agreement is supported by the parties through implementation, or even whether communications between the parties improved through the process (Bingham, 1984, pp.65-89). In order to increase the likelihood of success, certain crucial factors must hold. These include the voluntary nature of the process, whether incentives exist for parties to mediate, representation of all affected parties at the mediation table, awareness of power balances, and the likelihood of implementation of any agreement reached (Jeffery, 1988; Bingham, 1984; Ministry for the Environment, 1988b).

1.3 Objective

To identify the circumstances under which resource management problems might be more appropriately resolved by mediation than by judicial determination.

1.4 Approach

- (i) Overview of environmental conflict in resource management decision making in New Zealand within a broad general framework.
- (ii) Assess the ability of traditional judicial conflict resolution approaches to deal with environmental conflict.
- (iii) Review international literature on environmental mediation.
- (iv) Outline the mediation approach to conflict resolution.
- (v) Identify United States and Canadian examples of mediated conflict within the framework in (i).
- (vi) Identify essential elements that increase the likelihood of 'success' in mediation.

1.5 Summary

In Chapter 2 the fundamental nature of New Zealand's environmental problem, that is, competing claims for natural resources is outlined. Three broad classes of environmental issues will be discussed. The judicial approach will be examined to consider how appropriate it is in resolving resource management and environmental conflict.

The following chapter will look at potential benefits and limitations of an alternative approach to conflict resolution, that of environmental mediation.

Chapter 4 gives a general review of mediation practice in North America. References to 'calling in a neutral mediator' relate to the North American situation where mediation has been institutionalised. However, it should be noted that the New Zealand context is different to that of the United States of America where courts and Judges are confined to determining questions of law. Judges there are not specialists in environmental law and do not sit with expert members of the courts. In New Zealand, Planning Tribunal Judges are experienced in matters of

environmental law and are able to call upon experts to provide specialised knowledge.

In Chapter 5 the factors that influence a party's decision to choose litigation or mediation are identified.

In the final chapter the circumstances under which resource management problems might be more appropriately resolved by mediation than by judicial determination are discussed.

CHAPTER 2

Nature of the problem

2.1 Derivation of environmental and resource management conflict

Until recent times, economic development has been regarded by many as the cornerstone of social progress. It was "the means by which the lives of all members of society would constantly improve" (Bacow and Wheeler, 1984, p.1). Although there has always been a degree of awareness of some of the negative consequences of economic development, people's attitudes about them have begun to change. The emergence of new political movements in the 1960s and '70s demonstrated a fundamental change in social values. This shift in public opinion is also reflected in the growth of political and legal institutions that are concerned with environmental protection (Bacow and Wheeler, 1984, pp.1-2).

In New Zealand proposals were being made in the 1960s to raise the level of Lake Manapouri in order to provide generating head for potential hydro electric power schemes. Lobby groups such as "Save Manapouri Campaign", "Clutha Rescue" and "Coalition for Open Government" emerged to protest the lack of recognition being given to environmental values.

In addition, "... a dramatic advance has occurred (in the last decade) in both statute law and case decisions concerning the recognition of Maori rights, as provided for in the Treaty of Waitangi... (A)n important legal renaissance is occurring in relation to the recognition of Maori rights and values ..." (Palmer, 1987, pp.27-28).

Increasing pressure on finite resources from a varying range of potential users contributes to resource management problems and environmental conflict.

2.2 Causes of environmental conflict

The complex nature of the natural environment and our lack of precise scientific information causes problems in identifying the causal factors of environmental degradation. Because it is difficult to establish links between cause and effect we are not able to predict accurately the outcomes of our actions. Science can 'explain' some phenomena but there is no common agreement amongst the 'experts' as to the proper course of action.

The unique qualities of the environment makes conflict resolution difficult. Features of their complex nature include the irreversibility of some impacts, indeterminate

time-horizons, where the costs might fall, problems in identifying the public interest (Susskind and Weinstein, 1980, pp.311-357), uncertainty, differing assessments of probabilities, differing attitudes towards risk and the fact that impacts are not necessarily restricted to national boundaries (Bacow and Wheeler, 1984, pp.7-9). Cultural differences can mean that water that is clean by quality classification standards under the Water and Soil Conservation Act 1967 may not be clean by Maori spiritual standards.

"When we talk about what individuals, groups, organizations and interests are presently involved in the controversy - we frequently find that almost invariably the reasons people propose projects are technical, and economic, and the reason people oppose projects are social, (cultural) and environmental. The proponents continue to generate technical information which does not answer the (social or environmental) concerns of the opponents" (Huser, 1982, p.24).

Sullivan (1984, p.16) suggests four major sources of conflict that arise in relation to a development project. (The scheme is based on the work of Susskind *et al.*, 1978).

- " 1. Disagreement over the relevant weights granted to competing policies and values*
- 2. Disagreements over the new distribution of costs and benefits that arise from a project*
- 3. Disagreements over the appropriate level of protection from environmental and health harms*
- 4. Disagreements over the use of fixed resources".*

2.3 Categorising environmental issues

Before examining the proposition that the judicial approach may not always be the most appropriate for dealing with environmental conflict, it is useful to briefly examine the kinds of issues that come before the courts.

A general classification of environmental issues that represent the different levels of decision making involved in the allocation and use of natural resources will be used. Sheppard (1988, pp.1-2) proposes three broad classes: general primary issues, particular primary issues, and secondary issues.

"General primary issues are not bound to a particular proposal, although controversy about them may be stimulated by particular proposals. Rather, general issues question whether a particular activity should be permitted at all, anywhere" (Sheppard, 1988, p.1).

"Particular primary issues arise from a specific proposal, with its own site and neighbourhood, structures, inputs, operating methods, and impacts" (Ibid.).

"Secondary issues are about effects which do not directly and obviously result from the proposed activity, but which occur as a consequence of it" (Ibid. p.3).

General primary issues are based on social equity or philosophical issues, or matters that call for what are essentially value judgements (*Ibid.* p.10). Fundamental resource management issues that are addressed at the national policy level fall into this category. (For a discussion on national policy matters in resource management, see the paper prepared by Karen Cronin in (Ministry for the Environment, 1988c)). "Examples from New Zealand's experience over the last decade are: Whether natural gas should be used to produce ammonia urea, methanol, or synthetic petrol; (and) whether articles, and food in particular, should be sterilised by irradiation" (Sheppard, 1988 p.1); the debate over whether nuclear power is a viable or socially acceptable energy alternative for New Zealand, and whether the Treaty of Waitangi should be taken into account in decision making.

Susskind and Cruikshank (1987, pp.18-19) refer to disputes around such issues as constitutional disputes; they hinge primarily on interpretations by the courts of rights guaranteed under the (United States) Constitution. "New Zealand has no written constitution - no set of principles against which legislation is judged and struck down if it does not conform with the principles ... The basic legal rule of our constitution is that parliament is supreme. When it passes legislation that is the law" (Palmer, 1979, p.110). In other words, decisions over general primary issues are made by Parliament.

Particular primary issues "do not usually raise the question whether the proposed activity should be permitted at all, anywhere, but whether it should be permitted at the specific site, with the proposed inputs, structures and methods; and usually question whether the impacts likely to be generated should be accepted, or at least whether they can and should be reduced" (Sheppard, 1988, p.1). New Zealand examples include siting of the synthetic petrol plant at Motonui and the Clyde high dam. Such issues are generally addressed in the resource consent-granting process.

Susskind and Cruikshank (1987, pp.17-20) refer to such public disputes as distributional disputes. "Distributional disputes focus on the allocation of funds, the setting of standards, or the siting of facilities (including how we use our land and water)". United States examples include the reallocation of water rights, the closing of the Three Mile Island nuclear power plant in Pennsylvania, battles over Native American fishing rights in the Great Lakes, and various efforts to combat acid rain.

These site-specific disputes can involve scientific and technical issues related to activities such as mining, for example, or the local recognition of matters of national significance. Small-scale, low impact developments also fall into this category. Decision making is generally at the regional or local district level.

The distinction between these two categories of dispute is not always clear. Challenges to the exercise of governmental authority can arise at the point where a development project is being proposed. If the fundamental philosophical issue has not been previously debated it will have to be resolved before the site-specific issues can be addressed.

In the early stages of a controversial policy issue there may be disagreement over the nature of the problem and whether a problem exists at all (Bingham, 1986, p.77). The planning for the Clyde high dam provides a useful example. A number of those opposing the dam believed there was insufficient demand for end use of the electricity to be generated.

Secondary issues can include indirect social impacts of an activity, or additive effects such as incremental pollution. A synergism may occur where one impact may aggravate the effect of another. Secondary effects of a proposal are not always easy to identify in advance nor can their future effects always be quantified (Sheppard, 1988, p.3). A local example of secondary issues is that "... which arose about the end-use for an aluminium smelter of electricity which would be generated by a proposed power station" (Sheppard, 1988, p.2).

2.4 The judicial approach to conflict resolution

2.4.1 *The Planning Tribunal*

When giving wide planning powers to Councils, Parliament created procedures in order to protect the rights of land owners. "... (P)ersons and bodies (can) object to proposed planning schemes, or special applications and obtain a review (of Council decisions) by a judicial body" (Williams, 1985, p.4). Decisions made by city and territorial authorities (councils and regional water boards, for example), N.W.S.C.A.,

etc. on how resources are to be allocated and used can be appealed to the Planning Tribunal which has all the powers of the District Court.

The Planning Tribunal consists of a maximum of five District Court Judges (each of whom is a Planning Judge) and not more than 10 other persons. The presence of at least two members of the Tribunal (of whom a Planning Judge or alternate Planning Judge is one) is necessary to constitute a sitting of the Tribunal (Town and Country Planning Act, 1977, s.134). Persons with specialised knowledge or interest connected with the functions of the Planning Tribunal may be appointed (*Ibid.*, s.131). Evidence, whether legally admissible or not, may be called in (*Ibid.*, s.149). The Planning Tribunal's function is not confined to legal issues but extends to deciding environmental issues on their merits. A Planning Tribunal decision can be the subject of an appeal (limited to questions of law) to the High Court, and the High Court's judgement can, with leave, be appealed to the Court of Appeal.

The broad responsibility for the establishment of policy and the determination of works priorities lies with central and local government. The Planning Tribunal can consider a matter within the light of wider issues of Government or Council policies (Williams, 1985, p.6).

"The adversary system is used in Tribunal hearings to resolve District Scheme matters. It resembles a contest where opposing parties call (usually) expert witnesses to provide evidence, both fact and opinion. Legal advocates endeavour to 'build up' their client's case and 'break down' that of their opponents by examination, cross examination and re-examination of witnesses and by legal submissions" (Williams, 1985, p.6).

In Williams', (*Ibid.*) view, the immense advantage of this approach to conflict resolution is "that evidence is taken on oath and tested by cross examination. This generally results in thorough preparation and ensures a high level of integrity". A second important feature of the approach is the public nature with which hearings are carried out apart from certain specified circumstances.

2.4.2 Limitations of the adversarial approach

The adversarial approach tends to focus on the positions of the parties; the problem therefore appears to be a conflict of positions. Bargaining or negotiating over positions locks the parties into their positions; they defend them against attack and become involved in 'face-saving' strategies. "As more attention is paid to positions, less attention is devoted to meeting the underlying concerns or interests of the parties" (Fisher and Ury, 1981, p.5).

Because the approach requires disputes to be 'fitted' into a legal framework "(c)oncerns that 'really matter' to those affected by the decision of the court or tribunal may not be legally relevant and may necessarily be excluded from consideration by the decision-maker" (Ministry for the Environment, 1988b, p.5).

As stated in the previous chapter, attempts to resolve conflict using judicial processes may result in a 'win/lose' situation for the parties concerned. "The adversarial model involves an impartial third party making an enforceable decision after hearing argument on the law and/or facts presented by (legal representatives of) the parties" (Ministry for the Environment, 1988b, p.5). At the end of the day one side prevails. The model does not offer opportunities for compromise that could result in gains and losses for both sides.

A further limitation of the adversarial approach is raised by Judge Sheppard. "Most judges' experience is in a tradition of limited access to information, and the constraints of the adversary process. They tend to focus on the particular issue in hand, and the interests of the parties before them. However a decision on an environmental issue will almost always affect other people and other cases. A tendency to focus on the case in hand may hinder a judge from considering public values and interests which are not represented by the parties to the particular dispute. The parties cannot be relied on to draw attention to all relevant information" (Sheppard, 1988, p.13).

Some people have expressed the view (Ministry for the Environment, 1989, p.29) that the courts are not the most appropriate forum for resolving scientific and technical disputes, despite the opportunities available under the Resource Management Act 1991 for expert evidence to be presented to the Planning Tribunal. Part of the problem stems from the scale and complexity of the issues involved. It is difficult for the courts to evaluate the trade-offs in situations involving a high degree of uncertainty. "Disagreements exist about the magnitude of risk, the appropriateness of measuring techniques, and the reliability of data" (Jasonoff and Nelkin, 1987, p.61).

Although it is not possible to examine this issue within the scope of this publication, it is an area worthy of further research. It is noted that the Resource Management Act provides for a greater mix of knowledge and experience amongst members (commissioners and deputy commissioners) of the Planning Tribunal than has been provided for in the past. This may or may not address for the difficulties associated with resolving scientific and technical disputes.

Disputes over resource management and environmental issues sometimes place the courts in a difficult position when they are expected to make what are commonly referred to as value judgements. The following concerns relate to general primary issues involving fundamental resource management policy decisions.

“The (Planning) Tribunal is charged with interpreting legislation and the provisions of planning schemes and management plans which are sometimes very generally expressed. The various Acts give little specific direction on the criteria to be used by the Tribunal in its determinations. For example, matters stated in Section 3 of the Town and Country Planning Act, as being of ‘national importance’, are a series of very broad guidelines for the preparation and determination of policy related to planning schemes. Some are so general that they are not capable of interpretation in specific situations. Furthermore, in practice the guidelines may conflict with one another... The Tribunal has repeatedly emphasised that its role is not policy making but interpretation and the resolution of conflict” (Williams, 1985, pp.5-6).

Judge A.R. Turner (McBride, 1986) asks: “Is it appropriate that the Courts and other judicial bodies should become involved in the resolution of policy issues: Is that a proper role for a judicial body? How can the Courts persuade the community that a course of action not obviously beneficial will have the most beneficial long term effects: Should the Courts have the authority to make decisions which impose costs on the community when they are not directly answerable to nor elected by the community.”

Principal Planning Judge Sheppard gives his view. “Where questions of social equity, philosophical issues, or matters which call for what are essentially value judgement predominate, they cannot be satisfactorily made by a rational process following objective evaluation and sifting of the evidence. They are really policy decisions which ought to be made by a body which is politically responsible” (Sheppard, 1988, p.10). “Determination of policy on (such) broad, general issues is not an appropriate function for the judiciary because of a lack of judicially discoverable and manageable standards for resolving them, and because it is likely to draw the judiciary into controversy with the politicians. That could undermine public confidence (sic) in the independence of the judiciary” (*Ibid.*, p.2).

A final issue that is not a limitation of the approach discussed above but rather one that may emerge under the Resource Management Act is that the devolution of decision-making power from central government to regional and local government will probably result in an increased number of cases coming before the Planning Tribunal. Substantial time delays could be expected, particularly as the resources of the Tribunal have not been significantly increased under the Act. Alternative

dispute resolution approaches could therefore be in greater demand than they have in the past.

2.5 Summary

This chapter briefly examined the causes of resource management and environmental conflict. Some of those identified include differing attitudes towards risk and uncertainty, indeterminate time-horizons, cultural values, as well as disagreements over the distribution of costs and benefits, the use of fixed resources, appropriate levels of protection from environmental and health harms, and the relevant weights granted to competing policies and values.

Environmental issues that come before the courts were viewed within three broad categories; general primary issues, particular primary issues, and secondary issues. These issues relate to different levels of resource management decision making.

The judicial model of environmental dispute resolution in New Zealand was briefly examined. A major advantage is that a high level of integrity is maintained through the taking of evidence under oath and the cross-examination of witnesses.

A number of possible limitations to the adversarial approach were highlighted. The judiciary is responsible for ensuring that the will of the legislature is fairly and justly interpreted. Such decisions, however, tend to result in a win-lose situation for the parties involved. In addition, underlying interests of the parties might not be relevant in a judicial situation. A further concern is that third party interests may not be represented in the proceedings.

Finally, some members of the judiciary have expressed concern that they are required to resolve what are basically fundamental resource management policy issues. They are not assisted by vague legislative requirements.

In the next chapter an alternative model of dispute resolution, that of mediation, will be examined to see whether it has the potential to address the problems outlined above in a more satisfactory way.

CHAPTER 3

The mediation approach

3.1 Alternative dispute resolution approaches

Environmental dispute resolution is the collective term that refers to “a variety of approaches that allow the parties to meet face to face to reach a mutually acceptable resolution of the issues in a dispute or potentially controversial situation” (Bingham, 1984, p.xv). The processes are voluntary and all involve some form of consensus building, joint problem solving or negotiation.

One of the major assumptions inherent in environmental dispute resolution alternatives is that the parties involved are the best judges of what the real issues are and whether an adequate resolution has been achieved. In theory such processes allow broader attention to the real issues because the parties themselves set the agenda and they also decide the terms of the agreement (*Ibid.*, p.70). They are free to discuss the concerns that are of most importance to them; concerns that may not be relevant in the courtroom or tribunal situation but are relevant within these alternative processes.

It is in the interests of all parties to the dispute that all those who believe they might be affected by a decision should participate; a party that has been excluded has the potential to undermine the implementation of any agreement reached.

Johnston (1989, p.2) describes these approaches in the United States context. “Private dispute resolution, as contrasted to the public court system, is the consensual attempt by disputing parties to resolve their conflict outside of the public system... Rules of procedure, the binding or non-binding nature of the result, the role, if any, of the law, and other designed features are subject to the mutual agreement or acceptance of the parties to the dispute”. The consensual nature of this approach implies recognition of the legitimacy of the demands of other parties and of the parties themselves (Bacow and Wheeler, 1984, p.53).

Many of the references in this report derive from the North American experience which has tended to view these approaches as alternative to the judicial process. However, the proposed Resource Management Act (clauses 85 and 315) contains enabling provisions for mediation, facilitation, etc. to be used in a voluntary manner as a supplement to or extension of the resource consent hearing and appeal process. The intention is to provide opportunities for reducing or potentially avoiding unnecessary litigation.

3.2 Mediation

The process of mediation should be distinguished from those of negotiation and bargaining. Negotiation is a process similar to mediation but it occurs without the use of a neutral third party mediator. Bargaining is the least formal of the three processes and is a component of the negotiation and mediation processes (Jacobs and Rubino, 1987, pp.1-2). Appendix I provides a brief outline of the phases of the mediation process and the tasks performed by the mediator at each phase.

Mediation can be an informal ad hoc policy-making process where representatives from environmental and business groups sit down together with local government officials to negotiate policies to resolve a particular environmental dispute (Amy, 1983, p.346). The process can also be quite formal through the use of an institutionalised service, or more structured processes for intervention and/or dispute handling (Ministry for the Environment, 1988b, p.3).

Parties to a dispute may have reached an impasse and seek a neutral to help them break the deadlock. The mediator will usually perform an assessment of how amenable the particular dispute might be to mediation; the criteria on which this is based is discussed in Chapter 5.2. The neutral mediator facilitates negotiations but has no power to impose a settlement. The settlement is determined by the mediating parties.

3.3 Potential benefits of mediating environmental conflict

The adversarial approach tends to focus on the positions of the parties rather than on their underlying interests or concerns. Fisher and Ury (1981, p.43) argue that the basic problem in a negotiation lies in the conflict between each side's needs, desires, concerns, and fears, and **not** in conflicting positions. By focusing on interests, underlying values held by each of the parties can be articulated and a solution consistent with these values can be sought. A skilful mediator will assist the disputants to explore the range of needs and concerns of all parties and then to reframe or reconceptualise issues to move away from polarised positions (Ministry for the Environment, 1988b, p.6).

Mediation encourages a search for shared and compatible interests behind opposed positions and not just conflicting ones. Instead of a win/lose outcome, parties look to a win/win or all-gain situation where compromise on original positions means there are no outright winners or losers.

One of the major arguments in favour of negotiation and mediation of environmental disputes is that underlying interests can be addressed. Whatever issues are of concern to the parties are relevant to mediation of the dispute (Ministry for Environment, 1988b, p.6). If underlying concerns are addressed, any final agreement has the potential to be implemented with the support of the parties concerned and the conflict subsequently resolved.

Mediation provides an approach that may be appropriate to New Zealand's cultural environment. (It is also consistent with the provisions in the Resource Management Act for Tikāka Maori to be recognised at Planning Tribunal hearings.) Scientific and technical solutions emanating from one cultural view may have little relevance to that of another. Alternative dispute resolution processes provide a forum where cultural and spiritual values can be discussed and consensus agreements adopted that take these values into account.

The advantage of mediation is that where a dispute involves matters of a cultural interest, processes can be developed that are sensitive to cultural norms. This could include co-mediators of sufficient mana to provide legitimacy and credibility to the process (Ministry for the Environment, 1988b, p.32). Greater support for any final agreement could be expected from those to whom this issue is significant.

The face-to-face dialogue that is an integral part of the mediation process mirrors the traditional Maori decision-making process (Gray, Director, Centre for Maori Studies and Research, Lincoln University, pers. comm.). The principle of kotahitaka, that is, Maori political process, "is directed towards the necessity of reaching unity through consensus (sic) ... Maaori political process is designed to recognise individuals and include all their concerns even if in the end they do not get their own way" (Ritchie, 1986, p.30). Consensus decision making allows people to participate in their own destiny (Gray, pers. comm.).

Mediation is sufficiently flexible to allow all those who might be affected by the outcome of decision making to participate in the process (Ministry for the Environment, 1988b, p.6). Participation is particularly important when an agreement is being implemented. If anyone who might be able to undermine implementation is not present during negotiations, the agreement will probably fail.

"Applications for consents which have high impacts on a community or locality (e.g. siting of an LPG facility, a mining operation), or which require some co-operation from affected parties e.g. water rights, would seem to lend themselves to full-scale participation of community and environmental groups ..." within the mediation process (Ministry for the Environment, 1988b, p.10).

One major attribute of non-judicial processes not available to judicial processes may encourage parties to seek mediation, and that is control. "Parties ... gain greater control over timing of events, selection of neutral (sic), processes used, discovery ... (and) outcome" (Johnston, 1989, p.4). This might be an attractive feature to those parties who feel they are relatively powerless in a judicial setting.

Flexibility of process is related to the notion of control. Parties can design a process that is appropriate for their particular needs. The parties are likely to be more committed to the outcome if it is 'theirs' than if it had been imposed upon them by a third party decision-maker (Ministry for the Environment, 1988b, p.6).

Mediation can improve communications between the parties. It "seeks to educate disputants about each other's perceptions and concerns. This can significantly improve relationships between disputants even where no agreement is reached" (Ministry for the Environment, 1988b, p.6). Subsequent encounters are less likely to be confrontational if parties have met face-to-face and shared their concerns (Bacow and Wheeler (pp.18-19).

Proponents of environmental mediation see it as a supplement and sometimes as a substitute for unsatisfactory methods of public policy administration and implementation particularly at local government level. They believe that the public policy resulting from mediation efforts is clearer and more responsive to those interests concerned with that policy (Jacobs and Rubino, 1987, p.2).

"Mediation has proved a valuable process in negotiating the principles and standards to be applied in relation to how a development is to proceed in a particular community, e.g. waste management facilities. The process can be assisted by having a framework of broad national principles/standards, but enables the detail of how those principles will apply to be fashioned in the light of the circumstances and needs of the individual community" (Ministry for the Environment, 1988b, p.10).

A submission by K.R.T.A. Ltd in response to People, environment and decision making (Ministry for the Environment, 1989, p.29) favoured a non-adversarial approach for technically complicated resource development projects such as gold and coal mining. "For these projects, decisions based on the technical information should, in most cases, be better than those influenced by legal manipulation in a court-room situation".

3.4 Limitations of mediation

According to Talbot (1983, pp.93-94) "the chances that a dispute can be mediated are reduced when the resolution of a larger policy question is at stake (or) when the fundamental interests of the parties are mutually exclusive ...". He cites an example of where nuclear power plants may be opposed by groups, not because there is opposition to a particular site, but because they are basically against nuclear power. "They are embracing the particular dispute as part of a larger ideological agenda that they would be unwilling to sacrifice in mediation".

Mediation results in trade-offs and compromises being made. Some argue that on issues of basic values no substantive compromise is possible (Jacobs and Rubino, 1987, p.2). Some disputes are therefore amenable only to win-lose approaches (Ministry for the Environment, 1988b, p.7). "If there are philosophical differences, perhaps mediation is inappropriate" (Husar, 1982, p.23). "... (E)nvironmental disputes occasionally involve nonnegotiable items. In such cases, unless the issues can be redefined, mediation may not be the best way to settle the dispute" (Bingham, 1984, p.163).

"Mediation does not lead to a resolution of the basic differences that separate the parties in conflict. Rather, in situations where none of the parties perceives that it is able to gain its goals unilaterally, mediation can help the parties agree on how to make the accommodations that will enable them to co-exist despite their continued differences" (Cormick, 1987, p.307).

"Because it (mediation) is a process which seeks accommodation individual (sic) disputes, mediation in (sic) not helpful where there are systemic grievances. Where a dispute concerns the underlying legality of conduct, e.g., the need may be to identify or to reinforce the particular standard which should prevail. This need may relate to a lack of certainty where many groups are affected; and/or to the relative power between groups in the absence of an enforceable and predictable standard. Courts play a vital role in fashioning norms and articulating values for the wider society in the form of legal principles which operate as precedents for future, like cases ... This work of the adversary system may be more appropriate in particular cases than mediation. It also often forms an essential part of the framework for useful mediation (and negotiation)" (Ministry for the Environment, 1988b, p.7).

"Negotiations are not so likely to lead to a sound and satisfying conclusion where negative externality effects are spread thinly and wisely, so that those affected are not in practice able to take full part in the negotiation process. If no one chooses to represent the needs of future generations, or the intrinsic value of ecosystems and the sustainability of resources, those values could be neglected in a negotiation process" (Sheppard, 1988, p.12).

In his review of the Town and Country Planning Act 1977, Anthony Hearn, Q.C. (1987, p.103) highlights a further potential difficulty with the mediation model in terms of third party rights or those of the community at large in planning matters. Although parties may come to an agreement there is no certainty that the Planning Tribunal would find the agreement acceptable. All matters have to be considered in relation to the statutory regime within which the parties are working.

Mediation, therefore, cannot serve as an alternative approach to the judicial process in terms of the New Zealand resource management/planning system. The onus of any resource consent decision must always lie with the consent authority or the Planning Tribunal because of the policy element and third party interests inherent in environmental disputes.

Certain issues of principle or law are not appropriate for mediation. "If some party wants to set a legal precedent, mediation is not the way to go" (Husar, 1982, p.23). The oft-quoted Huakina case (1987) provides a useful illustration of this point. After a number of wrangles in the courts dating from 1981, the Huakina Development Trust finally received recognition of their concerns, namely, that Maori cultural and spiritual values are relevant to water right applications. Justice Chilwell's findings not only applied to the site-specific case on the Waikato River, but also served to act as a national precedent. His decision had a far-reaching effect that mediation could not have achieved.

Mediation would seem inappropriate in cases involving prosecution for an offence. The approach does not embody the procedural safeguards of the adversary system such as protection against self-incrimination (Ministry for the Environment, 1988b, p.7).

"Mediation is not helpful where key parties are effectively 'conflict junkies'; or the dispute is seen as a heroic battle; or where the conflict is infected by extreme irrationality or irremediable power imbalances" (Ibid.).

The question of privacy is one that should be considered in the management of public resources. Unless there is a statutory requirement that negotiations be publicly announced or that the details of any outcome be made public, mediation is generally a private affair involving only the mediator and the parties to the dispute.

3.5 Summary

Environmental mediation is a voluntary dispute resolution approach that is based on consensus-building, face-to-face dialogue between parties in conflict. Because it encourages consideration of the underlying issues at the heart of the conflict and parties are in control of the process, mediation has the potential to address some of the limitations of traditional decision-making processes. If the interests and concerns, rather than the positions, of the parties are addressed the problem has the potential to be resolved. This may reduce the need to turn or return to expensive, lengthy court hearings to try and gain resolution. Consensus facilitates an 'all-gain' outcome whereas the judicial approach often produces a 'win/lose' decision.

Further potential benefits of the mediation approach include its appropriateness within New Zealand's cultural environment and the flexibility it offers in terms of participation. Channels of communication can be opened and relationships improved between parties. Of particular importance with regard to the proposed Resource Management Act is that the mediation approach is to be employed as a supplement or adjunct to existing resource consent hearing and appeal processes.

Those familiar with the Planning Tribunal system would recognise that some of the potential benefits of mediation are also features of local authority and Planning Tribunal hearings. It is very important that alternative processes maintain these positive features.

However, there appears to be a number of limitations to its success. Non-negotiable items involving philosophical positions can not be resolved using the consensus approach unless the issues can be redefined. Mediation is not helpful where there are systemic grievances or where parties may wish to set precedents. There can be no guarantee that third party rights or, for example, the interests of future generations will be represented in negotiations. This was also expressed as a limitation of the judicial approach.

The issue of privacy needs to be considered in the management of public resources.

In the next chapter mediation in practice will be examined in order to gauge its success to date in resolving resource management and environmental disputes. It will be of interest to see whether mediation can address the other limitations of the judicial approach identified in Chapter 2. These were the issues raised by the judiciary of resolving national policy issues at the site-specific level, and the resolution of scientific and technical disputes.

CHAPTER 4

Mediation practice

4.1 Introduction

This chapter will look at mediation practice to see the kind of disputes that have been mediated and the features that denote success. We shall be interested in whether mediation might be appropriate in a bicultural environment, and whether it can resolve national policy issues and scientific and technical disputes.

4.2 What kind of disputes have been mediated?

In the main, environmental dispute resolution processes have been used on an ad hoc, case-by-case basis (Bingham, 1986, p.xix; Ministry for the Environment, 1988b, p.12).

"Over the past 15-20 years, mediation has been used, with varying success, in disputes over water use, mining, siting of nuclear power plants and hazardous waste facilities, dam construction, routing of highways, flood protection, native fishing rights, licensing under Clean Air legislation, and rule-making under a variety of statutes" (Ministry for the Environment, 1988b, p.2).

In North America, a diverse range of disputes (in terms of complexity, context etc.) has been brought to mediation.

Three studies of environmental mediation will be briefly reviewed. Bingham's (1986) study involves 160-plus cases covering both policy (general primary issues) and site-specific (particular primary issues) disputes, Talbot (1983) reviews six site-specific cases, and the Buckle and Thomas-Buckle (1986) study is based upon 81 site-specific cases. The number of cases common to all three studies is unknown; however, three of Talbot's cases are included in Bingham's review.

The 160-plus cases mediated during the decade 1973/4-1984 reviewed by Bingham (1986, pp.32-33) fall into six broad categories: land use (approx. 86 cases), natural resource management and use of public lands (31 cases), water resources (17 cases), energy (13 cases), air quality (13 cases), and toxics (16 cases). Of these cases 115 involved (particular primary) site-specific disputes, and 46 involved issues of (general primary) environmental policy (*Ibid.*, 1986, p.7).

In *Settling things*, Talbot documents six site-specific disputes that were settled by mediation with varying degrees of success. Those who served as mediators in these cases generally agreed that about 10% of environmental disputes can be successfully mediated (Talbot, 1983, p.91).

Buckle and Thomas-Buckle (1986, p.55) describe the outcome of a study they conducted in 1983 of 81 site-specific cases where mediators became involved. The cases ranged from small-scale disputes (such as the location of a small parking lot) to major environmental conflicts (of the scale of the siting of a regional hazardous waste facility). The authors conclude that approximately 90% of the cases where mediators do become involved never reach an agreement.

However, these studies give an account of mediation until 1984 only. The author has had difficulty in obtaining more up-to-date studies from which to make a contemporary assessment of mediation's success. Gamman and McCreary (Lecturer, Department of Landscape Architecture, University of California, pers. comm.) advise that as mediation practice has improved so have the number of successes.

McCreary (1989) documents a recent successful mediation effort in which he was the principal mediator. The outcome was a negotiated single text of the New York Academy of Sciences New York Bight Initiative. The policy issue was the management of polychlorinated biphenyls (PCBs) in the Hudson/Raritan Estuary and the New York Bight system. The consensus approach "does not necessarily represent the 'first choice' of each participant. Instead, it represents a synthesis that each important interest can 'live with'" (McCreary, 1988, p.1).

Gail Bingham has recently been involved in negotiating the United States national wetlands policy under the auspices of the Conservation Foundation (Gamman and McCreary, pers. comm.).

4.3 Mediation outcomes

'Success' to date in mediating environmental disputes has been varied. Reaching agreement is a preliminary measure of success. A more important measure is whether an agreement reached by the parties is fully implemented (Bingham, 1984, pp.69-72). If anyone who might be able to undermine implementation is not present during negotiations, the agreement can fail.

A further measure of 'success' (Bingham, 1984, pp.69-72) can be simply to improve communications between the parties. Mediation "seeks to educate disputants about each other's perceptions and concerns. This can significantly improve relationships

between disputants even where no agreement is reached" (Ministry for the Environment, 1988b, p.6).

Bingham delineated three categories of objectives set by the parties involved in the cases she reviewed. The categories were - to reach a decision, to agree on recommendations to a decision-making body not directly represented in the dispute resolution process, and to improve communications. One measure of success was whether or not they had met their objectives.

Table 4.1 gives a distribution of these cases by objective set (by the parties).

Table 4.1 **Distribution of environmental dispute resolution cases, by objective.**

	All cases	Objective		
		To reach a decision	To agree on recommendations	To improve communications
Site-specific cases	115	64	35	16
Policy cases	46	4	29	13
Total cases	161	68	64	29

Source: Bingham, 1986, p.8

In 29 of the total cases, the parties' principal objective was to improve communications. In the remaining 132 cases, the parties' objective was to reach some form of agreement with one another.

Agreements were reached in 78% of the 132 cases (Bingham, 1986, p.xxi). Bingham found little difference between the ability of parties involved in policy and site-specific disputes when the objective had been to reach some sort of agreement with each other. This was achieved in 79% (99) of the site specific cases and 76% (33) of the policy level negotiations (*Ibid.*).

However, she did find that when all parties that had the authority to make and to implement decisions (in particular the participation of the public agencies with decision-making authority in a dispute) were present at the negotiations, agreement was reached in 82% of the cases. When the decision-making authority to whom recommendations were being made was not present, the parties reached agreement 73% of the time (*Ibid.*, p.104).

Reaching agreement is not an absolute measure of success. If agreement has been reached voluntarily (assuming the parties entered mediation voluntarily), then there is a greater chance that it will be successfully implemented. Talbot (1983, p.xiv) agrees that implementation is an important test of a mediation effort. He does concede, however, that the process itself can offer valuable rewards. Buckle and Thomas-Buckle (1986, p.55) also argue that success can be evaluated against the process and not just the outcome.

In practice there are significant differences in the implementation of decisions reached between policy level dialogues and site-specific cases. "For site-specific disputes, of those cases in which agreements were reached and implementation results are known, the agreements were fully implemented in 80 percent of the cases, partially implemented in 13 percent, and not implemented in 7 percent ... Of the policy-level cases in which agreements were reached and implementation results are known, agreements were fully implemented in 41 percent of the cases studied, partially implemented in 18 percent, and not implemented in 41 percent" (Bingham, p.xxii).

Environmental policy issues often affect larger proportions of the population than do site-specific disputes. The key parties active at either the national level or regional level may be representative of the diverse interests concerned about the issues but are not representatives for specific interested parties. (*Ibid.*, p.79). Implementation of policy disputes has relied on the ability of the participants to gain the broad support of the wider community, and their ability to bring new policy options to the attention of those making policy decisions. Representation of the decision-making authority also seems to affect the likelihood of success in implementing agreements (*Ibid.*, p.124).

Of the six cases reviewed by Talbot, an agreement that was subsequently implemented was reached in three. Talbot ranked one as successful within the specific objectives of the mediation effort; others might argue that the process was flawed in that environmental groups that had been excluded were able to significantly delay implementation. The remaining two did not lead to the anticipated or agreed-to results (Talbot, 1983, pp.95-96).

Buckle and Thomas-Buckle (1986) focus on the lessons that can be learned from what they refer to as "failed" site-specific mediation efforts. It should be noted that the authors had only studied four cases in depth, and pointed out the difficulties they had in standardising their survey methodology (*Ibid.*, p.59). Of the 81, only three were brought to an agreement that was implemented or at least remained stable. Table 4.2 illustrates the 'fate' of all the cases in question.

Table 4.2 Outcomes of 81 cases of environmental conflict: the mediators' view.

At least one party rejected mediation after first enquiry	57
All parties considered mediation	<u>24</u>
	81
Mediation rejected at first joint meeting	16
Failed after extensive mediation	2
Brought to agreement but are regarded as unstable	3
Brought to agreement and implemented or stable	<u>3</u>
	24

Source: Adapted from Buckle and Thomas-Buckle,
1986, p.61

The analysis above can be criticised from the point of view that if mediation was not even attempted it cannot be said to have failed. Of the eight cases that entered mediation, three achieved either a stable agreement or actual implementation, and three reached agreement.

An important lesson to be learned from the Buckle and Thomas-Buckle study is the critical need for a full pre-negotiation conflict assessment before disputes are brought to mediation. Bingham (1986, p.91) points out that the relatively high success rate in the dispute resolution efforts reviewed in her study can be attributed to the fact that the mediators conducted dispute assessments as a first step in helping the parties concerned decide whether mediation might be appropriate. They 'screen out' disputes that appear to have little chance of being resolved on the basis of criteria to be discussed in Section 5.2.

Buckle and Thomas-Buckle stressed that reaching agreement should not be the sole indicator of 'success' but rather that "environmental mediation ought to be focused more on process than on outcomes". Bingham (1986, p.xxi) also supports this view. Participants in her study reported that the process itself was valuable in gaining insights into their opposition's point of view, and that more open lines of communication had been developed. It was interesting to note that in Bingham's study nearly 25% of cases had improving communication as their prime objective.

4.3.1 Disputes involving cultural values

Sullivan (1984, pp.9-15), Talbot (1983) and Amy (1983) outline two disputes involving cultural values of two different Indian tribes. Appendix II briefly describes the disputes. The one involving the Northern Cheyenne tribe was successfully settled; the other involving the Lummi tribe reached agreement but two years later had not been implemented.

Bingham (1986, p.102) refers to site-specific disputes involving Indian tribes and others. A success rate of 100% (six cases) was achieved in reaching agreements between government agencies and Indian tribes. She was unable to report on the outcome of two other disputes, one involving government agencies, Indian tribes and private landowners, the other involving two or more Indian tribes because of the need to preserve confidentiality.

Bingham (*Ibid.*, p.222) gives a brief outline of cases involving the Papago Indians and Tucson Water Rights, and (*Ibid.*, p.226) fishing rights for the Red Cliff Band of Chippewa Indian Tribe. The respective recommendation and decision were successfully implemented.

4.3.2 Scientific and technical disputes

Numerous cases involving scientific and technical disputes have been successfully mediated. These include the Brown Paper Co. case (Bacow and Wheeler, 1984, p.57), the George Banks case (Bingham, 1986, p.81) and the Brayton Point Coal Conversion case (Susskind et al., 1983, p.122) amongst others. Further research would be required to investigate whether mediation would be a more appropriate approach than the judicial one for resolving disputes of this kind.

4.4 Summary

A brief examination of mediation practice in North America has given some insights into the kinds of conflict that could be resolved using this approach. Disputes involving land use, natural resource management and use of public lands, water resources, energy, air quality and toxic substances have been successfully mediated.

Success can be measured in a number of ways: reaching agreement per se or agreeing to make a recommendation to a decision authority, or whether an agreement is actually implemented, or simply to improve communications. Success can also be evaluated in terms of process and not just of outcomes.

The three studies carried out by Bingham, Talbot and Buckle and Thomas-Buckle covered significantly more site-specific disputes than policy dialogues. Bingham concluded that there was little difference between parties to policy and site-specific disputes in their success at reaching agreement. Reaching agreement was facilitated if those with decision-making authority were present.

Success in the implementation of policy agreements did not appear to be as good as that for site-specific disputes during the period to 1984. However, public policy disputes have only recently been mediated and are more complicated than site-specific disputes. They also take longer to reach agreement.

Pre-assessments by a mediator may strongly influence this state of affairs. The role of the mediator is extremely important in helping the parties decide whether mediation is the approach they wish to adopt for their particular dispute. Such screening is intended to avoid wasting valuable time and financial resources. If parties are holding non-negotiable positions mediation would not be chosen.

Disputes over cultural values all exhibited success in reaching agreement. Implementation of the final agreement did not occur in all cases. One that was not successfully resolved had problems gaining funding for aspects of implementation of the agreement. Factors involved in the implementation of disputes involving cultural values need to be carefully examined in order to achieve successful resolution.

Scientific and technical disputes have been successfully mediated. However, more research is needed in this area.

This chapter has looked at the kinds of disputes (in general terms) that reach mediation and that are successfully resolved. The next chapter will examine the circumstances that affect a party's decision to choose litigation or mediation and the criteria that would be considered when making that choice.

CHAPTER 5

Litigation or mediation?

5.1 Circumstances surrounding a dispute

“The motivation to find alternatives to traditional dispute resolution processes for controversial environmental issues has come principally from the discontent of the parties with certain aspects of traditional adversarial processes. When decisions in a dispute are seen as choices between winners and losers or when decisions are based on narrow procedural grounds, the interests of one, and sometimes all, of the parties to the dispute often remain unsatisfied” (Bingham, 1986, p.2).

The decision to choose mediation rather than the adversarial approach to resolve conflict depends on the circumstances of the dispute and what each party hopes to achieve. It is “affected by applicable laws and regulations, by the experiences and resources of the parties, (and) by those parties’ calculations of how well their interests will be served using different dispute resolution approaches” (Huser, 1983, p.3) and by an evaluation of the possible consequences of going to the bargaining table (Bacow and Wheeler, 1984, p.42).

Laws regarding participation will be an important component in the decision to litigate or mediate. If a party or parties do not have ‘standing’ rights at formal hearings they may feel the only way they can influence the decision-making process is to opt for mediation. The Resource Management Act makes provision for any person to be heard at a resource consent application hearing, and also for the applicant or consent holder and any person who made a submission at the consent hearing stage to be heard at an appeal.

If a party has had no prior experience of participation in a voluntary dispute resolution process it may find it difficult to evaluate its likelihood of success or failure. It may not know what factors are important. The initiating party may have little or no communication with other affected parties and therefore experience difficulty in determining their willingness to participate. In this case the party may contact a mediator to learn about different dispute resolution options (Bingham, p.91).

For those parties with meagre financial resources mediation might be their only realistic opportunity to have some influence in the dispute. The inability to sustain lawyers’ fees for lengthy court appeals, plus the fear that they will be liable for costs at the end of the process means that small citizen and environmental groups may agree to mediation. Some groups may form temporary coalitions with others having

similar interests in order to rationalise demands on both people and time. The prospect of legal aid for environmental groups (Legal Services Act, 1991) could act as a disincentive to enter into mediation. The question of funding mediation in New Zealand has yet to be addressed.

Preference for litigation or mediation will also depend on how well the party's interests will be served by the approach. For local government organisations who have an on-going relationship with their constituents it may be important to maintain and improve communications with other parties to the dispute (*Ibid.*, p.48). Mediation could well be the preferred approach.

Groups seeking scientific and technical data may initially opt for mediation as a 'fishing expedition' and then use the information gained at a subsequent court hearing (Ministry for the Environment, 1988b, p.31). On the other hand, mediation can provide an opportunity for technical experts to meet to compile a single set of data on what is known and what is not known about a particular resource (*Ibid.*, p.50).

Environmental groups may prefer mediation to litigation on the grounds that they may be able to have more influence on an environmental impact report, for example, than they could do if they chose litigation. The consensus approach of mediation can produce an all-gain outcome where no one party emerges as 'winner'. However, Cormick (1987, p.308) suggests that citizen and environmental organisations who oppose proposed projects see the courts as a critical line of defence.

Others may wish to establish a legal precedent and therefore opt for litigation. Alternatively, some may choose mediation in the belief that novel solutions can be sought but that they will not necessarily act as a precedent in future disputes.

5.2 Critical elements

The circumstances outlined above give some idea of when a party may choose to litigate or to mediate. However, there are a number of other factors that will influence this decision. The mediator would consider these when conducting an assessment of the dispute to determine in advance the potential of mediation for resolving the issues under dispute.

Although there are few factors that are absolute preconditions for success, Bingham (1986, pp.91-126) isolates a number of elements that appear to increase the likelihood of success in mediating environmental and resource management conflict.

These factors can be grouped into party-related factors, process- and context-related factors, and substance-related factors.

Party-related factors include identification and involvement of all affected interests, the number of parties involved, types of parties involved, and the direct involvement of decision makers, including public agencies.

Process- and context-related factors include agreement on procedural issues, presence of a deadline, possession of sufficient incentives to enter mediation, the ability to satisfy each party's underlying interests, whether the dispute was in litigation, the maintenance of good representative-constituency relationships, and the will to negotiate in good faith.

Substance-related factors include the issues in dispute, agreement on the scope of issues, and agreement on the 'facts'.

5.2.1 *Party-related factors*

5.2.1.1 *Identification of parties*

Bacow and Wheeler (1984, p.19) raise the question of who should be included in the negotiations. As alternative dispute resolution processes usually operate on an ad hoc basis, there are no firm rules governing who can participate.

Successful implementation of a final agreement depends in large part upon whether all parties likely to be affected by the agreement were present during the negotiations. Even if an agreement is reached, it may not address the concerns of unrepresented groups who may subsequently take action to block or undermine implementation of the agreement (Bingham, 1986, p.xx). The mediator must therefore try to include all those who might be able to thwart any implementation efforts once an agreement has been reached. In Chapter 4.3 the importance of having the decision-making authority present at negotiations was highlighted.

At the same time, however, the mediator must be aware of the difficulties inherent in large disputes with a large number of parties seeking participation. Early involvement of all parties can result in attempts to address an overwhelmingly great number of issues simultaneously. Techniques such as segmentation, which break the process into several subsets of negotiations, present both advantages and disadvantages to the parties involved (Susskind *et al.*, 1983, pp.207-208).

Bingham (1986, p.77) observed that it was relatively straightforward to identify affected parties in site-specific disputes in comparison to policy disputes.

5.2.1.2 Representation

Fiss (1984, pp.1078-1082) raises the question of authoritative consent. He points out that while some organisations have formal procedures for identifying persons who are authorised to speak on their behalf, these procedures are not perfect. Personal conflicts of interest can undermine such procedures. The procedures for generating authoritative consent in governmental agencies may be cruder than those operating in the corporate context. 'Groups' may have a public identity but may lack any formal organisational structure and therefore have no procedures for generating authoritative consent.

Further, if those party to the final agreement are not truly representative of groups likely to be affected by any decision then implementation can be undermined by disenchanting individuals.

In his perspective on the effect Maori values are having within the current approvals process, Rickard, (1989, pp.23-25) comments on difficulties he has encountered in ascertaining appropriate representation of Maori interests in hearings and appeals. He believes that a person engaging in negotiations may not have the authority to do so. Rickard also perceives a reluctance to facilitate discovery of the correct representation.

Professor J. Ritchie, University of Waikato, refers to the principle of rangatiratanga: the hierarchical organisation of authority in Maori society (1986, p.30). He points out the need to deal with whanau, a hapu, an iwi, and a waka to establish the appropriate representation. According to Gray (pers. comm.), the Iwi Transition Agency will assist in clarifying and defining issues of rangatiratanga.

Mernitz (1980, p.159) recommends that the mediator should give particular consideration to the institutional responsibilities and constraints on representative negotiators. "Because of their employers, certain officials may be reluctant to comment, to make commitments, or to jeopardize future review responsibilities. Other officials may be required to comment, make recommendations, or promote policies in keeping with statutory or administrative responsibilities. Still other persons, often from advocate groups, may encourage technical and policy decisions which will further their interests and also influence the general public."

Bingham (1986, p.79) refers to the difficulty in determining who can represent the various interests in a policy dialogue. Key parties active at either the national or regional level can change as issues are redefined and as coalitions are built. In most of the policy dialogues included in Bingham's study "participants were representative of the diverse interests concerned about the issues but were not representatives for specific companies, public interest groups, or other interested parties. Because of this characteristic, policy dialogues are much less likely to produce formal decisions

and are more apt to result in recommendations for action or simply to discuss the issues”.

5.2.1.3 Number and types of parties involved

Bingham (1986, p.99) found no evidence among the cases she studied that reaching an agreement is affected by the number of parties involved in the dispute. The average number of parties in the cases she studied was just over four, with a range of between two and 40-plus. She does note, however, that some dispute resolution experts recommend limiting mediation attempts to cases involving 15 or fewer parties.

Bingham found that the average number of parties for cases in which the parties failed to reach an agreement was lower than the average number of parties in cases in which agreements were reached. She suggests, however, preliminary assessment may have eliminated cases where a large number of parties may have reduced the likelihood of success.

A diverse range of parties has participated in environmental dispute resolution efforts; they include “mediated negotiations between government agencies and local citizens or property owners; between government agencies, private companies, and local citizens; between government agencies, environmental groups, and local citizens; between government agencies and private corporations; and between government agencies and Indian tribes” (*Ibid.*, p.102). Although the reasons are unclear, the success rates for reaching agreements differ by the combination of types of parties. The combinations cited here have tended to reach agreement between 86 and 100% of the time. (Bingham’s (*Ibid.*, p.101) analysis is based on small numbers in each category; she is uncertain whether the differences would hold with larger numbers in each category.)

According to Bingham (*Ibid.*, p.xxiv) “(t)he most significant, measurable factor in the likelihood of success in implementing agreements appears to be whether those with the authority to implement the decision participated directly in the process”.

5.2.2 Process- and context-related factors

5.2.2.1 Incentives

"The willingness of all parties to a dispute to participate is a major factor in the success of a voluntary dispute resolution process, if one expects an agreement reached to be both fair and stable. But the parties are unlikely to participate, let alone agree to a settlement, if they can achieve more of what they want in another way. ... Mediators generally do not convene negotiations unless the parties are at least somewhat interested in attempting to resolve the dispute" (Bingham, 1986, p.xxiii).

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 negotiations. They may also have to choose whether to breach an agreement in whole or in part, after settlement has been reached (Bacow and Wheeler, 1984, p.42). If they are confident of victory in a lawsuit, there is little incentive to consider mediation or negotiation.

Disputes are settled when people perceive that the cost of continuing the dispute exceeds the cost of settlement (*Ibid.*, p.52). Developers who are likely to incur heavy financial losses if a project is halted after it has started may see mediation as a preferable option (Sullivan, 1984, p.15, p.49; Bingham, 1986, pp.35-36). A party may be tempted to seek mediation if it believes it could reduce delays that might occur while waiting to gain a court hearing.

Vern Huser (1983, p.26), an experienced United States mediator, suggests that if strong citizen activist groups gain power by being involved in a conflict they may not want to settle that conflict. Settlement may see an erosion of their power base; this is not in their best interest and they do not want to participate.

Johnston (1989, p.11) cites findings of two separate authors (Millhauser, 1987; Moore, 1986) on the reluctance of parties to seek an alternative dispute resolution approach. "Clients, they claim, are resistant because of suspicions of the motives of the other side, doubts that a side could so misread the facts of this dispute could be trusted in such a process (sic), strong feelings of righteousness and fear of the suggested alternatives". This statement does not refer specifically to environmental mediation but nonetheless could still apply in such circumstances.

5.2.2.2 Context of power

According to Cormick (cited in Amy, 1983, p.358) the key element in a successful mediation effort is the 'context of power' in which negotiations take place. If the parties in a dispute are unable to act unilaterally in what they perceive to be their

best interests they may be willing to enter the negotiation-mediation process. 'Good faith' mediation is likely to occur if the parties involved have some relative ability to exercise sanctions over one another.

All parties must have sufficient power to influence the action of each other party. Cormick (1987, p.311) points out that Government organisations and private corporations are endowed with power and influence by the existing political/economic system. Citizen and environmental groups, on the other hand, generally have to develop their power resources on a situation-by-situation basis. Cormick suggests that it may be necessary to develop "less transitory" sources of influence if mediation is to become more broadly and regularly applied.

The balance of power between parties is a 'powerful' determinant in choosing whether to mediate. Actual or threatened litigation can be the source of power and influence that brings parties to mediation (Cormick, 1987, p.308).

The leverage that individual parties can have in negotiation may depend on the context of substantive and procedural law. The absence of established principles can significantly reduce the leverage available to one or more parties (Ministry for the Environment, 1988b, p.10).

Burgess (1983, p.205) proposes that mediation cannot redistribute power. She suggests that if it seems likely a party will lose power they will certainly not participate. Chart (Senior Lecturer, Law Department, University of Canterbury, pers. comm.), however, argues that the power balance is never static, and that it can be changed by the presence of a mediator.

In the Montana Power and Northern Cheyenne case referred to in Section 4.3.1, Sullivan (1984, p.12) draws attention to the fact that the need to comply with a new federal regulatory programme altered the perceived ability of the two main parties to achieve their goals.

Disparities in resources between parties can influence the final agreement. Poorer parties may be disadvantaged in the bargaining process if they are less able to acquire and analyse appropriate information (Fiss, p.1076). The ability to generate a sufficient information base depends on "the availability of adequate funding, access to legal and technical expertise, familiarity with the process itself, and knowledge of the rights and remedies afforded by both the process and applicable legislation" (Jeffery, 1988, p.247).

Proponents of the judicial approach to conflict resolution argue that a judge can employ measures to reduce the impact of distributional inequalities between parties. Supplementary questions can be asked, witnesses called, and third parties can be

invited to participate (Fiss, 1984, pp. 1077-1078). (See also Section 149 of the Town and Country Planning Act 1977.)

5.2.2.3 *Ability to satisfy each party's underlying interests*

*"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 **interests**. Interests motivate people; they are the silent movers behind the hubbub of positions"* (Fisher and Ury, 1981, p.42).

Fisher and Ury (*Ibid.*, pp.41-57) advocate a focus on interests not positions. They claim that arguing over positions produces unwise agreements, endangers ongoing relationships and is worse when there are many parties at the negotiating table (*Ibid.*, pp.5-7). Their approach is of enormous help in resolving disputes in that an ability and willingness of parties to identify the interests that underlie each other's positions can facilitate a search for new alternatives that satisfy those interests (Bingham, 1986, p.109).

When a mediator is able to determine the underlying objectives or interests in the dispute, it may be found that they are sufficiently different that they are not mutually exclusive. There are cases, however, where the parties' underlying interests are mutually exclusive; they are unable to find common ground regardless of their skill in negotiating with one another or the presence of a mediator (*Ibid.*, p.xxiii). The parties may be unwilling to compromise sufficiently to reach an accord, or they are unable to develop alternatives that may satisfy each other's needs (*Ibid.*, p.110).

"A decision not to participate in a dispute resolution process often is an important protection for a party when the process either does not include the issues of importance to that party or when the way the process is designed is not in its best interests" (*Ibid.*, p.70).

5.2.2.4 *Whether the dispute was in litigation*

Bingham (1986, p.113) found that the cases (site-specific) in which a lawsuit had been filed were resolved less frequently than those where no lawsuit had been filed. However, she points out that over 90% of all environmental lawsuits are settled before the case goes to trial. Lawsuits can clarify or focus the issues. They can also "raise the stakes sufficiently that parties who had been reluctant to negotiate previously may be more willing to take their opponents seriously" (*Ibid.*).

5.2.3 *Substance-related factors*

5.2.3.1 *Crystallisation of issues*

Information is of crucial importance in resolving environmental and resource management conflict. Who injects it into the process, how much is injected and at what stage, affects the way in which the issues are viewed. As we are never in a state of perfect information we have to make decisions based on the information that is available to us. Expert opinion supporting each party's stance is very likely to be conflicting; a mediator may have to decide therefore whether there needs to be agreement on the relevance of facts of the dispute before negotiation can commence or at least agreement on the scope of the issues to be negotiated (Bingham, 1986, p.117).

Bingham (1986, p.117) concluded that, at least in site-specific disputes, the kind of issues involved had little effect on the likelihood of a dispute being resolved. However, the small sample size in some categories means those results were inconclusive. She goes on to suggest that the influence of the kind of issue on potential success would be linked to other factors such as whether the particular dispute has precedent-setting implications.

Although it is not always easy to discover the key issues that need to be resolved to satisfy all the parties in a site-specific dispute, it is a relatively straightforward task when compared with policy disputes (Bingham, 1986, p.77).

5.2.3.2 *Agreement on scope of issues*

When the mediation process is being designed, it must take account of whether all parties have reached general agreement on the scope of the issues to be addressed. Even if an issue is an issue for only one of the parties, it needs to be discussed (Huser, 1983, p.29). However, mediators are not in agreement as to whether the scope of issues should be addressed before or during face-to-face negotiations (Bingham, 1986, p.118).

Bingham (*Ibid.*) was unable to measure the extent to which agreement on the scope of issues was a significant factor in the success of the cases she studied. The difficulty could be attributed to a matter of timing in some cases, a matter of degree in others, and a matter of perception in others.

In his assessment of the effects of Maori values in the planning process Rickard (1989, p.24) identified the problem of group versus individual concerns. An individual objector may raise spiritual or other Maori concerns that may not represent the values that are more widely held. Maori protocol could restrain an iwi

from publicly challenging an individual's viewpoint. Such a situation has the potential to undermine an attempt to reach a genuine agreement.

5.2.3.3 *Agreement on the facts*

The term 'facts' as suggested by Bingham is a misnomer in the context of our discussion. The issue is the interpretation of the facts of the case rather than debate over the facts themselves. Some Maori people living in the vicinity of a proposed development site, for example, may not hold traditional values and may advise enquirers that there are no particular concerns. There may be a clear split between local people as to whether cultural values are likely to be affected (Rickard, 1989, p.24).

People disagree about the potential impacts of proposed projects. They have different attitudes towards risk and uncertainty. There may be no agreement over the accuracy or relevance of the facts presented, nor over how the data should be weighed. During the dispute assessment process mediators look for such problems and build opportunities for information exchange or joint fact-finding into the agenda before negotiations begin (Bingham, 1986, p.120).

Bingham (*Ibid.*) refers to a problem mediators face when designing a dispute resolution process to deal with complex technical information. Parties rarely have equal resources for obtaining the data and analysis needed to negotiate effectively. If this difficulty is not overcome, the chances of success are limited.

5.3 Summary

The circumstances surrounding a dispute, the application of laws and regulations, the experience of the parties concerned, their resources, and how well their interests will be served by the particular approach affects the decision to litigate or mediate.

In addition to these issues, a number of important factors have to be taken into account by a mediator when advising a party whether or not to proceed with mediation. These elements can be grouped into party-related factors, process- and context-related factors, and substance-related factors. Crucial to the mediation process is the identification of all affected parties, appropriate representation, incentives to mediate, and the existing power balance. The number of parties involved does not appear to influence success, although mediators may have screened out disputes with a large number of potential participants. The types of parties present do not appear to influence success.

Substance-related factors are also important. When designing a process for a particular dispute, the mediator encourages parties to identify the issues that are important to them, as well as attempting to gain agreement on the scope of issues and on issues relating to the facts of the case.

CHAPTER 6

Conclusion and recommendations

6.1 Summary

The purpose of this study was to identify the circumstances under which resource management problems might be more appropriately resolved by mediation than by judicial determination. It was suggested at the outset of this work that there are aspects of the adversarial process that are not always conducive to resolving environmental conflict. The following is a summary of how this proposition was examined and the findings that emerged.

Environmental conflict derives from a change in attitudes towards the impacts of development on the environment, a resurgence in the demands of Maori people that their rights as specified by the Treaty of Waitangi be recognised, as well as from increasing pressure upon finite resources. People differ in their attitudes towards risk and uncertainty. There is also disagreement as to the weights that should be placed on particular policies and values, the distribution of costs and benefits of development, and the use of fixed resources.

Disputes that come before the courts can be categorised within three broad classes of environmental issues: general primary issues that involve fundamental resource management decisions of a national policy nature, particular primary issues that are concerned with the potential impacts of development at the site-specific level, and secondary issues that arise indirectly from a proposed activity.

The judicial approach to conflict resolution was examined. Some positive aspects of the Planning Tribunal system such as obtaining evidence under oath and the public nature of the process were highlighted. However, this study was more concerned with potential limitations of the approach. Underlying concerns of the parties may not be relevant in the legal process. The adversarial approach encourages parties to focus on positions and not on more fundamental concerns. The approach tends to produce win/lose outcomes. Third-party interests may not be represented in proceedings. The judiciary argue that it is not their role to resolve national policy questions involving general primary issues. There is some debate on whether the courts are the most appropriate forum for resolving scientific and technical disputes.

Provision has been made in the Resource Management Act for alternative dispute resolution approaches such as mediation. The mediation approach is sufficiently flexible to be used as a supplement or adjunct to the existing resource consent hearing and appeal process.

The potential benefits and limitations of mediation were investigated to see whether it can address the possible limitations of the judicial approach.

A major benefit is that in such a voluntary process where the parties set the agenda themselves, the substantive underlying concerns can be identified and debated. When parties focus on interests and not positions they can be more flexible in their search for options. They may need to reframe the issues before they can proceed with negotiations. Through a process of consensus building and joint problem solving parties may be able to come to an agreement that is mutually acceptable. This can result in an 'all-gain' situation where there are no clear winners and losers. When the parties have reached an agreement that is 'theirs' they are less likely to undermine its implementation and to resort to court action.

Because the mediation approach is based on consensus decision making it is not appropriate for situations involving deeply held, non-negotiable values positions. Mediation does not resolve the basic differences that separate parties in conflict. The question of third party and community rights is of crucial importance. If they are ignored in the mediation process mediated solutions that are not environmentally suitable or acceptable can result.

Three studies of mediation practice were reviewed. Mediation has been used in cases involving land use, natural resource management and use of public lands, water resources, energy, air quality, and toxics. Success can be defined in a number of ways: reaching agreement, implementing an agreement, improving communication, or in the process itself. The most important factor in the implementation of site-specific disputes is the direct involvement of the decision makers themselves. Greater success was achieved in mediating site-specific disputes than policy dialogues. It should be noted, however, that these studies covered mediation practice to 1984. As experience has increased more success has been achieved in the mediation of national policy issues.

Disputes involving cultural values have been successfully mediated, particularly those between Government agencies and Indian tribes (Appendix 2). A full and proper examination of scientific and technical disputes was not undertaken; further research needs to be carried out in this area to see whether mediation might offer a more appropriate approach than the judicial one.

Finally, an examination was made of the variables that determine a party's choice as to litigation or mediation. It was found that a decision to litigate or mediate depends on the particular circumstances surrounding a dispute. These include the applicable laws and regulations, the experiences and resources of the parties, as well as the parties' calculations of how well their interests would be served using a particular approach and an evaluation of the possible implications of going to the bargaining table.

Factors that may increase or decrease the likelihood of success include party-related factors, process- and context-related factors, and substance-related factors. Factors crucial to the mediation process were identification of all affected parties, appropriate representation, incentives to mediate, and the existing power balance. Inherent difficulties with policy disputes is the identification of all parties that should participate and how representation of specific interests can be achieved. These difficulties could also occur in site-specific disputes involving Maori cultural and spiritual values. Identification of affected parties can be difficult for Pakeha who are unfamiliar with the Maori hierarchy of authority.

The number of parties involved did not appear to influence success, although mediators may have screened out disputes with a large number of potential participants. The types of parties present do not appear to influence success in a major way. Cases where a lawsuit had been filed were resolved less frequently than those where no lawsuit had been filed.

Substance-related factors are very important. When designing a process for a particular dispute, the mediator encourages parties to identify the issues that are important to them, as well as attempting to gain agreement on the scope of issues and on issues surrounding the facts of the case.

6.2 Circumstances when mediation may be more appropriate than judicial determination

"No firm guidelines exist for types of cases referred to private dispute resolution systems. No empirical evidence suggests that any single type of case is inappropriate. ... As a voluntary process, if the parties agree, any case can go to a private system" (Johnston, 1989, p.6). The fact that underlying substantive concerns can be taken into account suggests that in some circumstances mediation might be preferred to judicial determination.

However, the conclusion reached in this study is that it is not possible nor indeed proper to attempt to identify a particular set of circumstances when environmental mediation might be **more appropriate** at resolving resource management problems

than judicial determination. Such a definitive statement would be a short-sighted value judgement.

“The usefulness of mediation may be influenced more by the characteristics of a particular conflict at a particular time than on the ‘category’ of the case” (Ministry for the Environment, 1988b, p.10). No one process is likely to be successful in all situations (Bingham, 1986, p.2). The decision to litigate or mediate is affected by the applicable laws and regulations, the experience of parties with alternative dispute resolution approaches, the resources of the parties, and how well their respective interests will be served by the approach in question. It also depends on party-, process- and substance-related factors referred to above.

Attitudes towards the process itself by parties and by lawyers, for example, will influence the choice, as will perceptions of whether the process serves to empower particular groups in the community or not.

It is possible though to make some general observations based on documented past practice as to the general characteristics of disputes that might be amenable to mediation.

Mediation seems to be appropriate for site-specific disputes. They have a relatively good track-record for resolution once they get to mediation. Resource managers could find this a useful tool at both the regional and local levels. If the criteria discussed in Section 5.2 are carefully weighed up by a trained mediator, these disputes have a good chance of an ‘all-gain’ outcome.

Mediation has the potential to be appropriate in disputes concerning cultural and spiritual values. Documented case studies indicate a number of successes. The approach may also be preferred by Maori people because face-to-face dialogue and consensus decision making practised on marae more closely resembles alternative dispute resolution approaches than does the judicial approach. It is crucial that the appropriate representation can be identified within the Maori hierarchy of authority otherwise the potential exists for unrepresented groups or individuals to undermine implementation of the agreement.

Recent experience in the United States offers promise for the resolution of national policy issues in resource management through mediation. Such a step could remove this problem from the judicial arena. This option could be added to those suggested by Karen Cronin (Ministry for the Environment, 1988c, pp.6-10) in her report to the Resource Management Core Group.

6.3 Recommendations

1. A flexible, case-by-case approach to the use of environmental mediation should be adopted at this early stage. Experiments with more formal application of the process in specific issue areas may be a prudent course of action.
2. Documentation and monitoring of mediation efforts would allow policy and procedure to evolve in the light of what is learned from practice.
3. An investigation is required into the institutionalisation of mediation into resource management decision making at the resource consent application and appeal stages.
4. Research is required on establishing the role of the neutral mediator and how that could be funded. A sub-set of this enquiry should be mediator ethics and whether a mediator should be required to represent the interests of third parties not represented at negotiations.
5. Research is required into a mediation process that is appropriate for New Zealand's cultural environment.
6. Mediator training needs to be provided. This is crucial for all stages of the process but particularly for pre-assessment of the dispute.
7. Research needs to be carried out on whether mediation might be a more appropriate process for resolving scientific and technical disputes.
8. Research would be required into the specific nature of policy disputes as they are more complicated than site-specific disputes.

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APPENDIX 1

Tasks of the mediator

Phases	Tasks
Pre negotiation	
Getting started	Meeting with potential stakeholders to assess their interests and describe the consensus-building process; handling logistics and convening initial meetings; assist groups in initial calculation of BATNAs (Best alternative to negotiated agreement)
Representation	Caucusing with stakeholders to help choose spokespeople or team leaders; working with initial stakeholders to identify missing groups or strategies for representing diffuse interests
Drafting protocols and agenda setting	Preparing draft protocols based on past and agenda setting experience and the concerns of the parties; managing the process of agenda setting
Joint fact finding	Helping to draft fact-finding protocols; identifying technical raising and administering the funds in a resource pool; serving as a repository for confidential or proprietary information
Negotiation	
Inventing options	Managing the brainstorming process; suggesting potential options for the group to consider; co-ordinating subcommittees to draft options
Packaging	Caucusing privately with each group to identify and test possible trades; suggesting possible packages for the group to consider
Written agreement	Working with a subcommittee (sic) to produce a draft agreement; managing a single-text procedure; preparing a preliminary draft of a single text
Binding the parties	Serving as the holder of the bond; approaching outsiders on behalf of the group; helping to invent new ways to bind the parties to their commitments
Ratification	Helping the participants 'sell' the agreement to their constituents; ensuring that all representatives have been in touch with their constituents

Implementation or post negotiation

Linking informal agreements and formal decision making	Working with the parties to invent linkages; approaching elected or appointed officials on behalf of the group; identifying the legal constraints on implementation
Monitoring	Serving as the monitor of implementation; convening a monitoring group
Renegotiation	Reassembling the participants if subsequent disagreements emerge; helping to remind the group of its earlier intentions

Source: Susskind and Cruikshank, 1987, pp.142-143

APPENDIX 2

Disputes involving cultural values

Sullivan (1984, pp.9-15) documents a bitter conflict between the Montana Power Company and the Northern Cheyenne tribe over a 1972 decision to construct two 700-megawatt coal-burning plants at Colstrip, Montana. Emissions from the plants would have reduced the range that could be seen from the reservation of the Northern Cheyenne. Even though the air would have been amongst the cleanest in the nation, the tribe believed that part of their heritage as Indians lay in the clean air and water of their reservation lands. They were opposed to any project that would lead to environmental deterioration. In addition they believed that construction would pose a threat to traditional tribal values.

After years of litigation, representatives of all the parties involved began a series of negotiations in 1979. The tribe was able to air concerns over the perceived threats to the traditional way of life. Seven months later Montana Power and the Northern Cheyenne's tribal council reached a comprehensive settlement, part of which included compensation for the tribe for loss of amenity.

Portage Island, located in Puget Sound near Bellingham, Washington, illustrates an unsuccessful resolution of a dispute involving cultural values. There had been an ongoing controversy over who should own the island and how it was to be used. The island was originally owned by various members of the Lummi Indian Tribe and was connected to the tribal reservation by a sandbar at low tide. In 1965 the island was sold to the Whatcom County Park Board who wanted to create a public park (Amy, 1983, p.347).

In 1970 the Lummi Tribal Council reversed its decision and took steps to prohibit non-Indians from using the island. There was concern that increased motor traffic through the reservation would be disruptive. There was a fear that boat traffic would interfere with fishing nets and shellfish beds used by tribal members around the island. (*Ibid.*, p.348).

With the prospect of prolonged litigation, the Interior Department decided to explore the possibility of a negotiated settlement. Although "the tribe and county were locked into a battle of pride, principle, and cultural integrity, neither side was convinced that it wanted a court to decide the future of Portage Island" (*Ibid.*, pp.57-58).

After three months of negotiations aided by two mediators an agreement began to emerge. The Park Board was willing to sell the island back to the Lummis on the condition they would agree to let it be used as a park. The Lummis finally agreed, with the stipulation that no boat landings or marinas be included in the plan for the park. This would protect their fisheries. The Bureau of Indian Affairs was to provide the funds to buy back the island (Amy, 1983, pp.348-349).

Approximately two years after agreement was reached, it had not been implemented. A lack of tribal funds to fulfil particular aspects of the agreement may result in the case being referred to litigation (Talbot, 1983, p.96).