

THE CHARACTERIZATION OF PUBLIC SECTOR MEDIATION

BY

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INTRODUCTION

The rise of the field of Alternative Dispute Resolution (ADR) has produced an array of informal dispute settlement approaches. This Article focuses on the ADR process of mediation, specifically public environmental mediation.¹

The modern popularization of ADR approaches started in the late 1960s as an effort to expand ADR from the labor-management arena to communities. ADR's initial expansion was partly the result of deliberate efforts by foundations

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¹ See Susan L. Senecah, *Current Issues Facing the Practice of Environmental Mediation*, 17 *MEDIATION Q.* 391, 392 (2000).

such as the Ford Foundation to expand the ADR arena.² In the mid-1970s, mediation was applied to an environmental issue for perhaps the first time—a dam proposal on the Snoqualmie River in Washington state. Over the past decade mediation has become institutionalized, another tool used by public sector officials and administrators confronted with increasing numbers of complex disputes over the allocation of scarce resources. Governments seem at times unable to resolve these disputes, and they are turning to mediation for help. Public sector mediation is increasingly supplementing and supplanting traditional legislative and judicial processes. The most common form of public mediation is environmental mediation.

There is a unique set of characteristics exhibited by public environmental disputes.³ Environmental disputes may display all or some of the following characteristics: multiple stakeholders, undefined or unorganized stakeholders, externalities, intergenerational impacts or irreversible effects. Various parties may have different values and negotiations may be highly technical or deal with complex natural systems. Multiple parties may claim to speak for the public interest even though there is imperfect knowledge about natural systems. These characteristics make the traditional private two-party mediation analogy insufficient.

In the collective bargaining model, the mediator is almost exclusively concerned with the *process*. Many environmental mediators assume the additional responsibility of obtaining a favorable *result* from the process.⁴ The differences between these two concepts, and the mediator's role with respect to them, are products of different dispute characteristics.

This Article will explain the positive aspects of mediation, why it is used, and explore a few general criticisms of mediation. The next section sets out to explain both why mediation's use in the public sector is growing, and its advantages over traditional legislative and judicial decision-making processes. Special attention is given to environmental mediation because it represents the vast majority of all public sector mediation. In mediation literature, environmental mediation is nearly synonymous with public sector mediation. The Article also

² See *id.*

³ Environmental mediation is actually a sub-category of public mediation, a distinction some authors consider very important. See, e.g., E. FRANKLIN DUKES, *RESOLVING PUBLIC CONFLICT: TRANSFORMING COMMUNITY AND GOVERNANCE* 1 (1996). However, the terms "public mediation" and "environmental mediation" will be used interchangeably. These two terms are often used nearly synonymously in mediation literature.

⁴ See STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION, NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 180 (3d ed. 1999).

explains the unique characteristics of environmental mediation. These characteristics create unique difficulties for public sector, environmental mediation. Therefore, in the last section, this Article will argue that practitioners should carefully consider what types of public disputes are suitable for mediation.

I. GENERAL JUSTIFICATIONS FOR THE USE OF MEDIATION

Voluntary dispute resolution methods such as mediation work well in certain situations because parties are given the opportunity to directly shape the outcome. Satisfaction with settlements is higher when parties are able to participate and shape outcomes, rather than have a judicial decision imposed.⁵ Voluntary dispute resolution is also more likely than litigation to lead to settlements addressing interests and underlying problems.⁶ Settlements that reconcile underlying interests, rather than determine who is right or who is more powerful, are typically less costly.⁷ The hope is that voluntary resolution methods will result in solutions that are more suited to the parties' needs, transform relationships, reduce reliance on laws and lawyers, and give relief for nonparties affected by conflict — such as children of divorcing couples. Some commentators go as far as believing greater use of alternative dispute resolution may lead to the rebirth of local communities.⁸

Advocates of mediation techniques, such as courts, American Bar Association ADR sections or community and religious groups, have different goals and justifications for its use. Below is a list of the most often heard justifications for the use of mediation.

- 1) To promote understanding of other peoples' perspectives, including persons of other backgrounds, racial groups and cultural backgrounds;

⁵ See *id.*

⁶ See Lawrence J. MacDonnell, *Natural Resources Dispute Resolution: An Overview*. 28 NAT. RESOURCES J. 5, 17 (1988).

⁷ "Ury, Brett, and Goldberg distinguish among processes based on whether the aim is to reconcile the disputants' underlying interests, determine who is right, or determine who is more powerful. Reconciling interests typically occurs during negotiation processes, and involves 'probing for deep-seated concerns, devising creative solutions and making trade-offs.' The prototypical rights-focused procedure is adjudication. Power procedures include strikes, wars and 'power-based negotiation, typified by an exchange of threats.'" GOLDBERG ET AL., *supra* note 4, at 6.

⁸ See *id.* at 8.

- 2) Enhance party's control and self-determination;
- 3) Lower court caseloads and expenses;
- 4) Provide speedy settlement of those disputes that were disruptive of the community or the lives of the parties' families;
- 5) Improve public satisfaction with the justice system;
- 6) Encourage resolutions that are suited to the parties' needs;
- 7) Increase voluntary compliance with resolutions;
- 8) Restore the influence of neighborhood and community values and the cohesiveness of communities;
- 9) Provide accessible forums to people with disputes; and
- 10) Teach the public to try more effective processes than violence or litigation for settling disputes.⁹

II. CONCERNS OVER THE USE OF MEDIATION

Criticisms of mediation come from a relatively small number of scholars.¹⁰ They tend to focus upon power imbalances, collective and class harms, and the benefits of litigation. Some of the more fundamental criticisms are:

- 1) Powerful parties can impose their will on weaker parties, partly because mediation's informal setting provides fewer safeguards than more formal forums;
- 2) Mediation's focus on individual disputants will hide from public view disputes with societal implications;
- 3) Mediation's emphasis on accommodation and compromise may drain energy from collective action that would be of greater benefit to disadvantaged groups than a series of individual decision;
- 4) Mediation may deter large-scale structural changes in political and societal institutions that can only be corrected through the judiciary and not through mediation;
- 5) Co-option of less powerful groups by more powerful groups. This might occur when mediation is used by powerful groups to give weaker groups a false sense of participation in decisions. Groups can do this by skillfully limiting the perceived range of choices to those most beneficial for the powerful group.¹¹ The problem is that the

⁹ *Id.*

¹⁰ Criticisms are fewer relative to the number of articles in favor or even promoting mediation. For critics, see, e.g., Douglas J. Amy, *The Politics of Environmental Mediation*, 11 *ECOLOGY L.Q.* 1 (1983); Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073 (1984); MIRIAM K. MILLS, ed., *CONFLICT RESOLUTION AND PUBLIC POLICY* (1990); Laura Nader, *Disputing Without the Force of Law*, 88 *YALE L. J.* 998 (1979).

¹¹ As a keen observer to a nation political party convention that selects presidential candidates said, "I don't care who does the voting, as long as I do the nominating." See generally Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 *BUFF. L. REV.* 441, 498-500 (1992) (describing general inequalities in divorce mediation and the use of mediation by some husbands to confuse wives during divorce settlements).

powerful group can legitimize the decisions made in mediation even though the powerful group could have made a unilateral decision without the weaker group.

III. MULTIPARTY PUBLIC DISPUTES

As the number and intensity of environmental disputes grows, the ability of our political, legal and social institutions to settle these disputes in a timely, efficient and decisive manner has diminished. Governments seem unable to resolve these disputes partly because governments are parties involved in the disputes, and because, fundamentally, the fragmentation of political parties into shifting alliances of different special interest groups often leads to paralysis. This gridlock has placed a large burden on our courts where many distributional issues, which are usually better handled by the political process, are being decided.

A. Why Mediation's Use in Public Disputes Is Growing

Public mediations, including environmental mediations, are typically high stakes negotiations. Their consensus outcomes often become public policy that will impact millions of people or redirect very large sums of money. This is dissimilar to most two-party dispute negotiations where the stakes are high to the people involved, but the outcomes affect only a few people.

As mentioned earlier, mediation mechanisms allow for more direct involvement of those most affected by decisions than do most administrative and legislative processes. It produces results more rapidly and at lower cost than the judicial system and it is adaptable to a given need or situation.¹² Thus, in practical terms, public sector mediation moves the "horse trading" from elected bodies to direct face-to-face interaction among interests groups. In this sense, mediation does take power away from elected officials. Although most political agreements reached via mediation still require adoption by political bodies or government agencies, decision-makers almost always accept consensus accords in well-mediated decisions. Some scholars have argued that mediated collective decision making for public policy choices moves us toward a more participatory

¹² See Lawrence Susskind & Connie Ozawa, *Mediated Negotiation in the Public Sector*, 27 AM. BEHAVIORAL SCIENTIST 255, 256 (1983).

democracy.¹³ Others have charged that public mediation is simply a formalized method of backroom dealing.¹⁴ However, this criticism trips itself; if dealing is formalized it is harder to keep secret. Additionally, if talks are open forums with all stakeholders gathered, as negotiation should be if the parties hope to achieve success, the deals are moved from the backroom to the front room.

Public mediation has another advantage over the present political system. Taking an issue out of the legislative arena frees it from being held "hostage" to other issues and goals of a given political party or politician. Consensus on one issue area may not result in action because of other agendas. Mediated settlements produce packages that are coherent and not confused with other vast demands and shifting power balances. This makes it easier to get legislative adoption of consensus settlements. Mediation can accommodate multi-party disputes, and it is ideal for addressing broader causes of social conflict. Widely based public policy participation is recognized as an essential element to sustainable development and to effective public administration.¹⁵

B. *Environmental Disputes Are Unique*

In many environmental disputes, mediation techniques are being used to make tradeoffs that in the past were made on Capitol Hill or in statehouses across the country. The concept of mediation as supplanting or at least supplementing the traditional political process may help explain why some practitioners of environmental mediation have developed a slightly different set of rules compared to labor mediation.¹⁶ Environmental and other public sector mediators tend to practice activist mediation, which operates differently from the traditional stance of neutrality and the responsibility of the mediator.¹⁷ Environmental mediators, like Larry Susskind, are engaging in activities that are a mix of

¹³ See MAX J. SKIDMORE, *AMERICAN POLITICAL THOUGHT* 1 (1978). Thomas Jefferson promoted a participatory democracy where citizens have direct methods of shaping public policies. See *id.* at 72.

¹⁴ See John Harrison, *Environmental Mediation: The Ethical and Constitutional Dimension*, 9 J. ENVTL. L. 79, 88-89, 101 (1997).

¹⁵ See *id.* at 101.

¹⁶ Some scholars consider the difference more than slight. See, e.g., Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981).

¹⁷ Environmental and public sector mediators are often in the activist camp. See John Forester & David Sutzel, *Beyond Neutrality: The Possibilities of Activist Mediation in Public Sector Conflicts*, 5 NEGOTIATION JOURNAL 251 (1989); Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VERMONT L. REV. 1 (1981); DEBORAH M. KOLB ET AL., *WHEN TALK WORKS: PROFILES OF MEDIATORS* (1st ed. 1994).

capacity building,¹⁸ mediation and public participation methods. They place issues of power parity, inclusion, and accountability high on the list of mediator responsibilities. However, these activists practice something different from pure mediation. Environmental mediation seems to be a hybrid of public participation methods and mediation methods. John Harrison noted the difference between mediation and public participation:

Mediation is a technique of dispute resolution; if an interest group does not have sufficient power to put itself in dispute with others there may be little reason to include it in the process unless it holds the key to resolution. Public participation, in contrast, is open to all irrespective of their power or whether they are in dispute, but it does not have the character of a negotiation.¹⁹

Somebody who might be called a “mediation purist” would agree with the first sentence of this quote and its practical connotation. Others would consider it a myopic view of mediation.²⁰ The following section will explain why environmental mediation has developed into a hybrid of pure mediation and public participation methods.

C. The Differences Between Environmental Mediation and Private Two-Party Mediation

Environmental disputes can be distinguished from private labor-management disputes by its primary focus with the allocation of and use of land, air, water, and living resources. Bruce Glavovic, Franklin Dukes and Jana Lynott have identified three characteristics that are manifest at high levels in environmental disputes:

- 1) Environmental disputes center on the relationship between natural and human systems; they exhibit high levels of complexity and uncertainty, and they impinge on the public good.

¹⁸ “Capacity building” refers to the mediator practice of teaching the parties negotiation techniques and resolution processes, leaving them more skilled in consensus building and giving them the ability to better address future disputes. There is a debate whether it is the mediator’s role to build capacity. Some say that mediators have a responsibility to build capacity. Others opine that mediators should do only what they contract to do, settle particular issues. *See supra* note 1, at 397.

¹⁹ Harrison, *supra* note 14, at 91.

²⁰ *See, e.g.,* R.A. BUCHLER BUSH & J.P. FOGLER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994); DUKES, *supra* note 3.

- 2) Many parties with divergent views, experiences, and resources are involved in or affected by environmental disputes.
- 3) Environmental setting involves incongruous 'boundary' conditions.²¹

The first point centers on the fact that natural and human systems are interconnected in complex ways. Land, air, water, and living resources can be used in manners that are spread out over time and space, yet humans have imperfect knowledge of how these symbiotic systems operate. Therefore, we cannot fully predict what the consequences will be of various patterns of resource use. In addition, some human actions create serious threats to public health and well-being through their impact on natural resources and the real possibility of irreversible consequences, e.g., species extinction.²² Many of these actions are individually small, but they will collectively produce dramatic results. Natural resource decisions also have intergenerational effects. The choices made today may limit future options.

Their second point pertains to the tendency environmental impacts to affect multiple parties. Given the proclivity for environmental impacts to be spread out in time and space, multi-party impacts and involvement is not surprising. Affected or concerned groups may include private citizens, business and industry, government agencies, elected officials, and an assortment of non-governmental organizations. There might be undefined or unorganized stakeholders who are important and should be included in negotiations. These groups of disputants may have very different ideological perspectives, organizational structures, strategies, and capacities.

The third characteristic is that boundaries of natural systems are rarely coterminous to administrative and legislative boundaries. There is overlapping or incomplete jurisdiction. The significance of an issue may differ depending upon which jurisdictional level — national, state, regional or local — it is viewed from.

In contrast, labor disputes have institutionalized roles for parties. It is easy to identify and select spokespersons and contact all the groups likely affected. The issues at stake — wages, working conditions, fringe benefits — are well

²¹ Bruce C. Glavovic et al., *Training and Educating Environmental Mediators: Lessons from Experience in the United States*, 14 MEDIATION Q. 269, 271 (1997).

²² See generally Jonathan H. Adler, *The Cartagena Protocol and Biological Diversity: Biosafe or Bio-Sorry*, 12 GEO. INT'L ENVTL. L. REV. 761, 766 (2000) (finding a general consensus that human activity threatens many species around the globe).

defined and the distribution of costs and benefits are fairly predictable.²³ Often the disputing parties have on-going relationships and the parties involved are usually experienced negotiators. In labor disputes both parties have incentives to settle; both parties incur costs the longer the disputes continues.²⁴ Labor dispute mediation occurs between two parties; finally, there are fewer externalities or spillover effects.

Therefore, the context of environmental disputes is different from labor-management disputes. Environmental disputes have multiple stakeholders with varying amounts of organization and leadership or little to no continuing relationships among the parties. The parties may have no experience within a negotiation framework and only a few common goals may be readily apparent.

Furthermore, the implications of the dispute and any settlement reached will likely extend far beyond the disputants to impact natural systems and the general public.²⁵ These impacts are called externalities or spillovers. Externalities are ubiquitous when agreements regarding the allocation of natural resources are made; however, there is little written about them in the mediation literature. Hence, they deserve special attention here.

An externality occurs when an agent making a decision does not bear all of the consequences of his or her action.²⁶ In addition, an externality exists whenever the welfare of some person depends directly on not only his or her activities, but also on activities under the control of some other person. For example, suppose negotiations between an industrialist and local residents living downstream from a factory result in an agreement that waste should be incinerated rather than discharged into the river. The industrialist and downstream residents may be satisfied, but persons living downwind from the incineration site will bear a negative burden resulting from the settlement. Kevin Gibson has given another good example:

[T]wo neighbors arguing about paying for the removal of trash behind their houses could decide that the cheapest solution would be to haul it to a public area, and so place the burden on the community at large.²⁷

²³ See generally Bridget Genteman Hoy, *The Draft Uniform Mediation Act in Context: Can It Clear Up the Clutter?*, 44 ST. LOUIS U. L.J. 1121, 1126 (2000) (discussing the history and institutionalization of mediation).

²⁴ See Suuskind & Ozawa, *supra* note 12, at 270-71.

²⁵ See *id.*

²⁶ See TOM TIETENBERG, *ENVIRONMENTAL AND NATURAL RESOURCES ECONOMICS* 51 (3d ed. 1992).

²⁷ Kevin Gibson, *Mediator Attitudes To Outcome: A Philosophical View*, 17 *MEDIATION Q.* 197, 204 (1999).

Externalities are common when natural resources are used. Participants in negotiation who have and exploit their ability to create a large negative externality for parties not part of the negotiation undermine the legitimacy of any agreement reached.²⁸ Such agreements shift costs and burdens onto third parties. This shift may be the way the disputants resolved their differences—they created a win-win for each other by making losers of persons not represented in the negotiations for various reasons, such as lack of organization, awareness, physical proximity, money, time, and information. The outside groups may or may not be aware of the extra costs pushed on them.²⁹

Clearly, this shifting strategy is more effective when the third party is unaware of their extra burdens, or is powerless to prevent them.³⁰ The disputants may find that shifting costs in the form of externalities is the quickest and easiest solution. However, outside groups may later perceive the negative results and attack the agreements. Thus, there are not only important ethical considerations, but also practical reasons for making the greatest effort possible to identify and include in negotiations all persons who might be remotely impacted by an agreement. Without consensus of all stakeholders, implementation of a settlement could prove difficult.

It is sometimes the case that these shifted costs are spread among many more people to the point where they are imperceptible to each individual. However, this is morally questionable since these costs are incurred without consent.³¹ Moreover, decisions may be made that shift costs to the future. These are intergenerational shifts. Obviously, persons not yet born cannot have opinions; however, it can be logically assumed that future generations would object to such a morally dubious dispute resolution strategy.

In some cases, disputants do not knowingly cause externalities. Are they at fault? What if the mediator is aware the parties are creating negative externalities, but the parties are not? I would argue that in general, the mediator has a duty to inform the parties of these concerns. Although such a duty is not clear-

²⁸See Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 *LAW & CONTEMP. PROBS.* 157, 224, n. 87 (1998) (arguing that strong negative externalities can result from avoidance of public, published reasons of mediated decisions).

²⁹ Negative external costs may include impacts on one's health, well-being, or finances. See, e.g., Andre Hampton, *Markets, Myths, and a Man on the Moon: Aiding and Abetting America's Flight from Health Insurance*, 52 *RUTGERS L. REV.* 987, 989-990 (2000) (explaining definition of externality and the impacts it has on the health care system).

³⁰ See Gibson, *supra* note 25, at 204.

³¹ See *id.*

cut by law, these questions become challenging when one considers the varying degrees of harm in the thousands of different situations where externalities occur. However, the intricacies of these questions are beyond the scope of this examination.

Another unique trait of public environmental mediation is that it typically must take place in the sunshine; the process cannot be secret. A transparent process is important for its results to be credible. It is helpful to have joint fact-finding. When public officials are involved in the process, all open meeting, public notice, and freedom of information requirements should be met.

IV. WHICH DISPUTES SHOULD OR SHOULD NOT BE MEDIATED

Perhaps the most critical and unresolved issue is how to decide when mediation is an appropriate tool for resolving disputes about natural resources and the environment.³²

Campbell and Floyd go on to say that it is important to know the difference between the question of when it is *appropriate* to mediate an environmental dispute and the question of when a dispute is *ripe* for mediation or negotiation. These are distinct issues.³³ This section focuses more, although not exclusively, on the question of when is it appropriate to mediate.

Disputes that revolve around constitutional questions, definitions of basic rights, and fundamental and moral values, generally cannot and should not be mediated.³⁴ Agreement is probably unattainable, but more to the point, mediation would be inappropriate in these cases.³⁵ Mediation may also be futile to determine whether persons are permitted to use or exploit a natural resource in a certain way.³⁶

³² Marcia Caton Cambell & Donard W. Floyd, *Thinking Critically About Environmental Mediation*, 10 J. PLAN. LITERATURE 235, 237 (1996).

³³ *See id.*

³⁴ *See* Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 B.Y.U. L. REV. 1305, 1358, n. 60, 61 (1998) (discussing arguments regarding the utility, or lack thereof, of environmental mediation).

³⁵ *See* ENVIRONMENTAL CONFLICT RESOLUTION (Christopher Napier ed., 1998); LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* (1987).

³⁶ Disputes involving groups that take an absolute moral position leave no middle ground for tradeoff; these should not be mediated. For example, can and should a dispute over the killing of baby seals for their fur be mediated when one side believes the seals should not be killed in any way for any reason? No amount of mitigation will suffice; there is no middle ground between life and death. Should a dispute over the construction of a new nuclear power plant be mediated? Proponent's concessions and promises to build "the safest" nuclear power plant would not likely convince opponents to settle.

However, the issue of deciding whether the resource should be used in a certain way when, legally, other options are also allowed, is an issue that could be resolved through mediation. Distributional issues are usually mediatable, whereas rights issues are not. Some issues are simply non-negotiable. The mediation community needs to do better in identifying these situations. Enthusiasm over the increasing use and positive aspects of mediation abound in the mediation literature;³⁷ however, few authors have attempted to assess where the limits of mediation's applications might be.³⁸

When civil lawsuits are perceived to be tools for social good, judicial power can set precedent in ways mediation could not.³⁹ The case *Brown v. Board of Education*⁴⁰ is a classic instance where mediation may have led to a settlement that satisfied the parties in Topeka, Kansas, but would have failed to eradicate a nationwide caste structure.⁴¹ Even some distributional issues — those that include larger societal socioeconomic issues — may be inappropriate to mediate. Mediated agreements may hide from scrutiny systematic discrimination, harassment, widespread company or agency negligence, and legally suspect working conditions.⁴² The larger societal and group issues may be lost as mediation defines disputes as individual grievances, not societal wrongs. Laura Nader makes this point with eloquent force:

Disputing without law is not a very satisfactory experience for most consumers and citizens in the country, yet it is unlikely that the force of law can be marshalled to address 'little injustices' unless they are reconceptualized as collective harms. For official action in that direction to have any likelihood of yielding more than symbolic victories, and active and vital grassroots citizen and consumer movement use be encouraged.⁴³

In these situations, fair and effective mediation requires citizens and consumers to have the benefits of organizational power and networks of shared

³⁷ The sources are too numerous to list (page through any journal devoted to ADR). See, e.g., the works of Goldberg, Sander, Rogers, Susskind, Carpenter, Kennedy, Ozawa, Bingham, & Cruikshank,

³⁸ Two exceptions being: Amy, *supra* note 10, and Fiss, *supra* note 10.

³⁹ However, mediation sometimes creates outcomes that are more desirable for reasons of mobilization, organization, empowerment, or publicity-derived precedent. See Elaine Smith, *Danger-Inequality of Resources Present: Can Environmental Mediation Process Provide an Effective Answer?*, 2 J. DISPUTE RESOLUTION 380 (1996).

⁴⁰ 347 U.S. 483 (1954).

⁴¹ See Fiss, *supra* note 10, at 1089.

⁴² These concerns are not within the exclusive province of ADR, out of court settlements may raise similar issues.

knowledge before entering negotiations; otherwise, power imbalances and lack of information may result in injustice for many individuals.

A number of authors have identified criteria that can be applied up front to assess which cases are suitable for mediation. John Harrison identified five conclusions:⁴⁴

- 1) *Only a minority of environmental disputes is suitable for mediation.* Philip Harter reviewed sixty case studies and found only six that were negotiable.⁴⁵ Mediation critics should note that many of the problems with mediation⁴⁶ take place in the context of disputes where, for the aforementioned reasons, mediation is not the best route to conflict resolution.
- 2) *There must be some element of interdependence between the parties.* Parties must perceive themselves as needing something that the other parties can offer, e.g., environmental resources, time, or certainty of outcome.
- 3) *There must be universal participation among all affected parties.* Full participation in the mediation process greatly improves the chances of successful resolution and implementation.
- 4) *The timing must be right.* Mediators agree that a dispute must be "ripe" for negotiation, but ripeness is an elusive quality and may occur early or late in a dispute.
- 5) *The dispute must be appropriate.* As mentioned earlier, disputes that involve a clash of fundamental values or moral absolutes are among the least tractable.

Other authors have also found conditions that ought to be met before mediation takes place.

- 1) There must be legitimate representation of the constituencies affected by the disputed issues.⁴⁷
- 2) There must be relative power parity between the parties.⁴⁸

⁴³ Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 1021 (1979).

⁴⁴ Harrison, *supra* note 14, at 83.

⁴⁵ Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982). Both advocates and critics of mediation should note this statistic. Advocates of widespread institutionalization of mediation should be careful not to overestimate the number of cases that are potentially suitable for mediation. If they become overly zealous, practitioners will attempt consensus techniques in cases that are better left to the political process or courts. Participants in assisted negotiation sessions that turned out badly will sour to mediation and disparage it to others.

⁴⁶ Some of these problems include, i.e., inequalities, co-option of weaker groups by more powerful, institutionalization and legitimization of inequalities, authentication of unfair sets of rules, missing stakeholders (including those not born, living far away, not aware negotiations are happening, and those not organized), externalities and individualization of disputes to the point where systematic problems are invisible.

⁴⁷ Glavovic et al., *supra* note 21, at 275.

⁴⁸ CONFLICT RESOLUTION AND PUBLIC POLICY viii (Miriam K. Mills ed., 1990).

- 3) There is not a "negative bargaining zone." In other words, there must be potential for a mutually beneficial settlement.⁴⁹
- 4) The issues are clearly defined.⁵⁰

These issues need to be carefully considered before the mediator accepts a given case. Practitioners should also apply their own criteria tailored to the needs of the parties and situation. There is no substitute for good judgement.

CONCLUSION

In summary, voluntary dispute resolution methods such as mediation work well in certain situations because parties are given the opportunity to directly shape the outcome. Party satisfaction with settlements is higher when parties are able to participate and shape outcomes, as opposed to being forced to adhere to judicial decisions.⁵¹ This engagement is more likely than litigation to lead to settlements addressing interests and underlying problems.⁵²

The context of environmental disputes is different from two-party disputes. Furthermore, the implications of the dispute and any settlement reached will likely extend far beyond the disputants to impact natural systems and the general public.⁵³ Disputes that revolve around constitutional questions, definitions of basic rights, and fundamental and moral values, generally should not be mediated. Mediated agreements have the potential to hide from scrutiny systematic discrimination, harassment, widespread company negligence, and legally suspect working conditions. These problems should be considered before starting mediation.

The basic question of when mediation is and is not an appropriate tool for resolving disputes is not well covered in the mediation literature.⁵⁴ Practitioners who advocate for expanding the use of mediation also tend to be the authors of a great body of literature regarding mediation.⁵⁵ They seem unsympathetic to the more philosophical question of when mediation should be used. In others

⁴⁹ Gibson, *supra* note 25, at 199-200.

⁵⁰ LAWRENCE SUSSKIND ET AL., USING ASSISTED NEGOTIATION TO SETTLE LAND DISPUTES: A GUIDEBOOK FOR PUBLIC OFFICIALS 2, 28 (1999).

⁵¹ See GOLDBERG ET AL., *supra* note 4, at 180.

⁵² See MacDonnell, *supra* note 6, at 17.

⁵³ See Harrison, *supra* note 14.

⁵⁴ See Cambell & Floyd, *supra* note 29, at 236-37.

⁵⁵ See *id.*

words, the literature thoroughly addresses the question of how to do mediation; it deals less with the why and when of mediation. Mediators are understandably silent given that answers to these questions could limit the increasing extension of the use of mediation, thus impacting the practitioners' livelihoods.

Because of public mediation's complexity and newness it needs — more than other mediation sub-fields — further research to guide practitioners in deciding when it is the best tool to use. Although mediation literature reveals concerns about the use of mediation, few works have seriously analyzed when mediation is appropriate and what would result from a misapplication of mediation principles. Before the field of environmental mediation becomes widely used, scholars will need to delve into the area more deeply to discern its consequences.

