COMMENTS

ALTERNATIVE DISPUTE RESOLUTION IN ENVIRONMENTAL CASES: FRIEND OR FOE?

I. INTRODUCTION

Currently viewed by many as the salvation of our legal system, alternative dispute resolution (ADR) has steadily spread its wings to reach the environment (environmental ADR). ADR is generally seen as a better method of resolving disputes, saving much time and money in comparison to litigation. But is this necessarily true? Should ADR be used in all environmental disputes or should citizen groups and environmental organizations continue to rely on the courts and the legislature to solve these issues of public policy?

Because environmental disputes concern conflicts over the quality of life itself, the way in which we resolve these disputes will determine the future of our planet.[1] Such disputes arise due to the existence of conflicting views over what constitutes sound policy for the environment. These conflicting views arise, in part, because people have

1. *See* Robert Coulson, *Foreword* to JANE MCCARTHY & ALICE SHORETT, NEGOTIATING SETTLEMENTS: A GUIDE TO ENVIRONMENTAL MEDIATION vii (1984) ("Environmental disputes are likely to include the most fundamental conflicts that human life will face in its long march through history.").

different stakes in the outcome of these environmental conflicts.[2] In addition, people possess differing visions of how resources should be allocated and how the environment should be managed. Some believe that the earth exists for the benefit of humankind, and that it is industry's prerogative to use natural resources to make life easier for humans. Others believe that the earth exists for all of its creatures and that it is the duty of humanity to preserve its natural resources for the use and benefit of future generations of persons and species. Thus, it should come as no surprise that environmental disputes are some of the most hotly contested disputes in our nation.

When deciding whether to engage in ADR or to utilize traditional methods of dispute resolution, such as litigation, citizen groups must be aware of both the benefits and pitfalls of ADR. This Comment attempts to give citizen groups and those who represent them a better picture of what the move towards environmental ADR entails and what its proper role should be. Part II traces the roots of environmental ADR in the United States by summarizing two of the most significant case studies and the results of early attempts at environmental mediation. Part II goes on to discuss the current state of ADR in the resolution of environmental disputes by looking at two recent environmental mediations. Part III analyzes the pros and cons of using ADR in the resolution of environmental conflicts and Part IV concludes that environmental ADR should not be readily embraced by citizen groups, but instead should be approached with a great deal of caution.

II. ENVIRONMENTAL ADR: PAST AND PRESENT

Environmental ADR is a relatively new phenomenon, but one that is rapidly growing. It originated in the early 1970s as a result of ADR's success rate in the labor community and the desire of a few practitioners and private foundations to experiment with using ADR

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2. *See* LAWRENCE S. BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION 5 (1984). A great number of different views currently exist. At one end of the spectrum, some Native American representatives have expressed an understanding that the earth is a sacred being: "Our morality comes from our relationship with Mother Earth. We are a part of the land in every real sense. . . . Our struggle to preserve the Indian ways is tied up with our struggle to preserve the ecological balance. The two things are almost the same." Carter Camp, AIM leader, OKLAHOMA TODAY, May-June 1992, *quoted in* WILMA MANKILLER & MICHAEL WALLIS, MANKILLER: A CHIEF AND HER PEOPLE 200-201 (1993). Others view nature quite differently: "The only way the river is meaningful is if it is filtered through human experience." Harold Vangilder, *A View From the San Pedro*, HIGH COUNTRY NEWS, June 12, 1995, at A11.

techniques to resolve environmental disputes.[3] One of the first documented environmental mediation cases, Snoqualmie River, occurred in 1974.[4] Such early successes and the literature documenting them resulted in increased enthusiasm for environmental mediation.[5] This led the federal and state governments to join the ADR bandwagon by passing legislation calling for the use of ADR techniques in environmental disputes.[6] The general explosion in the number of environmental disputes in the past twenty years, combined with growing concerns over the costs and lack of predictability in environmental litigation,[7] has led to an increase in the number of cases that practitioners consider ripe for dispute resolution.[8] Since that time, a large amount of literature[9] has

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3. *See* J. Walton Blackburn & Willa M. Bruce, *Introduction* to MEDIATING ENVIRONMENTAL CONFLICTS: THEORY AND PRACTICE 1,1 (J. Walton Blackburn & Willa M. Bruce eds., 1995); William K. Reilly, *Foreword* to ALLEN R. TALBOT, SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION, viii (1983). These early experiments were funded by The Ford Foundation, Atlantic Richfield Foundation, The William and Flora Hewlett Foundation, The Andrew W. Mellon Foundation, and The Rockefeller Foundation. *See* Reilly, *supra* at viii.

4. *See* DOUGLAS J. AMY, THE POLITICS OF ENVIRONMENTAL MEDIATION 4-5, 60 (1987). The Snoqualmie River dispute involved a proposal by the U.S. Corps of Engineers to build a dam in order to deal with devastating flooding in the region. *See id.* at 4. A coalition of citizen and environmental groups opposed the dam. *See id.* They felt that the dam was not necessary and feared that it would lead to urban sprawl. *See id.* The governor of Washington State agreed with the coalition and vetoed the dam. *See id.* at 5. However, the dispute continued. In frustration, the governor agreed to try mediation. *See id.* After seven months of negotiations, the parties signed an agreement that provided for a smaller dam at a different site and a river basin planning council to coordinate planning for the region. *See id.* All parties hailed this as a victory for environmental dispute mediation. *See id.*

5. Some commentators were less enthusiastic. Howard Bellman, a well-known environmental dispute mediator, estimated that only about ten percent of environmental disputes were good candidates for alternative dispute resolution. *See* TALBOT, *supra* note 3, at 91. Another well-known environmental mediator, Gerald Cormick, noted that four criteria are necessary for a successful environmental mediation: "a stalemate or the recognition that stalemate is inevitable, voluntary participation, some room for flexibility, and a means for implementing agreements." *Id.* at 99.

6. *See infra* Part II.B.

7. *See* Ruby K. Sondock, *Environmental & Toxic Tort Matters: General Principles of ADR*, SA88 ALI-ABA 223, (March 28, 1996).

8. MCCARTHY & SHORETT, *supra* note 1, at xi. In the Preface, McCarthy and Shorett state that, "[t]he 1970s, tagged the Decade of the Environment, created unprecedented awareness of the need to protect and preserve our natural resources." *See id.* Many analysts believe that the movement towards alternative dispute resolution in environmental law is part of a growing trend in American politics towards the exploration of more cooperative approaches to problems. *See* Tom Melling, *Bruce Babbitt's Use of Governmental Dispute Resolution: A Mid-Term Report Card*, 30 LAND & WATER L. REV. 57, 58-59 (1995); *see generally* Christine M. Reed, *Mediation and the New Environmental Agenda, in* MEDIATING ENVIRONMENTAL CONFLICTS: THEORY AND PRACTICE 5-15 (J. Walton Blackburn & Willa M. Bruce eds., 1995); (discussing the role mediation can play in a new environmental policy agenda focusing on sustainability, ecology, and the global environment); AMY, *supra* note 4, at 1-16 (discussing the history of the emergence of ADR in the environmental context).

been generated on the subject and a number of success stories have emerged.[10]

A. Early Cases Dealing With Environmental ADR

1. Mediation in the Storm King Dispute[11]

The Storm King dispute is one of the most significant cases in environmental ADR. Its settlement concluded a seventeen-year dispute "among three environmental groups, four public agencies, and five electric utility companies over the use of the Hudson River for" power production.[12] The Storm King dispute began in 1962 when Consolidated Edison Company of New York's (Con Ed) announced plans to build a hydroelectric power facility at the base of Storm King Mountain.[13] Several citizen groups quickly voiced opposition to this plan.[14] They felt that the facility was unnecessary and that Con Ed had failed to consider the environmental impact of the project on the Hudson River biota.[15] The Federal Power Commission (FPC) continually attempted to grant a construction permit to the facility, and the citizen groups continually opposed such grants.[16] The dispute resulted in three court cases over a period of ten years.[17] However, even after the litigation had ended, the

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9. Much of the literature describes successful techniques and methods to expand the use of dispute resolution of environmental conflicts. *See, e.g.,* Blackburn & Bruce, *supra* note 3. Such literature must be viewed with a degree of skepticism because most of it has been written by "professional mediators with vested interest in the field." Neghin Modavi, *Mediation of Environmental Conflicts in Hawaii: Win-Win or Co-optation*, SOC. PERSP. June 1, 1996 at 301, *available at* 1996 WL 13645259 at *1.

10. *See infra,* Part II.A.

11. *See* TALBOT, *supra* note 3, at 7-24; BACOW & WHEELER, *supra* note 2, at 10-11. The Ford Foundation asked author Allan Talbot to document six such experimental environmental ADRs and the result of this request is the book, *Settling Things*. TALBOT, *supra* note 3, at 2. In this book, Talbot describes six case studies that were settled through mediation, one of which is the Storm King dispute. *Id.* at 7-26. The other five are: Interstate 90, Hydro Power at Swan Lake, Portage Island, The Eau Claire Dump, and The Port Townsend Terminal. *See id.* at 27-90.

12. *Id.* at 7.

13. *See* BACOW & WHEELER, *supra* note 2, at 10.

14. *See id.*

15. *See id.*

16. *See* TALBOT, *supra* note 3, at 9-13.

17. These cases began in 1965, with *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), in which the Second Circuit Court of Appeals ruled that the Federal Power Commission had erred by failing to allow testimony concerning the impact of this project and the possibility of alternatives. *Id.* at 612. The case came back to court in 1972 after the FPC had issued a new construction license to Con Ed. In this second case, *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (2d Cir. 1971), the court ruled in favor of Con Ed. *Id.* at 467. In 1974, Scenic Hudson Preservation Conference obtained an injunction barring Con Ed from dumping materials

dispute was far from over. It was at this point that mediation was attempted.[18]

In March 1979, the parties began to discuss negotiations. Everyone was tired of arguing about this case, and the time and the cost were becoming unmanageable.[19] The parties selected Russell Train, president of the World Wildlife Fund and a former EPA administrator, as the mediator.[20] After over a year of intense "haggling and bargaining" an agreement was reached.[21] Con Ed agreed to forfeit its Storm King license and to turn the site over to an interstate park commission.[22] Con Ed and the other utility companies also agreed to methods that would decrease the impact on the river's aquatic life.[23] In return, all proceedings among the parties ceased.[24] This battle was hailed by many as a great victory for all involved, yet it was fought at great costs and demonstrated to many the need for an alternative method of resolving environmental disputes at an earlier stage in the dispute.[25]

The Storm King mediation provides an excellent background for a brief analysis of the characteristics that distinguish mediation from litigation. First, mediation is generally seen as speedier and less costly than litigation.[26] In this case, traditional litigation methods took over ten years, whereas mediation was completed in a little over one year. The parties were unable to manage the litigation and appeals costs associated with a decade-long battle, and mediation was perceived as less costly due to its shorter duration.[27] Second, mediation generally allows for greater and more effective public participation than is possible through traditional litigation and lobbying techniques.[28] In the FPC hearings, the

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into the river without a permit. *See* Scenic Hudson Preservation Conference v. Callaway, 499 F.2d 127, 128 (2d Cir. 1974).

18. *See* TALBOT, *supra* note 3, at 13.
19. *See id.*
20. *See id.*
21. *See id.* at 24.
22. *See id.*
23. *See id.*
24. *See id.*
25. *See* BACOW & WHEELER, *supra* note 2, at 11.
26. *See* AMY, *supra* note 4, at 23-27.
27. *See id.* at 23.
28. *See id.* at 23-27. One of the problems for many environmental and citizen groups is the issue of lobbying. They cannot afford to lobby politicians and even if they could, they would lose their tax-exempt status. *See id.* The Internal Revenue Act of 1969 prohibits such nonprofit groups from spending "substantial" amounts of money on lobbying. *See id.* "Procedures like public hearings often only give the appearance of participation, while granting the participants no real say in policymaking. There is no guarantee that testimony will have any influence at all on administrators' decisions." *Id.* at 25.

citizen groups had not been influential in the agency's ultimate decision.[29] In mediation, however, the citizen groups were able to sit at the bargaining table where their concerns and those of the company were openly discussed and evaluated.[30] Third, frequently a more agreeable solution can be developed through mediation than may be attainable through litigation.[31] Here, the parties were able to achieve a solution that appeared unattainable through litigation: each party was able to win on at least one point. Because of this joint decisionmaking, the likelihood of subsequent challenges was diminished.[32] This is not true in litigation, as a quick glance at the procedural history of this case demonstrates.[33] Finally, mediation allows for greater flexibility and more informal procedures than litigation.[34] In the Storm King mediation, this flexibility allowed the parties to reach a solution that was amiable to all.

2. Mediation in the Foothills Dispute[35]

The Foothills dispute arose when the Denver Water Board (DWB) proposed to build a water treatment facility near Denver, Colorado.[36] The proposal was immediately criticized by environmentalists, the U.S. Environmental Protection Agency (EPA), and the Army Corps of Engineers (Corps).[37] These opponents expressed concerns over a wide array of issues.[38] The main concerns involved the issue of water rights and needs of a western community.[39] Environmentalists believed that water conservation and restrictions would be a better method of dealing with future water needs than building a new water treatment facility.[40] One of the points of contention was whether or not the DWB had properly estimated the future water needs of the region.[41] In addition, there were underlying concerns over

29. *See* TALBOT, *supra* note 3, at 10.
30. *See id.* at 24.
31. *See* AMY, *supra* note 4, at 37.
32. *See id.*
33. *See supra* note 13 and accompanying text.
34. *See* Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 12 (1987); MCCARTHY & SHORRETT, *supra* note 1, at 40 ("After the first meeting, the negotiating format is flexible, taking its form and format from the degree of progress being made, the mediator's style, and the preferences of the parties").
35. *See* BACOW & WHEELER, *supra* note 2, at 195-247.
36. *See id.* at 195.
37. *See id.* at 202.
38. *See id.* at 202-06.
39. *See id.* at 202-05.
40. *See id.* at 202.
41. *See id.*

the rapid growth of Denver and the associated problems of urban sprawl, lawn care, development of future raw water supplies, and air pollution.[42]

After eight years and two lawsuits, the parties to this dispute were able to agree to a settlement.[43] "During that time, two federal agencies wrote four [different] environmental impact statements . . . six federal agencies fought internally," numerous local and state agencies were involved, and various environmental groups fought against the project.[44] Mediation was attempted two times before the parties were able to fashion an agreeable solution.[45]

The first attempt at mediation failed due to a variety of factors. First, the parties were completely polarized and were unable to reach any sort of consensus.[46] Second, an impasse had not been reached.[47] According to nationally recognized mediator Gerald Cormick, a prerequisite to mediation success is the existence of a stalemate.[48] And third, the mediation was initiated in a very public fashion by Congresswoman Schroeder.[49] This public announcement placed the parties under a great deal of stress and public scrutiny. Due in part to this public scrutiny, the parties were unable to effectively bargain.

Fortunately, the second attempt was more fruitful. One year after the first mediation attempt had failed, Tim Wirth, the other congressional representative, successfully initiated mediation of the controversy through private discussions with the parties.[50] The main reason for his success was that the timing was right: the dispute was at an impasse and none of the parties knew what to expect next.[51] After much disagreement and haggling, the parties reluctantly agreed to a settlement, partly out of fear of the alternative social processes.[52] The terms of this settlement included the following; (1) the dismissal of both lawsuits, (2) the

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42. *See id.* at 202-07.
43. *See id.* at 196, 225-27, 236 (The dispute arose in 1972 and was settled in 1980).
44. *Id.* at 196-97.
45. *See id.* at 195.
46. *See id.* at 207-11.
47. *See id.* at 211.
48. *See* TALBOT, *supra* note 3, at 99.
49. *See* BACOW & WHEELER, *supra* note 2, at 209-10.
50. *See id.* at 214-38.
51. *See id.* at 214.
52. *See id.* at 238-40. Another consideration in any successful mediation is timing, concerning both the nature of the dispute and the amount of time the parties allow for mediation. It is important for the parties to allow an adequate amount of time to become comfortable with one another, to begin discussing positions and alternatives, and to reach agreements. Such bargaining takes time. If parties to a lawsuit were to be ordered into mediation by a judge who then imposed a time constraint on the mediation, the mediation would be doomed to failure.

issuance of the Section 404 water permit, (3) agreements by the DWB to undertake water conservation plans and to promote public participation in its decisions, (4) the development of the South Platte River as a community recreational area, and (5) an agreement by the federal agencies involved to provide a systemic analysis of the environmental impacts of any future DWB projects.[53] Thus, all parties to the mediation walked away with something.

B. Laws Providing for Alternative Dispute Resolution

Seeing ADR as a means to decrease litigation costs and increase settlements, federal and state governments have recently passed a variety of laws calling for increased use of environmental ADR.[54] Disputes covered by such laws range from oil spills, hazardous waste cleanups, and groundwater contamination, to land management plans, zoning laws, and fishing rights.[55]

One of the first federal responses to the wave of environmental ADR was the Superfund Amendments and Reauthorization Act of 1986 (SARA), amending the Comprehensive Environmental Compensation, Response, and Liability Act of 1980 (CERCLA).[56] CERCLA focuses on cleaning up abandoned, contaminated properties and preventing future problems with those properties. In amending CERCLA with the Superfund Amendment and Reauthorization Act (SARA), Congress allowed all toxic waste cleanup disputes to be submitted to an arbitration panel, where the rules of the American Arbitration Association govern.[57] SARA also encourages the use of negotiated settlements between the

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53. *See id.* at 235.

54. Federal laws include: The Administrative Dispute Resolution Act of 1990, 5 U.S.C. §§ 571-83 (1994), and The Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561-70 (1994). Several states have laws which allow or require the use of ADR in hazardous waste facility siting decisions. These states include Massachusetts (MASS ANN. LAWS ch. 21D § 15 (Law co-op 1996)); Rhode Island (R.I. GEN. LAWS 23-19.7-10 (1996)); Virginia (VA. CODE. ANN. §10.1-1434 (Michie 1996)); and Wisconsin (WIS. STAT. § 289.33 (1995-96)).

54. *See* David Singer, *An Arbitration Journal Report: The Use of ADR Methods in Environmental Disputes*, ARB. J., Mar. 1992, at 55, 56.

55. *See id.* at 55.

56. Pub. L. No. 99-499, 100 Stat. 1613-1781 (codified as amended at 42 U.S.C. §§ 9601-9675 (1994)). *See* Stephen Crable, *ADR: A Solution for Environmental Disputes*, ARB. J., Mar. 1993, at 27-28. In order to encourage the use of such negotiations, the EPA implemented a pilot project in Region V, in which the EPA contracted with a neutral dispute resolution group to provide ADR services for specified projects. *See id.* at 27.

57. *See* 40 C.F.R. § 304 (1996) (requiring cleanup disputes to be submitted to an arbitration panel).

EPA and all potentially responsible parties (PRPs).[58] By prohibiting the EPA from engaging in any cleanup or remediation actions for sixty days, SARA gives PRPs a chance to negotiate and finance a cleanup plan.[59] It also provides for a period of time during which the EPA and the PRPs can negotiate.[60] Other ways in which SARA encourages the use of negotiation include: allowing the EPA to enter into settlements with *de minimis* PRPs and allowing for "mixed" funding situations.[61]

There are also a number of general federal statutes that allow for or require the use of ADR and which may be applicable to environmental cases. First is the Administrative Dispute Resolution Act of 1990.[62] While the Administrative Dispute Resolution Act does not mandate the use of ADR, it does encourage agencies to consider using ADR methods prior to initiating litigation.[63] The Act does this by expressly granting authority[64] and providing for the training of bureaucrats in dispute resolution techniques.[65] Next is the Negotiated Rulemaking Act of 1990,[66] which calls for federal agencies to appoint specialists in dispute resolution in order to enhance public decisionmaking and provides for the training of ADR skills for federal agency employees.[67] Finally, the Civil Justice Reform Act of 1990[68] requires the district courts to consider using ADR and encourages them to do so in their "expense and delay" plans.[69]

In addition, Attorney General Janet Reno recently endorsed plans to "vigorously encourage" the use of ADR within the Department of Justice (DOJ).[70] In order to implement these plans, she established a new

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58. *See* Crable, *supra* note 56, at 28.
59. *See id.*
60. *See id.*
61. *See id.*
62. 5 U.S.C. §§ 571-83 (1994).
63. *Id.* § 573(c); *see* Charlene Stukenborg, *The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts*, 19 U. DAYTON L. REV., 1305, 1328 (1994).
64. 5 U.S.C. § 572(a) ("An agency may use a dispute resolution proceeding for resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.").
65. *Id.* § 573; *See* Richard C. Collins, *The Emergence of Environmental Mediation*, 10 VA ENVTL. L.J., 1990, at vi, ix.
66. 5 U.S.C. §§ 561-570 (1994).
67. *Id.* § 564; *see* Singer, *supra* note 51, at 56.
68. 28 U.S.C. §§ 471-482 (1994).
69. *See id.* § 473.
70. *See* Peter R. Steenland & Peter A. Appel, *The Ongoing Role of Alternative Dispute Resolution in Federal Government Litigation*, 27 U. TOL. L. REV. 805, 806 (1996) (citing Order of the Attorney General, *Promoting the Broader Appropriate Use of Alternative Dispute Resolution Techniques* 1-2 (1995)).

position within the DOJ, entitled Senior Counsel for ADR.[71] Some commentators feel that this will be especially beneficial for disputes in which a federal agency and a private party have "developed a mistrust for each other."[72] However, as many ADR scholars will agree, ADR is not likely to be successful in an exceedingly hostile atmosphere. Mediation requires feelings of comfort and trust. If they do not trust one another, parties are not likely to openly discuss the issues and develop creative remedies.

A number of states have also developed laws implementing ADR techniques to resolve environmental disputes. For example, Oklahoma's Department of Environmental Quality currently allows for mediation.[73] In Florida, the Dispute Resolution Act (DRA) which provides for ADR in certain limited situations, was enacted in 1995.[74] The DRA calls for an arbitration proceeding in the form of a public and informal hearing before a "special master."[75] Such proceedings are available for property owners who feel that the development orders or enforcement actions of state agencies and local governments are either unreasonable or impose an "unfair burden" on their property.[76] Such legislation may pave the way for more cooperation between government and citizen groups, but the legislation leaves a number of issues unresolved: (1) the term "special master" is not clearly defined, (2) there is no provision addressing a situation where the parties are unable to agree on a "special master," (3) there is currently no funding mechanism in place for such arbitration proceedings, (4) implementation and enforcement remain murky, and (5) there are no procedural rules in place for such proceedings.[77] Thus such proceedings may not be the best option for most private citizens; instead they may want to opt for traditional methods of resolving disputes, namely participation in public hearings and litigation.

Hawaii was one of the first states to adopt ADR laws, and thus serves as an important role model for their utility, especially for citizen groups. During the 1970s, Hawaii was the focus of concentrated environmental protest over land development.[78] This grass-roots anti-

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71. *See id.*

72. *See id.* at 814-815.

73. *See* OKLA. STAT. ANN. tit. 27A, § 2-3-104 (West Supp. 1996) (providing for a confidential mediation upon voluntary, written request).

74. 1995 Fla. Laws ch. 95-181.

75. *Id.*

76. *See id.*

77. These "unanswered questions" are detailed in Martin R. Dix, et. al, *Land Use and Environmental Dispute Resolution: The Special Master*, 69 FLA. B.J., Nov. 1995 at 65-67.

78. *See* Modavi, *supra* note 9 at *6.

development movement resulted in a large scale "political legitimization crisis" due to the fact that state and local officials were being portrayed as "co-conspirators" with the land developers.[79] Environmental groups began filing lawsuits against state and county officials and agencies, which led to massive publicity of the "pro-development bias" prominent in Hawaii.[80] The litigation also resulted in the creation of an unpredictable environment for land developers, which in turn led many to either abandon or delay their projects.[81] The state of Hawaii reacted by establishing an official state office of mediation to promote the use of ADR in such development disputes.[82]

ADR provided the state of Hawaii with a mechanism whereby these very public disputes became silent and confidential, allowing the government and land developers to avoid negative publicity.[83] Many citizens who participated in such mediations did so because of the office of mediation's strong pressures, and frequently felt that they had become powerless as a result of such mediations.[84] In addition, ADR allowed the state to "demobilize and depoliticize[] grass-roots opposition to development projects by channeling activism away from confrontation and publicly visible tactics" and by narrowing the "demands and concerns" of such environmental citizen groups.[85] Thus, the mediations of Hawaii demonstrate that ADR may not be the salvation of citizen groups, and may instead result in their destruction.

C. Recent Environmental ADR Cases

The current government endorsement of the use of ADR techniques to resolve environmental issues has resulted in a multitude of environmental cases utilizing such ADR techniques.[86] Two cases in particular illustrate the abilities and limitations of this new method of resolving environmental disputes: The Alaska Fisherman/Oil Companies Mediation and the Killington-Pico Ski Resorts Mediation.

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79. *See id.*
80. *See id.* at *7.
81. *See id.*
82. *See id.* at *10.
83. *See id.* at *12.
84. *See id.*
85. *Id.* at *15.
86. Implicit in this wide-spread embrace of ADR is the belief that government should facilitate consensus-building and conflict resolution. *See* Melling, *supra* note 8, at 58. For another, more recent example of such a mediation, see the case study on the Umatilla Basin project, Janet C. Neuman, *Run, River, Run: Mediation of a Water-Rights Dispute Keeps Fish and Farmers Happy—For a Time*, 67 U. COLO. L. REV., 1996, at 259.

1. Alaska Fisherman/Oil Companies: Babbitt Mediates Dispute[87]

In line with President Bill Clinton's emphasis on "collaboration, not confrontation," the Secretary of the Interior, Bruce Babbitt, successfully mediated a dispute between Alaskan fisherman and numerous oil companies.[88] Following the Exxon Valdez oil spill of 1989, there were dismal pink salmon harvests, putting the fishermen in a deep recession.[89] Many fishermen blamed the Exxon Valdez spill for these poor harvests.[90] Exxon refused to accept responsibility and resorted to stonewalling the fishermen's arguments.[91] As a result, the fishermen took action: they blockaded the Valdez Narrows, effectively bringing to a halt all traffic through the area.[92] The situation was extremely grave and resulted in a meeting between representatives of the fishermen, representatives of some of the oil companies, and the governor of the state.[93]

After an urgent call from the governor, Secretary Babbitt flew in to mediate the dispute.[94] Within twenty-four hours, the conflict was settled.[95] Although Exxon officials refused to participate in these negotiations, the parties were able to come to an agreement of sorts. The fishermen agreed to end the blockade upon the promises of Governor Hickel and Babbitt to search for financial aid for the fishermen, to protect salmon-spawning areas, and to press Exxon to dismiss its pending lawsuit.[96]

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87. *See* Melling, *supra* note 8, at 58-72. In addition, the Voyageurs National Park and the Boundary Waters Canoe Area Wilderness dispute is another national environmental dispute that should be looked at closely. For more information, see Dean Rebuffoni, *Lawyers Aid Environmentalists in Wilderness Mediation*, STAR-TRIB. (Minneapolis-St. Paul) Sept. 6, 1996, at 1B.

88. *See* Melling, *supra* note 8, at 58-59.

89. *See id.* at 68.

90. *See id.* at 69.

91. *See id.* at 69.

92. *See id.* at 70.

93. *See id.* at 70. Note that Exxon was noticeably absent; Melling speculates that Exxon felt that its Best Alternative to Negotiated Action was litigation. *See id.* at 72 n.74.

94. *See id.* at 71.

95. *See id.* First, Babbitt removed the press, next he met with the fishermen, then he met with the Alaskan officials and oil company representatives. *See id.* The fishermen agreed to lift the blockade in return for the governor's promise to search for methods to financially aid the fishermen. *See id.* The government officials promised to "urge federal and state trustees who oversee the $900 million civil spill settlement fund to buy more land to protect salmon-spawning streams in Prince William Sound and to aid local hatcheries." *See id.* (quoting *Fishermen to Lift Oil Blockade,* N.Y. TIMES, Aug. 23, 1993, at B7).

96. *See id.*

This dispute was successfully settled for a number of reasons.[97] First, Babbitt was an outside mediator and did not use his governmental leverage during the negotiations.[98] As an outsider, Babbitt lacked a vested interest in the mediation, and because he did not use his position to force a settlement, he was able to assist the parties in settling their differences. Second, the process was entirely voluntary.[99] Thus, the parties were able to bargain in good faith and a consensus was achievable. Third, the process was open to all interested parties.[100] Thus a party, such as Exxon, could not later complain that it was not offered the opportunity to settle the dispute. Finally, the parties were able to openly discuss their interests and develop creative solutions due to the private nature of the mediation negotiations.[101]

However, the mediation was also unsuccessful on a number of levels because it did not resolve the larger disputes. The health standards of the region and the question of Exxon's liability for the damages to the region were left in the air.[102] This was due to the pressure upon the parties for a quick settlement and the fact that Exxon, an extremely important party, chose not to participate in the process.[103] Thus, the Alaska Fisherman case study demonstrates both the successes and downfalls of an environmental mediation.

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97. The success of this dispute resolution should be contrasted with Babbitt's forcible intervention in the cattle grazing dispute. For more details on the cattle grazing dispute, see *id.* at 72-83.

98. *See id.* at 71. It was helpful that Babbitt was knowledgeable about the issues of environmental law involved in the dispute. A prerequisite for a successful environmental mediation is a neutral, third party with a degree of expertise or knowledge in environmental issues. A knowledgeable mediator will be better able to aid the parties in resolving their differences and creating a solution favorable for all involved.

99. Parties were free to leave or to participate and no coercion existed. *See id.* Voluntariness is an essential element of a successful mediation. "Mandated negotiations rarely produce good-faith bargaining." BACOW & WHEELER, *supra* note 2, at 332. For example, if a judge was to order the parties of a dispute into mediation, the chances for a successful resolution of the issues would be slim because the parties would lack any real interest in settling the dispute.

100. Although the process was open to all interested parties, Exxon chose not to participate. *See* Melling, *supra* note 8, at 71.

101. This open discussion of options was enhanced by Babbitt's decision to remove the press. *See id.*

102. *See id.* at 73.

103. The exclusion of an interested party is frequently the downfall in large-scale disputes. For instance, whenever a mediation excludes citizen groups, the mediation is likely to fail because those groups will not be precluded from filing suit against the settlement reached through the mediation.

2. Killington-Pico Ski Resorts[104]

This controversy is important because it was one of the first involvements of the Federal Mediation and Conciliation Service (FMCS) in an environmental ADR.[105] The FMCS is a successful negotiator which has traditionally been involved with labor dispute mediations.[106] The FMCS was contacted by the National Park Service in 1990 to mediate a dispute involving the Long/Appalachian Trail and the merger of the Killington and Pico ski areas.[107]

The parties to the mediation included the National Park Service, the Killington and Pico ski areas, and a number of environmental and conservation groups.[108] The issues that needed to be resolved involved the Long/Appalachian Trail, water use, protection of the black bear habitat, and the general environmental impact of the merged ski development.[109] The goal of the mediation was to discover alternatives that would protect the environment, allow for construction of new ski lifts, and discourage any future regulatory conflict.[110]

Despite some initial hesitation on the part of environmental groups, the mediation process was soon underway.[111] All parties agreed on the validity of the ski expansion as well as the need for environmental protection.[112] This, coupled with the fact that the ski developers had an item to negotiate with, namely land, made the negotiations somewhat smoother than most.[113] The basis of the agreement was embodied in the concept of trading land for non-adversarial permit proceedings.[114] Additionally, the uncertainty surrounding the political future in Vermont created a certain amount of pressure on the negotiating parties to reach an agreement.[115] According to Ira Lobel, "[w]ithout the pressure of the

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104. *See* Ira B. Lobel, *Addressing Environmental Disputes With Labor Mediation Skills*, ARB J., Sept. 1992, at 48.

105. *See id.*

106. *See id.*

107. *See id.* at 50. This mediation was funded through an interagency agreement between the NPS and FMCS. *See id.*

108. *See id.* at 48-56.

109. *See id.* at 50.

110. *See id.*

111. *See id.*

112. *See id.* at 55.

113. *See id.* at 53.

114. *See id.*

115. *See id.* at 55.

signing with the governor and two senators, the parties would still probably be negotiating last minute changes."[116]

The Killington-Pico mediation is a textbook example of how mediation can work in environmental disputes. The mediator was invited by a governmental agency and was chosen by the parties.[117] The mediator did not dominate the negotiation, but instead let the parties hash out their issues, occasionally nudging one or the other.[118] The mediation focused on interests, not positions.[119] There was room for give and take and little outside pressure to reach an agreement.[120] An agreement was reached and was amiable to all the parties.[121] Thus, the mediation fulfilled all of its stated goals and the mediator simply facilitated this agreement.[122]

IV. ANALYSIS

Although environmental ADR is currently hailed by some as the salvation of the legal system, it is important for citizen groups to analyze the validity of their claims, what their origins are, and just how far their hands should reach. After so doing, it is apparent that while environmental ADR may be used in certain limited situations, citizen groups would generally be best advised to continue to rely upon more traditional methods of influencing public policy.[123]

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116. *Id.*

117. *See id.* at 48-50.

118. *See id.* at 50-56.

119. *See id.*; *See also* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 40 (Bruce Patton ed., 2d ed. 1991). In this book, Fisher & Ury note that

> [w]hen negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack, the more committed you become to it. The more you try to convince the other side of the impossibility of changing your opening position, the more difficult it becomes to do so. Your ego becomes identified with your position. You now have a new interest in 'saving face'—in reconciling future action with past positions—making it less and less likely that any agreement will wisely reconcile the parties' original interests.

Id. at 4-5.

120. *See* Lobel, *supra* note 104, at 50-56.

121. *See id.*

122. Despite the fact that the Killington-Pico merger was never finalized, the mediation can still be deemed a success. The parties developed an alternate route for the Appalachian Trail and obtained private land to protect the black bear habitat. *See id.* at 55.

123. For two opinions that conflict with this conclusion, *see* Julia M. Wondolleck, et. al., *Teetering at the Top of the Ladder: The Experience of Citizen Group Participants in Alternative*

In his book, *The Politics of Environmental Mediation*, Douglas Amy analyzes each of the claims regarding environmental ADR and finds many of them to be purely mythical.[124] First, it is questionable whether or not the courts are really overburdened by environmental cases. Recent studies have shown that reports of excessive environmental litigation have been exaggerated.[125] Second, mediation is not necessarily any speedier than litigation.[126] In part, this is due to the fact that prior to mediation, most disputes have been going on for years and frequently have gone to court.[127] In order for parties to reach an impasse, one of the prerequisites for mediation, there must have been a certain amount of time and money expended. Third, ADR is not any less expensive than litigation.[128] Most groups must still hire attorneys to advise or represent them in a mediation.[129] As Bingham notes, "[t]he costs of preparing for negotiation, for example, may be as high or higher than the costs of preparing for some kinds of litigation, particularly for public interest groups."[130] Finally, alternative dispute resolution is a type of power politics, not an escape from it.[131]

One important aspect of ADR as power politics stems from the reality that industry is very experienced in the field of ADR and has been using ADR for decades, whereas citizens and environmental groups are fairly new to the scene and may not have the same level of knowledge, expertise, or influence. This may result in an imbalance of power between two parties to a negotiation, which creates a real danger that

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Dispute Resolution Processes, SOC. PERSP. June 1, 1996 at 249, *available at* 1996 WL 13645256; Neuman, *supra* note 86, at 259. (case study of the Umatilla Basin project mediation).

124. *See* AMY, *supra* note 4, at 67-95; *See also* Modavi, *supra* note 9, at *3 ("A few advocates [of mediation] admit that there is little empirical work that supports the claimed benefits of mediation." (citations omitted)).

125. *See* AMY, *supra* note 4, at 68.

126. *See id.* at 70.

127. *See id.*

128. *See id.* at 74.

129. *See id.*

130. *See id.* at 76, (quoting GAIL BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE (Executive Summary) 11 (1985)).

131. *Id.* at 86. Both Gerald Cormick and Howard Bellman agree with this portrayal of dispute resolution. *See id.* Melanie Rowland takes this one step further by noting that, "[i]n politics, uncertainty tends to support the status quo, and thus tends to work against conservationists." Melanie J. Rowland, *Bargaining for Life: Protecting Biodiversity Through Mediated Agreements*, 22 ENVTL. L. 503, 512 (1992). In addition, mediation can be extremely demobilizing for citizen groups. *See* Modavi, *supra* note 9, at *3.

inexperienced citizen groups can be taken advantage of by their more experienced opponents.[132]

Another danger that ADR poses for citizen groups comes from one of its seemingly positive aspects. Although the very appeal of ADR for citizen groups may lie in its informality, it may be this quality that makes such groups especially vulnerable. Many of the courtroom procedures involved in traditional litigation developed as a means of ensuring due process and the protection of parties.[133] These assurances are not available in mediation, unless expressly determined by the parties. Without such assurances, citizen groups may be vulnerable to exploitation by unethical opponents.[134] In addition, there are currently no federal or state standards that apply to environmental mediations or mediators.[135] Thus, the moral, legal, and economic pressures that ensure accountability in other fields are lacking in environmental ADR.[136]

Next, the very nature of environmental disputes may make them unsuitable for ADR techniques. One of the most important features of environmental disputes is the fact that they typically involve irreversible decisions and implicate major alterations to the physical environment.[137] Such decisions often involve fundamental questions of values.[138] Disputes concerning values are not well suited to dispute resolution, no matter how the mediators try to cast the dispute.[139]

Finally, most analysts agree that ADR techniques should only be used in disputes involving well-established legal principles where the main dispute is factual.[140] Because such disputes only account for ten

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132. *See* AMY, *supra* note 4, at 101-102. Thus, it is essential for citizen groups to be familiar with not only the mechanics, but also the pros and cons of mediation. *See* Wondolleck, *supra* note 123, at *8.

133. *See* AMY, *supra* note 4, at 106.

134. *See id.* at 107.

135. *See* BACOW & WHEELER, *supra* note 2, at 249 (quoting Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 4-8 (1981)).

136. *See id.* Gerald Cormick has written an article advocating the adoption of ethical standards for mediators. *See id.* at 266-269, (quoting Gerald Cormick, *The Ethics of Mediation: Some Unexplored Territory*, Unpublished paper presented to the Society of Professionals in Dispute Resolution (1977)).

137. *See* MCCARTHY & SHORRETT, *supra* note 1, at ix-xi.

138. *See* Rowland, *supra* note 131, at 516.

139. *See id.* Such values involve the way in which each person perceives the environment and the relationship of humans with the planet. *See id.* By "reframing" disputes in terms of conflicting interests, rather than conflicting values, the mediation suppresses the most fundamental issues at stake and "deprive[s] conservationists of the moral high ground, one of their strengths in the larger political process." *Id.* at 519.

140. *See* Stukenborg, *supra* note 63, at 1336.

percent of all environmental disputes,[141] most environmental disputes are not ripe for ADR. In fact, the most likely candidates for ADR are local disputes, because the parties involved are more inclined to respect and trust one another due to the existence of established relationships.[142] Because of this characteristic, the parties in such a mediation are more inclined to discover creative alternatives that will recognize and respect the locality. This is in direct contrast to most environmental mediations, where the parties are complete strangers who meet only on a one-time basis, lack any inherent feelings of trust and respect, and generally view one another as "the enemy." Thus, with the exception of some local environmental disputes, most are unlikely candidates for ADR.

Therefore, litigation and legislation may still be the best alternatives for citizen groups. Such processes may actually strengthen the influence of citizen groups in environmental matters by bringing issues out into the public arena.[143] Litigation in particular offers empowerment for citizen groups[144] because, unlike ADR, litigation forces action and allows the aggrieved parties to set the agenda.[145]

V. CONCLUSION

Although environmental ADR has proven successful in some cases, it should be approached with skepticism. Frequently the most effective methods of achieving gain in the environmental field will be through the public processes of legislation and litigation. Any public interest group considering alternative processes must be very careful to evaluate the costs and benefits of such an action and must know their "best alternative to a negotiated agreement" (BATNA).[146] However, when parties approach mediation with full knowledge and preparation, they can use it to achieve their interests and to preserve the environment.

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141. *See* TALBOT, *supra* note 3, at 91.

142. *See*, *e.g.*, Christine M. Reed, *Mediation and the New Environmental Agenda, in* MEDIATING ENVIRONMENTAL CONFLICTS: THEORY AND PRACTICE 14 (J. Walton Blackburn & Willa M. Bruce eds., 1995) (discussing disputes involving forest plans).

143. *See* BACOW & WHEELER, *supra* note 2, at 12.

144. *See id.*

145. *See id.*

146. *See* FISHER & URY, *supra* note 119, at 97.

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