

February 2019

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### Recommended Citation

Francis E. McGovern, *Trust and the SRBA Mediation*, 52 IDAHO L. REV. 335 (2019).

Available at: <https://digitalcommons.law.uidaho.edu/idaho-law-review/vol52/iss1/7>

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# TRUST AND THE SRBA MEDIATION

FRANCIS E. MCGOVERN\*

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## I. INTRODUCTION

Trust is one of the cornerstone elements in successful mediation of complex disputes. This is particularly true in the resolution of the Snake River Basin Adjudication controversies. The concept of trust, however, is in itself complex and difficult to unpack. In the context of relations between tribes and the U.S. government, for example, the “trust” obligations do not have the happiest of histories. The role of trust in the SRBA was both personal and institutional, adding to the multi-layered nature of the negotiations. For a mediator, engendering trust in a negotiation is equally complicated, but an appreciation of its importance and how it can be achieved among and between the various participants to a negotiation is critical in circumstances like the SRBA. On the other hand, trust in a mediator can be both simple—a binary reaction of yes or no—and graduated during an extended mediation process. Likewise, trust among and between all the participants in a mediation can be equally simple or complicated.

## II. THE THEORY OF TRUST IN NEGOTIATIONS

Defining trust has become its own enterprise. Most analysts focus on the context where the word is used. From a functional perspective, trust has been defined as “social integration . . . cooperation . . . and complexity reduction.”<sup>1</sup> Other authors define trust by what it is not: faith and confidence.<sup>2</sup> For purposes of negotiation theory, trust goes from shared cultural norms that reduce the noise that inhibits cooperation and leads to the possibility of mutual gain.<sup>3</sup>

According to Francis Fukuyama in *Trust*, the phenomenon of trust is cultural, based upon societal “norms, rules, moral obligations, and other habits.”<sup>4</sup>

“Law, contract, and economic rationality provide a necessary but not sufficient basis for both the stability and prosperity of post industrial societies; they must as well be

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1. KIERON O’HARA, *TRUST: FROM SOCRATES TO SPIN* 69 (2004).  
2. *Id.* at 21.  
3. *Id.* at 3–12.  
4. FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 7 (1995).

leavened with reciprocity, moral obligation, duty toward community, and trust, which are based in habit rather than rational calculation.”<sup>5</sup> In essence, trust leads to the “ability of people to work together for common purposes in groups and organizations”: social capital.<sup>6</sup> Conversely, distrust that exists in many cultures that have primarily kin relationships inhibits the ability to create cooperative economic enterprises.<sup>7</sup>

Other authors proposed that trust is, at its base, rational: “trust is, in some sense, in our interests . . . we did it because, however hard headed we are, we feel that in some sense we will be better off. It’s a foundation for the new capitalist society, where social stability can exist despite the mutual antagonism of competition and free markets . . . .”<sup>8</sup>

In his *Making Democracy Work: Civic Traditions in Modern Italy*, Robert Putnam explores democratic institutions—social, economic, and cultural—that lead to “the character of civic life, into the austere logic of collective action . . . .”<sup>9</sup> In comparing the north and south of Italy, he explores the “failure to cooperate for mutual benefit . . . .”<sup>10</sup> and the “dilemmas of collective action . . . .”<sup>11</sup> Although he focuses on the “forms of social capital, such as trust”<sup>12</sup> that engender the “moral resources” necessary for cooperation, he also envisions a rational basis for trust. “Virtually every commercial transaction has within itself an element of trust, certainly any transaction conducted over a period of time. It can be plausibly argued that much of the economic backwardness in the world can be explained by the lack of mutual confidence.”<sup>13</sup>

Pushing farther into the rational basis theory of trust, game theorists have studied the lack of cooperation in the tragedy of the commons, public good, the logic of collective action and the prisoner’s dilemma. By using sophisticated mathematical and computer modeling, Martin Nowak in *Super Cooperators* has analyzed “altruism, evolution, and why we need each other to succeed.”<sup>14</sup> Starting with the premise that Darwin’s theory of evolution dictates that “cooperation is irrational” and contrary to the self interest inherent in “survival of the fittest,”<sup>15</sup> he explains the logic of why “would-be competitors decide to aid each other.”<sup>16</sup> In his effort to understand cooperation, Nowak explicates five mechanisms that lead to cooperation,<sup>17</sup> all based on reciprocity.<sup>18</sup> He models multiple strategies for individual betterment and concludes that “clusters of cooperators can prevail, even if besieged by defectors.”<sup>19</sup> Going full circle from a soft to a hard perspective toward trust, Nowak concludes that “groups with meaningful social norms outcompete other groups.”<sup>20</sup>

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5. *Id.* at 11.

6. *Id.* at 10.

7. *Id.* at 336.

8. O’HARA, *supra* note 1, at 48.

9. ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 3 (1993).

10. *Id.* at 161.

11. *Id.* at 169.

12. *Id.*

13. *Id.* at 170.

14. MARTIN A. NOWAK, *SUPER COOPERATORS: ALTRUISM, EVOLUTION, AND WHY WE NEED EACH OTHER TO SUCCEED* iii (2011).

15. *Id.* at 14.

16. *Id.* at xiv.

17. *Id.* at 270–71.

18. *Id.* at 28.

19. *Id.* at 80.

20. *Id.* at 83.

Translating these analyses into the world of negotiations leads to the conclusion that parties can achieve mutual benefit through cooperation, and the foundation of cooperation is the establishment of trust between them. From an economic perspective, the goal of negotiation is to push into the northwest quadrant of a graph of benefits, maximizing the benefits in integrative bargaining rather than viewing the negotiation as a zero sum game.<sup>21</sup> At the same time, this approach to negotiation attempts to reduce the costs to each side so that the outcome can be easier to achieve. The concept is based on joint gains, not individual gains. Both sides can be better off by cooperating.

The process of achieving that outcome in a world where hard bargaining techniques and defection are always present called for an incremental approach of testing levels of reciprocity and creating trust. The preferred negotiating posture is to move by “baby steps” to insure that the cooperative approach to negotiation is reciprocated by the other side before proceeding further.<sup>22</sup> Once that mutual reciprocity is sufficiently established, the parties can begin to trust each other and engage in cooperative bargaining.

At the end of the day, there is inevitably some level of excess benefit to one side or another; at least a marginal zero sum game. A high level of cooperation allows the parties to “satisfice,” accept the good rather than the perfect, because it is superior to any non-negotiated outcome.

### III. TRIBAL TRUST

We should place our trust intelligently, with an eye to moral rectitude. There are many examples where excessive trusting has led to downfall. As a peculiarly egregious example, consider the unfortunate Native Americans. Faced with an unstoppable flood of European settlers, their representatives negotiated with the U.S. government about the ownership of land and compensation; their representatives were actually well briefed and not under any illusions about government settler policy. But each time, they trusted the government to keep agreements; the government never did, the settlers pushed their way through the Pacific . . .<sup>23</sup>

Needless to emphasize, tribal trust in state and federal governments should be suspect. That is not to say that an enforceable agreement cannot be superior to its alternative of a litigated outcome. Trust can be established both in the negotiation process with or without a mediator and in the mechanism of enforcement. Although a cultural basis for trust may not exist, trust in a mediation and the negotiation process can be an adequate surrogate to lead to an outcome with superior benefits and lower costs than a judicially imposed solution. This is particularly true in a natural resource dispute where the judicial tools are limited and the problem may demand a far more sophisticated solution.

At the same time, internal tribal trust is a critical variable both for the tribe and for all the other parties. Popular support for the negotiators is essential to achieve a consensual outcome at the end of the day. That internal consensus is also essential to lead the other parties to a negotiation to act reciprocally without fear that their ultimate approval

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21. See generally HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982).

22. LEIGH L. THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR*, 189–203 (2d ed. 2001); see generally CARRIE J. MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* (2d ed. 2011).

23. O'HARA, *supra* note 1, at 17.

of a negotiated outcome will not have sufficient support by the tribe to achieve a sufficient level of finality.

#### IV. STATE AND FEDERAL TRUST

Inherent in government is leadership change and turf battles, both of which can inhibit cooperation internally and externally. Most of these problems can be surmounted by communication, internal negotiation, and inertia and legal constraints for reopening solid resolutions. In any negotiation, however, the parties in general and a mediator in particular must be assured that a negotiated outcome is binding. Parties will resist situations when there is a risk of being second-guessed or put into a position where they are bargaining against themselves.

As with tribal governments, trust in a mediator can be a surrogate for trust among the parties. A more difficult task for a mediator is to mediate both the issues among the parties and issues within a given party. Sometimes it is necessary to even add another mediator rather than having a single mediator wear multiple hats. More often, however, there will be governmental officials who are sufficiently experienced in cooperative negotiation and who can serve a mediation role to insure an internal consensus.

#### V. NON-GOVERNMENT ENTITIES AND TRUST

Probably the most challenging arena for trust is in the context of non-governmental entities who are not necessarily a party but who have enough leverage to be necessary participants in a negotiation. Some of these entities can have no desire to cooperate—regardless of levels of trust—because of their internal business models or even behavioral models. If their sources of funding are dependent on intransigence, there is little motivation to do anything other than oppose a negotiated outcome. Their task then becomes whether or not they have veto power over any given party.

Generally there are non-governmental entities that are more interested in furthering interests other than partisan fund raising or behavioral gratification. They can become helpful resources for establishing a consensus if they feel comfortable with a process that allows them to reciprocate and be cooperative. Here trust in the mediator can be a useful surrogate as well. Again, the mediator needs to be careful about wearing too many hats; but there are usually individuals in the private sector or in government who have the necessary experience and perception to assist in achieving internal agreements.

#### VI. ENGENDERING MEDIATOR TRUST

In the context of the SRBA, there were three levels of engendering trust in the mediation and in the mediator: understanding, optimism, and leadership. In many mediations, the first two elements are ubiquitous, but the role of mediator in pursuing an active strategy to achieve resolution is controversial. An active strategy, however, can manifest itself in various forms, both obvious and less than obvious. Remaining deferential to a party or parties can, for example, be an integral part of an active leadership strategy.

**Understanding:** Parties expect and appreciate a mediator's understanding of their stated positions. An appreciation of their unstated position or interests is a more delicate proposition. Regurgitating stated positions with sufficient nuance to exhibit an understanding is a fairly straightforward proposition. Doing so with sufficient emotion to show a more basic and complete appreciation is more difficult. Generally there is a need for

both more repetition and time to allow the party or parties to have a full and complete opportunity to express their positions and to allow the mediators to establish a sense of sincere appreciation of their positions. The behavioral needs of the parties to express their positions, and, ultimately, their interests should not be understated. One of the great benefits of the informality of mediation is to allow the parties to participate in an ultimate resolution at their own pace and in their own manner.

Interests are another matter altogether. Sometimes the revelation on the part of the mediator of actual interests is better shared and sometimes better kept within the mediator's own calculus of a potential resolution. There is usually a boundary between what a party feels is proprietary or even doesn't even fully comprehend and what the mediator is at liberty to explicate. Understanding in silence may be a superior tactic in circumstances involving delicate issues rather than exhibiting understanding. Regardless of the context of revealing an understanding, there must be sufficient empathy and "heart" in the communication so that there is both an intellectual and emotional connection that promoted "faith" in the mediator. That faith should transcend the literal words expressed to a more visceral level of confidence that enables a party to make a calculated leap to the next level of negotiation.

**Optimism:** If a mediator is not realistically optimistic about the mediation process, it is difficult to convince the parties to make the necessary steps to achieve consensual resolution. Sometimes that realistic optimism may focus not on the level of water in a glass, but the size of the glass *ab initio*. Other times that realistic optimism may just be a high level of enthusiasm for the process of negotiation.

Another aspect of being positive about resolving a conflict is the ability to show creativity in possible solutions. If the parties are unable to see a pathway to a successful negotiated outcome, the ability of the mediator to suggest alternative pathways, even if there is no immediate acceptance of those suggestions, can create an aura of confidence that the mediator can devise a pathway that might ultimately be successful. At the same time, that creativity can assist the mediator in defining the actual benefits and costs of each potential solution to educate the parties in their decision-making processes.

**Leadership:** A mediator who is solely a "cheerleader" in a negotiation generally is not as effective as a mediator who has a strategy for reaching consensus, even if that strategy renders the mediator's role to more "cheerleader" than negotiation leader. In a dispute like the SRBA, where the parties will have a continuing relationship in an evolving natural resource, it can be critical to have them believe that "they," not the mediator, devised the resolution. Closure of the immediate dispute is the prelude to subsequent conflicts and the parties need to be sufficiently invested in the outcome to surmount future challenges that will inevitably arise. The mediator should be able to subordinate any credit for an outcome to the needs of the parties. The mediator's strategy, therefore, should be subtly aggressive in leading the parties, not from behind, but by not appearing to be in front.

This more subtle form of leadership can manifest itself in an indefatigability that assures the parties that the mediator will not give up on the process. Even when there are substantial alterations in the negotiation terrain—the leadership of the parties change; the financial climate deteriorates; the natural resources become altered—the mediators ability to keep the negotiation process moving is even more essential. Natural resource cases are not for the timid; oftentimes there is no obvious "end of the day" to preempt a settlement. Perseverance and longevity can assist the parties in finding a "court house steps" end game or a mutually recognized superior outcome.

## VII. TRUST IN AN AGREEMENT

Many an agreement has fallen apart between term sheet and signed document. In the SRBA, the signed document was the agreement; it contained a detailed enumeration of the understanding among parties leaving open only those issues that could not, because of the nature of a changing resource, be defined. The agreement itself embodied the resolution with sufficient specificity that the parties could trust the outcome met their expectation.

One of the benefits of negotiating in the world of natural resources is the need for future cooperation as an agreement is implemented and as the natural resources change. This necessary cooperation can engender future cooperation if the parties decide to do so. Often the foundation for that future cooperation is confidence in an enforcement mechanism that either is the agreement itself or externally. Punishment for defectors is often an essential element of cooperation. We often cooperate better under duress, punishment, or the prospect for punishment, can be necessary to enhance trust in an agreement.

It is not uncommon to find a dispute resolution mechanism, or at least a process for resolving emerging new disputes, included in the terms of the agreement. Essential, however, is a belief that some external authority—be it societal pressure, inertia, legal decree, or other—will enforce the agreement. This enforcement mechanism can actually strengthen a negotiated agreement by insuring that defectors will not be allowed to prevail over cooperators.

There are usually contingencies that arise, either anticipated or unanticipated, that can challenge the stability of an agreement. This is when the trust nurtured during the mediation process becomes critical. That trust can be reinforced by resolution that truly has joint gains and benefits for each party that exceed the cost of achieving those benefits and are superior to any alternative.

## VIII. CONCLUSION

Negotiation theory teaches us that trust creates a negotiation environment conducive to cooperation and that cooperation is critical to achieving mutual gains in a negotiated outcome. In a mediation, the parties can often use trust in a mediator as a surrogate vehicle to achieve these mutual gains. Mediators can create a requisite level of trust through understanding and optimism. That trust, albeit a necessary element of any successful mediation, is not sufficient without a level of leadership that is appropriate for any given case. In the SRBA the mediator's leadership was subordinate to the parties' appreciation that they owned the outcome. That ownership translated into the ability to confront and surmount future challenges that are inherent in any natural resource agreement. The trust the mediator had in the parties has been vindicated. The parties have now exhibited their mutual interest in maintaining a positive relationship for mutual gains.