

# POWER BALANCE

## Increasing Leverage in Negotiations with Federal and State Governments

### LESSONS LEARNED FROM THE NATIVE AMERICAN EXPERIENCE

#### STUDY GUIDE

This study guide is provided to enrich reading of the book. The questions are designed to help readers focus on central points raised in the narrative and thereby deepen their understanding of the subject matter. These questions can also serve as topics for in-class discussions among students who are reading the book as part of their curriculum on conflict resolution.

#### Preface

1. The author defines *negotiation* as a process by which the parties “work things out by talking things through.” Negotiation thus involves listening, being clear about what you want to achieve, providing underlying reasons, defining some rules of behavior, being persuasive rather than coercive, and making sure that the other party gets some value from the agreement and wins too. To what extent do you fit the profile of a good negotiator? What are your strengths, and in what areas do you need improvement?
2. Why is negotiation considered to be the most common and widely used strategy for resolving conflicts?
3. Can all conflicts be resolved through negotiation? To what extent do you agree with the author’s response to this question?

4. What do Native peacemaking traditions have in common with “interest-based negotiation” (IBN)?
5. In what ways did Native nations benefit from the US government’s program in the 1960s to provide federal subsidies to legal assistance programs in Native communities?
6. What two kinds of conflict do Native communities have that lend themselves to resolution through negotiation?
7. The book is written to benefit many different groups of people in American society today. Which different groups do you think could benefit from reading the book, and why?

## Introduction

1. Identify at least four different reasons why parties to a conflict may choose *not* to resolve that conflict through direct or mediated negotiation.
2. The Bureau of Indian Affairs (BIA) in the US Department of the Interior has jurisdiction over Native nations. Among other things, the BIA offers an adjudication (a quasi-judicial) process to tribes to settle their internal disputes. A contested tribal council election is one example of a dispute that a tribe could take to the BIA to investigate and rule on. What are the plusses and minuses of tribes referring their conflicts to this BIA-sponsored quasi-judicial appeal process?
3. The Indian Dispute Resolution Service (IDRS) administered the Torres Martinez Tribal Council election when the tribe was in the middle of an internal conflict over the dumping of toxic soil on its reservation. What was novel about how IDRS administered the election to minimize the chance that it would be challenged by the losing faction? What was the outcome?
4. Why do you think that tribal elections can sometimes be particularly contentious in Indian Country?

## Chapter 1. Negotiation as a Strategy for Conflict Resolution

1. The text describes twelve dispute resolution strategies in general use today throughout the world. The chapter’s typology of ways of dealing with conflict ranges from mild forms of

antagonism in which the conflict is not even acknowledged to all-out war, the most violent strategy. List the basic differences (a) between litigation and negotiation, (b) between arbitration and mediation, (c) between arbitration and litigation, and (d) between Native peacemaking and litigation.

2. The various forms of direct action the chapter describes have at least one thing in common: they are designed to influence public opinion and persuade the public to choose sides in a conflict and support the party that is appealing to it. Have you ever participated in direct action aimed at influencing the public to weigh in behind the party or cause you were supporting? If so, describe what you did and the type of impact you believe you had as an individual and as a member of the group you supported. If not, can you think of a group engaged in a local conflict that has sought to sway public opinion in its favor? What arguments did the group make? What sort of direct-action tactics did it employ?
3. Mediation is an “extension of the negotiation process.” What do you think this means? When, if ever, does mediation become necessary during a negotiation? How is mediation initiated? How is a mediator chosen?
4. Give three examples of adversarial (competitive) forms of dispute resolution, and two examples of collaborative (cooperative) forms of dispute resolution.
5. What are the basic differences between adversarial and collaborative forms of dispute resolution? What are the objectives of each?
6. To what degree is aggressive adversarial behavior directed by an attorney in court against the other party in the case inappropriate, improper, or unproductive? Explain your response.
7. To what degree is aggressive adversarial behavior directed by a negotiator against the other party in a dispute inappropriate, improper, unproductive? Explain your response.
8. In negotiation or mediation, how likely is a winner-take-all (or “I win, you lose”) mentality and approach to succeed in getting the parties to reach an agreement? Explain your response.

9. Of the two types of negotiation the text identifies—collaborative (win-win) and positional or adversarial (win-lose)—why does the author favor the collaborative approach? What are the likely consequences of resorting to positional or adversarial negotiation and using threats, intimidation, and coercion, rather than persuasion, to get what you want?
10. What factors could motivate one party to make sure that the other party in a dispute comes away from negotiation believing they've gotten a win? How does your party benefit and how does the other party benefit?
11. Describe the concept of managing expectations in negotiations. Why is it sometimes necessary? How is it done? Can you think of examples in your own life when you managed (lowered) someone's expectations? What was your motivation for doing so? What should you do when someone tries to lower your expectations during the negotiations? Are there times when you should lower your expectations?

## Chapter 2. Traditional Native Approaches to Negotiation and the Field of Dispute Resolution

1. One of the prominent principles of traditional peacemaking is consensus-based decision making. What are the advantages and disadvantages of consensus-based decision making? How does it differ from majority-rule decision making? Compare consensus-based decision making to win-win negotiation. What are the similarities and differences?
2. To what extent do parties have to trust and respect one another when they enter negotiations? What role do procedural ground rules play in developing trust and respect between the parties to a dispute? Describe specific measures negotiators can take to build trusting relationships as part of the conflict resolution process.
3. What qualities should Native communities look for in leaders whom they select to serve as their peacemakers and negotiators? List at least five personal qualities you would look for in a person who would represent you and your community or organization in an important negotiation.

4. What are the relative advantages and disadvantages of the way community leaders were traditionally selected versus the current reliance on democratic elections to select the most popular candidate?

### Chapter 3. Planning and Preparation

1. What is the purpose of discussing with your negotiation team and with the other side's negotiators the origins and causes of the conflict?
2. How can a discussion of the costs (current and future) of the persistence of the conflict help to motivate parties to enter, and to remain in, negotiations?
3. How can a discussion of the possible benefits of resolving the conflict through negotiations help to motivate the parties to participate and work harder on reaching an agreement?
4. In negotiations both parties listen to the other side to learn their interests and the problems they think need to be discussed and solved. This mutual listening is done early in the process and throughout the conversation. To what extent do you think that discussions about origins, costs, and benefits can help bring to light and clarify what the other party's interests and agenda items are? Explain.
5. The well-known social psychologist Abraham Maslow identified seven basic human needs that drive or motivate all human beings. What role can these needs play in the negotiation process?
6. The author distinguishes interests from proposals. Interests are the more general underlying concerns that a negotiator seeks to satisfy. In contrast, proposals are specific ways to satisfy, serve, promote, advance, or protect those interests. Interests are the "why," the reasons the proposals are being put forward. The proposals should be "wrapped" in the interests so that the other side understands why these points are important to the negotiator putting them forward.

Negotiators who are anchored in their underlying interests have greater flexibility in the discussion than those who are bound to specific proposals. The chapter provides numerous

examples of proposals that negotiators could make to satisfy their underlying interests. Take, for instance, an employee whose interest is strengthening their financial security. What does the employee gain in negotiation with their employer by focusing on the employee's general interest in financial security instead of on one proposal, such as a salary increase?

7. A negotiator's expectations help determine whether the party believes they've had a win or a loss. In a typical negotiation, when are these expectations formed? How are they formed? To what extent can expectations change in the course of the negotiation?
8. Formulating and following an agenda are essential to a productive negotiation. Which underlying interests (or basic human needs) identified by Maslow are served by having and following an agenda? Name at least three. (If necessary, reread the section on Maslow.)
9. In building an agenda, why should one use language that is general, value neutral, and noncontroversial? What other guidelines should negotiators on the two sides follow when listing the agenda items?
10. Have you ever attended a meeting for which no agenda was established or followed? Describe your experience and what you observed during the meeting: Was any agreement reached? Were the interests of any of the people attending met? What level of satisfaction did the meeting organizers leave the meeting with?
11. Imagine you are standing on a crowded street corner with the other party to a negotiation. You're both waiting for a traffic light to turn green in the middle of a rainstorm. Based on what you've read about making and exchanging proposals, is this the best time to propose a deal to the other side? Why or why not? What are ideal conditions for making and exchanging proposals? List at least seven preconditions.
12. An all-too-common approach to making proposals is to ask for more than one expects in order to get at least a portion of it. To what extent does this practice conflict with what you know about appearing credible to the other side? What other

approaches to preparing proposals are there? Explain how they might work better.

13. Explain the importance of maintaining confidentiality and limiting the sharing of information with people not directly involved in the negotiations. How could the negotiations be undermined if confidentiality is broken by one side or the other? How might negotiators' fear that confidentiality will be broken affect their behavior during the negotiations?
14. The author notes the tension between two competing objectives. On one hand, a negotiation team wants to limit the amount of information going to people not directly involved in the negotiation. On the other hand, the negotiator's constituents expect and need to receive some information to stay current with the negotiation's progress and do not want to be surprised by outcomes far different from their expectations. Do you have any ideas about how to reduce this tension between wanting to maintain some secrecy during negotiations and needing to keep constituents in the loop and their expectations realistic?
15. What is the difference between making a concession and offering a quid pro quo? Describe each kind of offer. What problem can emerge when negotiators get the two confused?
16. What is proactive listening? Identify and discuss at least three different techniques for proactive listening.
17. The point is made that you should not ignore or reject a proposal made by the other side. You should rather view it as a starting point and as something that can be built on, modified, expanded, edited, and eventually used as the basis for a more detailed and comprehensive agreement in which the interests of all parties are met. Imagine that the other side makes a proposal that you know your constituents will reject outright. Do you reject it, or do you use it as a starting point toward an agreement that you and the other party will be happy with? What are the advantages and disadvantages of outright rejection versus conditional acceptance?

## Chapter 4. Creating the Three Satisfaction

1. Identify and describe the “three satisfactions” that negotiators should try to build into the negotiation process to ensure a good working relationship and an eventual win-win agreement.
2. People involved in conflict are typically driven by strong negative emotions. They are often suspicious, hostile, distrustful, afraid, and angry and want redress of their grievances. These emotions are often expressed during the conflict resolution process, often to the point of disrupting it. How does the standard courtroom handle the likelihood that these emotions might be expressed and someone might get hurt? That is, what rules are in place and precautions taken to contain emotional outbursts? What ground rules can be put in place ahead of time to protect the negotiation process from being disrupted and derailed by the expression or acting out of these negative emotions? What can negotiators, in particular, do to prevent such disruptions?
3. What is the purpose of negotiating a set of procedural ground rules before discussing the substantive problems listed on your agenda? Name at least five functions or purposes of a procedural agreement.
4. Why is it important to inform the other side *before the meeting* who you intend to bring with you to the negotiation session? In each of the following situations, what might you propose, short of excluding the person from attending the negotiation session, that could satisfy the interests of both parties? (a) The other side objects to someone you intend to bring, because they “glare” at members of their negotiation team. (b) The other side objects to your asking a lawyer to join, because they do not want lawyers at the table. (c) You object to the other side inviting someone whom you know to routinely engage in name calling and personal attacks.
5. How would you respond if the other side suggested that everyone sit together rather than separating into two teams sitting opposite each other? Why might a party prefer one seating arrangement over another?
6. What would you do if an official you were negotiating with suggested that all sessions take place in his government agency



offices? Would this likely be regarded by you and your team as a neutral location? Why or why not? What alternative meeting places might you propose?

7. Why would allowing caucusing to take place during the negotiations benefit one side or the other in a dispute?
8. Describe the advantages of identifying in the procedural agreement who will sign off on the final agreement, and over what period of time, before it becomes legal and binding? Which of Abraham Maslow's basic needs or underlying interests are satisfied by clarifying these points?
9. What are the advantages and disadvantages of each of the following methods for making a record of the negotiations for future reference: a written transcript? meeting minutes? a list of explicit agreements? an oral agreement (i.e., no written record)?
10. Why should the parties openly address and discuss their cultural differences? Name at least three examples of cultural difference that might need to be addressed before the parties all feel equally welcome and accommodated.
11. List at least five qualities of the language used in the final agreement to best capture the promises that have been negotiated. Why is careful crafting of the agreement language so important?
12. Describe the "future dispute resolution" provision in a final agreement. Why do you think its inclusion is important to the success of the negotiation, to the longevity of the agreement, and to the long-term relationship between the parties?
13. How does building a trusting relationship with the other party in a negotiation contribute to getting an agreement? List at least five steps you think should be taken to build such a relationship. In which kinds of conflict would relationship building be especially crucial for success in negotiations?
14. Review the six stages of negotiation that are listed in the book. Identify any questions you still have that need further clarification. If possible, discuss those questions and concerns with classmates.

## Chapter 5. Meeting the Structural Challenges of Negotiating with Governments

1. This chapter examines the peculiar challenges that Native nations face in negotiating with remote, often multilayered bureaucratic government agencies. What structural and cultural challenges do Native nations have to overcome in order to gain access to and persuade a government agency to sit down with them and negotiate in good faith?
2. In most historic treaties negotiated with Native nations, the federal government promised the nation a reservation homeland together with perpetual financial support for certain basic necessities (e.g., health, education) in exchange for the tribe ceding substantial portions of their ancestral lands. After the reservations were defined in these treaty negotiations, the federal government unilaterally reduced the size of the promised lands. Name and discuss at least three different initiatives by the federal government that resulted in the further loss of Indian lands.
3. The author states, "Negotiation is a process, not an event." What do you think he means by this statement? What must Native leaders do to prepare for this reality?
4. Native leaders involved in government-to-government negotiations have to be operating in three different dimensions at the same time. What are these three dimensions? What is the primary reason for this complexity? Briefly describe what should take place in each of these three dimensions.
5. What role does the negotiation team typically take in defining the Native nation's negotiation objectives and strategy? Who else will be involved in defining and approving these before they become official guidelines for the upcoming negotiations?
6. Should the negotiation team perform as obedient messengers, essentially doing as they are told by the organization's bosses, who will ultimately approve and sign the agreement to be negotiated? Explain why or why not.
7. What authority should the negotiation team have to finalize the agreement? What does it mean to say that the negotiation team will have the "authority to recommend"?

8. Describe the differences between *consultation* and *negotiation* as these options apply to the government-to-government relationship between Native nations and the federal government.
9. Why should negotiation teams be in communication with their bosses (the ratifiers) throughout the negotiations? How do these periodic check-ins serve the tribe's team and the agency team? What is likely to happen if there is no communication until the end, when the bosses are asked to approve the recommended agreement? Why do you think some negotiation teams do not engage in these ongoing communications?
10. To what extent do you agree or disagree that a tribal government's negotiation team should avoid placing people with different opinions and expectations on its negotiation team? Explain your position. What is lost and what is gained by having diversity on the team?
11. What are some reasons you might call a *caucus* during negotiations?
12. When your team calls a caucus for your team members during the negotiations, who should leave the room—your team or the other team? Explain your response.

## Chapter 6. Leveraging Power

1. The chapter describes a government-to-government negotiation between the Klamath Tribes and the Freemont-Winema National Forest office in southern Oregon. The tribes sought commercial contracts to engage in work on the national forest—such as thinning, fuel reduction, converting biomass into energy resources—that would provide tribal members with employment and training opportunities and restore forest health. The forest supervisor refused. What strategies did the tribal negotiation team use to increase its negotiating power and convince the Freemont-Winema National Forest office to agree to the tribe's proposals? Describe at least five different strategies used.
2. The chapter reveals that as long as the Klamath Tribes relied exclusively on direct talks to persuade the leaders of the local

national forest to change their policies, the forest remained under the control and domination of that local agency. The tribes had to play by the agency's rule. Once the tribes secured resources, supporters, and spheres of influence that were not under the agency's control, they increased their leverage and became much more persuasive. Identify five different strategies the tribes used to extend the battlefield beyond the local agency and increase their negotiating power.

3. The chapter describes a comprehensive, multifaceted negotiation strategy initiated by the Stanislaus County Tenants Rights Association to get its county government to address a largely ignored housing crisis facing low-income and minority tenants that involved a housing shortage, high rents, substandard living conditions, exploitive landlords, and unprosecuted code violations. This example involves essentially disenfranchised Mexican American, Black, and low-income white residents and organizations in Stanislaus County who were directly affected by the bad housing conditions.

Describe eight strategies the Tenants' Rights Association and the other minority and low-income organizations implemented to highlight the issues and mount negotiating pressure on the county to respond positively to their peoples' initiatives. Which, if any, of these strategies could also be helpful in increasing Native nations' negotiating power in transactions with federal, state, and local governments? How would these strategies work?

## Chapter 7. How the Timbisha Shoshone Tribe Got Its Land Back: A Case Study in Government-to-Government Negotiations

1. The Timbisha Shoshone Tribe was involved in an extended negotiation to reacquire its ancestral homeland in Death Valley. These lands had been taken by the federal government in 1933 when it established Death Valley National Monument.

Two years after beginning negotiations in 1996, the tribe was still unsuccessful in obtaining any significant concessions from the four federal agencies involved. Until that point the tribe could make no headway because the National Park Service

(NPS) was essentially in control of the process and the tribe was focused almost exclusively on working through representatives of local and regional NPS offices. However, once the tribe took its cause to a larger audience beyond the NPS, it was able to shift the balance of power and enjoy greater leverage. Identify and describe the negotiating strategies that the tribe initiated outside the control of the local and western regional offices of the Park Service to increase its negotiating leverage.

2. The author suggests that negotiation can become either adversarial or collaborative, depending on the style of the negotiator. That is, the negotiator can resort to threats, intimidation, and coercion or can rely on persuasion to reach agreement. The main way to be persuasive is to have a conversation in which the negotiator provides the other side with the rationale for the proposals he is offering. Essentially, the information that he shares (which is missing in positional negotiations) consists of his underlying interests, which indicate *why* his proposals are important to him and why they may be important to the other side as well.

At several points in the Timbisha Shoshone negotiations, the parties avoided getting bogged down in arguing over proposals or positions by taking a step back to focus on the underlying reasons for making the proposals, that is, the interests they were designed to serve. This strategy was key to keeping the conversation going. These instances include the following:

- a. Once the tribe realized that its proposal to transfer 750,000 acres into trust land for the tribe was politically unrealistic, it *reexamined* what its underlying reasons were for wanting the land. What were the interests the tribal negotiation team identified? Was the ownership of real property among those listed?
- b. At one point the tribal and agency negotiation teams started to argue about a proposed desert inn in the national park. While they both agreed in principle to having a tribal-owned inn, they had very different ideas about how large it should be. The federal team proposed a maximum of seventeen rooms, while the tribe suggested one hundred rooms. What common interest

did the parties identify that would resolve the issue of the proposed inn's size?

- c. In the course of the negotiation the parties discussed establishing a million-acre "Timbisha Shoshone Natural and Cultural Preservation Area." This area would encompass and protect the tribe's seven sacred areas, and the tribe and the NPS would *jointly* pursue innovative resource management projects in the area. The question arose whether the tribe would request that these lands be transferred into the status of tribal trust land. Eventually, once the tribal negotiation team discussed the intended purposes for the land set-aside, its members agreed that transfer into trust land was not essential. What were the interests the team identified regarding this preservation area, and how were these satisfied?
- d. At the beginning of the negotiation, the Timbisha Shoshones proposed that the federal government transfer into tribal trust land 5,000 acres surrounding the tribe's residential and mesquite bean-harvesting area in the National Park. The federal team anticipated that putting this much park acreage into trust status would not be acceptable to the federal government. However, the parties agreed on a different legal status that met the interests of both parties. What were the tribe's underlying interests regarding this parcel of land, and what legal status for it was ultimately agreed to? Describe this part of the agreement.
- e. The author suggests that the ultimate success of the Timbisha Shoshone-NPS negotiation process during the second round was partly attributable to an informal communication track that emerged among the negotiators, a channel that operated parallel to the formal process. Describe how this informal track worked. In your view, what are some advantages of having this informal track? What are some of the dangers of having an informal process operating parallel to the formal process during a negotiation?