

# **MEDIATION: AN IGNORED OPTION?**

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**CHAPTER 1**

**TABLE OF CONTENTS**

INTRODUCTION ..... 1

ESTABLISHMENT OF MEDIATION PROGRAMS ..... 1

USDA-FARM SERVICE AGENCY..... 1

STATE MEDIATION PROGRAMS..... 1

ALTERNATIVE DISPUTE RESOLUTIONS: MEDIATION AND OTHER PRACTICES ..... 1

MEDIATION ACCESS AT STATE LEVEL..... 2

UNACCEPTABLE COSTS..... 3

APPENDIX..... 4

## MEDIATION: AN IGNORED OPTION?

### INTRODUCTION

American farmers and ranchers are tested at the dawn of each day by elements outside their control. Their worlds rise and fall with the prices of commodities, fluctuations in weather, and their ability to pay their debts in the face of unforeseen elements. With great grit and tenacity, American producers stare down this uncertainty through decades like the 1980s which were especially trying. Through this tumultuous period, the Federal government created the Farm Service Agency which enacted laws through the mid to late 1990s in order to provide avenues of reprieve and assistance for producers. During these decades, one avenue that was created under the Agricultural Credit Act of 1987 authorized the Secretary of Agriculture to help states develop USDA Certified State Mediation Programs and to participate in USDA Certified Mediation Programs. The creation of these programs and the intentionality of the access farmers and ranchers were granted is now more necessary than any other point in history<sup>1</sup>.

### ESTABLISHMENT OF MEDIATION PROGRAMS

The Agricultural Credit Act of 1987 was the legislation that made Mediation Programs available to producers as a means of providing dispute resolution avenues besides bankruptcy and the court system<sup>2</sup>. The intention in the establishment of these Mediation Programs was to assist all parties in facilitating the process toward resolution of disputes between producers and others like creditors. Some of the dispute areas can include "...farm loans, conservation programs, wetland determinations, rural water loan programs, grazing on national forest system lands, pesticides, and other issues determined by the Secretary of Agriculture."<sup>3</sup> By its very nature the mediation process is confidential, unbiased, and aimed at agreeable resolution for all parties involved.

### USDA-FARM SERVICE AGENCY

The Farm Service Agency (FSA) is the entity in the USDA that is tasked with making and guaranteeing loans to farmers and ranchers as a means to ensure the agricultural economy of the United States.<sup>4</sup> Commercial lenders may also service loans to these farmers and ranchers through applying for loan guarantees from the FSA. The intent of the FSA is not to become a long-

term lender to producers, but instead seeks to help them establish credit that would make obtaining commercial loans more possible. This intended purpose helps farmers and ranchers get their start or grow and expand their businesses. Along with providing funds, the FSA provides counseling and assessments of the farmers or ranchers operations. Though commercial lenders can provide loans through loan guarantees, they do not also provide all counseling and overview that the FSA provides. For a more extensive history, see the attachment labeled Figure 1.

### STATE MEDIATION PROGRAMS

Through grant funding provided by the USDA, Agricultural Mediation Programs provide producers, their lenders, and those directly affected with avenues for resolving disputes. As any affected party can request a mediation session, there are many different instances between these specific kinds of parties that can lead to the use of mediation. A USDA trained impartial third party helps the parties. For more specifics on State Mediation Programs, see Appendix.

### ALTERNATIVE DISPUTE RESOLUTIONS: MEDIATION AND OTHER PRACTICES

There are many avenues outside the courtroom system toward dispute resolution. These alternatives are not all equal in process or participant's agreement in final decision. To understand what sets mediation (and thereby State Mediation Programs) apart, an examination of each process is necessary.

Litigation or adjudication involves the formal court or judicial system. Those in conflict will usually be represented by attorneys and will either give decision making power to a judge or jury of their peers. Each case should be evaluated by its merits based on current laws. Judges help inform the jury of the laws that apply as do the lawyers during the process. Either the jury or judge will return a decision based on the information presented. The appeal process is usually available if the losing party chooses to pursue the case further.

Arbitration involves a third party, who is educated about the issue in dispute, and is granted the decision-making power for the parties in dispute. Like in mediation, this person is to be unbiased and neutral while facilitating the discussion. Unlike mediation, the arbitrator makes a final, binding decision after both sides have discussed the conflict.

<sup>1</sup> United States Department of Agriculture Farm Service Agency Outreach Staff Agricultural Mediation Program: Chester A. Bailey, Program Manager, 2004

<sup>2</sup> Your FSA Farm Loan Compass, FSA Responsibilities, pp. 48-52: [https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/Farm-Loan-Programs/pdfs/loan-servicing/farm\\_loan\\_compass\\_9-22-17.pdf](https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/Farm-Loan-Programs/pdfs/loan-servicing/farm_loan_compass_9-22-17.pdf)

<sup>3</sup> United States Department of Agriculture Farm Service Agency Outreach Staff Agricultural Mediation Program: Chester A. Bailey, Program Manager

<sup>4</sup> USDA Agricultural Mediation Program: Chester A. Bailey, September 2004. <http://www.mediate.com/articles/baileyC1.cfm>

Mediation is a process where an agreed upon third party, who is neutral and impartial, facilitates a discussion between two conflicting parties through communication practices while working toward an agreeable resolution for all concerned. In the case of agricultural lending, as stated above, the mediator has specific requirements in order to facilitate such sessions. The parties have the opportunities to describe the issues, discuss their interests, understandings and feelings, provide each other with information, and explore ideas for the dispute resolution. The mediator never makes decisions or gives advice. Their role is to remain neutral with the goal of steering all affected parties into an acceptable agreement<sup>5</sup>.

### MEDIATION ACCESS AT STATE LEVEL

As is federally mandated through Section 501 of the Agricultural Credit Act of 1987<sup>6</sup>, there are lenders who are opting out of participating in the mediation sessions through provisions in laws at the State level<sup>7</sup>. If a borrower requests a mediation session with a financial institution in the Farm Credit System (Farm Credit Banks, Agricultural Credit Associations, or Federal Land Credit Association) or a qualified lender, the lender must participate in the mediation session in good faith. In order to be considered a qualified or guaranteed lender, expertise in agricultural lending must be demonstrated by originating and servicing a sufficient volume of agricultural loans. FSA has a Certified Lender Program (CLP) and a Preferred Lender Program which offer streamlined application procedures and expedited actions for lenders who have a proficient record of farm loan making and servicing. FSA guarantees repayment of up to 90 percent of losses a lender may incur. For loans to certain beginning farmers and loans to refinance direct farm ownership loans, FSA provides a 95 percent guarantee. All loan guarantees are loss sharing, which means FSA will reimburse the lender for losses incurred if the loan goes into default, including loss of loan principal, some accrued interest, and certain liquidation costs. The FSA guarantees loans which are made and serviced by

qualified commercial, cooperative, or nonprofit lenders<sup>8</sup>.

Despite the clear value of State Mediation Programs in resolving conflict between producers and their lenders, some states have amended their laws to reduce the requirement for lenders to mediate. Texas, for example, allows lenders to lean on their own disclosures which protect them from having to attend arbitration sessions with producers who have borrowed from them<sup>9</sup>. Though mediation and arbitration are not similar in process, this arbitration law keeps the lender from having to meet with a distressed borrower to reach a mutually agreed upon and beneficial solution. Arguably the reasoning might be that the loan default results in a negligible loss to the lender as a guaranteed lender.<sup>10</sup> However, the spirit of the law requires participation in mediation by lenders is to help producers at such critical junctures.

As stated above, there is a Federal mandate for all qualified lenders to participate if the borrower requests mediation through a State Program and such programs exist in their state. Qualified lenders must cooperate in mediation by presenting and exploring all debt restructuring proposals discussed during the mediation and providing information to facilitate the mediation process. Qualified lenders may never require a borrower waive their mediation rights in order to receive a loan from them<sup>11</sup>.

Despite the clear intent of the law, qualified lenders have means to make this part of the federal law effectively obsolete. "Where federal law supersedes state law, state law is said to be preempted, meaning that it is not enforceable. There are three types of preemption: express, field, and conflict." State laws allowing for loopholes for lenders to opt out of the required, requested mediation sessions guaranteed in the Agricultural Credit Act of 1987, results in a form of conflict preemption. By that, "Where federal law and a state law are in conflict, the federal law will preempt that state law."<sup>12</sup> Clearly, the practice of qualified lenders being allowed to draft disclosures effectively opting them out of the mediation process, with support of laws

<sup>5</sup> McCorkle, S. & Reese, M. J. (2014). *Mediation theory and practice*. Thousand Oaks: CA. SAGE Publications.

<sup>6</sup> Section 501 of the Agricultural Credit Act of 1987, Retrieved from [https://www.fca.gov/about/BorrowerRightsFAQx.html#state mediation](https://www.fca.gov/about/BorrowerRightsFAQx.html#state%20mediation)

<sup>7</sup> Federal Arbitration Act (9 U.S.C. Sections 1-16. Retried from <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title9/content-detail.html>

<sup>8</sup> Evaluating the Relative Cost Effectiveness of the Farm Service Agency's Farm Loan Program. Retrieved from [https://www.fsa.usda.gov/Internet/FSA\\_File/farm\\_loan\\_study\\_august\\_06.pdf](https://www.fsa.usda.gov/Internet/FSA_File/farm_loan_study_august_06.pdf)

<sup>9</sup> See Civil Practice and Remedies Code: 154.021 Referral of Pending Disputes for Alternative Dispute Resolution

Procedure, (C) with reference to Federal Arbitration Act (9 U.S.C. Sections 1-16).

<sup>10</sup> Evaluating the Relative Cost Effectiveness of the Farm Service Agency's Farm Loan Program. Retrieved from [https://www.fsa.usda.gov/Internet/FSA\\_File/farm\\_loan\\_study\\_august\\_06.pdf](https://www.fsa.usda.gov/Internet/FSA_File/farm_loan_study_august_06.pdf)

<sup>11</sup> See [Section 4.14E of the Act; 7 USC §§ 5101 and 5103; § 617.7430]. Retrieved from [https://www.fca.gov/about/BorrowerRightsFAQs.html#state mediation](https://www.fca.gov/about/BorrowerRightsFAQs.html#state%20mediation)

<sup>12</sup> Feitshans, T. A., (2016). *Agricultural and agribusiness law: An introduction for non-lawyers*. Milton Park, Abingdon: Routledge.

at the state level is a case of conflict preemption. The intent in the Agricultural Credit Act to protect producers and their federally mandated right to alternative dispute resolution forums and should not be superseded by state law.

In Texas the Governor has designated Lubbock County and its Office of Dispute Resolution (a/k/a Texas Rural Mediation) as the provider for Texas. Since 2000, Texas Rural Mediation has facilitated an array of agricultural disputes thereby fulfilling the role of a State Mediation Program.

## UNACCEPTABLE COSTS

In the 1980s where producers and FCS lenders were in crisis financially, the Federal government legislatively provided a means to alleviate financial distress that could have led to catastrophic losses for the United States economy. Thirty years later, many producers are very much in crisis again, and the need for State Mediation Programs is more necessary now than ever. In the 1980s, the crisis was about monetary loss. Now the crisis is about the loss of life. “American farmers may have a higher rate of suicide than veterans<sup>13</sup>.” This is not just a crisis for producers; it is a crisis for the American people to address.

Producers are choosing to end their lives at an alarming rate. According to the Centers for Disease Control in 2016 “Farmers, fishermen, and forestry workers have the highest suicide rate of any occupation at 85 per 100,000 each year”<sup>14</sup>. Farmers and producers rise each day, undertaking the task of tending to the land they have deep connection to, and their efforts contribute to the economies of the United States and the entire global community of consumers in a way only they can. Their tenacity and passion for the commitment to that bigger, global picture should be met with compassion by everyone effected by the work they do. To state it more clearly, everyone who consumes anything is affected by the work farmers do. Their passion to farm and produce life-sustaining commodities that meet global needs deserves to be met with concern and action.

Financially, “farm income levels have hit their lowest point since 1985.” Between 2014 and 2015, “farm income dropped 95% and farm debt levels have increased by 25%.”<sup>15</sup> Farmers are making less income and are taking on more debt to attempt to cover expenses to avoid losing the land they pride themselves in tending and the way of life they cherish.

According to Dr. Mike Rosmann, who is a farmer in Iowa, a psychologist, and an expert on the behavioral health concerns for farmers, discusses the “Agrarian Imperative Theory. According to his theory, “the strong urge that farmers feel to produce and supply the essentials for human life...[this theory] is a plausible explanation of the motivations of farmers to be agricultural producers and to sometimes end their lives.”<sup>16</sup> They are. Too many producers are taking their lives at an alarming rate. According to the Centers for Disease Control one factor that contributes to this high rate is “potential for financial loss.”<sup>17</sup> If these farmers lose financially, they lose their land or means to continue producing. Even producers who are able to produce a good yield in crops or livestock are not guaranteed to get ahead or stay afloat. “Since 2013, net farm income for US farmers has declined 50%...without parity in place (essentially a minimum price floor for farm products), most commodity prices remain below the cost of production.”<sup>18</sup> These are factors outside the control of farmers that greatly affect their ability to pay their debts. When they reach out to their lenders for assistance, they are often left to fend for themselves. According to a farmer named John Blaske, whose family lost their home to a fire in 1982, “Soon after the fire, the farm crisis intensified. The bank raised their interest rate from seven to eighteen percent. Blaske raced between banks and private lenders, attempting to renegotiate loan terms. Agreements would be made and then fall through.” He was quoted saying, “They did not care whether we had to live in a grader ditch.” Unfortunately, the family filed for bankruptcy and lost 265 acres. This set Blaske on the path to considering suicide, and he still has every day since – more than thirty years later<sup>19</sup>.

<sup>13</sup> Stress in Farmers and Ranchers #StressAwarenessMonth. Retrieved from <http://txagrability.tamu.edu/stress-in-farmers-and-ranchers-stressawarenessmonth>

<sup>14</sup> Stress in Farmers and Ranchers #StressAwarenessMonth. Retrieved from <http://txagrability.tamu.edu/stress-in-farmers-and-ranchers-stressawarenessmonth>

<sup>15</sup> Farmer Suicide Rate is Concerning, but Resources for Solutions Are Available. Retrieved from <http://kswheat.com/news/2018/02/19/farmer-suicide-rate-is-concerning-but-resources-for-solutions-are-available>

<sup>16</sup> The Guardian: *Why are American’s farmers killing themselves in record numbers?* Retrieved from <https://www.theguardian.com/us-news/2017/dec/06/why-are-americas-farmers-killing-themselves-in-record-numbers>

<sup>17</sup> The Guardian: *Why are American’s farmers killing themselves in record numbers?* Retrieved from <https://www.theguardian.com/us-news/2017/dec/06/why-are-americas-farmers-killing-themselves-in-record-numbers>

<sup>18</sup> The Guardian: *Why are American’s farmers killing themselves in record numbers?* Retrieved from <https://www.theguardian.com/us-news/2017/dec/06/why-are-americas-farmers-killing-themselves-in-record-numbers>

<sup>19</sup> The Guardian: *Why are American’s farmers killing themselves in record numbers?* Retrieved from <https://www.theguardian.com/us-news/2017/dec/06/why-are-americas-farmers-killing-themselves-in-record-numbers>

What if there were someone who could have sat down with Blaske and these lenders? What if a USDA trained mediator could have facilitated a conversation to restructure the debt owed? Unfortunately, there is no way to know for sure, but the fact that federally funded access to mediation services appears to be underutilized as a resource to avoid these instances from occurring should set off alarms across the United States government.

**APPENDIX**

State Mediation Programs, U.S. Code, Title 7, Chapter 82, §5101-§5105:

“State mediation programs are established through the FSA and are required to meet certain functions and obligatory practices to receive funding. The services they provide include, but are not limited to:

- Scheduling mediation session
- Intake information for sessions
- Providing information about the mediation process
- Preparing participants for costs associated with mediation sessions

The decisions made by the parties in this process must agree with laws, regulations, and any other guides imposed on the agency providing the mediation services.”

“To become a participant in USDA cases, a certification must be obtained, and requirements must be met of the agency and the mediators. The agency must apply for this status by providing information as to how they meet the requirements to participate. The requirements include:

- An identification of issues available for mediation under the program
- Management of the program
- Mediation services offered by the program
- Program staffing and staffing levels
- Uses of contract mediation services in the program describing both services provided by contraction and costs of such services
- State statutes and regulations in effect that are applicable to the State’s mediation program
- A description of the State program’s education and training requirements for mediators including training in mediation skills and in USDA programs, identification and compliance with any State law requirements, and other steps by the State’s program to recruit and deploy qualified mediators”

“After all listed and any requested information has been submitted, appointed head of the State agency or

Governor must provide certification in writing. This certification affirms the following:

- That the State’s mediation program provides mediation services to covered persons with the aim of reaching mutually agreeable decisions between the parties under the program
- That the State’s mediation program is authorized or administered by an agency of the State government or by the Governor of the State
- That the State’s mediation program provides for training of mediators in mediation skills and in all issues covered by the State’s mediation program
- That the State’s mediation program shall provide confidential mediation and defined in §785.2
- That the State’s mediation program ensures, in the case of agricultural loans, that all lenders and borrowers of agricultural loan receive adequate notification of the mediation program
- That the State’s mediation program ensures, in the case of other issues covered by the mediation program, that persons directly affected by actions of the USDA receive adequate notification of the mediation program
- That the State’s mediation program prohibits discrimination in its programs on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, and marital or family status”

“In order to facilitate a mediation session, a mediator must be qualified according to the State’s guidelines. These guidelines can include:

- The individual must have attended a minimum of 40 hours of core mediator knowledge and skills training
- In order to remain qualified, they must complete a minimum of 20 hours of additional training or education every two years. This training must be approved by the USDA, an accredited college or university, or by the State Bar (of a qualifying State), a State mediation association, a State approved mediation program, or a society of professionals in dispute resolution”

“State Mediation Program funding and status are not guaranteed. Should an agency not comply with all requirements, the head of the State program or Governor may withdraw certification, cease or suspend the grant fund to the program, require any unspent funds be returned, reimbursal for unallowable expenses, and penalties and sanctions in accordance with applicable laws if:

- The State’s mediation programs, at any time, does not meet the requirements of the certification

- The mediation program is not being operated in a manner consistent with the features of the program certified by the State, with applicable regulations, or the grant agreement
- Costs that are not allowed under § 785.4 (b) are being paid out of grant funds
- The mediation program fails to grant access to mediation records for purposes specified in §785.8
- Reports submitted by the State pursuant to §785.7 are false, contain misrepresentation or material omissions, or are otherwise misleading”