



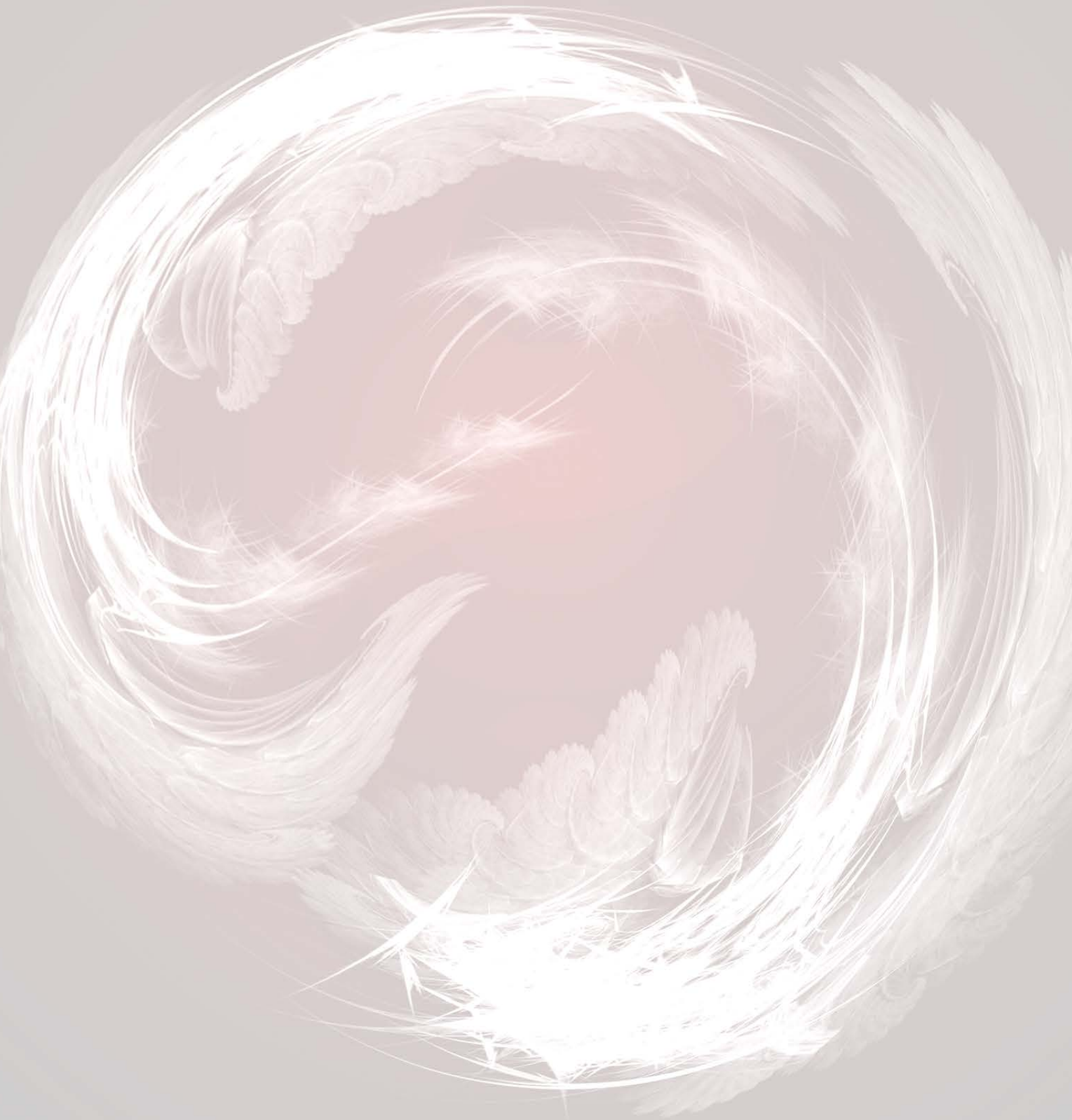
Building Better & Stronger Tribal Justice Systems

SOVEREIGNTY CONSIDERATIONS

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I. INTRODUCTION¹

Tribal justice system planning and implementation can be a daunting task, in part due to jurisdictional complexities, resource deficiencies and sovereignty considerations. Of course, this was not always the case. Prior to European contact, tribes in North America were fully self-governing. Tribes had very clear self-governance infrastructures, including systems to manage disputes and safeguard tribal communities. These systems were not always recognizable by colonizing forces because much of the tribal infrastructure or law was based upon oral tradition. Hence, the tribal systems looked very different from the justice systems that colonists were accustomed. As a result, it was presumed that tribal communities lacked structure or law.² These pervasive misconceptions have continued well into modern times. When coupled with early confusion regarding the sovereign status of tribes post-colonization, the development and recognition of tribal justice systems has been riddled with obstacles and challenges.

Early on, the United States Supreme Court sought to define the political status and legal rights of tribal governments through a series of cases commonly referred to as the Marshall Trilogy. In so doing, the Supreme Court placed limitations on the once fully sovereign indigenous people of what is now the United States.³ The three Supreme Court cases that make up the trilogy include:

- *Johnson v. McIntosh*, 21 U.S. 543 (1823) – this case was filed as a title action resulting from a land ownership dispute between two non-Indians. In determining the validity of each claimant’s title, the Court looked to international law to determine the rights and status of indigenous peoples. Ultimately, the Court determined that tribes retained a level of sovereignty that was not absolute.
- *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) – this case was filed as a result of a dispute between the Cherokee Nation and the state of Georgia as Georgia attempted to apply state law to the Nation. In an effort to further define the political status of tribes, the United States Supreme Court found that tribes are “domestic dependent nations” and as such retain all attributes of inherent sovereign authority that have not been divested by the Congress.

¹ Authored by Michelle Parks Associate Director, Tribal Judicial Institute, UND School of Law

² *Cherokee Nation v. Georgia*, 30 U.S. at 590 (1831).

³ *Johnson v. McIntosh*, 21 U.S. 543 (1823) (defining tribes as limited sovereigns); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (finding that tribes are domestic dependent nations); *Worcester v. Georgia*, 31 U.S. 515(1832) (setting forth that the federal governments authority to regulate Indian affairs preempted the application of state law).

- *Worcester v. Georgia*, 31 U.S. 515(1832) – this case stemmed from an incident involving a non-Indian missionary who was charged under Georgia law for failing to obtain a state permit prior to entering Indian territory. Again, this case involved an attempt by the state of Georgia to apply state law to people and activities within Indian territory. Ultimately, the Court found that the state of Georgia had no authority to apply its laws, given the circumstances, because the application of state law was preempted by federal authority.

Beyond the U.S. Supreme Court recognition of the political status of tribes as sovereigns in the United States, the United States Supreme Court has also recognized and affirmed that the United States government bears a trust responsibility to the tribes.⁴ The federal trust responsibility, coupled with existing federal plenary authority, vests the United States with authority over tribes but also places some constraints on the exercise of that authority. The United States Supreme Court has further suggested that the existing trust responsibility includes legal, moral and fiduciary responsibilities.⁵

As a result of the Marshall trilogy, subsequent United States Supreme Court cases, and federal legislative acts, tribes must be increasingly mindful of the need to protect and preserve their inherent tribal sovereign authority. Considering that a basic principle of sovereignty is the ability to make one's own laws and be governed by those laws, sovereignty must be at the forefront of tribal justice system planning.

As tribes across the United States seek to build stronger communities, many are finding need for extensive political change.⁶ Tribes are prompted to stabilize tribal governments to align with the culture of the Tribe, to effect institutional change that makes better and more efficient use of tribal resources, and finally, to develop laws and forums that promote the fair and impartial resolution of disputes. Tribes are developing laws, policies and programs that reflect their community standards and norms rather than simply replicating those passed onto them or developed by federal or state partners.⁷ This contributes to stronger justice systems, an essential component for building stronger nations.

This publication introduces sovereignty considerations for comprehensive tribal justice system planning.

⁴ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

⁵ See *United States v. Mitchell*, 463 U.S. 206 (1983)(recognizing a general trust responsibility) ; See also *Seminole Nation v. United States*, 316 U.S. 286 (1942)(finding that the federal trust responsibility was subject to “the most exacting fiduciary standards...”.)

⁶ Stephen Cornell and Joseph P Kalt, *Sovereignty and Nation Building: The Development Challenge in Indian Country Today*, JOPNA No. 2003-03 (2003).

⁷ Id.

II. NATION-BUILDING

Nation-building provides an alternate approach to planning in Indian Country. The Nation-Building approach recognizes the need for tribes to assert tribal sovereignty in light of existing federal and state policies, interests and bureaucracies.⁸ Nation-building supports the development of political infrastructures, reinforcing the notion that tribes have the authority to self-govern and govern effectively.⁹ According to the Harvard Project, nation-building requires the tribe to develop the following:¹⁰

- Stable institutions and policies – refers to the constitutions, laws, procedures and policies that establish a stable political infrastructure.
- Fair and effective dispute resolution – refers to the dispute resolution procedures and forums in place to resolve or adjudicate disputes, and support community safety free from political influence.
- Separation of governmental and private sector functions – refers to the need for governmental functions and economic functions to be distinct and to some degree separate.
- Competent bureaucracy – refers to the development of competent tribal agencies and departments to focus on program development, social programs and natural resources.
- Cultural “match” – refers to the need for the tribe’s political infrastructure to align with community values, traditions, customs and norms.

One key component of nation-building is planning and implementation of fair and effective dispute resolution forums.¹¹ This requires the development of institutions, procedures and laws that facilitate the fair and impartial adjudication of disputes.¹² As such, comprehensive justice system planning is part of a much larger movement underway for many tribes. Through comprehensive justice system planning, tribes are able to protect and preserve inherent sovereignty by providing:

- More efficient use of existing justice system resources and time;
- Protection and safety for tribal citizens;
- Local opportunities for rehabilitative and reentry services;
- Safeguards against federal mandates that deprive tribes of inherent authorities; and

⁸ Stephen Cornell and Joseph P. Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, JOPNA No. 2003-03 (2003).

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id. at 197 (stating that the development strong and independent judicial systems is a key to the Nation Building process)

- The development of fair and effective justice systems that reflect the values, customs and norms of the tribe.

III. TRIBAL SOVEREIGNTY

Sovereignty, in its most basic sense, refers to the ability to govern one's self without outside intrusion or interference. In a legal context, sovereignty is exercised by tribal legislative acts and enforcement of those acts. Despite the development of federal Indian laws, tribes retain all attributes of an inherent sovereign that have not been diminished, relinquished or otherwise extinguished.¹³ Tribes therefor have the right to form their own governments, make laws and enforce those laws.

At this point in time, most federally recognized tribes have established a legislative body commonly referred to as tribal council, village council or tribal business committee.¹⁴ The development of tribal courts or judicial branches of governments has been a much slower process for many tribes and many tribal constitutions do not reference or distinguish between the legislative branches. Funding for judicial services and justice system personnel is often limited and has hindered the growth and development of tribal justice systems, as a whole. Despite that fact, tribes are becoming increasingly aware of the need for a strong tribal justice system to protect and preserve tribal sovereignty, provide for local dispute resolution and foster safe tribal communities. This increased awareness coupled with tribal efforts to build tribal economies and realign political infrastructures has prompted tribes to focus on planning efforts to improve justice systems.

Tribal governmental officials have a challenging task of developing tribal economies, safeguarding tribal assets, and looking out for the safety and general welfare of tribal communities while building strong relationships with federal, state and tribal governments. All of the foregoing needs to occur while preserving the cultural values and traditions of the tribe. It is a delicate balance to be sure, however, as pressure increase on tribes to build strong inter-governmental relationships, it is essential that tribal justice system infrastructures reflect the community values of the tribe as a whole.

IV. COMPREHENSIVE PLANNING: GETTING STARTED

¹³ *Cohen's Handbook of Federal Indian Law*, § 4.01[1][a](2005 ed.)(citing *United States v. Wheeler*, 435 U.S. 313, 322-323(1978)).

¹⁴ <http://www.bia.gov/FAQs/>

When a tribe is ready to develop a comprehensive justice system plan it is important to consider whether the plan will address justice system needs as a whole or focus on alcohol and substance issues or other issue specific needs. Regardless of the focus of the plan, there are several basic factors to consider when getting started:

- The justice system as a whole (consider the bigger picture)
 - How does your tribal justice system fit within the existing political infrastructure of the tribe?;
 - How does your tribal justice system provide a means for the tribe to protect and preserve tribal sovereignty?; and
 - How independent, fair and stable is our current justice system?
- Existing justice system programs, departments, personnel, equipment and services;
 - How can you use your resources more efficiently and effectively?;
 - How well are our partnering justice system agencies and service providers currently communicating and collaborating?; and
 - What safety and wellness issue(s) do we spend the most time on across our justice system?
- Justice system gap
 - What partnerships might we establish to foster the safety needs of our community?
 - Partnership considerations might include reaching out to first responders as well as those providing post-adjudication services for court-involved individuals.

V. KEYS TO BUILDING BETTER AND STRONGER TRIBAL JUSTICE SYSTEMS

The approach taken to tribal justice system planning may require a preliminary discussion prior to engagement of the community in order to bring focus to the process. The keys to such a preliminary discussion include:

- 1) Dedication – **Who** are the builders?
- 2) Mission or goal – **What** are we building?; **What** are our priorities?
- 3) Organized approach – **How** are going to build it?; **What** is our timeline?
- 4) Community involvement/community needs – **What** is important to our community?; **Who** are our stakeholders?

A. PRELIMINARY DISCUSSION

When conducting a preliminary discussion there are several points for consideration. To help guide these preliminary discussions consider the following:

- 1) **Dedication-** Who are the builders?
Consider involving people who:

- Want to create a tribal justice system that will support tribal sovereignty
- Want to create a tribal justice system that will meet the needs of the community
- Are willing to work hard and who are willing to ask for assistance when necessary
- Are able to remove roadblocks to affect the process of change

2) Mission or Goal- What are we building? What are our priorities?

- What is the mission of your tribal justice system in the context of addressing the issues or priorities that have been identified?
- Do you know what you want your tribal justice system to look like?
- What issues, problems or priorities do you want your justice system to address OR to address more effectively (strategic planning)
- What role does the tribal court, law enforcement, probation or other service providers' play?
- What rehabilitative or service-based options exist for court-involved individuals? This is an excellent opportunity for tribes to incorporate culture, customs and traditions. Consider:
 - Diversionary Courts
 - Peacemaking
 - Counseling
 - Cultural programs or education
 - Spiritual practices

3) Organized Approach – How are we going to build it?; What is our timeline?

The approach to justice system planning can and should reflect the standard practices within your community. Planning provides an excellent opportunity for tribes to implement procedures that are rooted in the customs, traditions and culture of the tribe.

4) Community Involvement – What is important to our community?; Who are our stakeholders? Justice systems affect the safety and well-being of the community, therefore the community's input may be meaningful in assuring access to justice services and the perception of a fair and balanced justice system. Consider involving people who want to make their tribal community a safer place and those affected by the justice system, such as those adjudicated or victims of crime.

In terms of community outreach, consider the following options:

- Community meetings
- Community-wide surveys

- Community notifications throughout the entire process to provide status updates and notices of opportunities for community participation
- This stage also provides an excellent opportunity for tribes to incorporate cultural values by including tribal youth, elders and leaders

There are many benefits to engaging the community at the onset of the planning process. Engaging the community affords an opportunity for community members and service providers to participate in the development of the foundation or initial framework. When conducting community meetings it is a best practice to use trained facilitators to help guide the planning process. Trained facilitators can be very helpful to the process as they are able to help the group to stay on track and focused, to ensure that all perspectives are included and to keep a record of the overall discussions in an organized and comprehensive manner. Keep in mind that sometimes outside perceptions can help us to identify needs and problems or perhaps view those needs and problems in a different manner. Most importantly, community engagement helps to foster community input and buy in.

Tips for Community Engagement:

- Use a trained facilitator for meetings
- Include tribal and non-tribal agencies; gain commitment for collaborative partnerships
- Focus on identifying necessary services or procedures, opportunities for collaboration and the development of common goals
- Request that agencies and individuals share resources including drawing upon each other as resources
- Consider developing interdisciplinary work groups (helps to foster relationships and generate collaboration; provides significantly different disciplines with a common foundation).

Tribal Community Assessments

Once you've identified your goal or what you want your justice system to look like you then need to do some assessments. Community assessments help us identify existing resources in the community as well as areas that need improvement. Through the assessment process, we are able to highlight opportunities for growth and collaboration. By identifying opportunities for collaboration the assessment process can also help us to sustain programs if funds expire.

What to consider in the assessment process

- Strength-based approach is helpful
 - What is working in your community and can you build on that?

- What are some of the strengths of your community?
- What do you have in terms of community resources?
- Are there service providers or opportunities in neighboring jurisdictions?
- Identify areas, services or resources that need to be improved or developed
- Assess your training and technical assistance needs

Who to consider including during the assessment process

Be sure to include all disciplines within the justice system and community members who might offer input into customs, traditions and values.

- | | |
|--------------------------------------|---------------------------|
| ● Law Enforcement & First Responders | ● Probation |
| ● Advocates | ● Reentry |
| ● Indian Child Welfare | ● Mental Health Providers |
| ● Prosecutors/ Defense | ● Addiction specialists |
| ● Judges | ● Tribal Youth |
| ● Peacemakers | ● Tribal Elders |
| | ● Tribal Leaders |

VI. SOVEREIGNTY CONSIDERATIONS DURING THE PLANNING PROCESS

Planning efforts for tribal justice systems oftentimes become reactionary as tribes attempt to enhance sentencing opportunities or assert expanded jurisdiction. Take caution in building a justice system based upon reactionary goals and objectives. During the comprehensive justice system planning process, it is essential that planning teams focus on community values, standards, customs and norms, as well as on legislative mandates. By doing so, tribes ensure that their tribal justice system offers the respect that they deserve, meets the needs of the community and becomes a direct reflection of the tribal community.

So what might be considered to ensure that the justice system is a reflection of tribal values, customs, and norms? When discussing issues, developing a comprehensive justice system plan, developing laws, or creating justice system policies and procedures, it is always helpful to include in your discussion:

- **Language** – What role might language play? Is there a need to include interpreters in your justice system? Are there opportunities to provide language-based services to tribal members?
- **Spiritual practices** – Are there existing spiritual practices within the tribal community that may be of benefit to court-involved individuals? How can the justice system tap into or coordinate with spiritual leaders and teachers to link individuals to such opportunities? Within tribal communities, spiritual beliefs may vary greatly

so be sure to include a variety of spiritual leaders and teachers in your planning process.

- **Community and Family values** – Consider whether your laws and procedures foster the involvement of family and extended family in a manner that aligns with the values of your tribal community.
- **Community traditions and cultural practices** – Consider whether opportunities exist within your community for court involved or at risk individuals to benefit from participation in community based events or practices. How might you link individuals to such events?
- **Community-based services** – Do you have existing programs or services in your community that incorporate, emphasize or teach culture? How might you incorporate such services into your justice system?

It can also be helpful to include the foregoing as part of the assessment and planning process. For example if food, song, dance or prayers are important components of community gatherings, consider incorporating those things into the planning meetings or community engagement meetings that you host.

Final Tip

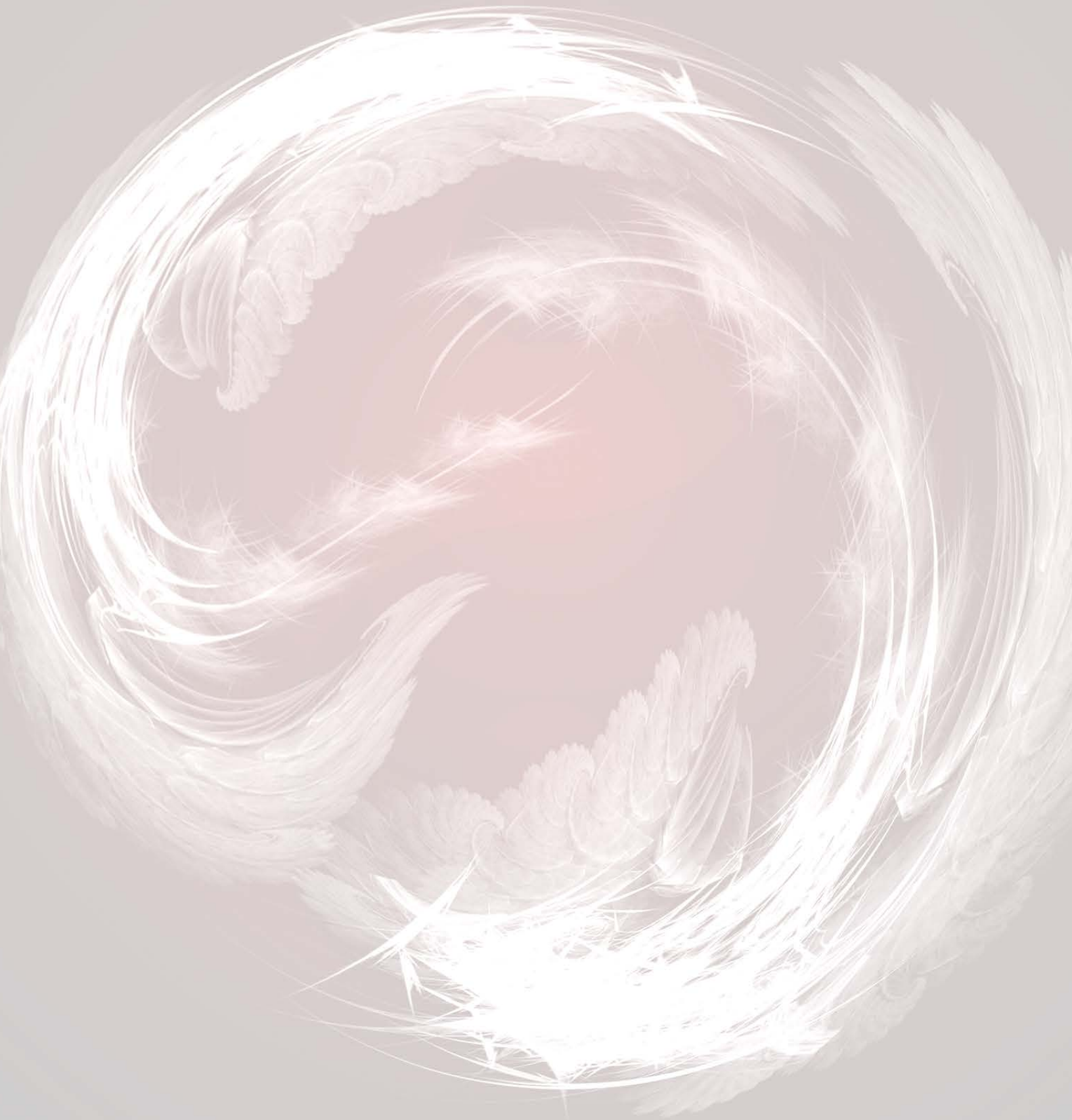
Diversity exists within tribal communities. Acknowledge that DIFFERENCES EXIST among individuals and among disciplines. Learn from each other's differences and understand that many people come to the table with their own deeply held sociocultural perspectives. Remember that differences are good and can provide opportunity for growth. Acknowledging and understanding difference allows for the sharing of ideas, information, and encourages innovative ideas.

Fish is Fish by Leo Leoni (1974)¹⁵

There is a fish that is keenly interested in learning about what happens on land but, of course, is stuck in the water. His friend frog, however, can leave his home and go exploring. So frog goes out on land and comes back to the pond a few weeks later and reports to fish on what he has seen.

Frog describes birds, cows, and people. Fish listens and learns all about birds, cows, and people... sort of. In fish's mind, the birds, the cows and the people all maintain very fish-like characteristics. Fish can't, in fact, ever completely quite escape or let go of his sociocultural perspective... after all a fish is a fish.

¹⁵ Leo Leoni, *Fish is Fish*, New York: Pantheon Books (1970).



FUNDING RESOURCES

{** Insert BJA information **}

Training and Technical Assistance

National Criminal Justice Training Center
Fox Valley Technical College
1825 N. Bluemound Drive
P.O. Box 2277
Appleton, WI, 54912-2277
Ph (855) 866-2582
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