

Intergovernmental Training Day

Session 2B – Tribal 101

September 27, 2023



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23rd Annual NTCSA Training Conference

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Tribal 101 - Information for State Workers

Bill Woods, Attorney, Interim Director Three Affiliated Tribes

Lisa Skenandore, Vice President, SMI

Laura Stone, Director Porter County Prosecutor's Office Indiana

OVERVIEW

DISCUSSIONS WILL CENTER ON:

- HISTORY OF TRIBAL IV-D
- FEDERAL MANDATES – 14 REQUIREMENTS
 - TRIBAL SOVEREIGNTY
- CORE PRINCIPLES OF TRIBAL SUBJECT MATTER JURISDICTION
 - PRINCIPLES OF PERSONAL JURISDICTION
 - CONCURRENT JURISDICTION
 - PUBLIC LAW 280 (PL-280) MYTHS
 - DUE PROCESS MISCONCEPTIONS
 - TRIBAL COURTS VS STATE COURTS
- COOPERATION - MOVING FORWARD

BACKGROUND

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- Tribes officially became part of the Child Support Enforcement Program with the passage of the welfare reform in 1996. Personal Responsibility and Work Opportunity Reform Act (PRWORA)
- PRWORA allowed tribes to join the IV-D program and authorized the operations of tribal child support enforcement programs and tribal cooperative agreements with state IV-D agencies.
- Currently there are 60 tribes that operate tribal child support programs throughout the United States with another 4 in the start up phase.

FEDERAL MANDATES – IV-D TRIBAL CHILD SUPPORT PROGRAM

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- Both States and Tribes have the same five mandates under the Social Security Act:
 - Locate
 - Paternity Establishment
 - Order Establishment
 - Order Modification
 - Order Enforcement

FEDERAL MANDATES – IV-D TRIBAL CHILD SUPPORT PROGRAM

What must a Tribe or Tribal organization include in a Tribal IV-D plan in order to demonstrate capacity to operate a Tribal IV-D program?

14 REQUIREMENTS, INCLUDING:

- (3) Assurance that the due process rights of the individuals involved will be protected in all activities of the Tribal IV-D program, including establishment of paternity, and establishment, modification, and enforcement of support orders;**
- (7) Copies of all applicable Tribal laws and regulations as specified under § 309.90;**
- (9) Procedures for the establishment of paternity as specified under § 309.100;**
- (10) Guidelines for the establishment and modification of child support obligations as specified under § 309.105;**

POWERS OF SOVEREIGN

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Powers of a Sovereign – Inherent NOT delegated. Tribes' powers are not delegated, they are 'inherent powers of a limited sovereignty which has never been extinguished.' United States v. Wheeler, 435 U.S. 313, 322 (1978). Sovereign powers preserved unless Congress' intent to the contrary is clear and unambiguous. • Although no longer possessed of the full attributes of sovereignty, Tribes remain a separate people with the power of regulating their internal and social relations, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), over its members and territory, U.S. v. Mazurie, 419 U.S. 544 (1975), and to take actions necessary to protect the health, welfare, political integrity and economic security of its people and its territory. Montana v. U.S., 450 U.S. 544 (1981)

TRIBAL CONSTITUTIONS AND CODES

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CONSTITUTION:

Preamble: “We, the Arickara, Gros Ventres, and Mandan Indians of the Fort Berthold Reservation, in North Dakota, eagerly embrace the opportunities for self-rule, and in order to enjoy the blessings of liberty and justice; to intelligently protect our vested rights under existing treaties and the constitution of the United States...”

TRIBAL CODE – PERSONAL JURISDICTION

“The court shall have civil and criminal jurisdiction over all persons who reside, enter or transact business within the territorial boundaries of the reservation...”

TRIBAL CODE – TERRITORIAL JURISDICTION

“The jurisdiction of the courts shall extend to any and all lands within the reservation boundaries....”

GENERAL RULE

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Tribes possess exclusive civil regulatory and adjudicatory jurisdiction over their own members and within their own territories.

Examples:

Internal Political Affairs (elections)

Membership/Citizenship

Domestic Affairs (family matters)

“Sovereignty begins at home.” - Hon. Cheryl Demmert Fairbanks
(Tlingit-Tsimpshian)

WHERE DUE PROCESS RIGHTS IN INDIAN COUNTRY COME FROM?

- The Indian Civil Rights Act (ICRA) Grants the Tribal Court the authority to enforce the provisions of the Indian Civil Rights Act, 25 USC 1301, et.seq. These set forth basic Constitutional Rights, similar to Bill of Rights.
- Tribal constitutions and/or codes
- A tribe's tradition and custom.

What types of due process are there?

1. Procedural
2. Substantive

Substantive due process requires the government to make sure that laws do not have an unfair impact on people, while procedural due process requires the government to follow fair procedures to ensure that the law applies equally to everyone.

PERSONAL JURISDICTION

Tribal courts can generally exercise personal jurisdiction over any party that maintains sufficient "minimum contacts" with the reservation sufficient to comply with the due process clause of the Indian Civil Rights Act.

Retaining Personal Jurisdiction

A long-arm statute is a statute that allows for a court to obtain personal jurisdiction over an out-of-state defendant, or in tribal terms, an off reservation defendant on the basis of certain acts committed by an out-of-state or off-reservation defendant, provided that the defendant has a sufficient connection with the tribe or state.

The tribal status of the litigant is largely irrelevant in a personal jurisdiction analysis, although it may be in a subject matter jurisdiction.

ESTABLISHMENT AND REVIEW GRIDS

NO EXISTING ORDER

- OPPOSING PARTY RESIDE ON RESERVATION
- OPPOSING PARTY A TRIBAL MEMBER

EXISTING ORDER

- TRIBAL ORDER VS. STATE ORDER
- MOVING PARTY RESIDE IN JURISDICTION THAT ISSUED THE ORDER
- OPPOSING PARTY RESIDE ON RESERVATION

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North Dakota Child Support ESTABLISHMENT/REVIEW AND ADJUSTMENT

February 2016

The grid below assumes that paternity is not an issue in the case because:

1. Child was born during a marriage
2. A valid voluntary paternity acknowledgment has been signed
3. The obligor is the child's mother

The grid below further assumes that at least one of the parties resides in your state or on a reservation in your state, or else neither jurisdiction would have an interest in the case beyond asking another state or Tribal IV-D program for assistance.

	Existing Order?	Does A Party Still Reside in the Jurisdiction that Issued the Last Order?	Does the Opposing Party Reside on the Reservation?	Is the Opposing Party a Tribal Member?	Were There Significant Incidents of Relationship in Jurisdiction of the Moving Party?	Court(s) with jurisdiction
1	No		Y	Y	N	Tribal
2	No		Y	Y	Y	Concurrent
3	No		Y	N		Concurrent
4	No		N	Y		Concurrent
5	No		N	N	Y	Concurrent
6	No		N	N	N	State
7	Tribal	Y				Tribal
8	Tribal	N				State
9	ND	Y	N			State
10	ND	Y	Y			State
11	Other	Y				Other
12	Other	N	Y	Y		Tribal
13	Other	N	Y	N		Concurrent
14	Other	N	N	Y		Concurrent
15	Other	N	N	N		State

A field is left blank on the grid above if the question either does not apply, or does not affect the conclusion.

SUBJECT MATTER JURISDICTION

BEGINNING POINT – TRIBAL SOVEREIGNTY

The centuries-old relationship between the United States and Indian nations is founded upon historic government to-government dealings and long-held recognition of Indians' unique legal status.

The United States' system of federalism recognizes three sovereigns: Indian nations, the States, and the federal government.

Tribe's status is rooted in their unique relationship between the United States Government and Tribes, whose sovereignty substantially predates the Constitution. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Worcester v. Georgia*, 31 U.S. 515, 559-62 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1, 15-18 (1831)

CONCURRENT JURISDICTION

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ISSUE OF CONCURRENT JURISDICTION
BETWEEN STATE AND TRIBAL COURTS IS
GOVERNED BY STATUTES AND CASE LAW

DISTINGUISH – EXCLUSIVE JURISDICTION
ISSUES OF PERSONAL JURISDICTION
ISSUES OF SUBJECT MATTER JURISDICTION

Example: ND Case of McKenzie County v. C.G. – ND Supreme Court held that membership of both parents with the tribe and conception on the reservation – this is a “reservation affair” – Exclusive Tribal Jurisdiction

CONCURRENT JURISDICTION – SUBJECT MATTER ANALYSIS

FACTORS FOR CONSIDERATION – ESTABLISHMENT OF PATERNITY

- WHERE DID CONCEPTION TAKE PLACE?
- IS THE MOTHER A MEMBER OF THE TRIBE?
- DOES THE MOTHER RESIDE ON THE TRIBE’S RESERVATION?
- IS THE ALLEGED FATHER A MEMBER OF THE TRIBE?
- DOES THE ALLEGED FATHER RESIDE ON THE TRIBE’S RESERVATION?

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North Dakota Child Support PATERNITY

February 2016

	Conception Where?	Is CP a member of the tribe?	Does CP reside on the tribe's reservation?	Is NCP a member of the tribe?	Does NCP reside on the tribe's reservation?	Court(s) with jurisdiction
1	On	Y	Y	Y	Y	Tribal
2	On	Y	Y	Y	N	Tribal
3	On	Y	Y	N	Y	Concurrent
4	On	Y	Y	N	N	Concurrent
5	On	Y	N	Y	Y	Tribal
6	On	Y	N	Y	N	Tribal
7	On	Y	N	N	Y	Concurrent
8	On	Y	N	N	N	Concurrent
9	On	N	Y	Y	Y	Tribal
10	On	N	Y	Y	N	Concurrent?*
11	On	N	Y	N	Y	Concurrent
12	On	N	Y	N	N	Concurrent
13	On	N	N	Y	Y	Tribal
14	On	N	N	Y	N	Concurrent?*
15	On	N	N	N	Y	Concurrent
16	On	N	N	N	N	State
17	Off	Y	Y	Y	Y	Tribal
18	Off	Y	Y	Y	N	Concurrent
19	Off	Y	Y	N	Y	Concurrent
20	Off	Y	Y	N	N	State
21	Off	Y	N	Y	Y	Concurrent
22	Off	Y	N	Y	N	Concurrent
23	Off	Y	N	N	Y	Concurrent
24	Off	Y	N	N	N	State
25	Off	N	Y	Y	Y	Concurrent
26	Off	N	Y	Y	N	Concurrent
27	Off	N	Y	N	Y	State
28	Off	N	Y	N	N	State
29	Off	N	N	Y	Y	State
30	Off	N	N	Y	N	State
31	Off	N	N	N	Y	State
32	Off	N	N	N	N	State

* Case law is still not definitive under these facts, but suggests concurrent jurisdiction.

PUBLIC LAW 280

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- In 1953, Congress enacted Public Law 83-280 (67 Stat. 588) to grant certain states criminal jurisdiction over American Indians on reservations and to allow civil litigation that had come under tribal or federal court jurisdiction to be handled by state courts.
- PL280 States include Alaska (except the Metlakatla Indian Community on the Annette Island Reserve, which maintains criminal jurisdiction), California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin (except the Menominee Reservation) with its passage in 1953.

MYTH – PL280 DIMINISHED TRIBAL COURT JURISDICTION

What PL 280 did not do:

- PL 280 did not “divest” (take away) tribes of their criminal and civil jurisdiction. Tribes can establish their own courts, have their tribal law enforcement and pass tribal laws enforceable on their reservations;
- PL 280 does not allow the state to impose its civil “regulatory” laws on the reservation (i.e. environmental laws, labor laws, building or fire codes, hunting and fishing regulations, and other laws designed to regulate land use); and
- PL 280 does not allow city or municipalities to impose their ordinances on the reservation.

PROPER INTERPRETATION PL280

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So, in terms of civil jurisdiction, the effect of PL 280 was merely to grant Indians access to state court forums to resolve disputes. It did not give the state jurisdiction to impose civil/regulatory laws on the tribes or tribal territory.

FULL FAITH AND CREDIT

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- Full Faith and Credit While tribes are recognized as sovereign, they are not —states|| for the purposes of the full faith and credit requirements of article IV of the U.S. Constitution. There is general consensus (but no Supreme Court authority on point) that tribes are not encompassed by the 6 Violence Against Women Act (federal). 6 federal full faith and credit statute (28 U.S.C. § 1738). There are, however, a number of relevant federal and state provisions that mandate full faith and credit for and between tribal courts: Indian Child Welfare Act (25 U.S.C. § 1911(d)) Violence Against Women Act (18 U.S.C. § 2265) Child Support Enforcement Act (28 U.S.C. § 1738B) Uniform Child Custody Jurisdiction and Enforcement Act (Cal. Fam. Code, § 3404) Where there is no specific statutory mandate for full faith and credit, the general rule is that tribal court orders are entitled to comity.

UIFSA VS FFCCSOA

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ACTION TRANSMITTAL

OCSE-AT-02-03

DATE: May 28, 2002

TO: STATE AGENCIES ADMINISTERING CHILD SUPPORT ENFORCEMENT PLANS UNDER TITLE IV-D OF THE SOCIAL SECURITY ACT, TRIBES AND TRIBAL ORGANIZATIONS, AND OTHER INTERESTED INDIVIDUALS

SUBJECT: Clarifying the Applicability of the Full Faith and Credit for Child Support Orders Act (FFCCSOA) to States and Tribes.

PURPOSE: The purpose of this action transmittal is to inform states and tribes of provisions of the Full Faith and Credit for Child Support Orders Act (FFCCSOA) and their application to both jurisdictions.

While tribes are not obliged to enact UIFSA as a condition of receipt of Federal funding of their child support enforcement programs operated under title IV-D of the Social Security Act, states are obligated to do so.

FULL FAITH AND CREDIT OF FOREIGN CHILD SUPPORT ORDERS

Sample Provision: TAT Chapter 5-25-01.

The TAT DCSE and District Court shall recognize child support orders issued by other tribes and states, in accordance with the requirements under the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B.

The TAT DCSE shall extend the full range of services available under its IV-D plan to respond to all requests from, and cooperate with, other tribal and state IV-D agencies.

TRIBAL CODES

- TRIBAL COURTS AND TRIBAL IV-D PROGRAMS OPERATE UNDER LAWS OF THE TRIBE THROUGH TRIBAL CODES OR CONSTITUTIONS
- A MAJORITY OF TRIBAL CODES WILL BE SIMILAR TO THEIR STATE COUNTERPARTS
- WHERE TRIBAL CODE DIFFER IS USUALLY ASSOCIATED WITH THE DESIRE OF THE TRIBE TO MAINTAIN ITS CULTURE, TRADITION AND VALUES
- THESE DIFFERENCE MAY OCCUR SUBSTANTIVELY AND/OR PROCEDURALLY.

TRIBAL COURTS

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- Generally, tribal courts have civil jurisdiction over Indians and non-Indians who either reside or do business on federal Indian reservations.
- Under 25 C.F.R. Part 115, tribal courts are responsible for appointing guardians, determining competency, awarding child support from Individual Indian Money (IIM) accounts, determining paternity, sanctioning adoptions, marriages, and divorces, making presumptions of death, and adjudicating claims involving trust assets.

DUE PROCESS RIGHTS

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BEGINNING POINT: MISCONCEPTIONS

THRU THE YEARS, THERE HAS BEEN A MISCONCEPTION THAT TRIBAL COURTS DO NOT ADHERE TO THE PRINCIPLE OF “FUNDAMENTAL FAIRNESS”

In 1979, the National American Indian Court Judges Association (“NAICJA”) published a report entitled Indian Courts and the Future: Report of the NAICJA Long Range Planning Project.

The study concluded that Indian courts suffer from a terrific lack of resources that undercut the ability of the courts to guarantee fundamental fairness. Perhaps most importantly, the study concluded that Indian courts had few law-trained judges and Indian country and had limited numbers of law-trained counsel available to litigants.



CULTURAL COMPETENCY AND LAW TRAINED TRIBAL ATTORNEYS

As more non-Indians live and work within Indian country, and as tribes gain recognition in modern society, fears of tribal court unfairness has lessened.

Additionally; What we see

- The growth of Native American law student enrollees per year has increased.
- More Native American students being introduced to the possibility of a legal career at a young age and then are provided with the tools, both financially and otherwise, to succeed.
- Elimination of barriers in the pipeline to ineffective recruitment and retention efforts for Native American students.

COMPARISONS AND CONTRASTS OF STATE AND TRIBAL COURTS

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Due Process is required in both State and Tribal Courts.

Hearings and Court procedures may be similar, depending on tribal principles and values.

Most tribal courts require attorneys to be licensed by a State or have graduated from accredited schools of law.

Both generally allow for consent agreements to encourage judicial economy.

Tribal courts, because of tribal court traditions, are divergent and are geared toward resolution, geared toward remediation, geared toward restorative justice.

Attorneys in Tribal Court are able to litigate cases and represent your client vigorously, but keep in mind that the goal of tribal courts, and consistent with tribal traditions and morals, and customs, is to restore the broken relationship and try to come to a mutual understanding. What's the best resolution in the given case?

DIVERSIONARY COURT STRUCTURES

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Alternative or diversionary courts provide alternatives to adversarial court systems.

Examples of diversionary courts include:

- Peacemaker Courts;
- Restorative Justice courts;
- Circle courts

SEVERAL TRIBES ARE USING MEDIATION TO SETTLE CHILD SUPPORT MATTERS

CONTENT – TRIBAL CODES

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TAT Code has been in place longer than I have been an attorney (41 years)

CODE PROVISIONS

Jurisdiction

Election – Appointment of Judges

Law Trained Judges – right of parties upon demand

Clerk of Court – maintain records

Rules of Civil Procedure

Rules of Criminal Procedure

Rules of Evidence

Attorney Licensing Standards

Domestic Relations Code – child support

MOVING FORWARD IN A GOOD WAY

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COOPERATION

Monthly Status Calls between State ND and TAT

Access to State ND – FACSES (Read Only)

ND – dedicated Tribal Unit

ND-TAT Intergovernmental Improvement Project

Conduct periodic data matches – to verify only one agency is providing services to a case.

RECOGNIZING DIFFERENCES AMONG TRIBES

Controlling Order – issues (Blackfeet matter) conflicting Orders from two separate tribes.

CONSULTATION

Cornerstone of Successful Collaboration.

MOU – with Addendums between TAT and ND – add on as needed based upon changes.

LEADERSHIP FROM THE BENCH

DIFFERENCES AMONG TRIBES

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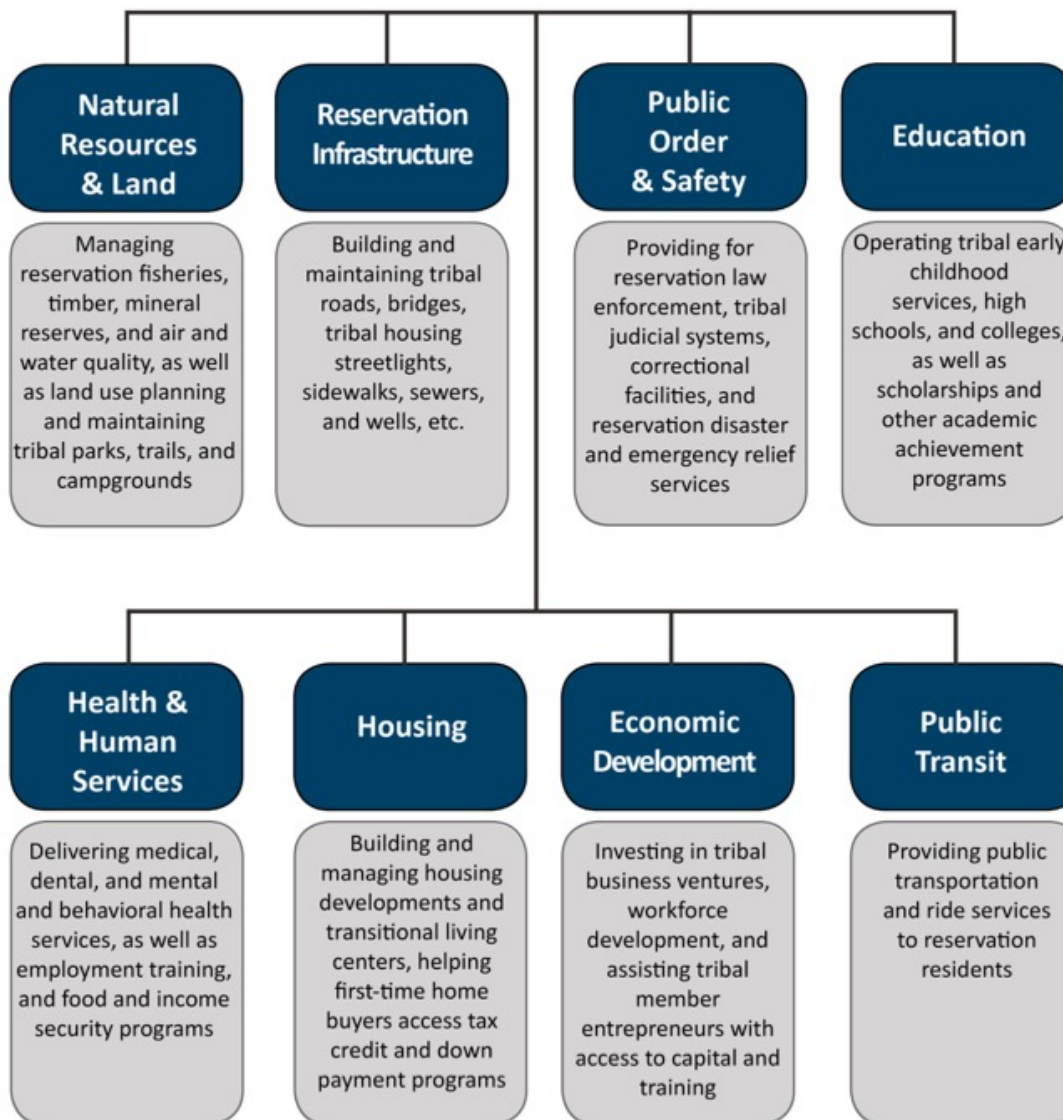
- There are 567 federally recognized Tribes and most do not have a federally funded (IV-D) child support program. Although many do hear family matters and may set child support.
- Each Tribe has a different culture, custom, and tradition, although some may be similar or related.
- Many times, tribal codes, laws, constitutions, and customs reflect the values and principles that guide tribal life necessitating laws, policies and procedures be different from Tribe to Tribe.

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Tribal Government Services



CONSULTATION-CORNERSTONE FOR SUCCESSFUL COLLABORATION

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- Establish a shared vision
- Develop personal relationships
- Create processes for averting and resolving disputes

Questions & Answers

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CONTACT E-MAIL:

Lisa Skenandore: lisa.skenandore@smimail.net

Bill Woods: wwoods@mhanation.com

THANK YOU FOR YOUR TIME