

# The Shift: Tribal Sovereignty and Peacemaking Courts

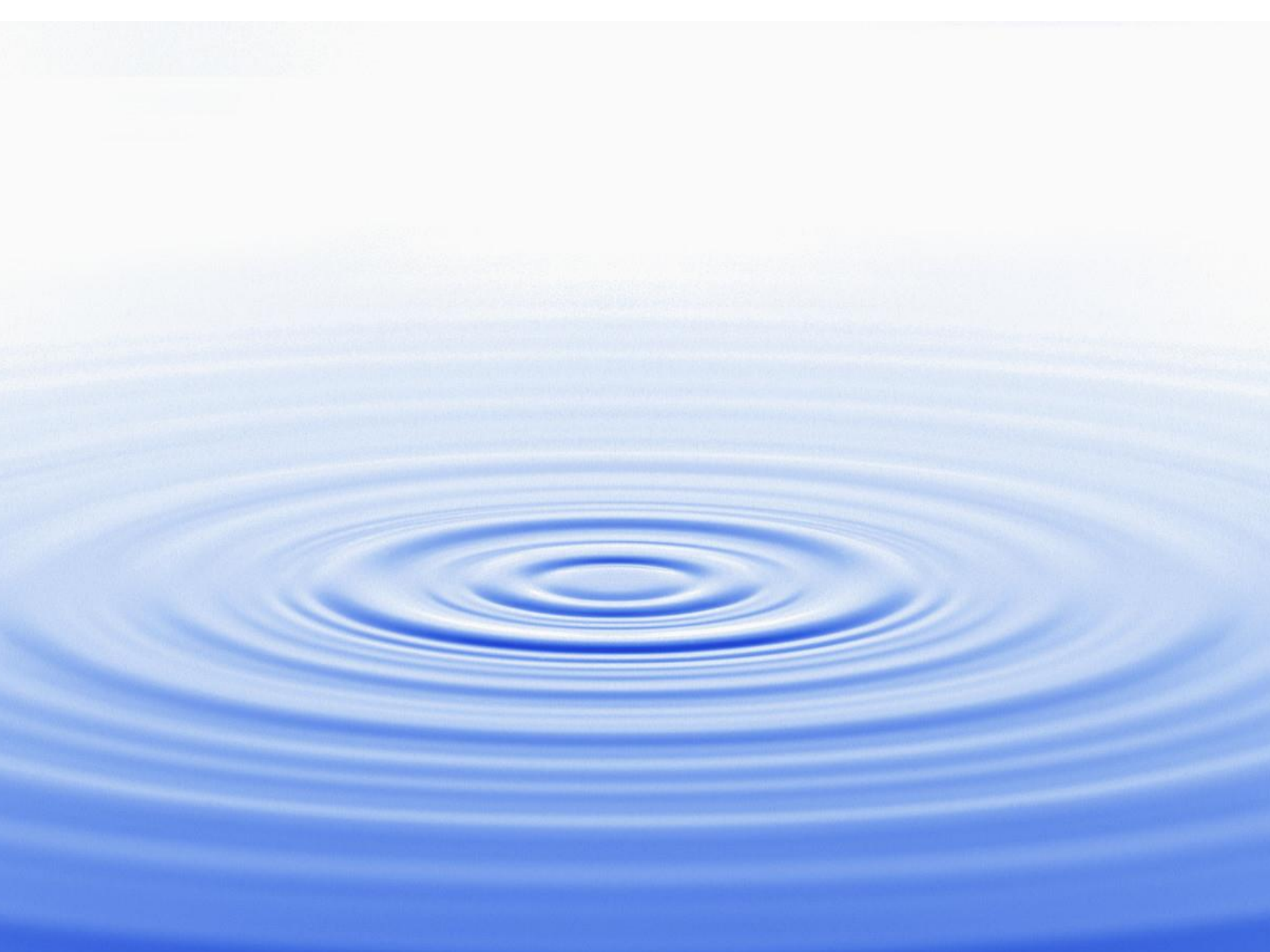
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2015

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The Shift...and the ripple effect....



# American justice is in crises:



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- Interestingly America is looking a traditional Native American processes such as Peacemaking, Sentencing Circles and other dispute resolution processes
- The Native American lens—the traditional dispute resolution process is not “alternative”.
- It has been a way of life for indigenous communities







# 5 guiding principles:

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1. We have been facing the wrong way
2. Understanding the impact of federal policies and the impact on Native America
3. Understanding the significance of oral tradition and Native American language as the common law of Tribes
4. Re-educate the educated
5. A call for consensus, cooperation, comity and unity







# SOUTHEAST TRADITIONAL TRIBAL VALUES

## “OUR WAY OF LIFE”

- Discipline and Obedience to the Traditions of our Ancestors
- Respect for Self, Elders and Others
- Respect for Nature and Property
- Patience
- Pride in Family, Clan and Traditions is found in Love, Loyalty and Generosity
- Be Strong in Mind, Body and Spirit
- Humor
- Hold Each Other Up
- Listen Well and with Respect
- Speak with Care
- We are Stewards of the Air, Land and Sea
- Reverence for Our Creator
- Live in Peace and Harmony
- Be Strong and Have Courage

# UNIVERSAL Native PRINCIPLES:

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- Keep our language
- Respect for Self, Elders and Others
- Kindness, Patience, Prayer and Spirituality
- Pride in children, elders, family, and traditions is found in love, caring and giving
- Be Strong in Mind, Body and Spirit
- Humor — Indian humor
- Hold Each Other Up-support for our people
- Listen Well and with Respect
- Speak with Care and Respect
- Respect for the land, earth and universe
- Reverence for Our Creator
- Live in Peace and Harmony
- Be strong and Have Courage and practice Humility

# Fairbanks-FALL15 class preferred preference listed by their most favorable: SILC:

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- ***Integrity***
- ***Diligence/Hard Work***
- ***Bravery “Warrior Spirit”***
- ***Universal law of Respect***
- ***Humility***
- ***Listening***
- ***Resiliency***
- ***Balance***
- ***Camaraderie***

# More and more:

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- ***Affirm Integrity/Affirm Respect + love/Affirm Honesty + Contribution:***
- ***Collaboration [working together/team effort]:***
- ***Affirmation***
- ***Authenticity***
- ***Sharing***

# More:

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- ***Confidence***
- ***Empathy***
- ***Adaptation***
- ***Happiness/Positivity:***
- ***True to Yourself***
- ***Manners/Hard work***
- ***Issues can be resolved so relationships can be mended & preserved***

# Core Values for SILC Fall 2015

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- ***Integrity:*** Be true to your word, with clients, colleagues and the Court.
- ***Diligence/Hard Work:*** Go the whole distance; be careful and thorough.
- ***“Warrior Spirit:”*** Be brave, confident and persistent in your representation. Stay balanced and happy. Be resilient, and adapt.
- ***Respect:*** Affirm others. Use good manners, and listen well. Bring love and empathy to your interactions. Be positive, and pursue camaraderie with all parties.
- ***Humility:*** Be authentic, and true to yourself. Resolve conflicts to preserve relationships.

# Turn around.....

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- Placing value on our ways, our traditions, culture and way of life
- We have been looking to the outside for answers ...
- It's time to turn around
- And look within our respective tribal communities
- For the answers
- **Draw upon tribal values, traditions and law in a contemporary context**



# 1. We have been facing the wrong way....

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- A replication society
  - Adoption of federal and state court models
- The “be-like” factor
- Our courts have been strongly criticized for this:
- A pale replication of American justice-in both conception and operation some of the tribal courts are little more than pale copies of the white system. All remedies to their operational problems are directed toward making them better copies. ~ Samuel J. Brakel



## 2. Understanding the impact of failed federal policies:

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Designed to:

- Assimilate
- And or
- Terminate

# An overview of the policies:

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- **Sovereignty intact---treaty making era**
- **Removal**—the forced removal of Indian people from their homelands-1838-forced migration of 12,000 Cherokees—4,000 perished—known as the “trail of tears; YAN, Choctaw-loss of children, elders and total families
- **Reservation**—designed to civilize the Indian-isolated land base;-use of military and civilian agents; destroyed an Indian way of life and US obtained major land holdings. Courts of Indian Offenses were authorized;
- **Allotment**—160 acres-everyone would be a farmer; major decline in total amount of Indian land and served to justify the non-Indian take over of Indian land;
- **IRA**—model codes and boiler plate constitutions; replaced traditional governments; Aunt Naomi—“the polls are open”!
- **Termination**—P.L. 280—extended state civil and criminal jurisdiction into five states; enhanced state role; Loss of language; Movement to the cities—relocation; ICRA; Indians are the most regulated citizens
- **Self-determination**—P.L. 93-638—Santa Fe Indian School; Mississippi Band of Choctaw;
- **Self-governance**—revitalization of traditional governments, language and culture;

# *Tribal Sovereignty, the Impact of Federal Policy*

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- Pre-contact: tribal sovereign governments intact, Treaty making period
- Movement to the reservation -1850-1887
- Allotment/Assimilation - 1887-1934
- Indian Reorganization Act -1934-1953
- Termination and Relocation -1953-1968
- Tribal Self-Determination and Tribal Governance 1968 to present



### 3. Significance of oral tradition:

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- Using **custom** is essential for the **cultural survival** of Indian people and nations
- The **Indian common law** comes directly from the **native language** and our **cultural viewpoint**—
- It becomes the **distinct unique** law of each of the Indian tribes.
- The **elders are valued** for their knowledge and wisdom and serve as a resource for the process
- **The oral tradition—has** been the glue that has kept our people together in the face of severe termination policies of the federal government

### 3. OUR NATIVE LANGUAGE...

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- “If we have our Indian language... we will always have the customs and laws of our tribe...”  
~David Demmert Sr.



## 4. Re-educate the educated

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- Education has always been valued in Indian country.
- We must pause and rethink our education and systems...
- due to the western education model, many of our indigenous concepts were deliberately destroyed and forbidden
- Education was the way to assimilation and termination;
- Now it is the greatest tool for the protection and strengthening of tribal sovereignty.
- Elders-keepers of the wisdom
- Understanding the significance of oral tradition
- Never to replicate past termination and assimilation policies



# 5. Unity, consensus, cooperation and comity

- **Universal law of respect.**
- **Consensus:** A process of decision-making that seeks widespread agreement among group members;
- general agreement among the members of a given group or community,
- each of which exercises some discretion in decision-making and follow-up action.
- **Comity:** In law, specifically refers to legal reciprocity—
- the principle that one jurisdiction will extend certain courtesies to other nations (or other jurisdictions within the same nation),
- particularly by recognizing the validity and effect of their executive, legislative, and **judicial acts**.
- The term refers to the idea that courts should not act in a way that demeans the jurisdiction, laws, or judicial decisions of another jurisdiction.
- Part of the presumption of comity is that other jurisdictions will reciprocate the courtesy shown to them.
- **Unity:** is the state of being undivided or unbroken.



# Sovereignty:

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- **BLACKS LAW DICTIONARY:**
- The supreme, absolute, and uncontrollable power
- by which any independent state is governed;
- supreme political authority; the supreme will;
- paramount control of the constitution and frame of govt. and its administration; the self sufficient source of political power....

## Sovereignty--To the Iroquois....Peace was the law....

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- They used the same word for both
- Peace (the Law) was righteousness in action..
- The practice of justice between individuals and nations...
- In their thought peace was so inseparable from the life of man
- That they had no separate term by which to dominate it.

*See Paul Wallace, The Iroquois Book of Life, White Roots of Peace (1994) at 26.*

# History of Tribal Courts

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- **Tribal sovereignty in the United States**
- refers to the **inherent authority** of indigenous tribes to govern themselves within the borders of the United States of America.
- The federal government recognizes tribal nations as "domestic dependent nations" and has established a number of laws attempting to clarify the relationship between the federal, state, and tribal governments.
- Traditional courts:
- Federal courts:
- Contemporary courts:

# Our way of life:

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- Sutque---matriarch; Raven; Tlingit;
- Basic dispute resolution in the family and tribe-Native language was used:
- Prayer
- Issue
- “talk it out”
- Silence/everyone has opportunity to speak
- [Cochiti- model]
- Build consensus
- Agreement—oral;
- Prayer

# Family Conferencing ...

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- Pre-litigation/pre –peacemaking tool
- Parties agree to meet
- Use consensus process
- Use similar rules as peacemaking
- Very informal
- Results in Family Safety and Wellness Agreement
- Signed by all parties including Tribal Administration
- Administrative process
- Non-compliance...parties agree to peacemaking/court



# Indigenous concepts related to peacemaking and traditional dispute resolution:

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- based on a **holistic philosophy** and the world view of the aboriginal inhabitants of North America.
- These systems are guided by the **unwritten customary laws**,
- Traditions and practices that are learned primarily by example and through the **oral teachings** of tribal elders.
- Holistic philosophy is a **circle of justice**
- that **connects** everyone involved with a problem or conflict on a continuum
- with everyone focused on the same center.  
~ Ada Pecos Melton –Pueblo of Jemez

# Peacemaking?

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- Traditional dispute resolution
- Not mediation
- Formal process
- A division of a tribal court
- Result is an agreed upon document which requires compliance

# Indigenous concepts related to peacemaking:

32

- Using **custom** is essential for the cultural survival of Indian people and nations;
- The **Indian common law** comes directly from the native language and our cultural viewpoint—it becomes the distinct unique law of each of the Indian tribes;
- The **elders** are valued for their knowledge and wisdom and serve as a resource for the process;
- The **oral tradition**—has been the glue that has kept our people together in the face of severe termination policies of the federal government



# In Indian country ...our traditional and customary laws:

33

- This law is oral ---and has been passed from generation to generation
- ...of any given community is not entirely accessible or contained in one place like written western law
- ...is internal, oral and for the most part –dynamic and not static in nature;

~ Professor Christine Zuni—Isleta Pueblo/UNM

# Peacemaking? Why?

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- Whenever you have a **continuing relationship**
- No anonymity in Indian country;
- **Process** is critical and lends itself to *healing*
- The **law evolves** from the process
- **Language** is key
- **Consensus** is necessary
- Brings a **spiritual element** to difficult situations

# MBCI: Indigenous law project:

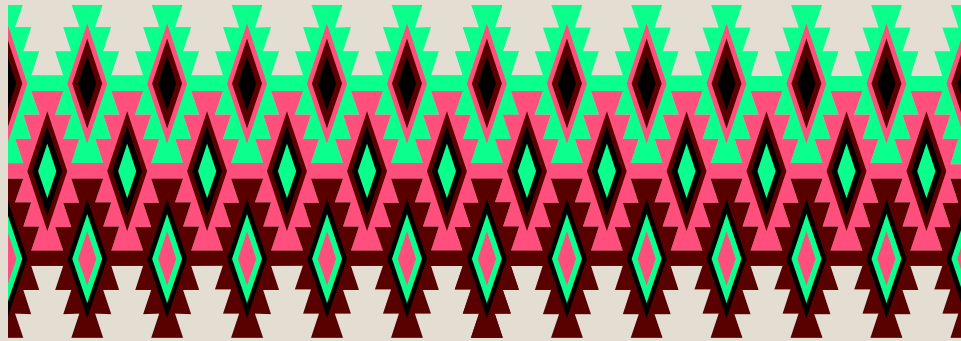
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- **The Project Goal:**
- “Through the process of oral tradition, we are recording the community voice of the Choctaw people by developing a library of indigenous law for future generations.”

# ITI KANA IKBI

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- Mississippi Band of Choctaw
- The peacemaker
- The peacemaking process
- Is established by tribal ordinance as a separate court



# The peacemaker model:

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- Focuses on **process**— “making things right” “to repair”
- **Prayer** is used initially and at the ending of process
- Both **civil and criminal jurisdiction**
- Use of **customary and traditional law**
- Builds on **trust** and **relationships**-to promote **healing** and **restoration**
- **No attorneys** representation by extended family or advocate
- **Talk** and discussion are necessary- **Native language** can be used;
- **No time limit**
- The **community right** may supersede the individual right
- **Apology** to victim , community, clan
- **Forgiveness**—is essential
- Enforceable as an **order of the court**
- Can give **full faith and credit** or **comity**
- **Completion**--finished; not to be spoken of again

# Adaptation of rules:

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# Peace Circle



## Procedure

- ✧ State the **purpose** of the session
- ✧ **Open** with prayer or moment of silence set the sacred space
- ✧ **Introductions**
  - Even though people may know each other, it is important to understand each person's role and hear the voices of the participants
- ✧ **Party filing the complaints goes first**
- ✧ **Questions**
  - Questions are allowed after everyone has an opportunity to speak
- ✧ **Closure**
  - Outcome expected
  - Memorializing the agreement
    - Safety and wellness
    - Agreement order
  - Close with prayer or moment of silence
  - Have all participants affirm each other's participation

## Rules

- ✧ Be tough on the issue but gentle on the person
- ✧ **Rule of Respect**
  - Respect for self, elders and others
- ✧ **Speaking**
  - Speak with care and respect
  - Only one person talks at a time
  - Use the talking tool (basket, etc.)
  - Silence and pauses are ok
- ✧ **Listening**
  - Listen well and with respect
  - Listen to learn
  - Listening is **MORE** important than talking
- ✧ **Consensus**
  - Consensus is critical
  - Build off of one another's ideas
  - Discussion, apology, and forgiveness
- ✧ **Passing is ok**

# Tribal Nations open with prayer....

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- Meetings of the Great Council were a sight found well worth seeing...
  - The meeting was opened with prayer
  - As prescribed in the constitution,
  - A prayer of thanksgiving to the Creator and to
  - The various manifestations of his Mind in nature.
- 
- *See* Paul Wallace, *The Iroquois Book of Life, White Roots of Peace*, ( 1994) at 80.



# Choctaw indigenous justice:

41

- “...it is a way to put back some of our people’s way into this justice system...”  
~ Sr. Youth Court Judge Hilda Nickey 2004



|                       |                 |               |
|-----------------------|-----------------|---------------|
| Choctaw               | Native American | American      |
| Chahta okla           | Community       | Individualism |
| Ittibachaffa          | Cooperation     | Competition   |
| Ittihal <u>a</u> llih | Relatedness     | Autonomy      |

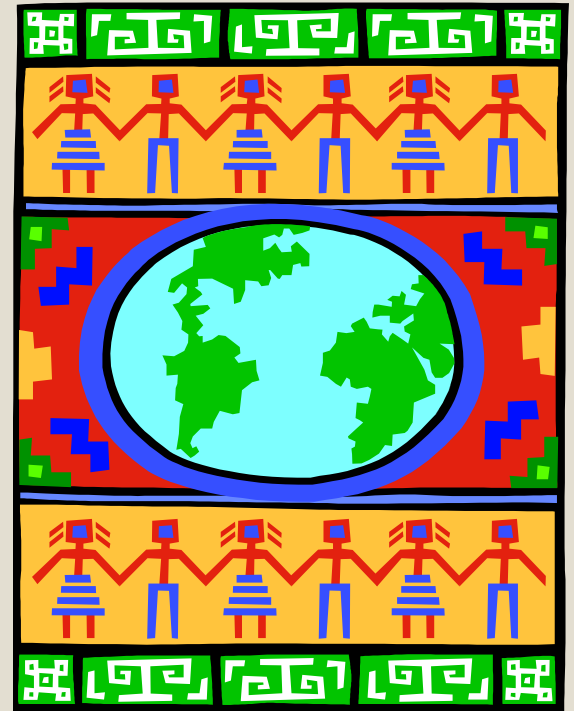
# Other tribal peacemaker models:

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- Seneca Nation of Indians
- Chickasaw Nation
- Navajo Nation
- Alabama-Coushatta Tribe of Texas
- Ho-chunk

## Traditional courts:

- Cochiti Pueblo
- Taos



# Example: Saddle Lake-Higher Indian Cree:

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- Affirmation of the Whole-Continuity
- Affirmation of the Creator- World
- Affirmation of the Community-Nationhood
- Law of Harmony
- Law of Relationships
- Law of Discourse-oral tradition; “good talk”
- Law of Truth
- Law of Personal Responsibility
- Law of Pity
- Law of Consequences
- Law of Consensus
- Law of Fairness and Equity
- Law of Duty
- Law of History

# Seneca Peacemaking goals:

45

- **The goals of the Court include:**
- To protect the sovereignty of the Seneca Nation of Indians by hearing our own cases and resolving our own problems and cases.
- To render decisions that promotes the health and safety of our children, their families and the Nation.
- To promote and strengthen the Seneca Nation Judiciary by making fair and honest decisions.
- To strengthen the integrity and soundness of our Courts to benefit the community and foster trust in our judicial system.
- To pursue fundamental fairness and equity for all Parties in each case.

# Example: Native Hawaiian- Ho' oponopono :

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- Pule-prayer
- Statement of problem/issues
- Recognition that injurer and injured are bound together by doing and blaming
- Grudge and fault released from the one holding it
- Ho' omalu-put it in the shade—a moment of silence—quieting parties to consider issue at a deeper level



# More Ho'oponopono...

47

- Injurer and injured must be released-for each feels the pain of the other
- Layers of trouble considered from all points of view
- Forgiveness
- Formal and binding statement-I release you from wrong, thus I may be released from it
- The wrong is separated from the person
- Pule-prayer of completion



# A peacemaker model: Alabama-Coushatta Tribe of Texas

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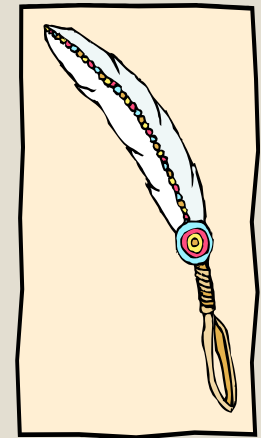
- Pursuant to the customary and traditional laws of the tribe;
- Adopted pursuant to the Constitution of the Alabama Coushatta Tribe of Texas, as amended,
- Article IX, Judicial Branch of Tribal Government and
- the Alabama Coushatta Tribe of Texas Peacemaker Code
- Sr. Peacemaker will be more specific



# Use of custom and tradition:

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- The Peacemaker shall have the authority
- to use tribal cultural teachings and customs,
- Including present day religious teachings in the peacemaking process
- if the Peacemaker reasonably believes
- that such will further the objective of
- voluntarily resolving a dispute.



# No appeal:

50

- Consensus model
- May have legal counsel review the agreement and order
- In agreement and order---**10 day reconsideration**
- Must be submitted to the court in writing

# Peacemaker:

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- Any person selected as a Peacemaker
- must be approved by the Tribal Council; and
- must agree in writing and by oath to serve under the authority of the Peacemaker Code.
- Judges and Peacemaker of the Peacemaker Court are
- officers of the court and
- shall have the same immunities as other judges of other Alabama Coushatta Tribe of Texas courts.

# In general:

52

- This Code is intended
- to provide guidance, in writing,
- to the Alabama Coushatta traditional method
- of resolving disputes.



# Kinds of disputes:

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- Domestic-family disputes-restitution
- Juvenile
- Child custody-CAN-per children's code;
- Domestic violence-forgiveness case
- Probate-simple; tribal law precedent
- Trespass
- Property disputes-repatriation case
- Commercial transactions
- Employee-employer disputes
- IDR-"Inter" dispute resolution [within companies/organizations/tribes, etc.]
- Criminal
- Tribal, state, national and international

# The Basket: the weave of tribal sovereignty

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- A talking tool—
- Brings respect and presence of the tribe
- Tears and laughter
- It is symmetrical
- Mind, body, spirit –the weaver
- The tradition of the tribe
- Each part of the weave is important to the whole
- You are the design
- Your input is necessary to the weave
- Without your part....it is incomplete and flawed
- Represents sovereignty
- Used in court/family conferencing/state tribal meetings



# The power of the circle:

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- Gathering in a circle is powerful
- Allows us to experience each other as equals
- Each person is the same distance apart and no one is seated higher than or stands apart from others in the circle
- A group of people in a circle become united
- The circle has no beginning or no end
- Parties who take part in a circle—the energy forms to build resolution
- Face to face in a circle—like ripples of water bringing about change!

# Washtenaw County Peacemaking Court

## Est. 2013

56

- Relationships
- Responsibility
- Respect
- Redirection



# What is it?

57

- Model created to replace the limitations of an adversarial court system
- Replace with a more comprehensive, harmonious and balanced solution that
- Integrate the repairing of harm
- Healing of relationships
- And
- Restoration of the individual within their family community

# Honors tribal court traditions:

58

- Integrates four intrinsic values:
- Relationship, Responsibility, Respect and
- REDIRECTION
  
- As a means of resolving conflict and returning balance and harmony to human relationship

# Facilitation:

59

- Cases will be facilitated by trained persons from the
- DRCenter
- Agreements made during the peacemaking circles are
- **BINDING AS A K**

# Outcomes: [in suitable cases]

60

- 94% of cases resulted in an agreement from both parties
- 82% agreed or strongly agreed that the result of the PM meeting were fair as compared to what might have occurred in the court setting
- 91% agreed or strongly agreed that after hearing everyone talk, the participant had a better understanding of the other person's perspective
- 94% agreed to strongly agreed that they would recommend peacemaking to others

# We can build on old partnerships:

61

- On September 16, 1987, the U.S. Senate passed a resolution officially stating that the U.S. Constitution was modeled after the Iroquois Constitution, the Great Law of Peace.
- The Iroquois had a major impact on the founding fathers, specifically Benjamin Franklin—who recognized their uniqueness and genius of their government as compared to the European model.
- Thus we already have a model of
- partnership



# UN Declaration of Rights of Indigenous People:

62

- Indigenous peoples have the right to access to and
- Prompt decisions through
- Just and fair procedures for the
- Resolution of conflicts and disputes [with due consideration to the
- Customs, traditions, rules and legal systems of the indigenous peoples concerned

# Humility:

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- To maintain a humble perspective in dealing with these difficult issues, acknowledging that no one person/group has all the answers, nor a monopoly on the “truth”.
- There must be a “willingness to listen as well as to speak.”
  - CHIEF JUSTICE/N.CAROLINA (1991)

# More:

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- **For example: Partnerships:**
- Alabama-Coushatta Judicial Symposium;
- Texas Supreme Court Permanent Commission on Children
- National Council of Juvenile and Family Court Judges task force;
- National Tribal Judges Annual Training to share dispute resolution models and to begin establishing a network of practitioners
- The MBCI –ICWA conference—grows and grows!
- NAICJA- state- tribal round tables;
- NM tribal state consortium
- NARF, NAICJA, Columbia SOL and UNM SILC- Peacemaking Collaboration; Nov. 13<sup>th</sup> at UNM.



# Tribal Justice

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- Since time immemorial indigenous communities have employed customary norms as a source of just procedures to guide and inform the behavior of community members.
- The concept of justice is shaped buy those customary norms.
- *See* April L. Wilkinson, A Framework for Understanding Tribal Courts and the Application of Fundamental Law: Through the voices of Scholars in the Field of Tribal Justice, University of New Mexico School of Law, Tribal Law Journal, Vol. 15 (2015).

# Alabama-Coushatta Judicial Symposium

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- “This forum was an example of how with open minds and good will, parallel judicial systems can learn from each other---discovering new approaches to serving communities and avenues for cooperation.”

~ Honorable William Thorne (Pomo), Utah State Court of Appeals, Speaker at the Alabama-Coushatta Tribe of Texas’ first Tribal-State Judicial Symposium (2011).

# AC State tribal round table

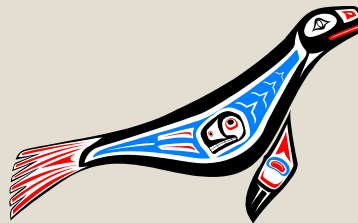
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# From the indigenous voices:

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- “...if there is an intent to bring about a peaceful resolution, everyone is involved...everyone feels it...there is an “Indian-ness” about it...instead of let us fight....let us make peace....”  
~ Peacemaker Henderson, MBCI



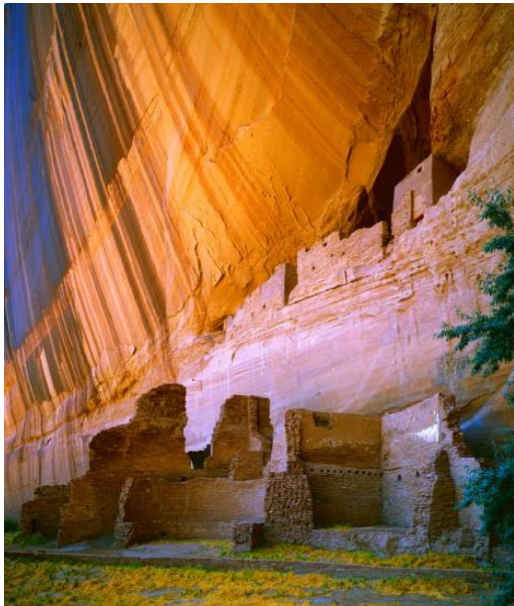
“Tribal Courts are important to community and to nation building. They’re the mechanisms to promote peace.”

~ Judge Joseph Flies-Away  
Hulapai



The peacemaking process is related to the concept of k'e, or respect. K'e means to restore my dignity, to restore my worthiness.”

~ Robert Yazzie, Chief Justice  
Navajo Nation



“The tribal courts and  
our indigenous concepts  
of justice shall be the  
guardians of our people,  
our communities and  
our tribal sovereignty”

~ Rae Nell Vaughn  
Former Chief Justice  
Mississippi Band of Choctaw Indians



# Holyfield:

72

“...we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy.”

~ *Holyfield*, 490 U.S. at 54.





# ICWA and common ground:

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- “For the sake of the children...even the most distressed families and communities communicate love and respect beneath the confusion and reveal a tremendous resilience of the Indian spirit”.  
~ Regis Pecos, former Governor, Pueblo de Cochiti

# For the sake of the children....



# A paradigm shift for the future: indigenous justice for our youth:

75

- “...working with youth in crises is challenging---we, as judges, have options to use a therapeutic model,
- such as peacemaking,
- to ensure an effective process.
- Our Native youth will be our upcoming leaders. .. they will be the ones to carry the torch for us... to protect our tribal sovereignty in future years.
- Our Choctaw values and traditional laws continue to pave the way for our Tribe’s future.”



~ Hon. Kevin Briscoe, MBCI Sr. Youth Court Judge  
Current Chief Justice

# The price of peace.....

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# Eternal vigilance....

77

- And the eagle which the man of the Five nations saw circling in the sky above him was a reminder that:
  - The price of peace
  - As of liberty
  - Is eternal vigilance.
- 
- *See* Paul Wallace, *The Iroquois Book of Life, White Roots of Peace*, (1994) at 30.

Sovereignty begins at home....  
Cheryl Demmert Fairbanks





- “Gunalchesh.”\*

\*A Tlingit thank you.





“Gunalchesh ho’ho”\*



\*A very big Tlingit thank you!!!!

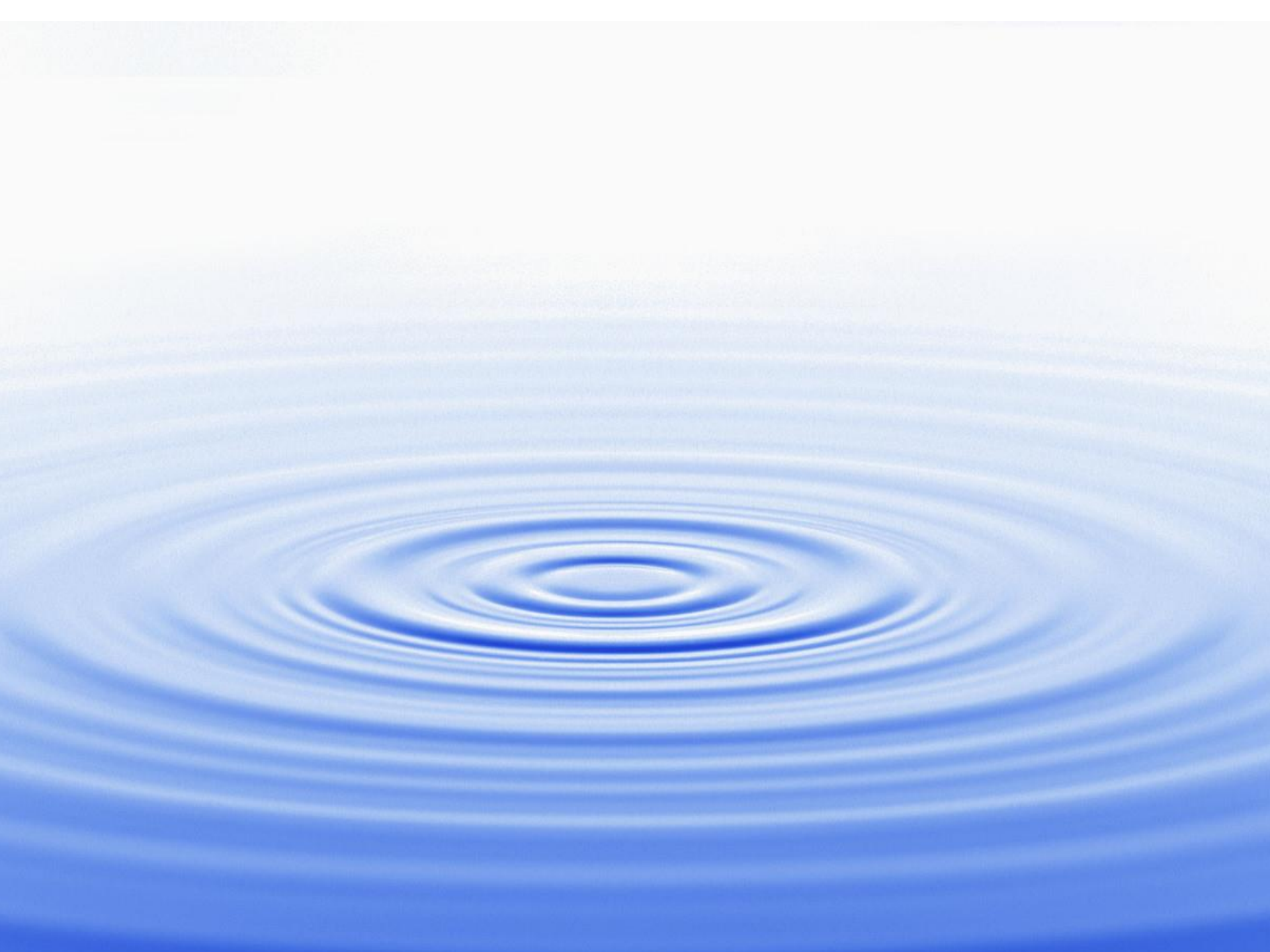


# Sovereignty:

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- A word of many meanings
- Used in many contexts
- For Tribes:
  - Protection
  - Exercise of
  - Enhancement of





# Sovereignty:

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- is the quality of having supreme, independent authority over a geographic area,
- such as a territory.<sup>[1]</sup>
- It can be found in a power to rule and make law that rests on a political fact for which no purely legal explanation can be provided.



# FFC and Comity:

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- The Peacemaker may give full faith and credit or comity to judgment, order, and decrees of the tribal court or courts of foreign jurisdiction.



# Yes, we can!

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- Never in the history of our families, our people, our nation...and our countries----is it more important to come together today in unity.
- The **universal law of respect** is one we can all abide by  
and leads toward unity.
- **Partnerships and sharing of knowledge and judicial processes** between tribal, state, federal and international governments can open the door to a better understanding between individuals, communities, governments and nations.

# The 4 C's

90

- **Communication**—is a two way street
- **Cooperation** –brings peace, forgiveness and understanding
- **Consensus** and unity—builds and enhances relationships
- **Comity**-allows for reciprocity and the universal law of respect

