



INTEGRATED JUSTICE SYSTEMS IN AMERICAN INDIAN COMMUNITIES PLANNING SERIES:

INTERGOVERNMENTAL AGREEMENTS SUPPORTING CRIME INFORMATION AND EXCHANGE AMONG TRIBES AND STATES

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INTRODUCTION

Intergovernmental agreements (IGA) are formal mechanisms by which crime data and information sharing can occur between tribes or between a tribe and a state government. They are usually developed through extensive consultation between tribal and state governments. Consultation is one form of conducting government-to-government relations.¹ An IGA is a formal agreement that recognizes the authority of parties to enter into an agreement and, by implication, recognize the capacity of the parties to enter into and fulfill requirements established in the IGA. The IGA process requires implementation of important steps covered in this article.

ELEMENTS OF INTERGOVERNMENTAL AGREEMENTS

Understand Governmental Structures and Processes of Parties

Developing intergovernmental agreements with tribes and states require

understanding and knowledge about the structure, laws and policies of the tribes and/or state entities involved. All parties should have a clear understanding about how to use their sovereign authority and power to enter into agreements. In particular, state and tribal representatives need to be aware of the limitations on their authority and sovereign powers as a tribe or state government. Additionally, state representatives need to be aware of protocols and process issues of the tribes they seek to enter into agreements. Often, mutual ignorance of one another's governmental structures, policies and processes hinder the use of intergovernmental agreements to deal with mutual issues and/or problems affecting each government. However, the onus of teaching and learning of structures, laws and process belongs equally to each tribal and state group entering into an agreement.

Acquiring knowledge about one another can be accomplished several ways, but the most effective are interactive educational events and meetings that encourage discussion among state and tribal stakeholders. These learning events help representatives from each side to learn about one another's history and culture, current

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systems and structures, laws and policies and the issues that are important to them. Interactive learning exchanges help to raise awareness and sensitivity to each other's views, concerns, issues, needs and wants. Most importantly, these interactive exchanges lay the foundation for intellectual knowledge and understanding to pave the way towards building intergovernmental relationships and alliances.

Develop Trusting Relationships

In addition to understanding governing authorities, structures and policies, IGA development involves creating or enhancing and sometimes repairing relationships between administrators of tribal and state justice agencies. Lack of trust is repeatedly identified as the major barrier to developing crime data sharing agreements between tribes and states. This places an important priority on trust building and developing mutual respect and understanding between the governments represented by an IGA. This is particularly true when there has been friction and poor intergovernmental relations in the past, even if those issues are unrelated to the topic at hand. Bad experiences and poor relations in the past between tribes and states are sometimes difficult to forget or overcome. Such situations require extensive effort by all groups to work out differences and to focus on mutual areas of interest and concern that will yield mutual benefits for all groups.

Although poor relations and bad experiences may have occurred between people who are not involved in present day matters, it is important for local and/cross-jurisdictional working groups to understand the need to review what went wrong in the past. A review can help working groups to:

- Simply acknowledge that things did not work out in the past,
- Commit to avoid repeating the same mistakes made in the past,
- See what damaged relations can be repaired,
- Identify how and what needs to be done to restore relationships, and
- Develop appropriate ways to address conflicts and implement problem-solving strategies and solutions.

Another consideration in trust development is differentiating the starkly different worlds tribal governments function from that of states. There are immense variances in the size and structure of tribal governments to state governments. Tribal governments tend to be small and led by common citizens appointed or elected by tribal members to leadership roles. Tribal leaders remain close, are more approachable and accessible to their constituents. On the other hand, professional politicians with advanced academic degrees and elected by all citizens (including tribal members) run state governments. Most high-level state officials, such as governors, cabinet officials, and legislators are not easily accessible to citizens. Often state officials and representatives view and treat tribes more as constituents rather than entities that the state government should engage on a government-to-government basis. It is important for state representatives to acknowledge that when a formal agreement is being negotiated, tribal representatives are acting on a government-to-government level on par with the state. Therefore, it is important for the State to view intergovernmental agreements as an act derived from tribes' sovereign powers similar to that of the state.

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For data sharing IGA's to be successful, the level of mutual trust needs to be elevated, communication paths need to be developed, and mutual concerns need to be identified. Trust, communications and mutual interests are intangible components of successful intergovernmental relationships. Interactive events and activities are vitally important to build trust and lay the foundations for cross-jurisdictional collaboration, cooperation and coordination. Developing trust between governments and agencies takes time and requires commitment and energy of the parties involved.

PROCESS

One government cannot simply call upon another government to enter into an agreement without first establishing the basis for the agreement. Important aspects include: identifying areas of mutual interest or concern, common problems, and overlapping jurisdictional response areas that each government has vested interest or responsibility. Mutual legal responsibilities, obligations or roles provide all the reasons why a government would participate in a formal agreement, but there may be other non-legal reasons. Sharing human, financial, or intellectual resources are some non-legal reasons that make entering into formal agreements desirable. The mobility of people off and on Indian reservations also necessitates local, tribal and state governments to work together to meet the needs of highly mobile citizenry.

Identify and Establish Authority

One of the first items is to identify and state the authority of each government to enter into intergovernmental agreements.

For states, this authority is generally granted through legislation to the executive branch. Under state constitutions, governmental powers are granted by the people to the state through the legislature. If the power to enter into an IGA is not specifically granted, the authority to enter into a formal agreement does not exist. For example, in 2003 the New Mexico (NM) legislature passed House Bill (HB) 278, which authorizes the State to enter into agreements with the Tribes and Pueblos in the State for the purposes of exchanging motor vehicle offense information, specifically DWI conviction information. This law provides the authority the state agencies such as the NM Motor Vehicles Department, Department of Public Safety and others need to enter into a formal agreement with the NM Tribes and Pueblos.

For Indian nations, it is recognized that they have all governmental authority that has not been specifically limited by an act of Congress. Generally this means that Tribes do not need specific authority to enter into IGA's; however, the IGA must be ratified by the Tribe's legislative branch. This ratification binds the tribe to the government-to-government agreement with states or other governmental units; and the power to bind the tribe in such a manner lies with the legislative branch unless it has been specifically delegated to the executive branch of government. However, it must be noted that all tribes have differing governing structures, laws and policies, which directly determines how the IGA negotiation and ratification process occurs.

Identifying Mutual Interests

The basic rationale for entering into a formal agreement such as an intergovernmental agreement (IGA), memorandum of agreement (MOA),

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memorandum of understanding (MOU) or joint powers agreement (JPA) is the need to resolve issues in areas of mutual interest. Historically, relationships between the tribes and states have been one of hostility and competition for authority and control. Getting past old hostilities and fears about who has jurisdiction or authority in a particular issue requires that the parties focus their efforts on those areas of mutual interest that hold each government accountable for response. It is also important that the parties see the protection of those mutual interests as being more important than maintaining a stance that leads to continued stalemate and neglect of those interests.

A good example of identifying a mutual interest was the stance taken by the Pueblo of Laguna in New Mexico promoting the need for major traffic offense conviction information sharing between the tribes and State of New Mexico. Public safety and concerns for the quality of life in Laguna prompted the Pueblo leadership to approach the Governor of New Mexico to request his support in submitting the idea of information sharing to the legislature. The need to initiate dialogue and address these issues of mutual concern (public safety and quality of life) overrode other concerns by the Pueblo that may have restricted access to tribally held DWI information.

Finding and determining mutual interest requires dialogue between tribal, state and local government stakeholders. The parties need to be able to speak to each other to determine how a particular issue impacts each government and/or the community they represent. Each representative needs to be able to listen to the concerns of the other stakeholders without being defensive about how those concerns impact their own or

groups' perspective of the issues. Dialogue requires listening as well as speaking, it requires one to see the merits of the other's perspective and it requires that the parties be open to compromise in their position. Identifying a mutual interest does not mean that parties automatically agree about how interests will be protected or approached. However, through consultation local, tribal and state governments create a process to listen and discuss each other's concerns and work out solutions. It should also be noted that there are often more than one issue of mutual interest. Crime data sharing and justice integration are long-term processes that involve many issues occurring over time. This requires a commitment to ongoing consultation to address the myriad of issues that arise.

Building Communications Paths

The IGA process and justice integration are long-term commitments, often requiring many years to establish and implement. This, in turn, requires that lines of communications be built up and strengthened. These communications lines need to become paths: clearly identifiable by constant use, known by all who are working to establish or implement the IGA and connecting key participants in the process. Communications is an ongoing two way process that needs to be done in a good way and in good faith. Positive communications is instrumental to maintaining trust.

Developing Trust

Since the lack of trust is the greatest barrier to crime data sharing, it is important that tribes and states take steps to engage in activities that enhance that trust. While dialogue helps to develop trust, it alone is not sufficient to instill the level of trust

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necessary to overcome a history of strained relations that may exist. Pre-agreement activities that are necessary for a successful justice integration project can provide the actions necessary to enhance the level of trust between the parties. Such activities include interactive events aimed at clearing the air, general meet and greet sessions, education and awareness events to share programmatic or agency information, etc.

Integrated justice projects require a great deal of time, effort and resources to implement. The process for any multi-jurisdictional justice integration or data-sharing project is far more than just signing an agreement. The actual process of developing an agreement on crime data sharing involves a number of preparation activities. These activities are necessary to provide the technical and political foundation for the success of the IGA and the activities carried out under the auspices of the agreement. These include:

- Establishing a governing board,
- Conducting IT assessments,
- Conducting community and organizational readiness assessments,
- Strategic planning, research and development,
- Conducting justice information exchange models, and
- Standards identification.

The above are just a few of the pre-planning activities that need to be conducted in order to lay the proper foundation for a successful data sharing agreement. These activities also provide the opportunity for the parties to work together to generate a positive environment that will enhance levels of trust between the stakeholders.

All of the above concerns are the intangible components of an IGA. The ability to reach consensus on the technical and political components of an agreement will be dependent upon the success in incorporating and utilizing these intangibles.

Tribal Leadership Buy-In

Since formal agreements must be approved by the tribal leadership, usually the tribal council, it is important to involve them as early as possible in the process and to keep them in the information loop as the pre-agreement activities proceed. It is important to keep in mind that the buy-in necessary at this stage of the process is not a complete, “sign on the dotted line” commitment. The tribal leadership buy-in necessary at the beginning of the process is mostly their willingness to explore the issue, to identify mutual interests and potential barriers and to establish a local working group responsible for directing the pre-agreement work. The *actual commitment* occurs when the tribal leadership signs the agreement.

Tribal Working Group

Contemporaneous with securing leadership buy-in is the process of establishing a tribal working group. The local working group will be responsible for pre-agreement activities involving the local community. This may include arranging for and scheduling information technology (IT) assessments and community readiness assessments; reviewing tribal policies that may impact capture, management and sharing of crime data; and developing justice integration plans for the community justice services agencies. The tribal working group should be comprised of tribal leadership, community members, and tribal justice

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agencies, such as law enforcement, courts, social services, and victim's advocates. The local working group is responsible for preparing the tribe for participation in the intergovernmental agreement negotiations. Such preparations could be very simple or it could require years of local justice integration projects, policy development, IT acquisition and training for program staffs.

Intergovernmental Working Group

As the IGA process continues, there will come a point in which local working groups will need to expand or establish an intergovernmental working group to assist in designing, developing, implementing and sustaining the data-sharing agreement. There is no magic time for this connection. It could happen very early in the process or the local group could wait until they felt that their local preparation efforts were completed. The intergovernmental working group can assist in identifying barriers to cross-jurisdictional integration and assist with solutions to those barriers. For that reason, it would be best if the intergovernmental working group were established as soon as feasible.

The intergovernmental working group needs to have the authority to recommend and follow through on changes in policy and direct the actual integration of the justice services agencies of both governments. A charter or MOA should be created that articulates the authority and roles and responsibilities of the intergovernmental working group. This agreement should also identify the stakeholder governments and their representatives on working group, authority of the working group, and tasks of the working group to the degree they can be specified. Signatories to the agreement need to be the highest executive officer with

authority to sign such an agreement and perhaps, if appropriate, it should contain a supporting tribal resolution.

It is not unusual for preliminary agreements to be developed. It should be clear that an IGA establishing the intergovernmental working group is not the agreement to share crime data and information. For example, under the NM Crime Data Project, the intergovernmental working group worked with state and federal agencies to develop working agreements. These agreements were in the form of letters of intent, letters of support that federal agents on the group could provide. A Charter was developed for the three Pueblos and the State, which was a necessary step that allowed each group to work on the processes by which crime data sharing would occur. There are a number of integration issues that need to be addressed before actual data sharing can take place. Policies and protocols need to be developed for administering integrated systems, defining how information transactions actually take place, defining violations of data sharing agreements and their consequences, and enabling other aspects of the integration process.

Strategic Planning

The primary role of the intergovernmental working group is to do the strategic planning for the justice integration project and therefore the implementation of a data sharing agreement. The strategic planning process for justice integration occurs in three stages: establishing a common understanding and vision, detailed analysis and design, and implementation. It is the responsibility of the intergovernmental working group to work through the strategic planning process.

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Justice integration efforts are very expensive. Time allocations, staff commitments, IT acquisitions and operations integration consume great amounts of resources. Planning provides the tools to insure that those resources are not wasted or misused. In many instances the resources available to assist in justice integration projects are one time only funds; if those funds are not strategically and efficiently used, it may be a very long time before justice integration can take place, even locally within the tribal justice agencies.

Essentially the strategic planning process will define the terms of the data sharing agreement. In the detailed analysis and design stage of the planning process, issues such as confidentiality, amount and kind of information to be shared, alternatives in case of violations of IGA, and other substantive issues related to the agreement will be identified and potential options for resolution will be identified. The strategic planning process also identifies issues related to funding, organizational structure, and other issues related to implementation of the justice integration initiative. All of these elements are necessary for a data sharing agreement to be successful.

DATA SHARING CONCERNS

Justice integration efforts are long-term projects. They require a great deal of planning and conscious implementation for success. This is true for both intra and inter-governmental integrated justice initiatives. However, when an intergovernmental project is attempted, there is potential for misunderstanding and crossed purposes. Perhaps even more problematic is when

historically poor tribal-state relationships form the basis of the IGA. The challenge for the intergovernmental effort is to reach the point in which the IGA is signed and implementation occurs. Meeting that challenge requires that the process be well planned and there is an effort to address all of the concerns by the parties to the agreement. Identifying the concerns of the tribal and state participants to crime data sharing is an important aspect of the IGA development process. There are various scenarios in which tribes may want to share crime data with other tribes or states and each of these scenarios will have its own set of issues. But there are a few issues that need to be considered, regardless of the nature of the data sharing agreement.

Who Speaks For The Tribe?

Justice integration is a new concept for many governments and particularly for Indian tribes. Generally the idea of sharing information between tribal justice services agencies, such as police, court, corrections, victim's services and social services is generally seen as something positive. But there are some within tribal governments and programs who feel that there is the possibility of misuse of such information and that it is the tribe's responsibility to protect tribal members from such potentialities. When the possibility of sharing that information with state agencies is added to the equation, there are many who are highly resistant, often for good reason given the history of strained tribal-state relations. While many tribes recognized the need to share information, the perceived risks associated with that sharing could outweigh the need.

Data sharing, especially with the state, is a highly charged political issue. Within

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tribal governments there are essentially two trains of thought regarding crime data sharing. The first point of view is that there should be no data sharing. Issues of sovereignty and fears of state incursion into tribal affairs generate distrust and suspicion. Many who hold this point of view are tribal officials who are responsible for protecting the tribe from a political standpoint. On the other hand, tribal law enforcement, judges, prosecutors, social workers and victim's advocates see the crime data sharing from a very positive perspective. In their effort to "get the bad guys", they want every tool available to insure officer safety and to get the convictions and sentences necessary to hold offenders accountable and keep tribal communities safe. These justice agency administrators also have the responsibility for protecting the tribe and see that sharing crime data is an essential aspect to fulfilling that responsibility.

It is important that both views are brought into any discussion that may occur relating to justice integration. Representation from both perspectives on the local working group is necessary. The success of the intergovernmental working group is dependent on its ability to address the basic political concerns about data sharing and develop some level of consensus. The intergovernmental working group will be focused more on technical issues and may not be prepared to deal with basic political questions related to data sharing. The local working group should have, as one of its priorities, the resolution of basic political questions related to data sharing in order for there to be a single voice for the tribe.

Potential State Concerns

Like tribes, states confront a variety of situations in which crime data sharing takes places or is expected to take place. And as with tribes, it is impossible to list the various concerns that states may have concerning crime data sharing with tribes. However there are some basic differences between tribes and states that impact IGA processes. State bureaucracies are very large, even in the smallest state. In comparison, most tribal governments are very small and often their concerns get lost within the bureaucratic maze of state governments. Because of the size of the bureaucracy, it is essential that efforts be made to insure that the proper agency is participating in the dialogue or the intergovernmental working group. Generally states are very comfortable and experienced with the IGA process. Often there are protocols and procedures to govern state participation in formal agreements, including delegations of signing authority for certain classes of agreements. It is important to be cognizant of such protocols and procedures.

States have been involved in justice integration to some degree for a longer time than tribes and have protocols and procedures in place that have been time tested and are working. When the tribes want the state to adjust these protocols and procedures to meet specific tribal needs, the state may resist on the basis that they should not have to change an existing system that serves a large population for the needs of a relatively a small tribal population. This issue illustrates the need for dialogue and the importance of the intergovernmental working group to be able to identify issues and formulate solutions. If the working group cannot resolve this issue, the tribe may feel that they would have to adopt state

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processes in order to participate in the IGA, thereby fulfilling the tribe's loss of sovereignty fears.

Timing

Any justice integration project takes a long time. Carrying that justice integration project to the point of establishing a formal agreement for sharing crime data between a tribe and other tribes or a state add even more time to the process. There often appears to be a sense of urgency in justice integration and data sharing efforts. Pressing tribal issues such as domestic violence, officer safety and crime data collection and management are often combined with DWI, counter-terrorism, and data driven funding to generate a sense of urgency and create an environment in which rapid change is seen as positive.

Many tribal officials do not see quickly changing environments as positive or to be encouraged. Tribal decision making processes may be based more on consensus building and discussion rather than voting and lobbying. The desire to move quickly could easily be interpreted by the tribes as pressuring or forcing a decision. Tribal justice services agency administrators are often caught in the middle, seeing what information technology can do to enhance their capabilities, but having to move at the speed that the tribal leaders establish.

Timing, then, becomes an issue. Leaders in justice integration initiatives need to be aware of local timing issues when establishing local working groups, making presentations before tribal leadership, establishing the intergovernmental working group and conducting other benchmark activities. Timing issues are not only tribally driven or simply relegated to the realm of

decision making: funding cycles, legislative sessions, consultant contract duration, and administrative deadlines also impact the timing of justice integration. Being cognizant of timing related issues is an important part of the IGA development process.

CONCLUSION

The intergovernmental agreement process is necessary for justice integration to move from the local tribal justice agencies to other tribes or states. The justice integration IGA process is one that combines issues of authority, power and relationship with technical issues related to information technology and integration. The technology issues have an appeal that often steals the spotlight from the governance related issues. However, the technical issues cannot be resolved until the participating governments have established the proper policies and protocols, made decisions about the scope and degree of information sharing, and made the political decision to have a positive working relationship with the other government stakeholders to the agreement.

It is not easy for the participating governments to make those decisions and to implement their intent. Building trust, opening communications and identifying mutual interests requires commitment, time and effort. The IGA process requires that tribal leadership and others are included in the assessments, planning, and policy development within the tribal structure. The local tribal integration efforts will lay the groundwork for the planning and technical work that needs to be done by all the stakeholders to the IGA. This planning and technical work, done prior to the actual implementation of the agreement, will

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define the terms of the IGA. Hopefully the commitment and effort of all involved will help build the trust and communications necessary to overcome tribal and state concerns and provide for a successful IGA.

¹ 2004, Melton, AP, *Consultation with Indian Nations (Updated Briefing Paper)*, Published by American Indian Development Associates, Albuquerque, NM.