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WORLD INTELLECTUAL PROPERTY ORGANIZATION

GENEVA

INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

Fifteenth Session Geneva, December 7 to 11, 2009

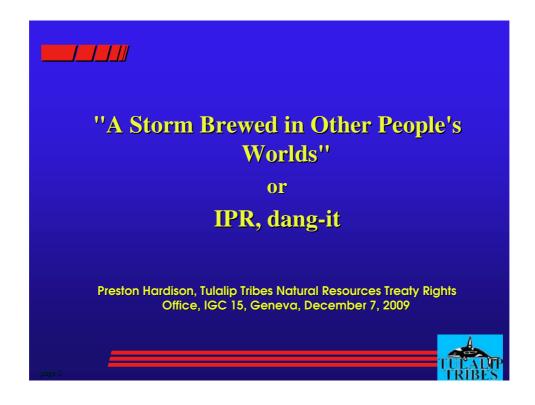
WIPO PANEL ON "INDIGENOUS AND LOCAL COMMUNITIES"
CONCERNS AND EXPERIENCES IN PROMOTING, SUSTAINING
AND SAFEGUARDING THEIR TRADITIONAL KNOWLEDGE,
TRADITIONAL CULTURAL EXPRESSIONS AND GENETIC
RESOURCES"

EXPERIENCES FROM THE UNITED STATES OF AMERICA

DECEMBER 7, 2009

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^{*} This document comprises the presentation in the form received from the presenter. Any views expressed in the presentation are not necessarily those of WIPO or any of its Member States.



United Nations Declaration on the Fights of Indigenous Peoples (September 7, 2007) Article 11

♣ 1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.



DECRPS

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

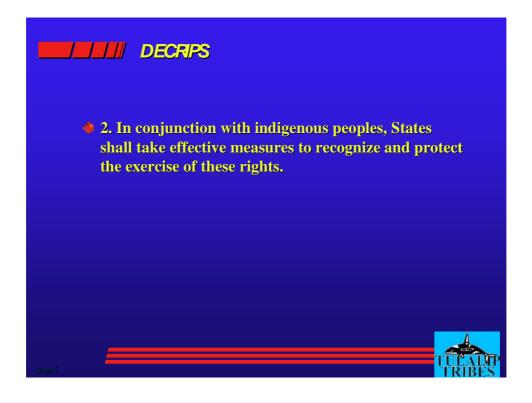




Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

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USA: Tribal Sovereignty

2. Snyder Act (1924): BE IT ENACTED by the Senate and house of Representatives of the United States of America in Congress assembled, That all non citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.



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Goals for Protection

- Protection against any use secret and sacred knowledge
- Protection against use contrary to customary law and spiritual values
- **Protection against commercial use**
- Protection of benefit sharing (e.g. Salish designs on salmon boxes)



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Responses

- ****** Use of Existing IPR Mechanisms
- Accomodation of Tribal issues within existing IPR
 - **Defensive approach registers, databases and public domain**
 - Due diligence approach reasonable discovery obligations by potential users
- **Sui** Generis ("generated in itself")
- ***** Tribal Codes / Customary law



Barriers to Conversation

- "Property" versus "collective heritage"
- "Intellectual Property" vs. holistic concepts of nature
- "Sui generis" versus "customary law"
- "public domain" versus "customary law"
- Spiritual barriers: What may and may not be talked about, spiritual power of words
- Customary law limitations on discussion



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Barriers to Implementation

- Expiration and exhaustion of rights versus customary law
- "Expression" versus "fact" distinction
- Commercial versus non-commercial use
- Spiritual versus secular issues
- Separation of Church and State
- Notions of "harm" and redress: e.g. offensive impacts (moral rights) versus spiritual impacts



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Earriers to Implementation

- Identifying rights holders and standing: Collective versus individual rights
- Clarity / Codification
- ***** Timeliness
- ***** Tribal and Intertribal Issues
- Customary law limitations on implementation



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Targets of Action

- Internal: Tribal members, visitors, researchers
- **External:** Non-resident tribal members, non-tribal members (domestic and foreign)
- Education: Petty transgression
- ***** Litigation: Hard Cases
- Controlling Use: Commercial and Non-Commercial
- Repatriation



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Draft Tulalip Tribes Cultural Heritage Act

- Governance right to set laws: Tribal Sovereignty (Law of Nations)
- Internal control over movement of TK and cultural heritage
- External recognition of customary law
- Transparent Tribal Process TK Holder Driven
 - Processes and rules determined by elders working with craftspeople, artists, etc.



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Draft Tulalip Tribes Cultural Heritage Act

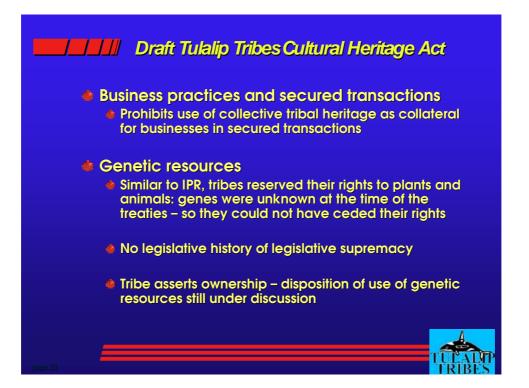
- Elders/TK Holder Council sets policy/resolves disputes
- Asserts tribal control over members on- and off-reservation when they are using collective heritage
- Creation of works not involving collective heritage are not covered by the law
- Most existing non-tribal of collective heritage uses given a holiday, but upon exhaustion of IPRs revert to Tribes; TK not in commercial use reverts.

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