

# Customary Law, TK/TCEs & Intellectual Property

**Sue Noe**  
**Senior Staff Attorney**  
**Native American Rights Fund**  
**Boulder, Colorado, USA**

**WIPO IGC 45**  
**Indigenous Panel**  
**December 5, 2022**



# Native American Rights Fund

“We ask for nothing more, and will accept nothing less, than the U.S. Government keeping the promises made to Native Americans.”

– John Echohawk (Executive Director)



- Established in 1970
- Oldest and largest nonprofit law firm representing Native American tribes
- Represented over 250 tribes in 31 U.S. states
- NARF’s client at the IGC is the National Congress of American Indians (NCAI)



# National Congress of American Indians



National  
Congress of  
American  
Indians

- Founded in 1944, NCAI is the oldest and largest advocacy organization made up of American Indian and Alaska Native tribal governments and their citizens
- Works to protect and enhance treaty and sovereign rights, securing traditional laws, cultures, and ways of life for future generations



**THE IMPLEMENTATION PROJECT**

# The Implementation Project

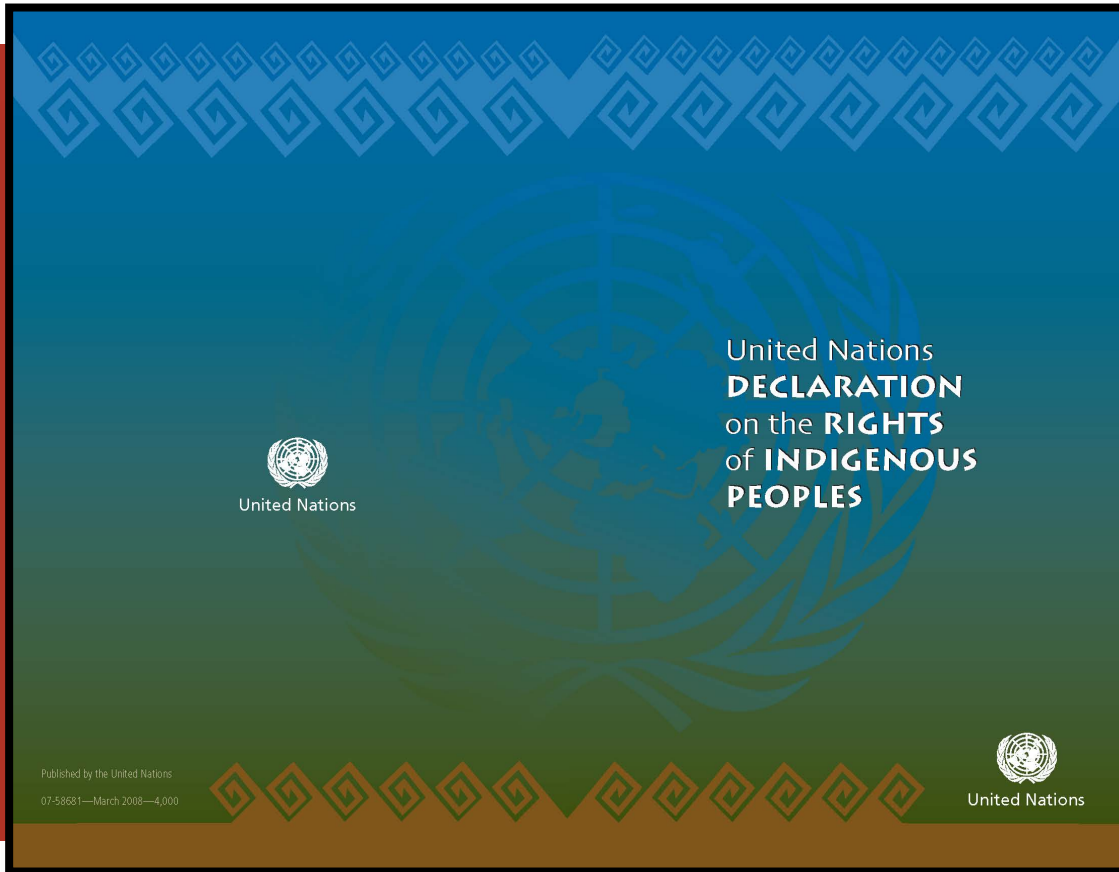
Realizing the United Nations Declaration on the Rights of Indigenous Peoples



**A JOINT INITIATIVE OF:**



# UNDRIP – Article 31



1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions . . . .  
  
They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

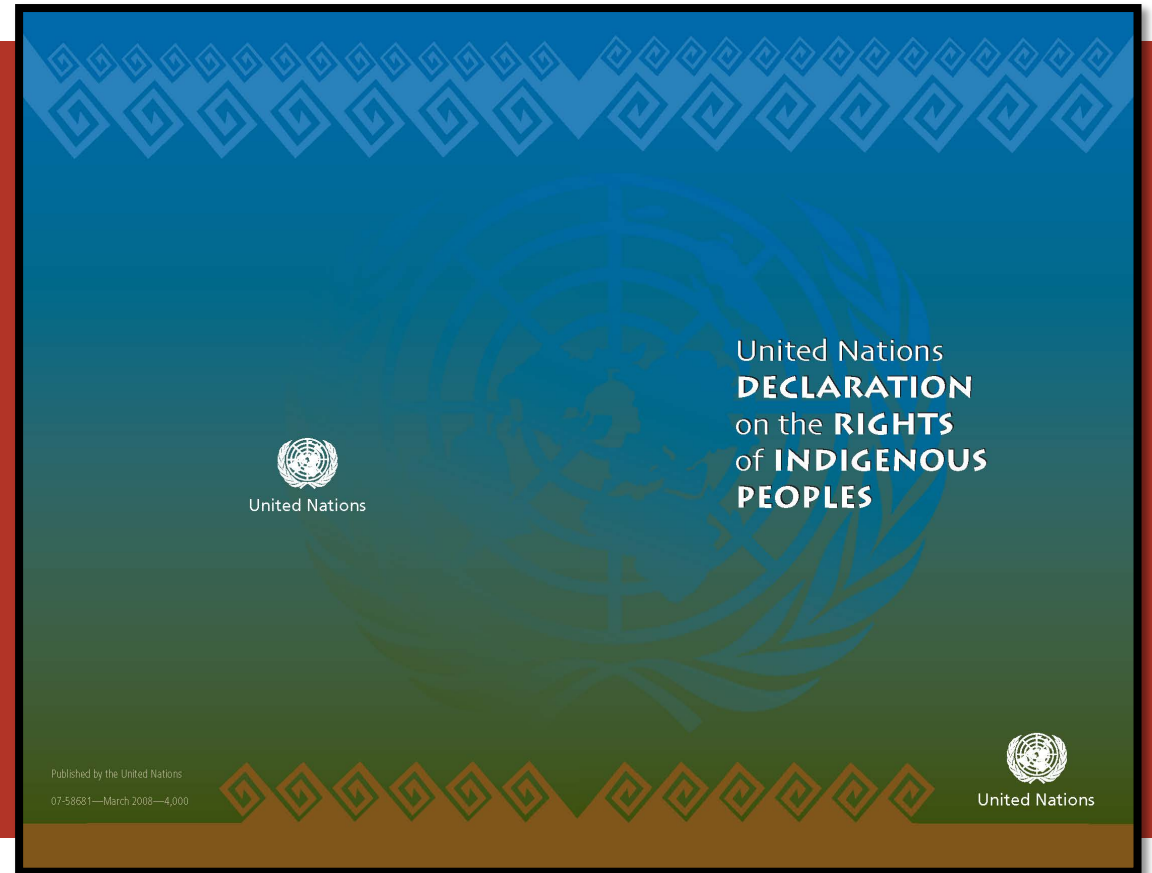


# UNDRIP – Cultural Rights

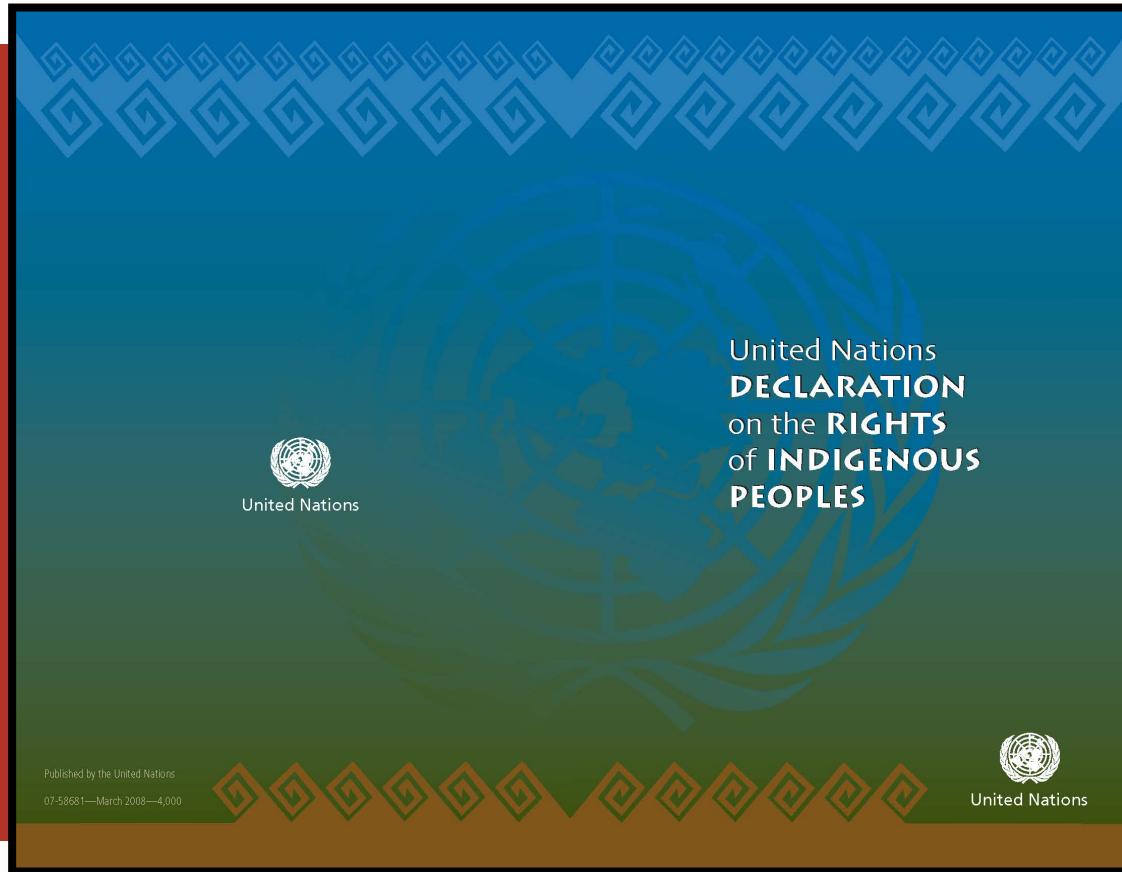
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## Article 11(2)

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.



# UNDRIP – Dispute Resolution



## Article 40

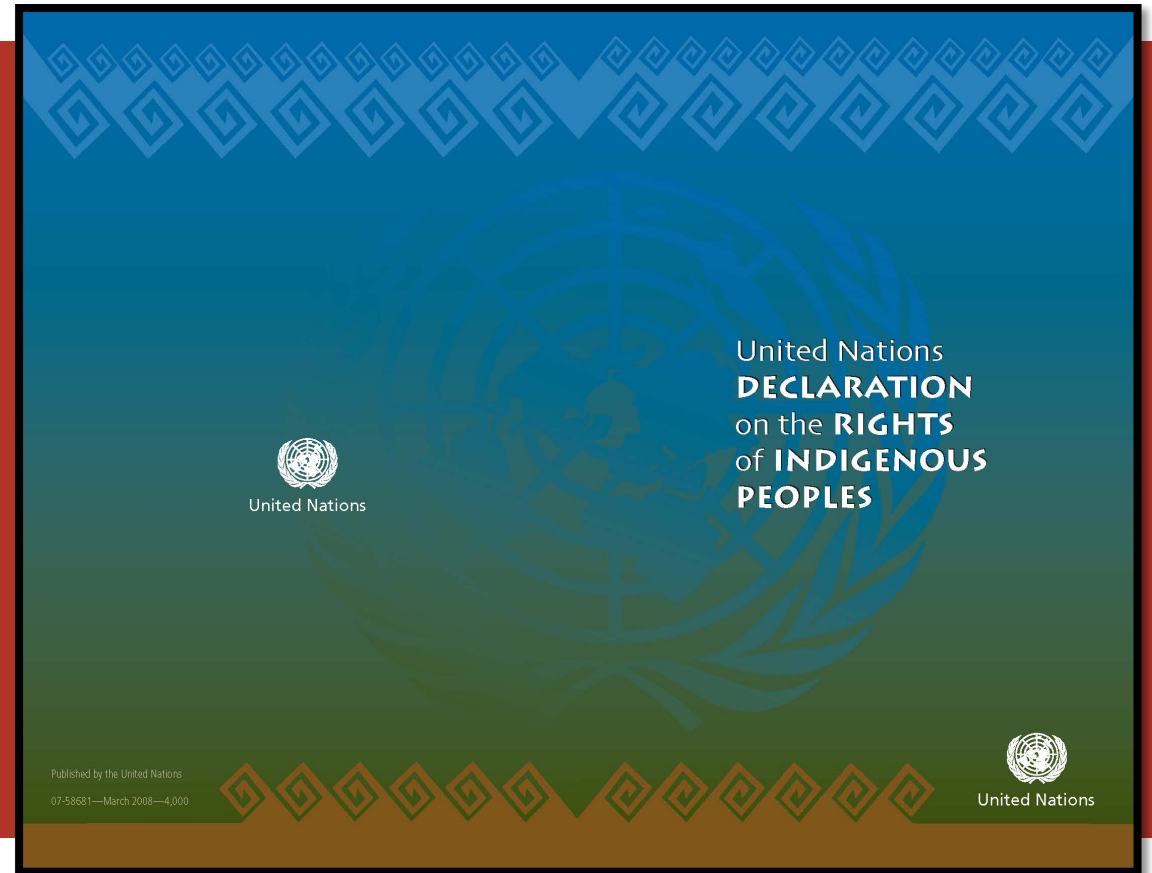
Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

# UNDRIP – Land Rights

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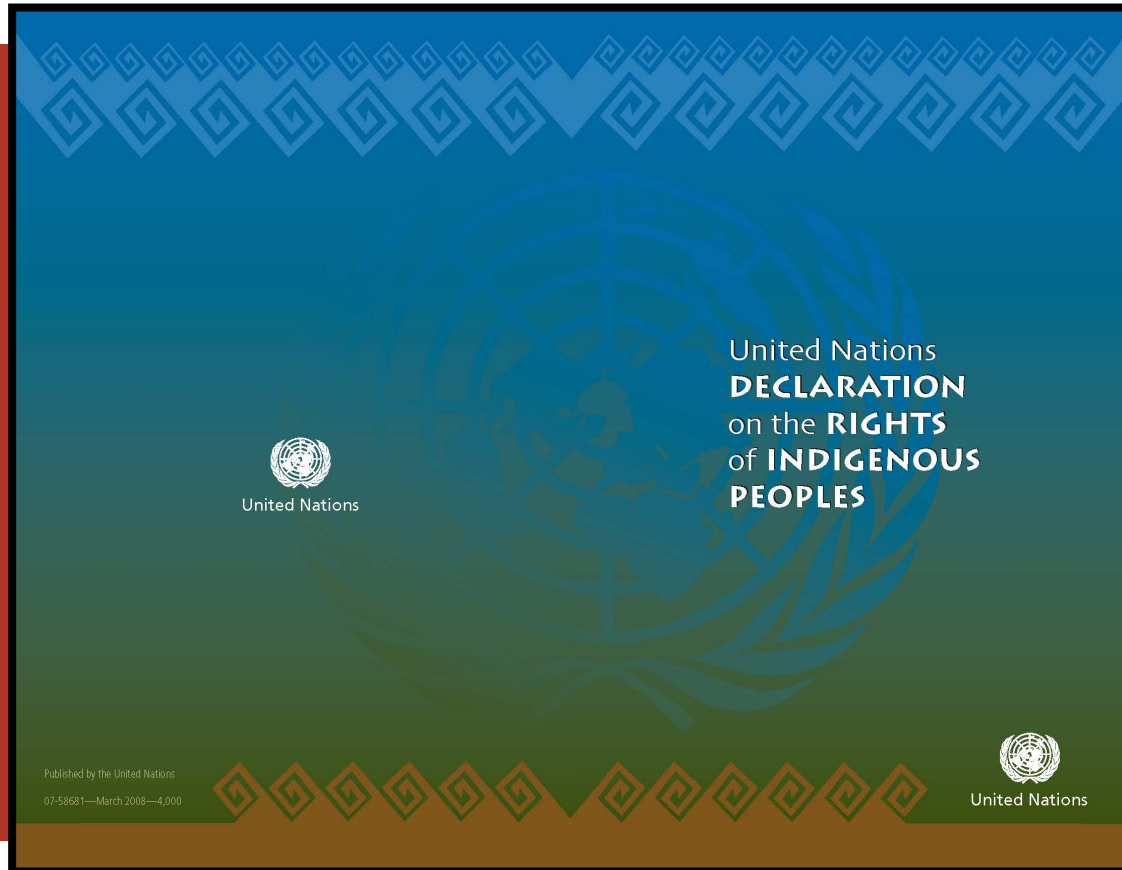
## Article 26(3)

States shall give legal recognition and protection to [traditionally owned, occupied, or possessed] lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.





# UNDRIP – Land Rights



## Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. . . .



# Proposed Indigenous Peoples' Customary Law Definition

**NORMS AND VALUES** accepted as legal requirements or obligatory rules of conduct

**RIGHTS AND RESPONSABILITIES** regarding lands, territories, waters, natural resources, cultural heritage and intellectual property, including TK/TCEs

**WRITTEN** legislative codes or judicial decisions

**ORALLY** maintained by elders or knowledge holders

**INTERPRETED AND APPLIED** consistently with UNDRIP and other human rights instruments

# Legal Status of Tribes

- 574 “federally-recognized” tribes – formal nation-to-nation relationship with US
- Sovereign governments
- Prior to 1871, the US entered hundreds of treaties with tribal nations
- Sovereign right to make own laws, policies, protocols
- Own law enforcement/Tribal Courts
- Jurisdictional limitations



United States  
Example



# US Laws That Look To Tribal Law

**INDIAN ARTS AND CRAFTS ACT**

The Indian Arts and Crafts Act (Act) of 1990 (P.L. 101-644), as amended, is a truth-in-marketing law that prohibits misrepresentation in the marketing of Indian art and craftwork within the United States. It is illegal to offer or display for sale, or sell, any art or craft product in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian tribe resident within the United States.

**ACT DEFINITIONS**

**Indian** is defined as a member of a federally or officially State recognized tribe of the United States, or a certified Indian artisan;

**Certified Indian artisan** means an individual who is certified, in writing, as a nonmember Indian artisan by the governing body of an Indian tribe from which the individual is a direct lineal descendant;

**Indian product** means any art or craft product


2) Any Indian group that has been formally recognized as an Indian tribe by a State legislature, a State commission, or another similar organization vested with State legislative tribal recognition authority.

**CIVIL AND CRIMINAL PENALTIES**


For a first-time violation of the Act, if the total sale amount is less than \$1,000, an individual will face a fine of up to \$25,000, imprisonment of up to a year, or both, and a business will face a fine of up to \$100,000. For fraudulent works with a total sales transaction amount of \$1,000 or more, a first-time violation by an individual will result in a fine of up to \$250,000, imprisonment of up to five years, or both. A first-time violation by a business will result in a fine of up to \$1 million.

**SCOPE OF THE ACT**

The Act broadly applies to the marketing of Indian and Indian-style traditional and contemporary art and craftwork produced after 1935 as Indian, Native American, or the product of a particular Indian tribe.



Bruce Caesar, Pawnee, Metal Work, *Natural Consciousness*, \*1978




Charles Loloma, Hopi, Bracelet, \*1982

## Indian Arts And Crafts Act

Indian Arts and Crafts Act  
25 U.S.C. § 305 et. seq.

National Park Service  
U.S. Department of the Interior

National NAGPRA



**National  
Native American  
Graves Protection  
and Repatriation  
Program**

**HISTORY:**

The Native American Graves Protection and Repatriation Act (NAGPRA) was enacted on November

## Native American Graves Protection and Repatriation Act

Native American Graves Protection  
and Repatriation Act  
25 U.S.C. § 3001 et. seq.

# US Laws That Look To Tribal Law

The screenshot displays the official website for H.R. 2930. At the top, the 'CONGRESS.GOV' logo is visible alongside navigation links for 'Advanced Searches' and 'Browse'. A search bar contains the text 'Examples: hrs, sres9, "health care"'. Below the search bar, the page title reads 'H.R.2930 - Safeguard Tribal Objects of Patrimony Act of 2021' for the '117th Congress (2021-2022)'. A progress tracker shows the bill's status: 'Introduced' (green dot), 'Passed House' (grey), 'Passed Senate' (black), 'To President' (grey), and 'Became Law' (grey). The 'Sponsor' is listed as 'Rep. Leger Fernandez, Teresa (D-NM-3)'. The 'Committees' are 'House - Natural Resources; Judiciary, Foreign Affairs'. The 'Latest Action' is 'Senate - 11/29/2022 Passed Senate without amendment by Unanimous Consent. (consideration: CR S6847-6848)'. A 'Summary' section is partially visible, starting with 'This bill prohibits the exportation of Native American cultural items and archaeological resources that were illegally obtained...'. The page also includes a 'Listen to this page' button and a 'Track' section with various filters like 'Summary (3)', 'Text (4)', and 'Actions (23)'.

## Safeguard Tribal Objects of Patrimony Act

Safeguard Tribal Objects of Patrimony (STOP) Act,  
H.R.2930, 117th Cong. (2022)

# ACCESSING TRIBAL LAWS

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## **National Indian Law Library (NILL)**

Celebrating 50 years!

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**National Indian Law Library**


JUSTICE THROUGH KNOWLEDGE



# NILL's Tribal Law Gateway

The screenshot shows the website's header with a navigation menu and a main content area. The header includes a logo for the National Indian Law Library, a search bar, and a 'DONATE today' button. The navigation menu lists 'INDIAN LAW BULLETINS', 'TRIBAL LAW GATEWAY', 'ONLINE RESEARCH GUIDES', 'RESEARCH HELP', 'ABOUT NILL', and 'CATALOG'. The main content area features a 'TRIBAL LAW GATEWAY' section with a sub-heading 'Find Tribal Law Materials by Tribe'. Below this is a list of tribes and a search box for tribal codes and constitutions. A sidebar on the right contains a 'HOW TO FIND TRIBAL...' section with links to various legal resources and a 'SELECTED ONLINE RESOURCES' section.

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 NATIONAL INDIAN LAW LIBRARY

INDIAN LAW BULLETINS TRIBAL LAW GATEWAY ONLINE RESEARCH GUIDES RESEARCH HELP ABOUT NILL CATALOG

## TRIBAL LAW GATEWAY

### Find Tribal Law Materials by Tribe

If your tribe is not yet linked below, please refer to our old tribal law index.

ABCDEFGHIJKLMNOPQRSTUVWXYZ

- Absentee-Shawnee Tribe of Indians of Oklahoma
- Affiliated Ute Citizens of the State of Utah (not recognized)
- Agdaagux Tribe of King Cove
- Agua Caliente Band of Cahuilla Indians of the Agua Caliente Indian Reservation, California
- Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona
- Akiachak Native Community
- Akiak Native Community
- Alabama-Coushatta Tribe of Texas
- Alabama-Quassarte Tribal Town
- Alatna Tribal Office
- Algaaciq Tribal Government
- Allakaket Village
- Alturas Indian Rancheria, California
- Angoon Community Association
- Anvik Village
- Apache Tribe of Oklahoma
- Arapaho Tribe of the Wind River Reservation WY
- Aroostook Band of Micmacs
- Asa' Carsarmiut Tribe

SEARCH TRIBAL CODES AND CONSTITUTIONS AVAILABLE IN OUR COLLECTION

Basic Search Help  
Operators and More Search Help

#### HOW TO FIND TRIBAL...


- Laws: Codes & Ordinances
- Constitutions
- Court Opinions
- Court Rules
- Compacts & Agreements
- Treaties
- Legal Histories

Article: Researching American Indian Tribal Law by David Selden, National Indian Law Library. (2014)

SELECTED ONLINE RESOURCES

# NILL's Tribal Law Gateway

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TRIBAL LAW GATEWAY | PENOBSCOT NATION

## Penobscot Nation

 Formerly known as: Penobscot Tribe of Maine

**TRIBAL CODE:**

At NILL's website.

See NILL catalog records for the tribal code.

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**TRIBAL CONSTITUTION:**

None Available.

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**TRIBAL COURT OPINIONS:**

At court website. Court dockets, forms, etc.

At Fastcase (\$\$\$). Selected opinions of the Penobscot Nation Judicial System Appellate Division. 1983-

At Indian Law Reporter. 1991-1994. See NILL's cumulative index of tribal court cases in the ILR. (Abbreviations: Penob. Tr. Ct., App. Div.)

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**OTHER LEGAL MATERIALS:**

See NILL catalog records for other tribe materials.

**CONTACT INFO**

[www.penobscotnation.org](http://www.penobscotnation.org)

207-827-7776

Tribal Court:

[www.penobscotnation.org/departments/tribal-court](http://www.penobscotnation.org/departments/tribal-court)

12 Wabanaki Way  
Indian Island, Maine 04468

207-817-7327

**RESEARCH TOOLS**


*United States Tribal Courts Directory.*  
By A. Schwartz and M.J.B. Hunter.

Tiller's Guide to Indian Country:  
Economic Profiles of American Indian Reservations. Tiller Research, Inc. (see older version online at the Internet Archive)

# NILL's Tribal Law Gateway

The screenshot shows the NILL's Tribal Law Gateway website. At the top, there is a dark blue navigation bar with a search box, a "DONATE today" button, and a "SIGN ME UP" button. Below this is a light beige header with the NILL logo and navigation links: "INDIAN LAW BULLETINS", "TRIBAL LAW GATEWAY", "RESEARCH GUIDES", "RESEARCH HELP", "ABOUT NILL", and "CATALOG". The main content area is white and features a breadcrumb trail: "TRIBAL LAW GATEWAY | PENOBSCOT NATION | TRIBAL CODE". The title "PENOBSCOT NATION - LAWS AND ORDINANCES" is prominently displayed. Below the title, it states "Most Recent Update Received: September 2022". A disclaimer follows: "Disclaimer: Although every effort is made to present current and accurate information, if you need an official version of the tribe's laws, please contact the tribe." A search prompt "Search the full-text of the Penobscot Nation's Laws and Ordinances:" is followed by a search box with "ENHANCED BY Google" and a search button. A list of 13 chapters is provided, including "Cover Page and Table of Contents", "Chapter 1. Members Civil Rights (Reserved)", "Chapter 2. General Meeting Law", "Chapter 3. Elected Officials", "Chapter 4. Tribal Election Law", "Chapter 5. Census Maintenance", "Chapter 6. Settlement Trust Fund (Reserved)", "Chapter 7. Inland Fish and Game", "Chapter 8. Penobscot Nation Judicial System", "Chapter 9. Land Assignment and Leases", "Chapter 10. Land Use / Comprehensive Plan", "Chapter 11. Adrian's Law (Presence of Non-Members)", "Chapter 12. Probate", and "Chapter 13. Banishment".

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[TRIBAL LAW GATEWAY](#) | [PENOBSCOT NATION](#) | [TRIBAL CODE](#)

## PENOBSCOT NATION - LAWS AND ORDINANCES

Most Recent Update Received: September 2022

Disclaimer: Although every effort is made to present current and accurate information, if you need an official version of the tribe's laws, please contact the tribe.

Search the full-text of the Penobscot Nation's Laws and Ordinances:

- [Cover Page and Table of Contents](#)
- [Chapter 1. Members Civil Rights \(Reserved\)](#)
- [Chapter 2. General Meeting Law](#)
- [Chapter 3. Elected Officials](#)
- [Chapter 4. Tribal Election Law](#)
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- [Chapter 12. Probate](#)
- [Chapter 13. Banishment](#)




# NILL's Tribal Law Gateway

All Tribal Laws Tribal Constitutions

About 457 results (0.20 seconds)

[Cultural Resource Management Code 2006-02](#)  
<https://www.narf.org/nill/codes/rosebudcode/title18chapter26.pdf>  
File Format: PDF/Adobe Acrobat  
Title. This Title is Title 18 of the RST law and Order Code which includes Chapter 26, the Cultural Resources Management Code of the Rosebud Sioux Tribe.  
Labeled [Tribal Laws](#)

[SWINOMISH TRIBAL CODE, Title 21 – Archaeological and Cultural ...](#)  
[https://narf.org/nill/codes/swinomishcode/21\\_1.pdf](https://narf.org/nill/codes/swinomishcode/21_1.pdf)  
File Format: PDF/Adobe Acrobat  
Page 1. Title 21 – Archaeological and Cultural Resources. Chapter 1 – Archaeological Excavation and Removal. Sec. 21-01.010 Purpose and Scope. 21-01.020 ...  
Labeled [Tribal Laws](#)

[title 40 lummi nation code of laws cultural resources preservation code](#)  
[https://narf.org/nill/codes/lummi/40Cultural\\_Resources.pdf](https://narf.org/nill/codes/lummi/40Cultural_Resources.pdf)  
File Format: PDF/Adobe Acrobat  
 Apr 28, 2008 ... CULTURAL RESOURCES PRESERVATION CODE. Table of Contents. Chapter 40.01 Title, Findings, Purpose, and Definitions. 40.01.010 Title.  
Labeled [Tribal Laws](#)

[Tribal Code - Rosebud Sioux Tribe; National Indian Law Library ...](#)  
<https://www.narf.org/nill/codes/rosebudcode/>  
Chapter 15 - Reservation Natural and Cultural Resource Zone Chapter 16 - General Environmental Protection Overlay Zone Chapter 17 - Flood Plains Overlay ...  
Labeled [Tribal Laws](#)

[Chapter 73 - Cultural Resource Protection Act & SWO-05-095](#)  
[https://www.narf.org/nill/codes/sisseton\\_wahpeton/Chapter73.pdf](https://www.narf.org/nill/codes/sisseton_wahpeton/Chapter73.pdf)  
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Labeled [Tribal Laws](#)

[Oglala Sioux Tribe: Law and Order Code, Environmental Review Code](#)  
[https://www.narf.org/nill/codes/oglaala\\_sioux/oglaalenviro.html](https://www.narf.org/nill/codes/oglaala_sioux/oglaalenviro.html)

SEARCH TRIBAL CODES AND  
CONSTITUTIONS AVAILABLE  
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[Operators and More Search Help](#)

## Angela R. Riley

Professor of Law

Director, MA/JD Joint Degree Program in Law and American Indian Studies

Director, Native Nations Law and Policy Center

**UCLA** Law

## The Ascension of Indigenous Cultural Property Law

*Michigan Law Review, Vol. 121, No. 1, 2022*

70 Pages • Posted: 29 Nov 2022

[Angela Riley](#)

University of California, Los Angeles (UCLA)

Date Written: November 13, 2022

### Abstract

Indigenous Peoples across the world are calling on nation-states to “decolonize” laws, structures, and institutions that negatively impact them. Though the claims are broad based, there is a growing global emphasis on issues pertaining to Indigenous Peoples’ cultural property and the harms of cultural appropriation, with calls for redress increasingly framed in the language of human rights. Over the last decade, Native people have actively fought to defend their cultural property. The Navajo Nation sued Urban Outfitters to stop the sale of “Navajo panties,” the Quileute Tribe sought to enjoin Nordstrom’s marketing of “Quileute Chokers,” and the descendants of Tasunke Witko battled to end production of “Crazy Horse Malt Liquor.” And today, Indigenous Peoples are fighting to preserve sacred ceremonies and religious practices at places like Standing Rock, Oak Flat, and Bear’s Ears. Though the claims range from “lands to brands,” these conflicts are connected by a common thread: they are all contemporary examples of Indigenous Peoples’ efforts to protect their cultural property. As issues surrounding cultural property play out on the global stage, there is a parallel movement underway within Indigenous communities themselves. More than fifteen years ago, in 2005, I conducted a comprehensive study of tribal law



# Traditional Ecological Knowledge

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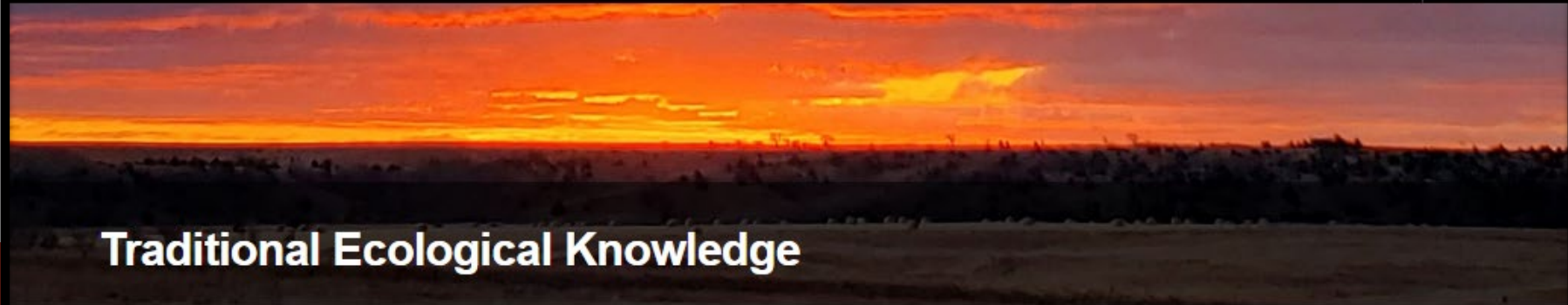
Issues

Resources

## Tribal Research Policies, Processes and Protocols

To facilitate the respectful inclusion of TEK for on-the-ground ecosystem stewardship, the following American Indian tribes have freely and with informed consent, provided information about their policies, processes and protocols (PPP). Tribes are listed alphabetically, using the names from the January 17, 2017, Federal Register Notice [Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs](#). Please keep in mind, some tribal names officially begin with "the" and will be located under "T."

*A Tribe's listing on this site does not constitute commitment to participate in TEK projects. As sovereign nations, tribes reserve the right to determine research participation.*



# Traditional Ecological Knowledge

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*NPS.gov / Home / Resources / Tribal Research Policies, Processes and Protocols / Tribes D-M*

## Hopi Tribe of Arizona

**Protocol:** Yes

**Contact:** Hopi Cultural Preservation Office

**Phone:** 928-734-3611

**PPP Link:** Hopi Research Protocols: <http://www8.nau.edu/hcpo-p/ResProto.pdf>

Intellectual Property Rights: <http://www8.nau.edu/hcpo-p/intellectPropRights.html>

Hopi Traditional Knowledge: <http://www8.nau.edu/hcpo-p/knowledge.html>

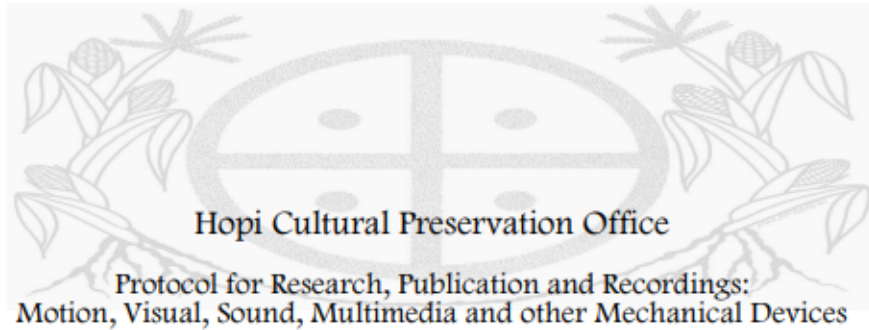
**Permission Needed:** Yes

**Fee Structure:** Yes

**Issues/Concerns:** Privacy; intellectual property; commoditization; commercialization; expropriation

**Verified:** SK 01.06.2021





## Hopi Cultural Preservation Office

### Protocol for Research, Publication and Recordings: Motion, Visual, Sound, Multimedia and other Mechanical Devices

#### Policy:

The Hopi people desire to protect their rights to privacy and to Hopi Intellectual Property. Due to the continued abuse, misrepresentation and exploitation of the right of the Hopi people, it is necessary that guidelines be established and strictly followed so as to protect the rights of the present and future generations of the Hopi people.

Towards this end, the Hopi Tribe shall be consulted by all projects or activity involving intellectual property and that such property or activity be reviewed and approved by the Hopi Cultural Preservation Office through a permitting process or other contractual agreement.

This protocol should in no way be construed as being a call for commoditization or commercialization of the intellectual property of Hopi people, nor is it a justification to bring the Hopi people unwillingly into a commercial relationship. The Hopi Tribe reserves the right not to sell, commoditize or have expropriated from the certain domains of knowledge or information.

#### Definitions:

- 1) **"Research"** includes, but is not limited to, ethnology, history, biogenetic, medical, behavioral, ethno-botany, agronomy, ecology, anthropology, archaeology, and microbiology.
- 2) **"Hopi Tribe"** includes Hopi individuals, families, clans, villages, communities, Hopi Tribal Government and the Hopi people as a whole.
- 3) **"Projects"** or **"Activity"** includes, but is not limited to, research, publications recording-motion, visual sound whether oral, written, via multimedia or other mechanical devices discovered or yet to be discovered.
- 4) **"Multimedia"** includes any product derived from Hopi intellectual resources of text, sound, and images combined into an integrated product that can be transmitted and accessed interactively via digital machine-readable form or computerized network.

#### Procedure:

- 1) All projects or activities must be submitted in proposal format and shall address, at minimum, the following:
  - a) **Intent and benefit to the Hopi Tribe:** The proposal should clearly outline and discuss the intent and benefit of the project or activity to the Hopi Tribe. Questions to be considered are: What are the anticipated consequences or outcome of the project? What groups will be affected? What are the plans (pre, duration, post-project) for publications or commercialization of the product or research findings? How will the Hopi Tribe share in future publication or commercialization of the product or

# Hopi Tribe of Arizona

Thank You!



[WWW.NARF.ORG](http://WWW.NARF.ORG)