

# WIPO



**E**  
WIPO/GRTKF/IC/15/INF/5(b)

ORIGINAL: English

DATE: December 7, 2009

**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

*Document prepared by Debra HARRY, Ph.D.  
Indigenous Peoples Council Biocolonialism, United States of America*

\* 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.

# Exercising Tribal Sovereignty In the Protection of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources: A North American Perspective

Presented by:

Debra Harry, Ph.D.

(Kooyooee dukaddo)

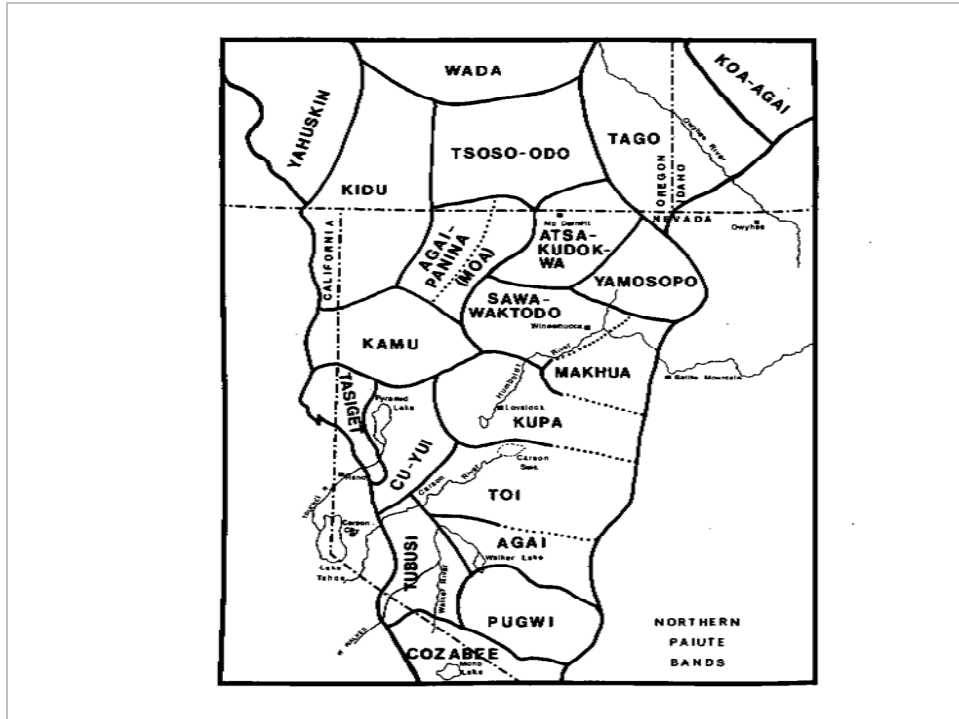
Executive Director

Indigenous Peoples Council Biocolonialism

dharry@ipcb.org

## Kooyooee Pah





## Legal Context of Indigenous Peoples' Rights

- Human Rights Law
  - Universal Declaration on Human Rights
  - Int'l Covenant on Civil & Political Rights
  - Int'l Covenant on Economic, Social & Cultural Rights
  - Convention for the Elimination of Racial Discrimination
  - UN Declaration on the Rights of Indigenous Peoples
- Indigenous peoples' customary law & legal systems
- Use of Indigenous Peoples and Indigenous Knowledge acknowledges this distinct rights

## The Human Right of Self-Determination

“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

- Art. 1.1 International Covenant on Civil & Political Rights; Art. 1.1 of International Covenant on Economic, Social & Cultural Rights
- Art. 3 - UN Declaration on the Rights of Indigenous Peoples

## Indigenous Cultural Heritage

The heritage of indigenous peoples includes all moveable cultural property ...

all kinds of literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry; all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines and the rational use of flora and fauna; human remains; immovable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of indigenous peoples, heritage on film, photographs, videotape, or audiotape.

Madame Erica Daes, Human Rights Special Rapporteur on the Study of Cultural Heritage

## Permanent Sovereignty Over Natural Resources

- “the developments during the past decades in international law and human rights norms in particular demonstrate that **there now exists a developed legal principle that indigenous peoples have a collective right to the lands and territories they traditionally use and occupy** and that this right includes the right to use, own, manage and control the natural resources found within their lands and territories.”
- **Extends to genetic resources**

(Human Rights Special Rapporteur Erica Daes, Indigenous Peoples' Permanent Sovereignty Over Natural Resources, E/CN.4/Sub.2/2004/30)

## UNDRIP - 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.**
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of their rights.

## UNDRIP Article 19

1. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their **free, prior and informed consent** before adopting and implementing legislative or administrative measures that may affect them.

## FPIC, beyond ethics

- CERD issued Recommendation XXIII, which calls for all parties to the Convention to obtain informed consent of indigenous peoples in all decisions that may concern their rights or interests.
- And, have found that in the context of resource exploitation on traditional lands, mere consultation was insufficient.

## Conflicting Sovereignties Re: "Protection"

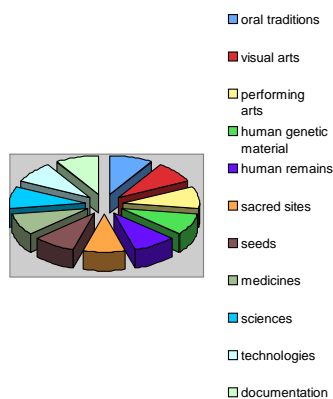
### IPRs

- Monopoly Rights
- Short Term, Time Specific
- Alienability
- Post-Protection Public Domain

### Indigenous Systems

- Collectively held resources, knowledge & rights
- Benefit for future generations
- Inherent
- Inalienable

## Real Dangers of IPRs



- Compartmentalizes & alienates IK
- Recasts IK in IP regime
- IP can only protect property in a commercial & western legal context

## WIPO Director General Francis Gurry, stated:

- Perpetual Protection of Traditional Knowledge “Not on Table” at WIPO
- Intellectual Property Watch, 22 October 2009

## Real Protections

- We do not need an international instrument that facilitates the commercialization of IK/GR
- We need protection that insures our inalienable cultural heritage is protected in perpetuity.
- The framework for the protection of the IK of Indigenous Peoples already exists in human rights law, not IP regimes.



# Asserting Tribal Sovereignty

## A North American Tribal Government Context

# Native American Tribal Sovereignty

- “The Tribe/Nation reserves its right, through its inherent sovereign authority and its police power, to exclude individuals from tribal jurisdiction and to deny permission and access for any research activities whatsoever.”
- 550+ federally-recognized Tribes & Alaska Villages



## Exercising Sovereignty: Little Traverse Band of Odawa Indians

- In 2004, the Tribe ratified an act prohibiting the patenting of living organisms
- Under this law, "no person may patent or claim any exclusive property interest in the makeup of any organism" within areas under tribal jurisdiction.

## Little Traverse Band of Odawa Indians p.2

- In the preamble of the act, the Tribe found that "the patenting of organisms **threatens the Tribe's health, welfare and economic security**" because it "**threatens the loss of biodiversity by limiting access to genetic variants through enforcement of proprietary rights** and encouraging the spread of a single variant of an organism in place of other natural variations."

## IRPA - Asserting Sovereignty Through Codified Law

- The Indigenous Research Protection Act - a Model Tribal Code
  - Prohibit certain activities
  - Establish regulations for research
  - Establish community-based research review committee
  - Puts Tribes in control of research process

## IRPA- Principle of Inherent and Prior Rights

- “recognizes that the Tribe/Nation has **inherent and prior proprietary rights and interests over all forms of their cultural and natural resources** within their territories together with **all cultural property and cultural property rights** associated with such properties and their use”

## IRPA - Principle of Self-Determination

- “recognizes that the **Tribe/Nation have a right of self-determination and exercise tribal sovereignty over their affairs**, and that researchers and persons will acknowledge and respect such rights”

## IRPA- Principle of Inalienability

- “recognizes the **inalienable rights of Tribes/Nation in relation to their traditional territories, cultural property and natural resources, and associated knowledge**”

## IRPA - Principle of Free Prior Informed Consent

- This principle recognizes that **individuals** have a right to give their free prior and informed written consent before participating in any research.
- **Informed consent is a process** in which information is provided to enable individuals to make fully informed choices about their participation in a specific research.
- The principle of **free, prior informed consent also applies to groups, such as Tribes**, when the research or other proposed activity potentially impacts the collective group.

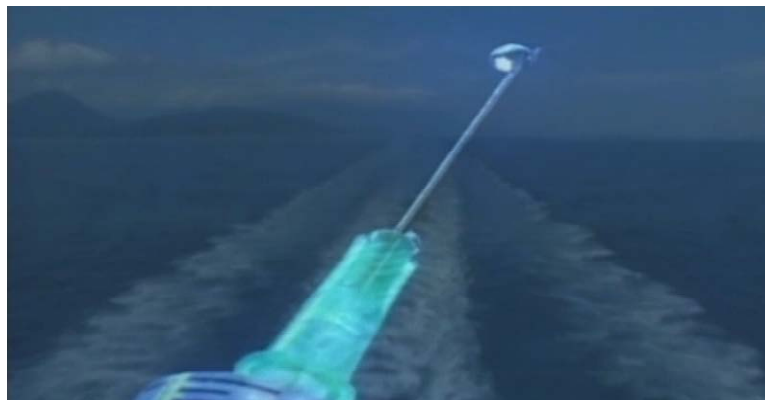
## IRPA – Defines Cultural Property

- ....means the traditional Indigenous knowledge, cultural information, uses, and practices unique to the Tribe/Nation's ways of life .....
- ... includes both tangible and intangible, historic and/or contemporary, which derives from unique historic or collective experience of the Tribe, or is otherwise held collectively by the Tribe.

## IRPA - Cultural Property Right

- and is a **communal right held by the Tribe/Nation**,
- the traditional right of the Tribe and individual members as consistent with tribal customs, laws and practice to determine access to, and use of cultural property.
- Use of cultural property requires prior informed consent of the Tribe

## IRPA's Special Regulations for Biological Samples



## IRPA - Patents & commercialization prohibited

- 11.7 No entity may seek to patent or commercialize any biological materials obtained from the Tribe/Nation, from the Tribe/Nation's jurisdiction, or under the authority of the Tribe/Nation. This includes genetic samples, any copies of the original genetic samples, any cell lines containing copies of the original genetic samples, and data derived from these samples.
- Commercialization only with FPIC of the Tribe & a second written agreement

## Section 11 - Regulating Biological Samples

11.2 The Tribe/Nation may, at any time, decide to **withdraw from the research** project or any portion thereof, and **request the return of all biological samples**. The researcher, and any other parties, must comply.

11.3 Upon completion of the research project, or termination or cancellation of the project at any time prior to completion, the biological samples must be completely and fully returned to the possession of the Tribe/Nation. A Tribe/Nation designate must be present and sign/witness any chain of custody, destruction or release of biological samples.

## IRPA – Ex Situ Storage of Biological Samples

11.5 If the Tribe/Nation permits any biological samples to be stored in any other locations, the researcher shall maintain at all times a complete list thereof. The list shall include a description of the sample or data, source, specific use or purpose of each item, responsible person(s) at the location, and where the item is housed (e.g., in a "gene bank" or on a specific computer), and any relevant time lines with regard to use of, disposition, return, or destruction of the samples or data. The researcher shall provide an updated copy of the list to the Tribe/Nation whenever changes are made. The updated list shall include identification of changes made since the last copy of the list was provided to the Tribe/Nation. The researcher will provide proof that the storage facility is physically guarded against unauthorized or inappropriate access.

## Two Row Wampum

- Two Row Wampum- Haudenosaunee (Iroquois) and Dutch Treaty (1514), subsequently also with the English and Americans.
- Reflects the existence of parallel societies as equals going down the river of life
- The right and responsibility to protect IK rests with the Indigenous system of governance.
- These mechanisms need to be respected from a principle of equity.



## Rights vs Doing the Right Thing

- ..... a right should always ..benefit life, and should always further that which is the Creator – given way that people were given to live. There is no right to sell out your own culture. There is no such right. That's just dysfunctional behavior.
- Onaubinosay, Jim Dumont, Anishinabe Spiritual Leader
- The IGC needs to conduct more broad-based consultation with Tribal Leaders.
- Indigenous Peoples need the opportunity to analyze these issue from their own cultural frameworks, and participate in the IGC.

## Summary - Protection of Indigenous Peoples' IK, TCEs and GR

- Any regime must recognize Indigenous peoples prior and inherent rights to their IK/TCEs/GR
- Must uphold and implement the UNDRIP & other HR laws that recognize and protect the rights of Indigenous peoples
- Efforts should focus on prohibiting the grant of IPRs over IK/TCEs/GR and promote strict enforcement of such prohibition.
- National legislation and policy should recognized the right of Indigenous peoples to assert the use of customary and codified laws to protect IK/TCEs/GR on their own terms and in accordance with Int'l human rights law.

## Future Work

- The IGC must ensure and facilitate the full and effective participation of Indigenous Peoples in every aspect of its mandate, as equals, including in the upcoming intersessional meetings in as open and transparent manner as possible. Indigenous peoples must be able to represent their own interests.

### For More Information Contact

Debra Harry, Ph.D.

Indigenous Peoples Council on  
Biocolonialism

[dharry@ipcb.org](mailto:dharry@ipcb.org)

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