

GRs & TK: Practical Measures Issues and Examples

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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)



About Us

- Native American Rights Fund (NARF) was 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

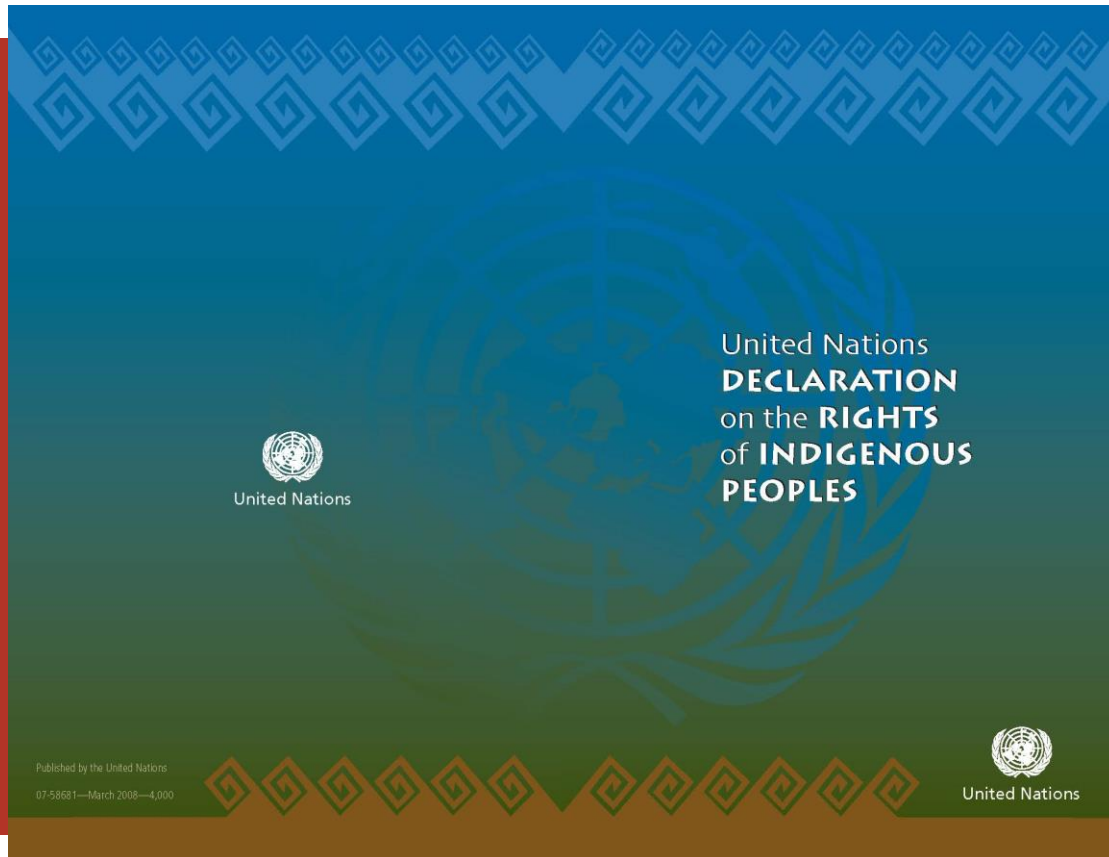
- Founded in 1944, NCAI is the oldest, largest, and most representative American Indian and Alaska Native organization
- Serves as a unified voice for Indian Country
- Works to protect and enhance treaty and sovereign rights, securing traditional laws, cultures, and ways of life for future generations



NARF & NCAI

Since 1999 NARF has represented NCAI in the negotiation and implementation of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)

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.



Key Components of TK Protection in the IP Context

POLICY INITIATIVES

- National Policies
- IGC Mandate: Negotiating instrument(s) “to ensure the balanced and effective protection” of GRs, TK and TCEs

LEGISLATIVE INITIATIVES

- National Laws/Regional Laws
(http://www.wipo.int/tk/en/legal_texts/)
- International instrument(s) being negotiated by IGC

INFRASTRUCTURE

- Databases, registries, inventories, and other information systems
- Can complement and support implementation of laws and policies

PRACTICAL TOOLS

- Contracts, guidelines, and protocols
- Can define relationships, control activities, and fill gaps in existing protection (subject to limitations)

Types of Protection



Defensive Protection

- For example, avoiding grant of erroneous patents based on preexisting TK



Positive Protection

- Prevent misappropriation/misuse of GRs and associated TK
- Opportunity for economic benefit

Drafting Session - University of Colorado

May 21-22, 2018



Drafting Session - University of Colorado

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PROPOSED TEXT REVISIONS TO ARTICLES 7 AND 8 GRs DRAFT TEXT (WIPO/GRTKF/IC/36/4)

*Prepared by the Native American Rights Fund,
National Congress of American Indians, and
University of Colorado Law School*

*for WIPO IGC 36
25-29 June 2018 in Geneva, Switzerland*

DEFINITIONS TO ADD TO ARTICLE 1:

"Confidential information" includes traditional knowledge that is considered secret, sacred or culturally sensitive. This information has strict rules of sharing and disclosure that are maintained through customary laws and protocols of indigenous peoples and local communities.

"Customary law" refers to the norms and values of peoples, including indigenous peoples, accepted as legal requirements or obligatory rules of conduct for human beings, as well as rights and responsibilities regarding natural resources, cultural heritage, and intellectual property, including traditional knowledge and genetic resources. Customary law may be *written*, as in legislative codes or judicial decisions, or *oral*, maintained by elders or knowledge holders. In the case of indigenous peoples, the term customary law must be interpreted and applied consistent with the provisions on laws, customs, traditions, and protocols set forth in the UN Declaration on the Rights of Indigenous Peoples and other human rights instruments.

"Prior and informed consent" regarding access to traditional knowledge means express agreement, consistent with community laws, customs, and protocols, by authorities of indigenous peoples and local communities, made upon advance provision, with sufficient time, resources, and translation services, to evaluate and analyze information covering all relevant aspects (such as the intended purpose of the access; its duration and scope; a preliminary assessment of the likely economic, social, cultural and environmental impacts, including potential risks; personnel likely to be involved in the execution of the access; benefit-sharing arrangements and ownership rights) and includes the right not to grant consent or approval. In the case of indigenous peoples, the term "prior and informed consent" must be interpreted and applied consistent with indigenous peoples' right of self-determination and the provisions for "free, prior and informed consent" set forth in the UN Declaration on the Rights of Indigenous Peoples and other human rights instruments.

III. COMPLEMENTARY MEASURES

ARTICLE 7 DUE DILIGENCE

[Member States]/[Parties] shall encourage or establish a fair and reasonable due diligence system to ascertain that genetic resources and traditional knowledge associated with genetic resources have been accessed in accordance with national law, customary laws and protocols,



DATABASE PRINCIPLES

1. Free, Prior and Informed Consent (FPIC)

Database creation, content, access, uses, and safeguards must be developed and carried out in conjunction with indigenous peoples and taking into account their customary laws and protocols

2. “Do No Harm”

Databases must not infringe the rights of indigenous peoples, including by misappropriation or misuse of TK

3. Right to Access/Remove/Correct

- Information inappropriately sourced or incorporated
- Confidential, culturally-sensitive, sacred, or secret information
- Fails to comply with FPIC and Mutually Agreed Terms (MAT)

Penobscot Nation



- Located in Maine, USA
- One of earliest US tribes working on intellectual property protection issues
- Loss and misappropriation/misuse of cultural heritage
- Researchers culling tribal traditional knowledge for own benefit

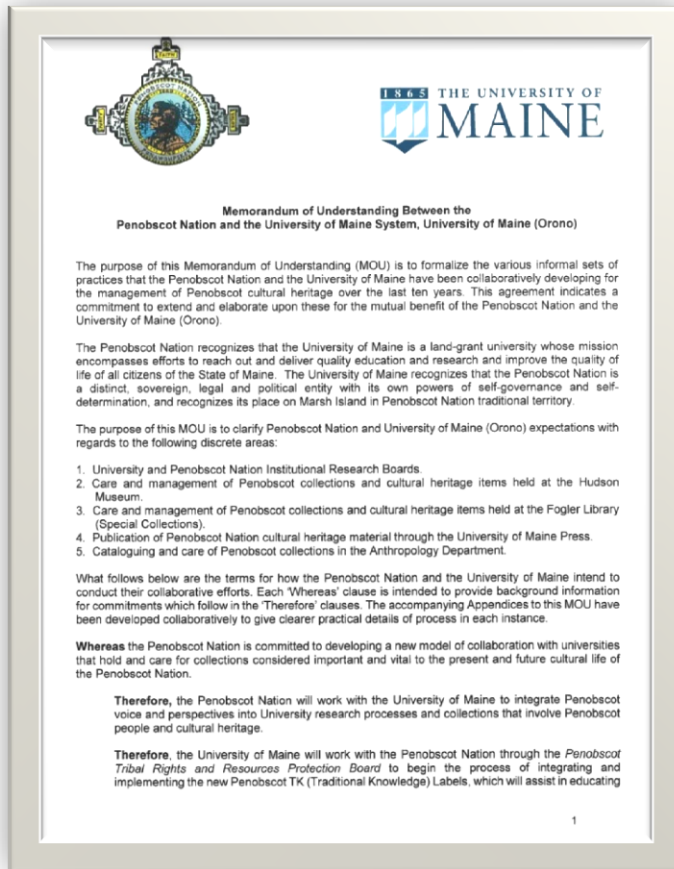
Penobscot Tribal Rights and Resources Protection Board

- Governing body responsible for review and oversight of all research conducted by non-tribal members involving Penobscot Nation cultural resources
- Penobscot Intellectual Property Working Group
 - Define Penobscot Community Intellectual Property Rights
 - Create administrative structures, policies, and tools to support tribal decision-making on intellectual property issues and proposed research projects



Penobscot Nation & University of Maine

- On May 10, 2018, Penobscot and the University of Maine signed historic Memorandum of Understanding regarding the University's research processes



Penobscot Chief Kirk Francis and University of Maine President Susan Hunter.
Photo Credit - Penobscot Nation and the University of Maine

- Penobscot will hold certain intellectual property rights, including authorship and copyright, and have rights of consultation regarding cultural heritage in the University's collections and publications
- University will work to begin implementing Penobscot Traditional Knowledge (TK) Labels to ensure respectful and appropriate use and sharing of Penobscot cultural heritage, including TK Labels for secret, sacred, and culturally-sensitive materials

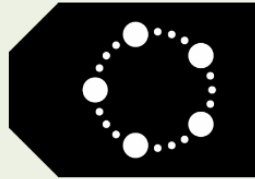
Traditional Knowledge (TK) Labels



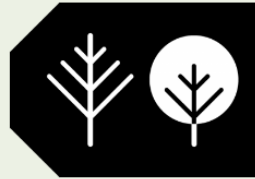
TK Multiple Communities (TK MC)



TK Non-Verified (TK NV)



TK Family (TK F)



TK Seasonal (TK S)



TK Outreach (TK O)



TK Verified (TK V)



TK Attribution (TK A)



TK Community Use Only (TK CO)



TK Secret / Sacred (TK SS)



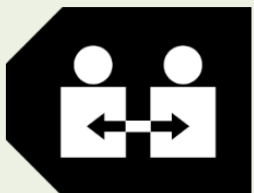
TK Women General (TK WG)



TK Women Restricted (TK WR)



TK Men General (TK MG)



TK Men Restricted (TK MR)



TK Non-Commercial (TK NC)



TK Commercial (TK C)



TK Community Voice (TK CV)

*For more information
on TK Labels
see: www.localcontexts.org*

Karuk Tribe



- Located in northwestern California, USA
- One of last indigenous groups in California to suffer consequences of Euro-American contact
- Loss of land and cultural resources
- “Fix-the-world People” - Annual World Renewal Ceremony
- Worked for decades with academic institutions to develop an intellectual property toolkit
 - To protect Karuk cultural and natural resources and intellectual property
 - To create frameworks for sharing information

Practicing Píkyav:

A Guiding Policy for Collaborative Projects and Research Initiatives with the Karuk Tribe

Practicing Píkyav:
A Guiding Policy for Collaborative Projects and Research Initiatives with the Karuk Tribe

For more information, please contact Bill Tripp, btripp@karuk.us, 530-627-3446

I. Introduction

In the Karuk language, the verb *píkyav* means "to repair," or "to fix."¹ Another Karuk word is *píkyávish*, which refers to the world-renewal ceremony, a set of ceremonies that the Karuk and neighboring tribes continue to hold annually. When describing the Karuk culture, tribal members often explain, "We are fix-the-world people." For the Karuk Tribe, the center of the world is *ka'timín*, the place where the Klamath River and the Salmon River meet.² As part of this philosophy, the Karuk Tribe is continuing its timeless responsibility to repair and restore the complex socio-cultural and ecological systems that make up the Klamath River Basin. This work includes mitigating environmental and social damages that continue to have profound impacts on Karuk People, traditions, and Karuk Ancestral Territory.

One example of *píkyav* in action today is the Karuk Tribe's active engagement in research programs that are currently guiding land management policy change and restoration activities in the Klamath River Basin. Entering into a collaborative research project, or other type of collaborative project agreement with the Karuk Tribe, means creating a project that supports Karuk philosophies and practices of *píkyav*.

Organization and Origins:

This agreement has been developed by the Karuk-UC Berkeley Collaborative³ – a partnership between the Karuk Tribe and UC Berkeley researchers working together with their allies to enhance the eco-cultural revitalization of the people and landscapes within Karuk Ancestral Territory. In 2011, the Collaborative launched an initiative to co-create a set of guiding principles that can govern future research and other collaborative projects with the Karuk Tribe to ensure protection of intellectual and cultural property and recognize tribal sovereignty. Acknowledging that individuals and institutions at UC Berkeley and other institutions have not always acted in the best interest of California Indian Tribes, the Karuk-UC Berkeley Collaborative members and our allies hope to be part of a larger effort "to fix it" – an effort to begin mending problematic relationships among universities, researchers, and Indigenous peoples.

These guidelines were inspired by the Indigenous Research Protection Act created by the Indigenous People's Council on Biocolonialism,

¹ See the online Karuk Dictionary, <http://linguistics.berkeley.edu/~karuk/>.
² See <http://www.karuk.us/karuk/departments/natural-resources> and <http://www.karuk.us/> for more information on the Karuk Tribe.
³ Through a multi-year process that engaged Karuk community members and their partners, the Karuk-UC Berkeley Collaborative was co-created by Karuk tribal member Ron Reed, UC Berkeley professor Tom Carlson, and UC Berkeley researcher Jennifer Sowerwine. In the fall of 2008, Karuk-UC Berkeley Collaborative members presented this initiative to the Karuk Tribal Council. The mission of the Karuk-UC Berkeley Collaborative is to foster synergistic collaborations between the Karuk Tribe and UC Berkeley, and additional partners working with them, to enhance the eco-cultural revitalization of the people and landscapes within Karuk ancestral lands.

- Guiding principles govern research/other collaborative projects with the Tribe
- Ensure protection of Tribe's intellectual and cultural property and recognize Tribe's sovereignty
- Core principles for collaborative projects include:
 - Free, Prior and Informed Consent
 - Confidentiality
 - Self-determination, Prior Rights, and Inalienability
 - Respecting Indigenous Knowledge and Intellectual Property

Protocol with Agreement for Intellectual Property Rights of the Karuk Tribe

- Problem of researchers publishing results and obtaining copyright
- Intellectual property products produced remain sole property of the Tribe, unless otherwise agreed
- Provisions allow for shared copyright and co-ownership

Karuk Tribe
Protocol with Agreement for Intellectual Property Rights of the Karuk Tribe
Research, Publication and Recordings

The purpose of this Protocol with Agreement is to protect the Karuk Tribe's rights to privacy and Karuk Tribal Members' and Descendants' rights to individual and collective intellectual property. As a result of acts of misrepresentation and appropriation of tangible and intangible culture, the Karuk Tribe has developed this Protocol with Agreement [i] specifically for all projects and activities that involve collaboration, consultation and engagement with the Karuk Tribe. The aim is to protect the rights of present and future generations of the Karuk People and to recognize the inherent tribal sovereignty that the Karuk Tribe asserts over all tribal knowledge, heritage and cultural resources. This Protocol with Agreement is to be implemented in all future authorized collaborations.

The Karuk Tribe shall be recognized and consulted as the primary legal and cultural custodians in any projects or activities that will produce any intellectual property (property) products. These projects will be reviewed and upon approval of KRAB, forwarded to Tribal Council with their recommendation prior to the permit process, release of information, and other contractual agreements, the Karuk Tribal Council will have final approval.

The Karuk Tribe does not seek to commoditize or commercialize its intellectual property or cultural heritage. Further, the Karuk Tribe asserts its age-old tradition of reserving certain domains of knowledge for rightful and culturally appropriate owners, as well as restricting access to this knowledge during certain chronological periods as dictated by time honored Karuk Law.

Definitions:

1. **Research** includes work conducted through social science, science and humanities strands, including, not limited to, ethnology, history, linguistic, biogenetic, medical, behavioral, ethnobotany, agronomy, ecology, anthropology, archaeology, and microbiology.
2. **Karuk Tribe** includes Karuk individuals – members and/or descendants, families, villages, communities, Karuk Tribal government and the Karuk People as a whole.
3. **Projects** and/or **Activities** include, but are not limited to, research, publications, data collection, implementation, 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 Karuk intellectual resources of text, sound, and/or images combined into an integrated product that can be transmitted and accessed interactively via digital machine readable form or computerized network.

Sípnuuk Digital Library, Archives, and Museum



- Sípnuuk: Karuk word for “storage basket”
- Repository and program for digital content
- Native foods, fibers, cultural practices related to natural resources management, Karuk traditional knowledge, Karuk language and culture
- Tribal data & materials accessible through other repositories, with tribal metadata providing culturally relevant context
- Publically accessible, with differential access to sensitive information
- Intellectual Property and Take-Down Guidelines
- “Any materials containing Karuk traditional knowledge are the intellectual and cultural property of the Karuk People” and are only to be made available according to Karuk cultural protocols

**“We’re all
in this
together”**

—
Let’s do our best.
THANK YOU!



WWW.NARF.ORG