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**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.



"A Storm Brewed in Other People's Worlds" or IPR, dang-it

Preston Hardison, Tulalip Tribes Natural Resources Treaty Rights
Office, IGC 15, Geneva, December 7, 2009

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United Nations Declaration on the Rights 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.

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 **DECRIPS**

- ❖ **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.**



 **DECRIPS**

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.**



 **DECRIPS**

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

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 **USA: Tribal Sovereignty**

- ❖ **1. Treaty Tribes not citizens at time of treaty
IPR provisions of Article 1, Section 8
(Enumerated Powers of Congress,
"Intellectual Property" system did not
strictly apply**

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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**

- ❖ **Accommodation 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**

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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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////// Barriers 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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Barriers to Defense

- ❖ **Commercial versus non-commercial of traditional knowledge or collective heritage**
- ❖ **Identifying rights holders and standing**
- ❖ **Clarity**
- ❖ **"Foreign Jurisdiction" and "Extraterritorial Application"**

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Tribal Codes Approach

- ❖ **Assert Sovereignty and Self-Determination**
- ❖ **Education**
- ❖ **Legal Standing**
- ❖ **Legal Clarity / Legal Record**

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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

Comprehensive:

- collective heritage
- research
- publications
- performances
- arts and crafts
- recordings
- business practices and secured transactions
- genetic resources and associated traditional knowledge

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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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Draft Tulalip Tribes Cultural Heritage Act

Researchers sign agreements/contracts




-  Tribes own information collected
-  Tribes have review rights over publication
-  Tribes can require researcher destroy information
-  Use rights clearly spelled out, and any change of use requires prior informed consent
-  Transfer to third parties prohibited without PIC
-  Proposes distinctive marking system to indicate mixed property in publications (see following)

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Draft Tulalip Tribes Cultural Heritage Act

“Aboriginal covenant” code - perpetual licenses, similar to covenants that run with the land.

-  Traditional knowledge covenants “contract in” customary law
-  License must be accepted for legal transfer to occur (found property, gifted, resold, inherited)
-  Regulates derivative uses of traditional knowledge
 - Example: Traditional Carvers
 - Publications

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Draft Tulalip Tribes Cultural Heritage Act

- ❖ **Similar to TK Commons/Community Protocols**

- ❖ **Doubts about usefulness**
 - ❖ Perpetuity
 - ❖ Enforceability
 - ❖ Boomerang and spillover effects
 - ❖ Legal interpretation of the licenses
 - *Jacobsen v. Katzer* (2008): Conditions on a copyright
 - Limited redress and expense of contract litigation

- ❖ **Not based on direct recognition of rights. Sui generis legislation would be required**

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Draft Tulalip Tribes Cultural Heritage Act

- ❖ **Business practices and secured transactions**
 - ❖ Prohibits use of collective tribal heritage as collateral for businesses in secured transactions

- ❖ **Genetic resources**
 - ❖ Similar to IPR, tribes reserved their rights to plants and animals: genes were unknown at the time of the treaties – so they could not have ceded their rights

 - ❖ No legislative history of legislative supremacy

 - ❖ Tribe asserts ownership – disposition of use of genetic resources still under discussion

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Draft Tulalip Tribes Cultural Heritage Act

- ◆ Remaining: Extraterritorial application
- ◆ US both foreign government and fiduciary with trust responsibilities
- ◆ Domestically, in line with DECRIPS, Tulalip argues this is an indigenous right, so there is no slippery slope.

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Tulalip Canoe Family requests permission to come ashore at Makah



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