

# WIPO Seminar on Intellectual Property and Genetic Resources



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# Native American Rights Fund

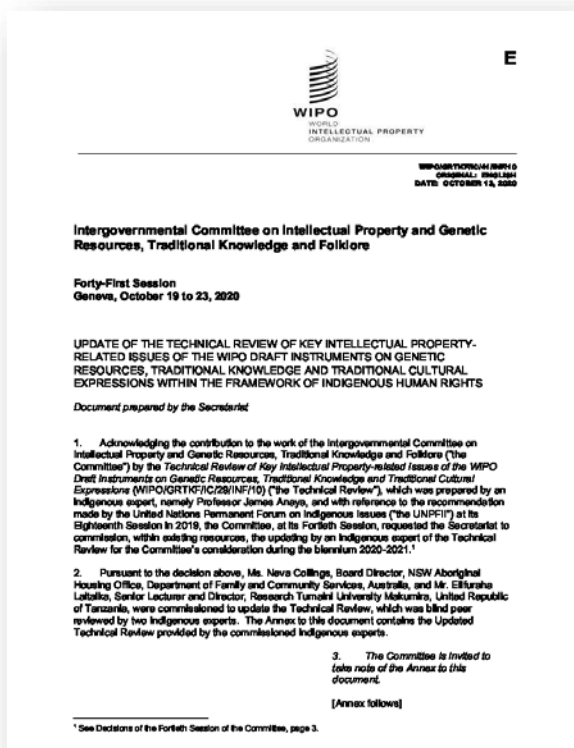
- Native American Rights Fund (NARF) was established in 1970
- Oldest and largest nonprofit law firm representing Native American tribes
- NARF's client at the IGC is the National Congress of American Indians (NCAI)
- NCAI is the oldest, largest, and most representative American Indian and Alaska Native organization in the US

# Starting Point – Fundamental Concepts

- Indigenous Peoples already have pre-existing, inherent rights; rights that are not granted to them under intellectual property law but exist independently of those laws
- Instruments being developed by the IGC must be consistent with contemporary human rights norms and cannot contravene Indigenous Peoples' rights
- Nation States have an obligation to ensure recognition and protection of Indigenous Peoples' rights

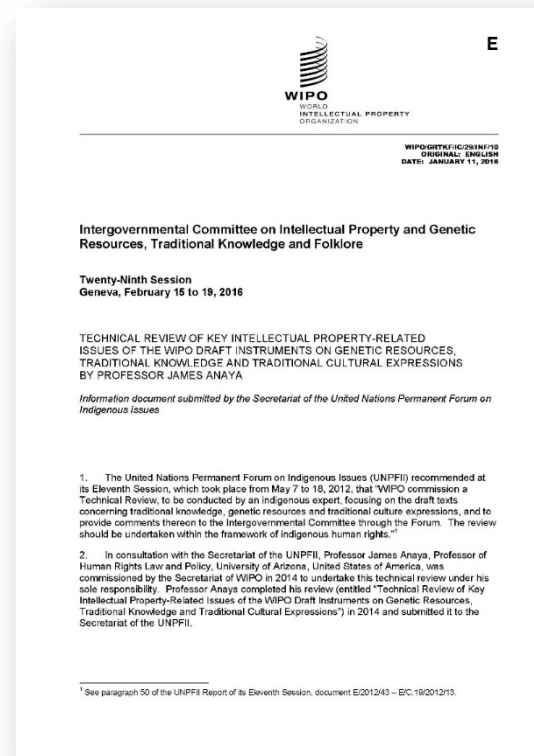


# Human Rights Framework



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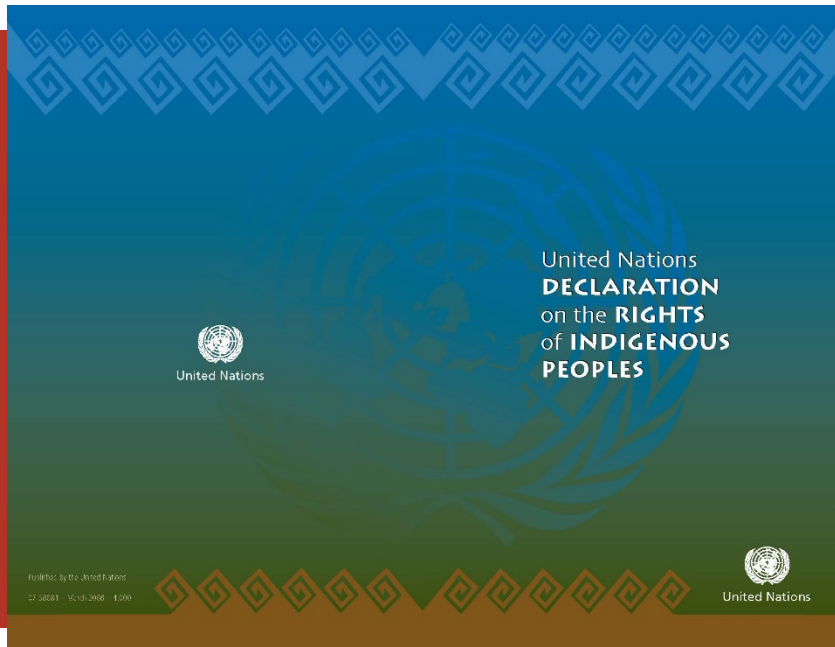
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# UN Declaration on the Rights of Indigenous Peoples



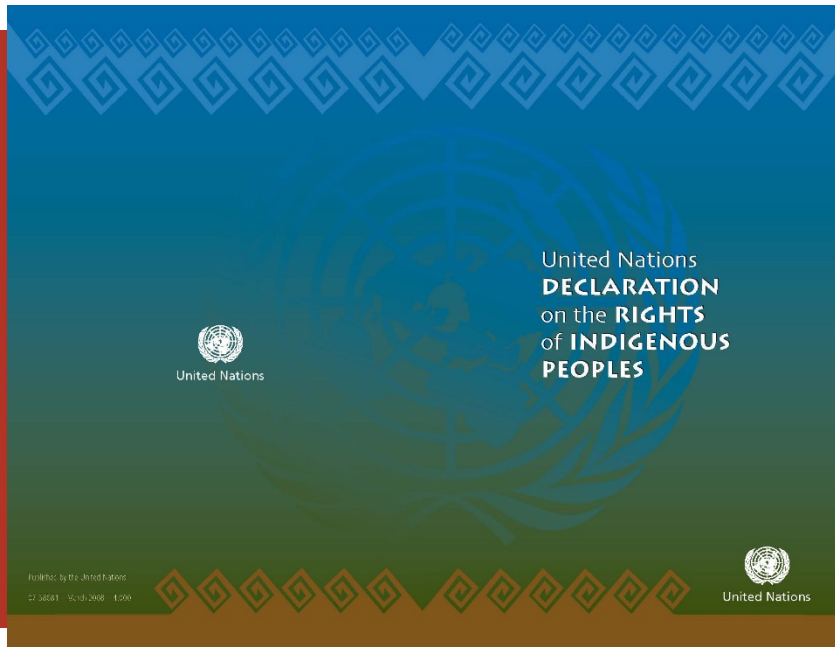
In 2007, following decades of advocacy by Indigenous Peoples, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples

Standard-setting document supported by 150 nations, including the United States

Acknowledges Indigenous Peoples' rights in realms of self-determination, equality, property, culture, and economic well-being

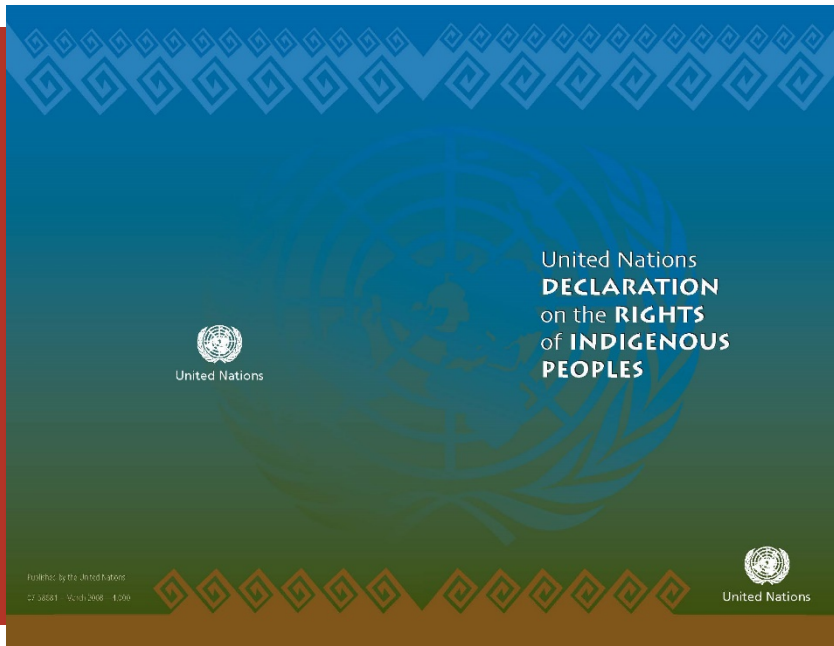


# UN Declaration on the Rights of Indigenous Peoples – Article 31



1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions , . . . including human and genetic resources . . . .  
  
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

# UN Declaration on the Rights of Indigenous Peoples



**Article 11(2):** Affirms Indigenous Peoples' right to redress for the unauthorized use of their TK, TCEs, and GRs and associated TK

**Article 3:** Recognizes the right to self-determination; the right of Indigenous Peoples to determine their political status and to pursue freely their economic, social and cultural development

**Article 19:** Sets out the requirement of free, prior and informed consent (FPIC)



## Key Components of 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/](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

# Double-Edged Sword

“If indigenous peoples have control over what and how data and knowledge will be generated, analysed and documented, and over the dissemination and use of these, positive results can come about. . . .

If, however, indigenous peoples lose control because there are no existing laws and policies that recognise their rights and regulate the behaviour of institutions and individuals involved in gathering and disseminating data and knowledge, marginalisation, inequality and discrimination will persist.”

“The respect of their right to have their free, prior and informed consent obtained before data are gathered and disseminated is crucial to prevent this from happening.”

Victoria Tauli-Corpuz, Preface, *INDIGENOUS DATA SOVEREIGNTY: TOWARD AN AGENDA*, xxii-xiii (Tahu Kukutai & John Taylor eds., 2016)



## Risks/Concerns

- Making TK more readily accessible/access issues
- Possible increased unauthorized/uncompensated uses of TK
- Disclosure of TK, for example in rejecting a patent application based on TK
- TK included in databases being treated as public domain
- Requirement that TK must be included as a prerequisite for protection
- Database security issues
- Lack of positive protection if the GRs text advances before the TK text
- Paramount Concern: Legally protecting Indigenous Peoples' authority and control over their TK





# 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)

# Karuk Tribe



- Located in northwestern California, USA
- 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
- Developed Practicing Píkyav: A Guiding Policy for Collaborative Projects and Research Initiatives with the Karuk Tribe



# Sípnuuk Digital Library, Archives, and Museum



- 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

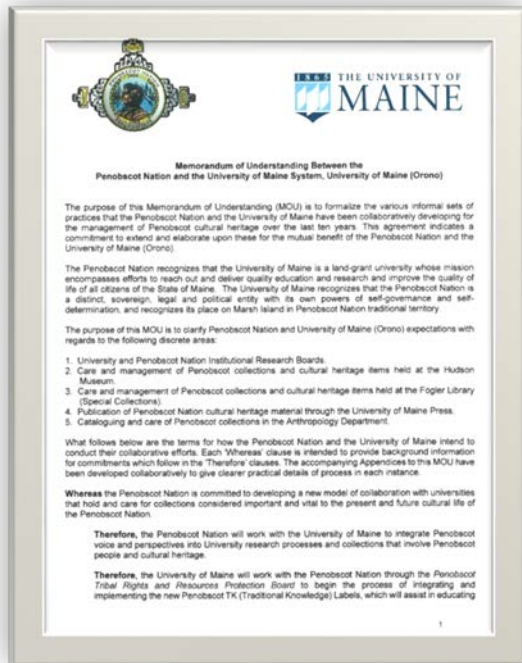
# Penobscot Nation



- Located in Maine, USA
- One of earliest US tribes working on intellectual property protection issues
- Penobscot Tribal Rights and Resources Protection Board
- Intellectual Property Working Group

# 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 and have rights of consultation regarding cultural heritage in the University's collections and publications
- University will work to implement 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



*For more information  
on TK Labels  
see: [www.localcontexts.org](http://www.localcontexts.org)*

# Biocultural (BC) Labels

*Jane Anderson, NYU*  
*Māui Hudson, University of Waikato*  
[www.localcontexts.org](http://www.localcontexts.org)

Click on a BC Label below to learn more about its usage.

Haz click en las Etiquetas de BC a continuación para aprender más acerca de su uso.



BC Provenance  
(BC P)



BC Consent  
Verified  
(BC CV)



BC Research Use  
(BC R)



BC Open to  
Collaboration  
(BC OC)



BC Open to  
Commercialization  
(BC OC)



BC Multiple  
Communities  
(BC MC)





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