



Indigenous Laws, Customs, and Protocols

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Indigenous Peoples have their own laws that express societal values and ensure their survival as distinctive cultural and political groups. For example, the Navajo Nation (Diné) explains that the *Diné bi beenahaz'áanii* or Fundamental Laws “provide sanctuary for the Diné life and culture, our relationship with the world beyond the sacred mountains, and the balance we maintain with the natural world.”¹ The Yurok Tribe’s Constitution describes: “Our people have always lived on this sacred and wondrous land along the Pacific Coast and inland on the Klamath River, since the Spirit People, *Woge’* made things ready for us and the Creator, *Kowonnoekcon Ne-kanupceo*, placed us here. From the beginning, we have followed all the laws of the Creator, which became the whole fabric of our tribal sovereignty.”²

Indigenous Peoples’ cultures and lifeways are deeply connected to the natural environment. Therefore, their laws, along with customs and protocols, offer important guidance for the appropriate treatment of traditional knowledge regarding plant, animal, and other resources. Among the Cherokee Nation, for example, a complex set of customs ensures certain plants work effectively for their appropriate medicinal purposes, protects species from overharvesting, and keeps habitats healthy.³ While “each indigenous community . . . may share the right to enjoy and use certain elements of its heritage under its own laws and procedures, [it] always reserves a perpetual right to determine how shared knowledge is used.”⁴

The text under consideration at WIPO IGC 36 can be improved by additional, express reference to the laws, customs, and protocols of Indigenous Peoples. These laws, which are generally called “customary laws” in the text, may be *written*, as in legislative codes or judicial decisions, or *oral*, maintained by elders or knowledge keepers. While written sources are readily available online or in print, oral sources may be better accessed in person, through consultations with Indigenous leaders. No matter the source, Indigenous laws, customs, and protocols are crucial to understanding and protecting traditional knowledge regarding genetic resources, as in the following examples.

The UN Declaration on the Rights of Indigenous Peoples: The Declaration recognizes Indigenous Peoples’ laws, customs, and traditions throughout the document, particularly in Article 11 (regarding the right to remedies for cultural, intellectual, religious and spiritual property taken without free, prior and informed consent or in violation of Indigenous Peoples’ laws, traditions and customs) and Article 27 (regarding the establishment of processes to determine Indigenous Peoples’ land rights). Articles 24 and 25, along with others, recognize rights and obligations to traditional medicines and spiritual relationships with lands and other resources. In addition, Article 31 broadly recognizes Indigenous Peoples’ rights and responsibilities to traditional knowledge.

1 Fundamental Laws of the Navajo Nation, <http://www.navajocourts.org/dine.htm> (2002).

2 Yurok Tribe Constitution, <http://www.yuroktribe.org/government/councilsupport/documents/Constitution.pdf> (1993).

3 Clint Carroll, *Roots of our Renewal: Ethnobotany and Cherokee Environmental Governance* (2015).

4 Erica-Irene Daes, *Study on the protection of the cultural and intellectual property of indigenous peoples*, E/CN.4/Sub.2/1993/28 (1993).

Domestic Law: In the United States, Indigenous Peoples are recognized as inherent sovereigns with their own laws governing conduct in their territories. The website of the National Park Service is a model with respect to acknowledging Indigenous Peoples' laws on traditional knowledge regarding genetic resources. It lists several dozen Indigenous governments and information about each one's "policies, processes and protocols (PPP)" regarding use of traditional ecological knowledge in the stewardship of lands and resources, noting that these PPPs have been shared with free, prior, and informed consent.⁵

Indigenous Peoples' Legal Codes: There are over 500 federally recognized Indian tribes in the U.S., and most have published legal codes. Some regulate the use of plants, seeds, and other elements essential to traditional medicines or ceremonies, or community wellbeing more broadly. For example:

- The Gila River Pima-Maricopa Indian Community has enacted a "Native Plant Law" which regulates the collection and use of enumerated plants, including the *Washingtonia filifera* (Fam plant), *lysilima thornberi* (ornamental tree), and *neoevansia diguetii* (dahlia cactus), with specific provisions regarding commercial and ceremonial uses by members and non-members.⁶
- The Code of the Little Traverse Bay Band of Odawa Indians states: "Patenting of organisms threatens the loss of biodiversity by limiting access to genetic variants through the enforcement of proprietary rights and by encouraging the spread of a single variant of an organism in place of other natural variations, [and thereby] threatens the Tribe's health, welfare and economic security.... Within the jurisdiction of the Tribe, no person may patent or claim any exclusive property interest in the makeup of any organism."⁸

Indigenous Peoples' Research and Other Protocols: Many Indigenous Peoples have research protocols that potentially apply to the protection of traditional knowledge regarding genetic and other resources. For example:

- The Hopi Tribe requires that researchers undergo a tribal review process administered by its Cultural Property Office. Key components are that the Hopi tribe must receive a "benefit" and "fair and appropriate return" from the project, and "ownership" of certain research products. In addition, the researcher must indicate "a mechanism to obtain permission to use the Hopi traditions, culture, and people as subject matter," noting that "informed consent may be required from an individual, a family or clan, a village or the Hopi Tribal Government." The tribe reserves the right to deny research permits and "the right not to sell, commoditize or have expropriated ... [its] knowledge or information."⁹
- The Karuk Tribe, recognizing past harms from appropriation, has developed interlocking policy, protocol, agreement, and license documents that form the basis of an intellectual property toolkit, protecting Karuk intellectual property over cultural and natural resources, and creating Karuk frameworks for sharing.¹⁰

Indigenous Peoples' Agreements with Third Parties: Across the U.S., Indigenous Peoples have entered into agreements with third parties regarding the treatment of tribal resources, including traditional knowledge. For example:

- The Penobscot Nation and the University of Maine recently signed a Memorandum of Understanding regarding the University's research processes. The Penobscot Nation 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. In addition the University "will work to begin

5 National Park Service, <https://www.nps.gov/subjects/tek/tribal-policies-processes-and-protocols.htm>.

6 Gila River Indian Community Ordinance, GR-03-90 (1990), <http://www.gricdeq.org/view/download.php/wildlife-program/media/native-plants>.

7 Gila River Indian Community Ordinance, GR-03-90 (1990), <http://www.gricdeq.org/view/download.php/wildlife-program/media/native-plants>.

8 Waganakising Odawak Tribal Code of Law, Ch. 10, 4.1001-4.1007 (2004), <http://www.ltbbodawa-nsn.gov/TribalCode.pdf>.

9 Hopi Cultural Preservation Office Protocol for Research, Publication and Recordings, <http://www8.nau.edu/hcpo-p/ResProto.pdf>.

10 Karuk Tribe Protocol with Agreement for Intellectual Property Rights
http://www.karuk.us/images/docs/forms/Protocol_with_Agreement_for_Intellectual_Property_Rights_of_the_Karuk_Tribe.pdf.

implementing the new Penobscot Traditional Knowledge (TK) Labels to aid in the respectful and appropriate use of cultural materials.”¹¹