

Policy Maker White Paper for Traditional Knowledge Governance

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This paper provides background:

1. Explaining the need for traditional knowledge governance;
2. The relationship between traditional knowledge and science;
3. Existing laws that fail to adequately protect traditional knowledge;
4. Risks and opportunities for sharing traditional knowledge solve environmental problems; and
5. Ways forward through recognizing tribal authority to regulate access to and use of traditional knowledge and procedures for free prior and informed consent.

In the State of our Watersheds 2012 report, the Northwest Indian fisheries commission reviews the many failures to adequately protect salmon and salmon habitat, despite a policy of “no net loss” and enormous amounts of money spent on salmon restoration. The report details large-scale and widespread habitat degradation and loss that affects not only salmon, but most to all of the resources that the tribes have depended on since time immemorial. Restoring habitats to health in the face of urban development, demands to service growing populations and climate change will be a daunting task. The rate of restoration will need to be increased in order to overcome these challenges and sustain tribal cultures.

Traditional knowledge will be essential in this process to ensure that justice is done for the tribes who have had little to do with these enormous environmental dislocations. In their treaties the tribes retained sovereign rights to access resources in order to maintain their ways of life. This was one of the fundamental purposes of the treaties. In order to uphold these purposes, it is necessary and traditional knowledge is used as a leading guide to landscape restoration and management. This should be done in a way that takes into account not only tribal resources that are economically important, but all culturally important resources. All of this will require the involvement of elders in the engagement of youth in describing what has been important to the tribes, the state of their cultural heritage today, where they would like to go in the future and involvement and landscape restoration and management to ensure these values are preserved in the landscape.

Under these circumstances there is a growing need to put traditional knowledge into a tribal governance context. Traditional knowledge governance, we mean that it should be explicitly recognized that the traditional knowledge and other knowledge tribes is not governed by foreign laws, but by a tribe’s own legal justice system and customary laws.

This need has been expressed by tribes for generations, because they have been concerned that when they share their knowledge, practices, resources and other gifts from the Creator, others have not respected their ways of being, their traditions or the obligations required of those receiving the gifts. In the United States this is been expressed in such issues as conflicts over the use of tribal images and symbols and sports mascots, state flags, commercial icons in the names of cars and military operations.

More recently there has been interest by non-Indians in the role that traditional knowledge of the environment (so-called “traditional ecological knowledge”) might be useful in such things as the search for new medicines, the understanding of climate change impacts, the determination of environmental baselines, the restoration of habitat, and adaptation to climate change. Tribes possess knowledge related to all aspects of climate change, for example the impacts of coastal storms, wildfire, severe floods, extreme heat, extreme drought, diseases in the reactions of plants and wildlife.

Tribes are getting engaged in these activities in forming partnerships with government agencies, scientists, nongovernmental organizations and others in order to solve environmental and climate change problems. Tribes have shared some of their traditional knowledge with others in gaining practical knowledge, technologies and skills from outside their tribes in these partnerships. Partnerships can be very beneficial in allowing all parties to engage in what has been called “co-learning” and the “co-creation of knowledge.” What is meant by this is that both sides can gain from these partnerships. For example, by establishing historical baselines using traditional knowledge draws from a longer history than science, tribes can help scientists to understand what landscapes used to be like in order to rebuild healthy habitats. Scientists can be informed about tribal values, sensitivities, detailed knowledge of local places that can enrich their science and make them more sensitive to tribal needs.

Much of this is occurring however without formal guidance. More formal guidance is needed in part because there are risks as well as opportunities in these partnerships. Some of the risks come from not understanding different cultural worldviews. Other risks arise when knowledge is informally exchanged and neither party is clear about what is expected from the other in the relationship, or how exchanged knowledge should be treated. Significant risks come from ignorance of the law and conflicts of law. Because of the collective nature of traditional knowledge, many disputes arise over a lack of clarity over who has the authority to give consent to access, exchange and set the terms of use for traditional knowledge. Failure to address these issues can mean that tribes can lose control over the use of spiritual, sacred and private knowledge which can lead to harmful impacts that can undo the benefits of partnerships.

All of these point to a need to develop more formal frameworks for the exchange and use of traditional knowledge, putting tribes in the holders of knowledge in control of determining how these relationships should proceed. This paper explores these issues in more detail in order to give tribes one framework among others that tribes can use in developing their own tribal codes, policies, guidelines and other instruments for managing traditional knowledge issues related to these partnerships.

This paper will briefly describe some of the cultural dimensions of knowledge sharing, problems in the current legal context of sharing traditional knowledge, the use of risk and opportunity analysis in order to ensure the free prior and informed consent of the knowledge holders in any knowledge sharing, and outline issues related to traditional knowledge governance.

The aim of traditional knowledge governance is not to increase conflicts, but to provide fundamental principles and guidance for right relationships that can increase trust, mutual understanding and clearer lines of communication and authority. When tribes have control over what they share in do not share, and have trust that what they are shared will be used appropriately and in accordance with their ways of being, this will allow their participation in conservation, habitat restoration and climate change adaptation on a level playing field.

I. The Cultural Dimension of Knowledge Sharing

Tribes possess many kinds of knowledge, and complex rules for managing these. Some have referred to these rules as “customary law,” “natural law” or the “Creator’s law.” Different tribes have their own ways of speaking of their ways of being. Here we will refer to customary law, respectful that different tribes may validly express their ways of being in different ways.

Under customary law some traditional knowledge may be highly secret and sacred, limited only to those whose heritage, teachings or wisdom allow them to hold that knowledge. Other forms of traditional knowledge may be held by women, families, clans or other groups within tribes. Some traditional knowledge may be widespread. Tribes should not be thought of as only possessing in regulating the use of traditional knowledge, as they often have much technical knowledge, scientific knowledge, and detailed observational knowledge of place.

Some have described traditional knowledge has been open and unowned, and have taken this to justify the free sharing of traditional knowledge and other forms of tribal knowledge. As suggested above, some knowledge falls under strict rules of customary law. Other knowledge may be freely shared, but this does not mean tribes are without property concepts, or that their property concepts are the same as those that have been developed by Western society.

Respecting each tribe’s right to describe how it views its own traditional and nontraditional knowledge systems, some generalizations can be made. One very common belief is that knowledge is a gift from the Creator. Because of this it is ultimately the Creator’s knowledge, given to the tribes as stewards and guardians. In general, all forms of knowledge come with what has been referred to as stewardship obligations. These are obligations inextricably linked to the knowledge that recipients are bound to follow in order to use it appropriately, wisely and according to the Creator’s wishes.

In Western law, this resembles the concept of a covenant that runs with the land or perpetual land easement. When property owners sell, will or gift lands to others, they may specify permanent restrictions or covenants on how all subsequent owners use that land. Covenants may specify, for example, that certain features like wetlands, lakes or ponds must be protected or certain habitats left in place. In theory such covenants never expire.

Traditional knowledge often has similar characteristics applied to knowledge. These complications to use traditional knowledge properly never expire. They have existed time immemorial and will exist in perpetuity. Other nontraditional tribal knowledge may also have formal tribal statutes regulating its use, and these do not necessarily resemble statutes in Western law.

II. The Legal Context of Traditional Knowledge Sharing

In order to achieve restoration, management and other goals, tribes have begun to share some of their traditional knowledge. Some tribes have developed guidelines and protocols to manage the sharing process, but this is very uneven. Some tribes refuse to share any traditional knowledge that all, because

of customary law, a history of exploitation and mistrust of outsiders. Failure to engage with outsiders unfortunately means many values that tribes would like to preserve are lost in the landscape. This is particularly true, because many of the resources to sustain tribal cultures are found off of reservation lands. The tribes purposely reserved their sovereign rights to these resources at the time of the treaties because their ancestors understood that reservations would not be enough of the land base to sustain their cultures, in the needed access to many spiritual and subsistence resources not found on the reservations allotted to them. Today tribes struggle for co-management rights and protection obligations to these resources and the habitats that sustain them on federal, state and private lands. Failing to somehow engage traditional knowledge in these efforts will significantly contribute to the continuing loss of tribal resources.

Guidelines are an important step in reversing these trends. They allow tribes to specify what they expect from all of those who seek to create relationships with them. Guidelines can specify how tribes wish to be contacted or not contacted, who is authorized to make decisions, tribal ownership of shared knowledge and project materials, tribal rights to review and make decisions over the publication of results among many other things. They provide a public statement of tribal expectations from outsiders, specify procedures they must go through in order to obtain the free, prior and informed consent (FPIC) of the tribes to access traditional knowledge, and set the terms of use or any shared knowledge. Guidelines may specify that outsiders must sign contracts in order to gain access.

Guidelines are an important step in increasing tribal control and governance the knowledge sharing process. But it has some significant limitations.

The main limitation is what is known as conflict of law. The tribes may have substantial customary law and tribal statutory law governs their knowledge systems, but the United States and other foreign legal systems have their laws as well. Many of the forms of protection in guidelines are social and based on mutual trust. Although tribes can employ contracts as a form of private law to protect their rights and interests, these private laws may not be the only laws that the United States and other sovereign governments may try to apply. These other laws often directly contradict customary law and contract law, it may be asserted to take precedence over any formal or informal agreement developed under guidelines.

One detailed example be given, and brief reference to other conflicts of law in order to illustrate this problem.

Much of Western knowledge is regulated by copyright law, a form of intellectual property law. Unlike tribal concepts which may not make clear distinctions the tangible and intangible, Western intellectual property law divides the world into real property and intellectual property. Intellectual property is viewed as a product of the mind which has no material qualities. The legal theory concerning copyright law was developed primarily in the Enlightenment (1700s) by Scottish and British philosophers. They were concerned that publishers were trying to create permanent protections for the books they published, which harmed both authors in the free flow of knowledge. They recognized that such protection on a wide scale was harmful to society, but that some protection was needed in order to provide incentives to create new knowledge and publish it. The compromise they reached was that publications would be given a short-term monopoly,, which allowed authors and publishers to assert exclusive control. However, after a short-term of protection, the protection would expire in the publication and all that was in it would go into what they called the public domain.

It is important to note that knowledge in the public domain can be freely used without the need for any permission and without any restriction on how it is used. By putting knowledge in the public domain, the philosophers argued society as a whole would be served, as it would provide a pool of knowledge from which everyone could draw be used to create novel ideas and inventions.

The problem is that this system does not recognize stewardship obligations or the kinds of principles embodied in customary law. In general, the copyright system has asserted its authority over all forms of knowledge and limited the application private contract law. For example, while private contract law and copyright law may protect the exact form of the contents of a published document, it does not protect any ideas contained in that document. Copyright in the United States currently specifies that any copyrighted work will only be protected lifetime the author plus 70 years, after which the document will fall in the public domain. Contracts may attempt to create stronger and longer protections, but federal court cases are generally finding that any contractual protections cannot last longer than an underlying copyright. While contracts can relax copyright restrictions, federal courts generally enough support stronger protections. What this means that there is strong legal pressure pushing knowledge into the public domain.

There are three other major characteristics copyright that conflict with the idea stewardship obligations. The first is that copyright allowance many exemptions for the use copyrighted material, for example in education, museum displays and news reporting. These exemptions allow copyright holders to use material without needing permission. The second problem is called the problem of fixation. Copyrights only apply to written knowledge, not oral knowledge. Finally, even if traditional knowledge has been written down the copyright system generally consider that it has no distinct author and that it is too old for protection.

There are other Western legal concepts that also worked against customary law and stewardship obligations. In *Department of interior v Klamath Water Users Protective Ass'n*, 121 S. Ct. 1060 (2001), the Supreme Court found that tribal information submitted to the federal government is not protected under the Freedom of Information Act as a sovereign to sovereign communication. This means that any traditional knowledge submitted to the federal government is open to FOIA requests and can be made public. Tribal stewardship obligations can also conflict with rights to freedom of expression is found in the United States Constitution and the Universal Declaration of Human Rights.

Many of these issues would require measures for providing legal recognition of tribal rights and authority. Guidelines are an important stepping stone to achieving this recognition. Conclusion from this discussion is that until such rights are recognized and respected the Western legal system there will continue to be many conflicts with tribal traditions, rights and expectations, and inadequate protection of traditional knowledge and other forms of tribal knowledge.

III. Risk and Opportunity Assessments for Sharing Traditional Knowledge

Guidelines can help tribes to cope with the problems discussed above. Where traditional knowledge is being used in solving environmental problems, there has been very little discussion of the risks for sharing traditional knowledge, with the emphasis focused on opportunities and benefits.

The standard for access to traditional knowledge is the concept of free, prior and informed consent (FPIC). This standard is used in the United Nations Declaration of the Rights of Indigenous Peoples (2007). This standard proposes before any outsider gains access to traditional knowledge or resources, they must obtain consent which is freely given and based on sufficient information for the holders of traditional knowledge or resources to make an informed decision.

This means that both risks and opportunities, or costs and benefits should be identified and explored and any proposed tribal-nontribal partnership. Tribes are free and should be in control specifying the FPIC process and the kinds of information they need to be informed of in order to give uncoerced and unbiased consent.

Some tribes and tribal activists have promoted the free sharing traditional knowledge, because of their perceptions will lead to a better world overall in the kind of private commodity-based and market-based systems favored by capitalism. They argue that tribes will receive more benefits themselves by helping others and to remain true to their traditions by sharing traditional knowledge. Others have promoted forms of protection for traditional knowledge in order to ensure that their traditions are respected and that they receive direct benefits from the use of their knowledge.

Risk opportunity assessments based on FPIC can help sort out different contexts for decisions to share openly or protect. For example, tribes may consider whether or not the knowledge is deeply connected customary law or is new knowledge that may not carry strong stewardship obligations. They can consider the nature of the knowledge being shared. Some kinds of knowledge useful for landscape and habitat conservation and restoration and climate change adaptation may not pose risks for tribes, and help them find mitigating harms in helping to restore culturally important resources. Observations of weather patterns, for example, may help establish climate change impacts on tribes and lead to solutions to prevent those impacts.

Other knowledge and information sharing may be more risky. Traditional knowledge is often not about abstract conceptual knowledge, but inextricably bound to cultural heritage and cultural identity, attached to natural resources used since time immemorial. Revealing that knowledge in order to solve problems, often generated by others, may contribute to solving the problems but open tribes to unintended consequences. For example, sharing knowledge about tribal crops adapted to drought may pose few risks to tribes, and help others adapt to the effects of climate change. In order to use knowledge, others must cultivate them on their own lands, and the nature of crop markets is such that they may not negatively affect tribal livelihoods (this may be true of potatoes, but not of Hopi corn – so generalizations are risky). Sharing tribal knowledge about environmental baselines can help provide guidance for restoration without unintended impacts on other tribal resources or values. Providing detailed information on specific wild resources may potentially create more problems. Wild resources are not cultivated and may be rare or in decline. Medicinal plants often have many spiritual dimension is attached to them. Sharing traditional knowledge and things such as medicinal plants, location of wildlife, places of fish aggregation and movement may carry substantial risks. Such knowledge can lead to more effective landscape and habitat restoration and management, while at the same time making the knowledge public which in turn can lead others to target the resources and overexploit them.

The conclusion from this section is that sharing traditional knowledge the forms of tribal information may be both beneficial and harmful, presenting both opportunities and risks. Guidelines can aid in

ensuring that the full spectrum of opportunities and risks are considered, while in mind existing limitations in legal protection.

IV. Traditional Knowledge Governance

Guidelines, FPIC and risk and opportunity assessments are an important start to ensuring that tribes benefit from, and are not harmed by, sharing traditional knowledge or other kinds of tribal knowledge. Their value will be limited by conflicts of law, and their legal standing in other legal systems. This is particularly true because many of the landscape and habitat problems tribes are trying to address are off of their reservations. Federal Indian law has recognized some off-reservation tribal jurisdiction to natural resources, and implementing this has been a struggle. The problem with traditional knowledge is even more difficult, is federal law is not generally recognized tribal jurisdiction over “intellectual property,” but has asserted the supremacy of its intellectual property laws.

This may be starting to change, but the future is still quite uncertain. The United States has articulated the policy that it “generally supports the tribes in their understanding that it is their sovereign right to protect their cultural heritage and cultural identity expressed in both tangible and intangible forms by the developing tribal laws” (Deputy Secretary of the Interior David J. Hayes in an undated letter to the Tulalip Tribes, received on September 27, 2011; also offered by Donald “Del” Laverdure, Principal Deputy Assistant Secretary for Indian Affairs, in testimony before the Senate Committee on Indian Affairs on the United Nations Declaration on the Rights of Indigenous Peoples, June 9, 2011).

Most partnerships for using traditional knowledge sharing have approached tribes as if they are another kind of stakeholder in research partnerships. Scientists and government agencies have much experience with citizen stakeholders sharing non-traditional, secular information. Traditional knowledge in these cases may be treated as another kind of information to be validated or invalidated through the research process, which must be made publicly available in order to meet scientific review and public administrative standards.

This ignores the fact that tribes are sovereign governments with sovereign powers over all they retained in the treaties and which have not been terminated by the government. The failure of the Federal government to legally recognize tribal authority over traditional knowledge is notable. There is ample evidence that tribes regulated their knowledge systems at the time of the treaties, and have done so since time immemorial. There is no evidence that the tribes surrendered this governance in the treaties, nor any evidence their governance rights have been terminated by acts of Congress. The United States has recognized the rights of other nation states in intellectual property and knowledge matters, recognizing the need to make treaties with them to regulate cross-border issues.

The United States has largely failed to do so with the tribes. The policy statements by Del Laverdure and David Hayes suggest that there is a window of opportunity for tribes to begin to establish sovereign jurisdiction over both traditional knowledge and other forms of tribal knowledge by passing tribal codes, ordinances and FPIC procedures. Guidelines are an important step in this direction. The acknowledgement of tribal governance authority directly supports the elimination of conflicts of law and strengthen the ability to enter trusted partnerships for the restoration of landscapes and tribal cultures.