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*ITEP Tribal Climate Change Webinar Series on
Climate Change Impacts, Traditional
Knowledge and Communication*
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Safeguarding the Living Breath of Life

FREE, PRIOR AND INFORMED CONSENT (FPIC) AND RISK AND
OPPORTUNITY ASSESSMENT FOR ENGAGEMENT WITH TK_s HOLDERS

Equitable and Respectful Relationships between Peoples

Why protocols for traditional knowledges?

Cultural differences in concepts associated with knowledge

Customary law v. open knowledge society

Cultural differences in risks and opportunities

Place-based peoples

Knowledges associated with identity, spirituality, subsistence

Knowledges and resources inseparable

Cosmovision

Linkage between TKs and associated resources

TKs and associated resources (TKRs) may be threatened, rare, declining

Misappropriation of TKRs can significantly challenge cultural integrity

Institutional Review Boards (IRBs) – Human subjects research



Emic

good mind

guardianship

customary law

cosmovision

reciprocity

obligations

relations

Etic

information

economics

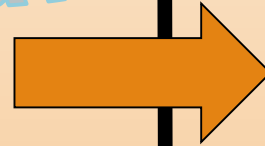
intellectual property

common heritage

public domain

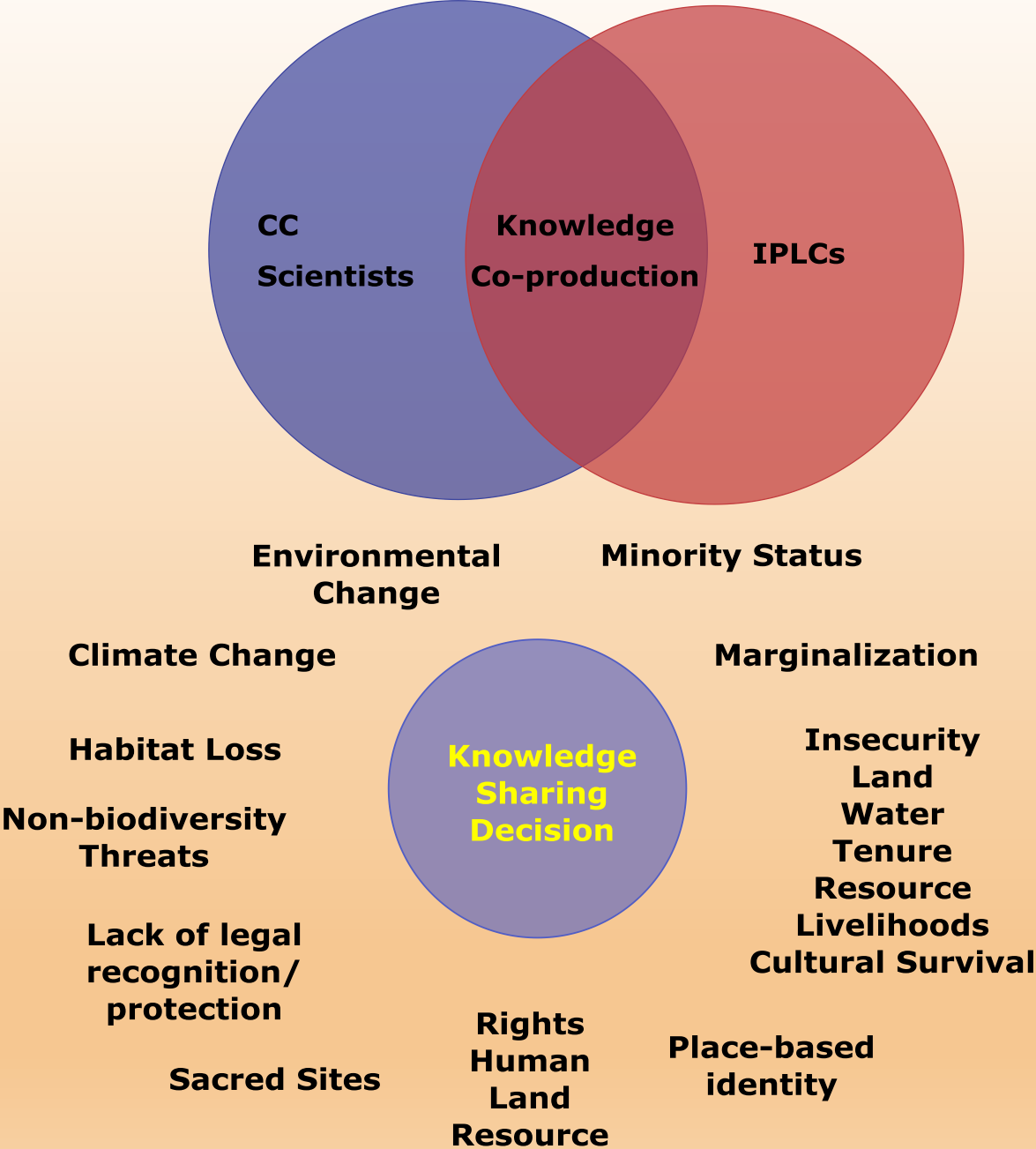
secular knowledge

open knowledge



Project-Focused Approach (TEK)

Holistic Decision Making (Ecology of TKs)

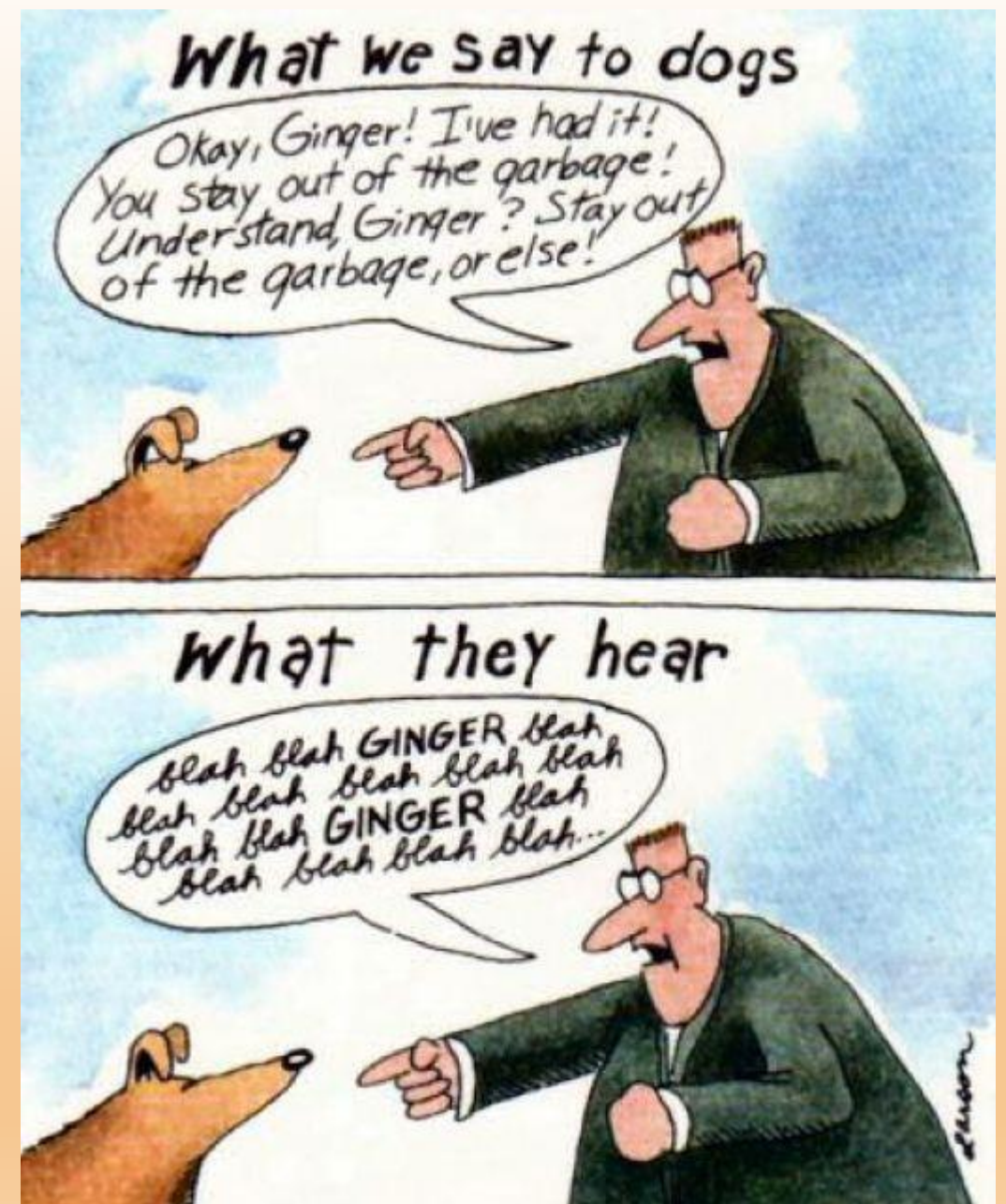


Traditional Knowledge Guidelines

Every indigenous community is sovereign over decisions related to sharing traditional knowledge

Guidelines provide an indigenous declaration of requirements for respectful relationships

Free, Prior and Informed Consent (FPIC):
Procedural safeguard to ensure that both risks and opportunities are addressed

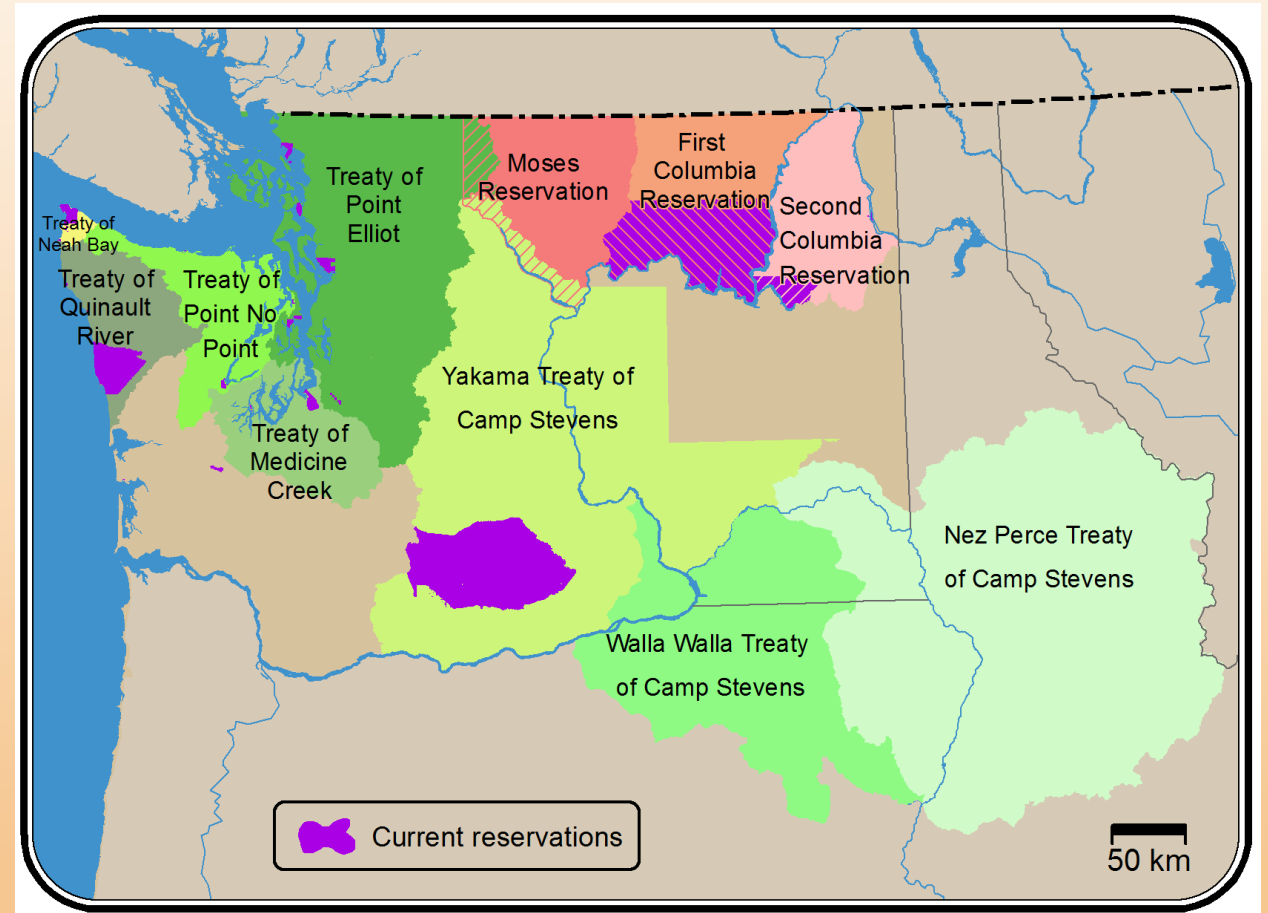


Traditional Knowledge Guidelines

Assert tribal sovereignty

US policy recognizes that “tribes have sovereign jurisdiction over their cultural heritage and cultural identity, including both tangible and intangible forms” (David J. Hayes, Former Deputy Secretary of the Interior)

Regulate internally and declare expectations for trust responsibility (“extraterritorial application”)



International Actions

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

Traditional Knowledges Guidelines

Free, prior and informed consent (FPIC)

Free: un-coerced, unbiased, freedom of tribes to set procedure through which consent is given

Prior: Consent prior to access and use, changes in use

Consent: Right to say no: Give or withhold consent

Not necessarily collective consent – collective rules

Risks and opportunities – appropriate and balanced information

Overcome “optimism bias”

Traditional Knowledges Guidelines Risks

Misappropriation of traditional knowledge per se

- Moral hazard of cultural offense (customary law/stewardship obligations)

- Third party acquisition of TKs (not bound by ethical guidelines or law)

- Loss of ownership/control over TKs

 - Western IP law and the public domain / FOIA

- Privatization of TKs through derived intellectual property rights

- Loss of benefits/lack of benefit sharing for TKs per se

Misappropriation of cultural resources associated with TKs

- Overharvesting/extirpation

Traditional Knowledges Guidelines Opportunities

Knowledge co-production and co-creation

- Novel solutions from combination of scientific knowledge and TKs

- Ensure indigenous resource, landscape and other values are reflected

New knowledge in a changing world

- Limitations of the ability of TKs to cope with unprecendated change

- Increasing unreliability of traditional environmental indicators

Valorization of traditional knowledges

Potential for right relationships

- Co-management, self-management, government-to-government

Traditional Knowledges Guidelines

1. How a tribe wishes to be contacted
2. Who owns research outcomes
3. Tribal control over what gets published
4. Recognition and Remuneration to elders
5. Acknowledgement
6. Restrictions on uses
 - customary law, collective ownership
 - “contracting into custom”
7. Restrictions on transfers
8. Checkpoints for changes in use
9. Ongoing responsibilities for consultation, negotiation, monitoring, reporting

Traditional Knowledges Guidelines

11. Reciprocity

- Clarity over benefits to tribes

- Monetary and non-monetary benefit sharing

- Distributive justice

12. Respect

13. Flexibility and responsiveness to community needs

13. Procedures/procedural justice

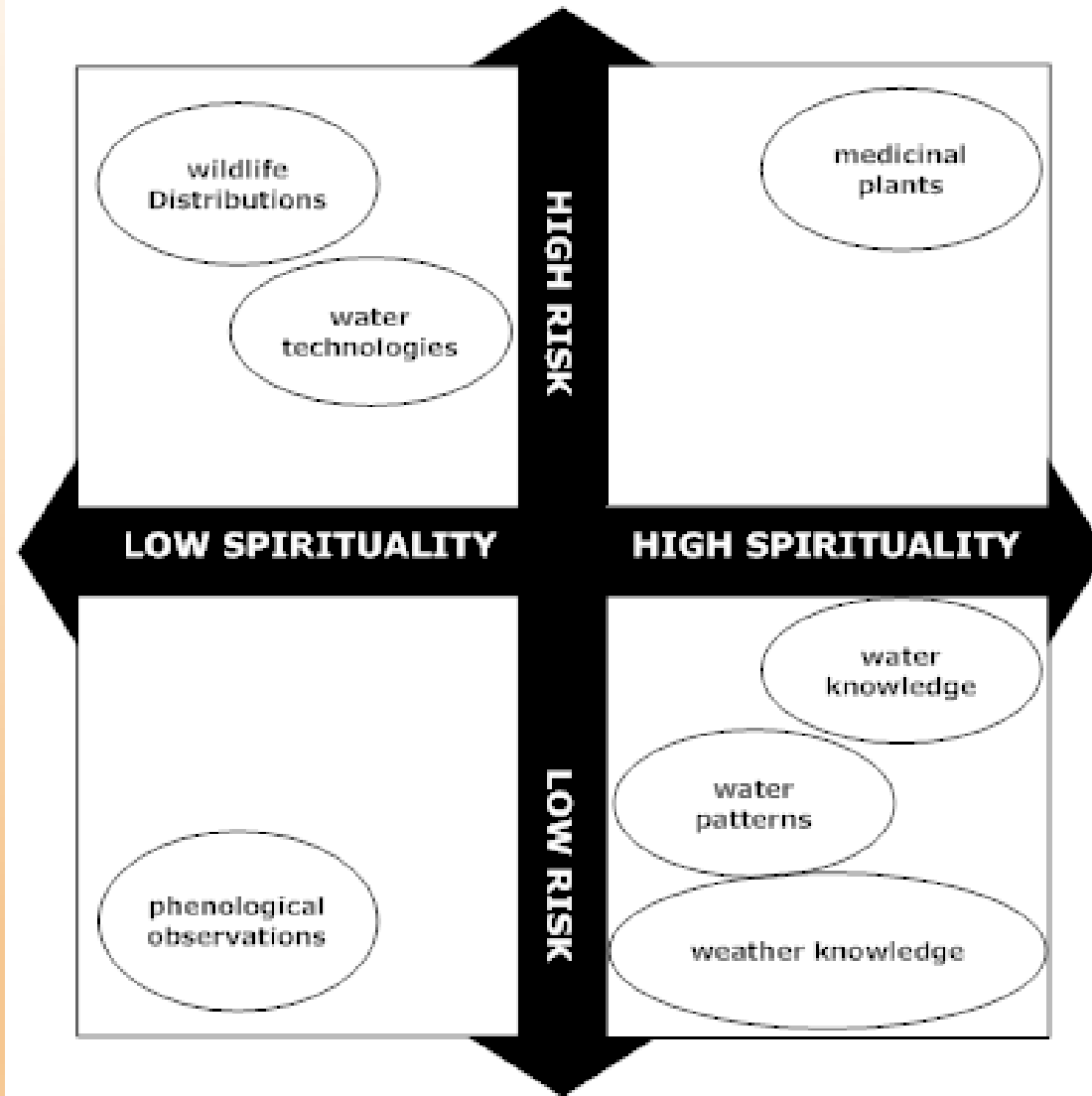
- Full and effective participation

- Traditional decision making

- Gender, youth, elder participation

14. Equilibrium based on tribal worldview, balance among partners and the environment

Risk / Spirituality Matrix



Tribal Law

Good mind
Creator's Gifts
Reciprocity
Stewardship Obligations
Relations

Opportunities for sharing
Risks of Sharing

Free, Prior and Informed
Consent (FPIC)
Opportunity/Risk Assessments

Opportunities/Risks

Western Law

Conflicts of Law
Intellectual Property Rights
Copyrights
Public Domain
Freedom of Information
USPTO Asserts Supremacy

Tribes have Sovereign
Jurisdiction

Knowledge as Sovereign
Property

UNDRIP
Co-Management

TK Governance



Conclusion

Indigenous peoples are generally very generous, and have shared much and often willing to work with their neighbors. But there needs to be caution - risk of disclosing unprotected traditional knowledge associated with unprotected cultural resources

FPIC challenging and will take bridge- and institution-building

Principle of Respect

Principle of co-protection for both TKs and associated resources

Principle of stewardship obligations (protected sharing)

Principle of doing no harm

