**Proposed Tribal Nation Leader Talking Points**

**for**

**USPTO Consultation (January 16-17, 2024)**

**Background:**

On January 16 and 17, 2024, the United States Patent and Trademark Office (USPTO) will host two virtual consultation sessions for Tribal Nations seeking input on “how best to protect the genetic resources, traditional knowledge, and traditional cultural expressions of Indigenous Peoples”. Additionally, on January 19 and 23, 2024, the USPTO will host two additional sessions on the same topic for “state and non-recognized Tribes and Native Hawaiians, their representatives, and inter-Tribal organizations”.

USPTO’s announcement is taking place now, in part, because a specialized agency of the United Nations—the World Intellectual Property Organization (WIPO)—is planning on finalizing its work on an international instrument focused on the protection of genetic resources and associated traditional knowledge. While negotiations over the content of this international instrument have been taking place for 24 years, this is the first formal consultation session the USPTO has had with Tribal Nations on this topic.

As part of the USPTO’s announcement, the office provided 18 questions for comment, noting that “[c]ommenters need not respond to every question and may provide relevant information, even if not responsive to a particular question.” While the 18 questions provided by USPTO can be found in the appendix of this document, the purpose of this document is to provide some optional guidance on how to approach some of the topics USPTO is inquiring about. Please feel free to use the information below to guide your own statements at one of the USPTO sessions.

If you have questions about this document or want to learn more about the issues the USPTO is seeking input on, please contact the [Implementation Project](https://un-declaration.narf.org/) at declaration@narf.org, and the [National Congress of American Indians](http://ncai.org) at rmorganverdin@ncai.org.

**Key Talking Points**

While more in depth information is provided below for those interested in learning more and developing more extensive talking points, the following bullet points are key items to highlight during the consultation period. *Of course, your tribe or organization may have different points or additional ones to make. This is not legal advice, and we encourage you to work with your own leadership and lawyers to develop positions.* NCAI’s suggested key talking points are as follows:

* The USPTO consultation process has been unacceptable up until this point in time. While the USPTO has been negotiating for 24 years on intellectual property right issues that impact Tribal Nations, the consultation process has only now just begun. Furthermore, the USPTO is holding final negotiations on a legal instrument focused on genetic resources and associated traditional knowledge this May—there is not ample time for Tribal Nation comments to be taken fully into consideration. USPTO must engage Tribal Nations at the very beginning of the process and seek to reach consensus about the United States’ positions that impact Tribal Nations directly.
* The USPTO is taking positions internationally that stem from a western/industrial/colonial intellectual property system that fails to take into account tribal sovereignty over their own resources and cultural heritage. The USPTO—and the U.S. as a whole—need to hear from Tribal Nations about tribal sovereignty and Tribal Nations’ own laws, protocols, customs, and traditions governing the use of tribal resources and cultural heritage.
* With respect to the instrument on genetic resources and associated traditional knowledge that is being negotiated at the WIPO, two points are critical:
	+ According to USPTO, the issue of “public domain” is a “fundamental concept” in all the WIPO negotiations. Traditional knowledge and traditional cultural expressions, if considered to be in the “public domain,” would be free for use by anyone, without tribal consent or control. What are your views on the concept of the “public domain” and its relationship with tribal sovereignty and property rights?
	+ A key feature of the instrument under negotiation is a “disclosure requirement” that would require anyone filing an application to patent a new invention (like a new medicinal drug) to disclose the origin or source from which they obtained genetic resources and/or traditional knowledge that were necessary or material to the development of the invention. Such disclosed information could be used at the national level to determine whether genetic resources and/or traditional knowledge have been appropriately accessed. Should the disclosure requirement be expanded to require other types of information—that is, is there other information that should be disclosed in the patent application in order to protect tribal rights in genetic resources and associated traditional knowledge (such as medicinal plant knowledge)?

**More Information for USPTO Consultations — Introduction**

For purposes of this document, proposed talking points have been divided into three large thematic areas:

1. Talking points related to the USPTO consultation process;
2. Talking points related to Native conceptions of intellectual property, genetic resources, traditional knowledge, etc., and how to protect them; and
3. Talking points related to the specifics of the upcoming international negotiations at the WIPO that will likely result in a finalized instrument on protecting genetic resources.

***Part I—Talking points related to the USPTO consultation process***

**Introduction:** As this is a preliminary attempt made by the USPTO to consult with Tribal Nations, there is an opportunity to engage in dialogue with the USPTO on how it can improve its government-to-government relations with Tribal Nations. There are a number of principles that must be addressed in any attempts to take tribal consultation seriously. Many of those principles can be found in the United Nations Declaration on the Rights of Indigenous Peoples, which the United States has stated it supports, meaning that the USPTO should also be striving to implement those principles in their consultation efforts.

Additionally, please consider the questions below in formulating your position on whether the USPTO’s consultation policy is meaningful and effective:

* **Principle: The *purpose* of tribal consultation must be clearly defined and should strive to obtain Tribal Nation consent.** Questions to consider:
	+ Does the USPTO define what the purpose of its consultation process is? Does the process seek to obtain free, prior, and informed consent (“FPIC”) of Tribal Nations? If the process isn’t designed to obtain free, prior, and informed consent, then does the process seek to achieve agreement or consensus?
* **Principle: Tribal Nations should be involved in the tribal consultation process *upon their request* or *as early as possible*.[[1]](#footnote-1)** Questions to consider:
	+ Has the USPTO policy involved Tribal Nations at the appropriate point in the process? If not, when should the USPTO have involved Tribal Nations in this process? When should the USPTO involve Tribal Nations in the future?
* **Principle: Tribal Nations must be given adequate *notice* about tribal consultation sessions.** Tribal Nations cannot exercise self-determination if they are unaware that tribal consultation is happening. Questions to consider:
	+ Has the USPTO given adequate notice about its consultation sessions given the complexity of the subject matter being discussed? Did the USPTO provide adequate time for Tribal Nations to review information provided on the subject matter of the tribal consultation? If not, how should the USPTO improve its notice provided to Tribal Nations in the future?
* **Principle: Tribal Nations must be given *complete information* about tribal consultation sessions.** Tribal Nations cannot exercise informed decision-making without complete information. Questions to consider:
	+ Has the USPTO provided complete information about the issue at hand to Tribal Nations? Does this information include an agenda, a framing paper, and relevant legal documents to assist in the dialoguing process? Has there been an opportunity for Tribal Nations to request additional information? Has the information been provided in an understandable format? If not, what improvements should USPTO make in the future?
* **Principle: Tribal consultation should involve individuals with *decision-making authority*.** Questions to consider:
	+ Do the USPTO's consultation sessions include individuals who are in a decision-making position with respect to the issues being discussed? If not, how can this be improved in the future?
* **Principle: For tribal consultation to be effective, both Tribal Nations and the United States must have the *capacity* to engage effectively.** Questions to consider:
	+ Have the USPTO’s attempts at consultation ensured that Tribal Nations have the resources necessary to carry out meaningful tribal consultation? Has USPTO provided technical assistance or other resources to assist Tribal Nations in providing meaningful feedback on the issues at hand? If not, what steps can the USPTO take to improve Tribal Nation capacity to engage in meaningful consultation on these issues in the future?

***Part II—Talking points related to Native conceptions of intellectual property, genetic resources, traditional knowledge, etc., and how to protect them***

**Introduction:** Many of the USPTO’s consultation questions appear to be seeking a better understanding of Native concepts of intellectual property, traditional knowledge, genetic resources, etc. It is appropriate and valuable for Tribal Nations to provide USPTO with input on how these concepts are understood. Additionally, it is equally as important to provide the USPTO with input on what sorts of protections Tribal Nations are looking for with respect to these concepts.

Please consider the questions below in formulating your Tribal Nation’s position on these broader conceptual issues:

* Based on past negotiation sessions, the USPTO’s positions are being developed from a worldview steeped in the western/industrial/colonial intellectual property system, that fails to take into account tribal sovereignty and Tribes’ sovereign authority over their own resources and cultural heritage. What does the U.S. need to understand about tribal sovereignty and tribes’ own laws, protocols, customs, and traditions governing the use of tribal resources and cultural heritage?
* Article 31 of the UN Declaration on the Rights of Indigenous Peoples recognizes Indigenous Peoples’ right to maintain, control, protect, and develop their cultural heritage, including their traditional knowledge, cultural expressions, genetic resources and associated traditional knowledge, and associated intellectual property rights. Article 31 also mandates that nations take effective measures, in conjunction with Indigenous Peoples, to recognize and protect the exercise of these rights. The U.S. has stated its support for the UN Declaration. What is your view of the U.S.’ obligation to adhere to the Declaration in these negotiations?
* Assume that U.S. law understands intellectual property rights to be rights that exist to protect creative works. How is this conception of intellectual property rights similar or different from Native views of creative works and protections for creative works?
* U.S. and international legal instruments utilize the term genetic resources in various contexts. One definition of genetic resources is the “genetic material of plant, animal, microbial or other origin containing functional units of heredity that has actual or potential value”, and this definition would include medicinal plants, agriculture crops, and potentially animal breeds. What is your Tribal Nation’s understanding of genetic resources? What genetic resources does your Tribal Nation wish to protect? How might that protection be achieved?
* Similarly, U.S. and international legal instruments utilize terms such as “traditional knowledge” and “traditional cultural practices”. How does your Tribal Nation understand such terms? What types of protections does your Tribal Nation seek for such concepts? How might the protections be achieved?
* Finally, what responsibility role does the United States (and other foreign governments) play to protect cultural intellectual property? What responsibility do Tribal Nations and other Indigenous communities need to play in protecting those same rights? What tools do Tribal Nations need to adequately protect their rights?

***Part III—Talking points related to the specifics of the upcoming international negotiations at the WIPO that will likely result in a finalized instrument on protecting genetic resources***

**Introduction:** As USPTO’s announcement describes, WIPO is convening a “diplomatic conference” on genetic resources and associated traditional knowledge, to take place in May 2024. A diplomatic conference is a high-level negotiation that is the usual step in finalizing an international legal instrument at WIPO. Thus, the present USPTO consultation is likely to be Tribes’ only opportunity to provide input on genetic resources and associated traditional knowledge before an international legal instrument is finalized and adopted.[[2]](#footnote-2)

Please consider the questions below in formulating your comments on genetic resources and associated traditional knowledge:

* The USPTO announcement states that the issue of “public domain” is a “fundamental concept” in all the WIPO negotiations. Traditional knowledge and traditional cultural expressions, if considered to be in the “public domain,” would be free for use by anyone, without tribal consent or control. Indigenous Peoples participating in the WIPO negotiations have strongly disagreed with the U.S. position, observing that to focus on the protection of the public domain in these negotiations is to legitimize hundreds of years of theft of Indigenous Peoples’ traditional knowledge and cultural expressions. What are your views on the concept of the “public domain” and its relationship with tribal sovereignty and property rights? Should whether something is in the public domain be determined by reference to Tribes’ own laws, protocols, customs, and traditions? Does it matter how “widely diffused to the public” traditional knowledge or traditional cultural expressions may be, if the disclosure to the public was the result of theft, misappropriation, or otherwise without tribal consent?
* A key feature of the instrument under negotiation is a “disclosure requirement” that would require anyone filing an application to patent a new invention (like a new medicinal drug) to disclose the origin or source from which they obtained genetic resources and/or traditional knowledge that were necessary or material to the development of the invention. Such disclosed information could be used at the national level to determine whether genetic resources and/or traditional knowledge have been appropriately accessed. Should the disclosure requirement be expanded to require other types of information – that is, is there other information that should be disclosed in the patent application in order to protect tribal rights in genetic resources and associated traditional knowledge (such as medicinal plant knowledge), for example, a requirement of disclosure of having obtained tribal consent for use of the genetic resources and/or traditional knowledge?
* Another prominent feature of the draft instrument is a provision suggesting that countries establish information systems (such as databases) of genetic resources and associated traditional knowledge. Under the patent system, patents may only be granted for inventions that are “novel”. Information systems would be made available to patent offices for use in evaluating patent applications by searching for “prior art” that would indicate that a claimed invention is not novel and is therefore not subject to receiving a patent. What are your views on the benefits and risks of establishing information systems? If established, how should disclosed information be stored and protected? How should the systems be used and who should be authorized to access them? What are the consequences to Tribes should the information be disclosed inappropriately?
* Another important provision of the draft instrument addresses what happens in the event of non-compliance with the disclosure requirement. The current draft requires countries to put in place at the national level “appropriate and effective” measures to address non-compliance. What role should Tribal Nations have in developing and implementing any sanctions and remedies for a patent applicant’s non-compliance with the disclosure requirement?

**Appendix I: USPTO Questions for Comment**

1. Please describe how Tribes protect genetic resources, traditional knowledge, and/or traditional cultural expressions.
2. Please describe your views on using the framework of intellectual property concepts and laws, such as patents, trademarks, copyrights, or trade secrets, to protect genetic resources, traditional knowledge, and/or traditional cultural expressions.
3. Please describe your views regarding using any other means to protect genetic resources, traditional knowledge, and/or traditional cultural expressions. Please also include your views regarding:
	1. whether eligibility criteria should be used to determine which types of traditional knowledge, traditional cultural expressions, and/or genetic resources would be protected and, if so, what criteria should be used, and
	2. what parameters, if any, should be placed on the scope or term of protection for traditional knowledge, traditional cultural expressions, and/or genetic resources.
4. Please describe your views regarding whether an international treaty should be pursued to protect genetic resources, traditional knowledge and/or traditional cultural expressions. If so, please describe your views on what essential elements or conditions would be necessary to include in an international treaty to ensure protection of genetic resources, traditional knowledge and/or traditional cultural expressions.
5. The WIPO IGC has not come to any conclusions about how to define "traditional knowledge." Please describe how you would recommend defining "traditional knowledge" or, alternatively, please provide your views regarding the attributes of traditional knowledge.
6. The WIPO IGC has not come to any conclusions about how to define "traditional cultural expressions." Please describe how you would recommend defining "traditional cultural expressions" or, alternatively, please provide your views regarding the attributes of traditional cultural expressions.
7. The WIPO IGC has not come to any conclusions about how to define "public domain."
	1. Please describe how you would recommend defining "public domain."
	2. Please share your views regarding how the concept of "public domain" relates to genetic resources, traditional knowledge, and/or traditional cultural expressions.
8. Please share your views regarding whether genetic resources, traditional knowledge, and/or traditional cultural expressions that have been widely diffused to the public are capable of protection, whether they should be protected, and, if so, how they should be protected, including any specific examples you may have. Please also share your views on whether there should be any exceptions to such protection.
9. Please share your views regarding whether genetic resources, traditional knowledge, and/or traditional cultural expressions that have been widely diffused to the public can continue to impact holders and, if so, please share any specific examples you may have.
10. Please describe your recommendations, if any, on how to identify traditional knowledge that has entered the public domain and, therefore, may be freely used by others.
11. Please describe your recommendations, if any, on how to identify traditional cultural expressions that have entered the public domain and, therefore, may be freely used by others.
12. Please describe your recommendations, if any, on how to identify genetic resources that have entered the public domain and, therefore, may be freely used by others.
13. Please describe the circumstances, if any, in which a holder of a traditional cultural expression, genetic resource, and/or traditional knowledge might be interested in permitting third party use. Please include your views regarding:
	1. what conditions or requirements a holder might place on third patties in exchange for granting permission for such use;
	2. how a third party, interested in potential use, could determine whether something is a traditional cultural expression, genetic resource, or traditional knowledge, and who holds it; and
	3. who, with respect to the holder of a traditional cultural expression, genetic resource, or traditional knowledge, would be the appropriate authority to control, or grant permission for, such third-party use.
14. Please describe real-world examples, if any, in which a Tribe has authorized others to commercially use its traditional cultural expressions, genetic resources, or traditional knowledge.
15. Please describe your views and any recommendations, including any real-world examples, regarding the use by third parties of genetic resources, traditional knowledge, and/or traditional cultural expressions for research.
16. Please describe your views and any recommendations, including any real-world examples, regarding the use of genetic resources, traditional knowledge, and/or traditional cultural expressions by archives, libraries, museums, or cultural institutions.
17. Please describe your views regarding how the unauthorized use of traditional knowledge, traditional cultural expressions, and/or genetic resources impacts Tribes, including any real-world examples.
18. Please provide your recommendations, including any real-world examples, regarding how best to address unauthorized uses of genetic resources, traditional knowledge, and/or traditional cultural expressions.
1. *Note*: In this instance, the National Congress of American Indians (NCAI) adopted two separate resolutions calling for USPTO to hold consultation sessions on this issue years ago. Those resolutions include [#PHX-16-054](https://archive.ncai.org/attachments/Resolution_ZlGiMHNGVtAbKpBODZObysfdKgbkPYPgDGnKYMSigaCfeNCnOlP_PHX-16-054%20final.pdf) and [#SAC-22-038](https://ncai.assetbank-server.com/assetbank-ncai/assetfile/3160.pdf). [↑](#footnote-ref-1)
2. WIPO has prepared a summary of the key terms of the current draft of the instrument, referred to as the “Basic Proposal”, that is available here: <https://www.wipo.int/export/sites/www/diplomatic-conferences/en/docs/executive-summary-basic-proposal.pdf>. [↑](#footnote-ref-2)