Developing Policies and Protocols
for the Culturally Sensitive Intellectual Properties
of the Penobscot Nation of Maine

(An Intellectual Property Issues in Cultural Heritage Community-Based Initiative)

Final Report
by
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with contributions from
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www.sfu.ca/ipinch
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Introduction

Indigenous communities face legal, social, cultural, and economic challenges when attempting to protect or manage their intellectual property (IP). One such challenge is the lack of a community-based infrastructure that formalizes processes for confronting IP issues. This deficiency is particularly apparent in the field of archaeology, where IP and cultural heritage issues are being contested on a number of domestic and international fronts.

To mitigate this challenge, the Penobscot Nation in Maine, with support from partners at the University of Massachusetts Amherst (UMass), engaged in a community-based initiative to develop tribal protocols, tools, and an internal infrastructure to address IP issues related to archaeology and heritage-based places. A key strategy for success was the creation of an IP working group comprised of tribal representatives with multi-disciplinary expertise that encompasses many facets of tribal administration and culture. This group worked collectively for over two years to address complex issues ranging from what constitutes intellectual property, to what characterizes intellectual property violations (and how to deal with them), to what are the Penobscot Nation’s intellectual property priorities.

This document reports on the Penobscot Nation Intellectual Property project and presents several community-based tools and strategies for managing and protecting IP resulting from this work. Its organization is based on the process the Penobscot Nation undertook to accomplish the project objectives. Interspersed throughout the document are several “hindsight comments.” These are reflective comments based on our experiences implementing a community-based initiative. They provide additional information on some key lessons learned throughout the process. While the Penobscot IP project is grounded in archaeology, the process and strategies presented here are broadly applicable across the spectrum of cultural heritage arenas related to IP.
Background: People, Place, Philosophy

The Penobscot Nation is a small, federally recognized tribe, Indigenous to Maine, U.S.A., with a population of 2,397 people. The people are Penawahpskewi—a name that connects our people to the rocky part of the Penobscot River near Old Town, Maine. Penobscot culture is intimately linked to the Penobscot River, and many of the tribe’s cultural practices are rooted in this relationship. The Penobscots are expert craftspeople, skilled in using natural materials such as birch, ash and sweetgrass to create cultural items. We are well known for our birch bark canoes, beadwork, and basketry.

The Penobscots are part of the Algonquian language family with close social, political, and kinship ties to other Algonquian speakers in Maine—the MicMacs, the Maliseets, and the Passamaquoddies. Collectively, the Maine tribes refer to themselves as Wabanaki—“People of the Dawn.”

Today the Penobscot Nation has a citizen-elected form of government with a Tribal Chief, Vice-Chief and a 12-member Tribal Council. Tribal Council is the lead decision-making authority for the Nation. Council members are elected every two years with staggered 4-year terms. The Tribal Chief and Vice-Chief serve for a period of four years. The Penobscot Nation also holds a seat in the Maine state legislature. This position has been in place since at least 1823 and likely had its roots in earlier governmental relations between the Penobscots and the Commonwealth of Massachusetts (for more information see http://www.maine.gov/legis/lawlib/indianreps.htm).

The ancestral territory of the Penobscot people encompasses the entire Penobscot River watershed—an area of roughly 8,600 square miles. However, prior to European contact, borders were fluid and our ancestors, along with the other Wabanaki tribes, had access to a territory covering much of the Gulf of Maine region. Most of this land base was diminished during European colonization. Today, the Penobscot Nation has roughly 123,000 acres of land which includes: 96,338 acres of trust lands that the Nation acquired through the 1980 Maine Indian Claims Settlement Act; reservation lands and waters comprised of more than 200 islands within the Penobscot River; and fee land parcels scattered across Maine that the Nation has purchased and holds in fee simple status.
Indian Island, located near Old Town, Maine, is the heart of the Penobscot community. All tribal administrative offices are situated here, and this island is the residential center and hub for community activities. Archaeological evidence indicates that Indian Island has been occupied since at least the Archaic Period (9000–3000 B.P.) and has served as a social and ceremonial center for millennia.

In 2004, the Penobscot Nation created a Tribal Historic Preservation Office (THPO) to manage historic properties and to oversee all archaeological work conducted on tribal lands. It was through this department that the Penobscot Nation initiated a project to address IP issues relative to heritage-based places, and to implement strategies for managing and protecting sensitive information connected to those places. This project was one of several community-based initiatives developed in conjunction with the IPinCH (Intellectual Property Issues in Cultural Heritage) project. The IPinCH project is a collaborative among scholars, Indigenous communities and other organizations designed to address intellectual property issues within the context of cultural heritage (http://www.sfu.ca/ipinch/).
The Penobscot THPO program initiated the IP project in 2008 through a partnership with members of the Anthropology Department at the University of Massachusetts Amherst, and Intellectual Property Issues in Cultural Heritage (IPinCH) project representatives based at Simon Fraser University, British Columbia, Canada. The partners entered the proposal development phase using an Indigenous archaeologies framework whereby the needs of the Penobscot Nation THPO department figured prominently in the project design. The focus of the project was inspired by an experience that the Penobscots had with an archaeologist who unwittingly shared archaeological information with a state entity without prior approval from the Penobscot Nation. This disclosure resulted in the release of sensitive information and undermined the authority of the Penobscot Nation to control access to archaeological site information on tribal lands. This situation highlighted the need for the Tribe to establish some protocols for, and parameters around, sharing of archaeological information.

The project emerged from an existing relationship among Julie Woods, Bonnie Newsom (Penobscot) and Dr. Martin Wobst—all of whom share an affiliation with the University of Massachusetts Amherst. At the time, Ms. Newsom was serving as the Tribal Historic Preservation Officer for the Penobscot Nation. She and Ms. Woods were graduate students in the University’s Anthropology Department, and Dr. Wobst was a faculty member. The three had an established relationship prior to the start of the project that carried with it a high level of trust and confidence—essential elements for an Indigenous research partnership.

Ms. Newsom served as the community liaison and project coordinator. Ms. Woods conducted background legal research and provided technical assistance and support to the community as needed throughout the project. Dr. Wobst served as the overall project leader, assisted with the funding application, and acted as an advocate for the Penobscots during early negotiations related to funds distribution, institutional requirements, and ethics reviews.

The partners agreed that Penobscot sovereignty and self-determination would be foundational research philosophies throughout the project. This enabled the Penobscots to conduct the project in ways that served their interests most effectively. Through this approach, the Penobscots and their UMass partners sought to design and implement a methodology that countered the invasive and extractive qualities common in researcher/Indigenous community relationships. Project decision-making rested with the Penobscot Nation and the UMass partners provided support to the project as needed. This “hands-off” approach on the part of the UMass partners proved to be a valuable contribution to the project. It supported the Penobscots’ efforts while affording them the opportunity for critical conversations that may have otherwise been stifled by the presence of external researchers. This approach also demonstrated that the UMass partners had confidence and trust in the Nation’s ability to carry out the project.
Research Context and Strategies for Success

The Penobscot Nation IP project was designed to identify issues the tribe faces regarding intellectual property associated with the cultural landscape of the Nation. The results were intended to include strategies for the negotiation of agreements and protocols, cultural sensitivity training for non-tribal researchers, and a stewardship and management plan for cultural information particularly as it relates to the Nation’s place-based heritage.

Project Objectives

The Nation’s original objectives for the project included the following:

- Assess the Nation’s intellectual property and related issues;
- Develop a management plan for the Nation’s intellectual property relative to archaeology;
- Develop a policy governing the use of and impacts on the Nation’s intellectual property by outsiders;
- Review and finalize drafts for Tribal Council approval and endorsement;
- Prepare and deliver sensitivity training for outsiders;
- Negotiate protocols and long-term policies to regulate IP interactions with institutions, communities, and governments and their agencies, on the basis of the Nation’s IP policies, protocols and long-range plans.

The Grant Process

The initial project start-up presented significant challenges due largely to long-established bureaucracies that pervade academia and federal funding institutions. These challenges are characteristic of the unequal power dynamics that typically exist between funders and grant recipients. Frequently, funding agencies (and educational institutions) have standardized requirements that are not designed around the diverse values, belief systems, and community infrastructure of grant recipients. The Penobscots’ experience with project start-up illustrated that the “one-size-fits-all” approach to grant requirements may force grant recipients to compromise their values or relinquish some of their rights to receive funding.

While the Penobscots were appreciative of being selected as one of several community-based initiatives within the IPinCH project, the Nation expressed concern over language in some of the early grant agreement documents that were required by Simon Fraser University, the institution where the IPinCH project is based. For example, early versions of “Schedule A” of the grant agreement, which is essentially a contract concerning ownership and use of research results, included the following language:
SFU and Principal Investigator shall have a non-exclusive, irrevocable, sub- licensable, perpetual license to use the Results for any purpose. Secondary Institution and its researchers shall not agree to anything that would have the effect of restricting the right of SFU or Principal Investigator to use the Results to an extent less than the usage rights that Secondary Institution or any of its researchers may themselves have [emphasis added].

The Penobscot Nation was not agreeable to this language, stating that it was “overly broad and potentially harmful to the interests of the Penobscot Nation” (Chief Francis Letter to H.M. Wobst at UMass-Amherst, 4 March 2010). Ironically, this language directly countered the spirit of Indigenous IP protection in which the Penobscot project was grounded. Working out an alternative option took significant time and energy. Our attorney crafted this version, which eventually was acceptable to SFU, and has been used as a template by other IPInCH community-based initiatives:

...all information will be collected from Penobscot Nation people by Penobscot Nation people, and it must be approved for distribution outside of the community by the Penobscot Nation’s Cultural & Historic Preservation Committee. All focus groups, interview and workshop notes, recordings, transcripts or other data will be kept password protected and stored at the Nation’s THPO office and remain the sole property of the Nation.

The Nation and its associated internal and external researchers shall not act in any manner that would have the effect of restricting the right of SFU or IPinCH Project Director George Nicholas to use the Results of research funded by IPinCH to an extent less than the usage rights that any researchers external to the Nation may themselves have. Results mean any intellectual property, information, data, inventions, improvements, and other results arising from the Research, including intellectual property in and to the Deliverables, whether patentable or not.

Other challenges, related to funds management, ethics reviews, and consent forms, also delayed project start-up.

The institutional challenges that presented themselves during the implementation phase of the project nearly derailed it. However, all partners were committed to working through these challenges, not only to improve the Penobscot Nation’s experience as a project partner, but also to inspire an improved and more balanced process for other communities and institutions embarking on IPInCH projects and relationships.

Additional complications occurred at the community level. The initial project design included a project advisory role for the Penobscot Cultural and Historic Preservation Committee. This
Committee was comprised of community members who were appointed by Tribal Council to serve voluntarily as advisory to the Cultural and Historic Preservation Department. During the time when the project partners were negotiating grant agreement documents, the Cultural and Historic Preservation Committee ceased meeting and the project was left without a community advisory group.

As the Penobscots’ IP project was getting underway, the tribe was also in the early stages of developing a tribal institutional review board (IRB) through a separate initiative. IRBs typically focus on regulating human subjects research. Because of the interrelationship between a community-based IRB and community IP protection, both initiatives were blended into a comprehensive effort, using archaeology and historic property IP as a model topic to establish a broader tribal infrastructure around rights and resources protection. Through this process, the Penobscot Intellectual Property Working Group (Working Group) was convened to assist with the intellectual property project and to address the broader needs of community research review. The intellectual property project served as the impetus for designing a tribal infrastructure to address IP and other research-related issues confronting the community. Combining the IRB and IP efforts was essential to identify a decision-making process around tribally-based research before determining how archaeological or other heritage-related IP should be managed. It was through this combined effort that the Working Group embarked on a two-year process focused on community intellectual property, research review, and cultural rights protection.

**Strategies for Success**

The Penobscot process included several strategies that contributed to developing a formal tribal infrastructure designed to protect community IP and manage Penobscot-centered research. They include:

- Early engagement with tribal leadership;
- Creation of an intellectual property working group or think tank;
- Educational efforts directed toward building capacity in IP;
- Defining IP;
- Identifying lines of authority and a decision-making process;
- Creation of tools to help manage IP;
- Community outreach and feedback;
- Tribal council approval.

Each stage of the process (described below) contributed to building community capacity in understanding heritage-based IP and supported the development of a community-based infrastructure for managing Penobscot research and safeguarding cultural heritage. The process
was not flawless. The Working Group faced a multitude of challenges as we worked through the many facets of IP, and we will continue to face challenges as the process evolves.

Significant challenges revolved around balancing personal freedoms against the need for protecting the integrity of a collective cultural heritage. Other challenges included the breadth of IP issues impacting the community; the inadequacies of the Western legal structure for providing means for community IP protection; personnel capacity; and the time and resource investment necessary for addressing IP issues. Challenges to the process are ongoing. A key strategy for success is to acknowledge challenges when they arise and commit to addressing them, but not be consumed by them in ways that derail the process.

**Early Engagement with Tribal Leadership (Council/Departmental Directors)**

Tribal approval of the project objectives, the overall grant application, and project design occurred in 2008 through an affirmative vote of support by the Penobscot Nation Tribal Council. The Council’s approval not only authorized the work, but also provided an early opportunity for public education. While most community members have an intuitive or experiential knowledge of misappropriation of community IP, many are unfamiliar with terms and concepts related to IP. This early engagement of leadership provided a venue for linking IP concepts to more concrete examples of how cultural misappropriation has occurred in the past and why creating tribal processes for safeguarding community IP was necessary.

As part of Tribal Council approval for the IRB process, the Penobscots established a research review board comprised of directors of each tribal department or their designees. Council charged this board with establishing an IRB and a research review process. Situating this work within existing tribal departments integrated research review into the responsibilities of all tribal departments. By doing so, this initiative benefitted from a diverse pool of expertise and was not subject to the instabilities of a volunteer committee.

**The Penobscot IP Working Group**

The Penobscot IP Working Group was essential to the success of this project. With the
exception of one non-member tribal employee, all working group members are tribal citizens. Each brings unique cultural and professional expertise to the group discussions and activities. More importantly, group members remain committed to the process and show a collective passion for addressing IP issues and protecting Penobscot culture.

The Working Group includes the following individuals:

- William Thompson—Penobscot Nation Vice-Chief and Air Quality Manager
- Mark Chavaree—Penobscot Nation Legal Counsel
- Awendela Dana—Assistant Director, Penobscot Nation Child Support Agency
- James Francis Sr.—Director, Cultural and Historic Preservation Department
- Nick Francis—Penobscot Nation Information Technologies Specialist; Traditional Musician
- Marie Mitchell—Counselor, Indian Health Services and Tribal Elder
- Dr. Darren Ranco—Chair of Native American Programs, University of Maine
- Chris Sockalexis—Tribal Historic Preservation Officer; Traditional Musician
- Timothy Walton—Tribal Planner
- Bonnie Newsom—Heritage Consultant and Project Coordinator

(See Attachment 1 for a list of Working Group members and their biographies).

Figure 5: Meeting of the Penobscot Nation Intellectual Property Working Group

The group formed in 2011 as a sub-group of the larger interdepartmental review board linked to the Penobscot Nation’s IRB initiative. Each individual volunteered to support the Tribal Historic Preservation Office in accomplishing the work necessary to fulfill the requirements of the IP project. Over the past two years, the group has met roughly bi-weekly and has been instrumental in the development of the project deliverables. The members of this committee have served as a think-tank of sorts—wrestling with topics such as “what constitutes Penobscot
identity,” “what are we trying to protect, why and from whom” and “what are our priorities for IP protection?”

It was through the thoughtful work of this committee that the Penobscots designed much of the tribal infrastructure around research review and intellectual property protection. With excessive demands on tribal departments and personnel, tribal communities are often challenged with finding opportunities to think collectively and to converse about critical issues they are facing with regard to culture, sovereignty, and community needs. Creating a space and time for thoughtful reflection and dialogue on IP issues was essential for identifying workable solutions to some of the Penobscots’ IP challenges.

Hindsight Comment: Having a “champion” is essential for sustaining an IP working group. We are not defining “champion” in the sense of a winner, but as a community-based person (or people) who is passionate about IP protection, familiar with the community culture, and committed to group sustainability. Champions should not be confused with “informants” or “liaisons” for outside researchers. While they may serve in that role, they can only be successful with their internal processes if a solid trust relationship exists between them and the members of the working group. Communities in the early stages of IP management may want to consider implementing an internal IP champion-development process before creating an IP working group. The key is education and outreach on IP.

Tribal Capacity-Building in IP

The process included a robust educational effort that took a variety of forms over the course of the project. The educational effort was designed to build the Penobscots’ intellectual capacity in several areas including IP, historic preservation, and IRBs. The Penobscots and their UMass and SFU partners developed an introductory workshop to begin the process of community capacity building. The workshop initiated a tribal dialogue around intellectual property issues with an agenda that combined informative presentations with break-out sessions to inspire IP-related conversations among the participants (see Attachment 2: Workshop Agenda). It included an overview of the project presented by Bonnie Newsom and presentations by two IPinCH team members—Dr. Sonya Atalay and Dr. Jane Anderson (see Attachment 3: Slide Presentations).

Dr. Atalay introduced the group to the Sanilac Petroglyph protection initiative being undertaken by the Saginaw-Chippewa Tribe of Michigan. Through her presentation, Dr. Atalay highlighted the Tribe’s IP concerns relative to the petroglyph site, as well as the project goals and activities. It became clear through her presentation that the Penobscots and the Saginaw-Chippewa shared similar challenges regarding jurisdictional issues and negotiating the federal and state regulatory arena. This was important for helping to contextualize Indigenous IP issues in the broader realm of tribal-state-federal relations. Dr. Anderson’s presentation served as an introductory lesson on IP law with particular emphasis on Indigenous IP. She highlighted legal avenues available for protection of IP, including copyright, trademark and patent. She also
shared with the group possible ways the Penobscot Nation could use IP laws and protocols to their advantage. For many workshop participants, this was their first exposure to concepts and laws related to IP, and Dr. Anderson’s presentation provided the necessary foundation for the group to begin their work.

The workshop included multiple breakout sessions designed to provide participants with the opportunity to discuss areas where IP issues might arise. Those areas included:

- Place based issues – This group considered and discussed topics such as how should the community share and protect knowledge about places that are important to the community. How should this knowledge be passed on to future generations? Is it appropriate to institutionalize this knowledge.
- Material culture issues – Issues considered by this group dealt with how the community should share and protect intellectual property surrounding various types of material culture, e.g. art, sacred objects, collectively owned items, imagery.
- Intellectual Property and Tourism – This group focused on discussing the balance between resource protection and economic development and ways in which cultural resources should be incorporated into tourism initiatives, if at all.
- Information Flow – This discussion addressed balancing the need to protect cultural information with the desire (and sometimes legal requirements) to educate outsiders. Group members discussed issues related to what types of information should have restricted access and how information should be shared.

The workshop break-out sessions were facilitated by members of the project team and resulted in rich information that highlighted the breadth of IP challenges within the community. Examples of issues raised included how the Penobscons are working with academic researchers on initiatives to protect the ash tree against the invasive emerald ash borer mindful of challenges in balancing that type of partnership against the risks and sensitivities associated with sharing location of ash stands. The health of the ash tree is critical to the sustainability of the Wabanaki basketry tradition.

Other accounts shared among the group highlighted violations of IP by outsiders. For example, one participant related an instance where a non-tribal citizen created an ID card for purposes of self-identifying as a Penobscot Nation tribal citizen. The ID card included the Penobscot Nation logo and other imagery obtained from the Penobscot Nation web

Figure 6: Penobscot Ash Basket. Photograph courtesy of the Smithsonian Institution.
Several participants expressed frustration in the lack of available remedies to such situations.

Information flow in grant applications and reporting was also highlighted as an area where the Nation’s IP could be compromised. Funders may have expectations relative to information-sharing that are not in the best interest of the Nation. Those expectations may be challenged if the parameters around information sharing are not established and agreed-upon early in the relationship. Grants serve as major funding sources for many Penobscot Nation programs. All information within grant documents is subject to potential IP violations.

The examples above illustrate the diversity of IP issues facing the Penobscot Nation. This initial workshop provided a venue for sharing these issues across the spectrum of tribal departments, and reinforced the idea that a collective approach to IP and other research-related issues is necessary for the tribe to manage cultural knowledge and information effectively.

**Participant Comment:** We are forced into a position of having to be isolationists [with regard to research] even though it may be counter-intuitive to our way because we need some time to get our house in order as we sort through these issues. However, at the same time we are faced with a sense of urgency because we lose cultural knowledge each time an elder passes. This is one of our dilemmas. Dr. Darren Ranco, Penobscot Nation introductory IP workshop, August 2011.

The University of Maine’s Native American Programs assisted the Penobscot Cultural and Historic Preservation Department with hosting a tribal IRB training workshop. This effort was not a formal component to the Penobscots’ IPinCH project. However, discussions and training within the realm of IRBs complemented the IP-related initiative and contributed to tribal capacity building. Dr. William L. Freeman, Program Director of the Northwest Indian College (NWIC) Center for Health, Director of Tribal Community Health Programs, and Human Protections Administrator for the NWIC’s IRB provided the training. His presentation covered the federal regulations governing IRBs, community models for instituting an IRB, and the strengths and weaknesses of instituting a formal tribal IRB. Dr. Freeman’s session highlighted the shortcomings of federal IRBs in addressing research issues beyond the scope of human subjects.

Given that many of the IP Working Group members were unfamiliar with federal historic preservation law, we elected to invite our federal contacts in the Native American Program Office of the Advisory Council for Historic Preservation to provide the group with a webinar session on Federal Historic Preservation Law and the Federal Tribal Consultation Process. This session provided Working Group members grounding in historic preservation laws, particularly as they relate to federal tribal consultation. The presentation focused on Section 106 of the National Historic Preservation Act and introduced the group to the rights tribes have in the
Section 106 process (see Attachment 4: ACHP Slide Presentation).

The group was also introduced to historic preservation law through the work of Julie Woods, one of our UMass partners. Part of Ms. Wood’s responsibilities within this project was to research historic preservation laws and provide the Penobschts with some legal background that helped inform their decisions about managing IP as it related to archaeology and historic preservation. Ms. Woods gave a formal presentation to the group that addressed the following topics:

- Ideas, laws and conventions regarding archaeology
- Archaeology processes and terms
- Review of Maine State Laws & Acts as they pertain to historic preservation.

The research supported the Working Group’s efforts to develop state legislative or public policy strategies to safeguard IP as it relates to heritage-based places, and to improve upon existing laws. This strategy is outlined in the Management Plan for Penobscot Community Intellectual Rights related to Heritage-Based Places (see Attachment 5).

In addition to hosting formal presentations by invited guests, the IP Working Group engaged in multiple seminar-like sessions to review existing literature on topics such as IP in archaeology, tribal consultation, and community-based strategies for protecting IP. These sessions provided group members an opportunity to familiarize themselves with current trends in IP protection and archaeology, and expanded their understanding of the academic and legal climate around Indigenous IP protection.

One valuable exercise in the literature review involved examining and assessing Frank Speck’s 1940 ethnography Penobscot Man. Members of the Working Group reflected on the cultural knowledge within it and contemplated how it might have been different if written without an external researcher. Two significant issues arose from the Working Group’s discussions of Penobscot Man. One dealt with the integrity of the information being shared at the time. This is related to community narratives that describe community members feeding anthropologists inaccurate information. Members of the Working Group raised concerns about the accuracy and validity of the information presented in the text. They also criticized methods used by Speck to obtain information, keying in on extractive practices of past anthropological researchers.
This exercise raised a second issue related to the power of ethnographies in shaping communities. *Penobscot Man* has become a primary reference on Penobscot people and is used by both tribal and non-tribal people. Concerns were raised about tribal people using *Penobscot Man* as a way to understand themselves and Penobscot culture. If the book’s accuracy is questioned because the anthropologist was misled by tribal contributors, what are the implications for tribal members using this book as a resource for understanding Penobscot culture and history? The exercise raised more questions than answers, but proved to be useful for identifying some long-term implications of knowledge sharing.

The group also examined the UN Declaration of Rights of Indigenous Peoples as a resource for developing language around the assertion of our rights over our collective heritage. The Declaration provided a framework to assist the Working Group in connecting IP to inalienable rights. Several articles presented in the Declaration shaped the products of this study. This also proved a valuable exercise because it provided an opportunity for Working Group members to experience how the Declaration could be applied at the local level.

**Defining IP**

Capacity-building efforts to increase the groups’ understanding of IP, research review, and historic preservation were critical in aiding the Working Group in defining IP. It became apparent early in the process that it was necessary for the group to determine what needed protection and why. Several references reviewed during our seminar sessions emphasized the inadequacies of Intellectual Property as a community-based concept due to its legal status and emphasis on individual ownership rights over collective rights. The Working Group conducted several brainstorming sessions to identify IP priorities as well as elements of Penobscot culture that carry with them community IP. The result was a diverse list of categories (Table 1) encompassing both tangible and intangible heritage.

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**Table 1:** List of areas potentially sensitive for Penobscot IP. Generated by the Penobscot IP Working Group.

The broad scope of IP-related areas identified during their brainstorming sessions prompted the Working Group to explore how others had defined intellectual property as it relates to collective
or community heritage. Inspired by Posey and Dutfield’s (1996) book *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, the Working Group adopted the following definition to capture what needed protection:

Penobscot Community Intellectual Rights refer to our rights over material and non-material cultural expressions that embody aspects unique to Penobscot Nation heritage and way of life. These include, but are not limited to, artistry, language, craftsmanship, history, ancestry, expressions of dance, music, stories, games, traditions and spiritual practices, traditional ecological knowledge, knowledge of and engagement with the physical world, and worldview (after Posey and Dutfield 1996).

This definition encompasses the spectrum of our cultural heritage and asserts the Penobscot peoples’ collective rights over that heritage as a way to preserve our collective identity. Throughout this document we reference Penobscot Community Intellectual Rights (PCIR) as the inalienable rights that we have over our collective identity, cultural heritage, and worldview. Examples of areas where PCIR may be at risk, particularly as they relate to heritage-based places, include: site location information; ceremonial practices related to sites; interviews related to heritage-based places and products; written products such as reports and field notes; symbols on material culture; and contemporary uses of heritage-based places.

**Lines of Authority and IP Decision-Making Process**

As the lead decision-making entity for the Penobscot Nation, the Tribal Council is responsible for protecting the interests of the Penobscot people. In the past, the Tribal Council has attempted to institute systems for managing research to protect the cultural interests of the community. However, sustaining these efforts was challenging because most were volunteer efforts, unprepared to respond to the large volume of work associated with research review. None of these efforts continued over the long term. In recent years, research review has fallen under the purview of the tribal historian. However, the lack of a formal vetting process has impeded that individual’s ability to carry out the research review process. The IP working group recognized the need for an internal system to address the varied and complex issues accompanying community-based research—including IP protection. We devoted a substantial amount of work to creating a decision-making structure and process to protect the Penobscots’ collective interests in community-based research. The IPinCH-funded project served as the impetus for designing an internal infrastructure for decision-making related to IP and heritage-based places. The product of this work is the formation of the Penobscot Tribal Rights and Resources Protection Board (PTRRPB), which is structured similarly to the original IRB. Community representatives and departmental directors or their designees serve as Tribal Council appointees to the PTRRPB. Collectively, they will act as the entity responsible for review
and oversight of research conducted by non-tribal members involving Penobscot Nation cultural resources, including the Nation’s history, customs and beliefs and their expressions in all forms, people, and Penobscot community intellectual rights. The Working Group recommended that the Board develop and guide the Penobscot Nation’s research agenda, ensuring that community-based research contributes to the needs of the community. The PTRRPB has three standing committees including: a formal IRB to address human subjects research; a community intellectual rights committee to address IP issues; and an education and outreach committee responsible for educating both the community and the broader public about the Nation’s research review process. The PTRRPB is accountable to the Tribal Council and the Penobscot people.

![Organizational Chart](image)

**Figure 8: Organizational Chart for the Penobscot Tribal Rights and Resources Protection Board**
The roles and responsibilities of the PTRRPB committees are as follows:

*Institutional Review Board (IRB)* – The Penobscot Nation’s Institutional Review Board will operate as a formal IRB and will be guided by federal regulations (Human Subjects Research 45 CFR 46). Roles and responsibilities of this group will be consistent with these regulations.

*Penobscot Community Intellectual Rights Committee* - The Penobscot Community Intellectual Rights Committee serves as the lead tribal entity for addressing all issues related to Penobscot Community Intellectual Rights including but not limited to:

- Developing policies and procedures to manage and protect Penobscot Community Intellectual Rights;
- Monitoring information technology for potential violations/breaches of Penobscot Community Intellectual Rights;
- Identifying and implementing mechanisms for corrective action/awareness building for Penobscot Community Intellectual Rights violations;
- Serving as a tribal resource for review of all research and Memoranda of Agreement that have the potential to impact Penobscot Community Intellectual Rights.

*Education and Outreach Committee* - The Education and Outreach Committee is responsible for outreach and educational activities related to the work of the PTRRPB which includes efforts both internal and external to the tribal community. Duties include:

- Developing and implementing community education initiatives for increasing awareness of rights and resources protection related to research;
- Developing policies and procedures for disseminating research to community;
- Serving as a conduit between the PTRRPB and higher education and other institutional venues to create awareness of the Penobscot Nation’s rights and resources protection efforts;
- Developing outreach efforts for building relationships with the broader research community.

The PTRRPB is a new concept and structure for the Penobscot Nation. As with many new initiatives, it will require some testing within the community along with flexibility among all stakeholders during early implementation to ensure the effectiveness of the process. Not
everyone is supportive of the proposed structure. Concerns linked to over-regulation of tribal members have been voiced and have resulted in limiting the PTRRPB’s scope of authority to non-tribal researchers. However, the PTRRPB will act as a community resource offering guidance and support to tribal researchers as requested.

**Tangible Tools for IP Negotiation and Management**

Developing a decision-making process for managing IP was a significant accomplishment for the Working Group. It was necessary to have a decision-making process outlined before a plan could be created for managing IP relative to heritage-based places. The Working Group spent several months drafting a management plan to guide the Tribal Historic Preservation Officer (THPO) in safeguarding community intellectual property as it relates to archaeological sites and other heritage-based places. Heritage-based places include archaeological sites, historic structures, historic buildings, sacred sites, and traditional cultural properties. This document (Attachment 5) also provides the community with some basic IP procedures and protocols that can be adapted for use within other departments or disciplines with minimal modification.

A significant component of the management plan is an archaeological researcher certification and training process that applies to archaeologists conducting research on tribal lands. To be certified to conduct archaeological research on tribal lands, one must meet both federal and tribal requirements. Recognizing that individuals interested in archaeological research are at various levels of their professional careers, the working group tailored the certification requirements and processes to meet the needs of both junior and senior archaeologists as well as students aspiring to enter the archaeology profession.

An initial objective of the project was to develop and offer cultural sensitivity training to outside researchers interested in becoming certified to conduct research that deals with Penobscot Nation cultural resources. Changes in staffing and the need for group capacity building prevented the offering of an actual training, however, the structure and content of the training has been developed. Plans for a researcher training session have been identified as an activity for the next phase of the Penobscots’ IP work.

The working group also established guiding principles for entering into relationships with archaeologists that are fundamental to the certification process. These principles are offered to enlighten archaeologists about foundational issues and sentiments that influence tribal values as they pertain to archaeology. They acknowledge the harm experienced by Penobscots and other Indigenous peoples resulting from inappropriate and unethical archaeological practices. Incorporating a process of acknowledging and accepting responsibility for harm was inspired by the Truth and Reconciliation process. This process was designed to “heal relations between
opposing sides by uncovering all pertinent facts, distinguishing truth from lies, and allowing for acknowledgement, appropriate public mourning, forgiveness and healing” (http://www.greensboroctr.org/truthreconciliation.php). The Truth and Reconciliation process is most notably known for its use in South Africa as a way to promote healing effects of apartheid through the sharing stories or testimony to articulate truths about past harms and acknowledgement and acceptance of those truths. The Truth and Reconciliation process in Maine centers on harms caused to Wabanaki children by the state child welfare system following the passage of the Indian Child Welfare Act (ICWA). It is designed to help rebuild relationships between Wabanaki people and those connected with the state child welfare system (http://www.mainewabanakitrc.org/about/background/). By incorporating facets of the Truth and Reconciliation process in IP management strategies, the Working Group has attempted to inspire a less-divisive archaeology and acknowledge the value of archaeological research in perpetuating and preserving tribal culture.

The guiding principles crafted by the Working Group are also incorporated into a sample Memorandum of Agreement (MOA) for guiding relationships between archaeologists and the Penobscot Nation (see Attachment 6-Sample Memorandum of Agreement). The MOA outlines the responsibilities of the archaeologist when conducting research on tribal lands, and it describes the philosophical and ethical foundations that form the basis of the relationship between the parties. Like other guidelines and documents created through the Penobscot IPinCH project, the MOA has broad applicability as a model for relationships between the Penobscot Nation and other types of researchers - not just archaeologists. We envision that these tools can be adapted or used by other tribal departments with expertise in particular areas of research.

**Community Outreach and Feedback**

Community outreach and feedback methods implemented during this project were initiated through a phased process following completion of much of the committee work. It has been our experience that community participation in various events and activities is impeded by excessive demands on peoples’ time. Work and parenting obligations, combined with a cloud of apathy over much of contemporary society has made community engagement challenging on many fronts.

The Working Group discussed several possible outreach efforts to incorporate into the IP project including focus groups, community meals, and youth outreach. One planned activity focused on a youth theater experience using drama as a form of IP education and outreach. However, unforeseen challenges within the Penobscot tribal youth programs hindered the development of a youth IP theater group. The Working Group was unable to coordinate a tribal
youth initiative within the scope of the project. However, there is still a strong desire to do so. Although the Working Group was unable to accomplish all that was planned for community education and outreach, the outreach activities that were implemented proved to be valuable and moved the Penobscot Nation in a positive direction with regard to safeguarding its IP.

*Administration Outreach.* The initial outreach effort consisted of sharing the Working Group grant products with the members of the research review board originally convened to create a Penobscot IRB. Although participation was not as robust as the IP working group had envisioned, the contributions and feedback from the participants provided some initial reactions to the products and processes developed as a result of the project. Reactions to the management plan, MOA, PTRRPB and guiding principles were positive and the working group received some affirmation that the grant products were of value to Penobscot Nation.

*Electronic Media.* A second phase aimed at showcasing the work of the committee and encouraged community thinking about IP issues. It involved broadcasting IP-related slides over the video monitors situated in community collective spaces such as the health clinic, the community building and other office buildings. The slides ran for roughly two weeks and provided the community with introductory information on IP. They posed several contemplative scenarios for tribal members to consider and prompted community members to participate in an intellectual property survey as a way to inform the work of the IP working group (see Attachment 7 for examples of these Community Outreach Slides).

*If it’s our language, is it our dictionary?*

*Who else has a claim to the work?*

*Are those claims legitimate?*

*How do we protect the work we are now doing to enhance and improve the dictionary?*

*To get it published?*

*To use it as a resource for learning our language?*
Figure 9: Penobscot Dictionary

Community Survey. Recognizing that the work of the IP working group would be enriched by community feedback, the working group designed and administered a community survey to complement the broadcast of the IP information slides. Although it was not an element of the Penobscots’ original IPinCH project design, the Working Group determined that the survey enhanced the project in two ways. First, it helped identify areas that the IP working group may have overlooked in completing their work. Second, the survey proved to be a valuable tool for educating tribal citizens on IP concepts and issues. The questions were designed to address broad concepts as well as specific areas where IP issues might surface. Eighty-four tribal members filled out the survey. A preliminary analysis of the survey data collected showed a positive sentiment for creating a process to address IP issues. The effort also illustrated the need for additional education and capacity building among tribal citizenry in topic areas related to IP protection. Further analysis of the data is planned to move the initiative forward (see Attachment 8-Community Survey Questions).

Community Day Presentation. Community Day at Penobscot Nation occurs every year in August. It is a community-wide event that blends social and cultural activities with community education. The IP working group identified community day as a venue for reaching out to tribal citizens for feedback on its proposals. Working group members created an informational booth and complementary materials to share with community day participants. They also developed and presented a public information/feedback session designed to introduce community members to the IP Working Group and its work to date. The dialogue during the community day sessions was valuable for finalizing the documents and proposing a process for managing IP at Penobscot Nation. The sessions also highlighted the need for additional education and outreach.

Tribal Council Approval

The final step in formalizing a Penobscot Nation IP management process for the Penobscot Nation consisted of receiving Tribal Council approval of the working group recommendations for the creation of a PTRRPB and approval of the documents and products of the Working Group process. Representatives of the Working Group delivered a formal presentation to the Penobscot Nation Tribal providing Council Members with draft versions of the PTRRPB Bylaws, the IP management plan, the archaeology guiding principles and the sample archaeology MOA. The document outlining the tribal process for implementation of the project was incomplete
and unavailable to present to the Tribal Council at the time of the presentation. The Working Group’s recommendations to Council received mixed reviews. While several council members acknowledged the need for tribal strategies in protection IP, some expressed concerns related to over-regulating tribal members and relinquishing authority to the IP Working Group. Some were also uncomfortable with approving the project deliverables without an opportunity to review a complete package of the project deliverables. The IP working group agreed to modify the PTRRPB bylaws to restrict applicability to only non-tribal members and to provide the Tribal Council with a complete package of grant deliverables. The process illustrated the need for additional public education and outreach, as well as a sustained effort in keeping the Tribal Council updated and informed throughout the process.

Relevance to IPinCH Objectives and Themes

The community-based initiative discussed here is aligned with IPinCH objectives and themes in several ways. It reflects an approach to IP management captured in a particular time and place by a particular group of Indigenous people. As such, it contributes to the growing literature of community responses to IP issues relative to cultural heritage. The Penobscot IP project documents our experiences, successes, and challenges in our efforts to respond to the misappropriation of our cultural heritage. Our approach is unique to us, but has value as a model for other communities. It also has value as a contemporary narrative of our efforts to empower ourselves during a time when our sovereignty is repeatedly challenged by external governments, academics, and private industries.

Two prominent themes permeate this project—relationships and ethics. Emphasis on building, sustaining and improving relationships is the core of our IP process and products. We have attempted to model appropriate research practices via our relationship with our UMass partners. This relationship is based on trust with sovereignty and self-determination being foundational to all aspects of our engagement.

With respect to ethics, the products of this initiative are designed to minimize the potential for unethical behavior that may cause harm to our community or our resources. As referenced in the Penobscot Nation’s Guiding Principles for Archaeological Research, unethical archaeological practices in the past have wounded relationships between Indigenous peoples and archaeological researchers. Our intent with the IP project is to create a system that promotes partnerships between researchers and the Penobscot Nation, and to ensure that the products and practices associated with research in our community benefit all stakeholders without jeopardizing Penobscot Nation values, resources, and interests.
Conclusion

The Penobscot Nation IP project aimed to address issues related to management of IP related to the Nation’s archaeological and place-based heritage. It was undertaken in the spirit of sovereignty and self-determination. The Penobscots led the project and had primary decision-making responsibilities with respect to the process and products of the initiative. As with most projects, the final outcome varied somewhat from our original vision. Over the course of the project, several key personnel and committee changes occurred, challenging our ability to fulfill our project obligations. We overcame these challenges largely due to the dedication of the people involved—both at the community level and at the institutional level. Key benefits and results arising from the project include:

- An established partnership with members of the academic community;
- A proposed tribal infrastructure for managing Penobscot IP;
- A certification process for certifying archaeologists to work on tribal lands;
- A process to better educate or help researchers understand Penobscot culture and IP issues;
- An institutionalized management plan for managing Penobscot archaeological information;
- The beginnings of a community-based understanding of intellectual property issues in cultural heritage.

These outcomes will continue to benefit the Penobscot Nation as well as other entities involved in the Penobscot IPinCH project. Through capacity building and community development around rights protection, we are better situated to address IP issues. It is our hope that the process and products of this project will be of benefit to others as they work to protect their rights to cultural heritage.
References Cited


Nicolar, Joseph

Posey, Darrell A., and Graham Dutfield

Speck, Frank G.

Starbird, S. Glenn
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Attachment 1: Working Group Biographies

Bill Thompson is in the middle of his second term as Vice-Chief for the Penobscot Nation. He is the tribe’s Air Quality Program Manager and is the Chair for the National Tribal Air Association Executive Committee. He lives on Indian Island in what is now known as Maine with his wife and daughter. His son is teaching him his native tongue.

Mark Chavaree, Penobscot Tribal citizen, has served as in-house legal counsel to the Penobscot Indian Nation for 23 years where he is responsible for reviewing and addressing all legal matters of the Nation and coordinating tribal relations with the State of Maine and United States Government. Mark has served on numerous tribal and state boards, commissions and committees. Mark received a degree in history from Dartmouth College and a Juris Doctorate from Cornell Law School. He has three children and resides in the Penobscot Nation community on Indian Island.

Awendela “Mali” Dana is the Assistant Director of the Penobscot Nation Child Support Agency and has been working there for over five years. She has a Master’s degree in Social Work from the University of Maine at Orono. Her undergraduate degree is in Elementary Education with a concentration in Human Development. Mali has lived within the Penobscot community her entire life. Her goal for obtaining higher education was to work within her community and she has had the honor of achieving that goal. Mali is part of the Intellectual Property workgroup and is proud of the work accomplished by the group. She feels strongly that archaeologists as well as people in general need to continuously educate themselves about any group of people they may work with. She hopes that this work continues in the Penobscot community.

Nick Francis, a Penobscot Tribal member, has an educational background in Information Technology and information systems. He has been employed with the Penobscot Information Technology Office since April of 2010 and has previously worked for a telecommunications company in Central Maine. Nick was initially asked and delegated to serve on a newly created Penobscot IRB (Institutional Research Board) and subsequently volunteered to serve on the connected Intellectual Property group being started. He lives in Bradley, a few miles downriver from the Indian Island reservation with his fiancé and their two sons. His oldest son is 5 years old & the youngest is just 2 months old.
Darren J. Ranco, a member of the Penobscot Indian Nation, is an Associate Professor of Anthropology and Chair of Native American Programs at the University of Maine. He has a Masters of Studies in Environmental Law from Vermont Law School and a PhD in Social Anthropology from Harvard University. Dr. Ranco’s research focuses on the ways in which indigenous communities in the United States, particularly Maine, resist environmental destruction by using indigenous diplomacies and critiques of liberalism to protect cultural resources. He teaches classes on indigenous intellectual property rights, research ethics, environmental justice and tribal governance.

Chris Sockalexis is a member of the Penobscot Nation. He is currently the Penobscot Nation Tribal Historic Preservation Officer serving in the capacity of managing, preserving and protecting the cultural and historic resources and interests of the Penobscot Nation. Mr. Sockalexis is a graduate of the University of Maine Anthropology program with his focus being on Maine Archaeology. Mr. Sockalexis is knowledgeable in the traditional art of flintknapping. He is a traditional Penobscot singer as well as an established contemporary powwow singer with his drum group the RezDogs. Mr. Sockalexis has been involved with the Penobscot Intellectual Property Working Group since June of 2012 and continues to work with the IPinCH project.

Tim Walton holds a Masters degree in Community Development from the University of Maine and a Masters and CAS in Educational Administration from Harvard University. He has worked with the Penobscot Nation as a grant writer, program designer, and development consultant since 1985, and has been Tribal Planner since 2007.

Bonnie Newsom is a citizen of the Penobscot Nation and President of Nutalket Consulting--a company specializing in archaeology and heritage preservation. She holds a B.A. in Anthropology and an M.S. in Quaternary Studies from the University of Maine. Currently, she is pursuing a Ph.D. in Anthropology at UMass Amherst. Her research interests include the archaeology of the Maine, ceramic analysis, NAGPRA, anthropology and public policy, Indigenous archaeologies, and Indigenous rights and intellectual property. Ms. Newsom is a military veteran and a mother of four. She lives in Eddington, Maine with her husband and two youngest daughters.

[Biographies and images for James Francis and Marie Mitchell were unavailable.]
Attachment 2: Penobscot Nation IP Workshop Agenda

Penobscot Nation Intellectual Property Workshop
August 24th, 2011
11:00-4:30
Penobscot Nation Council Chambers

11:00 – 11:30 Welcome, Invocation, Workshop Purpose/Agenda Review

11:30 - 12:00 Working lunch with introductions

12:00 – 1:50 IP Presentations (to be videotaped with permission)
   12:00-12:40 Jane Anderson
   12:40-1:20 Sonya Atalay via SKYPE

1:20-1:30 Break

1:30-1:50 Bonnie Newsom overview of the Intellectual Property project and role of group

1:50-2:35 Small Group Breakout Session 1

Group A will discuss: Place-based Issues – how should the community share and protect knowledge about places that are important to the community. How should this knowledge be passed on to future generations? Is it appropriate to institutionalize this knowledge?

Group B will discuss: Material Culture Issues – How should the community share and protect intellectual property surrounding various types of material culture, i.e. Art, sacred objects, collectively owned items, imagery.

2:35-2:40 Break

2:40-3:25 Small Group Breakout Session 2

Group A will discuss: Intellectual Property and Tourism – What is the balance between resource protection and economic development? How should cultural resources be incorporated into tourism initiatives if at all.

Group B will discuss: Information Flow – how should the community balance the need to protect cultural and tribal information with the desire (and sometimes legal requirements) to educate outsiders? What types of information should have restricted access and what's the process for sharing information.

3:25-3:30 Break

3:30-4:30 Large Group Discussion on all themes plus next steps (A group representative will present a summary of their ideas, concerns and discussion points for each theme. They will be able to refer to the notes or post-it pages recorded by the group facilitator. All other members of the workshop will be encouraged to participate in the discussion on each theme.)

4:30-5:00 Intellectual property workshop facilitators remain available for questions/comments that people may have not asked during the workshop.
Jane Anderson is from Australia, has a legal background and has been working on intellectual property law and the protection of Indigenous knowledge rights for over ten years. Most of this work was conducted in Australia where Jane worked for a large Indigenous-run organization, the Institute for Aboriginal and Torres Strait Islander Studies. This Institute has the world’s largest collection of Australian Aboriginal cultural material – photographs, video and sound recordings of ceremonies, songs, dances, language materials as well as important ceremonial objects that were collected by non-Indigenous people. Jane’s job was to negotiate with the appropriate owners of this material and to work with many local Indigenous communities on repatriation and return of this material. Jane is currently based in the U.S. and is an Assistant Professor at the University of Massachusetts, Amherst. In this role she teaches and is also working on the development of cultural protocols as a strategy for managing valuable local knowledges and to protect them from unauthorized use by outsiders to the community.

Sonya Atalay (bawshkeeng anungo kwe) is Ojibwe-Anishinabe of the wabizheshi (martin) clan, and is a first degree midewiwin in the Three Fires Midewiwin Society. She works in partnership with Native American communities in the Great Lakes region on a wide range of projects, including repatriation of ancestral remains and sacred items; protection of traditional knowledge and teachings; and culturally appropriate management of sacred sites and landscapes. All of these projects are fully community driven and involve youth, elders, and tribal members in every aspect of the work - the ideas and needs for each project have come directly from the community. Sonya is an assistant professor at Indiana University, and has recently written Community-based Archaeology: Research with, by and for Indigenous and local communities (University of California Press, 2012) conducting research in partnership with indigenous communities.

Dr. Martin Wobst is a Professor Emeritus at University of Massachusetts, Amherst. His interests include: archaeology and its theory, the theories behind archaeological method, indigenous archaeologies, the social articulations of material culture, egalitarian societies, computer simulations of social systems, Europe east and southeast of Germany, the celtic fringe, Australia, South Africa. His most recent books include two co-edited volumes: Indigenous Archaeologies: Decolonizing Theory and Practice (with Claire Smith, Routledge, 2005), and Indigenous Archaeologies: A Reader on Decolonization (Left Coast Press, 2010, with Marge Bruchac and Siobhan Hart).

Julie Woods is a PhD student in the Department of Anthropology at the University of Massachusetts, Amherst. Her research areas include the analysis of 15th-17th century archaeological ceramics from Western Massachusetts; ethnographic analysis of contemporary potters; intellectual property and cultural heritage; cultural landscapes; the Celtic diaspora; and the intersection of archaeology, Indigenous representation and digital media. At UM, Julie has been a teaching assistant for Archaeology and Pre-history, North American Archaeology and Contemporary Issues in Native America. She was the Public Outreach and Education Coordinator for the 2008 UMass Amherst Archaeological Field School and has participated in community-based archaeological research projects in Massachusetts, Colorado and Ecuador.
Attachment 3: Slide Presentations from Introductory IP Workshop
Penobscot Nation, Indian Island, Maine

A. Sonya Atalay Presentation
Education, Protection and Management of ezhibiigaadek asin
Sonya Atalay, Shannon Martin and William Johnson
Ziibiwing Center of the Saginaw Chippewa Indian Tribe

Saginaw Chippewa Tribe of Michigan

- Ziibiwing cultural center
Sanilac Petroglyph site

- Rock Art site (20SL1)
- ~400-1000 years old
- Over 100 petroglyphs

2003 Funding Cut

- Sanilac closed
- DNR requires funds for management
- Now Considering DNR-Saginaw Chippewa collaborative management*
IP Concerns

- Protect traditional knowledge
- Concern for appropriation of images
  - Archer for tribal sporting goods store

Project Goals

1) develop and administer a community survey to assess the importance of and interest in the site
2) engage with Anishinabe spiritual leaders living in both the US and Canada regarding appropriate knowledge to share and the relevant methods for doing so
3) develop and put forth a proposal for joint management of the site
4) work collaboratively to create a culturally appropriate site management plan that includes funding projections for the long-term protection of the site.
Penobscot Nation
Community Intellectual Property Workshop

Jane Anderson
University of Massachusetts

Map of Aboriginal Australia
United Nations 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, 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.

United States Constitution

The Congress shall have power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

Article 1, Section 8, Clause 8
What is Intellectual Property Law?

Copyright

- Copyright protection extends to:
  
  Original literary works including novels, poems, plays, newspapers, computer programs
  
  Scientific and artistic works including paintings, drawings, photographs, sculpture, architecture, advertisements.
  
  Copyright can cover a range of works including but not limited to films, musical compositions, choreography and maps.
Key issues to keep in mind for copyright are:

1. Originality – Is the work original?
2. Authorship – Who is the author of the work?
3. Ownership – Who is the owner of the work?

Copyright protection is automatic and protection lasts for the life of the author plus 70 years.

Copyright protection only extends to expressions of ideas and not to ideas themselves.

Patents

A patent is a very specific monopoly protection granted by the government to stop other people using, making or selling your invention.

A patent gives protection for 14-20 years, given the kind of patent that is sought.

Patents are registered and tested by a specific government office. They are not automatic.
Examples of particular species of patents for inventions include biological patents, business method patents, chemical patents and software patents.

• There are three criteria for successful patents:
  1. *Utility* – it has to be useful
  2. *Novelty* – it has to have a feature that sets it apart from previous inventions
  3. *Non-obvious* – it must not be obvious to someone who has ordinary skill in the area of the invention

**Trademarks™**

• Unlike copyright, trademark protection functions mainly in the context of business transactions.

• It is a distinctive sign or symbol used by an individual, business organization or other legal entity to identify that the products or services to consumers with which the trademark appears originate from a unique source, and to distinguish its products or services from those of other entities.
• Many trademarks are specific names, for example in 2002 the Aveda beauty company trademarked the name ‘Indigenous’ for a line of organic beauty products.

• A British company attempted to register the name Kikoi, which is a Kiswahili name for a colourful wrap of fabric.

• The Zia sun symbol has been used as a trademark and logo for numerous businesses from plates manufacturers to airlines.

Other areas of IP

Other areas of intellectual property include:

- Design
- Tradsecrets or Confidential Information
- Geographical Indications
Intellectual property law is one of the most powerful bodies of law in our contemporary present.

Why?

Because it works exclusively on knowledge.

But intellectual property law has a history of being used by non-Indigenous people to make Indigenous knowledges their exclusive property.

For example....
Emu Dreaming by Uta Uta Tjangala
and the Waterholes Carpet
When to use IP?

- There are many contexts where intellectual property is being made—or when intellectual property law can be used as a specific strategy for protecting knowledge.

- The key to using intellectual property law is discussing what it is that you want to protect, from whom, and for how long.
IP is not always the answer

Because intellectual property law is a western and European derived body of law it is not always appropriate to use in community contexts.

This is because IP law is –

- individualistic
- does not offer perpetual protection
- separates knowledge in ways that does not reflect the knowledge system itself

Having IP conversations

It is critically important to have community wide conversations about the use of intellectual property law and to make informed decisions about when and how to use it

It can be a really excellent tool.

It can also have serious drawbacks.
How might IP be used for the Penobscot Nation?

In cultural tourism contexts
To protect knowledge that you don’t want circulated outside the Nation
To help protect knowledge important to the community
To let outsiders know that certain knowledge belongs to the Penobscot people
To manage certain relationships between the Penobscot community and external researchers or government departments

Are there alternatives to Intellectual Property?

Yes!
There are other ways of protecting knowledge –
One new alternative is the development of a system of management called ‘Protocols’
Thank-you

Please feel free to contact me if you want to talk about any of this further

janea@anthro.umass.edu

www.andersonip.info
Attachment 4: Historic Preservation Slide Presentation, Advisory Council on Historic Preservation

Tribal Consultation

In the Section 106 Process

Advisory Council on Historic Preservation
Office of Native American Affairs

Advisory Council on Historic Preservation (ACHP)

- Independent federal agency
- Advises President and Congress on historic preservation issues
- Oversees the Section 106 process
Office of Native American Affairs

➢ Provides training
➢ Technical assistance, guidance
➢ Policy

Our purpose today

➢ To look at the Section 106 review process

➢ To understand what rights Indian tribes have in this process
The National Historic Preservation Act of 1966 (NHPA)

Established:

- federal historic preservation policy
- federal agency historic preservation programs
- review of effects of federal actions on historic properties
- Federal, State and Tribal Historic Preservation Officers

1992 Amendments to the NHPA

- Properties of traditional religious and cultural significance can be National Register eligible
- Federal agencies must consult with Indian tribes that attach religious and cultural significance to historic properties
- One ACHP member representing an Indian tribe or Native Hawaiian organization
1992 Amendments to the NHPA

- Indian tribes may assume State Historic Preservation Officer (SHPO) function on tribal lands
- Tribal regulations may replace ACHP’s regulations on tribal lands
- Coordination of NHPA and NAGPRA

What does Section 106 require?

Before taking action on an undertaking, federal agencies must:

- Take into account the effects on historic properties
- Afford the ACHP a reasonable opportunity to comment
How does an agency comply with Section 106?

The agency follows the review process set up in the ACHP’s regulations:

36 CFR Part 800:
Protection of Historic Properties

Aspects of the Section 106 Review

- Seeks balance of agency mission and historic preservation
- Defined by consultation
- Federal agency solely responsible for compliance - makes final decision
- Findings and determinations made by agency and reviewed by consulting parties
- ACHP is advisory
Principles of Section 106

➢ All historic properties must be considered

➢ Purpose is not preservation of all historic properties

➢ Historic preservation balanced with other public values

➢ Ultimate enforcement through third party litigation

What triggers the Section 106 review?

The review process is triggered by a federal undertaking that has the potential to affect historic properties
**Undertaking?**

It is any project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including:

- Those carried out by the agency
- Permits, licenses, other approvals
- Federal financial assistance

**How do you know if a project is an undertaking?**

- Is the project receiving federal funds?
- Is a federally owned or controlled property involved?
- Does the project require a federal permit, license or other approval?
Are all projects subject to Section 106 review?

NO

- Only those activities, programs or projects with federal involvement that have the potential to affect historic properties.

- Federal agency applies undertaking definition to all of its activities and programs.

Historic property?

Any prehistoric or historic district, site, building, structure, or object listed in, or eligible for listing in the National Register of Historic Places.
The National Register of Historic Places

A commemorative listing of buildings, structures, sites, objects, and districts of local, state, and national significance

Administered by the National Park Service
not the ACHP

Basic steps of Section 106 review

The federal agency must:

I. Initiate the Process
II. Identify Historic Properties
III. Assess Adverse Effects
IV. Resolve Adverse Effects
Participating in the review process

- Federal agency
- ACHP, when participating
- Indian tribes
- State/Tribal Historic Preservation Officer
- Applicants
- Local governments
- the public

The review process should end

- Prior to the start of project activities or release of funds
- Federal Agencies should start review process early in the project planning
What is consultation?

“... The process of seeking, discussing, and considering the views of other participants, and where feasible, seeking agreement with them regarding matters arising in the Section 106 process”

36 CFR 800.16 (f)

What do the regulations say about consultation with Indian tribes?

Federal agencies must:

➢ Make a reasonable and good faith effort to identify Indian tribes

➢ Recognize the government-to-government relationship
The regulations say the federal agency must:

- Consult with Indian tribes when they attach religious and cultural significance to historic properties
- Conduct consultation in a sensitive manner respectful of tribal sovereignty

A tool to help agencies and tribes with consultation

A federal agency and Indian tribe may enter into a consultation agreement that:

- specifies responsibilities
- establishes additional rights to participate or concur
What if you’re not invited to consult?

Your tribal representative can write and ask to be consulted.
What is identification?

It is the effort to locate properties eligible for the National Register of Historic Places

- Federal agency consults with tribe(s)

- There is no standard way to do it

Do you have a role in identification?

Yes

The federal agency consults with Indian tribes about what to do and how to do it
How does the agency know what is historic?

The agency consults with the SHPO and Indian tribes to apply National Register criteria to each property.

National Register Criteria

A. Association with significant historic events, patterns of history

B. Association with important people

C. Distinctive characteristics
   - construction, work of a master, artistic value, distinguished entity

D. Important data in history/prehistory
Can properties of significance to your tribe be eligible?

Yes

The NHPA states that historic properties of traditional religious and cultural importance to Indian tribes may be eligible for the National Register.

Can a place sacred to your tribe be eligible to the National Register?

Yes

But, the property must meet National Register criteria and possess integrity.
What places might be eligible?

- Ceremonial locations held through time
- Places associated with important events in tribal history
- Places associated with important people in your tribes past
  - must be a tangible property
  - can be an entirely natural feature

What if you cannot share cultural information known only to tribal members?

It is a tribal decision on what and how much information to share with the federal agency on any given project.

Considerations:

- will any proffered information cause a significant invasion of privacy?
- do you fear any information you give will become public?
- how much information is necessary to assist in the determination of eligibility?
What if you feel you cannot share certain information with the agency?

Per Section 304, NHPA, a federal agency can withhold information about a historic property from the public when disclosure may:

- risk harm to the property
- cause a significant invasion of privacy
- impede the use of a traditional religious site by practitioners
The process ends

Through a finding that:

- No historic properties will be affected; or
- There will not be an adverse effect; or
- There will be an adverse affect

Key Points about Tribal Consultation

- Federal agencies must consult with Indian tribes
- Consultation is on a government-to-government basis
- Review periods apply to all consulting parties, including Indian tribes
Key Points about the Review Process

- Balances agency mission with historic preservation
- Defined by consultation
- Federal agency is responsible for Section 106 compliance and makes all decisions
- Consulting parties review decision

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1. **Introduction**

This document provides an overview of the procedures and protocols associated with the protection of intellectual property or Penobscot Community Intellectual Rights (PCIR). It provides a general framework for community-based management of PCIR but applies special emphasis to PCIR as they relate to heritage-based places. Heritage-based places include archaeological sites, historic structures, historic buildings, sacred sites and traditional cultural properties.

We consider our heritage a collective asset in which all Penobscot people are stakeholders and caretakers. Legal mechanisms for protecting intellectual property such as copyright, trademarks, and patents are often inadequate for community-based intellectual property. This plan is a management framework for safeguarding intellectual property through a process of education, dialogue, engagement, consultation, and training. It is expected that this plan, and any others that emerge from it, will have the flexibility to evolve as we gain experience through implementation of our PCIR protection strategies. We recognize there are many issues that remain unresolved. However, we envision this plan being the initial step in a broader effort to safeguard PCIR.

2. **Definitions**

2.1 **Penobscot Community Intellectual Rights**

Throughout this document we reference Penobscot Community Intellectual Rights (PCIR) which we elected to use over “intellectual property” because the term intellectual property carries with it legal assumptions linked to individual ownership of creations of the mind. Alternatively, PCIR are the inalienable rights that we have over our collective identity, cultural heritage, and worldview. They are rights over creations of the mind and culture that embody aspects unique to Penobscot heritage and way of life. They include but are not limited to, traditions and spiritual practices, traditional ecological knowledge and knowledge of and engagement with the physical world. For more information on community intellectual rights see Posey and Dutfield (1996), *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*.

Some examples of PCIR as they relate to heritage based places include: site location information; ceremonial practices related to sites; interviews related to heritage-based places and products; written products such as reports and field notes; symbols on material culture;
and contemporary uses of heritage-based places.

2.2 Heritage (Adapted from UNESCO and University of Massachusetts Amherst Center for Heritage and Society)

Heritage encompasses the full range of inherited traditions, ceremonies, places, objects, monuments and culture that reflect who we are and how we identify ourselves. It includes both tangible and intangible elements that are manifested in the following domains:

- Oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
- Performing arts;
- Social practices, rituals and festive events;
- Knowledge and practices concerning nature and the universe;
- Traditional craftsmanship;
- Artifacts and objects;
- The built environment;
- Archaeological sites, historic properties, and traditional cultural properties.

2.3 Heritage-Based Places

Heritage-based places are places that carry with them an intrinsic value linked to the history, culture, traditions, and identity of the Penobscot people.

*Heritage-Based Places include the following:*

2.4 Archaeological Sites


2.5 Historic Buildings


2.6 Historic Structures

Historic structures are functional constructions over 50 years old made for purposes other

2.7 Sacred Site

Under Federal law, “Sacred site” means any specific, discrete, narrowly delineated location on Federal or Tribal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site. *Presidential Executive Order 13007, May 1996, Section1(b)(iii).* For purposes of this plan, the Penobscot Nation may adjust this definition to meet our needs for Sacred Site protection during negotiations of agreements related to this plan.

2.8 Traditional Cultural Property

A “traditional cultural property” is a place associated with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community. *National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties*. 1990; Revised 1992; 1998 For purposes of this plan, the Penobscot Nation may adjust this definition to meet our needs for traditional cultural property protection during negotiations of agreements related to this plan.

3. Purpose

The purpose of this plan is to provide clear and effective policies, procedures, and protocols for the protection and management of PCIR related to heritage-based places such as archaeological sites, sacred places, historic building/structures and traditional cultural properties. While this plan is designed specifically for these types of properties, the goals, priorities, and lines of authority outlined here have a broad applicability to PCIR for the Penobscot Nation.

4. Priorities

The Penobscot Nation has established the following priorities for safeguarding PCIR. These are broad-based priorities that encompass many aspects of PCIR. They are designed to provide the Penobscot Nation with a foundation for developing ways to safeguard PCIR:

• To identify and implement policies and procedures to protect PCIR.
• To encourage preservation of cultural heritage through protection and awareness of PCIR.
• To increase tribal and non-tribal community awareness of PCIR.
• To protect against commercialization and misappropriation of our culture through awareness of our PCIR.

5. Management Plan Goals

The goals of this plan are based on both broad needs of PCIR management and are specific to PCIR as they relate to heritage-based places.

• To define priorities of PCIR with respect to all heritage-based places, processes, and products.
• To outline the lines of authority for decision-making relative to PCIR.
• To develop a framework for the management of PCIR as they relate to heritage-based places.
• To provide a model for management of other areas of PCIR.

6. Guiding Principles: UN Declaration of Rights of Indigenous Peoples

As a sovereign nation, we retain authority over all intellectual property related to our identity and heritage. We encourage efforts to protect, preserve, and perpetuate all tangible and intangible forms of our collective identity and heritage—so long as these efforts are in partnership with us and consistent with best practices in relevant disciplines. Our efforts to manage and protect our community intellectual rights are rooted in philosophies outlined in Articles 11, 12, and 13 of the United Nations Declaration on the Rights of Indigenous Peoples (Appendix 1).

7. Guiding Principles: Penobscot Nation Archaeological Heritage

Archaeological research has significant potential to violate PCIR. We have elected to establish these guiding principles as a way to promote positive relationships with members of the archaeological community. It is our intent that these principles serve as the foundation for all practices, decisions, and relationships that relate to archaeological research:

7.1 The Penobscot Nation is a sovereign nation.

7.2 The Penobscot Nation values mutually beneficial relationships with archaeologists engaged in work related to Penobscot culture and heritage. Therefore, we encourage archaeological research that incorporates Penobscot culture and is conducted with an understanding that cultural sensitivities surround how archaeologists have interacted with us in the past. We consider our cultural heritage to be worthy of respect. In light of that, we seek to foster and maintain relationships with archaeologists through open, honest, communication.

7.3 Penobscot people have been, and continue to be, harmed by members of the
archaeological community through culturally inappropriate approaches to archaeological research. These approaches include excavating burials without tribal consultation, displaying ancestral remains, designing archaeological research without tribal input, and assuming control over archaeological resources.

7.4 The Penobscot Nation seeks an equal partnership with archaeologists and must be included in all aspects of archaeological planning and project activities related to Penobscot heritage. It is the responsibility of the archaeologist to inform the Penobscot Tribal Rights and Resources Protection Board of the scope and purpose of proposed projects and to solicit feedback relative to the project. Archaeologists working with the Penobscot Nation will include appropriate tribal representatives throughout all phases of the archaeological research.

7.5 Archaeology, as a western discipline had an active role in the colonization of the Penobscot people. Historically, archaeologists collected large quantities of “rare” and “exotic” materials from indigenous populations around the world. These materials were collected and placed on display without free prior and informed consent and/or input from the descendant communities. The archaeological practice of collecting information from archaeological resources on human settlement, subsistence and technological patterns neglected the interests of tribal communities and imposed a non-indigenous interpretation on the material culture and tribal histories.

7.6 The practice of transferring culture and knowledge orally from one generation to another was damaged severely through the colonization process. Practices such as forced acculturation; language suppression, genocide and structural violence have resulted in substantial gaps in tribal knowledge relative to heritage and culture. Archaeology is one mechanism we are using to heal from such trauma.

7.7 All archaeological materials and related information recovered from archaeological sites are essential to repair our peoples’ connection to our past. The recovery of archaeological materials is important to the Penobscot Nation and its peoples in the following ways:

7.7 (a) The Penobscot people are personally and emotionally connected to archaeological materials as these materials represent the thoughts, knowledge, ideas, actions, and voices of our people. They possess a spirit and energy similar to humans and they are considered sacred to Penobscot people.

7.7 (b) The materials and information recovered as part of archaeological research are important to the maintenance of Penobscot identity, and our re-engagement with them is necessary for strengthening our distinct, vibrant, living culture. This is significant as part of an emotional, cultural, and spiritual healing process for our people.

7.7 (c) Re-engagement with materials recovered from archaeological sites has the potential to evoke strong emotional responses among Penobscot people making all material sensitive.
7.8 The commercialization of Penobscot culture through archaeology publications and other forms of media has the potential to be offensive to Penobscot people. All publications related to Penobscot archaeological heritage will be done in partnership with the Nation.

7.9 The Intellectual Property (IP) surrounding Penobscot heritage is the property of the Penobscot Nation. All materials related to archaeological work within Tribal territories belong to the Penobscot Nation. These materials include, but are not limited to artifacts, background research, field notes, catalogues, photographs, digital data, interviews, etc.

8. **Legal Framework**

Federal law plays a key role in protecting heritage-based places on tribal lands. They also regulate the federal-tribal consultation process with respect to places of cultural significance regardless of where they are located. These laws are key to safeguarding the Penobscot’s Community Intellectual Rights. Where applicable, federal law has been referenced to highlight how processes and decisions have been aligned with federal law. A summary of relevant laws and their web site addresses are available in Appendix 2.

9. **Lines of Authority**

9.1 **Penobscot Nation Tribal Chief and Council**

The Penobscot Nation Tribal Chief and Council are elected officials serving as the governing body of the Penobscot Nation. They are responsible for oversight of this management plan.

9.2 **Penobscot Tribal Rights and Resources Protection Board**

The Penobscot Tribal Rights and Resources Protection Board (the Board) is the governing body responsible for review and oversight of all research conducted by non-tribal members involving Penobscot Nation cultural resources including the Nation’s history, culture, people, and intellectual rights. The Board is the lead entity for developing and guiding the Penobscot Nation’s research agenda and is established by the Chief and Council, who are legally responsible for the conduct of the Board. The Board is accountable to the Chief and Council for all its actions.

9.3 **Penobscot Community Intellectual Rights Committee**

The Penobscot Community Intellectual Rights Committee is a sub-committee of the Board and serves as the lead tribal entity for addressing all issues related to Penobscot Community Intellectual Rights including but not limited to:

9.3(a) Developing policies and procedures to manage and protect Penobscot Community Intellectual Rights.
9.3(b) Monitoring information technology for potential violations/breaches to Penobscot Community Intellectual Rights.

9.3(c) Identifying and implementing mechanisms for corrective action/awareness-building for Penobscot Community Intellectual Rights violations.

9.4(d) Serving as a tribal resource for review of all research and Memoranda of Agreement that have the potential to impact Penobscot Nation Community Intellectual Rights.

9.4. Penobscot Nation Cultural and Historic Preservation Department

9.4 (a) Department Responsibilities

The Penobscot Nation Cultural and Historic Preservation Department is responsible for implementation of this plan. The Tribal Historic Preservation Officer (THPO) is the lead staff person responsible for ensuring that appropriate actions are taken in accordance with this plan.

Figure 1: Organizational Chart for Lines of Authority
10. Guidelines

The following guidelines were developed to provide a framework for managing and safeguarding PCIR as they relate to heritage-based places. They are part of an ongoing effort by the Penobscot Nation to safeguard and preserve Penobscot culture, traditions and identity. These guidelines are organized into four broad categories (people, places, products, practices) in which PCIR issues related to heritage-based places may emerge. Additionally, a state legislative/public policy strategy is included to address areas of state law or policy that pertain to PCIR.

10.1 People

There are often multiple stakeholders involved in tribal research. The following section identifies the various stakeholders involved in place-based heritage research and discusses their roles, responsibilities and obligations in protecting PCIR.

10.1 (a) External Stakeholders

External stakeholders are considered to be those individuals or entities not affiliated with the tribe through citizenry or through tribal administration (e.g. tribal employees).

10.1 (a) (1) Contractors and Academic Researchers

All place-based heritage researchers wishing to work on tribal lands must go through the Penobscot Nation tribal researcher certification process (Appendix 3). This process consists of two parts—one in which the researcher is evaluated based on professional qualifications and another in which the researcher satisfies Penobscot Nation Researcher training requirements. This process will vary from discipline to discipline dependant upon the nature and scope of the research. Certification is considered part of the relationship-building process between the Penobscot Nation and the research community. It is designed to provide researchers the intellectual and social tools necessary for conducting culturally appropriate research that will result in balanced, accurate, and respectful representations of our community, culture and heritage. This process will also inform researchers of PCIR and the Tribe’s expectations for the researcher’s role in protecting those rights. For purposes of this plan, we have outlined the certification requirements and procedures for archaeological researchers working on tribal lands. Generally, the Federal Historic Preservation Professional Qualifications as outlined in 36 CFR Part 61 are the minimum professional requirements for conducting research on tribal lands. Additional professional qualifications may be required.

10.1 (a) (2) Federal Agencies

Federal agencies are frequently stakeholders in projects affecting heritage-based places of significance to the Penobscot Nation. The Tribal Historic Preservation Officer will be responsible for ensuring that federal agency officials are informed of the Penobscot Nation’s
policies and procedures related to PCIR. The primary tool for protecting PCIR in the realm of federal undertakings is the Memorandum of Agreement. All agreements with federal agencies will be developed using the UN Declaration of Indigenous Rights as a foundational framework. During consultation under Section 106, the THPO will alert federal agency personnel of any PCIR issues and work to ensure PCIR is protected. The THPO is responsible for providing Federal agencies with a list of professionals certified to conduct research on heritage-based places on tribal lands. If an agency desires to hire a professional who has not been certified to work on tribal lands, that individual will be required to go through the tribal researcher certification process.

10.1 (a) (3) State Historic Preservation Officer (SHPO)

The State Historic Preservation Officer (SHPO) is the lead historic preservation official for the state of Maine and serves as the state’s counterpart to the THPO. The SHPO maintains state records, site reports, and databases on historic properties throughout the state. Information sharing between the SHPO and THPO is necessary to ensure protection of heritage-based places. Additionally, the SHPO is responsible for the oversight of historic property protection off tribal lands. Many sites under SHPO jurisdiction are culturally relevant to the Penobscot people. Currently, no formal mechanism exists to define the information sharing process between the SHPO and THPO.

To ensure that Penobscot interests are considered as part of the SHPO’s responsibilities, the THPO will negotiate a programmatic agreement with the SHPO that addresses tribal consultation and information sharing. This programmatic agreement will be negotiated by the THPO and PCIR working group and will be approved by the Board and Penobscot Nation Tribal Council.

10.1 (a) (4) Volunteers

Individuals volunteering on Penobscot Nation tribal lands may engage in activities in which they have access to information related to PCIR. It is the responsibility of the director of the department that is overseeing the volunteer project or program to inform volunteers of any PCIR sensitivities associated with the project or program.

10.1 (b) Internal Stakeholders

Internal stakeholders are considered individuals or entities affiliated with the Penobscot Nation through citizenry or administration.

10.1 (b) (1) Tribal Departments/Tribal Projects

All tribal departments conducting projects that have the potential to affect heritage-based places on tribal lands are required to notify and consult with the Tribal Historic Preservation Officer for guidance on appropriate resource identification and management procedures prior
to the start of the project. Section 106 of the National Historic Preservation Act mandates that federal agencies take into account the impact of their undertakings on historic properties. This includes federally funded projects occurring on tribal lands.

10.1 (b) (2) Tribal Employees
Tribal employees are an integral part of the day-to-day functioning of the tribal community. As such, they are frequently exposed to information and activities that may be connected to PCIR. To ensure that employees are aware of PCIR sensitivities, the Penobscot Nation THPO in conjunction with the PCIR Working Group and Personnel Director/Committee will develop PCIR training materials for new and existing employees. Personnel Policies will be updated to reflect PCIR protocols.

10.1 (b) (3) Tribal Citizens
Each Penobscot person has a responsibility to serve as a cultural conduit between our ancestors and our youth to ensure our survival as Penobscot people. Recognizing that tribal citizens hold cultural knowledge and information that is valuable to present and future generations, the Penobscot Nation encourages its citizens to embrace the collective nature of our cultural heritage and to perpetuate our identity and culture by sharing cultural knowledge and information among the Penobscot people. Critical to the integrity of our cultural identity is the protection of PCIR. The Penobscot Nation encourages its citizenry to protect PCIR against misappropriation. The Board and PCIR working group are responsible for developing mechanisms for safeguarding PCIR on behalf of the Penobscot Nation citizenry.

10.1 (b) (4) Landowner/Assignees
The THPO is responsible for informing landowners/assignees of PCIR issues connected to their parcels. The two primary strategies for managing PCIR on parcels owned or assigned to tribal citizens are public education and outreach and Memoranda of Agreement. The THPO and the Board’s Public Education subcommittee will be responsible for PCIR educational and outreach efforts related to heritage-based places. The THPO will be responsible for negotiating agreements with landowners/assignees as part of projects that may impact heritage-based places to ensure the safeguarding of PCIR.

10.2 Places

10.2 (a) Site Location (Maps, Individual Knowledge, Tribal records, Site Reports)
Site location information will be maintained by the Penobscot Nation THPO and released to Departmental Directors on an as-needed basis to ensure sites are protected against disturbance by departmental activities.

Personal/individual tribal citizen requests for site location information for purposes of traditional use, cultural education, or ceremony will be evaluated by the Chief of the Penobscot Nation and THPO. Site location information will be evaluated on a case-by-case basis and provided to tribal individuals who can demonstrate that there will be no disturbance to the site
and that site location information will not be widely shared. The THPO will be responsible for routine monitoring of sites being used by individuals to ensure that on-site activities are not damaging or jeopardizing the site.

10.2 (b) Site Assessment and Interpretation
Information regarding site assessment and interpretation often includes multiple perspectives. Traditional knowledge holders may interpret sites, their contents, and uses differently than academics or professional archaeologists. Public presentation of site assessment and interpretation will include multiple perspectives when feasible and such information will be presented in a balanced way. Information on site assessment and interpretation will not be disseminated publicly without review by the THPO and PCIR working group.

10.2 (c) Site Uses-Past, Present, and Future

10.2 (c) (1) Present Uses
We encourage use of heritage-based places to preserve and perpetuate practices and knowledge unique to Penobscot people. Information regarding contemporary use of place-based resources is sensitive and permission to use information must be obtained from the Penobscot Nation PCIR working group. Information regarding contemporary uses of a place will be shared outside of the tribe only if it contributes to the ongoing protection of heritage-based places and/or supports against challenges to the Penobscot Nation’s sovereignty and jurisdiction.

10.2 (c) (2) Past Uses
The Penobscot peoples’ relationship to place is an important element of tribal identity. Equally important is how people have used heritage-based places throughout time. Information related to past site uses should be included in reports generated as part of all research on heritage-based places. This information may be obtained through mechanisms such as literature reviews, review of state archaeological databases and interviews with tribal citizens. The THPO will coordinate and monitor the tribal interview process.

10.2 (c) (3) Future Uses
Information on how the Penobscot Nation plans to use heritage-based places in the future will be considered confidential unless deemed appropriate for release by Penobscot Nation Tribal Council. Land use plans are considered internal tribal matters and will not be included in heritage-based place reports without prior approval.

10.2 (d) Tribal Register for Heritage-Based Places
Currently, the Penobscot Nation does not have a tribal register for heritage-based places. To protect these places for future generations, it is necessary to develop a tribal process identifying the criteria that make a place worthy of protection. It is also necessary to identify where those places are. It is recommended that the THPO work with the PCIR working group to develop a process for creating a tribal register for heritage-based places for the Penobscot Nation. That process should also include a mechanism for protection of those places and site
location information associated with them.

10.3 Products

10.3 (a) Archaeology Reports

10.3 (a) (1) Federal Project Reports
The distribution of archaeological reports generated from work conducted on tribal lands will consist of the minimal distribution required in accordance with federal historic preservation law. Under section 304 of the National Historic Preservation Act, a federal agency can withhold information about a historic property from the public when disclosure may risk harm to the property, cause significant invasion of privacy or impede the use of a traditional religious site by practitioners. Experience has shown us that public dissemination of site location and related information often results in damage to sites by looters. In an effort to protect these places and any associated knowledge for future generations, information contained in archaeological and other heritage-based place reports will not be disseminated to the public without the consent and approval of the THPO and the PCIR working group.

We recognize that public dissemination of archaeological or heritage-based place information can be beneficial to Penobscot citizens, humanity in general, and the natural environment. Many of the cultural practices and lifeways of our ancestors carry important lessons about sustainability, kinship, health, spirituality, artistry, and the natural environment. In determining what information is appropriate for release, the THPO and PCIR working group will assess the benefits and risks associated with public release of information contained in archaeological or other heritage-based place reports. If it is determined that the benefits outweigh the risks, the THPO and PCIR working group will negotiate with the federal agency official and author to outline the parameters of public dissemination. The THPO reserves the right to redact reports or to require that a public version of the report be prepared to protect information that is deemed by the THPO as too sensitive for release to non-tribal entities.

Prior to archaeological work being conducted as part of a federal undertaking, the THPO, federal agency official, and consulting archaeologist will negotiate an agreement which will include at a minimum, the parameters of the scope of work, how information relative to the work will be collected and disseminated and plans for appropriate curation of artifacts. Because of our government-to-government relationship with federal entities, all agreements negotiated between the THPO and federal agencies will be reviewed by the PCIR working group and approved by Penobscot Nation Tribal Council.

10.3 (a) (2) Academic Projects
Archaeological research conducted as part of academic scholarship will be conducted in accordance with federal law if it occurs on Penobscot reservation or trust lands. The PTRRPB will serve as the lead entity responsible for reviewing and approving of academically-based research projects on tribal lands. We recognize that publication of research is an essential part of an academic career. In determining what information is appropriate for release, the THPO
and PCIR working group will assess the benefits and risks associated with public release of information related to academically generated archaeological research. If it is determined that the benefits outweigh the risks, the THPO and PCIR working group will negotiate with the scholar to outline the parameters of public dissemination. Through negotiations with archaeological scholars, the THPO will reserve the right to review and edit manuscripts being proposed for publication. Preference will be given to publications that are approached through partnership (e.g. dual authorship) with the Penobscot Nation over those that feature the academic researcher as sole author, keeping in mind the tribal capacity for contributing to a manuscript.

Prior to archaeological work being conducted as part of academic research, the THPO and researcher will negotiate an agreement which will include at a minimum, the parameters of the scope of work, how information relative to the work will be collected and disseminated and plans for appropriate curation of artifacts. All agreements negotiated between the THPO and academic archaeologists will be reviewed by the PCIR working group and approved by Penobscot Nation Tribal Rights and Resources Protection Board.

10.3 (b) Symbols on Cultural Material
Symbols on cultural material recovered from tribal lands are the property of the Penobscot Nation and are not to be disseminated publicly without approval from the PTRRPB. Our intent is to discourage non-tribal commercialization of Penobscot symbolism without community consent. Petroglyphs, designs on stone tools, and etchings on wood or bone are unique images that have the potential to be exploited by non-tribal entities for business logos, clothing designs and other commercial products. To protect against misappropriation, all reports generated on heritage-based places will include language that stipulates the restrictions on the use of tribal symbols within the photographs and images presented in the report.

10.3 (c) Background Research
Background research on heritage-based places may include the collection and review of reference materials on land use history, previous archaeological or related studies, land owner research, changes in legal status of land etc. This work is typically considered to be the property of the researcher. As part of the negotiations of the research MOA, the THPO will advocate for shared use of background research by requiring from the researcher an annotated bibliography of all resources reviewed as part of the research process.

10.3 (d) Photographs
Photographs related to research on tribal lands, and obtained during the scope of work agreed upon between the Penobscot Nation and the researcher, will be the joint property of the Penobscot Nation and the researcher unless explicitly released for unrestricted use by either party. Use of photographs beyond the original agreement will require the approval of the Penobscot Nation THPO, the researcher and any other stakeholders (e.g. federal agency, photo subjects).
10.3 (e) Recordings (audio/video)
Recordings related to research on tribal lands, and generated as part of the scope of work agreed upon between the Penobscot Nation and the researcher, will be the joint property of the Penobscot Nation and the researcher unless explicitly released for unrestricted use by either party.

All video recordings of field work, tribal citizens, artifacts, and heritage-based places will be reviewed by the THPO and PCIR working group to determine whether or not they contain sensitive information to warrant restricted use. Video recordings of heritage-based places are generally discouraged unless it can be demonstrated that recordings will have exceptional value in the realm of cultural or historic preservation or Penobscot jurisdictional issues.

Audio or video recordings of tribal citizens generated as part of background research (e.g. interviews) will be the property of the tribal citizen unless a release of ownership or use is negotiated between the tribal citizen and the researcher. Use of audio or video recordings of tribal citizens must be negotiated prior to recording. Any extension of the original agreed-upon use must be renegotiated with the tribal citizen.

The PCIR working group will serve as a resource for tribal citizens who agree to participate in interviews with researchers. The PCIR working group will be available to review agreements between tribal citizens and researchers, offer guidance to ensure an equitable process, and to alert tribal citizens to any potential PCIR violations.

Personal/individual audio recordings of the researcher or crew members for note-taking purposes are the property of the researcher.

10.3 (f) Field Notes, Drawings and Sketch Maps
Field notes, drawings and sketch maps resulting from research on tribal lands will remain the property of the Principal Investigator. During MOA negotiations with the researcher, the THPO will require researchers to acquire approval from the Penobscot Nation prior to use of information contained in these records for future projects or publications.

10.4 Practice

10.4 (a) Archaeological Excavations
All archaeological research conducted on tribal lands by non-tribal archaeologists requires an Archaeological Resources Protection Act permit from the Bureau of Indian Affairs. It is the responsibility of the Principal Investigator conducting archaeological research to secure the required permits prior to the start of the project.

The Penobscot Nation requires that all archaeological research be consistent with Secretary of Interior Standards using professional excavation techniques common in Maine archaeology. Occasionally, there may be circumstances where a deviation from these standards is necessary. For example, alternative excavation strategies may be necessary for protection of
medicinal plants or other cultural resources. Information surrounding the archaeological process will generally be included as part of the standard reporting unless there are cultural sensitivities connected to any aspect of the methodology. The THPO is responsible for alerting Principal Investigators to the need for a modified methodology.

10.4 (b) Ceremonies Related to Excavations
Ceremonies related to excavations will not be recorded, publicized, photographed or reported on.

10.4 (c) Inadvertent Discovery Protocols
In the event of an inadvertent discovery of burials on tribal lands, all work will cease and the procedures outlined in Appendix 5 will be followed. Information regarding inadvertent discoveries will be considered confidential. The THPO in consultation with the Chief of the Penobscot Nation and Penobscot NAGPRA representative will determine the parameters for dissemination of information surrounding an inadvertent discovery.

10.4 (d) Cultural Affiliation Determinations
The Penobscot people consider themselves to be culturally affiliated to all Native American people living in Maine prior to European contact. All reports generated through heritage-based place research on tribal lands will articulate that viewpoint if relevant to the research project. All published documentation resulting from heritage-based place research on tribal lands will be reviewed by the THPO and the PCIR working group to ensure that our relationship to our ancestors is not jeopardized by public dissemination of inaccurate or incomplete information.

11. Legislative/Public Policy Strategies for Safeguarding Penobscot Community Intellectual Rights
The following section offers state legislative or public policy strategies to support the Penobscot Nation in safeguarding PCIR as they relate to heritage-based places.

11.1 Maine Historic Preservation Commission/State Historic Preservation Officer (27 M.R.S.A. Sections 501-511)
The Maine Historic Preservation Commission (“MHPC”) was established through a legislative act in 1971. It serves as an independent agency within the Executive branch of state government and functions as the State Historic Preservation Office. Its Director is the State Historic Preservation Officer (“SHPO”). The Commission is responsible for the identification, evaluation, and protection of Maine’s significant cultural resources as directed by the National Historic Preservation Act of 1966. The Commission consists of eleven members composed of the Commissioner of Transportation or a representative of the Department of Transportation, and the Commissioner of Agriculture, Conservation and Forestry or a representative of the Department of Agriculture, Conservation and Forestry (to serve ex officio) and 9 citizens of the state “who are known for their competence, experience and interest in historic preservation,
including at least one prehistoric archaeologist, one historic archaeologist, one historian, one architectural historian and one architect.” (See 27 M.R.S.A. Section 502). The 9 citizen members of the Commission are appointed by the Governor with due consideration given to the recommendations of representative professional, civic and educational associations and groups concerned with or engaged in the field of historic preservation. The work of the MHPC is closely related to the work of the Penobscot THPO and to tribal interests in heritage. Since there is no official tribal representation on the MHPC, tribal perspectives and tribal interests have the potential to be neglected.

Additionally, in 2010 the Governor of the State of Maine signed an executive order requiring state agencies to consult with tribes before passing laws or rules that could affect them. Each agency must draft consultation policies and guidelines which promote:
two-way communication between Maine's agencies and tribes
positive relations between state and tribal governments
methods for meaningful and timely input by tribes
similar communication efforts by tribes

The executive order also requires an appointment of representatives from each state agency to serve as liaisons between the state and tribes. To date, an official tribal liaison has not been appointed by the MHPC, nor has the agency developed consultation policies and guidelines.

To ensure that tribal interests are adequately addressed, it is recommended that:

The Penobscot Nation, through the Office of the Chief and in conjunction with its Representative to the State Legislature, initiate discussions with the Governor’s office to attain support for the appointment of a tribal representative to the MHPC and also the appointment of a tribal liaison for the MHPC as provided in the executive order.

The Penobscot Nation THPO, in coordination with the Maine Indian Tribal State Commission, engage with the SHPO in order to formalize a consultation process between the SHPO and the Penobscot Nation.

11.2 Title 27, Chapter 13 Archaeology

Sub-section 376 assigns ownership of all objects/artifacts/specimens recovered from state-owned lands to the State of Maine. As a state institution, the Maine State Museum serves as the curation facility for archaeological and other cultural materials owned by the state. Currently, the state museum governance structure does not include tribal representation, and as a result tribes have little opportunity to influence decisions about the care and interpretation of their cultural patrimony.

Additionally, tribes have no formal mechanism in place to influence information sharing about their material heritage from the museum to the public. Governance of the Maine State Museum consists of a museum commission comprised of fifteen Maine citizens appointed by the Governor to oversee museum policies, prescribe duties of the museum director, establish
museum admission fees, and generally supervise museum operations. The members of the Commission may serve up to two consecutive five-year terms and are appointed because of their special qualifications and interests in the several fields of museum activity. 27M.R.S.A. Section 82.

It is recommended that:

The Penobscot Nation, through the Office of the Chief and in conjunction with its Representative to the State Legislature, initiate discussions with the Governor’s office to attain support for the appointment of a tribal representative to the Maine State Museum Commission.

The Penobscot Nation THPO, in coordination with the Maine Indian Tribal State Commission, work to formalize a consultation process between the Maine State Museum and the Penobscot Nation.

11.3 Tribal Personnel Capacity Building

We recognize that there exists a need to increase the tribe’s personnel and professional capacity in historic preservation, heritage studies, museum management, archaeology and public policy in order to be effective in influencing change in these areas at the state level. In an effort to help the tribe meet those needs, it is recommended that the Education committee of the Penobscot Rights and Resources Protection Board, in conjunction with tribal education personnel, identify and implement ways to introduce tribal students and citizens to these fields of study and make them aware of the opportunities in these areas and to encourage the pursuit of such heritage-based careers.
Appendix 1: UN Declaration of the Rights of Indigenous Peoples

Relevant Articles of the UN Declaration of the Rights of Indigenous Peoples

Article 11
1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12
1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13
1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.
Appendix 2: Legal Framework


2. The American Indian Religious Freedom Act of 1978 states that it is a policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites.
http://www.nps.gov/history/local-law/FHPL_IndianRelFreAct.pdf

3. The Archaeological Resources Protection Act of 1979 defines archaeological resources as any material remains of past human life or activities that are of archaeological interest and at least 100 years old, requires federal permits for their excavation or removal, and sets penalties for violators.
http://www.nps.gov/history/local-law/FHPL_ArchRsrcsProt.pdf

4. The Native American Graves Protection and Repatriation Act of 1990 gives ownership and control of Native American human remains, funerary objects, sacred objects and objects of cultural patrimony that are excavated or discovered on federal land to federally recognized American Indian tribes or Native Hawaiian organizations. The law also establishes criminal penalties for trafficking in human remains or cultural objects, and requires agencies and museums that receive federal funding to inventory those items in their possession, identify the descendants of and repatriate those items.

5. Executive Order 13007, Indian Sacred Sites instructs all federal land management agencies, to the extent practicable, to accommodate access to and ceremonial use of Indian sacred sites by Indian practitioners and to avoid adversely affecting the physical integrity of those sacred sites.
http://www.cr.nps.gov/local-law/EO13007.htm
Appendix 3: Archaeologist Certification Requirements

1. Principal Investigators
Principal Investigators conducting archaeological work on Penobscot Nation lands must meet the following requirements:

- Certificate of Completion for the Penobscot Nation Researcher Training (See Appendix 4).
- Secretary of Interior Standards for Professional Archaeologists (36 CFR Part 61)
  - The minimum professional qualifications in archaeology are a graduate degree in archaeology, anthropology, or closely related field plus:
    - At least one year of full-time professional experience or equivalent specialized training in archeological research, administration or management
    - At least four months of supervised field and analytic experience in general North American archeology
    - Demonstrated ability to carry research to completion.
- At least one year of archaeological field experience in Maine.
- At least six months experience with Maine pre-contact material culture.
- At least one year full-time professional experience at the supervisory level in the study of archaeological resources.

2. Academic/Student Archaeologist Certification Requirements

- Certificate of Completion for the Penobscot Nation Researcher Training (See Appendix 4).
- For individuals interested in conducting archaeological research on tribal lands who do not meet the criteria for professional archaeologist certification, they must go through Penobscot Nation Researcher Training and have a tribally certified archaeologist to sponsor and oversee the project.

3. High School and Below:
Research conducted by youth will be facilitated and approved by the Director of Cultural and Historic Preservation with coordination among appropriate departments.

4. Certification Procedure
Persons wishing to be certified to conduct archaeological work for the Penobscot Nation for either pre- or post-contact archaeology shall submit to the THPO a complete and current resume, a letter of recommendation from one or more tribal entities stating that the person has experience working effectively with tribal communities or a philosophical statement on how their work has benefited tribal communities. Student researcher must submit a letter of recommendation from a tribally certified archaeologist.
The THPO will review the application packet and determine if the applicant meets the Penobscot Nation’s professional standards requirements for archaeologists. The THPO may:

- Approve certification and submit nomination to the PTRRB for ratification.
- Request additional information before acting on an application.
- Deny certification.

Once approved by the THPO and ratified by the PTRRB, the applicant is eligible to participate in the Penobscot Nation Researcher training (Appendix 4).

5. Certification Appeals Process
   Applicant may appeal a denial of certification to the PTRRB by submitting a written request for appeal to the Director of Cultural and Historic Preservation. The Director of Cultural and Historic Preservation will coordinate the appeals process through the PTRRB.

6. Recertification
   Recertification will be required every 5 years and will be approved by the THPO. To be recertified, archaeologists must provide the THPO with a written request for re-certification, an updated resume and philosophical statement on indigenous archaeologies, and arrange to meet with the THPO in-person to discuss any changes in tribal policy or protocols regarding archaeology or research. Re-certification will not occur if the archaeologist fails to provide the THPO with the required documentation or if the archaeologist has not acted ethically or in the best interest of the tribe or tribal resources during the initial certification period.
Appendix 4: Researcher Training Process (General Researchers)

Length of Session: Full Day

Topics:
1. Fundamentals of Indigenous/Community-Based Research (all research is done with and for Penobscot people)
   a. Supporting References: Participants will be expected to familiarize themselves with the following references prior to the start of the training.
   Sonya Atalay (Topic: Community-based Archaeology)
   Martin Wobst (Indigenous Archaeologies Theory)
   Linda Tuhiwai Smith (Decolonizing Research)
   George Nicholas (Archaeology and Intellectual Property)
   Jane Anderson (Community-based Intellectual Property)
   Shawn Wilson (Research is Ceremony)
   b. Dialogue around how one’s own work fits within an indigenous research model
2. Penobscot Nation Research Agenda
   Highlight Projects/Research topics that would be beneficial to Penobscot Nation
3. Penobscot History from Tribal Perspective
4. Contemporary Issues
5. Data Collection and Dissemination Protocols and Philosophies
   Review Sample MOA
   UN Declaration Overview
6. Tour of Community (Departments may use this opportunity to highlight specific research issues/goals/protocols)
7. Discipline-Specific Component to Training
   This section is designed to focus specifically on tribal standards linked to specific disciplines (e.g. health, natural resources, legal etc.). It will vary dependent upon the group of researchers taking the training. The following outlines an archaeology-focused researcher training.

   Archaeology-Specific Topics
   a. History and Role of THPO Program
   b. Archaeology of Indian Island
   b. Federal Indian Law, Archaeology, and Tribal Consultation
   c. History of archaeology and impacts on tribes.
Local
National
d. NAGPRA and Cultural Affiliation Issues

8. Questions and Answer
Appendix 5: Inadvertent Discovery Process

Procedures Related to Inadvertent Discoveries of Human Remains, Graves, and Funerary Objects on Penobscot Nation Tribal Lands

The Penobscot Nation is committed to protecting the final resting places of our ancestors. We recognize that burial places may be inadvertently disturbed and in those rare instances, we will make every reasonable effort to ensure that our ancestors are treated with respect and dignity.

1. Purpose

The purpose of this document is to describe the procedures that will occur in the event of an inadvertent discovery of human remains, funerary objects, sacred objects, and/or objects of cultural patrimony within Penobscot Nation Tribal lands. These procedures carry out the provisions of the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. et seq.) and its implementing regulations (43 CFR Part 10) regarding consultation, treatment, and disposition of human remains and cultural items that are inadvertently discovered as a result of ground disturbance due to human or natural activity on Penobscot Nation tribal lands.

Occasionally, human remains, funerary objects, sacred objects or objects of cultural patrimony (human remains and cultural items) may become exposed or disturbed inadvertently on Penobscot Nation tribal lands. Grave or burial exposure may occur during activities conducted by archaeology personnel, contractors, or Penobscot Nation tribal citizens. Exposure of such sites may also occur due to erosion or other natural processes. The Penobscot Nation has developed these procedures to comply with the requirements of NAGPRA and the Archaeological Resources Protection Act (ARPA) in the event that inadvertent discovery does occur.

2. Points of Contact

2.1 Penobscot Nation Points of Contact
Penobscot Nation Tribal Chief
Penobscot Nation Tribal Historic Preservation Officer
Penobscot Representative-Wabanaki Intertribal Repatriation Committee

2.2 External Points of Contact

2.2 (a) Wabanaki Intertribal Repatriation Committee:
Primary Contact: Repatriation Representative, Houlton Band of Maliseet Indians
Repatriation Representative, Aroostook Band of MicMacs
Repatriation Representative, Passamaquoddy Tribe

2.2 (b) Tribal Historic Preservation Officers (THPO)
THPO, Passamaquoddy Tribe
THPO, Houlton Band of Maliseet Indians

3. Inadvertent Discovery Procedures

3.1 Identification of Human Remains

When suspected human skeletal remains or NAGPRA defined cultural items are discovered, all activity in the area will cease and the individual who discovered the remains will contact the Tribal Chief and Tribal Historic Preservation Officer (THPO). The THPO will notify the Penobscot Nation Police Department and the Penobscot Nation Game Wardens (if applicable) and the Penobscot Representative to the Wabanaki Intertribal Repatriation Committee (Penobscot Repatriation Rep.). Standard law enforcement procedures will be followed to determine if the remains are part of a crime scene. The Penobscot Nation Chief of Police will assign an investigator to the case and notify the State Medical Examiner. These officials, with support from the Tribal Historic Preservation Officer if necessary, will make an on-site determination as to whether the remains are related to a crime scene. Every reasonable effort will be made to secure remains in-place. If law enforcement officials determine that the remains are not a crime scene, and the remains are determined to be Native American, then the procedures outlined below shall be implemented.

3.2. Notification and Consultation in the Case of Inadvertent Discovery

Once it has been determined that NAGPRA-defined human remains and/or cultural items have been inadvertently discovered, the Penobscot Nation will ensure that all ground-disturbing activity within a 50-meter perimeter of the discovery will cease and the remains will be protected from further disturbance. In keeping with 43 CFR Section 10.4 – 10.6 and as described below, the THPO in concert with the Penobscot Repatriation Rep. will:

3.2 (a) Confirm with the Tribal Chief either by phone or in person, that human remains and/or cultural items have been disturbed. The THPO will provide the Chief a written confirmation of the discovery and identification within 48 hours following a Native American determination.

3.2 (b) The Penobscot Nation Police Department or other appropriate law enforcement officials will cordon off the area and the THPO in consultation with the Penobscot Repatriation Rep. will take action to secure and protect the human remains and cultural items that were uncovered including, as appropriate, stabilization and covering.

3.2 (c) As soon as possible, but no later than 3 working days after confirmation the Penobscot Repatriation Rep. will determine and implement the appropriate level of consultation with the repatriation representatives from the other Wabanaki tribes.

3.2 (d) Consultation with Tribes: The THPO and Penobscot Repatriation Rep. will consult with the members of the Wabanaki Intertribal Repatriation Committee as appropriate
to determine the proper treatment, care, and handling of human remains and burial items.

4. Treatments, Care, and Handling of Human Remains and Cultural Items

The treatment, care, and handling of human remains and cultural items inadvertently discovered will be carried out in a respectful manner under the guidance of the Penobscot Repatriation Rep. and other Wabanaki Repatriation Representatives as appropriate.

If an assessment of the human remains and/or cultural items is warranted either during or following the identification process, it will occur only to the point that the nature and extent of the items can be determined. This may include further but minimal exposure of the burial feature. Non-destructive visual inspection of human remains shall be limited to determinations of age (of both the individual and the interment), gender and cultural affiliation, while leaving any discovered human remains and/or cultural items in place and protected (specifics to be determined through consultation). To the extent possible, such visual inspection shall be performed without handling, brushing off or disarticulating human remains and/or cultural items.

5. Disposition of Human Remains and Cultural Items

The preferred treatment of inadvertently discovered human remains and/or cultural items is to leave them in-situ and protect them from further disturbance. If the remains and/or cultural items are left in place, no disposition takes place and the requirements of 43 CFR 10 Sections 10.3 – 10.6 will have been fulfilled. The specific location and any other details of the discovery shall be withheld from disclosure (with the exception of tribal officials and law enforcement officials) and protected to the fullest extent allowed by federal and Tribal law.

If human remains and/or cultural items cannot be preserved in place, those human remains and/or cultural items encountered will be removed after appropriate consultation has taken place. The THPO shall prepare, approve, and sign a written Plan of Action as described in 43 CFR Section 10.5(e) prior to excavation and removal.

If removal is determined necessary, the Penobscot Repatriation Rep. and THPO will determine the appropriate removal process, using appropriate cultural protocols and culturally sensitive archaeological methods. To the extent possible, removed human remains and/or cultural items will be cared for in the field until disposition arrangements are made. If it is necessary to remove the human remains and/or cultural items from the site, they will be held at a secure facility approved by the THPO and Penobscot Repatriation Rep. until a decision on final disposition is made. Every reasonable effort will be made to ensure that the remains are reburied as close to the original burial location as possible.

Excavation or removal of the human remains and other cultural items must follow the requirements of the Archeological Resources Protection Act (ARPA) (16 U.S.C. 470aa et seq.)
and its implementation regulations. The THPO will ensure that all permitting requirements are met prior to removal of human remains to another location.

Prior to excavation or removal, an ARPA permit must be obtained as follows:

- for private lands within the exterior boundaries of any Indian reservation, the Bureau of Indian Affairs will serve as the permit issuing agency; or
- Under ARPA, government employees and contractors must adhere to the ARPA permitting standards for data recovery, but are not issued a permit as their official duties and scope of work, respectively, will define their actions with respect to the excavation

Final custody and disposition will be consistent with 25 USC 3002 (a), “Priority of Ownership,” and 43 CFR 10.6, “Priority of Custody.”

6. Intellectual Property

All documentation related to the inadvertent discovery of human remains and/or burial items will be the intellectual property of the Penobscot Nation. The THPO will be responsible for securing and maintaining all records, photos, maps, reports and any other forms of information documenting the human remains and/or burial items. The original burial location and any subsequent reburial locations will be deemed confidential and placed into protected status.

7. Burial Site Designation

To protect sites of reinterred individuals or burials that were inadvertently discovered and left in-situ, the Penobscot Nation will designate them as cemeteries and they will be afforded protections as such.

8. Definitions

8.1 Human Remains: The physical remains of the body of a person of Native American ancestry. The term does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets. For the purposes of determining cultural affiliation, human remains incorporated into a funerary object, sacred object, or object of cultural patrimony must be considered as part of that item. [43 CFR 10.2 (d)(1)]

8.2 Funerary Objects: Items that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally at the time of death or later with or near individual human remains. Funerary objects must be identified by a preponderance of the evidence as having been removed from a specific burial site of an individual affiliated with a particular Indian tribe or as being related to specific individuals or families or to known human remains.
8.3 **Burial Site:** Any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as part of the death rite or ceremony of a culture, individual human remains were deposited, and includes rock cairns or pyres which do not fall within the ordinary definition of grave site.

8.4 **Associated Funerary Objects:** Those funerary objects for which the human remains with which they were placed intentionally are also in the possession or control of a museum or Federal agency. Associated funerary objects also means those funerary objects that were made exclusively for burial purposes or to contain human remains.

8.5 **Unassociated Funerary Objects:** Those funerary objects for which the human remains with which they were placed intentionally are not in the possession or control of a museum or Federal agency. Objects that were displayed with individual human remains as part of a death rite or ceremony of a culture and subsequently returned or distributed according to traditional custom to living descendants or other individuals are not considered Unassociated funerary objects.

8.6 **Sacred Objects:** Items that are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. These NAGPRA items are rarely found within archaeological sites. While many items, from ancient pottery sherds to arrowheads, might be imbued with sacredness in the eyes of an individual, these regulations are specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony.

8.7 **Objects of Cultural Patrimony:** Items having ongoing historical, traditional, or cultural importance central to the Indian tribe itself, rather than property owned by an individual tribal or organization member. Similar to sacred objects, objects of cultural patrimony are rarely found within archaeological sites. These objects are of such central importance that they may not be alienated, appropriated, or conveyed by an individual tribal or organization member. Such objects must have been considered inalienable by the culturally affiliated Indian tribe or Native Hawaiian organization at the time the object was separated from the group.
Attachment 6: Sample Archaeology Memorandum of Agreement

Scenario: Archaeologist is hired by Penobscot Nation to conduct development or research-related archaeological research on tribal lands.

Memorandum of Agreement Between the Penobscot Nation and Archaeologist XXX for Archaeological Research Conducted on Penobscot Nation Tribal Lands

This Memorandum of Agreement (MOA) is entered into this (day) day of (month and year), between the Penobscot Nation, and the (name of the Archaeology Company), hereinafter called the Archaeologist. This MOA outlines the responsibilities of the Archaeologist when conducting archaeological research on tribal lands. It describes the philosophical and ethical foundations that form the basis of the relationship between the parties.

WHEREAS, the Penobscot Nation is a sovereign nation.

WHEREAS, the Penobscot Nation seeks equal partnerships with archaeologists and must be included in all aspects of archaeological planning and project activities related to Penobscot heritage.

WHEREAS, the Penobscot Nation values having mutually beneficial relationships with archaeologists engaged in work related to Penobscot culture and heritage. We consider our cultural heritage to be important and sacred. We seek to foster and maintain relationships with archaeologists through open and honest communication.

WHEREAS, Penobscot people have been, and continue to be, harmed by members of the archaeological community through culturally inappropriate approaches to archaeological research. These approaches include excavating burials without tribal consultation, displaying ancestral remains, designing archaeological research without tribal input and assuming control over archaeological and other heritage resources.

WHEREAS, certain archaeological methodologies and theories surrounding the nature of archaeological material are not aligned with Penobscot world views. We encourage archaeological research that incorporates Penobscot culture and is conducted with an understanding that cultural sensitivities surround how archaeologists have interacted with us in the past.

WHEREAS, archaeology as a western discipline has had an active role in the colonization of the Penobscot people. Historically, archaeologists collected large quantities of indigenous material culture and often curated, studied, and displayed these materials without free prior and informed consent and/or input from descendant communities. The archaeological practice of collecting information on human settlement, subsistence and technological patterns from archaeological resources neglected the interests of tribal communities and imposed a non-
indigenous interpretation on the material culture and tribal histories.

WHEREAS, the practice of transferring culture and knowledge orally from one generation to another was disrupted and damaged through the colonization process. Colonial practices such as forced acculturation, language suppression, genocide, and structural violence have left substantial gaps in tribal knowledge relative to heritage and culture. The recovery of such materials is important to the Penobscot Nation and its people.

WHEREAS, the Penobscot people are personally and emotionally connected to ancestral remains and archaeological materials as they represent our kinship with our ancestors and the thoughts, knowledge, ideas, actions, lives, history, and voices of our people.

WHEREAS, archaeological materials possess a spirit and energy similar to humans, and they are considered sacred by Penobscot people. All archaeological materials and related information recovered from archaeological sites are essential to repair our peoples’ connection to our past.

WHEREAS, re-engagement with materials recovered from archaeological sites has the potential to evoke strong emotional responses among Penobscot people making all material potentially sensitive and important to maintaining Penobscot identity.

WHEREAS, Penobscot heritage extends beyond contemporary tribal boundaries, and heritage sites of significance are located throughout what is now referred to as the state of Maine.

WHEREAS, today, archaeology is one mechanism we use to engage with our ancestral past in order to strengthen our cultural heritage.

ARCHAEOLOGY COMPANY INSERT WHEREAS’ HERE

NOW, THEREFORE, Penobscot Nation and the Archaeologist agree that the following stipulations shall govern the relationship between the parties, the scope of work and all of its parts until this MOA expires or is terminated:

The Intellectual Property (IP) surrounding Penobscot heritage is the property of the Penobscot Nation. All cultural materials and work products related to archaeological work on Tribal lands belong to the Penobscot Nation. These materials include, but are not limited to, artifacts, background research, field notes, catalogues, photographs, digital data, interviews, and other materials as determined by the Penobscot Tribal Rights and Research Protection Board (PTRRPB).

The Archaeologist will conduct excavations in a professional and appropriate manner that reflects the sensitive nature of archaeological research within the Penobscot community. The Archaeologist agrees to the following:

Principal Investigators must meet Penobscot Nation certification standards to conduct
archaeological work on Tribal lands (Attachment xxx).
The Archaeologist in consultation with the Tribal Historic Preservation Officer (THPO) will submit a project plan and scope of work to the PTRRPB for approval prior to commencing work. Crews working on behalf of the Archaeologist will participate in an Indigenous archaeologies/Penobscot culture orientation prior to conducting any work on Penobscot Indian territory. This training will be provided by the Penobscot Nation Cultural and Historic Preservation Department.

Both parties understand that archaeological materials and sites are non-renewable resources. Since these resources play an integral part in the maintenance of Penobscot culture and identity, stewardship of and curation decisions surrounding archaeological materials in which the Penobscot Nation has an interest rest solely with the Penobscot Nation.

Both parties understand that in the event of an inadvertent discovery of human remains, the Archaeologist will follow procedures as directed by the Tribal Historic Preservation Officer (THPO).

Both parties agree that the Archaeologist will employ and/or train at least (1) tribal archaeology student or tribal employee of the Tribal Historic Preservation Office to assist with field and/or laboratory work related to the scope of work. This employment will last for a period of xxxx.

Both parties agree that archaeological materials recovered while conducting archaeological services on tribal lands will be curated in a federally approved repository selected by the Penobscot Nation.

Both parties agree that all analyses of archaeological materials will be conducted in accordance with federal standards and Penobscot cultural protocols. The Penobscot Nation THPO will inform the Archaeologist of any special cultural protocols surrounding the handling of archaeological materials when the Archaeologist participates in the Penobscot Nation Archaeological Certification Process and through the field crew orientation process prior to the start of the project. The Archaeologist agrees to abide by cultural protocols for the handling and care of artifacts during analysis.

Both parties agree that all information surrounding cultural protocols related to archaeological sites, burials, or artifact handling and care is not to be published or disclosed in a public venue or through any form including print, electronic media, or verbal communication, without the prior written permission of the PTRRPB.
This agreement becomes effective on the date of the latest signature below:

Independent Contractor Agreement between the Penobscot Nation and (Archaeologist Name)

The Penobscot Nation is contracting with XXX for archaeological services. This is a (Phase I Archaeological Survey designed to identify historic properties within the area of potential effect) of project XXX.

This Agreement is made on (insert date) between the Penobscot Nation and XXXX (the Archaeologist).

Subject to the terms and conditions as set forth herein, the Penobscot Nation retains XXX as an independent contractor and XXX hereby accepts Penobscot Nation’s retention to perform services described herein.

**Contractor Obligations:**

1. **Services and Deliverables.**
   
   1.1 *Scope of Work.* The Archaeologist will provide archaeological services to the Penobscot Nation as outlined in the scope of work following approval by the Penobscot Nation Tribal Historic Preservation Officer.

   1.2 *If sub-contracting is part of the work plan, this section should include language as follows:* Penobscot Nation hereby acknowledges that the Archaeologist intends to sub-contract some portions of the Scope of Work to XXXX, and both the Penobscot Nation and the Archaeologist hereby affirm that the provisions of this Agreement shall apply uniformly to said sub-contractor as if it were the Archaeologist. It shall be the responsibility of the Archaeologist to supply to the Penobscot Nation the full name and details of the subcontractor as well as a signed MOA addendum by the subcontractor before the subcontractor begins his or her work.

   1.3 *Standard of Performance.* The Archaeologist represents and warrants that it (and any and all of its sub-contractors) has the necessary knowledge, experience, abilities, skills and resources to perform its obligations under this Agreement, and agrees to perform its obligations under this Agreement in a professional manner, consistent with federal and industry standards.

   1.4 *Licenses and Permits; Compliance with Law.* The Archaeologist represents and warrants that it (and any and all of its sub-contractors) has all licenses and permits necessary to conduct its business and perform its obligations under this
Agreement, and agrees to comply with all applicable federal, state and tribal statutes, regulations, codes, ordinances and policies in performing its obligations under this Agreement.

1.5 Independent Contractor Relationship. The parties intend that the Archaeologist’s relationship to Penobscot Nation in providing services hereunder shall be that of an independent contractor. Nothing in this Agreement, nor any performance hereunder, is intended or shall be construed to create a partnership, joint venture or relationship of agency or employment between Penobscot Nation and the Archaeologist or any of its sub-contractors. In providing services hereunder, the Archaeologist shall represent him/herself to third parties as an independent contractor to the Penobscot Nation and shall not hold him/herself out as having any authority to obligate the Penobscot Nation.

1.6 Confidentiality; Name or Logo Use. The Archaeologist shall treat all information disclosed by the Penobscot Nation pursuant to this Agreement as confidential, and the Archaeologist shall not disclose or use any such information except as required in connection with the performance of his/her obligations under this Agreement. The Archaeologist shall not use Penobscot Nation’s name or logos in any manner or media (including, but not limited to, press releases, promotions, advertisements or solicitations) without the prior written approval of Penobscot Nation.

2. Assignment of Rights Regarding Deliverables.

2.1 Assignment. The Archaeologist does hereby assign, grant, and deliver to Penobscot Nation, and the Penobscot Nation hereby accepts, the entire worldwide right, title, and interest of every kind and nature whatsoever in and to the deliverables under this Agreement, including but not limited to any related intellectual property rights.

2.2 Non-Infringement. The Archaeologist represents and warrants to the best of his/her knowledge that the use of the deliverables under this Agreement shall not infringe or otherwise violate the copyright, or other intellectual property rights of any third party.

3. Fee; Expenses; Invoicing.

3.1 Fee; Expenses. In consideration of the Archaeologist performing his/her obligations under this Agreement, the Penobscot Nation will pay the Archaeologist in the amounts and according to the schedule set forth in Section XXX of the Archaeologist’s proposal to Penobscot Nation, dated XXXX, XXXX, (Attachment 2). The Archaeologist shall be responsible and liable for any and all
costs and expenses related to the performance of his/her obligations under this Agreement.

3.2 Invoicing. The Archaeologist will provide Penobscot Nation with an invoice supporting each request for fee payment.

4. Term; Termination; Survival.

4.1 Term. This Agreement shall have an initial term of XXX commencing on the date of this Agreement, unless sooner terminated pursuant to Section 8.2 below.

4.2 Termination. This Agreement may be terminated prior to the completion of the Archaeologist’s services (i) by written agreement of the parties, or (ii) by either party upon a breach of this Agreement (which includes, but is not limited to, the Archaeologist’s services being deemed unsatisfactory by Penobscot Nation) by the other party that remains uncured 10 days after receiving written notice of such breach from the terminating party. In the event of a termination of this Agreement pursuant to this Section 8.2, Penobscot Nation and the Archaeologist will in good faith negotiate an appropriate reduction in the fees payable to the Archaeologist pursuant to Section 3 above.

4.3 Survival. Notwithstanding anything in this Agreement to the contrary, the provisions of Section 5 below shall survive any expiration or termination of this Agreement, and each party shall remain obligated to the other party under all provisions of this Agreement that expressly or by their nature extend beyond and survive the expiration or termination of this Agreement.

5. Insurance; Indemnification.

5.1 Insurance. The Archaeologist affirms that it has, and shall maintain during the term of this Agreement, any and all appropriate insurance policies including, but not limited to, workers’ compensation insurance, commercial general liability insurance, automobile liability insurance, professional liability insurance and excess liability insurance. Insurance coverage will be in an amount as deemed reasonable for the scope of work and consistent with established standards of professional archaeology. Prior to performing services hereunder, the Archaeologist shall provide Penobscot Nation with certificates of insurance evidencing such policies. Any commercial general liability insurance shall include coverage for the Archaeologist’s independent contractors and blanket contractual coverage for the Archaeologist’s obligations and liabilities under this Agreement, including, but not limited to, the indemnification obligations set forth in Section 5.2 below.
5.2 **Indemnification.** The Archaeologist shall indemnify, hold harmless, protect and defend Penobscot Nation and its elected officials, trustees, officers, employees, volunteers and representatives (the “Indemnified Parties”) for, from and against any and all demands, claims, suits, damages, losses, liabilities, costs and expenses, including, but not limited to, court costs and attorneys’ fees (the “Indemnified Matters”), of any nature whatsoever (including, but not limited to, damage to or loss of property, bodily injury or death), directly or indirectly arising out of or in connection with the performance of the Archaeologist’s obligations under this Agreement. The Archaeologist’s indemnification obligations under this Section 5.2 shall apply whether the Indemnified Matters are due in part to the concurrent fault or negligence of the Indemnified Parties or others, but shall not extend to such concurrent fault or negligence. The Archaeologist’s defense obligations under this Section 5.2 shall be provided by attorneys approved by Penobscot Nation, which approval shall not be unreasonably withheld.

6. **Miscellaneous.**

6.1 **Power and Authority; Due Authorization; No Conflict; Enforceability.** Each party represents and warrants to the other party that (i) such party has the power and authority to execute, deliver and perform its obligations under this Agreement, (ii) the execution, delivery and performance of this Agreement have been duly authorized by such party and do not and shall not conflict with any agreement or instrument to which it is bound, and (iii) this Agreement constitutes the legal, valid and binding obligation of such party, enforceable against it in accordance with its terms.

6.2 **Entire Agreement; Severability; Further Assurances.** This Agreement, including any exhibits attached hereto, constitutes the entire agreement between the parties, and supersedes all prior and contemporaneous agreements, understandings and negotiations, with respect to the subject matter hereof. In the event any provision of this Agreement is determined to be invalid or unenforceable, it is the desire and intention of the parties that such invalidity or unenforceability not invalidate or render unenforceable the remainder of the Agreement and that such provision be reformed and construed in such a manner that it will, to the maximum extent practicable, be deemed valid and enforceable, and the rights and obligations of the parties shall be construed and enforced accordingly. Each party shall execute and deliver such further documents and take such further actions as may be required or reasonably requested by the other party to effect the purposes of this Agreement.

6.3 **No Assignment; No Amendment; No Waiver.** This Agreement (i) may not be assigned or transferred, in whole or in part, by operation of law or otherwise, by either party without the prior written consent of the other party, and (ii) may
not be amended or modified, by course of conduct or otherwise, except in a writing duly executed by each of the parties. Any waiver of any provision of this Agreement shall be in writing duly executed by the waiving party. The failure or delay by either party to seek redress for any breach or default under this Agreement, or to insist upon the strict performance of any provision of this Agreement, shall not constitute a waiver thereof or of any other provision of this Agreement, and such party shall have all remedies provided herein and at law and in equity with respect to such act and any subsequent act constituting the same.

6.4 **Governing Law; Jurisdiction and Venue; Attorneys' Fees.** This Agreement shall be governed by, and construed and enforced in accordance with, the laws and regulations of the Penobscot Nation and of the State of Maine. The parties irrevocably consent to the jurisdiction of the tribe, and agree that the Penobscot Nation Tribal Court shall be an appropriate and convenient place of venue to resolve any dispute with respect to this Agreement. In the event either party commences any proceeding against the other party with respect to this Agreement, the parties agree that the prevailing party (as determined by the authority before whom such proceeding is commenced) shall be entitled to recover reasonable attorneys' fees and costs as may be incurred in connection therewith in addition to any such other relief as may be granted.

7. IN WITNESS WHEREOF, the Archaeologist and Penobscot Nation have duly executed and delivered this Agreement as of the date signed.

8. Penobscot Nation Representative Archaeologist

9. By___ By___

10. Name:___ Name:___

11. Title:___ Title:___
**Penobscot Community Intellectual Properties**

Intellectual properties are cultural expressions that embody our collective heritage, culture, traditions and way of life, including:

<table>
<thead>
<tr>
<th>Artistry</th>
<th>Language</th>
<th>Penobscot Dictionary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Craftsman-ship</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ancestry</td>
<td>Spiritual practices</td>
<td></td>
</tr>
<tr>
<td>Traditional Ecological knowledge</td>
<td>Dance, music, stories, games</td>
<td></td>
</tr>
<tr>
<td></td>
<td>World view</td>
<td>Knowledge of &amp; engagement with the physical world</td>
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</tbody>
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To understand how we can protect our intellectual property, visit our booth on Community Day (August 3) – or go to [www.penobscotculture.com](http://www.penobscotculture.com)
Which of these dancers poses a threat to the Penobscot Nation’s intellectual property rights?

To find out who and why, please visit our booth on Community Day (August 3).

Or go to www.penobscotculture.com

And be sure to complete our survey and enter the drawing to win either a $200 or $300 pre-paid credit card. Surveys are available at the Department of Cultural and Historic Preservation, the Chief’s office, or the website above.

*Penobscot Nation Intellectual Property Working Group*
How do we keep people from exploiting our culture and history for profit?

To learn more, please visit our booth on Community Day (August 3) or go to www.penobscotculture.com. And be sure to complete our survey and enter the drawing to win either a $200 or $300 pre-paid credit card. Surveys are available at the Department of Cultural and Historic Preservation, the Chief’s office, or the website.

*Penobscot Nation Intellectual Property Working Group*
Attachment 8: Community Survey Questions

Penobscot Nation Intellectual Property Working Group Survey

Who can participate?
Penobscot Nation Tribal members ages 18 and over

What do I have to do?
Fill out the survey on community intellectual property and safeguarding our cultural heritage.

Why is this survey being conducted?
To assist the Penobscot Nation with identifying ways to safeguard and preserve Penobscot culture and heritage.

When: Surveys will be available from July 15, 2013 - August 3, 2013. Drawings will be held on Penobscot Nation Community Day after the community meal. FULLY COMPLETED SURVEYS will have the opportunity to win either a $200 or $300 pre-paid credit card! One survey per person please.

Over the past 2 years, a Penobscot Nation workgroup has worked to identify mechanisms for addressing issues related to tribal research and intellectual property. Our Tribe’s intellectual property includes a wide range of cultural elements such as songs, research about our culture, books about our history and culture, artistic creations like canoes, and even things like objects found in archaeological sites. Your input is important to this process and we encourage you to offer your opinions about how the Penobscot Nation should approach the protection of our collective cultural heritage. For supporting documentation, please visit: www.penobscotculture.com.
On a scale of 1-10 (10 being very important), how important is it for you that the Nation identify and institute strategies to protect our cultural heritage from inappropriate use and misrepresentation (circle one): 1 2 3 4 5 6 7 8 9 10

On a scale of 1-10 (10 being very important), how important is it that the Nation invest resources (e.g. departmental personnel time) in oversight of research within tribal territory or on tribal culture (circle one): 1 2 3 4 5 6 7 8 9 10

Should the tribe’s research oversight process apply equally to tribal members as well as non-tribal researchers? Why or why not?

Would you favor a tribal process that certifies researchers wishing to conduct research on tribal people, lands or culture?

Have you personally encountered anyone exploiting or profiting from the Nation’s intellectual property, such as songs, stories, imagery? If so, can you give an example?

On a scale of 1-10 (10 being most important), how important is it that the Nation controls traditional songs (circle one): 1 2 3 4 5 6 7 8 9 10

On a scale of 1-10 (10 being most important), how important is it that the Nation controls what is done with archaeological objects (circle one): 1 2 3 4 5 6 7 8 9 10

On a scale of 1-10 (10 being most important), how important is it that the Nation controls the kinds of books that are written about the Tribe (circle one): 1 2 3 4 5 6 7 8 9 10

On a scale of 1-10 (10 being most important), how important is it that the Nation controls access to the Penobscot language (circle one): 1 2 3 4 5 6 7 8 9 10

What are some advantages and disadvantages of the Tribe creating guidelines regarding the protection of our intellectual property?

Are there times when a family should have more control over cultural intellectual property (songs, designs, etc.) than the Nation as a whole? In what situations should they have more control?

What are some disadvantages to having a formal board that oversees Intellectual property issues and tribal research?

What are some ways to engage the community in learning more about the Nation’s intellectual property?
Attachment 9: Supplemental Information - Reflective Questions

Near the end of the project, members of the IP working group were asked to respond to a set of IP-related questions developed by the IPinCH steering committee. Several members of the group provided insightful commentary that speaks to the breadth of IP issues Indigenous peoples are currently facing. Their responses are provided below:

Reflective Questions to Include in Your Final Case Study/CBI Report

1. What would you say are the most important reasons for protecting or safeguarding cultural heritage?

• Create a dialog about it with future generations, prevent cultural exploitation, raise awareness inside and outside the community

• It is an expression of our sovereignty both in terms of protecting those things that are important to us and also in defining them for ourselves. Also, it serves to preserve our identity as a native people and a tribe. We have a responsibility to do so for our ancestors and for our descendants.

• I think the most important reason for safeguarding cultural heritage should be strictly a safeguard of accurate information that is true and reflective of any point in time. Culture is ever changing and that should be understood as well and is also why this work is challenging.

• Due to the atrocities committed and being committed on our indigenous people and lack of self-determination of our tribe, if I or we do not take an active role in protecting the connection we still have a hold on, all will be lost in short order. We cease to be Penobscot without the protection of our heritage, our language, and unique customs. Passing on our traditional knowledge to our children and protecting that knowledge from wasting away is, in my opinion, one of the most important duties I have as a father and a Penobscot.

2. What challenges face communities who wish to be caretakers of their cultural heritage?

• Building an infrastructure, community education, limited availability of legal remedies

• One major challenge is identifying the human and financial resources to devote to such an effort. Another is acquiring the knowledge necessary to do so effectively. Getting buy in from the tribal community for the importance of this effort is also a challenge.

• What are we trying to preserve (stories, identity (what does this mean today?), language, music), what can be done in regard to in accurate information already out in the public, if anything, WHO is going to do this, how are they going to monitor what is happening, sustainability of the group (what happens if a leader steps down) and what can be done for
enforcement if anything, if somebody is portraying themselves or the culture under false pretense?

• Some of the challenges I see that communities who wish to formally begin the caretaking of their cultural heritage is achieving community buy in and more specifically trust in one another. Also they will need to find a champion to coordinate and facilitate the process. And of course, acquiring the funding for the process.

3. What, in your experience, seems to work best as a strategy (or strategies) for protecting cultural heritage? Alternatively, what do you see as the main path in a community’s journey to protect cultural heritage?

• The strategies have to combine public education, a community-based infrastructure for cultural practitioners and researchers (like a heritage center), and a good combination of carrots and sticks for outsiders interested in cultural heritage.

• The key first step is to get a group of dedicated and motivated group tribal members to undertake this work. Next it is important to identify what you are trying to protect. That is a difficult process. The most profound part of this experience for me is when we as a group and individually were confronted with the question of what it means to be Penobscot. Culturally we come from such a fractured experience. It’s not always clear what has been passed down to us by our ancestors and what has been imposed on us by the dominant society. Defining for ourselves who we are and what is important to us culturally is a daunting task. Once you are able to identify what you are trying to protect then acquiring the knowledge of how to protect it is crucial. Then creating the processes and protocols to protect it and identifying the resources to carry out that protection are essential next steps. Finally, it is necessary to continue with this work and sustain the systems implemented to carry it out.

• The number one strategy would be first making it known that this work is happening within the tribe, get more input as to what should be protected, community involvement, continuous government involvement (periodic updates to council) and education. Education is extremely important for community, the group and the government! The main path for the journey, is the journey! It is a long journey and very complicated. If you understand it to be a journey that has to be adjusted and re-evaluated, just as life, then more people may support it.

4. What do you think are important guidelines or strategies for conducting community-based cultural heritage research (in your community, in general, or both)?

• Informed consent on a community basis—either through a review board or formal governmental process. Flexibility of the researcher in topic area.

• I support the idea that the research should have relevance to our tribal community and that there be some beneficial outcome for the tribe. Guidelines need to be in place to insure the
protection of tribal members, preserve and protect tribal IP rights and incorporate tribal cultural awareness into the agreed upon research protocols.

• In general for carrying out community based cultural research is identifying what to protect, how and why and then getting buy in from the key players, identifying the key players and keeping them updated.

• There needs to be assurances that it’ll be a mutually beneficial agreement. Also during process, the researcher must be communicative with the community on progress. And also be willing to give constant updates on progress and to ensure that the people are protected in line with the agreement conditions set forth by the participating community.

5. What are key ingredients for good research relationships and research outcomes? Also, what, in your experience, causes these relationships or projects to break down?

• An understanding of what each side wants from the research from the very beginning is critical. That is the only way informed consent can really happen. The projects break down because of changing political issues within communities and the inflexibility of researchers.

• I don’t have much experience in this area, but as with any good relationship communication is key as well as building trust between the parties. I support the idea of designating a key contact person within the administration to monitor the project and be available to assist and guide the researcher. Creating a written agreement that clearly defines and outlines each of the parties’ responsibilities and rights is also crucial.

• Key ingredients for research relationships are understanding, clear objectives, clear outcome, clear process, safety for all parties to speak up, trust that guidelines are followed and the information is used and disbursed as specified. Breakdowns can occur when things are not clear, when people are just going to do as they please anyway (lack of respect for the process). One good suggestion in general but especially in this process would be to ask for clarification of the expectations (are they clear?) or ask people to repeat what they think the expectations are in their own words.

6. What fundamental values should guide a researcher working on heritage issues within a community-based context?

• Collaboration and flexibility are keys. Everyone is a knowledge keeper and has a responsibility to each other.

• The fundamental principle of the researcher in this context should be to do no harm. Respect tribal people and tribal culture in all aspects of your work.

• Fundamental values: Respect of the heritage being studied, of the community, know that they are not the expert in this case and understanding of why cultures, communities and/or people
are unique because they all are!

- Respect for the researched community and empathy for past indiscretions and how they contributed to current mistrust and apprehension with outside researchers. Also I think knowing and understanding the fundamental values of the community being researched will help guide the researcher in clarifying and solidifying their values that they bring to the research agreement.

7. What skills or capacities do researchers from outside a community need to be more effective in their research relationships? What skills or capacities do communities or other organizations with which you work need to be more effective in doing community-based research?

- Listening and flexibility. Initiative and relentlessness in engaging people is also critical.

- I would say to never, ever assume to know what it truly is like to be a Penobscot or an indigenous person if one is not from the community. One could research within the community for a very long time and assume they have a very well-grounded idea of what it is like to be indigenous. But unless you’ve grown up Penobscot, been in the household, speak in the language, think in the language....you will never really know the thought process of indigenous people. Empathy and respect is always necessary in these research relationships.

- I am repeating myself and I think in any relationships: Friends, working partners, husband and wife you need clear communication, trust, understanding and good listening skills. One thing is to check for understanding as well. What I say to one person may be interpreted completely different by another person depending on my body language, tone of voice etc. I think people coming into a community need to realize that they need to do research before their research. Same for communities. Look at previous studies or research this person has done. Identify issues and be able to speak to those at initial meetings with the researcher.

8. What legal frameworks, policies, protocols or other tools have you turned to help you in your cultural heritage work? What approaches have been useful and which have not? Does your community or any of the communities or organizations you work with have laws, practices, expectations, protocol(s) or guidelines for research that may be shared with others? If so, please provide copies of these in the appendices of your report if it is appropriate for the IPinCH project to have them. What advice do you have for communities regarding developing or using research guidelines or protocols?

- One thing to think about is what kind of support do you have from tribal government, how far do you want to take for enforcement of people who breach research contracts or misrepresent themselves, do you want your process to include non-natives or tribal people as well? It is a good idea to document the best you can what your processes are, guidelines for research and then what about after or if people violate those. Another issue is to draft policies, you also want to draft them so you are clear enough to achieve your objective but not too specific to lock yourself into certain processes. Finally know
that you may have to re-visit any part of your plan for protecting your heritage. What works
now may not work in a couple months or years. This may change as your tribal government
changes, it may change if people quit their jobs or get fired, anything can change it and how will
your tribe handle those changes.

9. What, if any, government or other institutions or authorities have oversight over your work in
this project? How has this affected planning, implementation, benefits, access to results,
consequences, etc.

• The other entities that have oversight in this are the funders of the project, the tribal council
and the chief. For this project specifically, not one of these entities impacted our work until the
final products which actually really, really helped the process. I think people doing this work
have to be comfortable to be able to speak freely and they were able to.

10. What would the community you worked with like to see in place that would continue to
help support its future efforts in regard to similar issues or research initiatives?

• Support for the infrastructure is critical in these communities—identify a champion and
supporting them monetarily and administratively.

11. What other experiences and perspectives can you share that illustrate examples of good (or
poor) practices, policies and lessons learned concerning community-based studies of cultural
heritage?

• The biggest barrier was educating the community on the fact that the tribe is carrying out this
work. Start education right away, maybe open a couple sessions for community input and do
periodic updates for the tribal council and chief. One issue for our group was that new council
members did not get the information and didn’t know that this work was being carried out.