

INDIAN LAW

RESOURCE CENTER
JUSTICE FOR INDIGENOUS PEOPLES

The Indian Law Resource Center is a non-profit law and advocacy organization established and directed by American Indians. We provide free legal assistance to indigenous peoples who are working to protect their lands, resources, human rights, environment and cultural heritage. The Center seeks to overcome the grave problems that threaten Native peoples by advancing the rule of law, by establishing national and international legal standards that preserve their human rights and dignity, and by challenging the governments of the world to accord justice and equality before the law to all indigenous peoples of the Americas.



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Indigenous Peoples and Sustainable Development:

PROTECTING OUR RIGHTS

*How can we make sure that
development initiatives are really
sustainable and bring positive results
for the well-being of our communities?*

One of the best strategies we can use is to demand that all development initiatives respect our human rights. This guide is designed to help indigenous peoples understand what our rights are and what obligations the governments, agencies, and businesses that finance development projects have when they impact our lands and our communities.

Indigenous peoples know that we must live in harmony with the earth if we are to survive as peoples, and indigenous peoples have developed effective strategies for living sustainably. We also experience on a daily basis the effects of unsustainable practices—the environmental destruction and the changing climate brought on by unregulated, unrestrained development.

We have seen many “development” strategies that not only destroy the environment, but take our lands and impoverish our communities—from agricultural development, to dams and roads, even environmental conservation projects have sometimes resulted in the expulsion of indigenous peoples.

More recently, governments and NGOs are beginning to talk of “sustainable development” and the green economy, introducing new strategies and mechanisms to address climate change, such as payment for ecosystem services or Reducing Emissions from Deforestation and Forest Degradation (REDD). “REDD cowboys” and businesses are even seeking opportunities to profit from the use of indigenous peoples’ environment and natural resources.

Indigenous peoples are in many ways the guardians of the natural world. It has been demonstrated that one of the more effective means of conserving the earth’s biodiversity and natural systems is by protecting indigenous peoples’ rights to our lands, territories and resources, and strengthening our capacity to effectively manage our territories. Unfortunately, many development initiatives instead seek to confiscate indigenous peoples’ resources or restrict our access to our own lands. Others try to put a price on our environments and criminalize our livelihoods. If development is going to be sustainable and benefit indigenous peoples, development projects must respect our human rights.

RIGHT TO DEVELOPMENT

“1. ...[E]very human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes...the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.”

UN Declaration on the Right to Development, article 1.

“Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development.”

UN Declaration on the Rights of Indigenous Peoples, article 23.

ADVOCATE FOR YOUR RIGHTS

All human rights work involves politics as well as law. No matter what steps are taken to promote our indigenous rights, it is essential that Indian leaders and Indian rights advocates meet with human rights officials and government representatives to present the Indian position. As more of our Indian leaders appear before domestic and international organizations to present their case regarding development initiatives, to lobby for Indian rights and for better international legal protection for those rights, the likelihood of success will increase.

What can I do?

- *Educate your community about your rights.*
- *Work to strengthen your own institutions and governance structures.*
- *Research any development proposals and the sponsors of those proposals.*
- *Communicate your rights to your local and national government and any agencies financing or implementing development projects that might affect you.*
- *Demand human rights impact assessments.*
- *Use your right to withhold or give consent for projects directly impacting your lands, resources or your rights.*
- *If your rights are violated, contact national indigenous and human rights and environmental authorities, including prosecutors. File a complaint with the ombudsman or complaint mechanism at the bank or agency that is funding the project.*
- *If you can't get justice in your national courts, consider filing a claim with a regional human rights system like the Inter-American Commission on Human Rights, or contacting the United Nations Special Rapporteur on the Rights of Indigenous Peoples.*
- *Join the Indian Law Resource Center email list and learn more at www.indianlaw.org or send us an email: dcoffice@indianlaw.org.*



WHAT WOULD A HUMAN RIGHTS-BASED APPROACH TO SUSTAINABLE DEVELOPMENT LOOK LIKE?

For sustainable development to actually be successful requires a paradigm shift away from the current development model that views indigenous peoples as an obstacle, or a risk to be mitigated. Instead, development strategies must recognize the critical role that indigenous peoples play in sustainable development and in combating climate change. Strategies must respect our rights of self-determination and be based on an understanding that protecting the rights and livelihoods of indigenous peoples leads to more effective development and environmental protection.

It has been shown, for instance, that protection of indigenous peoples' territories is more effective at preventing deforestation than creation of conservation areas. Likewise, when our peoples have secure land and resources, we do better in terms of all human development indicators.

... WHAT DOES THAT MEAN?

There are four main components of human rights-based development programs and policies: (1) they are directed at fulfilling human rights; (2) they identify rights holders and their rights and corresponding duty-bearers and their duties, (3) they work towards strengthening the capacities of indigenous peoples and other rights holders to claim their rights and of duty-bearers, like States and businesses, to meet their obligations; and (4) they are guided in all phases by standards derived from international human rights law.

UNDERSTANDING OUR RIGHTS

WHAT ARE INDIGENOUS PEOPLES' HUMAN RIGHTS?

Human rights are the rights that all individuals have - without discrimination. These rights are **inherent** which means that they exist whether or not they are recognized by a government. Human rights are also **inalienable**. This means that no one can take them away.

In addition, indigenous peoples also have collective rights as peoples. These **collective rights** include the right to exist as a distinct people with our own political and economic systems, to own our lands and natural resources collectively, and to practice and disseminate our cultures to future generations.

What can I do?

Demand that development agencies adopt safeguard measures to protect the collective nature of our rights as indigenous peoples, not just the rights of individuals or non-indigenous communities.



WHERE ARE HUMAN RIGHTS FOUND?

Our rights can be found in international human rights instruments, like the United Nations Universal Declaration on Human Rights or the International Labor Organization Convention 169 on Indigenous and Tribal Peoples. Indigenous peoples are also entitled to the human rights found in the body of law known as customary international law. These are the norms generally agreed upon and practiced by the international community, and are binding on all countries.

WHAT IS THE UN DECLARATION?

The United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) was passed by the United Nations in 2007. It is the only human rights instrument that was drafted with considerable participation of indigenous peoples, and the most recent statement of the law focusing on the collective rights of indigenous peoples. It represents the international consensus on the minimum standard to ensure the survival, dignity, and well-being of the world's indigenous peoples.



HUMAN RIGHTS OBLIGATIONS

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States, international agencies, and private companies must respect the human rights of all individuals and communities, including indigenous peoples, consistent with international human rights standards.

FOR EXAMPLE

If a domestic law limits our property rights to only possession and not ownership of our lands, this does not change the State's obligation to respect our rights under international law. We are still entitled to full ownership rights to our lands, and the State has an obligation to afford us those rights because they are our human rights.



What can I do?

Demand that development proposals include financial, legal, and technical support to ensure that indigenous peoples are able to participate in evaluation, design, and implementation in a meaningful way.

Because of our right of self-determination and full ownership rights to our lands, territories, and resources, indigenous peoples have the authority to give or withhold our free, prior and informed consent for any development projects that will 1) take place on our lands; 2) involve, interfere with, or diminish our natural or cultural resources; 3) or directly and substantially affect our lands, territories, natural or cultural resources, or the health and welfare of our people, or other rights. UN Declaration, articles 26, 28, 19, 32.

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FPIC is a process for seeking a consensual agreement (1) without coercion or manipulation, (2) sought sufficiently in advance of any authorization of activities, (3) based on full and understandable information on the proposed project and likely impacts, and (4) which respects both the community's internal collective decision-making processes and authority or representative structure. The specific process for a particular indigenous community to give or withhold FPIC must be decided by that community in accordance with its rights of self-determination and self-government, customs and traditions. Indigenous peoples have the authority to give or withhold FPIC at any point during the life of the development project, not just at the proposal stage.

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Protection of indigenous peoples' rights to lands, territories and resources requires that indigenous peoples receive an equitable share of any benefits derived from those resources, including any sustainable development or climate funds or sale or trading of carbon credits. Sustainable development projects must have policies to ensure equitable and transparent distribution of benefits in a way that does not infringe on indigenous peoples' self-determination or cultural rights and avoids conflict within and among communities. Indigenous peoples must be involved in the monitoring of the distribution of benefits.

Everyone has the right to an effective remedy for any violation of their human rights. The UN Declaration guarantees indigenous peoples “the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights.” UN Declaration, article 40.

States must ensure that indigenous peoples whose rights have been violated can have their case heard by fair and effective courts or administrative procedures. Additionally, States and agencies supporting development projects should create and provide access to independent and transparent mechanisms that allow communities to lodge complaints where a development project results in (1) a violation of a right of the community, (2) environmental harm, or (3) lack of compliance with applicable laws and policies. The mechanism must have the power to secure corrective action by the financing or implementing agency or project host.



Demand that every development project proposal include an effective project complaint mechanism for impacted communities.

States have an obligation to raise domestic laws and policies to the relevant human rights standards found in international law.

States, international agencies, and companies have an obligation to diligently do what is necessary to prevent human rights abuses from occurring or to avoid being complicit in human rights abuses, including abuses by other parties.

If a State opens an area to development, it has an obligation to ensure that no human rights violations result, even if those violations are caused by a private investor or a conservation organization. The private investor and the conservation organization also have an obligation to ensure that they aren't involved in projects where the host government is violating a community's human rights.

States and international agencies have the obligation to provide redress to indigenous peoples because of human rights violations, which implies compensation for any harms that arise out of the violations. International agencies and private companies also have an obligation to address and compensate human rights abuses.

When our lands have been affected, those lands must be restored, or if that is not possible, compensation must be provided in the form of lands, territories and resources equal in quality, size, and legal status.

Human Rights Impact Assessments (HRIAs) are a critical tool for assessing a development project's human rights risks or impacts and making sure that development projects respect local communities' rights. HRIAs identify local communities who might be impacted by a project and how the project would affect those communities' human rights. HRIAs also identify what human rights obligations the project sponsor has and what measures must be taken in order to prevent human rights violations, including whether a project should be implemented or not. HRIAs should be carried out by the government or the implementing agency with the effective participation of potentially impacted communities. They should be performed at every major stage of a project – from proposal, to implementation, to monitoring and evaluation.

Demand that development project sponsors use HRIAs, not just assessments that measure social or environmental impacts.



Indigenous peoples have in many cases had our lands taken from us or have been denied legal title. But this does not mean that our lands and resources are limited to only those which an outside government recognizes. Under international law, indigenous peoples have full ownership rights to the lands, territories and resources which we have historically used or occupied and currently possess.

SELF-DETERMINATION AND SELF-GOVERNMENT

WHAT DOES THAT MEAN?

LANDS, TERRITORIES AND NATURAL RESOURCES

Indigenous peoples have a right of permanent sovereignty over our natural resources. We have the right to own, use, and manage our lands, territories, and resources, including those owned by reason of traditional or collective ownership. We also have a right to the conservation and protection of the environment. We may not be removed from our territories or denied access to our resources without our consent. UN Declaration, article 25, 26, 27, 28, 29.

■ ■ ■ WHAT DOES THAT MEAN? ■ ■ ■

In a case regarding logging in the Awas Tingni Community lands, the Inter-American Court held that Nicaragua had an obligation to delimitate, demarcate, and title the Awas Tingni lands, and that until that was done “the State must abstain from any acts that might affect the existence, value, use or enjoyment of the property...” either directly or through the acts of third parties.

PARTICIPATION IN DECISION-MAKING

■ ■ ■ WHAT DOES THAT MEAN? ■ ■ ■

If our communities might be affected by a development initiative, they should be involved in its design and implementation. The participation of indigenous communities must be meaningful and real, which means that affected communities must have the ability to impact decisions, not merely to be informed or consulted with. We must be provided timely access to accurate and culturally accessible information regarding the content of our rights, the details of any proposed initiative, the identity of actors involved, alternatives to the initiative, and the likelihood of potential costs and benefits to the community and to other actors.