Native Title Law and Indigenous Legal Rights: The Interface between Native Title and Environmental Legislation for Preparing and Negotiating Land Claims

Nitmiluk (Katherine Gorge) National Park, Northern Territory, Australia

Source: *Invited presentation at the "National Native Title Law Summit", LexisNexis Professional Development, Brisbane, 15 July 2009.*

1. The presentation reviewed legal rights for sustainability contained in environmental legislation; and the opportunities presented for their application for negotiating sustainable solutions for land claims.

2. In order to achieve "sustainable and equitable development" through a negotiated outcome, three key conflict resolution concepts were discussed and applied:

i. Developing creative land use options (or scenarios) for mutual gain;

ii. Using objective criteria for evaluating the scenarios; and

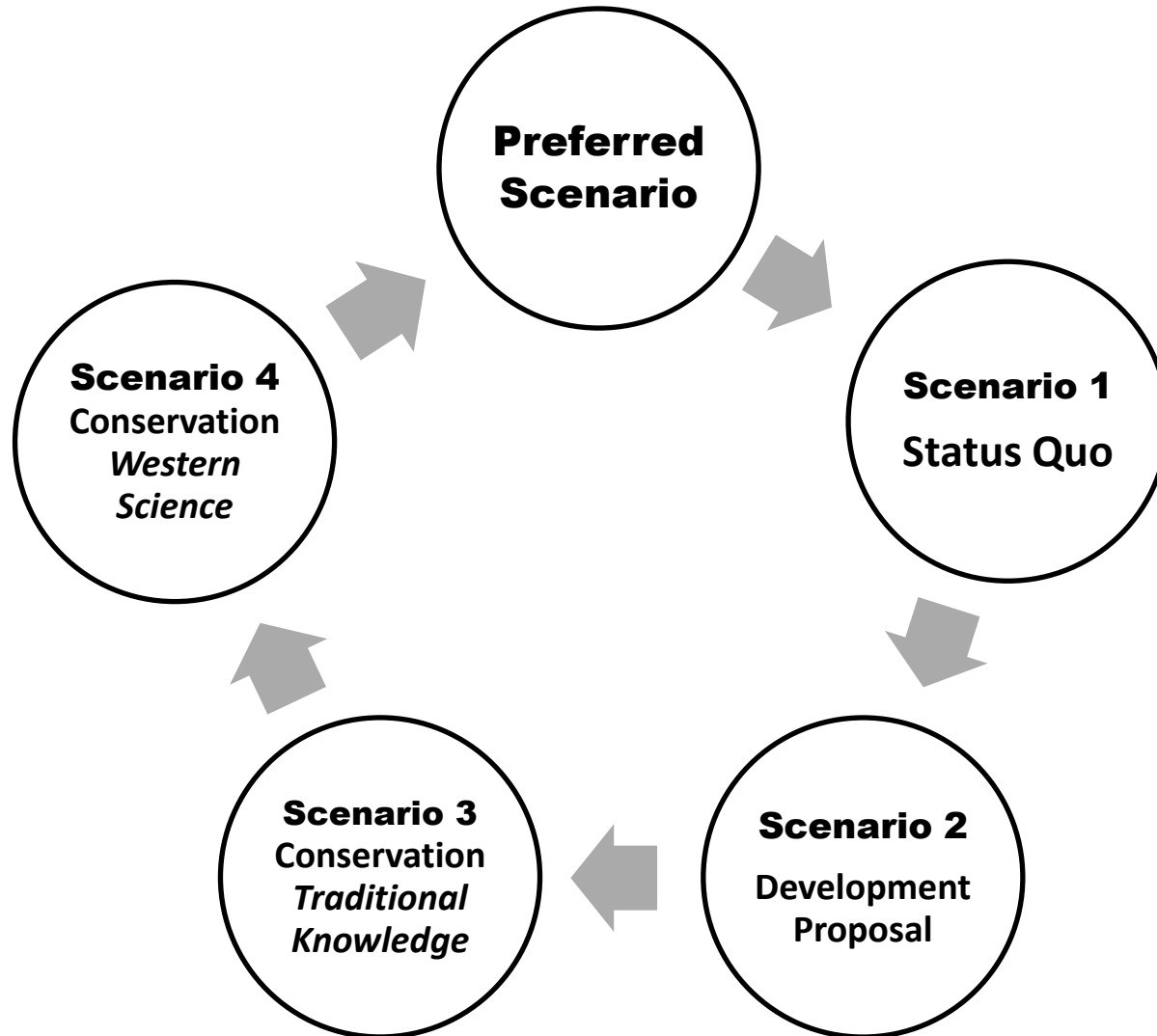iii. Promoting Indigenous traditional knowledge.

Only part of the presentation is set out in the following slides.

Linking Western Scientific Knowledge and Traditional Knowledge: The Alternatives

- *"Developers… have quite defined priorities with respect to…land…They generally have fairly clear ideas about what it is they want to do, when they want to do it and why. Negotiations will revolve around how the [development] can be made to fit within existing patterns of land use and development…*

- *[However] negotiations could operate to an agenda that emphasized, for example, cultural issues, community development and the preservation of ecologies. Proposed development could be discussed in terms of its consistency with Indigenous aspirations on these issues."*

  - **Mick Dodson (1996)**

Land Use Agreements: Finding a Sustainable Solution
Developing creative land use scenarios for mutual gain

Preferred Scenario

Scenario 1
Status Quo

Scenario 2
Development Proposal

Scenario 3
Conservation
Traditional Knowledge

Scenario 4
Conservation
Western Science

Developing Creative Land Use Options (*or Scenarios*) for Mutual Gain

- A scenario is a hypothetical construction of the land use conflict. Different weight is given to ecological, economic, social and cultural considerations in each scenario.

- *'Scenario 1'* represents the existing land uses in the area. It acts as benchmark for comparing the alternative scenarios.

- *'Scenario 2'* represents the future land uses should a proposed development be approved e.g. a mining project. The project may be subject to an EIS.

- *'Scenario 3'* represents the future land uses, based on traditional knowledge. The proposed development would need to co-exist with Indigenous aspirations on "*cultural issues, community development and the preservation of ecologies*".

- *'Scenario 4'* represent future land uses in the area where the focus is on western scientific knowledge for conserving the environment.

- The *'Preferred Scenario'* is found following the evaluation of all scenarios. It may be any of the four scenarios - or an entirely new scenario constructed on the desirable features of two or more of the scenarios evaluated.

Land Use Agreements: Finding a Sustainable Solution
Setting Objectives and Criteria for their Evaluation

Ecological Objective ('Heritage Preservation'):

To preserve and protect from injury or desecration, areas and objects in Australia and in Australian waters being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition (See ATSIHPA at s.4 Object).

Example of Criteria to Evaluate this Objective

Promotion of Indigenous traditional knowledge for the management of cultural and natural heritage.

Economic Objective (Regional Economy)

Rationale: *To ensure an equitable balance of benefits between the region and the nation; the major costs to not be borne disproportionately by the community in the region.*

Examples of Criteria to Evaluate this Objective

Household income

Employment/unemployment levels

Range of employment options

Non-market values e.g. non-use values

Land Use Agreements: Finding a Sustainable Solution
Setting Social Objectives

1. ## Social Equity Objective
    Community involvement in administrative decisions that affect them.

2. ## Indigenous Community Interests Objective
    Recognition of Indigenous interests in the distribution of benefits arising from the use of natural resources.