

# Native Title Law and Indigenous Legal Rights: The Interface between Native Title and Environmental Legislation for Managing and Resolving Land Use Conflicts

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# 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 \(1996\)](#)

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**Dr Ted Christie**

1. This presentation reviews legal rights for sustainable development in Australia’s environmental legislation; and the opportunities for their application to find sustainable solutions for land use conflicts by negotiation.
2. To find a sustainable solution that may lead to a firm commitment that can be implemented, three key conflict resolution concepts will be discussed and applied:
  - i. Developing creative land use options (or scenarios) for environmental assessment;
  - ii. Using objective criteria for evaluating the scenarios; and
  - iii. Promoting Indigenous Traditional Knowledge.

**The PowerPoint slides provide the framework for the presentation.**

# Environmental Legislation: Sustainable Development Provisions



*Great Barrier Reef Marine Parks Act (Cth)*  
*ss. 3AA, 3AB*



*Environment Protection Biodiversity Conservation Act (Cth)*  
*ss. 3,3A*



*Environmental Protection Act (Qld)*  
*ss. 3,4 Schedule 4 (Dictionary – Standard Criteria)*



*Marine Parks Act (Qld)*  
*Schedule (Dictionary)*

# Integrating Traditional Knowledge and Western Science:

## (1) The United States Legislative Model

The innovative United States statute, the *National Environmental Policy Act of 1969* (“NEPA”) directs Federal Agencies to assess the potential adverse impacts of proposed major actions that may significantly affect the environment, and to inform the public about those impacts.

- NEPA recognizes a **Lead Agency**: The Federal Agency that prepares or takes primary responsibility for preparing the environmental documents: Depending on the extent and nature of impacts an *environmental impact assessment* or an *environmental assessment*.
- Upon request by the Lead Agency, any Federal, State, Tribal, or Local Agencies having special expertise with respect to an environmental issue or jurisdiction by law may become a **Cooperating Agency**.

## Integrating Traditional Knowledge and Western Science:

### (2) [40 Code of Federal Regulations \[C.F.R.\] 1501.8 \(USA\)](#)

- “The purpose of this C.F.R. Section is to emphasize Agency cooperation early in the NEPA process. Upon request of the Lead Agency, any Federal agency with jurisdiction by law shall be a Cooperating Agency.
- ... A State, Tribal, or local agency of similar qualifications may become a Cooperating Agency by agreement with the Lead Agency. ***Relevant special expertise may include Indigenous Knowledge...***”

*The US Environmental Protection Agency (“EPA”) seeks participation of **Federally recognized Indian Tribes** as a “Cooperating Agency” when the project’s effects may affect Indian country and other Tribal areas (Author’s emphasis).*



# Integrating Traditional Knowledge and Western Science:

## (3) Identifying Federally Recognized Indian Tribes

- There are 574 Federally recognized Indian Tribes in the United States:  
*“Historically, most of today’s Federally recognized tribes received Federal recognition status through Treaties, Acts of Congress, Presidential executive orders or other Federal administrative actions, or Federal Court decisions”.*
- In 1978, the Interior Department issued Regulations to assess requests for Federal recognition: ***The Federal Acknowledgment Process***. These regulations – [25 Code of Federal Regulations Part 83](#), as revised, are still in effect.
- In 1994, Congress enacted the ***Federally Recognized Indian Tribe List Act*** which formally established three ways an Indian group may become Federally recognized:
- By Act of Congress. Or by decision of a United States court.
- Or by the administrative procedures under ***25 C.F.R. Part 83***. Click on this [LINK](#) for an abbreviated form of the seven mandatory criteria. All criteria must be satisfied by meeting this requirement: *“The available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion?”*

## Integrating Traditional Knowledge and Western Science:

### (4) Benefits of Cooperating Agencies for project assessment

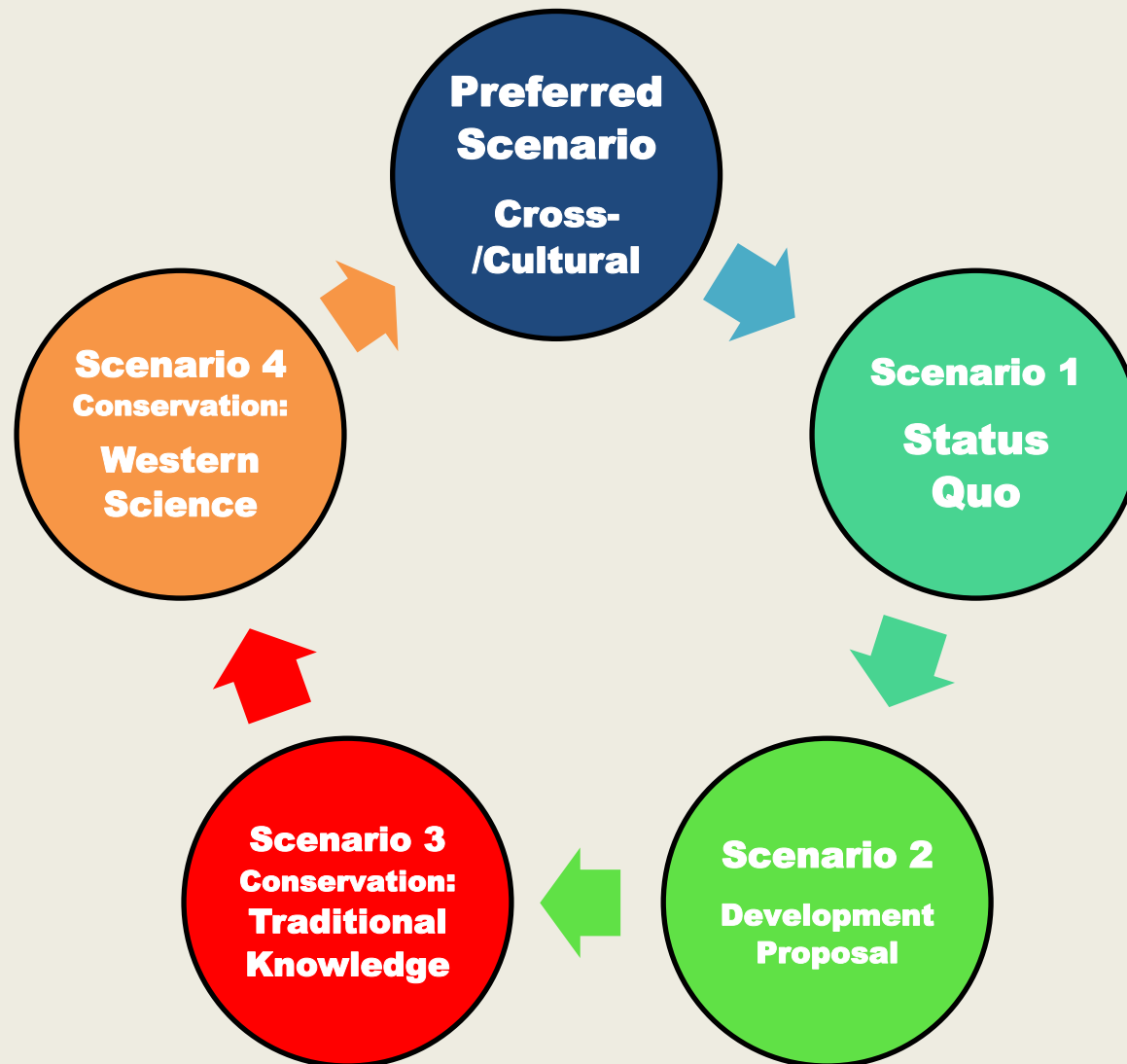
- “Has allowed for early review and input into the public review.
- Without Tribal involvement, Lead Agencies may have a narrow scope/limited impact assessment, and not identify potential negative impacts to Tribes.
- As Cooperating Agencies, Tribes can help direct project alternatives and selection”.

*A key advantage of the US approach is to provide staff that enhances cross-disciplinary capability between the Lead Agency and Co-operating Agencies to facilitate integrated decision-making.*



# Land Use Conflicts: Using a Multi-Cultural Pathway

*Developing creative land use scenarios for mutual gain*



## Developing Creative Land Use Options for Mutual Gain

- A scenario is a hypothetical construction of the land use conflict. Different weight is given to environmental, 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 the *Environmental Impact Assessment* process or some form of *Environmental Assessment*.
- 'Scenario 3': Cooperating Agency 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': Lead Agency represents 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 Conflicts: Finding a Sustainable Solution

## 1. *Setting Environmental Objectives*

### ***Environmental Objective ('Heritage Preservation')***

*Promotion of Indigenous Traditional knowledge for the conservation and management of cultural and natural heritage.*

### ***Environmental Objective ('Sustainability Cornerstones')***

*The multiple objectives - environmental, economic, and social (including cultural) - to be objectively evaluated, weighted equally, and balanced fairly.*

### ***Environmental Objectives ('Guiding Principles')***

- *Recognizing **the** need to develop a strong, growing and diversified economy which can enhance the capacity for environmental protection.*
- *Recognizing **the** need to maintain and enhance international competitiveness in an environmentally sound manner.*

# Land Use Conflicts: Finding a Sustainable Solution

## 2. *Setting Economic Objectives: Criteria for their Evaluation*

### **Economic Objective (Regional Economy)**

*Rationale: To ensure an equitable balance of benefits between the Region, State 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 Conflicts: Finding a Sustainable Solution

## 3. *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.*

### 3. **Social Wellbeing Objective**

*To follow a path of economic development that safeguards the welfare of future generations.*

# The Regis Resources Gold Mine Development Proposal: *Could History Repeat in Australia?*

*Community concern on land use, to some extent, may reflect the area of Aboriginal and Torres Strait Islander people's owned land in Australia.*

The [Productivity Commission](#) estimates that nationally, as of June 2023, 16.2% of Australia's land area was owned or controlled by Aboriginal and Torres Strait Islander people.

*The area of Indigenous lands in Australia is much greater compared to the United States, where Indian tribes now hold only 6.7% of the land.*

The areas of mainland Australia and the United States [48 States and DC] are similar, *about 7.6 million km<sup>2</sup>*. But there is a significant difference between both countries in their approach to environmental assessment of proposed developments that may adversely impact Indigenous lands and people; and for co-existence between heritage protection and development.

**NOTE:** *"In 1871, with Indian power waning, Congress declared that the U.S. would no longer view Indian tribes as separate nations and would sign no more treaties...The Indians who once held all the land retained only about 200,000 square miles. The whites now held about three million square miles".*

SOURCE: Ezra Bowen (Editor) *"The Indians"* (The Old West) Time-Life Books/Alexandria, Virginia with text by Benjamin Capps (1973) at p155.

## Conclusions

- *A legislative pathway enabling Indigenous peoples be engaged as a Cooperating Agency is a valuable way to ensure relevant and reliable Traditional knowledge is available to facilitate decision-making in the review and analysis of impacts; and the effectiveness of management and mitigation measures presented in the environmental assessment documents.*
- It would be prudent for Government to be aware of the United States experience: That “no other strategy offers a more telling acknowledgement of the legitimacy of local concerns” than where those who must live with a decision on proposed actions that may have potential adverse environmental impacts, know they can trust the monitoring and management plans.