

“Co-Management of Natural Resources by Indigenous Peoples and States: A Method to Promote Environmental Justice and Sustainability”

Professor Bradford W. Morse, Dean of Law,
Te Piringa Faculty of Law, University of Waikato
& Faculty of Law, University of Ottawa
IUCN Academy of Environmental Law 2012

Overview

- Widely accepted that most of 370 million Indigenous peoples around the world have retained a strong, close & spiritual affiliation with their traditional territories – Durban Accord of IUCN Vth World Parks Congress 2003
- Indigenous peoples also possess Traditional Knowledge (TK) of their traditional areas of great value in pursuing sustainable economic & humane relationship with environment they are willing to share if is a true partnership
- Presentation will describe several key factors that have created vital opportunities for co-management of natural landscapes & resources by Indigenous peoples & states



International Recognition

- Clearest example of acknowledgement of important place of Indigenous peoples as leaders of guardianship relationship with Mother Earth thru their TK & core guiding principles of their cultures was in Rio in 1992 via Agenda 21 & Convention on Biological Diversity
- While both instruments are creatures of states as signatories, they contain ground-breaking acceptance as international law that “indigenous and local communities” are in vanguard of rediscovering solutions to unsustainable lifestyles.

Convention on Biological Diversity, 1992

Preamble: “Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources... of sharing equitably benefits arising from the use of traditional knowledge, ...”

Article 8. “Each Contracting Party shall, as far as possible and as appropriate:
(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices...”

Article 10. Sustainable Use of Components of Biological Diversity “Each Contracting Party shall, as far as possible and as appropriate:...

(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements;

(d) Support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced; ...”

UN Declaration on Rights of Indigenous Peoples (DRIP)

- Overwhelmingly endorsed by UNGA on 13 September 2007 (143-4)
- Reaffirms many established principles of human rights in positive language but recasts in Indigenous context to set new international benchmarks for state & UN agency compliance
- Jointly developed over 25 years by Indigenous & states representatives globally



DRIP Reflects Indigenous Worldview

Article 25

“Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to **uphold their responsibilities to future generations** in this regard.”

Reflects view as being **of the land** – not owners of land – with obligations owed to protect and preserve nature as guardians/stewards/katiaki

Customs & Traditions

Article 11(1) Indigenous peoples have the right to practise 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, artefacts, 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 [i.e., Indigenous not state] laws**, traditions and customs.

This builds on UNESCO Conventions on the *Safeguarding of Intangible Cultural Heritage* of 2003 & *Protection and Promotion of the Diversity of Cultural Expressions* of 2005

Puts clear onus on states to provide appropriate forms of redress for cultural property taken without consent along with obligation to recognise ongoing Indigenous rights to control how their cultures are practised as well as presented

Spiritual & Religious Protection

The vital importance of spiritual connection to traditional territories for cultural identity and survival is captured again in a discrete provision.

Article 12 (1) Indigenous peoples have the right to manifest, practise, 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.

Core Land Rights

Article 26

1. Indigenous peoples have the right to the lands, territories and resources **which they have** traditionally **owned, occupied** or otherwise **used** or **acquired**.
 - Past tense suggests re former territory only but means more than repeat of Art 25 or would be redundant
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources **that they possess** by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
 - Re current lands similar to ILO 169 & in accord with decisions of IACHR & UNHRC
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.
 - apply re both (1) n& (2)

Indigenous Involvement in Environmental Protection

- ***Article 19*** States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
- ***Article 29(1)*** Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

Implementation Obligations

Art. 38 “States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”

Art. 41 United Nation agencies & other IOs “shall contribute to the full realization of the provisions of this Declaration...”

Art 42 – The UN ... and “States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.”

DRIP Limitations

- Not binding on states [unless = international customary law]
- No mechanism for enforcement via a treaty body
- No formal UN monitoring body [although PFII could choose to do so & UNHRC, CERD, etc can clearly refer to DRIP in complaints & periodic reports]
- Many states have little intention to honour
- Unclear how some of its phrases should be interpreted or implemented

Indigenous Rights & Environmental Sustainability

- Domestic recognition of indigenous rights in growing number of states holds promise for increased focus on protection of environment and rehabilitation of degraded lands & waters
- Constitutional Recognition to some degree re land: Norway, Russia, Sweden, Malaysia, Philippines, Fiji, Ghana, Kenya, Madagascar, Uganda, Paraguay, Argentina, Bolivia, Peru, Ecuador, Columbia, Brazil, Venezuela, Panama, Guatemala, Nicaragua, Mexico and Canada
- Legislative & Judicial Recognition in many states as well: USA, Australia, NZ, South Africa, etc

Domestic Examples

- Range of important developments enhancing environmental protection & remediation have arisen due to:
 - Judicial recognition of land rights & customary laws, e.g., Canada & Australia
 - Legislative arrangements, e.g., Aotearoa New Zealand
 - Settler-Indigenous Treaties, e.g., Aotearoa New Zealand, USA & Canada

Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010

Preamble (17)...the Crown acknowledges:

- that to Waikato-Tainui, the Waikato River is a single indivisible being;...their relationship with...the Waikato River gives rise to their responsibilities to protect the mana and mauri of the River...lies at the heart of their spiritual and physical wellbeing, and their tribal identity and culture;...that the deterioration of the health of the Waikato River,...while under the authority of the Crown, has been a source of distress for the people of Waikato-Tainui;...that the pollution, degradation and development of the Waikato River, its lakes, streams and wetlands have caused the decline of once rich fisheries that, for generations, had sustained the people's way of life and their ability to meet obligations of manaakitanga, and this is a further source of distress;

s. 3 The overarching purpose of the settlement is to restore and protect the health and wellbeing of the Waikato River for future generations.

Key Elements of Waikato River Settlement

- Act implement deed of settlement over breach of Treaty of Waitangi through confiscation of Waikato-Tainui Iwi lands in 1864-5 that not resolved in 1995 Treaty Settlement re River
- Intended to prevail over other land law
- Establish Vision & Strategy to restore Health & Wellbeing of River with goal of integrated, holistic, coordinated management of natural, historic and cultural resources of River under precautionary approach standard
- Establish permanent Guardians (5 Māori & 5 Crown) to promote restoration of River
- Establish Cleanup Trust of \$7M/yr x 30 yrs
- Establish Waikato River Authority of Māori & local government to implement co-management principles

Co-Management of Lands

- NZ Dept of Conservation (DOC) estate = 33.4% of NZ land area; Conservation Act 187, s4:
 - “This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.”
- Treaty protects tino rangatiritanga & taonga
- DOC will maintain positive relations with Maori, seek avoid breach of Treaty & must consult on planning & should form partnerships. Maori on NZ Conservation Authority & 13 local Boards
- Specific co-management commitments under # of recent Treaty Settlements
- Transfer of full ownership to iwi of some DOC lands with commitment to protect conservation values

LAND CLAIM SETTLEMENTS IN CANADA

4 Northernmost Settlements

for the Inuit:

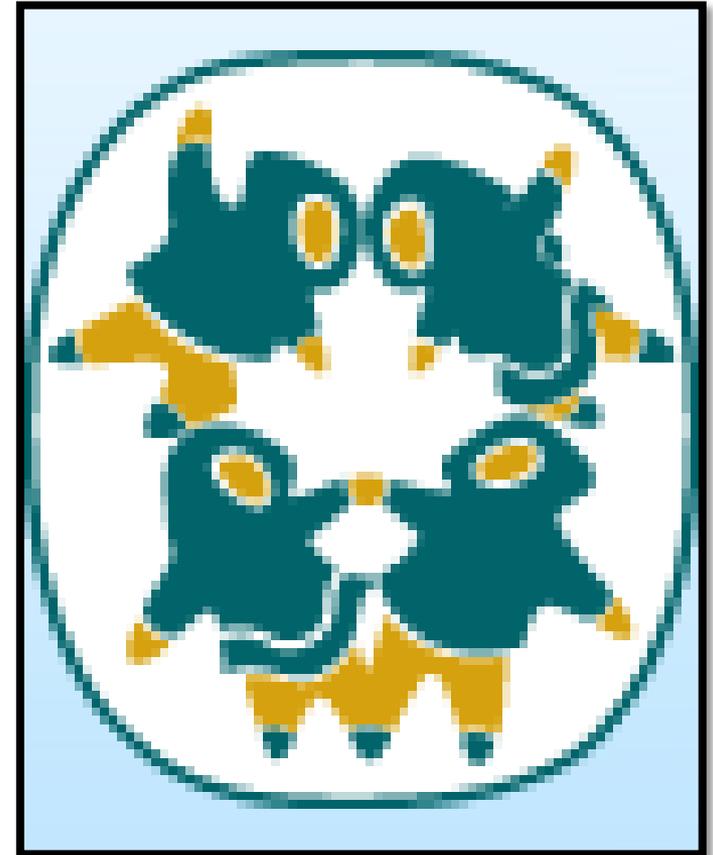
JBNQA 1975

Western Arctic 1984

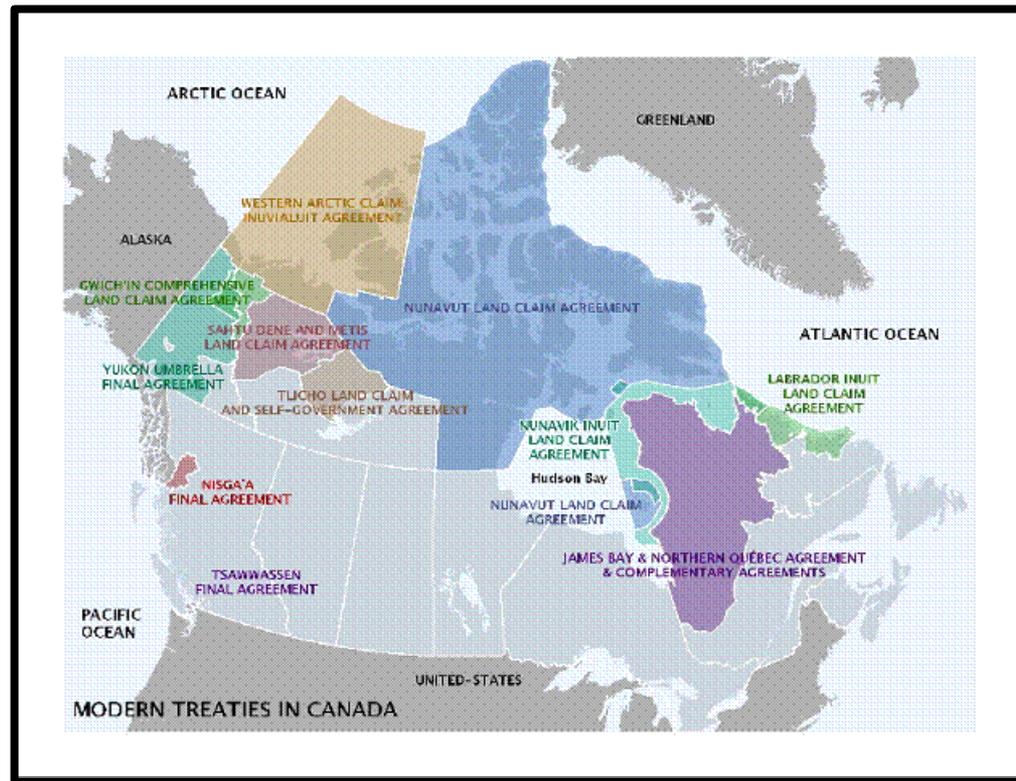
Nunavut 1993

Labrador 2003

**These settlements resulted in
large recognized Inuit land base
& self-governance or public
governments with heavy Inuit influence or dominance**



Map of the Modern Treaties in Canada



Key Components of New Treaties

- Land – from small to massive exclusive land base confirmed = 600,000 sq. km. (2005)
- Beneficiary enrolment under Indigenous control
- \$ - range from \$10s to \$1000 million = \$2.8 BN (2005)
- Commercial rights [e.g. fishing; natural resource rights and/or royalties]
- Co-management of parks, waters, land use; wildlife & environmental project screening
- Dispute resolution – binding arbitration common element in all agreements since 1984 but only used once
- Self-Government

Advisory Bodies

- A majority of the Agreements have provisions for advisory bodies, usually in relation to environmental assessment, fish and wildlife harvesting, water quality & licenses, or land use management.
- The sections of the Agreements describing the advisory bodies usually include terms regarding guiding principles, membership, powers, and responsibilities etc.
- Some Agreements give guaranteed seats on licensing bodies

CDN Examples of Parks Creation

- Western Arctic – create Ivvavik National Park (10,168 km² on North Slope of Yukon) & Herschel Island Territorial Park
- Nunavik – Torngat Mountains National Park, Labrador (10,000 km²)
- Nunavut – Auyuittuq, North Baffin, Ellesmere Island & Wager Bay National Parks = 103,334 km² (and many conservation areas)
- Vuntut Gwitchin First Nation Final Agreement -Vuntut National Park (4,345 km²)
- Others in place or reserved for designation as National Parks once full agreement reached with local Indigenous peoples

Australia - National Parks

Co-Management

- 26 Oct 1985, Governor General presented Uluru-Kata Tjuta National Park title deeds to Anangu (traditional owners) who leased lands back to Australian Government for 99 years via Director of National Parks
- 12 member Board of Management (8 from Anangu) develop Plan of Management for Park & make all policy decisions
- Similar scheme with Kakadu National Park but Aboriginal peoples only own 50% but co-manage all; 18 in NSW, 3 in SA, 6 in WA, 8 in Vic, 2 in Qld
- Some co-managed via Indigenous Land Use Agreements (ILUAs)



Aus Indigenous Protected Areas (IPAs)

- IPA = lands where Aboriginal owner voluntarily agree promote biodiversity & conserve cultural resources per international (IUCN) standards
- Seek marry TK with modern science aided by Aus Govt \$ - \$50M for 2008-13
- Provides support for 'caring for country' via health, education, employment & official endorsement that fulfilling cultural responsibilities is important to sustaining the territory
- 50 IPAs across Aus total 26M hectares from 1 km² to 100,000 km²; 40 more under consultation, including sea country IPAs
- = 25% of Australia's National Reserve System

Declared Indigenous Protected Areas

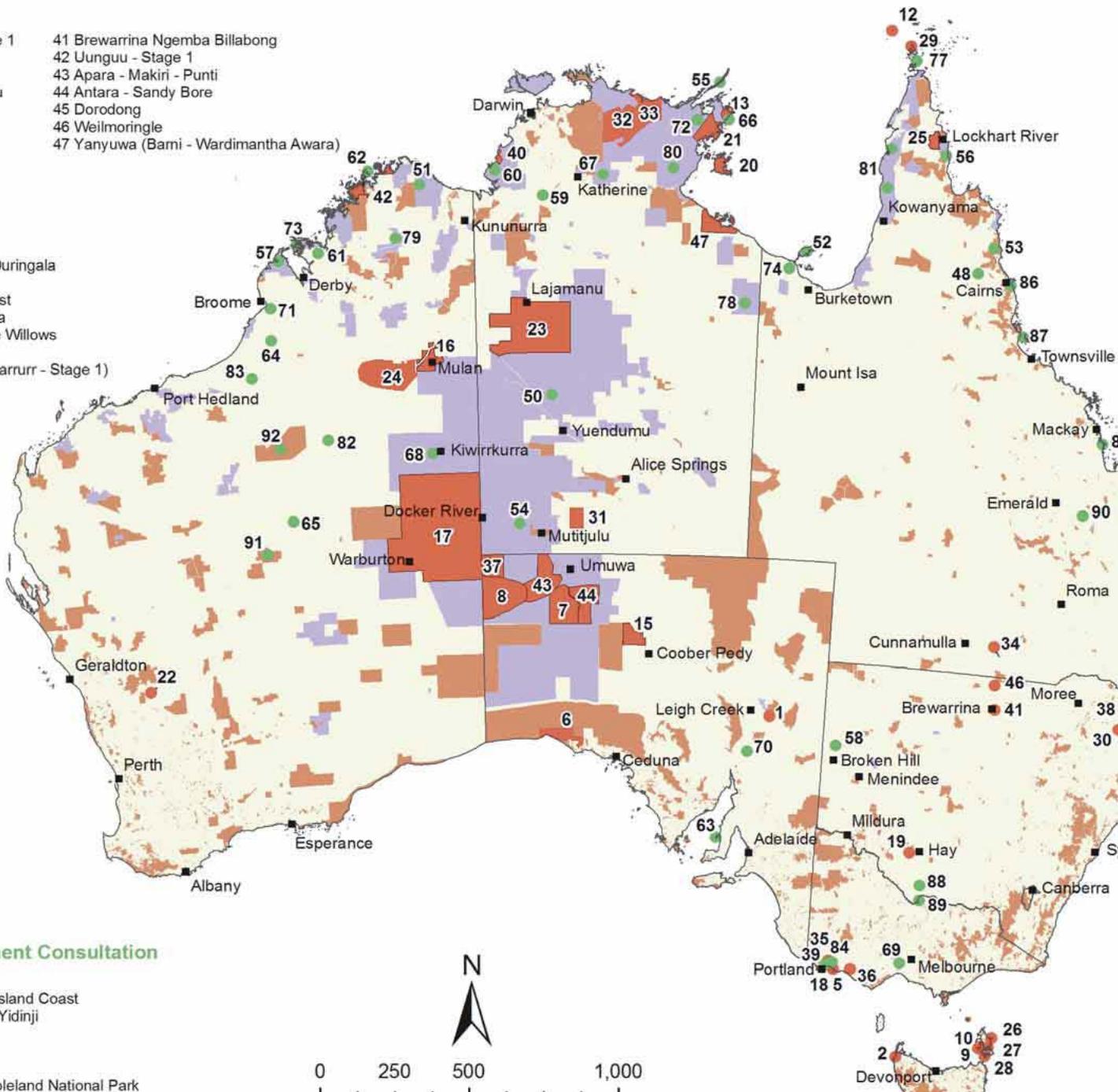
- 1 Nantawarrina
- 2 Preminghana
- 3 Risdon Cove
- 4 putalina
- 5 Deen Maar
- 6 Yalata
- 7 Walalkara
- 8 Watarru
- 9 Badger Island
- 10 Mount Chappell Island
- 11 Guanaba
- 12 Warul Kawa Island
- 13 Dhimurru
- 14 Wattleridge
- 15 Mount Willoughby
- 16 Paruku
- 17 Ngaanyatjarra
- 18 Tyrendarra
- 19 Toogimbie
- 20 Anindilyakwa
- 21 Laynhapuy - Stage 1
- 22 Ninghan
- 23 Northern Tanami
- 24 Warlu Jilajaa Jumu
- 25 Kaanju Ngaachi
- 26 Babel Island
- 27 Great Dog Island
- 28 lungatalanana
- 29 Pulu Islet
- 30 Tarriva Kurrukun
- 31 Angas Downs
- 32 Warddeken
- 33 Djelk
- 34 Jamba Dhandan Duringala
- 35 Kurtonitj
- 36 Framlingham Forest
- 37 Kalka - Pipalyatjara
- 38 Boorabee and The Willows
- 39 Lake Condah
- 40 Marri-Jabin (Thamarrurr - Stage 1)
- 41 Brewarrina Ngemba Billabong
- 42 Unguu - Stage 1
- 43 Aparu - Makiri - Puntji
- 44 Antara - Sandy Bore
- 45 Dorodong
- 46 Weilmoringle
- 47 Yanyuwa (Barni - Wardimantha Awara)

Indigenous Protected Area Consultation Projects

- 48 Ngarrabullgan
- 49 Gumma
- 50 Southern Tanami
- 51 Balanggarra
- 52 Wellesley Islands
- 53 Eastern Kuku Yalanji
- 54 Katiti Petermann
- 55 Marthakal
- 56 Angkum
- 57 Bardi Jawi
- 58 Poolamacca
- 59 Wardaman
- 60 Thamarrurr - Stage 2
- 61 Dambimangari
- 62 Unguu - Stage 2
- 63 Wauralte (Wardang Island)
- 64 Karajarri
- 65 Birilburu
- 66 Dhimurru - Stage 2
- 67 Jawoyn - Stages 1 and 2
- 68 Kiwirrkurra
- 69 Wurdi Youang
- 70 Yappala
- 71 Yawuru
- 72 Laynhaupy - Stage 2
- 73 Mayala
- 74 Gangalidda
- 75 Wardell - Lumleys Lane
- 76 Minyumai
- 77 Torres Strait Region
- 78 Waanyi Garawa
- 79 Wilinggin
- 80 South East Arnhem Land
- 81 Wik, Wik Way and Kugu
- 82 Jilakurru, Kaalpi and Western Desert Lakes
- 85 Central Queensland Coast
- 86 Mandingalbay Yidinji
- 87 Giringun
- 88 Werai Forest
- 89 Yorta Yorta
- 90 Blackdown Tableland National Park

Co-Management Consultation Projects

- 85 Central Queensland Coast
- 86 Mandingalbay Yidinji
- 87 Giringun
- 88 Werai Forest
- 89 Yorta Yorta
- 90 Blackdown Tableland National Park



USA

- Judicial revival of Indian Treaties in Washington (Boldt decision) upheld by USSC in 1979 and Great Lakes has led to co-management of fisheries via compact between State of Washington with Tribes & via Great Lakes Indian Fish & Wildlife Commission (GLIFWC) that work with Michigan, Wisconsin & Minnesota to achieve agreements in fisheries and hunting
- GLIFWC push habitat restoration and sustainable harvesting
- Reservation lands can play important role in providing protected areas

Conclusions

- Though State recognition of aboriginal title, OR accepting obligation to respect treaty relationships, & appreciating mutual benefit of common cause in face of massive environmental challenges has led to positive outcomes in some nations that may hold out hope for future
- BUT must note these examples cannot be easily generalized even in each of these nations as have been (1) largely forced upon regional or national governments & (2) limited to remoter areas
- Hopefully success breeds success & desire for more