



# Banking on Aboriginal water rights: new approaches in modelling cultural and economic water property rights

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“Water is the basis for our songs and our culture. We have been looking after our waterholes and rivers for thousands of years. We have respect because we know that if you don’t treat it right many things can happen. This is the lesson that we need to make other people learn.”

Walmajarri Senior Lawman Joe Brown

*New Legend: A Story of Law and Culture and the Fight for Self-Determination in the Kimberley*, KALACC 2007:39

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The legal fiction of ***terra nullius*** was used to deny Aboriginal rights and interests to land in Australia

A prevailing doctrine of ***aqua nullius*** continues to deny Aboriginal people their rights and interests to water – economic and cultural

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“Human rights are not abstract concepts ... they become meaningful when they are able to be exercised”

Australian Human Rights Commission Social Justice Commissioner’s Report 2010

**Water use should be consistent with Indigenous use in all water legislation. Note Environmental Sustainable Level of Take: Commissioner Walker**

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‘Access to water for economic purposes can improve prosperity, create jobs and business opportunities, improve health outcomes and help financial security and independence’

‘Engaging Indigenous peoples in water planning and management’, *National Water Initiative policy guidelines for water planning and management*, Module 3.3: 23, Australian Government 2017.

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‘If sustainable and culturally appropriate economic development is to occur in many regional and remote Indigenous communities, water will be a critical component to that development’.

‘Connection to Country: Review of the *Native Title Act 1993* (Cth)’, Final Report, ALRC 126, s 8. p104.

Australian Law Reform Commission, April 2015.

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- 1. Perpetual water allocations** for Aboriginal communities outside the consumptive pool
- 2. Reserved Water Rights regime** allocated for Aboriginal communities to develop economic capacity and intergenerational prosperity
- 3. Biennial and independent reporting** to Parliament on the progress of implementing water reforms within respective jurisdictions

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“In *Overturning aqua nullius*”, I propose an administrative framework for an **Aboriginal Water Holder** similar to the Commonwealth Environmental Water Holder:

- with a capacity to trade Aboriginal water holdings on the open market; and
- the capacity to buy and sell water between Aboriginal water holders & broader.



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The Commonwealth, States and Territories **to** provide for:

1. Recognition of Aboriginal peoples' *special association to water* as a **First Right** before any other water rights;
2. Strategies to increase Aboriginal participation in the Australian water market and increase the **ownership of water property assets** in Aboriginal communities;
3. Economic benefits under statutory water legislation **to promote wealth creation** within Aboriginal communities;
4. meaningful consultation with Aboriginal peoples to identify and allocate **permanent water rights**

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The Commonwealth, States and Territories **must** provide for:

5. Aboriginal wealth creation policies and strategies, consistent with **the principles of self-determination** within national Indigenous policy frameworks, to include water ownership;
6. Aboriginal water rights to ensure communities **can utilise** communal and private water rights and interests;
7. **Tradeable** Aboriginal water access licences;
8. A national water policy which **excludes caps** on water resources held by native title claimants;
9. Water resources for Aboriginal peoples under the principles of **intergenerational equity & human rights instruments.**

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### Canadian perspectives

“Water insecurity—with associated effects on health and wellbeing—affects hundreds of Indigenous communities across Canada. There is also growing recognition of the need to comprehensively examine Indigenous relationships to water at a broader scale, and to address Indigenous water governance”.

West Coast Environmental Law, *Between Law and Action: Assessing the State of Knowledge on Indigenous Law, UNDRIP and Free, Prior and Informed Consent with reference to Fresh Water Resources*, 2017:4.

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### Canada: First in time, but not first in right

- First in Time, First in Right (FITFIR) water rights regimes in BC & other provinces established at the time of colonial settlement **in a manner prejudicial to the rights of Indigenous communities.**
- FITFIR regimes allocate water on the basis of a rank order of licence holders. A priority number, determined by the date and time the application approved, recorded & indicates seniority in times of shortage. The oldest licencees get their water before the later.
- First Nations are undeniably **“First in Time,”** but prevented from applying for water licences at the time the regulatory regime was created. **(Australian water regimes & national water reforms!)**

West Coast Environmental Law, 2017:15

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# Canada: Unsafe drinking water

Indigenous communities face ongoing challenges with respect to safe drinking water ... **high-risk water systems pose a threat to the health of one-third of First Nations people** living on reserves.<sup>.58</sup> Water is absent from the Supreme Court of Canada's definition of Aboriginal title.<sup>.59</sup> In Canada, Indigenous water rights and laws, as well as their participation in water governance, have, with few exceptions, been treated implicitly within land-focused legal claims and negotiation processes.<sup>.60</sup> As a result, historical inequalities have constrained Indigenous communities' access to secure water in Canada.<sup>.61</sup>

West Coast Environmental Law, 2017:14

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# Flawed strategies to safeguard rivers:

- Strategies, such as creating a statutory recognition of the legal standing of rivers ('rights of nature') are **flawed**.
- 'Rights of nature' came from Christopher Stone's 'Should trees have standing' in USSC *Sierra Club v Morton*
- Stone's 'step to solving material planetary problems ... exerting human will & nature'
- Indigenous rights, Property rights v rights of nature?
- Indigenous perspectives **not** included in this concept.



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## Aboriginal Studies Press

