

WATER – Fluid Perceptions

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Abstract

There is no place in modern river management systems for the protection of Indigenous spiritual values. Indigenous people must continue to use the mechanisms at hand, but real impact on the commercial market in water and therefore river management will only occur when Indigenous people are water owners themselves.

The paper examines the development of Indigenous participation in the water economy and the potential for Indigenous people to influence river management decisions which may breath renewed spiritual life into a tired Rainbow Serpent.

In the beginning the Rainbow Serpent made its way across the landscape leaving in its wake the rivers, creeks, lagoons and waterholes that to this day dot the country side. In most manifestations of Aboriginal religion throughout Australia a spirit being in the form of rainbow coloured snake is the central feature in the creation stories.

The rivers, creeks, lagoons and waterholes for that reason alone have a spiritual context that is far greater than that found in the Christian church, for example. The creation spirit personally came to the particular site while travelling through the lands.

I do not suggest however, that Aboriginal people have the exclusive rights to real feelings of love and respect for the land. People who have spent time on the land, given birth to children, buried their dead, survived flood and drought, no matter what race creed or colour, develop a relationship with and an understanding of the land that extends well beyond the physical. That doesn't mean to say anybody who has been through any or all of those trials and tribulations will necessarily comprehend the long term or broad scale effects upon the land from any given activity. But there will be an undeniable connection to the land. And, at certain times for certain people that connection might take some elements of the spiritual.

But that connection is not and never will be grounded in religious belief that the earth is one's mother and a gigantic snake brought the rivers into existence.

On the other hand the NSW Government asserts its ownership of all the water in New South Wales. In 2000, the NSW Government passed the Water Management Act.¹ The purpose of the Water Management Act was to decouple water ownership from land ownership, create a semi regulated water market, and abolish riparian rights.

"Rivers" are defined in the Water Management Act in the following manner:

"river" includes:

- a) any watercourse, whether perennial or intermittent and whether comprising a natural channel or a natural channel artificially improved, and
- b) any tributary, branch or other watercourse into or from which a watercourse referred to in paragraph (a) flows, and
- c) anything declared by the regulations to be a river, whether or not it also forms part of a lake or estuary, but does not include anything declared by the regulations not to be a river.²

The objects of the Water Management Act are:

to provide for the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations and, in particular:

- c) to recognise and foster the significant social and economic benefits to the State that result from the sustainable and efficient use of water, including:
 - iv) **benefits to the Aboriginal people** in relation to their spiritual, social, customary and economic use of land and water.³

¹ NSW Water Management Act 2000. Act 92 of 2000:
<http://www.austlii.edu.au/au/legis/nsw/consol_act/wma2000166/>

² Water Management Act, Section 404: *Dictionary*.
<http://www.austlii.edu.au/au/legis/nsw/consol_act/wma2000166/sch99.html>

³ Water Management Act, Section 3: *Objects*.
<http://www.austlii.edu.au/au/legis/nsw/consol_act/wma2000166/s3.html>

When we reside in a world where our river systems are managed in a policy framework designed for extractive purpose there is no room for spiritual considerations and it would be naïve for Aboriginal people to think that such a framework has any ability to protect the spiritual aspects of the rivers. It would also be naïve to think that heritage protection, native title or land rights law can protect those spiritual interests.

The spiritual context in which the river systems maintain their relevance is through the use of and the access to the flooding, the drying and the ecosystems that once flourished on the floodplains. There are no religious stories about a rising water table and vast tracts of land becoming salt scorched, of rivers silting up or whole colonies of river redgums dying through lack of inundation. Clearly, the existence of stories about spear fishing or netting, finding certain plants or animals in and around the rivers as an incident of that religious connection will not be, and has not been, enough to stop the madness.

The Water Management Act does make provision for Aboriginal people of NSW to exercise their native title rights so long as those rights are limited to the use of water for traditional purposes. Section 55 of the Act provides:

- 1) A native title holder is entitled, without the need for an access licence, water supply work approval or water use approval, to take and use water in the exercise of native title rights.
- 2) This section does not authorise a native title holder:
 - (a) to construct a dam or water bore without a water supply work approval,
 - or
 - (b) to construct or use a water supply work otherwise than on land that he or she owns.
- 3) The maximum amount of water that can be taken or used by a native title holder in any one year for domestic and traditional purposes is the amount prescribed by the regulations.⁴

⁴ Water Management Act 2000, Section 55: *Native Title Rights*.
<http://www.austlii.edu.au/au/legis/nsw/consol_act/wma2000166/s55.html>

The effect of the Native Title Act is that where a person has a right obtained through some form of “valid act”, such as a water access license granted by the Government, that right is protected. However, to the extent that native title is impaired then compensation is payable.

Assuming for a moment that there are Aboriginal people that can make it over the bar set by the High Court in terms of proving native title rights and interests in the waters of a particular river, and that those people could prove that they engaged in aquaculture on a substantial scale, for instance by the use of fish traps, and that they needed substantial amounts of water of a particular quality for those fish traps to work, that right to have water would be subordinate to the rights of other users who had valid rights. If the rights held by the other users had the effect of depriving native title holders of the use of those waters, then the NSW Government would arguably be required to compensate the native title holders for the water rights given to third parties.

But of course, money doesn't fix the problem. The loss is not only the fish that are not caught in the fish trap but the damage to the continuation of the culture through loss of use and contextual relevance of the fish traps.

The creation of a semi regulated water market is an irretrievable change in the river management landscape. The rights to the water have been sold. The value of the water on the market has increased dramatically, and the only water the Government can get back for purposes other than environmental, is water compulsorily acquired.

There is however, another way of approaching this dilemma. Aboriginal people are now well acquainted with the notion that the laws do nothing to protect Aboriginal spiritual and cultural beliefs. What was proposed by the NSW Aboriginal Land Council (“NSWALC”) and the NSW Native Title Services (“NSWNTS”) when the Water Management Act went through Parliament in 2000, was the establishment of an Aboriginal Water Trust. The schema for the Trust was as follows:

- Money was to be paid into a trust;
- The trust would use the money to buy water rights;

- The trust would ensure that for the first ten years the water remained on the market by leasing the water on to users;
- The first ten years of operation would be an accumulation period.
- In the interim Aboriginal communities could access up to 10% of the water for cultural purposes and 10% for commercial purposes (on a subsidised basis);
- At the expiration of the 10-year period the water rights and interests could be divided between the traditional owners, or the trust could continue to manage the water on behalf of the traditional owners.

The theory was, and remains, that in a commodified world the only real power to control exploitation is to own the commodity. If Aboriginal people own significant quantities of water they can then make the decision to use the water, so to speak be keeping it in the river or by extraction.

The justification for making such payment can be found in the policy underpinnings of the Aboriginal Land Rights Act 1983 (NSW). That Act sought to provide a mechanism for Aboriginal people to be compensated for the manner in which they had been dispossessed from their lands. That Act recognised that Aboriginal people had been dispossessed. What it did not contemplate was the decoupling of water rights from the ownership of land. For it had been through the common law imported into NSW that people originally obtained water rights by owning land adjacent to the watercourse, from which they could exercise their riparian rights to take water. From the ancient concept of riparian rights, the water licensing framework found in the 1912 Water Act was developed in which a land owner could only apply for a water license if their land was adjacent to the water course and the water license then attached to the land.

Because Aboriginal people in NSW had been dispossessed from their land, the opportunity to obtain water licences had not eventuated. Upon the de-coupling of water rights from the land it was those people who had water licenses under the Water Act 1912 who were able to then convert such into water access licences under the Water Management Act 2000. The result was that Aboriginal people were also dispossessed of their water rights.

The argument held some sway with the NSW Government and Cabinet approved the creation of an Aboriginal Water Trust which would receive an initial payment of \$5 million over two years after which time the project would be reviewed. However, the scheme of the Aboriginal Water Trust as approved by Cabinet was markedly different to that proposed by the Aboriginal groups. The Cabinet Office or the Department of Land and Water Conservation did not like the concept of an Aboriginal water bank and cited as the reason that the water market was still developing and thought to be too volatile, and therefore an expenditure of Government money in such a fashion would be reckless.

As an aside, it was with great interest that the news of the groundbreaking proposal of the Wentworth Group⁵ came into the public domain six months after the NSW Aboriginal groups had made the same Aboriginal water trust submission to the Commonwealth for consideration in the National Water Initiative. As you will recall the Wentworth Group proposed that an Environmental Water Bank be established in which Government money was paid into a trust which could purchase water access licenses on the open market, lease the water back to industry for a period of time in order to gain revenue to buy more water licenses. The Government thought it was a great idea which gained widespread support.

The Aboriginal Water Trust on the other hand never really got off the ground because the Cabinet approval was for a grants program which assisted Aboriginal people in developing water based enterprise, not buying water licenses. That is an Aboriginal person would be given money to buy a pump, a tank, build a dam or buy a tractor but the project could not accommodate Aboriginal people amassing water rights. The DIPRN then obtained legal advice to the effect that a grants program could not be a Trust or a charitable trust for tax purposes, and therefore the Minister could not create the Trust as an interim measure as first proposed. There has been no further development.⁶

⁵ See <<http://wwf.org.au/about/wentworthgroup/>>

⁶ Addendum: On 29 November 2005 the NSW Premier announced the “Riverbank” program as part of the City and Country Environment Restoration Program to which the Government allocated \$105 million over five years. In late 2005, the NSW Department of Natural Resources called for applications from Aboriginal individuals or organisations for funding grants in respect of “water related” business (excluding the purchase of water access licenses).

Aboriginal people are faced with world in which water is commodified to the extent that water managers see rivers as water delivery mechanisms. It is a world in which the Rainbow Serpent is having the life sucked out of it and mother earth is breaking out in pustules. It is a sad day for everybody in this country when Aboriginal people must claim money for compensation for dispossession from the waters only to use that money to buy back water rights in order to ensure that they have some control over the health of the rivers.

But it is the use of the River that has been commodified, not the spirit. Aboriginal people must have the ability to engage in the water economy not only for economic purposes but because Aboriginal people cannot trust the Government to defend their spiritual beliefs and cultural practices, or make decisions which understand or the respect the rivers.

It is perhaps timely to remember the words of Ted Strehlow, the anthropologist, who once said that it would only be when we abandoned our search for abstract scientific laws and turned instead to acknowledge the place that their (Aboriginal peoples) spirituality has in our common future with Aborigines, that Australian anthropology would blossom into maturity at last as the true Science of Man.

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