

10 September 2023

Natural Resources Commission
Department of Planning, Industry and Environment
GPO Box 5341
SYDNEY NSW 2001

By email only: ncc@nrc.gov.au

Dear Natural Resources Commissioner,

Re: Review of Water Sharing Plan for the Gwydir Regulated River Water Source 2016 (NSW)

- 1 Thank you for providing the Gomeroid Applicant on behalf of the Gomeroid People native title claim group NSD 37/19 (**Gomeroid People**) with the opportunity to comment on the statutory review of the *Water Sharing Plan for the Gwydir Regulated River Water Source 2016 (Gwydir Water Sharing Plan)* currently being undertaken by the Natural Resources Commissioner prior to the expiry of the Gwydir Water Sharing Plan on 30 June 2026.
- 2 NTSCORP Limited (**NTSCORP**) performs the functions of a native title representative body for New South Wales and the Australian Capital Territory under s 203FE of the *Native Title Act 1993 (Cth) (Native Title Act)*. NTSCORP is also the legal representative for the Gomeroid Applicant in the Gomeroid People's Native Title Determination Application (NSD 37 of 2019) (**Gomeroid Applicant**).

Gomeroid Country

- 3 The Gomeroid People are the Traditional Owners of a large area of land and water in north western New South Wales.
- 4 The vast majority of the area subject to the Gwydir Water Sharing Plan falls within Gomeroid Country and within the external boundaries of the Gomeroid People's Native Title Determination Application Area (NSD 37 of 2019) (**Gomeroid Country**).
- 5 Specifically, this includes the towns of Moree, Bellata, Pallamallawa, Warialda, Bingarra and Bundarra and the Gwydir River, Mehi River, Horton River and Carole Creek, Gil Gil Creek, Myall Creek, Moomin Creek and Tycannah Creek.
- 6 The water and waterways in Gomeroid Country are of particular cultural significance to Gomeroid People. The Gomeroid People understand water and waterways as being the 'veins' of Gomeroid Country. Water and waterways are an integral part of Gomeroid culture and are also locations closely associated with creation stories and the presence of ancestral beings.
- 7 Gomeroid People hold traditional responsibility for caring for and sustaining the waterways within Gomeroid Country. Gomeroid People are also particularly impacted when the health of the waterways within Gomeroid Country is compromised.
- 8 Increased water scarcity has led to severe consequences for the health of river systems across NSW which have disproportionately impacted Gomeroid People, including through the associated impact on fish resources and fish habitat and bush food and medicines. The impacts of climate change, including increasingly common and intensive periods of droughts, have been compounded by water mismanagement practises and ineffective extraction limits.

- 9 The Gomeroi Applicant is concerned by the fact that overallocations of water from rivers, coupled with a lack of effective monitoring and compliance, has meant that in recent years some rivers have either not flowed, run dry and/or have had poor water quality for extended periods. In affected areas, this scarcity of water has either limited or prohibited the exercise of native title rights.

Native Title and Water Rights

- 10 Native title is an important recognition of the rights and interests of Traditional Owners. The Native Title Act defines 'native title rights and interests' as being communal, group or individual rights and interests of Aboriginal Peoples or Torres Strait Islanders in relation to land or waters.
- 11 When the Federal Court of Australia makes a native title determination, the rights and interests that are, and always have been, held by the Traditional Owners in accordance with traditional law and custom are recognised at law.
- 12 In their native title application, Gomeroi People have claimed native title rights and interests which specifically concern water and include:
- (a) the right to have access to and use the natural water resources of the application area;
 - (b) the right to fish in the application area; and
 - (c) the right to have access to share and exchange resources derived from the land and waters within the application area.
- 13 In their native title application, Gomeroi People have also claimed native title rights and interests, which may be exercised on or in relation to water and waterways, including:
- (a) the right to participate in cultural and spiritual activities on the application area;
 - (b) the right to maintain and protect places of importance under traditional laws, customs and practices in the application area;
 - (c) the right to conduct ceremonies and rituals on the application area; and
 - (d) the right to transmit traditional knowledge to members of the native title claim group including knowledge of particular sites on the application area.
- 14 Section 211 of the Native Title Act provides that where a licence, permit etc. is required for a certain activity, native title holders are not required to obtain the licence, permit etc. for hunting, fishing, gathering or cultural and spiritual activities, where they do so for the purpose of satisfying their personal, domestic or non-commercial communal needs.
- 15 In the Gomeroi Applicant's view, these legal rights should be reflected more explicitly in the Gwydir Water Sharing Plan, rather than just as a notation beneath Part 5, Division 2, Section 20, which presently provides that there has been no determination of native title in relation to the water source and that native title rights may be exercised in accordance with Section 211 of the Native Title Act.

Recognition of native title in water policy/legislation

- 16 The recognition of native title rights and interests in water requires, as a starting point, a legislative and policy setting which ensures that native title holders are able to, in fact, exercise their rights and interests. As such, Commonwealth, State and Territory legislation and policy should provide for, among other things, access to water and waterways, cultural flows, and for water allocations to be made to native title holders.

- 17 It also requires that rivers and water resources are managed in a way that ensures they are not depleted, which of course impacts on the exercise of native title. This requires that water from rivers is not overallocated, that monitoring and compliance regimes are adequately resourced, and that Departments and Agencies undertake monitoring, conduct investigations and use enforcement mechanisms available to them in order to deter non-compliance.
- 18 All of these mechanisms could be strengthened in the Gwydir Water Sharing Plan 2016 to ensure better management of the waters and waterways within Gomeri Country and to ensure that Gomeri People's native title rights and interests are not adversely impacted as a result of the Gwydir Water Sharing Plan.
- 19 The Gomeri Applicant encourage Governments to explore options wherever possible to hand back land and waters to native title holders and to consider establishing (and adequately resourcing) programs that allow native title holders to actively participate in the management of rivers and water resources, such as programs for river rangers.
- 20 It should be acknowledged that the nature of native title rights and interests in water and therefore the manner in which Commonwealth, State and Territory policy and legislation should recognise, protect, and accommodate these title rights and interests is a developing area of the law. The Gomeri Applicant anticipates further decisions and commentary from the Courts on these issues in the coming years, including decisions relating to compensation arising from the mismanagement of water and waterways.

Water Sharing Plan for the Gwydir Regulated River Water Source 2016 [NSW]

Acknowledgment of the Gomeri People

- 21 The draft Gwydir Water Sharing Plan does not acknowledge Gomeri People, the Gomeri Native Title Application (NSD 37 of 2019) or outline the specific rights claimed by Gomeri People in the waters the subject of the Gwydir Water Sharing Plan.
- 22 The Gomeri Applicant submits that the Gwydir Water Sharing Plan should be amended to include a section which sets out details of the Gomeri Native Title Application, including the specific native title rights claimed by the Gomeri People.

Native Title rights claimed by the Gomeri People

- 23 The native title rights claimed by the Gomeri People in their native title application, which are exercisable on or in relation to waters are as follows:
 - the right to access the area;
 - the right to use and enjoy the area;
 - the right to move about the area;
 - the right to fish in the area;
 - the right to have access to and use the natural water resources of the application area;
 - the right to have access to share and exchange resources derived from the land and waters;
 - the right to participate in cultural and spiritual activities on the area;
 - the right to gather natural resources of the area;
 - the right to manage natural resources;

- the right to maintain and protect places of importance under traditional laws, customs and practices on the area;
- the right to participate in cultural and spiritual activities on the area;
- the right to conduct ceremonies and rituals on the areas;
- the right to transmit traditional knowledge to members of the native title claim group including knowledge of particular sites on the application areas;
- the right to speak for and make non-exclusive decisions about the area in accordance with traditional laws and customs;
- the right to speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws and customs;
- the right to control access to or use of the lands and waters within the application area by other Aboriginal People in accordance with traditional laws and customs.

24 Native title rights and interests claimed by the Gomeroi People on or in relation to land that will be affected where the land is connected culturally or physically to waters include but are not limited to:

- the right to possession, occupation, use and enjoyments of the lands and waters where exclusive native title can be recognised;
- the right to camp in the area;
- the right to erect shelters and other structures;
- the right to live in the area;
- the right to hold meetings on the area;
- the right to hunt in the area; and
- the right to manage natural resources.

Recognition of uses of water by Aboriginal People in the Gwydir Water Plan

25 The Gomeroi Applicant welcomes the inclusion of the following Aboriginal cultural objectives in Part 2 of the Gwydir Water Sharing Plan:

- (a) *to provide access to water in the exercise of native title rights,*
- (b) *to provide access to water for Aboriginal cultural use, including fishing,*
- (c) *to protect, and where possible improve, identified surface water-dependent culturally significant areas, including important riparian vegetation communities,*
- (d) *to contribute to the maintenance of water quality within target ranges to ensure suitability of water for Aboriginal cultural use.*

26 Further, the Gomeroi Applicant welcomes the recognition in the Gwydir Water Sharing Plan that these targeted Aboriginal cultural objectives are to be achieved via the following strategies, amongst others:

- (a) *Manage access to water consistent with the exercise of native title rights,*

(b) *Provide for water associated with Aboriginal cultural values and uses.*

...

- 27 Whilst the Gwydir Water Sharing Plan provides performance indicators to measure the success of the strategies for achieving the broad Aboriginal cultural objectives and considerations for evaluating the effectiveness of the strategies, it is unclear how in practice this has occurred. It is also unclear how DPE has upheld its stated intention to manage access to water under the Gwydir Water Sharing Plan 'consistent with the exercise of native title rights'.
- 28 As outlined above, increased water scarcity in the area subject to the Gwydir Water Sharing Plan has led to severe consequences for the health of river system which has disproportionately impacted Gomerioi People, including through the associated impact on fish resources and fish habitat and bush food and medicines. The impacts of climate change, including increasingly common and intensive periods of droughts, have been compounded by water mismanagement practises and ineffective extraction limits.
- 29 The Gomerioi Applicant is concerned by the fact that overallocations of water from rivers, coupled with a lack of effective monitoring and compliance, has meant that in recent years some rivers have either not flowed, run dry and/or have had poor water quality for extended periods. In affected areas, this scarcity of water has either limited or prohibited the exercise of native title rights. The Gwydir Water Sharing Plan is presently failing to recognise and protect native title rights and interests in water.
- 30 The various and complex factors contributing to these events are beyond the scope of these comments, but in the Gomerioi Applicant's view, the policy and legislative settings which allowed this to occur constituted – and continues to constitute – a suppression of the native title rights and interests held by Traditional Owners along those rivers.
- 31 The Gomerioi Applicant urges DPE to undertake more comprehensive and culturally appropriate consultation with Gomerioi People in relation to the development and implementation of the next Gwydir Water Sharing Plan [2026], including through consultation with the Gomerioi Gaba Giirr Buggay Water Board (**the Gomerioi Water Board**), which has been established by the Gomerioi Applicant for the purpose of allowing the Gomerioi Applicant to be consulted with directly in relation to all matters which concern the waters of Gomerioi Country, including the management, regulation, control, and use of water resources.

Is the Gwydir Water Sharing Plan delivering benefits for Gomerioi People?

- 32 The vision statement contained in Part 2, Section 8 of the Gwydir Water Sharing Plan includes:

(c) the spiritual, social, customary and economic benefits of surface water to Aboriginal communities,

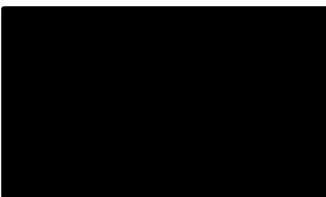
- 33 The Gomerioi Applicant would encourage the Natural Resources Commissioner to undertake a forensic audit of how this vision statement, together, with the Aboriginal cultural objectives contained in Part 2, Section 11, have been met since the Gwydir Water Sharing Plan was introduced in 2016.
- 34 This forensic audit should consider how many Aboriginal Cultural access licences for the taking of water by an Aboriginal Person or Aboriginal community have been granted in accordance with section 42(2) of the Gwydir Water Sharing Plan since its inception and the ML/year allocated for those purposes.

- 35 The forensic audit should also consider how “*economic benefits of surface water to Aboriginal communities*” have been delivered, especially given Aboriginal Cultural access licences are limited to personal, domestic or communal purpose as outlined in section 42(3) of the Gwydir Water Sharing Plan.
- 36 Similarly, Part 12, Section 82(6) provides that the Gwydir Water Sharing Plan may be amended for the protection of water-dependent Aboriginal cultural assets. The Gomeri Applicant would encourage the Natural Resources Commissioner to consider what, if any, steps were taken by DPE to engage with Gomeri People in relation to the identification of water-dependent Aboriginal cultural assets in Gomeri Country and to consider the impediments which exist to making amendments to the Gwydir Water Sharing Plan for this purpose.

Gomeri Cultural Flow

- 37 Gomeri People have long advocated for the establishment of a Gomeri owned Cultural Flow as part of a comprehensive On Country water rights model.
- 38 Water allocation impacts the sustainability of catchment and river systems along with the cultural, social and economic health of Gomeri communities. The quantity of water presently allocated for commercial use within Gomeri Country is unsustainable and the water system is being degraded as a result of water depletion, pollution and salinity. The poor health of the water system impacts upon Gomeri People’s ability to exercise their native title rights to fish and use water resources for subsistence, recreation and other traditional purposes. A major failing of the Gwydir Water Sharing Plan 2016 is that it does not prescribe a Gomeri Owned Cultural Flow.
- 39 The Gomeri Applicant urges the Natural Resources Commissioner to consider the extensive scientific and cultural data developed concerning the efficacy of Aboriginal Owned Cultural Flows and to consider that information with regard to the current Gwydir Water Sharing Plan. The Gomeri Applicant call for the inclusion of a Gomeri Owned Cultural Flow in the Gwydir Water Sharing Plan 2026.
- 40 If you require any further information or would like to discuss these submissions with the Gomeri Applicant, please do not hesitate to contact [REDACTED] Solicitor at NTSCORP, by email at [REDACTED]

Yours sincerely,



NTSCORP Limited