

07 December 2022

Our reference: NTS008

Benjamin Cox
Principal Planning Officer
Water Assessments
Planning and Assessment
Department of Planning and Environment

By email only

Dear Benjamin,

Dungowan Dam SSI-10046

- 1 We refer to the above State Significant Infrastructure Application and Environmental Impact Statement (**EIS**) prepared by the Department of Planning and Environment - Water Infrastructure NSW (**the Proponent** or **WINSW**) in support of the proposed Dungowan Dam and Pipeline Project (**the Project**).
- 2 Please find below submissions from the native title applicant for the Gomeroi People (**Applicant**) for the Gomeroi People's Native Title Determination Application (Federal Court Proceedings number NSD37/2019), in relation to the Project.

Background

- 3 NTSCORP Limited (**NTSCORP**) acts for the Applicant in relation to the Gomeroi People's Native Title Determination Application (Federal Court Proceedings number NSD37/2019) (**Gomeroi Claim**).
- 4 The area that is the subject of the Gomeroi Claim is bounded by the NSW/QLD state border in the north, the western slopes of the New England Tableland in the east, the Hunter and Goulburn Rivers in the south and the Castlereagh River in the west (**Gomeroi Claim Area**).

Proposed Project

- 5 WINSW is currently seeking planning approval for:
 - a. The decommissioning of the existing Dungowan Dam;
 - b. The construction of a new dam 3.5km downstream from the existing Dungowan Dam with an expected capacity of 22.5 GL (**New Dungowan Dam**);
 - c. The construction of a new buried 32km pipeline from the New Dungowan Dam to the connection point with the existing Chaffey Dam; and
 - d. The construction of ancillary infrastructure, including overhead powerlines and access tracks.
- 6 If approved and constructed, the Project is intended to be operated by WaterNSW and Tamworth Regional Council.
- 7 The area identified by WINSW to be affected by both the construction and operation of the Project covers approximately 315 hectares, including approximately 148 hectares that will be

permanently disturbed by inundation and permanent infrastructure (**the Project Area** and **Permanent Disturbance Area**, respectively). The Project Area is partly within the Gomeroi Claim Area.

- 8 The site of the New Dungowan Dam is on the Dungowan Creek, which is part of the Peel Valley and Namoi River catchment. The Peel Valley and Namoi River catchment incorporates a large part of the Gomeroi Claim Area from Nundle in the East to Walgett in the West, as well as a number of important waterways to Gomeroi People including the Namoi, Manilla and Peel Rivers, and the Narrabri, Baradine and Bohena Creeks.
- 9 The Project is intended to improve long-term water security for the Tamworth region, which also falls within the Gomeroi Claim Area.
- 10 Accordingly, the Applicant has an interest in the Project as a whole, including due to the potential impacts the Project may have on waterways and water security throughout Gomeroi Country.

Position Statement

- 11 The Applicant is of the position that any proposal to address water security within Gomeroi Country must be developed with Gomeroi People.
- 12 The Applicant is concerned that the works proposed by the Proponent may impact on Gomeroi People's native title rights and interests and cultural heritage within the Project Area, as well as on the health of the connected waterways throughout Gomeroi Country. These concerns are informed by an assessment of the EIS for the proposed Project, as well as the Applicant's knowledge of and responsibility to care for Gomeroi Country, including the sustainable management of water.
- 13 The Department of Planning and Environment's (**DPE**) assessment of the Project must take into proper consideration Gomeroi People's:
 - a. native title rights and interests, including in relation to access to and use of water and waterways;
 - b. cultural heritage; and
 - c. connection to country, including the significance of water and waterways as well as biodiversity.
- 14 Should the Project proceed, the concerns raised by the Applicant may be mitigated by the development of a Cultural Heritage Management Plan, Cultural Flow Management Plan and Cultural Resource Protection Plan, in consultation with the Applicant. It is submitted that the development of such plans should be included as conditions to any Project approvals, if given.

Native title rights and interests

- 15 Within the boundaries of the Gomeroi Claim Area, Gomeroi People actively exercise a range of native title rights, as set out in the Register of Native Title Claims in relation to the Gomeroi People Claim, including rights to access, use, camp, gather and use resources, hunt, fish, conduct ceremony, speak for and make decisions in relation to the land, and maintain and protect places of importance.

- 16 Gomeroi People have a vital cultural and spiritual connection to their country. That connection includes artefacts and objects which are the physical evidence of Gomeroi People's occupation of their territories. It also consists of a connection to the cultural landscape. That is, a connection to the plants, animals, and geographical forms which Gomeroi People have cared for, and been cared for by, for millennia.
- 17 Gomeroi People's cultural landscape incorporates the dreaming stories which pass through their country. These stories and song lines connect and unite the landscape and tell of the creation and formation of the country. That connection is enduring today. Gomeroi People continue to tell the stories of their country and continue their cultural practices.
- 18 The water and waterways of Gomeroi Country are of particular cultural significance to Gomeroi People. Gomeroi People understand the water and waterways as being the 'veins' of the country they live on. These waterways are integral to the creation stories of Gomeroi Country.
- 19 Given the above, it is submitted that the Project should provide for, amongst other things, access to water and waterways, cultural flows, and water allocations to be made to Gomeroi People.
- 20 The recognition of native title rights in water within the Project Area is also required under s 20 of the *Water Sharing Plan for the Namoi and Peel Unregulated Rivers Water Sources 2012* (NSW) (**Namoi and Peel Rivers Water Sharing Plan or Plan**).

Impact on native title rights and interests

- 21 The Project may have significant impacts, both temporarily and permanently, on Gomeroi People's native title rights and interests within both the Project Area and the Peel Valley and Namoi River catchment area.
- 22 The Applicant is particularly concerned that the Project will permanently impair Gomeroi People's right to access and exercise their native title rights and interests within the Permanent Disturbance Area. Gomeroi People's right to access and exercise their native title rights to other parts of the Project Area may also be impaired during the proposed six years of construction.
- 23 The Project may also affect Gomeroi People's native title rights and interests in relation to access and use of water and waterways throughout the Peel Valley and Namoi River catchment area. The Gomeroi Applicant is concerned that the increased capacity of the New Dungowan Dam may affect the flow and depth of the Dungowan Creek and other connected waterways within the Peel Valley and Namoi River catchment area. The depletion of waterways within Gomeroi Country has an impact on Gomeroi People's asserted native title rights and interests in water, including the right to fish and have access to and use the natural water resources.
- 24 The Applicant submits that the impact of the Project on Gomeroi People's native title rights and interests must be mitigated wherever possible. The Applicant suggests that mitigation may be achieved by through the development of:
 - a. Appropriate Management Plans; and
 - b. Safety Protocols to ensure Gomeroi People's right to access and exercise native title rights and interests within the Project Area during the construction and operation of the Project.

- 25 The Applicant further submits that Gomeroi People must be compensated for any permanent impairment of their native title rights and interests as a result of the Project, in accordance with the *Native Title Act 1993* (Cth) (**NTA**).
- 26 Finally, the Applicant notes that the Project may be a 'future act' that may need to be validated under the future act regime contained in Part 2, Division 3 of the NTA.
- 27 Should the Project proceed, Applicant requests that WINSW advise how it proposes that the works associated with the Project will be validated under the future act regime of the NTA, including whether this will be achieved by way of an Indigenous Land Use Agreement (**ILUA**) with Gomeroi People.

Cultural Heritage

- 28 The Applicant is concerned by the potential impact on cultural heritage, particularly arising from ground disturbance works associated with the Project.
- 29 The Applicant notes the Aboriginal Cultural Heritage Assessment (**ACHA**) at Appendix J to the EIS, and the AHIMS data provided within the ACHA. The Applicant is not satisfied with the ACHA.
- 30 The Applicant re-iterates the comments made at page 10 of the ACHA regarding concerns 'focused on the level of on-Country participation, especially in relation to RAPs not from the local area...'.
- 31 The Applicant is of the position that the current regime for the protection of cultural heritage contained within Part 6 of the *National Parks and Wildlife Act 1974* (NSW) (**NSW Aboriginal Cultural Heritage System**) does not adequately ensure that Traditional Owners are able to speak for and protect their Country and cultural heritage, nor does it provide for the protection of Country or cultural heritage in accordance with cultural protocols for men's and women's business.
- 32 Gomeroi People have the rights to protect and speak for Country, including to manage, protect and decide on what happens with cultural heritage in accordance with traditional laws and customs. For this reason, the Applicant considers it vital that decisions which affect cultural heritage be made by consulting only with those Traditional Owners who have a right to speak for Gomeroi Country. Should the Project proceed, the Applicant notes the need for the Proponent to engage with it in an ongoing manner with respect to cultural heritage matters.
- 33 Particular care should be undertaken by the Proponent to not disturb any sites listed in the AHIMS database and identified by the ACHA within the Project Area.
- 34 The Applicant notes that WINSW should not place sole reliance on the AHIMS database as not all sites are recorded on AHIMS and sites themselves often form part of a wider cultural landscape which is not readily understood by non-Gomeroi People nor captured by the AHIMS. Gomeroi People have the right, and the cultural obligation, to protect all of the sites within their Country whether they are registered on AHIMS or not.

- 35 Gomeroi People conceive of Gomeroi Country as a unified whole, connected by dreaming and song lines. When there is an impact on one part of the landscape, it has cultural and spiritual impacts on other locations, even if they are geographically distant.
- 36 The Applicant submits that in order to give the fullest effect to the objectives listed under s 12(3) of the Namoi and Peel Rivers Water Sharing Plan, NSW DPE should engage with the Applicant at this preliminary stage.
- 37 The Applicant further submits that any further cultural heritage surveys and development of a Cultural Heritage Management Plan (**CHMP**) and Cultural Resource Protection Plan must be conducted with the involvement of local Gomeroi People, as nominated by the Applicant.
- 38 These Plans must establish appropriate processes for managing Aboriginal Heritage, including the establishment of an appropriate Keeping Place, with particular consideration for the relocation or reconstitution of artefacts and sites likely to be affected by the clearing of vegetation or inundation.
- 39 We seek a commitment to ensure the above requests form a condition of any consent provided to the proposed acts and specifically request a response on this matter.
- 40 It is noted that the above procedures will assist the Proponent to comply with its legislative requirements to conduct adequate cultural heritage due diligence.

Sustainable water and ecological management

- 41 Gomeroi People hold traditional knowledge and responsibility for how to care for and sustain the waterways within Gomeroi Country. Gomeroi People are also particularly impacted when the health of the waterways on Gomeroi Country are compromised. The Applicant acknowledges the need to address water scarcity for communities living on Gomeroi Country but is concerned about the cumulative impact the proposed Project may have on the health of these waterways.
- 42 As noted above, the sustainable management of rivers and water resources, in a way that ensures they are not depleted, is critical to ensure that Gomeroi People's native title rights and interests, particularly as they relate to water management, are not impaired. This requires that water from rivers is not overallocated, that monitoring and compliance regimes are adequately resourced, and that responsible NSW Departments and Agencies undertake monitoring, conduct investigations and use enforcement mechanisms available to them in order to deter non-compliance.
- 43 The Applicant notes that Dungowan Creek is regulated by the Namoi and Peel Rivers Water Sharing Plan and is within the Dungowan Creek Management Zone. Section 9 of the Namoi and Peel Rivers Water Sharing Plan sets out the following vision statement for the Plan:

The vision for this Plan is to provide for the following—

- (a) the health and enhancement of these water sources and their water-dependent ecosystems,*
- (b) the continuing productive extraction of surface water for economic benefit,*
- (c) the spiritual, social, customary and economic benefits of surface water to Aboriginal communities,*

(d) the social and cultural benefits to urban and rural communities that result from surface water.

44 The Applicant notes that the Plan sets out the Aboriginal cultural objectives, including the following identified targeted Aboriginal cultural objectives at s 12(2):

- (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.*

45 The Applicant also notes that the Plan refers to targeted environmental objectives at s 10(2) including the enhancement of:

- (a) The recorded distribution or extent, and population structure, of target ecological populations;*
...
- (b) The longitudinal and lateral connectivity within and between water sources to support target ecological processes;*
...
- (c) Water quality within target ranges for these water sources to support water-dependent ecosystems and ecosystem functions*

46 The Applicant submits that DPE must consider the vision statement as well as the targeted Aboriginal cultural and environmental targets of the Plan in their assessment of WINSW's EIS.

47 Increased water scarcity has led to severe consequences for the health of river systems across NSW which have disproportionately impacted Gomeroi People. The impacts of climate change, including increasingly common and intensive periods of droughts, have been compounded by water mismanagement. Of particular concern for the Applicant is the non-compliance with water regulations by irrigators, instances of water theft, and the unsustainable limits on water extractions.

48 The Applicant is concerned that past mismanagement of water systems at the State level, such as the overallocation of water from rivers and a lack of effective monitoring and compliance, has meant that in recent years some rivers in NSW 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.

49 The Applicant is concerned that the proposed Project does not address the broader ongoing water issues facing Gomeroi People, particularly those residing further downstream.

50 Noting the need to ensure that flows are sufficient and appropriate for Aboriginal cultural use, the Applicant is also concerned for the potential for the water quality of flows to be affected by agricultural and cold-water pollution associated with the project.

Cultural flows

- 51 The Applicant considers cultural flows as vitally important to not only upholding Gomeroi People's custodial responsibility to country, but also to ensuring that Gomeroi People's native title rights and interests in regards to water and waterways within Gomeroi Country may be exercised.
- 52 The Applicant is concerned by the statement at page 41 of the ACHA that '[c]ultural flows were explored in the cultural mapping study, but no specific values were identified.'
- 53 The Applicant requests that WINSW consult with the Applicant to develop a specific study of the cultural significance of water and waterways within the Project Area.
- 54 The Applicant also requests that WINSW commit to the development of a Cultural Flow Management Plan (**CFMP**) in consultation with the Applicant. The CFMP must ensure that any reduction in flow and depth to Dungowan Creek and connected waterways is not overly burdensome on Gomeroi People's native title rights and interests in regards to water and waterways, and to ensure that there are adequate flows to support fish habitat downstream of the dam. The CFMP should also provide an opportunity for the Applicant to ensure that water release plans are developed in a way which is mindful of the potential impact that releases may have on culturally significant sites and artefacts in the vicinity of Dungowan Creek.

Impact on biodiversity

- 55 The protection of biodiversity, including native fish populations as well as bush tucker and bush medicine resources throughout the Project Area, is a significant concern for Gomeroi People.
- 56 Gomeroi People hold knowledge of, and make use of, bush tucker and bush resources from native vegetation throughout Gomeroi Country. The Applicant is concerned by the potential impacts on bush tucker and bush medicine resources within the Project Area. The Applicant requests that a further assessment of the significance of bush tucker and bush medicine resources within the Project Area be undertaken by WINSW in consultation with Gomeroi People nominated by the Gomeroi Applicant.
- 57 The Applicant has reviewed the Aquatic Ecology Assessment (**AEA**) at Appendix I to the EIS.
- 58 The Applicant is concerned that the works associated with the proposed Project Area will have significant impacts on key fish habitat. The Applicant notes that the AEA, at page 115, states that that a total of 210,562m of key fish habitat in the Project Area will be affected.
- 59 The Applicant also notes that at page 176 of the AEA it is stated that these impacts are intended to be offset through measures determined in consultation with the Department of Primary Industries – Fisheries (**DPI – Fisheries**). Given the direct impact that this loss of key fish habitat has on the ability of Gomeroi People to exercise native title rights to fish within the Project Area and the connected waterways, the Applicant is of the position that any biodiversity offset programs should be developed in consultation with Gomeroi People on Gomeroi Country.

- 60 The Applicant is also of the position that a Construction Environment Management Plan (**CEMP**) should be developed in consultation with the Applicant to establish culturally appropriate ways of rehabilitating areas once affected by the Project's construction.

Employment opportunities

- 61 The Applicant proposes that the Proponent should create economic opportunities for Gomeroi People, at every stage of the Project, whether this be through the paid engagement of Gomeroi People to undertake cultural heritage assessments or environmental or site monitoring or employing Gomeroi People during construction works and other related activities.
- 62 The Applicant requests that it be informed of the types of economic opportunities likely to be available during the Project's construction and operation.
- 63 We further submit that the Proponent should ensure that Gomeroi People are provided with preferential employment and contracting opportunities in relation to the Project.

Next Steps

- 64 The Applicant requests that DPE ensures that the contents of the Applicant's submission are genuinely considered when reaching its decision regarding the current EIS and any others made in the future.
- 65 Should the Project proceed, the Applicant submits that it should be subject to the following conditions prior to the commencement of any construction works:
- a. The development of the following plans in consultation with the Applicant:
 - i. Cultural Heritage Management Plan,
 - ii. Cultural Flows Management Plan,
 - iii. Cultural Resource Plan,
 - iv. Construction Environment Management Plan, and
 - v. Biodiversity Offset Plans.
 - b. Any future dam management should have allocated Gomeroi Management systems, such as Gomeroi Water Scientists and Water Rangers. These positions should be provided with decision making capabilities and compliance powers.
 - c. The proponent should consult with the Applicant to further develop and implement the recommendations contained within the ACHA.
- 66 The Applicant submits that it should be consulted with in the planning and design stage of all future projects to ensure that they are supported by the Gomeroi Community in the first instance. These consultations should be engaged in before any planning works or studies begin.
- 67 If you have any questions in relation to the above, please do not hesitate to contact the authors.



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