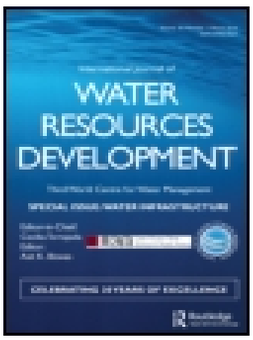

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International Journal of Water Resources Development

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/cijw20

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To cite this article: William Nikolakis & R. Quentin Grafton (2021): Law versus justice: the Strategic Aboriginal Water Reserve in the Northern Territory, Australia, International Journal of Water Resources Development, DOI: 10.1080/07900627.2021.1882406

To link to this article: https://doi.org/10.1080/07900627.2021.1882406

Published online: 24 Feb 2021.

INTERNATIONAL JOURNAL OF WATER RESOURCES DEVELOPMENT
https://doi.org/10.1080/07900627.2021.1882406

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Law versus justice: the Strategic Aboriginal Water Reserve in the Northern Territory, Australia

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ABSTRACT

Using a policy tracing approach, we analyse the legislating of the Strategic Aboriginal Water Reserve (SAWR) in the Northern Territory, Australia. The SAWR is a share of the consumptive pool allocated to eligible Indigenous landowners in water plan areas, providing water resources for future economic development. Drawing on parliamentary and policy sources to reveal competing interests and ideologies, and the challenges of codifying water rights, this study finds that legislating water rights alone is insufficient to achieve water justice – water justice measures must respond to power imbalances and inequities by empowering people with the capabilities to implement their rights.

ARTICLE HISTORY
Received 23 June 2020
Accepted 24 January 2021

KEYWORDS
Indigenous People's water rights; First Peoples; water justice; water policy; law

Introduction

> We assert that water has a right to be recognized as an ecological entity, a being with a spirit and must be treated accordingly. For the Indigenous Peoples water is essential to creation; Ancestral beings are created by and dwell within water. We do not believe that water should solely be treated as a resource or a commodity (Garma International Indigenous Water Declaration, 2008, p. 1).

In 2019, the Strategic Aboriginal Water Reserve (SAWR) became statute in the Northern Territory (NT) of Australia. The SAWR is 'water allocated in a water allocation plan for Aboriginal economic development in respect of eligible land' (Section 4(1), Water Act 1992 (NT)). The SAWR's enactment, after a decade of deliberations, was greeted with enthusiasm by many Indigenous peoples and their allies, although not without concerns expressed about the process and outcomes (Godden et al., 2020). For some, entrenching Indigenous water rights in legislation was seen as critical for protecting these rights (O'Bryan, 2019; Taylor et al., 2016). However, water legislation is produced through political and interpretive processes that may entrench water inequity and injustice (Alatout, 2007). We explore this 'law versus justice' issue through the lens of the NT experience and the SAWR.

A critical goal for water justice is supporting Indigenous peoples with water rights and access for self-governance (Victoria State Government, 2016; Zwarteveen & Boelens, 2014). A Strategic Indigenous Reserve (SIR) policy was first advocated by Indigenous representative groups, and then developed in collective and deliberative processes in 2009–10 (Nikolakis &

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Grafton, 2014). The SIR policy was then taken up by the NT Labour Government as policy in 2011. The SIR policy provided water in water allocation plans (WAPs) to relevant Indigenous peoples for future economic purposes (Jackson & Barber, 2013; Nikolakis, 2011; Nikolakis & Grafton, 2014, 2015; Nikolakis et al., 2013). In 2012, the newly elected Country Liberal Party (CLP) government rejected the SIR. Following an election promise, an incoming NT Labour Government revived the policy, and after community consultation processes, it developed a policy framework that renamed the SIR as a Strategic Aboriginal Water Reserve (SAWR) in 2017. After an inquiry, public consultation and debate in the Legislative Assembly, this SAWR policy framework was legislated in October 2019 as an amendment to the Water Act 1992 (NT): the Water Further Amendment Act 2019 (NT).

Using a process tracing method, we focus on the processes and discourses used to develop the SAWR. Our contribution is to illuminate existing ideologies and heuristics for water justice and to identify the opportunities and challenges in legislating Indigenous water rights.

Water justice context

Indigenous Australians own around half the NT land area, primarily under the Aboriginal Land Rights Act (Northern Territory) 1976 (Commonwealth). This landmark legislation provides collective title to 'traditional owners' who established a traditional connection to Crown (public) land. Aboriginal land councils and land trusts (traditional owner groups) govern these lands across the NT. The common law doctrine of native title, recognized by Australia's High Court in 1992, established a bundle of property rights for Indigenous peoples who can prove these rights to specific areas. These rights, later codified in the Native Title Act 1993 (Commonwealth), can be non-exclusive (rights to hunt, fish and practice ceremony), coexisting with other land uses, such as pastoral leases; or exclusive, a right to exclusive use and possession of land. There are statutory procedures to ensure these rights are not encroached upon. Water access is critical for exercising native title rights, but the courts have still not yet recognized a native title right to commercial water use (O'Donnell, 2013). Recognizing Indigenous commercial water rights is a problem globally, and at the time of writing, two states in Australia recognize commercial water rights in statute. The New South Wales Water Management Act 2000 (NSW), which provides Aboriginal commercial licences capped at 500 ML. These are only available outside the Murray–Darling Basin, so cover only 25% of the state (Jackson, 2018). In Queensland, the Cape York Peninsula Heritage Act 2007 (Queensland) provides for water plans to provide a water reserve for Indigenous communities in the plan area (around 1% of surface water flow) to achieve their economic and social aspirations. These plans have largely not been implemented (Queensland Government, 2019).

The Water Act 1992 (NT) vests the right to use and manage water to the Crown (state) and provides for the management of ground and surface water resources in the NT (Figure 1). WAPs and water licences are the mechanisms for sustainably managing water. WAPs establish the consumptive (stock and domestic, agricultural and industrial use) and non-consumptive (environmental use) pool based, typically, on sustainable yield data and are reviewed every five years. It is estimated that only 5% of the NT is covered by WAPs (Higgins, 2019). Licences set the conditions for water use between different users and are valid for 10 years. Indigenous peoples are under-represented in holding water

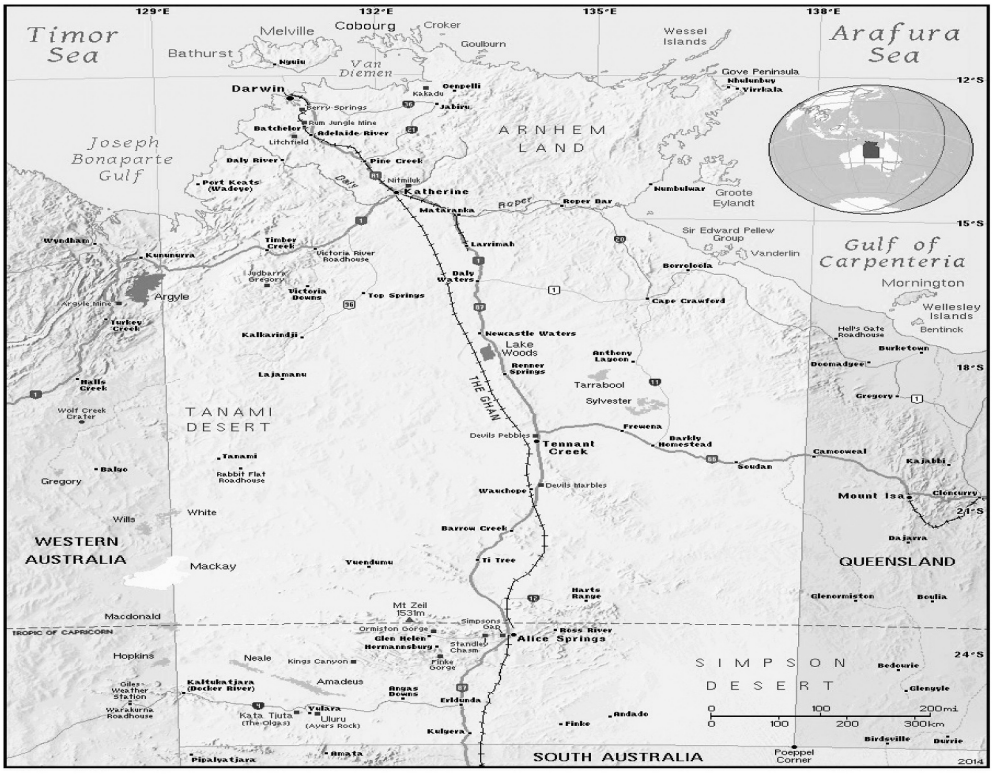

Figure 1. Map of the Northern Territory. Source: Copyright © 2010, 2013 by Ian Macky. https://ian.macky.net/pat/map/au/nt/nt.html.

resource entitlements in the NT, and across Australia (Hartwig et al., 2020; Jackson & Langton, 2011). Thus, enacting legislation can be a crucial step to the delivery of Indigenous water resources as permanent and binding (Abbott et al., 2000), and it can safeguard against administrative discretion (Salbu, 2000). But legislation may, nevertheless, reinforce existing inequities (Godden et al., 2020).

The remainder of this paper is structured as follows. We present a conceptual framework on water justice and detail the process tracing method. From secondary sources, we document the development of the SAWR. We then offer insights for water justice, concluding that water justice processes are rooted in cultural and political systems, and shaped by power, that can dominate concepts of justice and fairness (Nikolakis & Grafton, 2014; Nikolakis et al., 2013; Syme et al., 1999).

Conceptual framework

Legal perspective

In Australia (and in other settler colonial countries), parallel legal orders exist – those of Indigenous peoples, whose legal orders pre-exist colonization, and those of the state – with both asserting sovereignty to lands, peoples and natural resources (Nikolakis et al., 2019; Nikolakis & Hotte, 2020; Poelina et al., 2019; Ruru, 2018; Watson, 2002). Indigenous

rights to water are complex and evolving, often coexisting with, and contesting, the state's asserted sovereignty to water (O'Donnell, 2013). Marshall (2017) documents that:

> From an Aboriginal perspective, the importance of characterizing water through contextual layers of creation stories remains paramount to understanding traditional law obligations. [. . .] Aboriginal laws articulate the rights and interests of Aboriginal communities as they have always existed in the creation narrative. (p. 21)

Where the legal orders of Indigenous peoples and the state interact can be the locus of conflict, struggle, advocacy and negotiation – for water, this is embodied in the goal and process of *water justice* (Getches, 2005; Jackson & Barber, 2013; McLean, 2007, 2007; Nikolakis et al., 2016; Robison et al., 2018; Taylor et al., 2016).

Law is normative and expresses a desired state (Cover, 1983). Achieving water justice through legislation involves a process of social construction – whereby politics and interpretation entrenches the winners (those who gain or maintain water access) and losers (those who lose access or remain excluded) (Alatout, 2007). Those with power determine what water justice is, for whom and how. As Dr Martin Luther King, Jr acutely observed, 'law and order exist for the purpose of establishing justice and when they fail in this purpose they become the dangerously structured dams that block the flow of social progress' (King, 1963). In sum, laws seeking to promote water justice law are *not* the same as water justice.

Operationalizing water justice

Justice has several interdependent components, including distributive justice (a fair distribution of rights, resources and benefits), reparative justice (restoration for historical injustices) and justice as recognition (cultural, legal and political recognition) (Aggleton et al., 2019). 'Practical justice' offers a bridge between concepts of justice and the policy choices and actions to effect social change for justice (Aggleton et al., 2019; Patton & Moss, 2019). Practical justice engages with normative theories of justice, but also connects to equity and equality, and the actions about how best to achieve justice goals (Aggleton et al., 2019, p. 2).

Drawing from Fraser (2000, 2009), Jackson (2018) conceptualizes three pathways for water justice with Indigenous peoples that go beyond meeting basic water justice (delivering basic water needs for drinking, sanitation and health): *recognition* of Indigenous water rights, by the state, as part of Indigenous sovereignty over their traditional lands and water and over intergenerational timeframes (Zwarteveen & Boelens, 2014, p. 143); *representation* at specified temporal and spatial scales in terms of Indigenous water governance based on respectful partnerships (Poelina et al., 2019); and *redistribution* or the reallocation of state-backed water rights and the benefits derived from these to Indigenous peoples (such as that affirmed in the National Cultural Flows Research Project, 2018). Recognition, representation and redistribution are interconnected because if water rights are recognized, this also requires Indigenous representation in water governance and, if Indigenous nations have been dispossessed of their traditional lands and water, a redistribution of rights and outcomes is needed to deliver water justice.

Indigenous scholar Marshall (2017) details how First Peoples in Australia have been dispossessed of access and control of water in their Country, including where they have native title rights. In her view, this dispossession requires restitution and legal recognition of water rights of First Peoples that fully accounts for their traditional custodianship of their Country, their history, their culture and practices. The constitutional or statutory recognition

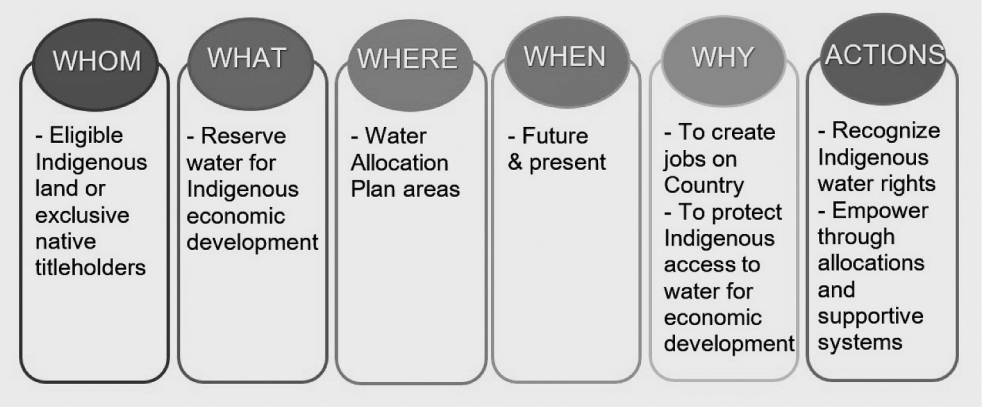

Figure 2. Critical questions for water justice and summary responses.

of Indigenous water rights (and to lands and natural resources more generally which is their 'Country') has been the focus of advocacy and negotiation, to mitigate state encroachment of these rights (Nikolakis & Hotte, 2020; O'Bryan, 2019; Taylor et al., 2016).

Critics of state recognition, representation and redistribution approaches argue that 'official recognition policies and ideologies commonly serve to simplify local complexity, align "unreliable" and "unruly" rights frameworks, and subtly include and domesticate the water use communities according to bureaucratic or markets needs and images [. . .]' (Boelens, 2009, p. 328). Thus, when rights are translated into the dominant system, they become subject to 'existing normative hierarchies' (Roth et al., 2015, p. 457), and living water rules and law can be frozen and simplified (p. 458). Further, the 'inclusive' approach to water governance, as observed by Boelens et al. (2016), can become a tactic of 'territorialisation', 'integrating local norms, practices and discourses into its mainstream government rationality and its spatial/political organization [. . .] through "participatory" strategies it recognizes the "convenient" and sidelines "problematic" water cultures and identities' (p. 7). Thus, while involving Indigenous peoples in water governance is a powerful legitimating force (Boelens, 2009), it is not enough: there must also be a genuine commitment and support to implement Indigenous worldviews and institutions into governance (Te Aho, 2019; Moggridge et al., 2019; Ruru, 2018).

Drawing from these practical justice and water justice literatures, critical questions for water justice are: for *whom* (recognition of rights-holders); *what* (distribution or redistribution of rights and outcomes to rights-holders); *where* (the spatial dimension for representation); *when* (the temporal dimension for representation); *why* (justifications for action, such as restorative justice); and *the actions* selected to deliver justice (practical justice, or the policy and legal pathways to achieving water justice) (Figure 2).

Methods

In this section we detail the chronological development of the SAWR through a process-tracing method, drawing from secondary sources such as Hansards, committee hearings and written submissions. We also draw on anonymous personal communications with key

actors, who include persons the authors have worked with, drawn from Indigenous representative bodies and the NT government, and who provided insights into their personal interpretations of events and causal ideas. The records from these anonymous discussions have been stored in a secure and password-protected folder.

The process-tracing method produces a narrative of the development of the SAWR (Collier et al., 2010; Tansey, 2007), detailing the sequence of events, identifying the causal ideas in the narrative and the competing evidence across sources to test the causal narrative (Mahoney, 2012). We also draw from a political ecology perspective, where nature is socially constructed, and the knowledge and insights we gained on traditional owner perspectives from the SIR fieldwork in Nikolakis and Grafton (2014), to interpret the events and causal ideas in the development of the SAWR. Also, to better embed the SAWR phenomenon in a broader water justice context, we apply the critical questions for water justice to the SAWR, which are a synthesis of the three pathways to water justice (recognition, representation and redistribution) and practical justice concepts (the policy choices and actions to achieve justice).

Strategic Aboriginal Water Reserve (SAWR): listening versus legislation

2001–10: Advocacy for, and development of, an SIR policy

Over the decades, the imperative to expand water-based industries across northern Australia has waxed and waned on the national agenda (Hart et al., 2019; Nikolakis et al., 2011). In turn, Indigenous communities have consistently expressed concerns about their water rights and the Traditional Law over Country being ignored (Armstrong, 2008; Kruse, 2018). At a national level, the principle of Indigenous rights and interests to water has been given limited recognition (National Water Initiative (NWI), 2004, paras 25 ix, 52–54). This gap between principle and practice remains very large (Aboriginal & Torres Strait Islander Social Justice Commissioner, 2009; Godden et al., 2020; Marshall, 2017; National Water Commission, 2014), notwithstanding public support for mechanisms to buy and hold water for Indigenous communities (Jackson et al., 2019). There is growing recognition of the need for increasing Indigenous access to water for economic development, reflected in the Victoria State Government's (2016) Water Plan. Recent research by Hartwig et al. (2020) documented that Aboriginal-owned economic water entitlements declined by 17.2% over the past decade in New South Wales alone, coinciding with market-based reforms.

Water was first negotiated for a 'reserve' in the NT in the Tindall Aquifer WAP around Katherine (Figure 1), specifically for Indigenous economic development (2007–08). This reserve, however, was dependent on a successful exclusive possession native title determination (to about 2% of the Tindall plan area) – Indigenous peoples highlighted concern over this requirement because of the lengthy time required to settle native title cases in the courts (Jackson, 2009). Cooper and Jackson (2008) also documented inequity in this reserve, where approximately 25% of the population is Indigenous in the Katherine Water Control District area, namely, the reserve was for 2% of available consumptive water. (As of 2020, the Tindall water reserve remains notional as the consumptive pool is 'fully allocated' and the native title claim is not yet determined.)

In response to increased attention on north Australia's water resources, Indigenous groups from across the region came together in 2009 and prepared the Mary River Statement. This statement called for a collaborative approach between Indigenous peoples in northern Australia and governments to develop '[an Indigenous] water entitlement and allocation [. . .] to satisfy our (i) social and cultural; (ii) ecological; and (iii) economic needs' (North Australian Indigenous Experts Water Futures Forum (NAIEWFF), 2009). Building on this statement, the North Australian Indigenous Land and Sea Management Alliance (NAILSMA), representing Indigenous land councils, presented a water policy statement through its Indigenous Water Policy Group (IWPG) on 24 March 2010. This statement called on the NT government to recognize Indigenous rights to water for cultural and commercial purposes, on the premise these rights could enhance Indigenous enterprise development and potentially reduce Indigenous disadvantage (NAILSMA, 2010).

2010–12: the SIR policy

In 2010 and 2011, the NT Labour Government offered relevant Indigenous groups 24% of available water for an SIR in the Oolloo (near Pine Creek in Figure 1) and Mataranka (Figure 1) WAPs. The SIR was to be written in the WAPs, but not entrenched in law, and could be removed with revisions of the plan (as these were later). The reasoning for the proposed 24% was that it approximated the exclusive land tenure for Indigenous groups under the Aboriginal Land Rights Act in the plan area (Nikolakis & Grafton, 2014). Following this offer, a study commissioned by the Northern Land Council and NAILSMA, carried out by Nikolakis and Grafton (2014), explored the acceptability of this allocation among the Mataranka and Oolloo communities.

Drawing on a highly participatory research design, Nikolakis and Grafton (2014) documented Indigenous perspectives that the 24% offer was unfair – participants wanted a proportion of the consumptive pool in the SIR that reflected their land tenure, population and development goals. Using this formula, the two Aboriginal communities would have enlarged the SIR allocation in the consumptive pool to around 67% in Mataranka and 50% in Oolloo. Nikolakis and Grafton also documented discontent among traditional owners with the unilateral process applied by the NT government for determining the SIR allocation, and they advocated for an SIR that supported a broader range of community development goals.

2012–16: CLP government and the SIR 'scrapped'

The CLP won government in August 2012, winning 16 of 25 seats. The SIR policy was scrapped by the CLP and the SIR was removed from the Mataranka and Oolloo WAPs in 2013. Willem Westra van Holthe, CLP Minister for Land Resource Management, described previous governments water policies as: 'ad hoc, somewhat parochial, without reference to the national agenda to develop northern Australia and, in my view, unbalanced with an emphasis on protection over economic development' (Westra van Holthe, 2013, p. 2431). He reminded the Legislative Assembly that '[. . .] Aboriginal Territorians enjoy rights to non-consumptive uses of water for [. . .] hunting or gathering, ceremonial and sacred purposes under the Native Title Act. [. . .] Native title rights do not extend to extraction of water resources for commercial uses' (p. 2407). He further stated: 'All Territorians, Aboriginal and non-Indigenous alike, are welcome

to apply and receive equal consideration for water extraction licences to support commercial development' (p. 2407). In sum, there would be no 'special treatment' for Indigenous peoples and the SIR was to be removed. Nevertheless, the CLP did commit to further public consultation on the SIR over the following three years.

The NT Labour opposition questioned in the Assembly the minister's decision to remove the SIR in Mataranka. In particular, the Labour opposition focused on the size of the consumptive pool and the shorter term aquifer recharge data (from 19.5 to 36 gigalitres), and the allocation of substantial water rights to a pastoralist and former CLP political candidate. The opposition stated: 'this year, [a] CLP candidate and her husband were granted a water extraction licence for 5800 ML [megalitres] [. . .] 15 times the combined total of the other licences' (Fyles, 2013, p. 2412), and also stated that: 'Without an Indigenous reserve it will be too expensive for most Indigenous groups to buy into the water market in the future.' The decision to grant the CLP candidate a water licence was later quashed in *The Environment Centre Northern Territory (NT) Incorporated v The Minister for Land Resource Management* (2015) 35 NTLR 140.

The CLP Chief Minister argued in this debate:

one might think that reserving water for use by Aboriginal Territorians is the right thing to do, and on the surface it is [. . . but] we do not want to lock up natural resources that are recharged and renewed. [. . .] We need to ensure [. . . these] are available for people to utilize to become productive, grow things, and build jobs. (Giles, 2013, p. 2418)

Divisions over the allocation of the SIR were exposed between CLP leaders and the CLP Indigenous members of the Assembly. One of these Indigenous CLP members, Larisa Lee, broke ranks and advocated in the Assembly: 'It is especially important and appropriate that strategic Indigenous reserves be considered in the water allocation plans' (Lee, 2013a, p. 2425). The different perspectives held by Indigenous CLP members grew into a discontent over the SIR and contributed to three of four Indigenous members leaving the party in April 2014 (for comments in the Assembly, see Anderson, 2013, p. 2814; Lee, 2013b, pp. 2817–2818).

In 2015, the CLP government released the *Our Water Future Discussion Paper: A Conversation with Territorians* (Northern Territory Government, 2015), which coincided with the Commonwealth Government's 'Our North, Our Future: White Paper on Developing Northern Australia', focusing on agricultural development in the region (O'Neill et al., 2016). The CLP's discussion paper outlined a 'strategic' approach to managing water resources as part of an election platform. On the SIR, the discussion paper stated:

> There has been significant discussion around Strategic Indigenous Reserves. Some advocate flows for cultural objectives, while others advocate for setting aside water to supply possible future Indigenous economic developments [. . .] The discussion paper suggests a broader strategic reserve be withheld in order to cover a range of outcomes determined at the discretion of the Minister. Such outcomes might include Indigenous economic development, industry-specific developments, increasing the reliability of existing licences for extraction, or increasing future allocations for public water supplies. (Northern Territory Government, 2015, p. 10)

2016–present: NT Labour Government reinstating the SIR

During the 2016 election, NT Labour campaigned on 10 water policy commitments. Among these were:

> Reinstat[ing] Strategic Indigenous Reserves and ensur[ing] specific consultative structures are in place to guarantee Indigenous Territorians a real say in water allocation that affects their interests; and Establish[ing] an Indigenous Water Unit within Government to oversee these processes and to also capitalize on the economic opportunities sustainable water use presents for Indigenous Territorians. (Territory Labor, 2016, p. 5)

After returning to government, NT Labour released an SIR discussion paper in March 2017 to solicit stakeholder feedback (Department Environment and Natural Resources (DENR), 2017), which included a Joint Position paper from the Northern and Central land councils on the SIR (Table 1, first column).

An SAWR policy framework was developed in October 2017, reflecting a shift from SIR to SAWR (Table 1, second column). The framework's focus was on 'increased opportunity to access water resources for [eligible Aboriginal people's] economic development [. . . through] use, or trade' (Northern Territory Government, 2017, p. 3). Table 1 compares the key elements of the SIR/SAWR advocated by the Central and Northern land councils and that provided in the NT government's SAWR policy framework.

A key finding in Table 1 is that the land councils wanted a more expansive definition of eligible Aboriginal peoples, and for it to include all native titleholders and residents of Community Living Areas. The land councils were also concerned the SAWR applied only to WAP areas. Further, the NT government capped the SAWR at 30% of consumptive water, but land councils called for a minimum of 50% based on land tenure, as well as population, disadvantage and other factors (following the community-driven formula documented by Nikolakis & Grafton, 2014).

Where WAPs were claimed to be fully allocated, the land councils called for an Indigenous Water Holder to purchase entitlements for the SAWR. In addition, the land councils called for water trading beyond WAP areas to open up economic opportunities. In terms of governance, the land councils asked for an entity designed and controlled by eligible First Peoples to control and manage the SAWR, and also advocated for a broader definition of eligible purposes to cover stock and domestic, and cultural water.

2019: First reading of the SAWR amendment

Following the development of the SAWR policy framework, the Water Further Amendment Bill was developed and introduced to the Legislative Assembly on 14 August 2019. In the first reading, Eva Lawler, Minister for Environment and Natural Resources, proclaimed, 'The Strategic Aboriginal Water Reserves policy framework was the first of its type and scale to be released anywhere in Australia and represents significant progressive policy reform [. . .]' (Lawler, 2019, p. 6768). The rationale for the SAWR, Lawler explained, was: 'Aboriginal people with eligible rights [. . .] may not have the current capacity to use those resources today' (p. 6768). Aboriginal economic development was to be established as a beneficial use in relevant WAPs. Following the government's SAWR policy framework (Table 1), eligible land included Aboriginal land rights and exclusive native title (and non-exclusive native title was excluded). In response, the two land councils argued that excluding people with non-exclusive native title rights would exacerbate social inequity (Central Land Council, 2019; Northern Land Council, 2019). The SAWR was capped at 30%. Eligible Aboriginal peoples could apply to the SAWR on a first-in, first-served basis.

Table 1. Key elements of the Northern Territory (NT) Labour Government's Strategic Aboriginal Water Reserve (SAWR) policy and the land councils' positions.

Land councils' joint position on the key elements from the Strategic Indigenous Reserve (SIR) discussion paper (Northern and Central Land Council, 2017)	NT Labour Government's SAWR policy (2017): key elements
Establishing SAWRs • The land councils defined the SAWR as a 'perpetual, exclusive and inalienable [right . . .] to a share of water available for consumptive use [. . .] for Indigenous economic development [. . .] and held and managed by traditional owners for the benefit of Indigenous communities' (Northern and Central Land Council, 2017, p. 5) • The land councils advocated for eligible Aboriginal peoples to include those with Aboriginal land rights, Aboriginal freehold, all native titleholders (exclusive and non-exclusive) and residents of Community Living Areas • The land councils expressed concerns about the SAWR only applying in water allocation plan (WAP) areas, arguing this limits its transformative potential	• New and revised WAPs will specify a portion of the consumptive pool as an SAWR to provide for future economic development by and for the benefit of eligible Aboriginal peoples • Eligible Aboriginal rights holders are those who have land rights, and rights to take water resources for consumptive beneficial uses. Eligible Aboriginal peoples have rights vested in the following land: Aboriginal land (scheduled under the Aboriginal Land Rights Act); Aboriginal land (Northern Territory enhanced freehold); and Exclusive Possession Native Title Determination Areas • The Water Act will be amended to ensure that SAWRs are an enduring requirement in water resources management
Right to consent to access to an SAWR • The land councils recommended that the principles of free, prior and informed consent apply to any allocation from the SAWR	• Eligible Aboriginal peoples, or their authorized representatives, have the right to consent (or not) to any allocation from the SAWR • If there is more than one group of eligible Aboriginal peoples, each group has the right to provide or withhold consent to their portion of the SAWR
Determining SAWR percentage and volume • The land councils advocated for a minimum of 50% of consumptive water WAPs to reflect Indigenous land tenure, population, need and disadvantage, and community aspirations (Northern and Central Land Council, 2017, pp. 10, 16, reflecting Nikolakis & Grafton, 2014)	• The SAWR will be a percentage of the available consumptive pool identified in each WAP: 0% eligible land in WAP = no SAWR 0% to ≤10% = 10% Between 10% and 30% = actual amount of eligible land (i.e. 15% = 15%) 30% > capped at 30% 100% = no SAWR (as all the available water is for eligible Aboriginal peoples and unlikely to have a WAP)
Administering access to the SAWRs • The land councils advocated the SAWR be held and managed by eligible Aboriginal peoples through a trustee or corporate entity developed by eligible Aboriginal peoples and be resourced appropriately	• The Department of Environment and Natural Resources will administer the SAWR. The Controller of Water Resources will grant licences from the SAWR • Before an allocation from the SAWR is granted, applicants must demonstrate they have negotiated in good faith and present evidence of consent from eligible Aboriginal peoples or their authorized representatives
Risk assignment • Any reductions in licence security should consider job creation rather than the first-in, first-served principle	• Any right to access water is not guaranteed by the NT government (and can be reduced in times of drought)
Maintaining SAWRs • The land councils argued for a broader definition of the SAWR to include water for industrial purposes, and maintaining stock and domestic use, and cultural uses	• The SAWR is an exclusive right to a volume of water for current or future economic development. The SAWR is reduced by any allocations to eligible peoples
Inclusion in WAPs • An SAWR should be available on wholly owned Aboriginal land, which could open up economic opportunities if a major project were proposed for these lands (subject to consent) • The land councils argued that where water is fully allocated, the SAWR should take precedence over any new or existing applications for water. They also proposed the creation of an 'Indigenous Water Holder' with funds to purchase water entitlements to benefit Aboriginal peoples	• SAWRs will not be included in WAPs where Aboriginal rights holders do not have access to consumptive water, or they hold all land where water can be accessed • A 'notional' SAWR will be established where all consumptive water has been allocated. Any water entitlements that are surrendered or cancelled may be allocated to the SAWR (after cultural and public uses)

(*Continued*)

Table 1. (Continued).

Land councils' joint position on the key elements from the Strategic Indigenous Reserve (SIR) discussion paper (Northern and Central Land Council, 2017)	NT Labour Government's SAWR policy (2017): key elements
Trading water from SAWRs • The land councils argued water trading should apply broadly, such as trading in continuous aquifers, to create economic opportunities for Aboriginal peoples **Pending applications for water extraction licences** • The land councils advocated that any new licence applications be allocated through the remaining consumptive pool, or trading or the SAWR	• Eligible Aboriginal peoples can agree to provide temporary or conditional water access to third parties in exchange for employment, payments or equity in a project • The Controller of Water Resources will consider the SAWR in making determinations of water availability

The Controller of Water Resources would evaluate applications to the SAWR, using the same criteria as for other licences and requiring the consent of 'relevant Aboriginal peoples' (proposed section 71BA). This provision envisaged a dual role for government agencies and land councils in managing the SAWR in terms of both assessing applications to the SAWR and the land councils engaging the relevant Aboriginal peoples for their consent. Minister Lawler stated that if the land councils and the federal minister responsible for the land councils agreed, a new SAWR consent function would be conferred on the land councils (and reflected in Water Regulations).

Minister Lawler envisaged three ways eligible Indigenous peoples could generate benefits from the SAWR: (1) running a water-based enterprise on their land; (2) partnering with a third party to run water-based enterprises on Aboriginal or non-Aboriginal land; and (3) trading their water entitlement to a third party for benefits such as money and employment (Lawler, 2019, pp. 6768–6769). Minister Lawler also called for 'effective administration, active promotion [of the SAWR to Indigenous communities] and ongoing capacity building and support for Aboriginal enterprises [. . .] to take advantage of the benefits established by the policy' (p. 6770). Yet she also assuaged investors and farmers by stating: 'These reserved allocations are not, however, quarantined or passive' (p. 6769). Indigenous water rights in the SAWR were being reframed as active economic rights, while less 'convenient' aspects of Indigenous water rights were ignored (Boelens et al., 2016).

2019: The Northern Territory Economic Policy Scrutiny Committee (EPSC)

The bill was referred to an EPSC for report by the 15 October 2019. The NT EPSC enquires and reports on economic matters referred to it by the Assembly. It determines whether the Assembly should pass or amend a bill, if a bill affects individual rights and liberties and has sufficient regard for the institution of Parliament (EPSC Terms of Reference, 2017). The EPSC held two public hearings, in August and September 2019, and received eight submissions, of which five are of particular relevance.

All the relevant submissions supported the bill, but various concerns and amendments were expressed. The NT Farmers Association was concerned the SAWR would 'lock water up' (Northern Territory Farmers Association, 2019). There were other concerns expressed on the barriers to agricultural development on Aboriginal lands, such as an awareness of the SAWR and agriculture and horticulture, and excessive red tape and remoteness on Aboriginal lands (confirming previous work; Commonwealth of Australia, 2019; Nikolakis, 2008, 2010). The Northern and Central land councils maintained their focus on the restrictive definitions of

'eligible land' and 'eligible Aboriginal people' in the bill. For example, in the EPSC's second public hearing, Sue Sze Ting, senior lawyer for the Central Land Council, argued: 'we just want to ensure that this bill [. . .] recognise[s] the interest[s] of all our constituents' (Central Land Council, 2019, p. 1). Ting concluded that allocating water also influences the rights of non-exclusive native title holders of land, hence: 'you should take into account their interests, let them be involved in any of the decision-making, let their land be recognised as part of the eligible land [. . . as] part of the Aboriginal water reserve' (p. 2).

Speaking for the Northern Land Council, Greg McDonald, manager of the Minerals and Energy Branch, also reaffirmed that 'eligibility should extend to all Aboriginal people with owner-occupier rights and specifically should include those holding native title [both exclusive and non-exclusive rights]' (Northern Land Council, 2019, p. 4). McDonald explained that:

> a non-exclusive determination does not mean the native title holders have any less of a connection to the country. It simply means the land had been allocated to non-Aboriginal interests, such as pastoral leases, before the rights of Aboriginal people were recognized. (p. 4)

He further argued the bill was incompatible with human rights (a requirement of legislation in the NT) as reflected in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), in particular: Article 25, 'Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned [. . .] waters'; and Article 32 (1), 'Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.'

The EPSC acknowledged the Northern Land Council's concerns about including non-exclusive native titleholders within the scope of eligible land, but highlighted that the SAWR's principal purpose was to build capacity and conduct water-based enterprise. To conduct business on non-exclusive native title pastoral lease lands, the EPSC concluded, 'would require the agreement of other rights holders, most commonly the pastoral lease holder and this is likely to impede the setting up of commercial developments' (EPSC, 2019, p. 4). The EPSC also noted that an exploration of non-exclusive native titleholders as an eligible class of land was warranted, though outside the scope of this enquiry. The EPSC recommended the Assembly pass the bill with two minor amendments (the other amendments are not prescient to this study).

2019: Second and third readings and the legislating the SAWR amendment

At the second reading in the Assembly, on 16 October 2019, Gary Higgins, leader of the opposition CLP, confirmed the opposition's support for the bill, 'contrary to the previous government's view' (Higgins, 2019, p. 7322). Higgins then estimated that only 5% of the NT is covered by WAPs and argued:

> The area is very small [. . .] which to some extent may be of concern' (p. 7323). Gerry Wood, an independent member of the Assembly, emphasized his support for the bill, but emphasized activities 'more directly [. . .] beneficial to Aboriginal people living on that land, especially when you hear how unemployment is high in many of these areas. (Wood, 2019, p. 7326)

This idea of jobs on country was taken up by Minister of Aboriginal Affairs, Selena Uibo, who stated, 'It is economic development and jobs that will provide for generational

change and improvement in the quality of life for Territorians living in our remote communities' (Uibo, 2019, p. 7326). Uibo added the SAWR is an 'acknowledgement that such water resources are related to traditional ownership of land and the water associated with this land' (p. 7326). The bill was passed as law by the Assembly (with minor amendments).

Implementation

To implement the SAWR, Water Regulations need to be updated, and roles conferred on the land councils to facilitate consent processes for SAWR allocations. The latter requires the consent of the Australian Federal Minister responsible for the land councils. At the end of 2020, the federal minister's consent had not been obtained, the Water Regulations not been amended and, thus, the SAWR has not yet been activated. A proposed Indigenous Water Unit has not been developed and funding for the land councils has not yet been provided to support the implementation of the SAWR (anonymous personal communications, 2020).

Towards water justice

Drawing from the critical questions on the water justice framework (Figure 2), we analyse key elements of the SAWR though concepts such as recognition, representation and redistribution, a practical justice: For whom? (recognition); What is allocated? (redistribution and practical justice); Where and when is this allocation provided? (representation); Why is the allocation provided? (practical justice). The responses to these questions determine the required actions to deliver practical justice. The SAWR aims to be more inclusive of Indigenous interests, but it is embedded within a framework where, for water to have value, it must be extracted and used to deliver economic benefits. As described by Boelens et al. (2016):

> the struggles of local territorial collectives are about water and economic resources to sustain their livelihoods as much as they are about the discourses that support their claims to self define their own water rules, nature values, territorial means and user identities. (p. 8)

We contend that the SAWR codifies, but also restricts, First Peoples' water rights. The SAWR, as an actionable step for practical justice, provides transferable water rights within an economic framework (an important justification, or *why*). But the SAWR also contextualizes these rights within the state government's conception of what Indigenous water rights should be – commercial water rights – not necessarily what Indigenous communities have argued for in relation to water rights and their Country. While the SAWR may assist in overcoming water injustice for some, it does not embody holistic Indigenous views of water and the spiritual and cultural values of water. It is the dominant system translating these rights, and ordering these rights into their own 'normative hierarchies (Roth et al., 2015, critiques this in Latin America).

To what extent an SAWR constrains the practices associated with a holistic set of values, especially in terms of non-use, will only be known after the SAWR is implemented. Nevertheless, the SAWR is currently limited to exclusive Indigenous tenures and to relevant WAPs (the latter only encompassing a small share of the water resources in the

NT, the *where*). Consequently, the SAWR falls short of what some Indigenous leaders have argued for – rights to water that address injustice – or even what is delineated in the UNDRIP in terms of rights to water resources for Indigenous peoples in their territories (whether or not recognized by the state) (Marshall, 2017; Taylor et al., 2019).

The *why* or political justification of the SAWR is contentious. It could, for instance, be argued that the SAWR reflects broader trends of pluralism and liberalization of water resource governance (Roth et al., 2015), or an incremental improvement in favour of First Peoples. On the other hand, it may be argued that the creation of the SAWR (limited at 30%) may provide greater opportunity for non-Indigenous interests to secure additional water allocations from the consumptive pool if it is viewed as resolving long-standing water injustice. The history of the SAWR would suggest that both factors have played a role – the SIR policy adopted by the NT Labour government in 2007–08 was sparked by broader attention on northern Australia as a food bowl that demands increased water extractions for commercial interests, and a separate but growing recognition of Indigenous water rights and allocations to meet Indigenous livelihoods (reflected in the National Water Initiative – NWI) (Nikolakis et al., 2013, 2011).

The gap between the enacted legislation and what Indigenous leaders asked for is substantial: non-exclusive native titleholders are ineligible (striking out a large number of people); the SAWR is capped at 30% of the WAP; and the reserve is administered by the Controller of Water Resources (Table 1). Further steps towards water justice and practical justice more broadly are needed beyond the existing SAWR legislation. These steps have been highlighted by the Northern and Central land councils throughout the SAWR legalization process and include: (1) the SIR be a perpetual share of the consumptive pool, to be held and managed by traditional owners for their benefit; (2) 'eligible land' for an SAWR should also include lands subject to non-exclusive native title rights (the *who*) to address injustice into the future (the *when*); (3) SIRs should not be notional in over-allocated WAPs, and water entitlements should be actively purchased in these systems; (4) the size of the SIR should be at least 50% of the consumptive pool (the *what* and the *why*) to reflect tenure, as well as Indigenous population and disadvantage, and community aspirations in these areas (such as that expressed by Nikolakis & Grafton, 2014); and (5) the need for adequate funding and support for land councils and supporting organizations to catalyse outcomes from the SAWR (such as developing an Indigenous Water Unit). These steps support practical justice, that is, establishing policy choices and a policy environment that help deliver on the ideals (Aggleton et al., 2019) of water justice.

Conclusions

While the SAWR provides additional rights to water for First Peoples on their Country, it falls short of that advocated by Indigenous representative groups. Water justice, like social justice, cannot be limited to legislation, but must go further and respond to power imbalances and inequities – achieving practical justice requires people to have the capabilities and support to implement their rights (Sen, 2009; Taylor et al., 2020). In the case of the SAWR, this demands a well-articulated Indigenous water governance structure that includes cultural protocols for engagement with Indigenous communities, and adequate funding for both community engagement and community capacity in relation to water (Moggridge et al., 2019).

Without additional NT government, or other support, the SAWR risks becoming a 'failed experiment' (anonymous personal communication, 2020). We contend that only through actively listening to Indigenous communities and providing adequate resources to govern Country (including surface and groundwater), in their own ways to meet their own needs, will the critical impediments towards water justice in Australia, and globally, be overcome.

Acknowledgments

We acknowledge the First Peoples as the traditional custodians of Australia, pay our respects to their leaders, past, present and emerging, recognize their struggle for social, economic and water justice, and their continued (and never ceded) sovereignty over their Country. We are grateful for anonymous personal communications provided by key actors, both Indigenous and non-Indigenous, in relation to the SAWR legalization process. These individuals validated events, evidence and causal ideas. Each individual who assisted us requested anonymity because of their concerns over possible negative consequences, either to them or to their communities or organizations, should their commentary be made public. We appreciate and acknowledge the valuable comments and suggestions of the reviewers that substantially improved the quality of the manuscript.

Disclosure statement

No potential conflict of interest was reported by the authors.

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