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**OWNERSHIP AND MANAGEMENT OF RIVERS IN
NEW ZEALAND – WHITHER NOW FOR MAORI
INTERESTS?**

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1 INTRODUCTION

Abstract

The purpose of this essay is to examine the somewhat vexed question concerning the law relating to the ownership and management of rivers in New Zealand, and the position of Maori interests. It initially argues that the application of the common law doctrines regarding rivers has been inconsistent and inappropriate and that legislative intervention has failed to clarify the situation, leaving the question of ownership unanswered. The paper then considers the nature of Maori interests in rivers as they exist today and the possible implications of Waitangi Tribunal reports for the way the common law has treated rivers. Finally, this essay considers the related issues of river management and Maori rangatiratanga. The paper argues that any reconfiguration of ownership rights to rivers must also entail a reconfiguration of management regimes in order to adequately give effect to Maori interests in rivers.

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¹ David Young, *Politics as Law: the History and Legacy of the Resource Management Act* (Institute of Policy Studies, Wellington, 2001) 37.

² *State of New Zealand's Environment 1997: The State of our Waters* (<http://www.mfi.govt.nz/about/publications/waters.html>) (last accessed 20 September 2002), para 7.20.

I INTRODUCTION

During the 1980s there was an overhaul of the resource management legislation in New Zealand. In the process, an obvious question arose – who owns the resources?¹ This is a question of particular importance to Maori who claim ownership of many resources in New Zealand on the basis of rights guaranteed to them under the Treaty of Waitangi. However, the Resource Management Act sought to sidestep this issue purporting to deal only with the environmental management of natural resources.

In relation to rivers, the question of ownership is unsettled. New Zealand has over 70 major rivers and thousands of streams.² In many respects, they are vital to all New Zealanders in terms of their recreational value and economic potential. It is a popular conception that all major rivers are, and always have been, publicly owned. However, there is no basis for this in the law. The question of the ownership of our rivers is complex and is today inextricably bound to questions of management, given the importance of rivers in our society. While the law relating to river ownership is complex and unclear, the position is further complicated by Crown obligations to settle Maori claims to rivers.

This essay purports to give an overview of the law in relation to the ownership of rivers in New Zealand. It then examines the implications of two recent Waitangi Tribunal reports on Maori claims to rivers in the North Island. It will be seen that, for Maori, the issue of the ownership of rivers is bound up with questions of management and control. Therefore, the paper will examine the management regime in relation to Rivers and analyse how Maori interests are accommodated. While resource management legislation attempts to side-step ownership issues, this essay argues that the settlement of these issues, in relation

¹ David Young, *Values as Law: the History and Efficacy of the Resource Management Act* (Institute of Policy Studies, Wellington, 2001) 27.

² *State of New Zealand's Environment 1997: The State of our Waters*
<<http://www.mfe.govt.nz/about/publications/ser/ser.htm>> (last accessed 21 September 2002), para 7.20.

to rivers, will probably require a reconfiguration of some of the management structures and regimes put in place by the Resource Management Act 1991.

II OWNERSHIP OF RIVERS IN NEW ZEALAND – COMMON LAW AND LEGISLATION

A Introduction

The purpose of this section is to consider the ownership of rivers from the perspective of the common law which was received in New Zealand.³ The section also considers subsequent legislation concerning ownership of, and rights to rivers. This is necessary in order to establish the contextual legal framework within which Maori claims to rivers are asserted. It should be noted at this point that this paper only purports to examine the position in relation to non-tidal rivers. This is because the position regarding tidal rivers involves numerous issues relating to the foreshore which it is beyond the scope of this essay to consider.

The first and most important point to note concerning the common law in relation to rivers is that the common law compartmentalises rivers into separate legal components: the bed, the banks, and the flowing water. This is in sharp contrast to the Maori conception of rivers and becomes important when considering how to give effect to Maori interests in rivers. For the purposes of this section of the essay, however, it is necessary to adopt the common law distinctions in order to describe the relevant features of the common law in relation to rivers. Therefore, the ownership of and rights to water are considered first, followed by a discussion of the ownership of river beds.

It will become apparent that the law relating to the ownership of rivers, in particular, the river bed is far from clear or settled in New Zealand. This is partly

³ By virtue of the English Laws Act 1858, the English common law has been deemed to apply in New Zealand as from 14 January 1840, to the extent that it is applicable in New Zealand.

due to problems arising from the wholesale application of the common law to New Zealand rivers despite the vast differences that exist between our rivers and those in England. This forced Parliament to intervene with legislation which, for the most part, has been wholly unsatisfactory.

B Ownership Of Free Flowing Water

1 Water is unowned

Water flowing freely in a river is not capable of being owned by anyone under the common law. Water is only owned when appropriated by someone with access to it.⁴ Thus, flowing water was characterised as *publici juris* which means that it is common to all who have the ability to access it. Once appropriated however, water can indeed be the subject of property. Such water remains the property of whoever is in possession of it for as long as that possession lasts.⁵

One possible rationale for this rule is that water, when in its natural state flowing in a river, is 'a moveable, wandering thing' which must 'of necessity continue common by the law of nature'.⁶ This rationale seems sound. The molecules of water that flow freely over land can not be subject to any type of lasting control unless they are appropriated. Otherwise, such water follows its own path.

Given this somewhat peculiar stance of the common law in relation to the ownership of flowing water, the more particular residual rights such as those of access to, and use of such water become more pertinent. As MacArthur J stated in

⁴ *Embrey v Owen* (1851) 6 Exch 353.

⁵ *Ballard v Tomlinson* (1885) 29 Ch D 115.

⁶ Blackstone's Commentaries on the Law of England (1765) 2 Wm Bl 14, 18 cited by Crown Counsel in *The Whanganui River Report 1999: Waitangi Tribunal Whanganui River Report 1999: Wai 167* (GP Publications, Wellington, 1999). This is something akin to the eloquently expressed opinion of John Kneebone who, in a dissenting opinion as to remedies in the *Whanganui River Report 1999*, stated that the water component of a river as its own energy and will, and flows as part of nature's cycle...Humanity has

⁷ *Glenmark Homestead Limited v North Canterbury Catchment Board* [1975] 2 NZLR 71.

Glenmark Homestead Limited v North Canterbury Catchment Board,⁷ a riparian owner possesses “no property in the water of a stream flowing through or past his land but is entitled only to the use of it as it passes along for the enjoyment of his property.”

2 *Rights to use water*

In common law, the rights to take possession of or use water flowing in a river were bound up with the ownership of riparian land. Under the doctrine of riparian rights a riparian owner had the right to take water from a river for ‘ordinary purposes’ connected with the riparian land such as drinking, washing and supplying a reasonable quantity of livestock.⁸ There was no limit to the amount of water that could be taken for ordinary purposes.

If a riparian owner wished to take water for ‘extraordinary purposes’ then the common law imposed limits to protect downstream users. Such purposes can include irrigation and mining purposes. If a riparian owner wishes to take water for extraordinary purposes then, (1) those purposes must be connected with the riparian land; (2) the use must be reasonable; (3) the water must be returned to the river not substantially diminished in quantity or altered in character.⁹

The common law position has been substantially altered by statute. On April 1 1968, the Water and Soil Conservation Act 1967 came into force. This had the effect of removing common law rights from individuals and vesting those rights in the Crown. Thus, rights to use water were nationalised. The effect of this legislation is continued by the more comprehensive Resource Management Act

never commanded authority over natural water as it evaporates, precipitates, freezes, melts, and flows. ... It is borrowed from nature, made use of, then returned to be cleansed and refurbished, 345 – 346.

⁷ [1975] 2 NZLR 71.

⁸ *Glenmark Homestead Limited v North Canterbury Catchment Board* [1975] 2 NZLR 71.

⁹ *Glenmark Homestead Limited v North Canterbury Catchment Board* [1975] 2 NZLR 71.

1991. Under both Acts, however, some limited rights remain relating to various uses.¹⁰

The focus on rights to use water has changed from a question of individual property to one of public use with appropriate environmental protection mechanisms. Previously, environmental concerns about the conservation of water were really a corollary of the need to protect the property rights of downstream users.¹¹

C Ownership Of The River Bed¹²

1 The *ad medium filum aquae* doctrine

By virtue of the common law, non-tidal rivers are vested in the owners of adjoining lands (the riparian owners) to the half-way point between the banks of the river. This is known as the *ad medium filum aquae* doctrine.¹³ If the same person owned both adjacent banks of a river then the entire river bed is presumed to be vested in that person.¹⁴ This presumption applies even when the title to the land originates from a Crown grant and the grant describes the land as being bounded by the river. It does not matter that the Crown grant may specify the exact measurements of the land granted and these exclude the river; the presumption applies regardless.¹⁵

2 A rebuttable presumption

¹⁰ These are domestic use exceptions which largely mirror the common law.

¹¹ N Whelan "A Natural Flow – A History of Water Law in New Zealand" (1997) Otago LR 71, 79. Whelan makes the point that the "idea of water as a public good to be preserve and protected for future generations was not apparent in the law".

¹² At this point it should be made clear that this essay only purports to examine the position of non-tidal rivers.

¹³ *Re the Bed of the Whanganui River* [1962] NZLR 600 (CA). The presumption also applied to lakes to the centre point and also to highways although the presumption has been rebutted in New Zealand in relation to highways.

¹⁴ *Smith v Andrews* [1891] 2 Ch 678 (CA).

¹⁵ The position has been altered by legislation concerning the beds of 'navigable' rivers. This is discussed below.

The presumption has always been rebuttable. Thus the right to the bed of a river is not necessarily forever attached to the right to the riparian land. In England the presumption could be rebutted by proof of immemorial use of part of the river as a private fishery or by proof of a grant of such fishery.¹⁶

In New Zealand, as in other commonwealth countries such as Canada, the presumption has been held to be more readily rebutted. This is due to the fact that such countries have their own unique circumstances which differ to those in England, where the presumption has its origin. One case where the presumption was rebutted in New Zealand was that of *Mueller v Taupiri Coalmines Ltd*.¹⁷ This case involved the Waikato River and is authority for the proposition that the question of whether the presumption is rebutted is to be determined from the intention of the grantor. Naturally, the simple description of the land as bordered by a river will not suffice. However, the intention of the grantor is to be interpreted with reference to the terms of the grant or with regard to attendant circumstances.¹⁸

3 *Mueller's Case*

This case concerned the activities of the defendants in relation to the mining of coal beneath the bed of the Waikato River. The Commissioner of Crown Lands sought to prevent the defendant's coal-mining on the basis that the land beneath the river was Crown land. All the land in question was confiscated from Maori under the New Zealand Settlements Act 1863 which provided that "where any Native Tribe has been in rebellion against her Majesty, the Governor may declare the land in possession of the Tribe to be a district under the Act". The land was intended to be granted to military settlers who were placed in the district to maintain law and order.

¹⁶ Ben White, *Inland Waterways: Lakes*, Waitangi Tribunal Rangahaua Whanui Series

¹⁷ *Mueller v Taupiri Coalmines Ltd* (1900) 20 NZLR 89 (CA).

¹⁸ *Mueller v Taupiri Coalmines Ltd*, above, 113 – 114 Edwards J.

In all the grants in question the land was described as being bounded on one side by the Waikato River. This, of course, was sufficient to raise the presumption that the grantees of the land were entitled to the river bed *ad medium filum*. However, the majority considered that in this case the presumption was rebutted by a number of circumstances. Williams J considered that,

Where, as in this country, the Crown is in effect a trustee for the public of lands vested in the Crown, comparatively slight evidence of circumstances from which an intention might be presumed on the part of the Crown, as representing the public, not to part with the land in question, ought in my opinion to rebut the presumption against the Crown which the mere words of the grant, taken by themselves, would raise.¹⁹

Thus the role of the Crown as 'trustee for public lands' in the colony is used as a justification to use 'comparatively slight evidence' to rebut the presumption. Williams J even went as far to consider that if, from the facts, it could be shown that a probable use to the Crown of the bed may have been contemplated, the presumption is rebutted.²⁰ Williams J considered this to be consistent with the 'principle' that grants are to be construed in favour of the Crown where possible.²¹ This contention, however, appears to be at complete odds with the *ad medium filum aquae* presumption which clearly favours the grantee.

The circumstances relied upon by the majority to rebut the presumption included: the history of the area as confiscated land, the fact that the river was the only practical highway, and the statutory context²² which indicated the Crown's intention to retain the beds of rivers. Williams J queried:

¹⁹ *Mueller v Taupiri Coalmines Ltd*, above, 106 Williams J.

²⁰ *Mueller v Taupiri Coalmines Ltd*, above, 106 Williams J.

²¹ *Mueller v Taupiri Coalmines Ltd*, above, 106 Williams J.

²² Edwards J relies on the Public Works Act 1876 which makes it lawful for the Superintendent of any province to 'divert or stop up any river, stream or creek in such province, and to build bridges, dams, wharves and other erections on the banks or in the beds of any such river, stream or creek'. The fact that the river was so wide that the acreage of the grants would be increased dramatically by including the bed *ad medium filum* was also relied upon.

[i]s it conceivable that the Legislature could have contemplated that, if in any district there was a river which was the only practicable highway for military purposes and for every purpose, the Crown should by virtue of the Act grant away the bed, and so deprive itself of the right to interfere with the soil and improve the navigation?²³

Williams J clearly thought this to be an untenable proposition. It is interesting that the majority tended to rely on the fact of the navigability of the river as the only practical highway in the region, when the apparent purpose of the litigation was to ensure Crown rights to coal beneath the bed.

Possibly a more realistic appraisal of the circumstances concerning the river was given by Stout CJ in a strong dissenting judgment. Stout considered that there was nothing in the terms of the grant to rebut the application of the presumption. Also, the fact that the river was navigable was not sufficient for the bed to remain with the Crown.²⁴ Rather, the question of navigability with which the majority were so concerned, could be dealt with by express or implied rights of dedication allowing the river to be used as a highway.

So far as the Waikato is concerned, but for the recent discovery of coal-deposits under the riverbed, the granting of the bed was really giving a valueless piece of land to the grantee so long as the right of navigation was preserved. No public inconvenience has been felt by the bed being vested, or certain parts of it vested, in private owners.²⁵

Stout CJ considered that the use of the river for over twenty years as a highway would be sufficient evidence of the dedication of the right of navigation 'by the Crown and all Native owners who had any rights of the river as a highway'.²⁶ However, it is probably questionable whether Maori who possessed the river willingly acquiesced in the use of the river as a public highway.²⁷ Stout considered that it was not open to the Court to question the applicability of the

²³ *Mueller v Taupiri Coalmines Ltd*, above, 109 Williams J.

²⁴ *Mueller v Taupiri Coalmines Ltd*, above, 103 Stout CJ dissenting.

²⁵ *Mueller v Taupiri Coalmines Ltd*, above, 102 Stout CJ dissenting.

²⁶ *Mueller v Taupiri Coalmines Ltd*, above, 98 Stout CJ dissenting.

²⁷ Tainui have asserted ownership rights in respect of the Waikato River.

presumption in New Zealand. He considered that the Court was bound by Privy Council authority which undoubtedly applied the presumption in colonies.²⁸

3 *Re the Bed of the Whanganui River*²⁹

Forming an interesting contrast to the *Mueller* decision is the decision of the Court of Appeal in *Re the Bed of the Whanganui River*. This case illustrates the uncertainty of the application of the *ad medium filum aquae* presumption in New Zealand. Here, somewhat inconsistently, the Crown argued for the application of the presumption with regard to Crown grants that followed investigations of riparian land by the Maori Land Court. This was despite its arguments to the contrary in relation to the Waikato River. This decision was the culmination of New Zealand's longest running item of litigation.³⁰

The singularity of the Crown argument probably lay in the fact that it had legislatively appropriated minerals within the bed of the river years earlier. Thus when the Court found that Maori had alienated the bed of the river when selling riparian land, the Crown would not be liable to pay compensation

D *Legislation – The Coal-Mines Amendment Act 1903*³¹

Parliament's response to the *Mueller* decision was to enact legislation vesting the beds of navigable rivers in the Crown. This was in spite of the fact that the *Mueller* decision found that the *ad medium filum* presumption was rebutted, and the river bed remained vested in the Crown. The first operative provision was section 14 of the Coal-mines Amendment Act 1903 which was passed with little

²⁸ *Lord v The Commissioners for the City of Sydney* 12 Moo PC 473.

²⁹ *Re the Bed of the Whanganui River* [1962] NZLR 600 (CA).

³⁰ No comprehensive description or analysis of the litigation concerning the Whanganui River bed will be attempted here. For an excellent summary see J P Ferguson, *Maori Claims Relating to Rivers and Lakes* (LLM Research Paper, Victoria University of Wellington, 1989); and Waitangi Tribunal *Whanganui River Report 1999: Wai 167* (GP Publications, Wellington, 1999), chapter IX.

³¹ The Resource Management Act came into force on October 1, 1991.
[1984] 1 NZLR 13.

debate in the House. The effect of the provision has been preserved in successive legislation relating to coal mines and exists today in the Coal Mines Act 1979, section 261(2). This provides that

Save where the bed of a *navigable* river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown; and without limiting the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown. [emphasis added]

This section was repealed by s120(1) of the Crown Minerals Act 1991. However, its effect continues by virtue of s354(1) of the Resource Management Act 1991 which provides that the repeal of any enactment by the Crown Minerals Act 1991 (including specifically s261 of the Coal Mines Act 1979) "shall not affect any right, interest, or title to land or water acquired, accrued, established by, or vested in, the Crown before the date on which this Act comes into force,³² and every such right, interest, and title shall continue after that date as if those enactments had not been repealed."

There is some controversy over the interpretation of the first sentence of this section: 'save where the bed of a navigable river has been granted by the Crown'. In *Tait-Jamieson v G C Smith Metal Contractors Ltd*³³ Savage J held that the section was not a statutory rebuttal of the *ad medium filum presumption*. He considered that in order for a river to be held as 'granted by the Crown' and therefore not subject to s261, it need not be expressly included in the grant. Instead, the middle line presumption would suffice to bring a river bed within the exception.

³¹ The Coal-mines Amendment Act 1903 was preceded by a raft of legislation permitting a variety of controls and public uses of rivers. However, it was considered that these did not have the effect of vesting the beds of the rivers concerned in the Crown.

³² The Resource Management Act came into force on October 1, 1991.

³³ [1984] 2 NZLR 13.

It has been commented that this interpretation of the section renders its effect to be largely nugatory.³⁴ The High Court in *Tait-Jamieson* failed to consider earlier contrary authority in *R v Morison*.³⁵ This represents the preferred view that the bed of the river belongs to the Crown unless the grant includes the bed expressly or by necessary implication.

Thus, under s261, whether a river bed is or is not deemed to be vested in the Crown turns on whether or not it can be described as 'navigable' for the purposes of the Act. The use of this concept as the criterion under the Act appears to have followed from the majority's decision in *Mueller v Taupiri Coal Mines Ltd*. Section 261(1) of the Coal Mines Act 1979 defines navigable as, "of sufficient width and depth (whether at all times or not) to be used for the purposes of navigation by boats, barges, punts, or rafts."

The concept of navigability was the subject of intense criticism in the 1983 *Interim Report on Law Relating to Water Courses* of the Property Law and Equity Reform Committee. Some of the issues surrounding the interpretation of the concept included the following: for what purposes a river must be navigable – commercial or recreational or otherwise; the proportion of the river which must be navigable; whether a river must be navigable in both directions; and whether the river must have been navigable at 1903 or whether a river might become navigable at a later date.³⁶ Also, the committee considered that, given that the dominant purpose of the 1903 legislation was to secure rights to minerals, there is no logical reason why this should depend the concept of navigability.³⁷

E Conclusion

³⁴ Property Law and Equity Reform Committee *1983 Interim Report on Law Relating to Water Courses*, (Wellington, 1983) 7; J P Ferguson, *Maori Claims Relating to Rivers and Lakes* (LLM Research Paper, Victoria University of Wellington, 1989) 4.

³⁵ [1950] NZLR 247, 267.

³⁶ Property Law and Equity Reform Committee, above, appendix A 4 – 6.

³⁷ Property Law and Equity Reform Committee, above, 7.

This section has sought to introduce the law relating to the ownership of rivers for the perspective of the common law which separates rivers as entities into the bed, banks and water. In relation to the river bed, it has been established that the application of the *ad medium filum* doctrine has been uncertain and the legislative intervention has not served to clarify the situation a great deal. Whether the general uncertainty surrounding the concept of navigability is a cause for immense concern remains to be seen. The last time the question of navigability was considered in the Courts was almost 20 years ago in 1983.³⁸ However, in the context of Waitangi Tribunal claims the issue may be of some pertinence as it may well determine what lands the Crown has available for any negotiated settlement. Indeed, recent Maori claims have served to bring the issue river ownership into recent attention. These are discussed in the following sections of this paper.

III MAORI PROPRIETARY INTERESTS IN RIVERS

A Introduction

There are several bases on which Maori may claim interests in rivers.³⁹ This section will examine two of these – claims based on the common law doctrine of aboriginal title and claims based on the Treaty of Waitangi, concluding that potential Treaty rights are probably more potent than possible customary rights. It then examines the way in which Maori interests in rivers have been characterised by the Waitangi Tribunal in two of its recent reports: the *Whanganui River Report 1999*,⁴⁰ and the *Te Ika Whenua Rivers Report*.⁴¹

³⁸ In *Tait-Jamieson v GC Smith Metal Contractors Ltd* [1984] 2 NZLR 513. Although the question has been considered by the Waitangi Tribunal in the Mohaka River Report: Waitangi Tribunal *Mohaka River Report: Wai 119* (Brooker & Friend, Wellington, 1992).

³⁹ Richard Boast "The Bases of Maori Claims to Natural Resources" (Paper presented to the Energy and Natural Resources Association of NZ Inc, Auckland, 19 February 1993). Boast identifies the possible sources of rights as property rights, statutory rights, rights based on equitable obligations, and rights based on a treaty or agreement.

⁴⁰ Waitangi Tribunal *Whanganui River Report 1999: Wai 167* (GP Publications, Wellington, 1999).

It is necessary at this point to make it clear that the following section deals only with the possible Maori *ownership* interests in rivers, what the nature of that interest is, and the possible implications given the current legal framework for rivers in New Zealand. Treaty rights in relation to the *management* of rivers are considered later in the paper. This may seem something of an artificial distinction to make⁴² as it is not difficult to conceptualise any ownership interest as implying a right to manage according to one's preference. Also, in many instances the authority to manage a resource may be far more important to Maori than whether their interests amount to 'ownership' for the purposes of the common law. However, the distinction is relevant here as it is possible to separate the attempts of the Tribunal to give effect to an economically meaningful property right to rivers and its discussion of management rights in terms of rangatiratanga.

B Aboriginal Title and Rivers

The doctrine of aboriginal or native title is aptly summarised by Cooke P in the Court of Appeal case of *Te Runanganui o te Ika Whenua Society v Attorney General*,⁴³

Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation. On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical title or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights. They are usually, although not invariably, communal or collective. It has been authoritatively said that they cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only in strict compliance with the provisions of any relevant statutes.

⁴¹ Waitangi Tribunal *Te Ika Whenua Rivers Report: Wai 212* (GP Publications, Wellington, 1998).

⁴² Although it is adopted for the purposes of the Resource Management Act 1991.

⁴³ [1994] 2 NZLR 20, 24 - 25.

In this case Cooke P held that Te Ika Whenua's rights to the river under aboriginal title were not prejudiced by the transfer of energy assets. This was because the Court considered that the applicant's aboriginal title could not include any rights to generate electricity. In addition, there was no substantial prospect that the assets would be vested in the Maori applicants. However, the Court did say that, in relation to the river bed, the 1903 legislation may not be sufficiently explicit to override the concept of a river as a whole and indivisible entity. Thus non-territorial rights to rivers might exist despite the vesting of the bed in the Crown.

Adopting this argument, Brookfield argues that the Coal-mines Amendment Act 1903 is insufficient to extinguish Maori customary interest in rivers. He argues that any native title rights to minerals have clearly been extinguished, but otherwise the section and its successors merely serve to declare the Crown's radical title to the bed.⁴⁴ This is despite contrary authority in *R v Morison* which held that the relevant legislation vested the beds of navigable rivers beneficially in the Crown.⁴⁵ Given that "customary rights of native or aboriginal peoples may not be extinguished except by way of specific legislation that clearly and plainly takes away that right",⁴⁶ Brookfield asserts that *Morison* would not be followed by any Court today.⁴⁷ Whether this is the case remains to be seen.

However, no matter what the case might be in relation to the river bed, it has been noted that the Resource Management Act regime in relation to water allows scant scope for any private property rights in water and that if the statutory regime does not extinguish those rights then it almost certainly renders them valueless.⁴⁸ In addition to the natural resources legislation, the Crown is of the view that it is

⁴⁴ F M Brookfield "The Waitangi Tribunal and the Whanganui River Bed" (2000) NZ Law Rev 1, 4 – 6.

⁴⁵ *R v Morison* [1950] NZLR 247.

⁴⁶ *Te Wheehi v Regional Fisheries Officer* [1986] 1 NZLR 680, 691.

⁴⁷ Brookfield, above, 9.

⁴⁸ *Brooker's Resource Management* (Brookers, Wellington, 1999) para TW8.01.

unlikely that Maori would be able to establish no adverse dominium.⁴⁹ Therefore, asserting rights to rivers under the Treaty of Waitangi, described below, can be viewed as a potentially more beneficial option for Maori. This is despite the fact that, in contrast to treaty rights, aboriginal title rights are recognized by the common law without incorporation into statute.⁵⁰ It is accepted that the Waitangi Tribunal recommendations, while having no legal effect,⁵¹ have some reasonable political strength.

C *Treaty Claims To Rivers*

Article II of the Treaty of Waitangi provides,

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess . . .

And in Maori,

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangitira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangtiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa . . .

In recent years the Waitangi Tribunal has reported on claims to rivers. This section of the paper examines how the Tribunal has dealt with rights to rivers guaranteed to Maori under this article. The Tribunal is an invaluable mechanism to establish what the exact nature of Maori interests in rivers are, and whether

⁴⁹ Extract from letter of the Director of the Office of Treaty Settlements to claimants, 4 February 1999. Reported in *Maori Law Review*, February 1999, 6.

⁵⁰ The orthodox view of the Treaty is that any rights guaranteed to Maori are not enforceable in the Courts save to the extent that they are incorporated into statute. This view is increasingly criticized given the importance accorded to the Treaty by various bodies. The prevalent view that Treaty is gaining increased cognisance as New Zealand's most important constitutional document: New Zealand Law Commission *Maori Custom and Values in New Zealand Law* (NZLC SP12, Wellington, 2001).

⁵¹ Besides possible admissibility as evidence in the Courts.

they have been extinguished fairly or in a manner which requires redress by the Crown. Where redress is required, the nature of the Maori interest becomes critically important, as any negotiated solution must fairly accommodate these interests. This section concludes by examining some of the practical implications of the Waitangi Tribunal's findings and recommendations

1 Rivers as Taonga

In both Reports, the tribunal has no trouble coming to the conclusion that all the rivers concerned were and are taonga in the eyes of the tangata whenua of those regions. In relation to the Whanganui River, the tribunal characterized the river as a 'taonga' of great significance to Atihaunui. This is

a manifestation of the Maori physical and spiritual conception of life and life's forces. It contains economic benefits, but it is also a giver of personal identity, tribal cohesion, empathy with ancestors, and emotional and spiritual strength.⁵²

Similarly, the Tribunal found that the middle reaches of the Rangitiaki, Whirinaki and Wheao Rivers were a taonga of the hapu of Te Ika Whenua. The Tribunal considered that

Not only were they a vitally important food source and means of transport and communication, but they were also essential for spiritual and cultural well being. From the Te Ika Whenua perspective, the people belong to the rivers and the rivers belong to them.⁵³

Thus the rivers come within the scope of what was guaranteed to Maori under article II of the Treaty. The Tribunal also notes that, in terms of the English text of the Treaty, rivers come squarely within the definition of 'other properties' which Maori possessed.⁵⁴ The issue which now arises concerns establishing the exact nature of the Maori interest in these taonga.

⁵² Waitangi Tribunal *Whanganui River Report 1999: Wai 167* (GP Publications, Wellington, 1999) 261.

⁵³ Waitangi Tribunal *Te Ika Whenua Rivers Report: Wai 212* (GP Publications, Wellington, 1998) 16.

⁵⁴ *Whanganui River Report 1999*, above, 263.

2 *The nature of the interest*

(a) *Te Ika Whenua*

In this case the claimants sought a finding that they are entitled to a proprietary interest 'which can practically be encapsulated within the legal notion of ownership in the waters of the rivers.'⁵⁵ In response, the Tribunal sought to distinguish between the different elements of property that Te Ika Whenua possessed in respect of the rivers and were therefore guaranteed to them by article II of the Treaty. Furthermore, the Tribunal contrasts the position as at 1840 when the Treaty was signed, and the contemporary situation.

The Tribunal analyses the elements of property in terms of tino rangatiratanga which vests in the hapu and the use rights which were available to individual members of the hapu. The exercise of tino rangatiratanga did not require positive demonstration at all times by the hapu. Various restrictions in the form of rahui were known and accepted customs. The tribunal finds that

[a]s at 1840, Te Ika Whenua were entitled to the full use and control of their rivers. The rivers were theirs and nobody could obtain use rights other than by submitting to their jurisdiction and control and through their authority or acquiescence.⁵⁶

Thus, in the case of Te Ika Whenua, the Tribunal considered that the Treaty promise of full, exclusive and undisturbed possession encapsulates an interest which is more than mere common law use rights.⁵⁷ Rather it includes, over and above use rights, the separate element of tino rangatiratanga. The Tribunal thus concluded that, at 1840, Te Ika Whenua were entitled to a "proprietary interest in

⁵⁵ *Te Ika Whenua Rivers Report*, above, 122.

⁵⁶ *Te Ika Whenua Rivers Report*, above, 124.

⁵⁷ *Te Ika Whenua Rivers Report*, above, 124.

the rivers that could be practically encapsulated within the legal notion of ownership of the waters thereof."⁵⁸

However, the Tribunal took a somewhat different view when considering what the position is today. The Tribunal acknowledged that it must have been within Maori contemplation that resources would have to be shared in the climate of settlement.

The article 2 guarantee of exclusive possession of resources had to be modified by a practicable accommodation by Maori to make the Treaty a living and workable document. In other words, the Treaty had to be viewed in the light of existing circumstances and it had to be interpreted reasonably.⁵⁹

The Tribunal's view is that the sharing of resources under the treaty does not detract from the Te Ika Whenua's te tino rangatiratanga. However, such sharing does detract from the 'proprietary interest' that Te Ika Whenua might now claim in the rivers. This begs the question as to what Te Ika Whenua's residue proprietary interest might entail. The Tribunal does not undertake a detailed examination of what this might be. It considered that this was a matter that would be best left for negotiation and settlement between the claimants and the Crown. However, the tribunal does state that this would at least involve legal title and access to the banks and beds of the river.⁶⁰ Therefore the residual interest would be reasonably substantial.

(b) Whanganui River

The Tribunal considered that property rights guaranteed by the Treaty must be referenced according to what Maori actually possessed in fact, according to

⁵⁸ *Te Ika Whenua Rivers Report*, above, 124.

⁵⁹ *Te Ika Whenua Rivers Report*, above, 125.

⁶⁰ *Te Ika Whenua Rivers Report*, above, 127.

historical evidence. The nature of Maori possession should not be judged according to the property rights that might be held validly under English law.⁶¹

In the Whanganui River Report the Tribunal does not make such an explicit distinction with respect to elements of property as it does in the Te Ika Whenua case. However, the analysis of the Maori interest is broadly consistent. The Tribunal considered that the Atihaunui's interest in the river did involve use rights and included most of the elements of English common law ownership, except free transferability. But further to this, the hapu and the descent group as a whole possessed "the right to manage and control [the river] according to the tribal preference and to be left in quiet possession."⁶² This can be described as tino rangatiratanga.

Maori saw themselves as permitted users of ancestral resources. With regard to the prospective threat from other descent groups, they thought in terms of 'possession' and 'control'. Within their own hapu, their use of resources was always conditional on obligation to ancestral values and future generation, but they did not think in terms of 'ownership' at English common law, with its rights of use and alienation independent of the local community.⁶³

Where the position undoubtedly differed from English common law ownership was in the area of alienation. The Tribunal noted that the river was definitely not a tradable item.⁶⁴ However, the Tribunal considered that the Treaty had introduced the concept of alienation.⁶⁵

Interestingly, in contrast to the Te Ika Whenua Rivers Report, the Tribunal does not undergo any analysis of whether the Atihaunui interest in the river has

⁶¹ Waitangi Tribunal *Whanganui River Report 1999: Wai 167* (GP Publications, Wellington, 1999) 264.

⁶² *Whanganui River Report 1999*, above, 50.

⁶³ *Whanganui River Report 1999*, above, 49.

⁶⁴ *Whanganui River Report 1999*, above, 48.

⁶⁵ The Tribunal did not expand on this point. One can assume that the Tribunal is referring to article II which contemplates that Maori should retain possession of their properties for as long as they wish. This postulates that the properties might be alienated. However, it is difficult to imagine, in the case of rivers, any tribe willingly disposing of river interests.

been diluted at all by virtue of the sharing envisaged by the Treaty of Waitangi.⁶⁶ Undoubtedly, the river has been shared, willfully or not. However, the Tribunal was adamant that 'ownership' is now required in order to effectively recognise Atihaunui interests in the Whanganui River.

(c) A single and indivisible entity

In both reports the Tribunal is at pains to emphasise that conceptually, the traditional Maori view of rivers differs immensely from that of the common law. As noted in previous sections of this essay, the English common law divides rivers conceptually, into the bed, banks, and water; and then, if applicable, into tidal and non-tidal parts. In contrast, the Maori conception of rivers regard such compartmentalisation is inappropriate. Rather, rivers are characterised as single and indivisible entities.⁶⁷

The idea that Maori viewed rivers and other water resources as undivided entities is not at all novel. In relation to lakes in particular, but also with reference to rivers, Native Land Court judge F V Acheson stated in 1929,

The bed of any lake is merely a part of that lake, and no juggling with words or ideas will ever make it other than part of that lake. The Maori was and still is a direct thinker, and he would see no more reason for separating a lake from its bed (as to the ownership thereof) than he would see for separating the rocks and the soil that comprise a mountain. In fact, in olden days he would have regarded it as rather a grim joke had any strangers asserted that he did not possess the beds of his own lakes.

A lake is land covered by water, and it is part of the surface of the country in which it is situated, and in essentials it is as much part of that surface and as capable of being occupied as is land covered by forest or land covered by a running stream.

⁶⁶ Although, in its recommendations, the Tribunal considered that any negotiated settlement between the Crown and Atihaunui should provide for the continuance of existing public use rights.

⁶⁷ *Whanganui River Report 1999*, above, 48; *Te Ika Whenua Rivers Report*, above, 86. This is also consistent with Tribunal's findings in relation to the Mohaka River claim.

Indeed, the concept has received some recent judicial support in the form of obiter dicta from Cooke P. In relation to native title interests in rivers, Cooke P endorsed the tribunal's concept of a river as a taonga which is a whole and indivisible concept.⁶⁸

(d) Ownership of actual water?

In the *Whanganui River Report* the Tribunal devoted much time and analysis to establish that, in contrast to English common law conceptions, ownership of the river as a whole does include ownership of the water itself. This was essential to the claim because, as established above, the common law does not recognise ownership over free-flowing water. However, by characterising the issue as concerning what Maori possessed according to their own terms the tribunal was able to conclude that the actual water was within Maori possession.

Included in what was possessed was the water. The river would be meaningless without it. The river was a waterway. The whole river was a fishery. The water was the habitat of creatures to whom Maori were related, from fish to taniwha. ... The water was treasured as the gift of Ranganui just as much as the land was respected as part of Papatuanukuu. ...

Adopting the holistic thinking of the Maori, water was an integral part of the river that they possessed. Though its molecules pass by, the river, as a water entity, remains. The water was their water, at least until it naturally escaped to the sea, at which point its mauri changed.⁶⁹

This finding, in particular, will have repercussions for the prospective content of any negotiated settlement.

⁶⁸ *Te Ika Whenua Incorporated Society v Attorney General* [1994] 2 NZLR 20, 26 – 27.

⁶⁹ Waitangi Tribunal *Whanganui River Report 1999: Wai 167* (GP Publications, Wellington, 1999) 262 – 263.

3 *Treaty Breaches and Recommendations*

Both Reports enter into extensive analysis of the Crown's breaches of the principles of the Treaty. The following is merely a brief summary of the findings in relation to the proprietary interest of the Maori claimants. The Tribunal considered, in both cases, that the Crown had breached its duty to actively protect Maori property interests. Much of the Maori interest in all the rivers concerned had come about through the operation of the *ad medium filum aquae* rule, which had applied unbeknown to Maori claimants.

In relation to the Whanganui River the Tribunal recommend that the Crown take steps to recognise Atihaunui ownership of the river as an entity and a resource, without reference to English common law conceptions of rivers.⁷⁰ Regarding the Te Ika Whenua case, the Tribunal similarly recommended recognition of the claimants' residuary property interest in the rivers.⁷¹

D Recommendations and Implications – A Meaningful Interest In Rivers?

The Tribunal's findings and recommendations in relation to the ownership of rivers are difficult to reconcile with the current legal framework concerning rivers and the popular public perception that rivers are public property and therefore freely accessible to all.

This essay has stressed that the common law does not recognize the ownership of free flowing water in a river. The Tribunal's recommendations are clearly incompatible with this common law proposition. Indeed, there is a popular perception that water is a common property resource, and therefore available to all as of right. This rings especially true in relation to water for human consumption. To illustrate, in some states the right to water is constitutionally enshrined. In Mexico, for example, the state is constitutionally obliged to make

⁷⁰ *Whanganui River Report 1999*, above, 343.

⁷¹ Waitangi Tribunal *Te Ika Whenua Rivers Report: Wai 212* (GP Publications, Wellington, 1998) 145.

water available for citizens. However, the strength of this obligation is probably related to the fact that Mexico, like many other countries, has relatively scarce water availability. New Zealand, on the other hand, is a relatively water abundant state and state-granted water rights have the potential to be used to generate large profit, especially in the area of hydro-electricity generation. Indeed, it seems rather peculiar that water, as opposed to other resources, has developed evolved notions of common property.

Currently, the Crown's position accords with the common law view. It does not accept that Maori may own rivers as water is free from ownership by anyone.⁷² Also, the Crown will not countenance any payment of compensation for hydroelectricity generation. This is in alignment with the reasoning of the Court of Appeal in *Te Runanganui o te Ika Whenua Society v Attorney General*.⁷³ It seems that the Court of Appeal finding that Treaty and native title rights cannot include a right to generate electricity gives the Crown a strong position in this regard.

One thread that is apparent within the two reports is the Tribunal's attempt to characterise Maori interests in rivers in such a way as to render them meaningful in an economic sense. The ownership of water creates clear implications that the rights to use water within the jurisdiction of the Maori claimants could be licensed by them as resource owners. This would be quite separate from any state-imposed environmental regulation. This would be a huge departure from the proposition that water is a common property resource available to all but with rights allocated by the State. Ferguson suggests if the concept of 'Maori-owned' water gains cognisance, then the owners may not be subject to the usual environmental restrictions of resource management legislation.⁷⁴ With respect, it is submitted that this is an untenable proposition as it is unlikely that the Crown would be willing to exempt major rivers from the operation of the RMA. However, the

⁷² Extract from letter of the Director of the Office of Treaty Settlements to claimants, 4 February 1999 – reported in *Maori Law Review* February 1999, 6.

⁷³ [1994] 2 NZLR 20.

⁷⁴ J P Ferguson *Maori Claims Relating to Rivers and Lakes* (LLM Research Paper, Victoria University of Wellington, 1989) 37.

more interesting question is how the management regimes in place can adequately recognise Maori interests in relation to rivers, especially where Maori are entitled to an 'ownership interest in the rivers based on treaty rights. This question is addressed later in this paper.

In light of the Crown's position, from legal and Treaty of Waitangi jurisprudence it is difficult to comprehend how the ownership of rivers can be given a meaningful effect in an economic sense. The solution probably lies in the political sphere. It is submitted that any settlement for past Crown breaches could endeavour to bestow Maori claimants with enough capital to enable some future development of economic interests in relation to the river. Whether this could relate to tourism⁷⁵ or to some sort of joint venture in relation to electricity generation would be up to the claimants. If this type of solution were adopted, the 'ownership' rights in rivers need not have huge economic implications. Rather, legislative recognition of Maori ownership would be of more importance in a symbolic sense. The value of symbolic recognition to Maori claimants should not be underestimated.⁷⁶ This, in conjunction with a management system that gives effect to this authority would, go a long way to satisfying the desires of Maori in relation to rivers.

In both Reports the Tribunal stressed that the recognition of Maori proprietary interests in the rivers would involve provision of existing public use rights. However, in relation to the Whanganui, the tribunal stated that these rights would be recognised as deriving from permission. One obvious implication of this would be the possibility of the revocation of such permission. This would not be an acceptable situation to recreational users of rivers.⁷⁷

Atihaunui ownership would have to be established by legislation. Therefore, it is likely that the parameters of that interest would be clearly stated, including what rights of public access exist. The Crown has expressed its view that any

⁷⁵ For example, the Ngai Tahu operation of tourist ventures on the Shotover River.

⁷⁶ Ngai Tahu were offered symbolic ownership of Aoraki (Mount Cook) in a Crown settlement offer.

⁷⁷ See, for instance, the views of the New Zealand Recreational Canoeing Association at <http://www.rivers.org.nz/access/treaty_issues.php> (last accessed 25 September 2002).

settlement should have "minimal impact" on public access.⁷⁸ It is difficult to reconcile statutory rights of access with the notion that such rights are derived from owner permission. Practically speaking, the issue would probably never arise as it is extremely unlikely Atihaunui would attempt to 'revoke' rights of access for recreational purposes.

IV MANAGEMENT OF RIVERS AND MAORI INTERESTS

A Introduction

As suggested above, it is hardly tenable that Maori ownership of any particular river would entail its exclusion from environmental legislation. This is especially the case with the Whanganui River which is the second greatest in the North Island. Indeed, this is hardly suggested by the Tribunal which considers that "[R]esource management may have the effect of constraining private ownership but it cannot be used to deny its existence."⁷⁹

However, the Tribunal has found that the Crown is under an obligation to actively protect Maori authority or rangatiratanga over their possessions for as long as they wish to retain it.⁸⁰ The Tribunal has held that the concept of rangatiratanga includes the notions of 'autonomy', 'self-management', 'self-regulation', and 'self-government'.⁸¹ This encapsulates much more than a mere right to use and enjoy. Rather, it encapsulates the much broader and meaningful concepts of possession, authority, and the right to manage and control in accordance with one's preference. This begs the question as to whether Maori interests, thus characterised, are given adequate effect in contemporary river management.

⁷⁸ Extract from letter of the Director of the Office of Treaty Settlements to claimants (4 February 1999) – reported in *Maori Law Review*, February 1999.

⁷⁹ Waitangi Tribunal *Whanganui River Report 1999: Wai 167* (GP Publications, Wellington, 1999) 312 and 330.

⁸⁰ *Whanganui River Report 1999*, above, 329.

⁸¹ *Whanganui River Report 1999*, above, 284.

The purpose of this section is to give an overview of the management of rivers under the RMA, and then to essay an evaluation of how the RMA takes Maori interests into account. The strength of Maori interests in various rivers no doubt varies with the circumstances of each individual case. The focus in this section will be largely confined to the adequacy of management regimes where Maori can be said to possess a 'high-level' interest. This will no doubt be the case with regard to the Whanganui and Te Ika Whenua situations where, as outlined above, the Waitangi Tribunal has found Maori to possess a very strong interest, including ranagatiratanga, in the rivers based on Treaty guarantees.

B Rivers, Water and the Resource Management Act 1991

1 The water regime

While, holistically, the RMA attempts to provide for an integrated approach to environmental management of land, air and water,⁸² the legislation does contain a specific focus on water as a separate resource. As touched on above, section 14 of the RMA outlines the principle restrictions in relation to water. In relation to rivers, no person may take, use, dam, or divert any water, unless the taking, use, damming, or diversion is expressly allowed by a rule in a regional, and in any relevant proposed regional plan or a resource consent.⁸³ In addition, there are various other exceptions which allow water to be taken.

One of the central features of the Act is the devolution of management responsibility away from central government. Thus, most of the responsibility for freshwater management has devolved to regional councils.⁸⁴ The underlying

⁸² It is generally acknowledged that pre-RMA there existed a convoluted minefield of sometimes overlapping legislation relating to the environment and resource management.

⁸³ Resource Management Act 1991, ss 14(1) and 14(3)(a). This can be contrasted with the position as to land under the Act where any use must not be prohibited.

⁸⁴ There are other agencies which have responsibilities relating to rivers. One of the Department of Conservation's statutory functions relates to the preservation, as far as is practical, indigenous and recreational freshwater

rationale for this approach is the principle that local communities who are directly affected by decisions relating to local resources, should undertake responsibility for those decisions.⁸⁵ Thus, in relation to the allocation and management of water resources, regional councils have the primary responsibility.⁸⁶ Section 30(1) of the Act provides that the functions of the regional councils include:

- (e) The control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including –
 - (i) The setting of any maximum or minimum levels or flows of water;
 - (ii) The control of the range, or rate of change, of levels or flows of water;
 - (iii) The control of the taking or use of geothermal energy.
- (f) The control of discharges of contaminants into or onto land, air or water and discharges of water into water.

2 *Implementation – Regional Policy Statements*

The Regional Policy Statement (“RPS”) represents one of the most important mechanisms in achieving the Act’s objectives. Section 59 states that the RPS is to provide an overview of the resource management issues of the particular region and policies and methods to achieve integrated management of the natural and physical resources of the entire region.⁸⁷ RPSs must be consistent with any national policy statement, water conservation and the national coastal policy statement. Regional policy statements will be pivotal in terms of stating regional issues and policies for dealing with them. They form the basis for regional plans which will detail performance standards and other rules. The potential role of the regional policy statement in achieving adequate recognition of Maori interests is discussed below.

fisheries. Also, the Ministry for the Environment has responsibilities in relation to broader governmental policy in the management of resources.

⁸⁵ L Burton and C Cocklin “Water Resource Management and Environmental Policy Reform in New Zealand: Regionalism, Allocation, and Indigenous Relations” 7 *Colo J Int’l Evt’l L & Pol’y* 75, 89. P Memon “Freshwater Management Policies in New Zealand” in P Memon & H Perkins *Environmental Planning and Management in New Zealand*, (Dunmore Press, Palmerston North, 2000) 234, 235.

⁸⁶ This continues the functions of the regional water boards and catchment boards that existed under the Water and Soil Conservation Act 1967.

⁸⁷ Resource Management Act 1991, s 59.

C *Maori Interests and the RMA*

The previous statutory water regime, the Water and Soil Conservation Act 1967 was notable for its complete omission to consider Maori view points in the management of water.⁸⁸ Under the present integrated regime, the RMA does much more to attempt to accommodate Maori views and interest in water management. This section will evaluate the adequacy of the regime in this respect. In relation to rivers this involves a discussion of two areas: the specific code relating to Water Conservation Orders and the general RMA decision making regime.

1 *Water Conservation Orders*

One aspect of the RMA which has the capacity to safeguard Maori interests in rivers to some degree is the provision in part IX of the Act for Water Conservation Orders⁸⁹ ("WCO"). The purpose of a water conservation order is to recognise and sustain the outstanding amenity or intrinsic values which are afforded by waters in their natural state or, where waters are no longer in their natural state, the amenity or intrinsic values of those waters which in themselves warrant protection because they are considered outstanding.⁹⁰

A WCO imposes restrictions on the exercise of regional councils' powers under the Act relating to water. In particular, the restrictions or prohibitions can relate to the quantity, quality, rate of flow, or level of the water body; the maximum or minimum flows; the maximum allocation for abstraction.⁹¹ A WCO

⁸⁸ Micahel Roche *Land and Water: Water and Soil Conservation and Central Government in New Zealand, 1941 - 1988* (Historical Branch Department of Internal Affairs, Wellington, 1994) 155 - 156.

⁸⁹ These were initially introduced by the Water and Soil Conservation Amendment Act 1981.

⁹⁰ Resource Management Act 1991, s 199(1).

⁹¹ Resource Management Act 1991, s 200.

has the effect of constraining a consent authority so that it cannot grant a consent that is inconsistent with the WCO.⁹²

The scope of a WCO to protect some Maori interests in rivers is obvious from section 199(2). A water conservation order may, amongst other things, provide for the protection of characteristics which any water body has or contributes to, and which are considered to be outstanding, for recreational, historical, spiritual, or cultural purposes.⁹³ Also, a WCO may provide for the protection of characteristics which any water body has or contributes to, and which are considered to be of outstanding significance in accordance with tikanga Maori.⁹⁴

However, to date, there have been instances where Maori have objected to various applications for water conservation orders.⁹⁵ Under the RMA any person can apply to the Minister for the Environment for a WCO⁹⁶ and it is generally not Maori who constitute the applicants. The Minister is then obliged to appoint a special tribunal to hear and report on the application. Although, where appropriate, the Minister may consult with the Minister of Maori Affairs regarding the membership of the Tribunal,⁹⁷ the general objection of Maori to WCO applications has been on the grounds that the process undermines the authority of tangata whenua in relation to the control and management of the rivers. This is indeed a valid concern despite the seemingly meritorious objectives behind an application for a WCO.

2 *The general management regime and Maori interests*

⁹² Resource Management Act 1991, s 217. Although, such an order will not affect any resource consent already granted prior to the order – s 217.

⁹³ Resource Management Act 1991, s 199(2)(b)(v).

⁹⁴ Resource Management Act 1991, s 199(2)(c).

⁹⁵ For example, Ngati Pahauwera's objection to a WCO application in relation to the Mohaka River; and Atihaunui's objection to a WCO application in relation to the Whanganui River.

⁹⁶ Resource Management Act 1991, s 201.

⁹⁷ Resource Management Act 1991, s 202(2).

The Resources Management Act 1991 has, as its central purpose, to ensure the sustainable management of natural and physical resources.⁹⁸ In achieving this purpose, the Act stipulates that all persons exercising functions and powers under it shall recognise and provide for five matters of national importance. Included in these matters of national importance is "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga."⁹⁹ In addition to this section there are several others which introduce Maori view points and concepts into the regime.

(a) Section 7 (a) – Kaitiakitanga

Section 7 (a) of the RMA directs all persons exercising functions and powers under the Act to have particular regard to kaitiakitanga, amongst eight other matters. Kaitiakitanga is defined as "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship."¹⁰⁰

Burton and Cocklin note that the Maori conception of kaitiakitanga may indeed be much deeper and more pervasive than Pakeha notions of stewardship and guardianship.¹⁰¹ Thus, the authors consider that use of this concept in the Act may "represent portals for the entry of distinctly Maori principles governing the human-environment relationship into mainstream New Zealand environmental law."¹⁰² Whether this will occur remains to be seen.

⁹⁸ Section 5(2) defines sustainable management as, "managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

⁹⁹ Resource Management Act, s 6(e). The other four matters of national importance are refer to the protection and preservation of coastal marine areas, rivers, lakes, wetlands, indigenous florae and fauna; and the maintenance of public access to these – ss 6(a) – (d).

¹⁰⁰ Resource Management Act 1991, s 2.

¹⁰¹ L Burton and C Cocklin "Water Resource Management and Environmental Policy Reform in New Zealand: Regionalism, Allocation, and Indigenous Relations" 7 *Colo J Int'l Env't'l L & Pol'y* 75, 97 – 98.

¹⁰² Burton and Cocklin, above, 98.

(b) Section 8 – the Treaty of Waitangi

In addition to these provisions, section 8 of the RMA states that in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).¹⁰³ Whether this clause is strong enough to give effect to the Crown's guarantee of rangatiratanga over Maori taonga has been the subject of debate.

The Waitangi Tribunal has stated that Maori rangatiratanga should not be qualified by any balancing of interests as it is protected absolutely by the Treaty.¹⁰⁴ The Tribunal considers that those charged with implementing the Act should be obliged to apply the Treaty principles, rather than merely take them into account.¹⁰⁵ This view point has gained support with calls from others for the inclusion of a stronger incorporation clause of the Treaty's principles into the Act.¹⁰⁶

The RMA, as it currently stands, is more consonant with the Crown argument that it has an overriding duty to manage the resource for the overall benefit. If the RMA did require decision-makers to 'give effect to' the principles of the Treaty, this might have had a gravely stifling effect on the efficacy of the legislation. The whole tenor of the Act is to make decisions to grant various rights in relation to resources including water resources. It would be extremely difficult to see how regional councils could grant any rights to water where there are unresolved ownership issues based on the Treaty. This could hardly be considered 'giving

¹⁰³ Resource Management Act 1991, s8.

¹⁰⁴ Waitangi Tribunal *Whanganui River Report 1999: Wai 167* (GP Publications, Wellington, 1999) 330. In addition to these criticisms, another issue is the fact that the Act devolves duties to regional councils while these entities do not have the Crown responsibilities relating to the Treaty.

¹⁰⁵ *Whanganui River Report 1999*, above, 331.

¹⁰⁶ Janet Stephenson "Consultation is not enough – the principles of the Treaty in Resource Management" (2000) 1 Resource Management Bulletin, 5. Stephenson considers that the optimal solution would require authorities to give effect to the principles of the Treaty.

effect' to the principles of the Treaty. Thus, the real question is how a stronger incorporation clause would be put in to practice.

Mathew Palmer argues that such generic clauses, no matter how they are worded, are important for symbolic value but the legal effect of the Treaty should not rest on such generic clauses, as this will invariably be the subject of litigation.¹⁰⁷ Rather, the specific legal effect that the Treaty should be given detailed elaboration within the legislation.

In the area of Maori rangatiratanga over rivers in terms of the RMA, this would require an alternative regime which elevates Maori beyond the status of mere participants and submitters in the decision making process. The Act as it stands does not adequately allow for this. However, the Waitangi Tribunal, in relation to the Whanganui River, has made specific recommendations that perhaps represent a better recognition of Maori rangatiratanga over rivers.

3 *The Tribunal and Joint Management*

In the area of Maori rangatiratanga over rivers in terms of the RMA, this would require an alternative regime which elevates Maori beyond the status of mere participants and submitters in the decision making process. The Act as it stands does not adequately allow for this. However, the Waitangi Tribunal, in relation to the Whanganui River specific recommendations represent a better recognition of Maori rangatiratanga over rivers.

The essential finding of the Tribunal in the Whanganui River Report is that the Whanganui River should be managed by Atihaunui. The Tribunal found the Crown to be in breach of Treaty principles in failing to facilitate the right of Atihaunui to manage and control their river. Presumably this will be the case in relation to any other rivers where the Tribunal might find that local hapu or iwi are entitled to an ownership interest based on the Treaty.

¹⁰⁷ M Palmer "The Treaty of Waitangi in Legislation" (2001) June NZLJ 207, 212.

The Waitangi Tribunal has offered two possible solutions of joint management in relation to the Whanganui River. This does not represent a blueprint for the recognition of all Maori interests in rivers. Rather, the Tribunal is at pains to emphasise that its recommendations relate solely to the Whanganui River given its unique history. However, there may be other situations where the case for Maori involvement in the management of rivers is similarly strong.¹⁰⁸

The first option offered by the Tribunal is a system of owner approval where the river is vested, in its entirety, in ancestors representative of Atihaunui. The Whanganui River Maori Trust Board would act as trustee and would have to approve any resource consent application in relation to the river. This would require an amendment to the regional plan relating to the river. The second option postulates that the Whanganui River Maori Trust Board would act as a consent authority for the purposes of the RMA. Thus, in relation to any resource consent application relating to the Whanganui River, the Board could act jointly or severally with the relevant authority, with the consent of both required.

The difference appears to be that under the first option Atihaunui's consent is required as a consequence of its position as resource owner. This reflects the proposition that no one should be able to use their resource without their consent. It is unlikely that the Crown would agree to a management regime which gives anyone a right of veto over the use of any river, least of all such a significant river as the Whanganui. Thus the second option seems a more realistic prospect than the first.

Under the second option the Whanganui River Maori Trust Board decisions as a consent authority would be reviewable by the ordinary rights of appeal under the RMA. Therefore this option is much weaker than the first as a means of recognising Maori rangatiratanga. However, this would still be a significant step forward given the current state of Maori interests under the RMA. It would serve to address the recurring concern that Maori have been constantly relegated to the

¹⁰⁸ For example, the Tainui Claim to the Waikato River which was confiscated under the New Zealand Settlements Act 1863.

position of passive respondents and powerless submitters in the decision making process in relation to their taonga.¹⁰⁹ One advantage that is inherent in both options is that neither excludes the input of non-Maori expertise. The management of rivers is a far from simple exercise and any system that recognises Maori rangatiratanga should also take this into account.

The Tribunal's recommendations relate to the Whanganui River as a specific resource. If such joint management systems were potentially adoptable under the RMA, the exact workings of any particular system could be fleshed out by the content of a relevant regional policy statement or regional plan. At present, the Act does not require a RPS to allow for recognition of Maori interests in specific rivers.¹¹⁰ Rather they deal with water resources generally and section 62(b) merely requires RPSs to state resource management matters of significance to iwi authorities.

By way of example, the Manawatu-Whanganui regional policy statement recognises as an objective the need to recognise nga hapu and nga iwi of the Manawatu-Wanganui Region as Treaty partners in resource management and to provide for their participation in Regional Plans and resource consent decisions.¹¹¹ In order to implement this the Council set out the following methods:

- (a) promoting *participation* by nga hapu and nga iwi in the preparation of Regional Plans;
- (b) providing for *participation* by nga hapu and nga iwi in the Resource Consents process¹¹² [emphasis added]

It is fairly evident that this will fall well short of the Tribunal's recommendations in relation to the Whanganui River. Also, the references are

¹⁰⁹ M Stock and C Chisholm "Ownership or Control of Our Rivers" (2000) 9 Resource Management Bulletin 52, 54.

¹¹⁰ This much is pointed out by Tom Bennion. Tom Bennion "Waitangi Tribunal" (1999) June Maori Law Review June, 1.

¹¹¹ *Regional Policy Statement for Manawatu-Whanganui*, <http://www.horizons.govt.nz/images/Resource%20Policy%20&%20Information/regional_policy_statement8.htm#_Toc422898482> (last accessed 27/9/2002), para 20.2.1.

¹¹² *Regional Policy Statement for Manawatu-Whanganui*, above, para 20.2.2. A similar provision appears in the council's *Regional Plan for the Beds of Rivers and Lakes and Associated Activities*.

rather generic. Clearly, it is possible for the Regional Policy Statement to elaborate on the management regime that could apply to specific resources, for example, Atihaunui's role in relation to the Whanganui River.¹¹³ The RMA need only provide for the potential adoption of such joint management systems with such systems being adopted in relation to specific resources where necessary.

Regional Councils may be reluctant to voluntarily relinquish some of their power of control over rivers by adopting such joint management systems. However, Maori may only be able to authoritatively establish rangatiratanga over a particular river through a Treaty claim. Therefore, the case for joint management is likely to be backed by the Waitangi Tribunal and possibly a settlement with central government. This would probably lead to regional inconsistency concerning Maori control over rivers. However, this is clearly appropriate given that the strength of those interests will vary with regional history and alienation of interests.

D Conclusion

This section has suggested that the various provisions of the RMA that may operate to protect Maori interests in rivers are inadequate where the interest amounts to an 'ownership' interest in the river. It may be that where lesser interest in rivers exist that the present provisions are sufficient to accommodate Maori concerns. Therefore, the existing provisions should remain. However, it is argued that, in order to adequately protect Maori rangatiratanga in rivers, the scope of the Act to accommodate joint management of rivers should be extended in line with Waitangi Tribunal recommendations. In addition, it is argued that the mechanisms of regional policy statements may be hugely beneficial in establishing the regimes that can apply to specific rivers. The chances of such a regime being successful may well depend upon the willingness and flexibility of central and local government.

¹¹³ It is difficult to criticise the regional council for this as it prepares its policy statements in accordance

V CONCLUSION

This essay has sought to examine the law relating to the ownership and management of rivers in New Zealand. It has argued that the application of the common law presumption of *ad medium filum aquae* has been inconsistent and inappropriate. It also argues that legislative intervention has failed to clarify the situation, leaving the question of ownership unanswered. The paper then considers the nature of Maori interests in rivers as they exist today and the possible implications of Waitangi Tribunal reports for the way the common law has treated rivers, and the way that we perceive rivers in our society. Finally, this essay has considered the related issues of river management and Maori rangatiratanga. It is clear that the special rights held by Maori under the Treaty challenge the perception of many who would regard rivers as the public domain, the challenge lies ahead for law and policy-makers in ensuring these interests are given adequate recognition and effect. Given that the Maori concept of resource management stems from *manawhenua* (roughly, 'concept of place'),¹¹⁴ a broad brush approach is not likely to be appropriate. Rather, it is likely that specific negotiations with regard to specific resources will be required.

with the statutory regime.

¹¹⁴ David Young, *Values as Law: the History and Efficacy of the Resource Management Act* (Institute of Policy Studies, Wellington, 2001) 27.

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