LAW, RESPONSIBILITY AND MĀORI PROPRIETARY INTERESTS IN WATER

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INTRODUCTION

The Māori right is more than management

This paper is about Māori proprietary interests in water. "Proprietary" means that the Māori interest is something that they own. It contrasts with the Māori interest in water management. The Waitangi Tribunal has agreed with the New Zealand Māori Council and certain iwi (tribal confederations) that the interest which Māori have in water is indeed proprietary. The Tribunal has directed a further hearing to determine the scope of the interest and how it might be provided for today.[1]

There is nonetheless a residue of official opinion that no-one can own water or have a proprietary interest in it. On that view the Māori interest in water is said to be limited to an interest in its management. This seems to derive from the role of the totems or kaitiaki which directed Māori towards the proper management of natural resources. My family totem or kaitiaki for example, is the morepork bird or ruru.[2] However, Māori did more than manage water. They also asserted authority over certain waters in the tribal district and more especially they also used the water. Māori have used particular waters of their hapū (tribe) and iwi (tribal confederation) from time immemorial and the question with which the Māori Council has been grappling concerns how this translates to the ownership of a material right today. This much is clear, that the interest is bigger than a management interest.

The Māori proprietary interest is about access, use and partial control.

This paper considers first that in custom, the Māori proprietary interest in water is (a) a family right of access to particular tribal waters for general and specific purposes, and (b) a tribal right to control its use by tribal members and others. The ownership is not in the water but in the authority to access it, to use it, to enhance its use through weirs and other contraptions, and as a tribe, to control it.[3]

The right of control is now limited by the fact that following the influx of settlers from about 1830, the tribe no longer has exclusive control of most water bodies in the tribal territory. This must be brought into account in developing thoughts on how the customary right of control can be acknowledged today.

The use is conditioned by an ethic of responsibility

The paper then considers the Māori laws which, under the superintendence of the kaitiaki, defined the ethical responsibilities of the user of natural resources to preserve the resources for the generations to come. It is in this section that the kaitiaki figure. In contrast with the Māori law, the government law is not so concerned with future generations. The belief that no-one can own water has rather fostered a view that water is free for all on a first come first served basis. The Māori Council considers that this is not a sound principle on which to develop a framework and much prefers the customary approach.

The Council has therefore searched for a better law based on the responsible use of natural resources in the interests of the generations to come. In this respect the Council has found it useful to consider the extensive work already done in promoting a Charter of Responsibility. I think the last century will be remarkable in history for assuring, after the excesses of two world wars, the survival of humanity through the recognition of the rights of all people. But this century will need to be remarkable for a charter of responsibilities simply for the survival of the human species. The framework the Council seeks would be based on responsible use.

The framework

The paper then considers a framework for a law that recognises the Māori proprietary interest in water, the associated ethic of responsibility, the customary tribal control, and the general, public interest. The search is for a law that offers the general public the same protection as is proposed for Māori, while imposing on them the same responsibility for preserving the resource for future generations.

The paper puts forward a possible approach which is currently under consideration by the New Zealand Māori Council and others involved in the earlier court proceedings on water. It broadly involves charging those whose use of water threatens the future of the natural resource and its availability for basic domestic needs. It involves applying the income in ways that best meet both the Māori and the public needs in water and maintains the resource for those to come.

THE PROPRIETARY INTEREST

Māori proprietary interests, whether in land or in water, were based on access to natural resources. The access was secured through membership of a hapū holding political authority over a given district or having a history of use of particular resources outside that district. Māori did not have the experience of the British where land had been enclosed in defined parcels and where a single proprietor or tenant could hold all the rights to all the uses in that parcel. In such cases, a water body was simply water on land in the possession of the proprietor, unless the water body served as a highway in which case it did not form part of the title.

On the other hand, the usual Māori case was that the water body was either in whole or in part a resource of a particular tribe subject to individual use rights and responsibilities. The same applied to the inland seas and foreshore. These were all resources which were treated in same way as land with different persons having different uses of parts. The hapū had the political authority. They had authority or mana in respect of a general district and generally, of everything in it. The tribal members had access and specific use rights. For example, a person or a family may have the right to snare birds on a particular tree at a particular time of year, another to take the wood from that tree, or a person to maintain an eel weir at a particular spot on a river, another to fish at the mouth of that river when the mullet are running. There was thus a smorgasbord of use rights each demonstrating a use which, if unchallenged, became a right over time.

It was also the case however that hapū and individuals might have resource use rights at places removed from their normal habitations. Examples are the use rights of inland Tūhoe hapū in parts of Ohiwa Harbour or rocks in the adjoining open seas, or the use rights of inland Tūwharetoa hapū at the mouth of the Whanganui River.

THE ETHICS OF RESOURCE USE

The individual access to resources however, was conditioned by an ethic of resource use managed by spiritual sanctions. In Māori law all things within a given ecosystem, even a significant landform or a waterway, have a life-force or mauri and a spirit or wairua which constitute the authority or mana of that being or phenomenon. To access the resource the mana of the resource should be understood and respected. The kaitiaki serve to warn and advise people on proper resource use. Water monsters or taniwha fulfill a similar role. Their presence adds to the mana of the resources which they inhabit.

Many cultures consider there is a human spirit which transcends the sum of the body's molecules. That is also the customary Māori view. The difference is that for Māori, the same applies to all living things and many natural resources as well, including lakes, rivers, springs and swamps. It might be better said that Māori inhabited a spirit world rather than that the spirit world was occasionally in contact with them.

The way this played out in practice may be illustrated by a few examples. The respect paid to the spiritual dimension of a forest and the mana of an outstanding tree within it, required the careful selection of a tree for removal and appropriate incantations to gain approval for its extraction. Similarly, respect for the seas and the fish required respect for the associated life cycles, incantations to seek an authority to take before embarking, the return of the first fish, and the feeding of the elderly ahead of the expedition members.

Accordingly the Māori access to water was not solely governed by the tribe's political authority over a resource. The user of the resource was also expected to respect the resource's distinct character expressed in terms of its mauri and mana.

To illustrate the distinctive mauri of a water regime, the abstraction of water serving the Whanganui River through the Tongariro Power Scheme, as proposed in the 1950s, was seen to deleteriously affect the mauri of the Whanganui River. Similarly, the diversion of water from the Waikato River to Mānukau Harbour as proposed in the 1980s was seen to impair the mauri of the harbour. A respect for the unique personality of each water regime appears to have applied in much the same way as one would respect the personality or standing of different persons when seeking some permission from them.

Equally, one should respect the customary practices of Māori in using natural resources. Notwithstanding the vast oceans, lakes and rivers of this country, at least for a people who came from small Pacific islands and atolls, and the comparative paucity of the human population here, Māori imposed prescriptive laws on themselves to maintain pure water regimes and healthy life cycles. For example one did not dispose of waste to water, but only to land. There were also separate streams for bathing, for washing, for preparing garments, and for consumption. Then notwithstanding the multitudinous oceans surrounding the country, one could not gut fish at sea, or put food waste overboard, or even gut fish or open shellfish on the foreshore, below the high tide mark. If one took a paua from off a loose rock, the rock had to be restored to its original position and while it was acceptable to take what we would now call undersized paua, at least two of the largest paua were supposed to be left in any area of say three metres circumference. One could not drag a sack of shellfish across the foreshore but had to carry it so as not to disturb the shellfish underfoot. There are still Māori who wince when vehicles are driven along the foreshore.

The point is that in the customary system, the authority of the hapū to control the right of its members does not confer a right on members to use as they wish but a responsibility to use in accordance with the ethic of respecting the mauri of the resource. The unconstrained use right feeds the user, but the Māori ethic in using feeds the future generations.

BUILDING THE FRAMEWORK

Our own legal systems may provide appropriate principles in seeking a framework for legal rights, interests and responsibilities in water. The Māori and national legal systems have their own strengths and weaknesses but in this instance the Māori law appears to be more helpful. When officials say no one owns the water, they are not speaking a universal truth but are expressing an opinion based on a legal system which sees a lake as water on land, as though they are separate entities, where Māori law sees simply a lake and the under it, the lake bed, and

adjacent to it as a single entity, and (not as) a separate resource from dry land. As a result, a lake, river or aquifer is seen as the land is, as a resource which may be subject to various use rights.

Both legal systems are of help however in considering the source of the individual Māori right. In the Māori law the use right was seen to come from ancestors. For example one might say "I will build my weir on this particular spot because this is where my father had his weir and his father before him". In the general law it is a longstanding principle that Māori proprietary rights are determined by Māori custom, not by the law from England. That was the position generally adopted by the Crown's land purchasing officers from 1840 and was the position adopted by the Native Land Court from 1865. However the Native Land Court had trouble when it came to considering rights in respect of water where the surrounding land had been alienated because Māori had no custom of land alienation in the same way as Europeans. A gift of land for example was not a gift of the land itself but of a right to use it. In some cases the Court treated the water resource as separate from the land in view of the Māori custom that it was distinct resource. It must be remembered the major source of food for Māori was fish and fowl, predominantly water fowl, there being no land animals and a limited number of crops. The Court therefore made some title orders for springs, lakes, river camping sites, shellfish beds and mudflats. In most cases however the Court treated the water use rights as extinguished on the alienation of the adjoining land but the rationale appears to have been based on the law from England.

The Treaty of Waitangi provides the primary source of principle when reconciling the two laws and when marrying the Māori proprietary interest existing from time immemorial, and the general public interest resulting from land acquisitions effected or confirmed after the Treaty of Waitangi and the Proclamation of sovereignty in 1840. It was evident to the framers of the Treaty, as was stated in the preamble to the articles, that large numbers of settlers were poised to enter the country and that the British Crown should intervene to protect Māori interests. The numbers to arrive appear not to have been appreciated by Māori but the likelihood of significant change was written into the waters of the Bay of Island with well over 100 commercial vessels moored in the harbour and visible from the spot where the Treaty was being debated.

For present purposes I refer to two operative parts of the Treaty. One envisaged the protection of Māori authority over their lands, estates, forests and fisheries or in short, their customary, natural resources. The other envisaged the alienation of land for European settlement where Māori were willing to sell. Māori would benefit in turn not so much from the price paid but from the added value to the land they kept, following European settlement, provided they kept enough. The retention of sufficient reserves was thus a further way of giving effect to the principle of protecting Māori interests. Although a requirement for adequate reserves was not written into the Treaty it was written into Lord Normanby's instructions to officials. Putting these together

the intention appears to have been to provide severally but equitably for both peoples, ensuring that both would have access to critical resources.

As the Waitangi Tribunal has since made clear, Māori understood the earliest land alienations in their own terms, according to which the settlers were not buying the land but the right to use it, as with tenants. For that and other reasons many land sales were not understood as Europeans intended them. In addition, many land alienations were not willingly alienated. One need not look further than the land confiscations along the lower reaches of the Waikato River to appreciate that. There is also a regular opinion in the Tribunal's research archives that sufficient reserves were not maintained, as in central Hawke's Bay, Wairarapa, Horowhenua, or Manawatu. The Claims Settlement process has provided a palliative for the loss of such reserves but no palliative is needed in relation to water rights as the original Treaty objective can still be achieved.

There is then good reason for a water-rights framework that provides for both Māori and general public interests. It cannot be said that the Māori claims have been settled, for in the Crown's view at the time no one could own water and therefore there could be no Māori proprietary interest in it.

To summarise this section, the general public has an interest in water resources following the acquisition of the associated lands from Māori. The legitimacy for that view is found in the Treaty of Waitangi which foresaw such an outcome. The general public right derives from the Treaty.

The Māori interest in the water derives not from the Treaty but from time immemorial. It existed before the Treaty but is protected by the Treaty. The Treaty guaranteed the ongoing recognition of the Māori proprietary interest unless it was expressly and consensually extinguished and provided a sufficient resource was retained. The logical consequence appears to be that where the proprietary interest in water has been lost for failure to maintain a sufficient land reserve, but a water interest can be restored to what might be expected if a sufficient reserve had been maintained, then in giving effect to the Treaty today the Māori proprietary interest in the water resource should be restored.

BUILDING THE FRAMEWORK

The framework should therefore provide for a law which recognises the Māori proprietary interest in water, which recognises the general public interest in water, and which, in the interests of the generations to come, promotes a responsible use.

In addition the framework should provide for a resource which may have been damaged and could be damaged again in future. I am not aware that Māori caused any major, environmental

damage in the past, or even had the tools to do so, but they had a law for transgressions causing spiritual damage to natural resources, or spiritual or material damage to the property or persons of others. In such cases the law of utu applied. "Utu" has been taken to mean "revenge", as in the film called 'Utu', but its proper meaning is to restore the balance. The late Sir Robert Mahuta gave expression to the sentiment in response to the Waikato Land Confiscations when saying "Riro whenua atu, hoki whenua mai" – for land taken land should be returned. However, the recompense for a wrong was often undertaken by a muru, or the taking of goods from the wrongdoer family. A muru did not require the recognition of a wrong with associated remorse but was a non-judgmental restoration of balance. As if to drive home the point that this was more than a punishment for malfeasance and that mana was unaffected, families were known to put out for muru, far more goods than were needed as restitution.

Our framework too should provide a mechanism for the restoration of balance following an intentional or unintentional abuse of a water resource.

One might imagine then a diagram on a page using a circle to represent a mountain on one side, a straight line for the sea coast on the other side, and a line representing a river running from the mountain to the sea. Along that river, in a simple society, are many people all of whom use the river without charge, for certain basic purposes that are natural for all human beings, for fishing, for consumption, for recreation and for use on land for sanitation. I would describe as the public interest, the interest that all people have in using the river for the activities described and not to have that use compromised by the excessive use by some, or despoliation by others.

Today we must recognise that with industrialisation and enhanced agriculture, our simple society has been complicated by the commercial use of water for industrial and agricultural purposes in which some stand to profit from the extra use of water and the public interest stands to be threatened.

Further, access to water for domestic purposes no longer depends on living beside a natural water resource. The exercise of the right to water for basic human needs as well as the needs of animals, such as farm animals, must now depend on the reticulation of water to the homes, or alternatively, the catching and storage of rainwater at home by other means.

Finally, Māori and the government have reached some imaginative settlements which provide for Māori interests in water, in relation to the Waikato and Whanganui rivers. The framework which the Māori Council would develop, would not disturb those settlements unless the parties can gain some benefit from the new framework. In the same way there are other provisions for Māori water interests made by the government or the Māori Land Court last century, like Poroti Springs or Lake Rotoaira. These provisions should not be disturbed either unless there is a further benefit to be gained from doing so.

For most Māori however, their proprietary interests in water have not been provided for, by way of tribal settlements or other means and so a proposal is required.

AN OUTLINE FOR A PROPOSAL

1. The assumption is that Māori and the general public have a legitimate interest in the natural water regimes of the country for drinking water, fish and water fowl, recreation and sanitation, the supply of water to distant homes and in the maintenance and management of water bodies. However, the source of the interest is not the same and Māori have special interests in focusing on such matters as the supply of water to marae, papakainga, and areas of concentrated Māori populations, the paid engagement of Māori and community groups in resource restoration projects, the funding of water tanks for Māori homes as an alternative water supply and the development of water based industries which provide for general and Māori employment.
2. Those utilising water for commercial purposes should be charged. The charging and management of revenue should be managed by an independent, elected commission for the water bodies of a district. A proportion of the funds should be allocated to Māori authorities in recognition of the Māori interest.
3. Whether in public or Māori hands, the funds should be applied to the maintenance or improvement of the natural water bodies of the district or the assurance of water supplies to all homes. The purposes for which funds may be allocated would include the matters mentioned above and assisting communities to present before authorities with a power of decision on water rights. As mentioned the Māori groups are likely to have a different focus from others.

Attached is the proposal from the New Zealand Māori Council, approved this month for the purposes of developing the discussion.

The Council also acknowledges the assistance it has received from certain iwi in advancing the water claim.

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[1] The Waitangi Tribunal is a body established to hear Māori claims in relation to government policy.

[2] The morepork came from my Maniapoto ancestry. The Kaitiaki from my Rangitane line was the kotuku or white heron but the heron has long disappeared with the draining of the large Manawatu swamps.

[3] I am aware of the argument that Māori considered themselves to own water, based on historical records that Māori charged a fee to captains who took water for their ships from Bay of Island streams prior to the Treaty of Waitangi and possibly after. That may have had more to do with charging for access.