

“Bridge Over Troubled Water: Māori Co-Management and Co-Governance Rights and Responsibilities to Fresh Water in New Zealand

Dr Robert Joseph¹

Presentation at the Indigenous Peoples’ Legal Water Forum

University of Otago Stadium Centre Wellington

Monday 27th July 2009

The increasing control by a small group of multinationals over the allocation of fresh water to the peoples of this planet should be a concern for New Zealanders. The human race has taken fresh water for granted and has misjudged the capacity of the earth’s water systems to recover from corporate profits that are increasingly drinking up precious fresh water resources. Schemes to transfer control of water to multinational corporations have resulted in water pollution and environmental damage, while some communities have even lost the water supply altogether. New Zealand is a ‘water rich’ nation featuring numerous rivers, lakes and aquifers but New Zealand is not immune from future water shortages. New Zealand currently faces two major energy challenges - the response to the risks of climate change by reducing the greenhouse gases caused by the production of energy, and the delivery of clean, secure and affordable energy while treating the environment responsibly. The sustainable use of fresh water is a key ingredient of both challenges. Climate change has played its part in the fresh water debate with the recent dry summers and low water storage levels in the South Island Lake catchments being key examples.² Some New Zealand catchment areas are even over allocated with resource consents being granted to take more water than is surplus in those catchments.³

To many, legal ownership of fresh water in New Zealand is unclear. Māori, however, have often claimed property rights in water. For example, in 1914, Attorney-General John Salmond, wrote a memorandum noting possible Māori property rights in water:

The Prime-Minister ... has instructed me to appear before the Native Land Court to contest the claims of the Natives on the ground that the only rights possessed by the Natives over the larger lakes of this country are rights of fishery and not rights of ownership as are now claimed. ... It is to be observed in the first place that the question relates not merely to Lake Rotorua but to all rivers, lakes, foreshores and tidal waters in the Dominion. ... I think it exceedingly doubtful whether any such contention as that

¹ Ngāti Raukawa, Maniapoto, Tuwharetoa, Kahungunu, Rangitāne, Ngāi Tahu, Pakeha. Lecture, School of Law, University of Waikato.

² See Hembry, O ‘La Nina’s return threatens South Island drought’ in *New Zealand Herald*, (Tuesday 13 January 2009). Hembry noted that the 2008 South Island summer drought is estimated to have cost the New Zealand dairy sector \$1.4 billion. See also ‘Mix of storms and drought leaves Kiwis with \$1 b bill’ in *New Zealand Herald*, (Tuesday 13 January 2009). The article even noted that the 2008 heat waves and droughts that plagued farmers were blamed in some quarters for sparking the current recession.

³ Examples include the Waikato and Waitaki River catchment areas.

*which I am now instructed to raise before the Native Land Court could be maintained ... it may be anticipated that the Court will hold that by native custom the Natives own not merely the land but the water of this country and freehold titles will be issued accordingly.*⁴

The Crown alleges that at common law, no one ‘owns’ water because it is common property and that only ‘use rights’ can be owned. Although water use and allocation rights are neither real nor personal property, they are a grant to use the resource akin to ownership. The value placed on fresh water and the pressure that exists for competing interests and users who try to gain access to water (akin to ownership) has been highlighted in the High Court recently.⁵ Water is a basic necessity that should be treated differently from other commodities and not placed into private hands. Māori must assert their rights and responsibilities by playing a key role in the co-management and co-governance of fresh water.

The long standing sustainable nature of Indigenous cultures offer key lessons that can be, indeed should be, drawn from to manage and govern our resources in a modern context. Co-management and co-governance of fresh water appears to be the better options for Māori and New Zealand rather than outright privatised ownership of water, corporate exploitation and mismanagement by multi-national corporations. Co-management and co-governance with the Crown means that Māori will not exclude private interests and other stakeholders from using fresh water but will ensure that Māori play an active role in the decision making processes and co-governance concerning fresh water according to a Māori world view, and governed by sustainable Māori values and protocols.⁶ Recent co-management models in New Zealand include the Waikato River Deed 2008, the Te Arawa Lakes, and Tuwharetoa and Crown agreement over the water quality of Lake Taupo.

The paper explores research on competing fresh water rights drawing on international experiences in the Americas. The paper situates New Zealand’s unique Treaty of Waitangi relationship within the increasingly complex stakeholder environment. Ownership and privatisation of fresh water in New Zealand is occurring and Māori need to place a stake in the resource to assert tribal ownership before the Government assumes ownership through

⁴ Salmond to Attorney-General, 1 August 1914, Opinions Relating to Lands Department 1913-1915, cited in Frame, A, *Salmond: Southern Jurist* (Victoria University Press, Wellington, 1995).

⁵ Resource Management Act 1991, s. 122. In the 2005 case of *Aoraki Water Trust v Meridian Energy Ltd* [2005] NZRMA 251, the issue before the Court was whether further resource consents could be issued to a number of parties for irrigation purposes when Lake Tekapo was already allocated to Meridian Energy for electricity generation. The Court decided that granting any further consents would reduce the amount of water available to Meridian and by refusing to allow any further claim to water, the Court effectively confirmed the principle that the right granted by the consent really amounts to an allocation of that resource, or as Bennion terms it in Bennion, T, *Māori Law Review* (April 2007) at 3: ‘full blown property rights.’ Bennion added that in practice, Meridian Energy effectively ‘owns’ the entire waters of Lake Tekapo and possibly all contributing waters to that lake, so long as their water permits continue. See also Kirkpatrick, D, ‘Has the Resource Management Act Replaced the Property Law Act?’ in New Zealand Law Society, *Intensive Resource Management* (Vol. 25, 2007) at 28.

⁶ See for example Stephenson, J, ‘Recognizing Rangatiratanga in Resource Management for Māori Land: A Need for a New Set of Arrangements?’ in *New Zealand Journal of Environmental Law* (Vol. 5, 2001) at 159, 160.

legislation, case law and/or Government policy. The paper teases out other sustainable models that are being used elsewhere such as co-management and co-governance models in Canada, making fresh water access a human right and responsibility, and constitutionalising the right to fresh water, which can only be beneficial for the country as a whole, not just for Māori .