

The Potential for Maori Customary Claims to Freshwater

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Introduction

Maori assert a range of relationships with and interests in freshwater resources in New Zealand, which may be recognised under the common law as customary rights. This dissertation begins with an exploration of possible uses or interests in running water, and examines Maori interests in closer detail. Cases such as *Ngati Apa v Attorney General* [2003] 3 NZLR 643 establish that it is the indigenous conception that must be at the forefront in determining the rights to be recognised under the common law. The Court emphasised the necessity of taking Maori conceptions of ownership and rights to natural resources as the starting point in cases concerning aboriginal title.

It is then necessary to consider whether or to what extent these interests may have been extinguished. While customary rights are vulnerable to statutory extinguishment, the Court of Appeal has adopted a particular approach to interpreting such legislation, which must be sufficiently “clear and plain” in order for the Court to hold that the rights have been extinguished. The effect of a number of statutory provisions and regimes on customary rights will be considered on this basis. It may be that many of the interests and relationships Maori assert in freshwater have in fact been extinguished by legislation which meets the test in *Ngati Apa*. However, it is unlikely that the full range of interests have been so disposed. Others may have been translated on to a statutory foundation. The Resource Management Act 1991 (RMA), in particular, as well as various Treaty settlements will be considered in this context. Finally, how any rights or interests that have not been extinguished or incorporated into legislation may be recognised will be examined, having regard to the possible avenues Maori may have for redress.

CHAPTER ONE: Ownership and Control of Running Water

Ownership of running water

The ownership of running water at common law

If one follows English common law principles, the general position regarding ownership of freshwater in NZ is that there is no owner of running water until it is abstracted. According to Wheen, “At common law, water itself (as compared to the land beneath it) was not the subject of property or capable of being granted to anybody.”¹ This proposition has not been altered by statute. Parliament has, however, conferred the authority to regulate the resource and to allocate uses on certain bodies through various legislative enactments, principally the Water and Soil Conservation Act 1967 (the Water Act) and the RMA, although neither Act dealt explicitly with ownership.

The current (statutory) position

While under the common law there were rights to use water, based on riparian ownership, such rights have generally been extinguished by the Water Act and/or the RMA. Section 14 of the RMA requires a resource consent to be obtained in order to take, use, dam or divert water, although there are some situations whereby water can be taken as of right. A permit can be granted for a maximum period of 35 years after which the consent holder must apply for renewal. The authority to grant such consents is conferred by statute on regional councils under the RMA.²

Despite these two rules concerning ownership and allocation of use of the resource, there is still the possibility that customary interests of Maori may be recognised under the common law of NZ. These interests would have to be based on past uses or connections. This section will therefore examine the range of uses that can be made of a river, and, in turn, the range of interests and relationships Maori assert to the resource.

¹ N. Wheen, (1995), *The Resource Management Act and Water in New Zealand: Impact and Implications*, (a thesis submitted for the degree of Master of Laws at the University of Otago, Dunedin), p13.

² See further Chapter Two: Extinguishment. The functions of regional councils are set out in the Resource Management Act 1991, section 30(1).

Possible uses of a river

This section will examine the range of possible uses of or connections with a river. These functions can be divided up and separately regulated or separately allocated to different parties, as ownership interests or use rights and the like. Some may remain with Maori, as the original, indigenous users or owners of the resource, while some may have been conferred by law on others.

Sustenance/harvesting

Rivers may be “sources of water, food and other resources such as hangi stones and pounamu.”³ NZ’s rivers and lakes are also important for recreational fishing and commercial operations such as salmon farming, eeling and whitebaiting.

Navigation/transport

Rivers used to form “part of traditional travel routes and trading networks.”⁴ The Waitaki catchment, for example, was “... a means of travel by reed raft (mokihi).”⁵ In NZ, the use of waterways as transport is now largely confined to history, although jet boating and white water rafting are popular activities.

Spiritual and ancestral connections

Rivers may carry spiritual and ancestral connections, particularly for the indigenous users of the resource,⁶ although others may also assert such interests.

³ Office of Treaty Settlements, (2002), *Ka Tika a Muri, Ka Tika a Mua, Healing the Past, Building a Future*, Wellington, p110.

The practice of mahinga kai, for example, is central to Maori culture and tradition.

Mahinga kai is “a seasonal food and resource-gathering activity requiring intimate knowledge of the catchment, seasons and methods of procurement” (Waitaki Catchment Water Allocation Board, (2005), *Waitaki Catchment Water Allocation Regional Plan*

Available:

<http://www.ecan.govt.nz/Plans+and+Reports/Water/Waitaki+Catchment+Water+Allocation+Regional+Plan.htm>

Accessed: 14/05/06).

⁴ *Supra*, n. 3, at 110.

⁵ Waitaki Catchment Water Allocation Board, (2005), *Waitaki Catchment Water Allocation Regional Plan*

Available:

<http://www.ecan.govt.nz/Plans+and+Reports/Water/Waitaki+Catchment+Water+Allocation+Regional+Plan.htm>

Accessed: 14/05/06.

⁶ For example, the Office of Treaty Settlements states that, to Maori, “rivers and lakes can be or represent any or all of the following:

- the embodiment of or creation of ancestors
- a key aspect of tribal and personal identity
- the location of wahi tapu
- boundary markers and part of traditional tribal defences, and
- possessors of mauri, the life force or essence that binds the physical and spiritual elements of all things together.”

(See Office of Treaty Settlements, (2002), *Ka Tika a Muri, Ka Tika a Mua, Healing the Past, Building a Future*, Wellington, p110).

Recreation

There is uninhibited public access to many of NZ's rivers and lakes for recreational uses such as fishing, swimming and boating.⁷ Also, as outlined by the Ministry for the Environment's Water Programme of Action, "[l]akes, rivers and wetlands may be preserved for conservation values (or in national parks)."⁸ There may be further restrictions regarding waterways which are managed under the Conservation estate.

Harnessing for energy

Hydro-electricity generation is another purpose for which water is highly valued in NZ. The Water-power Act of 1903 first reserved to the Crown the sole rights to generate electricity by waterpower.⁹ Later, under the Public Works Amendment Act 1908, the Crown allowed private enterprise to construct hydro schemes, subject to it issuing a generation consent.¹⁰ The rights to use water and generate power were eventually separated by the passing of the Water and Soil Conservation Act 1967, which effectively meant that two consents were required for hydro-schemes, one from the Water and Soil Conservation Authority, and one from the Minister of Electricity.¹¹ However, the Authority's power to grant consents is now exercised by regional councils under the RMA, who have management responsibilities under section 30(1)(e).¹² A land use consent is also required in order to build a dam on a river bed.¹³

Irrigation

Resource consent is required in order to abstract water for irrigation for agricultural or horticultural uses. Pastoral farming also requires stock drinking water, but this use is provided for as of right by section 14 of the RMA, a water permit thus not being necessary.

Commercial and industrial usages

⁷ Commercial operators require a resource consent or water permit under the RMA to carry out activities. Uses of the surface of rivers and lakes are controlled by territorial authorities rather than regional authorities, who in the main exercise responsibility for water management. (See the Resource Management Act 1991, section 31).

⁸ Ministry for the Environment, (2004), *Water Programme of Action: Water Allocation and Use*, MfE, Wellington, p4.

⁹ See the Water-power Act 1903, section 2.

¹⁰ Waitangi Tribunal, (1998) *Te Ika Whenua Rivers Report* (Wai 22), GP Publications, Wellington, p44

¹¹ *Ibid.*, 46-47.

¹² Regarding "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, the setting of any maximum or minimum levels of flows of water and the control of the range, or rate of change, of levels or flows of water."

¹³ See the Resource Management Act 1991, section 13(1), which places restrictions on the use of the beds of lakes and rivers. No person may "use, erect, reconstruct, place, alter, extend, remove, or demolish any structure or part of any structure in, on, under, or over the bed" of any lake or river except as expressly allowed under a rule in a plan, or by a resource consent.

Discharge permits are the type of consent required in order to discharge waste or water onto land or into waterways.¹⁴ Industrial uses often require abstraction of water, for which a water permit from a regional council is needed also.

Therefore, there are many ways to divide up the interests in a river. Some uses are in the public domain; others require a statutory consent. Maori also have customary connections to rivers in NZ. Thus, it is necessary to consider to what extent the common law can recognise these customary interests.

¹⁴ Resource Management Act 1991, section 15.

Customary title

Boast defines customary title as the “rule that rights of use and occupancy in lands and waters formerly exercised by native peoples continue as a recognised legal interest after conquest, discovery or cession until such time as the rights are extinguished by the colonising power. The aboriginal title is a burden on the Crown’s primary title.”¹⁵ This legal recognition is afforded “...through the simple fact that the indigenous peoples were already there, living in communities according to their own laws and customs.”¹⁶ The doctrine of aboriginal title is now well established in NZ. In *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 Cooke P described it as “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...”¹⁷

Historical recognition of Maori customary rights in NZ

Customary title is “enforceable in the ordinary courts and enforceability is not dependent on legislative recognition,”¹⁸ unlike the Treaty of Waitangi. However, there have been two conflicting lines of authority on customary rights in NZ. Chapman J held in *R v Symonds* (1847) NZPCC 387 that:

“It cannot be too solemnly asserted that [native property over land] is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the consent of the Native occupiers.”¹⁹

But the later decision in *Wi Parata v Bishop of Wellington and Attorney General* (1877) 3 NZ Jur (NS) 72 became the basis for much of the Crown’s future legislative and administrative dealings with Maori. *Wi Parata* held that the common law rule that native customary property survived the acquisition of sovereignty had no application to the circumstances in NZ. According to Prendergast J, Maori had insufficient social organisation upon which to found custom recognisable by the new legal order.²⁰ Thus, any Maori rights could only be derived from statute. Maori had no pre-existing customary rights.²¹ However, the Privy Council provided some sort of bulwark against the attitudes of the colonial courts during this period.

¹⁵ R. Boast, *Treaty rights or aboriginal rights* [1990] NZLJ 32.

¹⁶ R. Maihi, (2003), *The foreshore and seabed: Maori customary rights and some legal issues*, NZ Parliamentary Library, Wellington, p3.

¹⁷ *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, at 21.

¹⁸ *Supra*, n. 22, at 32.

¹⁹ *R (On the Prosecution of C H McIntosh) v Symonds* (1847) NZPCC 387.

²⁰ *Wi Parata v Bishop of Wellington and Attorney General* (1877) 3 NZ Jur (NS) 72.

²¹ As described by Kahn, “The Court in *Wi Parata* theorised that countries with multiple tribal chiefs and no unified governmental body could not possess any supreme sovereign power, pre-existing natural resource rights, or authority to negotiate a treaty, although these concepts had already been rejected in English courts prior to the signing of the 1840 Treaty of Waitangi.” (See Benjamin Kahn, *The Legal Framework Surrounding Maori Claims to Water Resources in New Zealand: In Contrast to the American Indian Experience*, (1999) 39 Stan J Int L 49, p104.)

Nireaha Tamiki v Baker (1901) NZPCC 371 held that it was “rather late in the day for such an argument to be addressed to a New Zealand Court.”²²

Maori customary rights were eventually ‘re-recognised’, initially in the context of customary fishing rights in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680. According to Kahn, “...the decision is notable as a renewed recognition that natural resource rights secured by common law aboriginal title and ratified by the Treaty of Waitangi are indeed enforceable unless subsequent laws alter those rights.”²³

The content of customary rights

As stated by Boast, “what might be called the *content* of Native title... in terms of the precise kinds of rights to be protected, the descent groups who can lay claim to such rights, the rules relating to succession... and so on can only be governed by indigenous customary law.”²⁴ Therefore, the content of any native title is to be derived from an investigation of the traditional customs and conceptions of the indigenous people in question.²⁵

The sui generis nature of customary rights

As stated by the Waitangi Tribunal in its Whanganui River Report, “custom is to be seen in its own terms.”²⁶ The Tribunal also accepted that past judicial determinations of Maori interests [in rivers] were erroneous because they relied on the division of waterways into water, bed and banks: “The decisions had fitted Maori interests into categories that were relevant to English law so that Maori interests had not been assessed in terms of Maori concepts.”²⁷ The need to avoid equating customary rights with English concepts has been emphasised in a number of cases, the most well known being *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 AC 399. There the Privy Council stated:

“There is a tendency, operating at times unconsciously, to render that title [to native land] conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely...”²⁸

²² *Nireaha Tamiki v Baker* (1901) NZPCC 371, at 382.

²³ B. Kahn, *The Legal Framework Surrounding Maori Claims to Water Resources in New Zealand: In Contrast to the American Indian Experience*, (1999) 39 Stan J Int L 49, p160.

²⁴ Boast et al, (1999) *Maori Land Law*, Butterworths, Wellington, p3.

²⁵ In *Mabo v Queensland (No 2)* (1992) 175 CRL 1, 48, at 58 Brennan J stated it thus: “Native title has its origin and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.”

²⁶ Waitangi Tribunal, (1999), *Whanganui River Report* (Wai 167), GP Publications, Wellington p25.

²⁷ *Ibid.*, at 23.

²⁸ *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 AC 399, at 403.

This proposition was affirmed in *Ngati Apa*, where Elias CJ held: “The proper starting point is not with assumptions about the nature of property... but with the facts as to native property.”²⁹

The danger in attempting to treat aboriginal rights as analogous to western property conceptions is twofold. On the one hand, “it may be dismissive of customary interests which are less than recognisable English legal estates.”³⁰ In *Re Landon and Whitaker Claims Act 1871* (1871) 2 NZCA 41 the Court held that “whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it.” Thus, as stated by McHugh, “there may well be a range of common law aboriginal rights relating to land which Courts will recognise notwithstanding their non-conformity with conventional property rights.”³¹ Conversely, there is a valid concern that a euro-centric approach “may cause lesser customary interests to be inflated to conform to familiar legal estates.”³²

A spectrum of rights

It has been asserted that aboriginal rights cannot amount to exclusive ownership but only a lesser form of use right.³³ However, aboriginal title jurisprudence has affirmed that customary rights may include not only usufructuary rights but also ownership. According to Cooke P, in *Te Ika Whenua*:

“At one extreme they may be treated as approaching the full rights of proprietorship of an estate in fee recognised at common law... At the other extreme they may be treated as at best a mere permissive and apparently arbitrarily revocable occupancy...”³⁴

Fiduciary obligations of the Crown

The Crown may also have a fiduciary obligation to preserve Maori customary rights. The existence of such a duty is well established in Canadian jurisprudence, but has also gained support in NZ. As described by McHugh:

“In the *New Zealand Maori Council* case (1987)... the Court held that... the relationship between the Crown and tribes created responsibilities analogous to fiduciary duties... The Court located the fiduciary duty squarely in the ‘principles of the Treaty of Waitangi’ [whereas] the North American courts have seen treaties and legislation not as the legal source so much as a declaration of the preexisting duty. By the North American approach, the Crown would owe a fiduciary duty to the tribes irrespective of the Treaty. This must also be the case in New Zealand; however, the Treaty gives the aboriginal fiduciary duty added

²⁹ See *Ngati Apa v Attorney General* [2003] 3 NZLR 643 at 661 (per Elias CJ).

³⁰ *Supra*, n. 16, at 5.

³¹ P. McHugh, *Proving Aboriginal Title*, [2001] NZLJ 303.

³² *Supra*, n. 16, at 5.

³³ Which may or may not be territorial in nature.

³⁴ *Supra*, n. 17, at 21.

potency, for it is an explicit and formal assumption of responsibility that is often lacking in the North American treaties.”³⁵

In *Te Ika Whenua* the Court appeared to leave open the possibility of claim based on a customary interest in the flow of the rivers, or breach of fiduciary duty by the Crown. As stated by Cooke P, the removal of such a right “by less than fair conduct or on less than fair terms would be likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power...”³⁶ Whene writes:

“Maori customary title may today support a Waitangi Tribunal claim to control or participate in the management of water bodies. Although there is a prospect that it could support action in the ordinary courts... even if the argument that Maori customary title has itself survived should fail, it could still be argued that in extinguishing the Maori rights, the Crown breached its fiduciary duties...”³⁷

Thus, even if customary interests have been extinguished, it may remain open to Maori to bring a claim based on breach of the Crown’s fiduciary duty to preserve these rights and interests.

Given that customary rights may be recognised in NZ Courts, it is therefore necessary to consider Maori customs and traditional interests in water resources in order to understand the potential extent of any interests that may still remain. As stated by the Waitangi Tribunal, “[t]o consider whether the Crown extinguished Maori interests in the river, we have first to ask what those interests were.”³⁸ This exploration must keep in mind the warning in *Amodu Tijani* against attempting to categorise these interests in terms of western property conceptions. It must also be recognised that such interests may occupy a full spectrum, ranging from use rights to exclusive ownership.

³⁵ P. McHugh, (1991), *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Oxford University Press, Auckland, p247 – 249.

³⁶ *Supra*, n. 17, at 24 (per Cooke P).

Also at 26: “...the assumption of control over the rivers implicit in the construction of the dams is more fundamental. If control has been assumed without consent there may well have been breaches of the Treaty of Waitangi, as the Crown acknowledges... The Maori remedy lies in the Waitangi Tribunal claim, or conceivably in Court action based for instance on Maori customary title or fiduciary duty...”

³⁷ N. Whene, *A Natural Flow: A History of Water Law in New Zealand* (1997) 9 *Otago LR* 71, at 77-78.

Also see the Canadian cases *R v Sparrow* [1990] 1 WWR 410 (SC) and *Guerin v R* [1984] 2 SCR 335; 55 NR 161; 13 DLR (4th) 321.

³⁸ *Supra*, n. 26, at 15.

The interests and relationships Maori assert to freshwater: Property, Authority & Metaphysical Claims

Maori assert their relationship to freshwater at a number of different levels, which are all linked by an underlying spiritual philosophy.

PROPERTY

Rivers as taonga

The Waitangi Tribunal has recognised that rivers are a “taonga essential to the identity, culture, and spiritual well-being of the people.”³⁹ Maori were guaranteed the possession and tino rangatiratanga of their taonga by Article II of the Treaty of Waitangi, which may therefore be seen as declaratory of aboriginal title.⁴⁰ In one sense, “taonga” is a resource owned or treasured by Maori. With regards to the Whanganui River, the Tribunal were of the view that Maori may ‘own’ water in the river by virtue of the fact that they were recognised as the possessors of the river as a whole: “Maori ‘rights’ in either land or waterways can be seen to be based on usage and possession, from which, according to the law as settled in the Native Land Court, ownership derives.”⁴¹ Thus, White writes, “ownership...seemed to flow from the right to use the resource. This is in contrast to the European model of ownership where use rights derive from the ownership of the resource...”⁴²

Rivers as holistic, indivisible entities

Maori holism regarding natural resources underpinned the Tribunal’s conclusion that Te Atihaunui ‘owned’ the water in the Whanganui River.⁴³ They were of the view that “it was inconsistent with Maori river interests, according to their philosophy, that those interests might be determined according to...the severance of water, banks and bed.”⁴⁴ The Maori conception of ownership sees a river “... as an indivisible whole, not something to be divided up and analysed by the constituent parts...”⁴⁵ The Tribunal reasoned:

³⁹ *Supra*, n. 26, at 25.

⁴⁰ See *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, at 21 where Cooke P stated: “The Treaty of Waitangi 1840 guaranteed to Maori, subject to British kawanatanga or government, their tino rangatiratanga and their taonga. In doing so the treaty must have intended effectively to preserve for Maori their customary title.”

⁴¹ *Supra*, n. 26, at 49.

⁴² B. White, (1998), *Inland Waterways: Lakes*, Waitangi Tribunal, Wellington, p251. He further writes: “But...one must be wary of trying to reduce Maori customary rights to accord to western conceptions of ownership.” As stated by the Waitangi Tribunal, “‘land ownership’ is not a universal law but a particular construct of some cultures.” (See Waitangi Tribunal, (1999), *Whanganui River Report* (Wai 167), GP Publications, Wellington, p49).

⁴³ And that Te Ika Whenua had a proprietary interest in their rivers, described as “the right of full or unrestricted use and control of the waters thereof – while they were in their rohe.” (Waitangi Tribunal, (1998) *Te Ika Whenua Rivers Report* (Wai 22), GP Publications, Wellington, p 84 & 124.)

⁴⁴ *Supra*, n. 26, at 23.

⁴⁵ *Ibid.*, 23.

“Without ownership of the water within a river, ownership of that river is meaningless... If the river is regarded as a whole, as we think it must be in terms of Maori possessory concepts, the water is an integral part of the river that was possessed, and was possessed as well. Though its molecules may pass by, as a water regime it remains.”⁴⁶

This view also underlies the Maori approach to resource management, as illustrated by Ngai Tahu’s Freshwater Policy: “[As] water is a holistic resource, the complexity and interdependency of different parts of the hydrological system should be considered when developing policy and managing the water resource.”⁴⁷ This is in contrast to the approach of the NZ legislature in regulating water use, whereby various different uses or interests in water may be both separately regulated and separately allocated. Such a particularistic, compartmentalised approach is also reflected to some degree in the existence of various different bodies controlling water use.⁴⁸

AUTHORITY

Rangatiratanga

Rangatiratanga is generally interpreted to include *the power* to control and manage resources in accordance with Maori customary practices. As described by the Waitangi Tribunal, “rangatiratanga denotes mana, not only to possess what one owns, but to manage and control it in accordance with the preference of the owner.”⁴⁹ Thus to Maori, ownership and authority go hand in hand. According to Stephenson, “[r]angatiratanga incorporates [both] concepts...As such, it does not fit easily with the contemporary legal structure which makes a distinction between ‘ownership’ – that is, the right to use, trade and benefit from the use of the resource, and ‘resource management’, which incorporates concepts of controlling the use of the resource.”⁵⁰

Kaitiakitanga

Kaitiakitanga may be considered as the practical expression of rangatiratanga. It therefore involves *the exercise* of customary authority over the way a resource is used, managed and protected. As described by the Waitaki Catchment Water Allocation Regional Plan, “[k]aitiakitanga, a function of manawhenua, involves the observance of kawa and tikanga, traditional rules applied to protect the mauri from harm by human actions.”⁵¹ To the extent that kaitiakitanga is inextricably linked to

⁴⁶ *Supra*, n. 26, at 50.

⁴⁷ Te Runanga o Ngai Tahu Freshwater Policy (iwi management plan), p8.

⁴⁸ For example, while regional councils exercise the main responsibilities in respect of running water, territorial bodies are authorised to control the use of the surface of lakes and rivers (under the Resource Management Act 1991, section 31(1)(e)).

⁴⁹ Waitangi Tribunal, (1992), *Mohaka River Report* (Wai 119), GP Publications, Wellington.

⁵⁰ J. Stephenson, *Recognising Rangatiratanga in Resource Management for Maori Land: A Need for a New Set of Arrangements?* [2001] 5 NZJEL 159, at 160.

⁵¹ *Supra*, n. 5.

rangatiratanga⁵² and thus Maori conceptions of resource ownership, it is one aspect of the relationship between Maori and their taonga that may be both preserved as an element of customary title and entitled to active protection under the Treaty of Waitangi. While the central concept is more one of obligation than authority, it still “entails an active exercise of power in a manner beneficial to the resource.”⁵³

METAPHYSICAL CONCEPTS

Rivers as living “beings”

There is a large overlap between the metaphysical or spiritual beliefs of Maori regarding water, and the concepts of rangatiratanga and kaitiakitanga. The content of these values is derived from the Maori world-view, which sees taonga such as rivers as imbued with a spiritual essence, or mauri. As Durie writes, “[d]istinctions between inanimate and animate objects are therefore blurred, because each is afforded a spiritual existence which complements the physical state. Nothing is lifeless.”⁵⁴ According to the Waitangi Tribunal, “the river is seen as a living entity with its own personality and life-force...”⁵⁵ by Maori.

Maori spiritual relationships with water

While iwi may differ in their expression of spiritual relationships with water, as stated by the Waitangi Tribunal, “there is among all tribes a continuing and all embracing theme of acknowledging traditional holistic concepts of water in both physical and spiritual, tangible and intangible senses.”⁵⁶ The Waikato River, for example, “has long been used for healing illnesses, the cleansing of the dead, the baptism of new-borns, spiritual cleansing and preparing those who had important tasks to perform or journeys to undertake.”⁵⁷ Such traditions have retained contemporary relevance. Freshwater is integral to Maori cultural and personal identity and wellbeing – “rivers and lakes carry ancestral connections, identity and wairua for whanau, hapu and iwi.”⁵⁸ Preservation of the metaphysical attributes of the river is not only important for the integrity of these spiritual practices, however. Tangata whenua, as kaitiaki, have a reciprocal obligation to protect taonga, including rivers, now and for future generations.

⁵² Te Puni Kokiri, (1993), *Mauriora Ki te Ao: An Introduction to Environment and Resource Management Planning*, Ministry of Maori Development, Wellington, p10.

⁵³ *Ibid.*, 10.

⁵⁴ M. Durie, (1998), *Te Mana Te Kawanatanga: the Politics of Maori Self-determination*, Oxford University Press, Auckland, p22.

⁵⁵ *Supra*, n. 26, at 23.

How the concept of a river as a being may be provided for by our legal system is further considered in Chapter Three: Incorporation.

⁵⁶ Waitangi Tribunal, (2002) *The Pouakani Report 1993* (Wai 33), Legislation Direct, Wellington.

⁵⁷ Environment Waikato Regional Council, *Waikato Te Awa – A Taonga*, Available: <http://www.ew.govt.nz/enviroinfo/water/healthyivers/waikato/facts6h.htm>. Accessed: 18/7/06.

⁵⁸ Ministry for the Environment, (2005), *Wai Ora: Report of the Sustainable Water Programme of Action Consultation Hui*, Wellington, p8.

The Water Act made no provision for these metaphysical or spiritual relationships. However, in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, Chilwell J applied *Public Trustee v Loasby* (1908) 27 NZLR 801 to find that “customs and practices which include a spiritual element are cognisable in a Court of law provided they are properly established, usually by evidence.” He held that “Maori spiritual and cultural values could not be excluded from consideration if the evidence established the existence of spiritual, cultural, and traditional relationships to natural water held by a particular and significant group of Maori people.”⁵⁹ Under the RMA, these interests are given some protection by section 6(e).⁶⁰

It is clear therefore that English and Maori customs regarding ownership of running water are markedly different. The above discussion has illustrated the range of traditional concepts Maori use to describe their relationship with rivers. In terms of the common law, the various interests and relationships that are asserted can be brought under the headings of property and authority. Both the power of rivers, particularly in metaphysical or spiritual terms, and duties towards them are recognised. However, the status of our law currently is that many of these interests are not fully recognised or incorporated, or may in fact have been extinguished. If the NZ legal system was really to start from the proposition that customary rights of Maori are to be recognised on their own terms, all these notions would have to be recognised freely.

⁵⁹ LexisNexis, (2002), *The Laws of New Zealand*, [81] “The Treaty of Waitangi as an aid to statutory interpretation.”

⁶⁰ They have thus been codified to some extent, albeit in a limited sense which does not give them priority over any of the other matters listed in Part 2. See further Chapter Three: Incorporation.

CHAPTER TWO: To what extent have Maori customary interests in running water been extinguished?

Statutory extinguishment

The common law position that there is no owner of running water until abstracted has not been explicitly modified by statute. According to a Ministry for the Environment working paper, “[u]nder the Water Act 1967 there is still no right to own water – except confined water. What the Act addresses is *the right to use water*.”⁶¹ The same can be said of the RMA. Thus, there has been no express statutory extinguishment of Maori customary rights to freshwater, in the sense of ownership being vested in the Crown (or elsewhere). However, such enactments, dealing with the management and control of fresh water, still have the potential to have an extinguishing or expropriating effect on customary interests.

The Court in *Ngati Apa* adopted a very specific approach to statutory interpretation in the context of considering whether or not a statute has the effect of extinguishing aboriginal rights. As stated by Keith and Anderson JJ, “...the onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain.”⁶² This approach is not new, however. NZ Courts have affirmed the principle that extinguishment of customary rights cannot occur ‘by a side wind’ in a number of cases. In *Te Weehi* for example, Williamson J adopted the Baker Lake “test” for extinguishment from Canadian jurisprudence,⁶³ holding that “customary rights of native... peoples may not be extinguished except by way of specific legislation that clearly and plainly takes away the right.”⁶⁴

Thus it is necessary to consider whether NZ legislation such as RMA and its legislative precursors has achieved the extinguishment of Maori customary interests in water (and if so, to what extent) in such clear and plain terms.

⁶¹ Ministry for the Environment, (1988) *Resource Management Law Reform Analysis of Existing Statutes, Working Paper No. 7: “Water and Soil Conservation Act”*, Wellington, p4.

⁶² *Ngati Apa v Attorney General* [2003] 3 NZLR 643, at 685 (per Keith J).

⁶³ *Supra*, n. 15.

⁶⁴ *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, at 691 – 692.

Similarly, in *Faulkner v Tauranga District Court* [1996] 1 NZLR 357, at 363 Blanchard J stated: “It is well settled that customary title can be extinguished by the Crown only by means of a deliberate Act authorised by law and unambiguously directed towards that end... Customary title does not disappear by a side wind. Where action taken by the Crown which arguably might extinguish aboriginal title is not plainly so intended the Court will find that the aboriginal title has survived.”

THE COAL MINES AMENDMENT ACT 1903

Only the beds of navigable rivers were statutorily vested in the Crown by this enactment, and in any case, according to the Court of Appeal in *Te Ika Whenua*, “the Coal-mines Amendment Act 1903 and succeeding legislation might not be *sufficiently explicit* to override or dispose of the concept of a river as taonga, meaning a whole and indivisible entity, not separated into bed, banks and waters.”⁶⁵ It is therefore arguable that the entirety of customary rights to the beds of navigable rivers have not, in fact, been validly extinguished, in accordance with the test in *Ngati Apa*. Such a conclusion would also accord with the admonition given in that case, whereby the indigenous property conception is taken to be the starting point in what may be recognised under the common law.

However, as Boast points out:

“The Court of Appeal has taken different views over the legal effects of the 1903 legislation as to whether it extinguishes native title and vests title in dominium in the Crown....In *Ngati Apa* Keith and Anderson JJ were very clear that section 14 did extinguish Maori customary title to riverbeds, contrasting this provision with the language used in the Territorial Sea Acts of 1965 and 1977. To them the key phrase was ‘absolute property’ of the Crown’...With respect, however, the view of Cooke P is to be preferred. Section 14 does not actually state that the Crown has ‘absolute property’ of river beds. Rather the provision states that the beds of navigable rivers are ‘vested’ in the Crown and that *minerals* ‘within’ the bed are the *absolute property* of the Crown.”⁶⁶

Thus Boast concludes that “...the legislation is insufficiently ‘clear and plain’ to extinguish a customary title to the beds as such and... the Crown’s title remains burdened by Maori title.”⁶⁷

THE WATER AND SOIL CONSERVATION ACT 1967

In 1967, the rights of the Crown in relation to freshwater were extended by the Water and Soil Conservation Act. The Act did not specifically or explicitly vest ownership of running water in the Crown⁶⁸ but did appropriate to it “... the sole right to dam any river or stream, or to divert or take natural water, or discharge natural water or waste into any natural water, ...or to use natural water”, by section 21(1). In order to establish whether the effect of this vesting was to extinguish Maori customary rights in freshwater, it is necessary to carefully examine both the

⁶⁵ *Supra*, n. 17, at 24.

⁶⁶ R. Boast, (1995), *Foreshore and Seabed*, Lexis Nexis, Wellington, p21.

⁶⁷ *Ibid.*, 21.

⁶⁸ Presumably because of the common law proposition that running water could not in fact be owned.

wording and purpose of the legislation in light of the “clear and plain” test in *Ngati Apa*.

In *Ngati Apa*, the Court considered the effect of section 7 of the Territorial Sea Acts of 1965 and 1977, which was prima facie an extinguishment of Maori customary title in that it deemed the foreshore and seabed to be vested in the Crown. However, the Court was of the view that the enactments “were primarily directed in 1965 to extending NZ fishing waters and in 1977 to establishing an exclusive economic zone” rather than at the extinguishment of any customary rights that may have existed. According to Boast, “the view expressed by Keith and Anderson JJ amounts to a proposition that a mere ‘vesting’ of property rights in the Crown is, by itself, insufficient to defeat the presumption against extinguishment. Much clearer language is necessary, unless it is possible to infer an intention to extinguish from the circumstances.”⁶⁹ However, it is arguable that the precedential effect of this interpretation is limited by the international dimension to the legislation. Where there is another purpose of that kind to which legislation can be considered to be directed an “intention to extinguish” is far less easily inferred.

It is therefore necessary to consider the primary purpose or intention of section 21(1) of the Water Act. The long title described it as “an Act to promote a national policy in respect of natural water...” Chilwell J in *Huakina* described the effect of section 21(1) as “to extinguish all rights which riparian owners previously had at common law to take, divert or discharge natural water and to substitute in place of common law rights certain statutory rights...”⁷⁰ The purpose of the Act was thus to establish a more coherent management regime than the existing system of common law riparian rights. However, of necessity this required the expropriation of any existing common law use rights, so that the intention to extinguish these rights can arguably be inferred from the circumstances. To this end, the legislation does not display the same concern with preserving existing property and use rights as the Territorial Sea Acts, nor the Foreshore and Seabed Endowment Revesting Act 1991, neither of which the Court in *Ngati Apa* considered an effective extinguishment of customary rights.⁷¹

Further, in *Ngati Apa* legislation vesting the seabed in the Crown was not considered to be necessarily inconsistent with the continued existence of Maori property in the resource.⁷² In contrast, a vesting of ‘sole rights of use’ relating to freshwater in the Crown is clearly at odds with a Maori conception of ownership based on use and possession. The Act also confers authority to manage and control running water on regional bodies. It is this conflicting administrative responsibility which may be fatal to the continued existence of Maori customary rights, so linked to the exercise of rangatiratanga and kaitiakitanga.⁷³ In *Western Australia v Ward* [2002] HCA 28 aboriginal title is described as a “bundle of rights, the separate

⁶⁹ *Supra*, n. 66, at 82.

⁷⁰ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, at 197.

⁷¹ *Supra*, n. 62, at 687 (per Keith and Anderson JJ).

⁷² *Ibid*.

⁷³ This proposition will be further discussed below, in relation to the RMA.

components of which may be extinguished separately.” Looking at the possibility of extinguishment this way, with sole rights of use vested in the Crown, and management and allocation responsibilities located in regional bodies, it appears that section 21(1) operated to extinguish a large proportion of ‘the ownership bundle.’

THE RESOURCE MANAGEMENT ACT 1991

The primary responsibility for controlling, managing, and allocating water uses has been conferred on regional councils by Parliament pursuant to the RMA. As with the Water Act, the question of ownership is not addressed (although the effect of section 21(1) is preserved by section 354 of the Act). There are three ways in which the RMA may be seen as extinguishing customary rights.

1. Devolution of authority and control of running water to regional councils

How regional councils are delegated authority and how they exercise it

The functions of regional councils relating to freshwater are specified in section 30(1) of the RMA.⁷⁴ The Act also provides for councils to make regional policy statements and plans with respect to management of water resources. Water is allocated between uses under the resource consent process, which is generally a ‘first-in first-served system’ although there may also be provision for priority users. In granting a water permit “the focus is on avoiding, remedying or mitigating adverse environmental effects and the potential impact on existing permit holders”⁷⁵ but the council’s considerations regarding consent applications are also made “subject to Part 2” by section 104(1) of the Act.⁷⁶

Grant of authority over water management to regional councils

Maori challenge the right of the Crown to devolve management responsibilities to regional government as failing to recognise that ownership rights to their resources were guaranteed by the Treaty and had been wrongfully subsumed to the Crown in breach of its provisions.⁷⁷ The guarantee of tino rangatiratanga in Article II may be seen as declaratory of the doctrine of aboriginal title, thus the assertion of the right to manage or control freshwater through the RMA is also inconsistent with Maori customary rights. While the legislation does make some attempt to codify aspects of these rights through various provisions in Part 2,⁷⁸ nevertheless, the vesting of

⁷⁴ Section 30(1)(e) refers to “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 of 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.

Section 30(1)(f) relates to the control of discharges or contaminants into water and discharges of water into water. Section 30(1)(fa) governs “the establishment of rules in a regional plan to allocate...the taking or use of water.”

⁷⁵ *Supra*, n. 8, at 4.

⁷⁶ For our purposes, these matters relevantly include the principles of the Treaty (section 8), kaitiakitanga (section 7(a)), and the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga (section 6(e)).

⁷⁷ IUCN Inter-Commission Task Force on Indigenous Peoples, (1997), *Indigenous Peoples and Sustainability – Cases and Action*, IUCN Indigenous Peoples and Conservation Initiative, Utrecht, The Netherlands, p341.

⁷⁸ Kaitiakitanga, for example, is given explicit recognition in the RMA. (See Chapter Three: Incorporation.)

ultimate authority concerning the management and control of waterways in regional bodies is inconsistent with the guardianship role of tangata whenua.

The Waitangi Tribunal has expressed the view:

“no matter how often it is said that the [RMA] concerns management and not ownership, in reality the authority or rangatiratanga that was guaranteed to [Maori] has been taken away. ‘Management’ is the word used for the powers exercised in relation to the Act, but on our analysis of the statute, the powers given to regional authorities are more akin to ownership.”⁷⁹

It may still be open to conclude that there has only been a partial extinguishment of the right, since Maori are not necessarily wholly prevented from performing their role as kaitiaki by the devolution of general management responsibilities to regional bodies. Obligations of kaitiakitanga do not cease to exist once the resource in question is no longer in the possession or control of tangata whenua. However, while some vestige of the right to manage and control according to tribal preferences may remain, (or be provided for through preservation of elements of tikanga Maori in the RMA)⁸⁰ Maori generally no longer have the freedom to practise traditional resource management methods or take part in management of the resource at all, absent a statutory foundation.

The role of other bodies in water management

Central government also has a number of responsibilities regarding freshwater management, which include the Minister for the Environment’s role of recommending (to the Governor General) water conservation orders.⁸¹ As outlined by Williams, “the Minister may also assume responsibility for determining a water-related resource consent if he or she were to ‘call in’ a project pursuant to section 140 of the RMA on the basis that the project is of national significance.”⁸² Similar arguments can be made regarding the effect of the exercise of these powers on Maori customary rights.

⁷⁹ *Supra*, n. 26, at 339.

⁸⁰ See Chapter Three: Incorporation

⁸¹ The RMA provides for water conservation orders as an instrument to protect the outstanding amenity or intrinsic values of a water body (see Part 9 of the Act). The Waitangi Tribunal’s Mohaka River Report, discussed in Chapter Three, concerned a proposed water conservation order over the Mohaka River which was opposed by local iwi on the basis that the making of the order interfered with their rights of rangatiratanga and kaitiakitanga.

⁸² D.A.R. Williams, (1997), *Environmental and Resource Management Law*, Butterworths, Wellington, p285.

2. Inconsistent grants (water permits)

While resource consents confer a limited right for a limited period of time, granting a water permit may still impact on the ability of Maori to engage in their traditional usages and practises concerning freshwater. Consents granted in relation to hydro-electricity generation, for example, impact on water flows and the ecological systems of a river. This affects both its mauri and the ability of fish species such as eels to migrate, limiting traditional Maori uses, spiritual practices and relationships with the waterway. Consents that permit the diminishing of flow rates, or diversions or discharges that mix water from different sources all affect the mauri of the waterway, which carries implications for Maori as kaitiaki of the resource.

According to the Ministry, “[w]hile there is no explicit guarantee of the renewal of a water permit, to date the custom has been for this to occur...”⁸³ Thus, “consents tend to be ‘set in concrete’... and have proven difficult to adjust.”⁸⁴ Amendments aimed at strengthening the position of existing permit holders may add further weight to the suggestion that inconsistent grants, in the form of water permits, have the effect of extinguishing Maori customary rights in water.⁸⁵ Furthermore, regarding the extent to which councils must take into account possible impacts on the availability of water to existing consent holders when issuing new consents, Chisholm and Harrison JJ held in *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 that:

“Where a resource was already fully allocated to a permit holder a consent authority could not lawfully grant another party a permit to use the same resource... Water permits conveyed rights to the allocated water. A granted right of exclusivity could not be interfered with...”

This proposition arguably serves to increasingly entrench the rights of consent holders, thus operating as a further limitation on the exercise of customary interests. Nevertheless, it seems clear that while a resource consent may limit the exercise of Maori customary rights in freshwater, it cannot act as an extinguishment of those interests. Section 122 of the RMA explicitly states that consents are not real or personal property. “Consequentially a water permit does not ‘confer upon the holder any rights of ownership in the resource’ which remain with the Crown (section 354).”⁸⁶

⁸³ *Supra*, n. 8, at 4.

⁸⁴ *Ibid.*, 11.

⁸⁵ Section 67 of the Resource Management Amendment Act 2005 inserted new sections 124A-C, which will give existing holders priority over new applicants for the same resource. These amendments come into force in August 2008. In a similar vein, section 104(2)(A) (already in force) requires the consent authority to have regard to the value of investment by the existing consent holder when considering an application affected by section 124.

⁸⁶ *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268, at 276.

Indefinite grants

There were exceptions to the general vesting in the Crown of rights in respect of natural water. The excepted rights were those under mining privileges granted under the former Mining Act 1926 and other specified legislation.⁸⁷ Indefinite grants may arguably be seen as more of a property allocation, and thus more of an extinguishment of any Maori customary rights. However, it is now the case that "...the last of the mining privileges will expire in 18 years"⁸⁸ and further, they "are confined to Otago... and their specific case does not represent a universal issue in respect of property rights."⁸⁹

3. The regulatory regime provided by the RMA

The approach of the RMA to regulating the water resource is to place a prohibition on use without permission (under section 14) and then provide for a licensing or permit system whereby uses can be allocated. The question of whether a regulatory regime with a prohibition is effective to rub out an aboriginal right has been considered by Canadian Courts. In *R v Sparrow* [1990] 1 SCR 1075 it was suggested that the progressive restriction and detailed regulation of the fisheries extinguished any aboriginal right of the Musqueam Band to fish. However, the Court rejected this view, stating:

"An aboriginal right is not extinguished merely by its being controlled in great detail by the regulations... Nothing in the Fisheries Act or its detailed regulations demonstrated a clear and plain intention to extinguish the Indian aboriginal right to fish. These fishing permits were simply a manner of controlling the fisheries, not of defining underlying rights."⁹⁰

In *R v N.T.C. Smokehouse Ltd* [1996] 2 SCR 672 Canada's Supreme Court reaffirmed its decision, holding:

⁸⁷ LexisNexis, (2002), *The Laws of New Zealand*, Water, Part II Inland Water, [42] "Exceptions, authorisations, and continuations." Section 14(3)(b)-(e) of the RMA also provides that "Fresh water...may be taken or used if it is required for an individual's reasonable domestic needs, or the reasonable needs of an individual's animals for drinking water, as long as the taking or use does not, or is not likely to, have an adverse effect on the environment."

⁸⁸ Ministry for the Environment, *Property Rights in Water: A Review of Stakeholders' Understanding and Behaviour*,

Available:<http://www.mfe.govt.nz/publications/water/property-rights-water-nov03/html/page2.html>,

Accessed: 9/7/06.

⁸⁹ Ibid.

⁹⁰ *R v Sparrow* [1990] 1 SCR 1075, at 1097.

The Crown had argued that "extinguishment need not be express...but may take place where the sovereign authority is exercised in a manner 'necessarily inconsistent' with the continued enjoyment of aboriginal rights. The Fisheries Act and its regulations were...intended to constitute a complete code inconsistent with the continued existence of an aboriginal right." (*R v Sparrow* [1990] 1 SCR 1075, at 1097).

“The intention to extinguish must... be clear and plain, in the sense that the government must address the aboriginal activities in question and explicitly extinguish them by making them no longer permissible. This is diametrically opposed to the position that extinguishment may be achieved by merely regulating an activity or that legislation necessarily inconsistent with the continued enjoyment of an aboriginal right can be deemed to extinguish it.”⁹¹

It is therefore unlikely to be accepted by NZ Courts that the licensing system provided by the RMA itself constitutes an extinguishment of customary rights in freshwater. The Court of Appeal has said of the RMA in relation to the foreshore and seabed:

“The management of the coastal marine area under the [RMA] may substantially restrict the activities able to be undertaken by those with interests in Maori customary property. That is the case for all owners of foreshore and seabed lands and indeed for all owners of land above the high water mark. The statutory system of management of natural resources is not inconsistent with existing property rights as a matter of custom. The legislation does not effect any extinguishment of such property.”⁹²

This decision, which makes a distinction between statutory regulation and extinguishment, is in keeping with the Canadian jurisprudence, and seems equally applicable to other natural resources within the scope of the RMA. Although the use of freshwater and many activities that may be permitted on it (at least in a commercial context⁹³) are regulated, there may still be room for some underlying Maori customary title to be recognised.

⁹¹ *R v N.T.C. Smokehouse Ltd* [1996] 2 SCR 672, at 712 (per L'Heureux-Dube J).

⁹² *Supra*, n. 62, at 667 (per Elias CJ).

See further 643 (per Tipping J): “The prescribed restrictions on activities within the coastal marine area, stringent as they are, do not inevitably lead to the view that the potential for an underlying status of Maori customary land has thereby been extinguished.”

⁹³ For example, commercial tourist ventures like jet boating and white water rafting.

CHAPTER THREE: Incorporation – to what extent does our current law recognise the interests Maori claim?

The scope that remains for recognition of the interests Maori assert in freshwater under the common law is also dependent on the extent to which these interests and relationships are already provided for by our legal system. One way in which customary rights might be seen as recognised is through various provisions of the RMA. Treaty settlements which vest water resources in Maori ownership may also provide for the expression of Maori customary interests, there being significant overlap between the guarantees of the Treaty and aboriginal title.

Vesting of lake and river beds in tribal ownership

The position with regards to lakes is instructive because it demonstrates that in the absence of statutory constraints, Maori customary interests, independent of ownership of the surrounding land, could be judicially recognised.⁹⁴ As stated by the Waitangi Tribunal, “unless the customary interest had been extinguished, a separate ‘lake title’ could be given... The Native Land Court [in *Tamihana Korokai v Solicitor General*] considered that it could award the beds of lakes to Maori upon proof of customary usages.”⁹⁵ According to Edwards J in the Court of Appeal:

“If it can be established that under those customs and usages there may be a separate property in the bed of a lake, I cannot doubt that the jurisdiction of the Native Land Court with respect to Native lands extends as much to the land covered with water as it does to lands covered with forest.”⁹⁶

This contrasts with the position regarding rivers, where in the case of non-navigable rivers, the *ad medium filum aquae* presumption meant that title to the riverbed was dependent on riparian ownership.⁹⁷

Lakes were treated differently to rivers in terms of recognition of Maori customary ownership. The Crown was less adamant in its claims, and there was no legislation corresponding to the Coal Mines Amendment Act 1903 vesting ownership of lakebeds in the Crown. As White writes: “Although the Crown tried repeatedly to prove that lakes were not subject to a Maori customary title, this was not the view taken by the Native Land Court. Hence the Crown was forced to admit the existence of strong Maori rights in lakes, and negotiate settlements to secure public rights in them.”⁹⁸ It is arguable that vestings of lake and riverbeds in Maori

⁹⁴ *Supra*, n. 26, at 19.

⁹⁵ *Ibid.*, 19.

⁹⁶ *Tamihana Korokai v Solicitor General* (1912) 15 GLR 95, at 108-109 (per Edwards J).

⁹⁷ The beds of navigable rivers were vested in the Crown by section 14 of the Coal Mines Amendment Act 1903, as discussed in Chapter Two.

⁹⁸ *Supra*, n. 42, at p7.

ownership are symbolic of their ownership of the resource as a whole, particularly when regard is had to the jurisdictional limitations of the Courts. According to the Waitangi Tribunal, (speaking in respect of the Whanganui River):

“In the Courts, the matter was decided in terms of the bed of the river because of the way in which the case was brought. The proceedings began in the Native Land Court, which had jurisdiction only in respect of land, so only an order as to land could have been sought. The Court of Appeal has since opined that a different conclusion might have been reached had the claim been made to the river as a whole.”⁹⁹

Deeds of settlement were however, at pains to avoid explicit recognition of customary title. The Native Land Amendment and Native Land Claims Adjustment Act 1926 section 14(1), for instance, stated:

“The bed of the lake known as Lake Taupo, and the bed of the Waikato River extending from Lake Taupo to and inclusive of the Huka Falls, together with the right to use the respective waters, are hereby declared to be the property of the Crown, freed and discharged from the Native customary title (*if any*)¹⁰⁰ or any other native freehold title there to...”

This legislation followed negotiations that provided for Ngati Tuwharetoa to receive a share of fishing licences as compensation. A negotiated settlement was also reached in respect of the Te Arawa lakes, which vested in the Crown the beds and waters of the 14 lakes. As described by White, “native customary title..., if such a thing existed, was extinguished in exchange for the preservation of certain fishing rights, and an annuity of £6,000.”¹⁰¹ If indexed to inflation, the annuity was estimated to have been worth an estimated \$400,000 as at 1993. However, the Te Arawa Lakes Settlement Deed, entered into on 18 December 2004, includes financial redress of \$2.7 million in cash and annuity redress of \$7.3 million to capitalise the annuity Te Arawa receives from the Crown and to address the remaining annuity issues. The Te Arawa Lakes Settlement Bill also provides for vesting of the fee simple title to each of 13 lakebeds in Trustees, as well as various other cultural redress provisions.¹⁰²

⁹⁹ *Supra*, n. 26.

The decision referred to is *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, at 24, where the Court stated: “The vesting of the beds of navigable rivers in the Crown provided for by the Coal-mines Amendment Act 1903 and succeeding legislation may not be sufficiently explicit to override or dispose of that concept [of the river as ‘a whole and indivisible entity, not separated into bed, banks and waters’], although it is odd that the concept seems not to have been put forward in quite that way in the line of cases concerning the Whanganui River...”

¹⁰⁰ Emphasis added.

¹⁰¹ *Supra*, n. 42, at 89.

¹⁰² As the explanatory note states: “The vesting provides for Te Arawa’s beneficial ownership of the lakebeds and subsoil... In each case, title specifically excludes the water column (the space occupied

Lakes Wairarapa, Onoke, Horowhenua, Rotorua, Waikaremoana, Rotoaira, Omapere and Taupo have also all been vested in Maori ownership, pursuant to negotiated settlements. The Ngai Tahu settlement, in addition, provides for vesting of the bed of Lake Mahiniapua and Te Waihora (Lake Ellesmere) in Te Runanga o Ngai Tahu under sections 192 and 168 of the Act.¹⁰³ However, while ownership, at least in the European sense of the word, normally includes the right to exclude others from the resource, these vestings have preserved public rights of access. Discussing Lake Taupo, White states:

“As with other lakes that remained in Maori ownership... the case of Taupo stands testament to the fact that the restoration of Maori ownership of lakes does not necessarily preclude the public enjoying rights of access, navigation, and fishing. In this regard, title to Lake Taupo is more usefully conceptualised in terms of a recognition of Ngati Tuwharetoa’s manawhenua and rangatiratanga, than as exclusive ownership.”¹⁰⁴

Office of Treaty Settlement guidelines state that where statutory vesting of lakebeds (and riverbeds) is to occur, “existing lawful public access and commercial usages will be preserved.”¹⁰⁵

The position may therefore be summarised as follows. The Court of Appeal in *Tamihana Korokai* considered that on proof of customary usage, the Native Land Court had jurisdiction to grant a separate ‘lake title’ awarding the beds of lakes to Maori. Thus, in the absence of statutory constraints Maori customary interests that were independent of ownership of the surrounding land could be judicially recognised, and were recognised in fact in some cases. This is an important distinction in the treatment of lakes and rivers. In respect of the latter, the *ad medium filum aquae* presumption was applied in many instances to deprive Maori of customary title.¹⁰⁶ Such vestings as have occurred are, arguably, symbolic of Maori ownership of the water resource as a whole, and also serve to demonstrate that rights of public access are not a barrier to return or re-vesting. To the extent, therefore, that Maori ownership of lakebeds has already been recognised under NZ law through these means, there is no need for such ownership to be recognised again under the common law of aboriginal title. This is an area in which some

by the water) and the airspace... The rights relating to public navigation, recreational activities, existing commercial activities, and public utilities are provided for in the Bill.” (See Te Arawa Lakes Settlement Government Bill, Explanatory Note: *Key elements of the settlement package*).

The settlement is conditional on the establishment by Te Arawa of a governance entity (in accordance with the deed) and the passage of the Bill.

¹⁰³ The lakebed of Te Waihora is managed under a Joint Management Plan developed between Te Runanga o Ngai Tahu and the Director-General of Conservation. (Office of Treaty Settlements, (2002), *Ka Tika a Muri, Ka Tika a Mua, Healing the Past, Building a Future*, Wellington, p129).

¹⁰⁴ *Supra*, n. 42, at 202.

¹⁰⁵ *Supra*, n. 3, at 129.

¹⁰⁶ See for example, *In Re the Bed of the Wanganui River* [1955] NZLR 419 (CA).

degree of incorporation of Maori interests in freshwater resources has already occurred.

The RMA 1991: ‘a modern expression of Maori traditional authority’?

Even if a Maori ownership conception in respect of freshwater has been extinguished, other relationships and interests may still have been statutorily incorporated by various provisions of the RMA. It is therefore necessary to consider how far the Act goes towards integrating these interests into the law before determining the potential for any further recognition of Maori customary rights.

What is sometimes referred to as the “Maori Part II trilogy” is comprised of sections 8, 6(e) and 7(a). Section 8 requires the principles of the Treaty of Waitangi be “taken into account”. To the extent that the Treaty’s guarantee of tino rangatiratanga over taonga is declaratory of aboriginal title, section 8 has the potential to be a powerful mechanism by which customary ownership or rights could be recognised. As outlined in Chapter One, rangatiratanga denotes the power to control and manage in accordance with Maori preferences and customary practices. Thus directly “taking into account” this guarantee would afford substantive opportunities for recognition of Maori customary rights. However, such opportunities may be limited by the predominant method of statutorily incorporating the Treaty, by way of reference to its ‘principles’, as it is not the actual wording or guarantees of the Treaty which decision-makers are required to take into account. Nevertheless, its principles have been enunciated by both the Courts and the Waitangi Tribunal as including active protection of taonga, which in turn has been interpreted as including various rivers.¹⁰⁷

By section 6(e) decision-makers are required to “recognise and provide for the relationship of Maori and their taonga” as a matter of national importance. This section can be seen as a form of incorporation of Maori spiritual or metaphysical beliefs regarding waterways, and has assumed particular significance in the context of resource consent objections and appeals.¹⁰⁸ However, as held in *Watercare Services Ltd v Minbinnick* [1998] 1 NZLR 294:

¹⁰⁷ See for example the report of the Waitangi Tribunal on the Whanganui River (Waitangi Tribunal, (1999), *Whanganui River Report* (Wai 167), GP Publications, Wellington, p45).

Maori customary law may also be considered taonga. Thus, customary management practices (tikanga Maori) concerning running water can also be seen as included in the duty of active protection that must be taken into account under section 8.

¹⁰⁸ See for example *Ngati Rangi Trust v Manawatu-Wanganui Regional Council* (EnvC Auckland, AO67/2004, 18 May 2004, Judge Whiting). As outlined by Kenneth Palmer in *Local Government Law and Resource Management* [2004] NZLR 751, the case is significant for its acknowledgment that “claims by Maori of spiritual affront, and related Waitangi Tribunal claims, were relevant to limit the entitlement of the applicant for reconsideration at the end of the period.” The case concerned an application by the Genesis Power Company to reissue water permits for the Tongariro Power diversions. Ngati Rangi Trust appealed the decision to renew the consents, arguing that the diversions were culturally unacceptable to Maori, and that “diversion of water from these rivers had affected their cultural traditions in number of ways.” This decision is subject to appeal, however.

“Such Maori dimension as arises will be important but not decisive even if the subject matter is seen as involving Maori issues... While the Maori dimension, whether arising under section 6(e) or otherwise, calls for close consideration, other matters may in the end be found to be more cogent... In the end a balanced judgement has to be made.”¹⁰⁹

The “intrinsic values of ecosystems”, another matter to which decision-makers are to “have particular regard” (section 7(d)), is arguably an expression of the Maori concept of mauri, or a life-force or essence, which underpins the various relationships that Maori assert in freshwater. “These Maori values and concepts have been reflected and/or endorsed in the jurisprudence of the Environment Court. In *Ngati Rangi Trust v Manawatu-Wanganui Regional Council* (EnvC Auckland, AO67/2004, 18 May 2004, Judge Whiting), the Court affirmed that ‘in the world as conceptualised by Maori, the spiritual and physical realms are not closed off from each other, as they tend to be in the European context.’”¹¹⁰ The concept of a river as a being was discussed in Chapter One. According to the Waitangi Tribunal, “the river is seen as a living entity with its own personality and life-force...”¹¹¹ Section 7(d) may be seen as a limited codification of this proposition. In *Friends and Community of Ngawha Inc & Others v Minister of Corrections* [2003] NZRMA 272 it was stated: “in relation to spiritual matters, it is within the scope of the RMA to recognise beliefs as part of the cultural and spiritual environment, whether or not it is possible to make any tangible provision for those beliefs.”

The potential may exist for tangible provision to be made for this belief, however. In *Huakina*, Chilwell J referred to the Privy Council’s decision in *Mullick v Mullick* (1925) LR 51 Ind App 245. In this case “the Court held that a family idol had a personality of its own. Accordingly, in a dispute within the family concerning the custody of the idol, it was directed that the idol should be represented by a disinterested next friend appointed by the Court.”¹¹² The potential may exist for an approach modeled on the Privy Council’s decision to be taken in respect of rivers with particular spiritual significance to Maori. Action that would interfere with the river’s spiritual existence or integrity could be opposed on its behalf by kaitiaki who had been judicially recognised or appointed. Recognition of such a novel form of interest would be one way in which the spiritual beliefs that Maori assert in freshwater could be further recognised.

The analysis of the Ministry for the Environment’s working group was that the term “intrinsic values”, as used in section 7(d), was an adequate expression of the Maori philosophy which sees elements of the environment as having their own life-force.¹¹³ The paper took the view that the term incorporated a spiritual component,

¹⁰⁹ *Watercare Services Ltd v Minbhinnick* [1998] 1 NZLR 294, at 305.

¹¹⁰ D.A.R.. Williams (deputy editor), D. Nolan, S. Berry (et al), (2005), *Environment and Resource Management Law in New Zealand*, Butterworths, Wellington, p821.

¹¹¹ *Supra*, n. 26, at 23.

¹¹² *Supra*, n. 70, at 197.

¹¹³ Ministry for the Environment, (1988), *Resource Management Law Reform Paper No. 8*, “The Treaty of Waitangi and its Significance to the Reform of Resource Management Laws”, p16.

which extended the concept of a resource further than that encompassed in western understanding.¹¹⁴ However, according to Durie, “the omission of reference to mauri [in the RMA]... caused some concern... Moreover, its replacement with the phrase ‘intrinsic values of ecosystems’ fails to convey the same sense of interconnectedness or an appreciation of the environment as a network of living entities.”¹¹⁵ Harris writes:

“In theory, the RMA promotes the integrated management of natural and physical resources, but in practice the separation of responsibility between different parts of local and central government for fisheries, water and land management is often a source of frustration for Maori and derogates from holistic or integrated management.”¹¹⁶

Thus, it appears that the concept of mauri is not wholly incorporated into our resource management legislation.

The concept of kaitiakitanga has been at least partially codified by the Act. Section 7(a) requires that decision-makers “have particular regard to” “the exercise of guardianship by tangata whenua in accordance with tikanga Maori...”¹¹⁷ when exercising their functions and powers. Thus in *Haddon v Auckland Regional Council* [1994] NZRMA 77 kaitiaki were given an active role in monitoring the impact of a resource consent. In considering section 6(e), which was also of relevance, the Court held that “where appropriate, iwi should be given some empowering mechanism.”¹¹⁸ Reporting requirements were put in place in *Carter Holt Harvey v Te Runanga o Tuwharetoa Ki Kawerau* [2003] 2 NZLR 349, where the High Court acknowledged that long term discharge consents can alienate Maori from a river and impede or prevent their ability to perform their functions as kaitiaki.¹¹⁹ “The Court held that the Environment Court did not err in law by proposing a consent condition involving consultation with Maori during the period of the consent, and that a condition of parallel reporting to tangata whenua was lawful.”¹²⁰ However, given that kaitiakitanga is inextricably linked to rangatiratanga - kaitiaki exercising a guardianship role because of their status as mana whenua with authority over the natural and physical resources within their rohe - provision for the exercise of kaitiakitanga in isolation from authority and control (or ownership) of the resource is arguably artificial, and limits both the scope and effectiveness of the role Maori can play as guardians of natural resources, including waterways.

¹¹⁴ Ibid.

¹¹⁵ *Supra*, n. 54, at 30.

¹¹⁶ R. Harris (ed), *Handbook of Environmental Law*, Royal Forest and Bird Protection Society of New Zealand Inc, Wellington, 2004, p481.

¹¹⁷ Resource Management Act 1991, section 2.

¹¹⁸ *Haddon v Auckland Regional Council* [1994] NZRMA 77

¹¹⁹ *Carter Holt Harvey v Te Runanga o Tuwharetoa Ki Kawerau* [2003] 2 NZLR 349, at 356.

¹²⁰ *Supra*, n. 110, at 836.

By sections 61(2A), 66(2A) and 74(2A), the RMA requires councils to “have regard to” relevant planning documents recognised by iwi authorities in the preparation of plans and policy statements.¹²¹ These provisions have been heralded as having “great potential as a mechanism for proactive Maori input and affirmation of the rights of the tangata whenua to act on and influence the management of natural resources important to their communities.”¹²² However, “the weakness of the duty on local government cannot ensure the integration of iwi planning objectives.”¹²³ Thus, what at first glance appears to be a powerful statutory recognition of rangatiratanga, whereby Maori are afforded the power to manage and control natural resources in accordance with tribal preferences is in fact uncertain, dependent on the willingness of councils to consider such documents in a meaningful way. According to Durie, “while they provide a basis for consultation and discussion, iwi sometimes feel that their plans have to be more or less consistent with the wider district [or regional] plan to be recognised at all.”¹²⁴ Strengthening the requirement to “have regard to” these plans may therefore be one practicable way to provide for greater recognition of Maori customary rights in freshwater.

Obligations of councils in this area may also be strengthened by the existence of a Treaty Settlement. Office of Treaty Settlements guidelines concerning options for cultural redress state:

“...for rivers, the role of regional councils under the RMA 1991 will be preserved, but additional means may be developed to allow the claimant group to play a greater role in managing the riverbed – for instance, the establishment of a special advisory body.”¹²⁵

The Ngai Tahu settlement makes provision for Lake Ellesmere¹²⁶ to be managed under a Joint Management Plan, developed between Ngai Tahu and the Director-General of Conservation. Sections 36B-E of the RMA also provides for public authorities and iwi to enter into joint management agreements in relation to areas that are not part of the conservation estate.

Section 33 of the Act provides for transfer of a council’s functions to public authorities, which includes tribal authorities. Thus, “in theory, tribal organisations should be able to seek an active role in management through transfer of relevant

¹²¹ One such plan is the Te Runanga o Ngai Tahu Freshwater Policy. Its purpose is described as providing “a foundation for Papatipu Runanga, statutory resource managers, resource users and other interested parties... planning for the management of freshwater resources within the *rohe* of Ngai Tahu. In broad terms, this document sets out Te Runanga o Ngai Tahu policies with respect to freshwater, outlining the environmental outcomes sought and the means by which Ngai Tahu would like to work with interested parties to achieve these outcomes.”

¹²² *Supra*, n. 77, at 351.

¹²³ *Ibid.*

¹²⁴ *Supra*, n. 54, at 30.

¹²⁵ *Supra*, n. 3, at 129.

¹²⁶ The bed of which is vested in Te Runanga o Ngai Tahu by the Ngai Tahu Claims Settlement Act 1998.

local authority functions.”¹²⁷ However, because the criteria for such a transfer include efficiency, adequate representation of a community of interest and the possession of technical or special capability and expertise, the possibility is likely to be heavily dependent on the level of resources available to a tribal organisation.¹²⁸ Since the RMA was enacted there has been no transfer of functions to an iwi authority.

There are also consultative mechanisms put in place by the RMA. Schedule 1, clause 3(1) creates a statutory obligation to consult with tangata whenua in a range of situations. However, while consultation is an important aspect of the partnership envisaged by the Treaty, it is often seen as an empty obligation. At the various consultation hui regarding the Sustainable Water Programme of Action, for instance, Maori participants voiced concerns that “although they may ‘get to have a say’, they do not have any part in decision-making and management.”¹²⁹

The capacity of iwi to object to others’ proposals concerning water and to assert their role as kaitiaki is also of importance in considering the current statutory regime, and the extent to which it transposes customary interests on to a statutory footing. The opportunity to make submissions on an application for resource consent only arises, however, if the application is notified, or served individually on a third party (see sections 96 – 98 of the RMA).¹³⁰ There is provision for limited notification of applications under section 94(1), whereby the consent authority must serve notice on all persons who may be adversely affected.¹³¹ In “forming opinion as to who may be adversely affected,”¹³² the authority must have regard to relevant statutory acknowledgements.¹³³ Provision is also made for this in section

¹²⁷ *Supra*, n. 77, at 351.

¹²⁸ *Ibid.*

¹²⁹ *Supra*, n. 58, at 40. For example, one participant at the Nelson hui stated: “Maori need to have the power to protect their taonga (water) as guaranteed by Article 2. Planners and decision makers must realise that. At some stage those decisions must involve iwi. Iwi must have input. We have no representatives on either of the two councils here. Once decisions are made, we are then told what the decision is.”

Further, problems have arisen regarding what is termed ‘consultation fatigue.’ Many iwi authorities feel that they are inadequately resourced to deal with the large number of consultation requests from regional and other bodies that they must respond to.

¹³⁰ The Resource Management Act 1991, section 93(1) sets out the general rule regarding notification, which will be required unless the application is for a controlled activity or the consent authority is satisfied that the adverse effects on the environment will be minor

¹³¹ Even where the application is not notified under section 93(1) of the Resource Management Act 1991.

¹³² See the Resource Management Act 1991, section 94B(2).

¹³³ Statutory acknowledgements are discussed below. Briefly, they are one aspect of the cultural redress package normally provided in Treaty Settlement legislation which record the special relationship of Maori with areas of particular spiritual, cultural or historical importance to them, including lakes and waterways. The following Acts include statutory acknowledgements:

Ngai Tahu Claims Settlement Act 1998

Ngati Ruanui Claims Settlement Act 2003

Ngati Tama Claims Settlement Act 2003

Pouakani Claims Settlement Act 2000

Te Uri o Hau Claims Settlement Act 2002

(See the Resource Management Act 1991, Schedule 11).

208 of the Ngai Tahu Act 1998.¹³⁴ Further, under clause 10 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003, where a consent authority is required to serve notice of an application under section 93(2) or 94C, it must serve that notice on any iwi authorities that it considers should have notice of the application.¹³⁵ Thus there is a strong indication in favour of serving local iwi with notice of consent applications concerning areas of special significance to them.

Under section 120 of the RMA, any person who made a submission on an application is given the right to appeal to the Environment Court against a decision of the authority to grant the consent.¹³⁶ Thus the right to appeal is dependent on the application either having been notified, or having been individually served on an affected party. However, section 274(1)(c) also provides that “any person who has an interest in the proceeding that is greater than the public generally” may be a party to the proceedings. Under subsection (6), in determining whether a person has such an interest, the Court must have regard to any relevant statutory acknowledgment (see also section 209 of the Ngai Tahu Act).¹³⁷

The opportunities conferred on iwi to object to proposals can be seen as one sense in which their rangatiratanga over the resource in question is recognised. However, while iwi will, in most cases, be afforded the opportunity to object to proposals concerning water by virtue of having been served notice of the application, their objections do not constitute a veto. As discussed above, “[s]uch Maori dimension as arises will be important but not decisive...”¹³⁸ Provisions ensuring that Maori are notified of applications, and are thereby able to make submissions and appeal decisions are, nevertheless, one means by which Maori are able to assert their role as kaitiaki.

These statutory provisions directed to Maori issues and participation in resource management as a whole are therefore significant, but some aspects of the relationships and interests that Maori assert in respect of freshwater are not fully recognised by the Act. Requiring that certain interests be taken into account in decision-making (the main way in which Maori concerns are integrated) is obviously intended to affect the outcome in some cases. Thus, as stated in *Indigenous Peoples and Sustainability – Cases and Action*:

¹³⁴ The Ngai Tahu Claims Settlement Act 1998, section 208 provides that consent authorities must have regard to the statutory acknowledgment relating to a statutory area in forming opinion as to whether Te Runanga o Ngai Tahu is a person who may be adversely affected by the granting of resource consent.

¹³⁵ Resource Management (Forms, Fees, and Procedure) Regulations 2003, Clause 10(2)(d).

¹³⁶ In accordance with the provisions in section 121.

¹³⁷ The Ngai Tahu Claims Settlement Act 1998, section 209 provides that the Environment Court is to have regard to statutory acknowledgments relating to a statutory area in determining whether Te Runanga o Ngai Tahu is a person having an interest in the proceeding that is greater than the public generally in respect of an application for a resource consent for activities within, adjacent to, or impacting directly on the statutory area.

¹³⁸ *Supra*, n. 109, at 305.

“The range of positive obligations in the Act dealing specifically with Maori and Treaty interests give considerable scope for Maori to take an active role... [and] to ensure a distinctive Maori dimension is incorporated into resource management decision-making and practice.”¹³⁹

However, the weighing and balancing approach inherent in the RMA is not well suited to giving priority to any one set of concerns. While such a system of structured compromise may well be considered appropriate, this is less obviously the case where there are unresolved issues regarding underlying ownership of the resources in question. The RMA has, arguably, failed to give Maori any real decision-making power.¹⁴⁰ Nevertheless, the provisions of the Act still provide for some degree of incorporation of Maori interests in freshwater into the existing fabric of our law.

¹³⁹ *Supra*, n. 77, at 345.

¹⁴⁰ Durie is of the view that “Maori are often left as passive respondents in the process of resource management. The Maori preference is for involvement as participants in the planning process or not at all.” (See Mason Durie, (1998), *Te Mana Te Kawanatanga: the Politics of Maori Self-determination*, Oxford University Press, Auckland, p32.

Treaty Settlements

There are many different ways Treaty settlements may interact with customary rights under the common law. Settlements may recognise these rights to a certain extent, or may transpose them on to a statutory foundation. It is also possible that settlement legislation may extinguish the right to bring a further claim based on customary rights. These matters will be considered in turn.

Recognition of Maori interests in freshwater through settlement legislation

Settlements reached with Maori in respect of breaches of the Treaty are a significant means by which recognition of customary rights relating to freshwater, including ownership, may proceed within the legal system. On the basis that the guarantee of tino rangatiratanga, or “full and exclusive ownership” in Article II affirms customary rights, a settlement may be seen as a codification or recognition of these rights at a higher status than the common law. This is significant as statutory recognition reflects recognition of the rights claimed by the legal system as a whole, and because customary rights are particularly vulnerable to extinguishment by statute.¹⁴¹ However, it is unlikely iwi will be granted double compensation in respect of claims made regarding a water resource. Because the guarantees of the Treaty largely overlap with the doctrine of aboriginal title, a claim based on Treaty breaches and associated recommendations for redress may go a long way towards addressing Maori claims to customary title or rights in freshwater. To this end, claimants may be restricted to such ‘residual remedies’ as remain outside the scope of the settlement package.

The question of what forms of redress are available under a Treaty settlement is therefore relevant. Settlements to date have generally included the vesting of natural resources (which may include river and lakebeds) in Maori ownership, but not, however, ownership of an entire river or lake. An Office of Treaty Settlements publication outlines the options available for redress in relation to waterways in the following terms:

“...the Crown acknowledges that Maori have traditionally viewed a river or lake as a single entity, and have not separated it into bed, banks and water... However, while under New Zealand law the banks and bed of a river can be legally owned, the water cannot... For this reason, it is not possible for the Crown to offer claimant groups legal ownership of an entire river or lake – including the water – in a settlement.”¹⁴²

However, to state that “it is not possible” for the Crown to offer such redress is to take account only of what might be seen as the political obstacles to such a proposal. There are no insurmountable legal barriers to vesting ownership of rivers

¹⁴¹ Although the Court of Appeal has affirmed that such extinguishment cannot be by implication (see *Ngati Apa v Attorney General* [2003] 3 NZLR 643, and also Chapter Two, “To what extent have Maori customary interests in running water been extinguished?”).

¹⁴² *Supra*, n. 3, at 111.

or lakes in Maori, recognition of new types of property interest being a historical feature of our legal system.¹⁴³

¹⁴³ Furthermore, such vesting as has occurred has demonstrated that issues relating to public access and other interests can satisfactorily be dealt with by legislation.

The effect of Treaty settlements on customary claims to freshwater

Given that Treaty settlements to date have not wholly incorporated the range of interests Maori assert to freshwater, it is also necessary to consider the effect of such settlements on residual customary claims Maori might make to freshwater resources. There are a range of relevant clauses currently found in settlement legislation that bear on the possibility of further claims under the common law.

When settlement legislation is prepared, the Crown generally insists on a full and final settlement clause. According to Dawson, “In legal terms... this is an important part of what settlement means: preclusion of any further inquiry or litigation concerning these grievances which are now satisfied, releasing the Crown from any further obligation to make redress.”¹⁴⁴ The Ngai Tahu Act, for example, states in section 461(1):

“The Settlement of the Ngai Tahu claims to be effected pursuant to the deed of settlement and this Act is final, and the Crown is released and discharged in respect of those claims...”

Settlement legislation will also include an ouster clause, precluding further jurisdiction over such claims in the Courts or Waitangi Tribunal.¹⁴⁵ The aim of this kind of privative clause is “to oust any continuing jurisdiction of the courts or the Tribunal over the matters raised in the now-settled claim. The clear intention is that there will be no further legal proceedings in the same terrain.”¹⁴⁶ Such provisions do not necessarily prohibit iwi from making other kinds of claims, such as claims under the common law or regarding future breaches of the Treaty, however. Nevertheless, the effect of settlement legislation, which has made provision for water issues, on a subsequent customary claim by affected iwi, is unclear. It is also necessary to consider the implications that might be drawn from the substance of the settlement reached itself.

It is arguable that some Treaty settlement legislation is intended to be exhaustive in respect of water issues, regardless of the legal basis for the claim, and therefore precludes any further remedy relating to the resource in question being granted. This view requires one to accept that Parliament’s consideration of the issue at the time of passing the settlement legislation was comprehensive, intending a full expression of the customary rights to be that found in the provisions of the legislation. However, such an intention would have to be abundantly clear to meet

¹⁴⁴ J. Dawson, “Remedial Powers of the Waitangi Tribunal”, (2001) Public L R 171, at 180.

¹⁴⁵ See for example, the Ngai Tahu Claims Settlement Act 1998, section 461(3)(a) also provides that “[d]espite any other enactment of rule of law, no court or tribunal has jurisdiction to inquire or further inquire into, or to make and finding or recommendation on respect of any or all of the Ngai Tahu claims.”

“Ngai Tahu claims” are defined in section 10 of the Act as “all claims made at any time by any Ngai Tahu claimant” founded on the Treaty of Waitangi, common law, fiduciary duty or other right and arising out of loss of interest in land in the Ngai Tahu claim area. It also includes a number of identified claims lodged with the Waitangi Tribunal.

¹⁴⁶ *Supra*, n. 144, at 180.

the test for extinguishment in *Ngati Apa*.¹⁴⁷ Similarly, in the event that settlement legislation makes no provision for ousting the jurisdiction of the Courts or Tribunal with regards to future claims,¹⁴⁸ it may be argued that customary rights or other claims based on the common law, such as the Crown's fiduciary obligations, are nevertheless extinguished by implication. That is to say, the statute concerned deals with the relevant issues and there is therefore no more room for claims based on aboriginal title to be brought in respect of the same water resource. However, in light of *Ngati Apa*, such an argument does not appear to be sound.

On the other hand, the effect of an exclusionary clause may in fact be to reinforce the importance of customary rights in respect of freshwater, given that Parliament clearly directed itself to the matter of future claims but made no provision for excluding the possibility of customary claims under the common law. The view might be taken that the exclusion of claims based on the Treaty (other than in respect of future breaches) therefore gives more weight to the continued availability of a claim based on aboriginal title. It is however, possible that future Treaty settlements will expressly purport to be "full and final" settlements of *all* water claims in respect of the area or resource concerned, whether based on the Treaty or customary rights. Such an extinguishment of all ancillary rights is indeed probably more likely given their greater prominence in the legal system today.

The effect of settlement legislation on cross-claiming tribes

The question also arises as to whether an exclusionary clause in settlement legislation would operate to extinguish the possibility of other tribes (than those party to the settlement) bringing claims based on customary rights to water resources covered by the legislation. If such a clause was held to have no effect in terms of limiting customary claims, then it is arguably the case that another tribe would be able to pursue a claim in spite of the existence of a settlement in respect of the water resource concerned.¹⁴⁹ The "effect of one tribe's settlement legislation on the subsequent position of a cross-claiming group"¹⁵⁰ was considered by the Court of Appeal in *Ngati Apa Ki Te Waipounamu Trust v The Queen* [2000] 2 NZLR 659. While it was not open to the Court or the Waitangi Tribunal to challenge the deed of settlement and the Settlement Act (in terms of section 461(3) of the Settlement Act and section 6(9) of the Treaty of Waitangi Act), Gault J considered that "the tribunal, and other Courts and tribunals as well, may properly consider and determine, for instance, whether a claim made by another tribe can stand consistently with the Settlement Act."¹⁵¹

¹⁴⁷ See *Ngati Apa v Attorney General* [2003] 3 NZLR 643, at 685 (per Keith J): "The onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain" in order that a Court will hold that customary rights have been extinguished.

¹⁴⁸ This is unlikely given the government's aims in reaching a Treaty settlement.

¹⁴⁹ Whether or not such a claim would be successful would no doubt depend on the evidence of past occupation and use of the resource that tribe could assert.

¹⁵⁰ *Supra*, n. 144, at 181.

¹⁵¹ *Ngati Apa Ki Te Waipounamu Trust v The Queen* [2000] 2 NZLR 659, at 684.

In accordance with the general approach taken to construing privative clauses,¹⁵² Elias CJ held:

“the provisions of the enactment are perfectly workable without any assumption that claims by non-Ngai Tahu are precluded. In my view, moreover, any such implication of purpose would have to be irresistible. This case trenches upon basic rights. If the respondents are right, Parliament has legislated to deny Ngati Apa the right of access to the Courts and to the Waitangi Tribunal...”¹⁵³

Her Honour’s decision was based on the structure and language of the Settlement Act, and its specific and carefully limited recognition of Ngai Tahu’s interests. She was of the view that the rights affected¹⁵⁴ “cannot be overridden by general or ambiguous words in a statute.”¹⁵⁵ Some of the remedies granted by Treaty settlements are exclusive in nature, and would therefore be unavailable to later claimants.¹⁵⁶ However, the judgment also identified the possibility of some ‘residual remedies’ being available to Ngati Apa in the event that their claim was held to be well-founded.¹⁵⁷

The range of relationships which may exist between Treaty settlements and the continued existence of customary rights under the common law is therefore complex, and will turn in any particular case on the wording of the settlement legislation and what provision it makes for it being a “full and final” settlement.

¹⁵² It is well settled that privative clauses are generally to be construed narrowly. According to Dawson, “... privative or ouster clauses in legislation usually receive a narrow reading to support the continued access of litigants to the courts or other forms of redress, unless the contrary intention of Parliament is clear.” Further, “there seems no good reason why different principles should apply to the interpretation of final settlement clauses – at least if the aim is the resolution of the claims of *all* tribes” (J. Dawson, “Remedial Powers of the Waitangi Tribunal”, (2001) Public L R 171 at p181.)

¹⁵³ *Supra*, n. 151, at 675 (per Elias CJ).

¹⁵⁴ Namely, Ngati Apa’s rights to natural justice and cultural rights.

¹⁵⁵ *Supra*, n. 151, at 675 (per Elias CJ).

See also *R v Secretary of State for the Home Department, ex parte Simms* [1999] 3 WLR 328 (HL), at 341 (per Lord Hoffmann); *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539, at 575 (per Lord Browne-Wilkinson).

This view is also consistent with the approach to statutory interpretation affirmed by *Ngati Apa v Attorney General*.

¹⁵⁶ Ngai Tahu, for instance, is given a right of first refusal if the Crown wishes to dispose of any land within its takiwa by the Ngai Tahu Claims Settlement Act 1998. According to Tipping J, “both conceptually and practically this provision is inconsistent with Ngati Apa having any outstanding claim to any of that land.” (See *Ngati Apa Ki Te Waipounamu Trust v The Queen* [2000] 2 NZLR 659, at 691 per Tipping J).

¹⁵⁷ For instance, Keith J considered that “[t]he possibility of Ngati Apa having rights or interests arising from its mana relating, for instance, to such local authority matters may well be consistent with the 1998 Act.” (See *Ngati Apa Ki Te Waipounamu Trust v The Queen* [2000] 2 NZLR 659, at 684).

NGAI TAHU CLAIMS SETTLEMENT ACT 1998

The Ngai Tahu Act provides an example of existing recognition of the rights of Maori with regards to freshwater through a number of statutory instruments. The Act integrates Ngai Tahu concerns and representative into joint-decision making regimes¹⁵⁸ in a manner which enables recognition and protection of their interests and relationships regarding freshwater, and the exercise of a degree of authority and control over such resources.

Vesting of lakebeds and wetlands

Ngai Tahu was offered ownership and/or control of various resources and areas of land of tribal significance as part of the settlement, including title to three lakebeds: Te Waihora (Lake Ellesmere), Muriwai (Coopers Lagoon) and Lake Mahinapua.¹⁵⁹ These vestings have restored to the tribe a degree of ownership and control over the water resources, facilitating the exercise of both rangatiratanga and kaitiakitanga. Notably, however, the provisions of the Act explicitly state that title is only to the bed of lakes/wetlands.¹⁶⁰

Statutory acknowledgements

The Act includes statutory acknowledgements, which are intended to “recognise the special relationship of Ngai Tahu with a range of areas in the South Island.”¹⁶¹ As described by the Waitaki Catchment Water Allocation Regional Plan, “the purpose of statutory acknowledgements are to ensure that the particular relationship Ngai Tahu has with these areas is identified and Ngai Tahu are informed when a proposal may affect one of the areas.”¹⁶² Consent authorities must ‘have regard to’ these acknowledgements in their decision-making by section 94B(2), “establish[ing] that Ngai Tahu concerns will be mandatory relevant considerations in the administrative process.”¹⁶³ Thus, these acknowledgments go a considerable way towards giving legal recognition to the spiritual beliefs and relationships that Maori assert in freshwater.

¹⁵⁸ J. Dawson, “A Constitutional Property Settlement Between Ngai Tahu and the New Zealand Crown,” p210 in J. McLean (ed), (1999), *Property and the Constitution*, Hart Publishing, Portland Oregon.

¹⁵⁹ In addition, a range of wahi tapu (sacred sites), wahi taonga (special sites) and mahinga kai (places where food resources are gathered). (See: *Cultural Impact Assessment Report: An assessment of impacts on Ngai Tuahuriri and Ngai Tahu values*, p20.)

Available:

<http://www.waimakariri.govt.nz/publications/pegasus/Appendix%20H%20%20Cultural%20Impact%20Assessment.pdf>,

Accessed: 10/7/06.

¹⁶⁰ For example, the Ngai Tahu Claims Settlement Act 1998, section 193(1)(a) provides that “ownership of the bed of Lake Mahinapua by Te Runanga o Ngai Tahu does not of itself confer any rights or impose any obligations of ownership, management, or control of the waters of Lake Mahinapua”.

¹⁶¹ *Supra*, n. 5.

¹⁶² *Ibid*.

¹⁶³ *Supra*, n. 158.

WAIKATO RIVER SETTLEMENT

In 1989 the Tainui Maori Trust Board lodged a claim with the Waitangi Tribunal regarding the Waikato River seeking the “restoration, management and protection of the River for the benefit of current and future generations.”¹⁶⁴ Waikato-Tainui are currently negotiating a Treaty settlement with the Crown.¹⁶⁵ While details of the settlement are awaited, it is anticipated that it will incorporate a co-management regime over the river, which would enhance the ability of iwi to exercise both rangatiratanga and kaitiakitanga over the resource.

EXHAUSTIVENESS OF THESE MEASURES

In summary, the various forms of incorporation of Maori interests are extensive, but do not cover the full range of interests and relationships that Maori assert in freshwater. The provisions of the RMA focus primarily on creating procedural opportunities for Maori to participate in resource management, affording only limited recognition of the concepts of rangatiratanga and kaitiakitanga. Further, the metaphysical relationships of Maori are only one concern that must be weighed against many.

Treaty settlements which vest ownership of freshwater resources in iwi perform a significant incorporative role in terms of recognising Maori customary interests. Establishment of co-management regimes in conjunction with such vestings further enhances the ability of Maori to manage the resource in accordance with tribal preferences, and to exercise their role as kaitiaki. However, the reluctance of the Crown to vest ownership of water resources in their entirety is inconsistent with the interests Maori assert, and thus a significant limit on their incorporation. It is therefore arguably not sound to assert that such incorporation of Maori interests and relationships as has occurred to date evidences a general intention that these measures should be exhaustive, precluding any further recognition of Maori interests in this area under the common law.

¹⁶⁴ *Supra*, n. 57.

The bed of Lake Taupo and the Waikato River downstream, to and including Huka Falls, has already been acknowledged as ‘Taupo waters’ of Ngati Tuwharetoa in the Native Land Amendment and Native Land Claims Adjustment Act 1924.

Further, as described by R. Harris (ed), (2004), *Handbook of Environmental Law*, Royal Forest and Bird Protection Society of New Zealand Inc, Wellington, p482: “In *Mabuta v Waikato Regional Council* EnvC A91/98, noted [1998] BRM Gazette 121, the Environment Court has also recognised the ancestral relationship of Waikato iwi with the river and all its constituent elements including the banks, beds, waters, streams, tributaries, vegetation, fisheries, flood plains and the metaphysical being, and acknowledged the deep spiritual significance of the resources of the Waikato River.”

¹⁶⁵ As outlined by the Waitangi Tribunal, “claimant groups in this stage have signed Terms of Negotiation and are negotiating... the basic elements of a settlement such as the nature of the historical account and cultural and commercial redress. The culmination of this stage is the signing of a Heads of Agreement or an Agreement in Principle, which will include a proposed financial quantum of the settlement.” (See Office of Treaty Settlements, *Progress of Claims*, Available: <http://www.ots.govt.nz>, Accessed 18/7/06.)

CHAPTER FOUR: Where does space remain for recognition of the various interests Maori assert regarding freshwater?

In light of the extinguishment of some Maori interests in water resources, on the one hand, and the incorporation of other interests into the existing legal framework, on the other, it is necessary to examine what space remains for any further recognition. This discussion will be organised by reference to the various legal forums in which proceedings to vindicate such additional rights might be heard.

Possible avenues for further recognition

High Court declaration

It is possible Maori may bring an application to the High Court to declare that common law aboriginal title in freshwater exists. This might be done by a tribe concurrently seeking redress in the Waitangi Tribunal for breaches of the Treaty, as was the case in *Te Ika Whenua*. While in this case the Court rejected the application for interim relief¹⁶⁶ it appeared to leave open the possibility of a claim based on a customary interest in the flow of the rivers, or breach of fiduciary duty by the Crown in authorising others to interfere with that flow.

The concept of a fiduciary duty owed by the Crown adds scope to the customary claim. Although it may be that customary rights of ownership in respect of running water have been extinguished by legislation, such as section 21 of the Water Act, on this view, it may still be open to Maori to bring a claim based on breach of a fiduciary obligation on the part of the Crown in failing to preserve aboriginal rights. In *Te Ika Whenua* Cooke P held:

“It may be that the requirement of free consent has at times to yield to the necessity of the compulsory acquisition of land or other property for specific public purposes which is recognised in many societies; but there is an assumption that, on any extinguishment of the aboriginal title, proper compensation will be paid.”¹⁶⁷

However, it is also necessary to consider the legal basis of the Crown’s actions in respect of interference with such rights, as statutes can authorise actions that may otherwise constitute a breach of fiduciary duty. The building of dams for hydro-electricity generation, which was the interference complained of in *Te Ika Whenua*, was indeed authorised by ministerial consent. The relevant legislative history is discussed in Chapter One. The Electricity Act 1968, section 25, prohibited the use

¹⁶⁶ The Court was of the view that “however liberally Maori customary title and treaty rights might be construed, they were never conceived as including the right to generate electricity by harnessing water power” (at 24, per Cooke J).

¹⁶⁷ *Supra*, n. 17, at 24.

of water for the generation of electricity except as expressly authorised by or under any other Act or with the consent of the minister. The ministerial consents, under which the two dams in question were authorised for the generation of electricity and the associated water rights, were granted under this Act. Compensation is only provided for under the Public Works Act 1981 for takings of land or for injurious effects on other land, and does not apply to an interference with any customary water rights or interests.¹⁶⁸

It is arguable that the failure to provide for compensation under the Public Works Act may impliedly oust any right to compensation for breach of fiduciary obligations. On the other hand, it may be argued that there can be no breach of fiduciary duty where the actions complained of are authorised by the granting of a statutory consent. While it is arguable that the Crown breached its obligation to preserve customary rights by enacting the empowering legislation in the first place, statutes cannot be challenged in the NZ Courts.

This particular example of a possible breach of fiduciary duty illustrates that where a statute expressly states that consent or authority is required to do something lawfully, it would be hard for Maori to argue successfully that they retain a common law right to deal with a resource in that manner, and further, that any 'breach' of fiduciary duty takes place, for which compensation is available, when the statutory process has been followed. These principles may therefore preclude recognition of additional Maori customary interests in fields covered by statutory consent processes of this kind.

¹⁶⁸ The Public Works Act 1981, section 60.

Waitangi Tribunal claims

The Waitangi Tribunal is another avenue through which Maori customary rights and interests in running water may eventually be recognised on a wider footing. A claim based on Treaty breaches and associated recommendations for redress may go a long way towards addressing Maori claims to customary rights in freshwater.¹⁶⁹

Claims already brought in respect of rivers demonstrate the opportunities for recognising customary interests in freshwater, and for redressing what may be seen as simultaneously a breach of the Treaty of Waitangi, and a failure to protect customary rights. The Mohaka River claim, for example, concerned the rangatiratanga of Ngati Pahauwera over the river. A water conservation order had been recommended by the Planning Tribunal, but was opposed by iwi on the basis that the making of the order without their consent would usurp their rangatiratanga and be a breach of the principles of the Treaty.¹⁷⁰ The Tribunal identified as a principle of the Treaty “[t]he affirmative obligation of the Crown to protect taonga to the fullest extent reasonably practicable.”¹⁷¹ However, it was of the view that:

“Far from actively protecting the interest of Ngati Pahauwera in their property... the Crown has actively undermined that interest through promoting legislation and adopting practices which have given no or quite inadequate recognition to the[ir] position...”

The Tribunal recommended the Crown enter into negotiations with a view to reaching agreement on vesting the bed of the river in the tribe and establishing a co-management regime. It also recommended that a water conservation order should not be made unless and until such a regime had been agreed.¹⁷² Such recommendations give explicit recognition of tribal rangatiratanga over the resource, and allow for iwi to assert their role as kaitiaki. Furthermore, as discussed in Chapter Three, vesting of riverbeds may be seen as symbolic of ownership of the river as a whole.

The recommendations of the Tribunal concerning the Whanganui River are also demonstrative of the opportunities Treaty settlements present for recognition of customary interests in freshwater. The Tribunal recommended affirmation of Atihaunui’s right of ownership of the river “as an entity and as a resource, without reference to the English legal conception of river ownership in terms of riverbeds”¹⁷³ and compensation for the taking of water in respect of the Tongariro

¹⁶⁹ Assuming such recommendations as are made are implemented by the Crown.

¹⁷⁰ Waitangi Tribunal, *The Mohaka River Report 1992*, (Online Version), *Report Summary* Available: <http://www.waitangi-tribunal.govt.nz/reports>
Accessed: 12/06/06.

¹⁷¹ *Ibid.*, 6.1 *Principles of the Treaty*.

¹⁷² *Ibid.*, 6.4, *Recommendations*.

¹⁷³ *Supra*, n. 26, at 343.

power scheme.¹⁷⁴ Two options for joint management of the river were also proposed. The first was to vest the river in its entirety in an ancestor representative of the tribe, with the trust board as trustee. Any resource consent application in respect of the river would require the approval of the trust board as owner. Alternatively, the board could be made a consent authority regarding the river, to act severally and jointly with the current consent authority for any particular case. Both would have to consent to an application for consent to be granted.¹⁷⁵

There was however, a dissenting view on remedies. Tribunal member John Kneebone felt unable to support the recommendations of the majority that Atihaunui should own natural water. He stated:

“To suggest that a river as an entity should be alienated and legally transferred to a particular and special descent group is not in my view a viable option. Such an action could not escape the interpretation that naturally occurring, free-flowing water, and access to it, will become subject to private control, which must then lead to the potential for private exploitation of an essential natural resource...”¹⁷⁶

Accordingly, Mr Kneebone recommended a joint body, consisting of three Crown and three Atihaunui appointees, be created and vested with legal ownership of the riverbed.

The Waitangi Tribunal is important in terms of an avenue for eventual recognition of customary rights as it is open for claimants to challenge directly statutes which have the effect of conferring authority for management of the water resource elsewhere, or of authorising the granting of consents in respect of a resource considered to be taonga of a particular iwi, for example. In contrast, customary rights are vulnerable to statutory extinguishment, and a claim based on aboriginal rights or title will not succeed if the rights are held to have been extinguished by legislation.¹⁷⁷ Recommendations made by the Tribunal may also act as a stimulus for law reform, which may in turn reduce the extent to which Maori customary interests are extinguished by law.¹⁷⁸

¹⁷⁴ Including both exemplary damages for the use of a private resource without consent and compensation for the deleterious impact of a large water abstraction. (See Waitangi Tribunal, (1999), *Whanganui River Report* (Wai 167), GP Publications, Wellington p344).

¹⁷⁵ It was recognised that this proposal would “fall short of effective recognition of the authority of Atihaunui” however, since the final decision regarding an application would still rest with the Courts. Thus the Tribunal proposed a review of the position after 5 years, with the view to making Atihaunui the sole consent authority at that time.

In the Whanganui River Report, for instance, the Tribunal recommended that the RMA be amended to provide that all persons exercising functions and powers under it “shall act in a manner that is consistent with, and gives effect to, the principles of the Treaty of Waitangi.” (See p

¹⁷⁶ *Supra*, n. 26, at 346.

¹⁷⁷ Although such legislation must meet the “clear and plain” test in *Ngati Apa*.

¹⁷⁸ In the Whanganui River Report, for instance, the Tribunal recommended that the RMA be amended to provide that all persons exercising functions and powers under it “shall act in a manner that is consistent with, and gives effect to, the principles of the Treaty of Waitangi.” (See Waitangi Tribunal, (1999), *Whanganui River Report* (Wai 167), GP Publications, Wellington, p344).

Direct negotiations with the Crown

Another means by which customary rights could be further recognised would be through direct negotiations with the Crown (in the sense that such negotiations are not preceded by a claim to the Waitangi Tribunal.)¹⁷⁹ A possible catalyst for such negotiations might be proposals for a market-based water allocation framework, which has been proposed as part of the Sustainable Water Programme of Action.¹⁸⁰ In this respect, however, there is also a large overlap with the Treaty settlement process. It is likely that the redress provided by any relevant settlement dealing with freshwater would be considered relevant, thus limiting what an independent negotiated settlement regarding customary rights could achieve.

Redress, in the context of Treaty settlements, will generally be by way of a formal apology and various financial and cultural redress. Financial redress may entail a capital sum, and/or the vesting of commercial properties and assets. The vesting of areas of particular significance to Maori is generally an element of cultural redress, along with statutory instruments such as acknowledgments and deeds of protocol. While future settlements regarding freshwater are likely to follow this general formula, there may be increased emphasis on the establishment of co-management regimes, given that the Crown appears to be unwilling to offer vesting of rivers (or lakes) in their entirety. Such a framework is expected to be the outcome of the negotiations currently in progress regarding the Waikato River.

¹⁷⁹ The direct negotiation process involves, first, the preparing of a claim and the mandating of representatives to deal with the Crown. The object is to ensure that those who will negotiate with the Crown have the requisite authority to do so, and to bind members of the iwi or hapu to any settlement reached. Formal negotiations will comprise of Heads of Agreement, and subsequently, a Formal Crown Offer. Once agreement is reached, the parties will enter into a Deed of Settlement outlining the redress to be provided by the Crown. The terms of the Deed of Settlement may then be embodied in legislation.

Negotiations that follow an inquiry by the Waitangi Tribunal proceed on a slightly different basis. The Tribunal will usually have made general or specific recommendations for redress, although it may make findings only, with negotiations between the parties as to remedies or redress to follow. If negotiations become deadlocked, the claimant group can go back to the Tribunal for a further remedies hearing, as occurred in the Turangi Township claim where the Tribunal used its binding powers to order clawback of certain memorialised lands.

The terms of the Deed of Settlement may then be embodied in legislation.

¹⁸⁰ The programme was established by the Government in 2003 and is coordinated by the Ministries for the Environment and Agriculture and Forestry.

Reform of the RMA

Legislative reforms to the RMA could be an effective way of affording greater recognition to Maori customary rights in freshwater. Section 88(2) of the Fisheries Act 1983, which stated “nothing in this Act shall affect any Maori fishing rights” provided the basis for judicial recognition of Maori customary fishing rights in a commercial context, and the subsequent pan-tribal fisheries settlement. If a similar provision concerning freshwater were to be inserted into the RMA, however, it would be very difficult to integrate this re-recognition of customary rights with the existing use rights that have been granted under the Act. Further, as discussed in Chapter Two, it is arguable that any ownership conception of customary rights in freshwater has in fact been extinguished by section 21 of the Water Act. Therefore, it may also be necessary to repeal the savings provision in section 354 of the RMA for such reform to have effect.

Another possibility would be amendment of section 8 of the Act. As stated in *Indigenous Peoples and Sustainability – Cases and Action*, the Treaty principles are “a powerful vehicle for the introduction of Maori cultural concepts of authority... and value... into statutory resource management.”¹⁸¹ However, according to Durie, “[t]hrough a significant restraint on the way in which the Act is administered, section 8 is less powerful than section 9 of the State Owned Enterprises Act 1986.”¹⁸² To this end, the Waitangi Tribunal has suggested that section 8 should be amended to require that the Act is interpreted so as to “give effect to” the principles of the Treaty.¹⁸³ This would have the flow on effect of more weight being placed on Treaty principles in the Environment Court, and thus of greater recognition and protection being afforded to the interests Maori assert in freshwater.

Strengthening of other provisions, such as the duty to “have regard to” iwi management plans would be a further way to enhance the ability of Maori to exercise rangatiratanga and kaitiakitanga over natural resources.¹⁸⁴ As discussed above, section 33 of the RMA, which provides for transfer of functions, has not

¹⁸¹ *Supra*, n. 77, at 349.

¹⁸² *Supra*, n. 54, at 28.

¹⁸³ See Waitangi Tribunal, (1999), *Whanganui River Report* (Wai 167), GP Publications, Wellington, p344, where the Tribunal recommended that the RMA be amended to provide that all persons exercising functions and powers under it “shall act in a manner that is consistent with, and gives effect to, the principles of the Treaty of Waitangi.” This would be the same as the statutory admonition found in the Conservation Act 1987, section 4.

¹⁸⁴ This would also accord with the view taken in a Report prepared for the Waimakariri Regional Council, that “contemporary and practical expressions of rangatiratanga would include the active involvement of tangata whenua in resource management decision-making processes and/or the implementation of iwi management plans over particular resources or localities.” (See *Cultural Impact Assessment Report: An assessment of impacts on Ngai Tuahuriri and Ngai Tabu values*, p20).

Available: <http://www.waimakariri.govt.nz/publications/pegasus/Appendix%20H%20-%20Cultural%20Impact%20Assessment.pdf>,

Accessed: 10/7/06.

Further, at consultation hui concerning the Sustainable Water Programme of Action many participants were of the view that central government should provide funds for development of iwi management plans and that these plans should be included more in regional planning. (See Ministry for the Environment, (2005), *Wai Ora: Report of the Sustainable Water Programme of Action Consultation Hui*, Wellington, p8).

been used in respect of an iwi authority to date. Transfer of relevant functions would enable Maori to exercise management responsibility over freshwater resources, thus providing recognition of their customary interests. Statutory amendments making such transfers more attractive to regional councils may be therefore be appropriate. Some efforts have been made in this respect - in 2005 the Act was amended to the effect that liability no longer remains with the transferring authority where there is a transfer. Increased resourcing of iwi authorities may be necessary to enable them to meet the statutory prerequisites, however.

It is possible that such reforms may be applied in a piecemeal way, being acted on with respect to specific water resources over which a customary interest is claimed, or incorporated into a Treaty settlement statute.¹⁸⁵

Catchment plans

Recent amendments to the RMA require the preparation of catchment plans by regional councils, or in some cases by water allocation boards. In this respect, a more holistic approach is adopted, which accords with Maori attitudes and perspectives regarding freshwater management. However, the provisions of the RMA govern the preparation of these plans, thus similar outcomes as have been reached in regional plans are likely, whether prepared by councils or another body. The Waitaki Catchment plan¹⁸⁶ was the first of these new plans to be promulgated. However, Ngai Tahu were disappointed in their expectations of a significant allocation being made to them.¹⁸⁷

Thus, there are a number of possible avenues by which greater Maori interests in freshwater may be recognised. The relative likelihood of further vindication of these rights through judicial forums, however, is limited. As discussed below, it appears that the most optimistic prospects lie in legislative reforms, or adoption of Waitangi Tribunal recommendations in respect of water resources by the Crown.

¹⁸⁵ Statutes passed to date, such as the Ngai Tahu Claims Settlement Act 1998, are illustrative of how this type of region-wide reform may work in practise. Section 208, for example, requires consent authorities to have regard to statutory acknowledgments in forming opinion as to whether Te Runanga o Ngai Tahu is a person who may be adversely affected by the granting of resource consent under the RMA.¹⁸⁵ The same requirements do not necessarily apply in other parts of the country.

¹⁸⁶ Prepared by the recently established Waitaki Water Allocation Board.

¹⁸⁷ Te Runanga o Ngai Tahu's submission stated: "The plan fails to provide an allocation to Ngai Tahu as a development right. As the first water allocation plan prepared under the RMA and specifically designed for determining a regime of allocation of water to various existing and potential future users, we see it a serious omission that an allocation to Ngai Tahu has not been provided for." (See Ministry for the Environment, (2005), Available:

<http://www.mfe.govt.nz/issues/water/waitaki/water-allocation-board/hearing/transcripts/waikati-hearing-21jun05.pdf>, Accessed: 10/7/06).

Conclusions

In conclusion, it appears the most valuable opportunities for vindicating the customary rights and interests Maori assert in freshwater, that remain outside our legal system, lie largely in the political arena. There are obstacles to a claim based on customary rights, or breach of the Crown's fiduciary duty to preserve these rights, in the Courts. Maori customary interests in freshwater have been partly extinguished by legislation which meets the "clear and plain" test in *Ngati Apa*. Any claim Maori may have to ownership of freshwater under the common law is, arguably, extinguished by section 21(1) of the Water Act, which vested sole rights of use in the Crown inconsistently with a Maori conception of ownership based on possession and use.¹⁸⁸ While there exists the possibility of a fiduciary claim against the Crown for failing to preserve customary title, since legislation itself cannot be directly challenged in the Courts any such claim would have to be based on other interferences (with water flows, for instance). However, such an argument may be precluded where the interference is authorised by a statutory regime that does not provide for compensation. The existence of a Treaty settlement may also, in some instances, preclude further customary claims from being brought in either the Courts or the Waitangi Tribunal.¹⁸⁹

This does not mean that the full range of interests and relationships Maori assert in freshwater has likewise been rubbed out, however. In some instances these interests have instead been given a statutory basis. While the devolution of control and management responsibilities to regional councils is at odds with tribal rangatiratanga over such resources, provision for iwi planning for resource management and transfer of management functions to Maori is made in the RMA. Likewise, the concept of kaitiakitanga, while arguably having been partly extinguished by placing authority for management of running water outside Maori hands, has also been codified by the Act to some extent.

Further provision for these interests could be made through the legislative reforms discussed. Greater inclusion of and weight placed on iwi plans would provide for enhanced exercise of rangatiratanga over freshwater resources. Similarly, reforms aimed at increasing the frequency of transfer of functions to iwi would give practical recognition to the 'authority' interests Maori claim. Amendments to the statutory admonitions in sections 6(e) and 8 of the RMA would also result in greater value being placed on Maori spiritual relationships with their taonga in resource consent decisions. Thus, law reform, in terms of the options outlined in the previous chapter, represents the most optimistic prospect for greater recognition of Maori interests and relationships in freshwater. The possibility of recognising novel forms of interests through amendments to the RMA should also not be overlooked. Explicit recognition of the mauri of rivers, and the appointment of kaitiaki as spokespersons for the river as a whole, are means by which an aspect

¹⁸⁸ While judicial opinion on the issue is divided, it is arguable that native title to riverbeds has not been validly extinguished, in terms of the "clear and plain" test in *Ngati Apa*, however.

¹⁸⁹ This will be dependent on the specific terms, and the substance, of settlement legislation in any given case.

of the metaphysical relationship of Maori with freshwater resources may be recognised.

Vesting of water resources in Maori ownership (pursuant to future Treaty settlements or direct negotiations with the Crown), in conjunction with the establishment of co-management regimes, is another manner in which Maori customary interests may be further recognised. Vesting of lake or riverbeds in tribal hands may serve a symbolic function, representing ownership of the water resource as a whole. Tribunal recommendations may in fact propose legislative recognition of ownership in these terms¹⁹⁰ but are ultimately dependent on the Crown's willingness to implement such proposals.¹⁹¹

The full range of interests that Maori assert to freshwater, which span property, authority and metaphysical conceptions are, under the common law of customary title, to be recognised on their own terms. While our legal system makes some provision for these interests, many of the relationships of Maori with running water are not freely recognised. Further, some aspects of the claims Maori would make have been extinguished by statute. The potential for future claims thus lies largely in the political arena of law reform and Crown-Maori settlements.

¹⁹⁰ See, for example, Waitangi Tribunal, (1999), *Whanganui River Report* (Wai 167), GP Publications, Wellington, p343.

¹⁹¹ The Crown's current position is that "it is not possible" to offer ownership of a water resource in its entirety. (See Office of Treaty Settlements, (2002), *Ka Tika a Muri, Ka Tika a Mua, Healing the Past, Building a Future*, Wellington, p111).