

The New Zealand Māori Council claim to the Waitangi Tribunal and water management in New Zealand

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The New Zealand Māori Council filed the 'National Water and Geothermal Resources claim' with the Waitangi Tribunal in February 2012, in large part due to the Government's proposal to part-privatise power-generating State-owned enterprises and to foreshadowed changes to property rights suggested in the Government's Fresh Start for Fresh Water programme (Waitangi Tribunal 2012).

This claim represents an important step in the evolution of Māori involvement with water management in New Zealand. However, much has yet to be resolved. In particular, the Waitangi Tribunal has yet to make recommendations to the Crown on 'Māori residual proprietary rights' in regards of the water resource. Revision of property rights associated with water consents under the Resource Management Act (1991) could have significant economic and financial implications for the community and water users, and so will require serious consideration by government.

It seems likely that current approaches in the water management roles of Māori authorities, including co-management of water resources between Māori and regional councils, will develop further following the Māori Council claim. An increased role for Māori means extra responsibilities. These responsibilities should result in capability development by Māori in water management and science.

Introduction

The recent claim to the Waitangi Tribunal by the Māori Council on fresh water and geothermal resources (Waitangi Tribunal 2012) has brought intense media interest in New Zealand's water management. In particular, the media have highlighted part-privatisation of government shares in power-generating State-owned enterprises (SOEs) and water ownership as important issues for the Tribunal. To date, the Tribunal has released an interim finding as the first step in a two-step process to consider the claim.

The interim finding includes consideration of Māori rights and interests in water and geothermal resources, options for

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rights recognition or rights reconciliation, and the effect of partial privatisation of the SOEs on these options (Waitangi Tribunal 2012). The second step will include an assessment of: Māori residual proprietary rights to fresh water and geothermal resources; the consequences of past Treaty of Waitangi breaches; the position of Māori in relation to the Government's Fresh Start for Fresh Water programme; and recommendations to protect Māori rights and interests in fresh water and geothermal resources (Waitangi Tribunal 2012).

As a background to these issues, this paper summarises water management and property rights in New Zealand and economic issues associated with these rights.

Māori property rights, integral to the Māori Council claim, have been before the Waitangi Tribunal in the past. Māori claims to the Tribunal followed changes in the fisheries management system in the early 1980s with the introduction of individual property rights (i.e. a privatisation) that controlled access to the fishery. Therefore, this paper summarises implementation of the fisheries management system as a possible guide to the timescales of potential revisions to water management coming from the Māori Council claim. This paper then finishes with a discussion including the potential implications of the claim on water management in New Zealand.

Water management in New Zealand

The Resource Management Act (1991), or RMA, currently governs water management in New Zealand. The key novelty of this legislation, in regards of water management, was the integration of the Water and Soil Conservation Act (1967) with the Town and Country Planning Act (1977), and amendments. This has allowed the integrated management of water and land. Key features of the RMA in regards of water management include the definition of consent authorities, including regional or unitary councils, responsible for managing water consents. These authorities manage water consents with a mix of instruments including regional plans, allocation limits, and water consent conditions which can include provisions in regards of the effects of water use. Commonly, the term 'water right' is



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used to describe a water consent. However, this term is not used in the RMA and 17 RMA amendment acts between 1993 and 2011 (<http://www.legislation.govt.nz/act/public>), and is a relic of the Water and Soil Conservation Act (1967).

Increasingly, communities are using the RMA to address the links between land use and water use. The last ten years has seen development by regional councils of integrated land and water management policies that have aimed to protect water quality from the intensification of land use. For example, Environment Waikato's Variation 5 to their regional plan, the 'Lake Taupo Protection Project', aims to control land use in the Lake Taupo catchment for the benefit of lake water quality (Environment Court 2011). In parallel with some of these developments, Māori authorities are playing a greater role in land and water management.

Co-management of water resources between regional councils and Māori authorities is developing from Treaty of Waitangi settlements. Recent settlements associated with the Waikato River include the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act (2010) and the Ngāti Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act (2010). These acts 'set in place a framework with the overarching purpose of restoring and protecting the health and wellbeing of the Waikato River for current and future generations' (Environment Waikato 2010).

Also relevant to water management in New Zealand is the ownership of some lake beds and rivers where these have been assigned to Māori through treaty settlements and deeds (Ministry for the Environment 2009). An early example was the transfer of Te Waihora/Lake Ellesmere bed ownership from the Crown to Ngāi Tahu as part of a Treaty of Waitangi settlement (Ngāi Tahu Claims Settlement Act, 1998). Ngāi Tahu holds a 'fee simple' title to the lake bed (Environment Canterbury 2004). Ngāi Tahu policies relevant to the management of water in Te Waihora/Lake Ellesmere and its catchment include: recognition of Ngāi Tahu rangatiratanga, maintenance of Te Waihora as a tribal taonga and improvement in the mahinga kai resources of Te Waihora (Department of Conservation and Te Runanga O Ngāi Tahu 2005).

Property rights and water consents

Property rights are defined as 'a bundle of entitlements, privileges and limitations defining the owner's rights to use a resource' (Tietenberg 1994). Numerous legal approaches to the management of these rights, in regards of water resources, are practised worldwide, including: common law, correlative rights, and statutory approaches (Job 2010). Six characteristics of the property right, in regards of water consents, include: flexibility of use; divisibility amongst other users; quality of title, including security of supply and ease of establishing ownership; exclusivity of use; duration of consent and arrangements for renewal; and transferability including tradability (Harris Consulting 2003).

Some characteristics of property rights associated with water are defined by the RMA. Water consents are: not real or personal property (RMA, section 122), carry a maximum period of 35 years (RMA, section 123), and may be transferred within the same catchment, aquifer, or geothermal field (RMA, section 136). Further definition of the characteristics of water consents

is provided by regional or unitary authorities. For example, a water consent typically specifies maximum rates, location, and type of water use. Water consents may also include a cut-back regime where users are requested to reduce water use, e.g. in times of drought.

In addition to the RMA, 'mining privileges', which were the first (from the 1870s) licensing system for water use in New Zealand, control some water use in the Otago region. These privileges provided exclusive rights to water (J. Rekker pers. comm. 2012) and are 'completely flexible and transferable' (Harris Consulting 2003). Currently, the privileges are used for horticulture and pasture irrigation; however, they are in the process of being phased out by the RMA, ceasing by 2021 (J. Rekker pers. comm. 2012).

Water consents have value, both to the community (an economic value) and to the consent holder (a financial value). The value to the community is in the production (e.g. by agriculture) and services (e.g. for ecology) provided by the water resource. Water consents have value to the consent holder because the consent is fundamental to the productive use of water. The value of the consent is typically determined by proxies, as water consents are not typically traded. One proxy is agricultural land values. For example, a survey of agricultural land in the Waimea Plains found that irrigated land was worth approximately \$8,100/ha more than land without water consents (White *et al.* 2001). The economic uses for water also determine the value of water consents so a move to higher-value crops, which is a common market driver for changes in land use and water use (White 2011), would increase the value of a consent. The value to a consent holder is also related to the property rights embedded within the consent. For example, long-duration consents are more valuable than short-duration consents because investors, e.g. district councils providing water supplies, require certainty of returns during the duration of their investment. Therefore, legislative changes to property rights associated with water consents would alter the value of the consent.

Māori Council claim to the Waitangi Tribunal

The New Zealand Māori Council filed the 'National Water and Geothermal Resources claim' with the Waitangi Tribunal in February 2012 (Waitangi Tribunal 2012). This claim sought to establish 'a framework by which Māori proprietary rights in their water bodies can be recognised (where that is possible) or compensated (where recognition is not possible)' including 'payment for the commercial use of water in which they have property rights (particularly its use for electricity generation)', Waitangi Tribunal (2012).

The claim was in response to:

- the Government's proposal to sell up to 49 per cent of shares in the power-generating state-owned enterprises (Mighty River Power, Meridian Energy, and Genesis Energy);
- changes to property rights foreshadowed in the Government's Fresh Start for Fresh Water programme, which considers fresh water, not geothermal, resources; and
- Māori claims and assertions, since the signing of the Treaty of Waitangi in 1840 between the Crown (i.e. the Government) and Māori, of customary rights and authority over

water bodies (Waitangi Tribunal 2012). For example, various claims to the Waitangi Tribunal since 1984 found that ‘Māori possessed their water bodies as whole and indivisible resources, in customary law and in fact. Māori did not possess only the beds of rivers or lakes; they possessed water regimes consisting of beds, banks, water, and aquatic life’ (Waitangi Tribunal 2012) within their rohe (boundary of a tribal group).

In relation to the sale of shares, the Tribunal had the view that the Crown should ‘recognise its obligation to seek a mutually agreed and beneficial resolution with its Māori Treaty partner’ and delay the sale ‘while an accommodation is reached with Māori’ because ‘rights recognition may be much more difficult after private shareholders have been introduced into the mix’ (Waitangi Tribunal 2012). The Crown, for its part, provided ‘formal assurances that nothing which arises from the sale of shares will be allowed to prevent it from providing appropriate rights recognition afterwards.’ (Waitangi Tribunal 2012).

A key finding by the Waitangi Tribunal (2012) was that Māori retain ‘residual proprietary rights’ to particular water bodies. Clearly, the nature of these rights is a very important issue for future water resources and geothermal management in New Zealand but was not addressed by the Waitangi Tribunal (2012) as this will be considered in the future in a second stage of the claim assessment. The second stage may include assessment of: the nature of these rights; ‘the framework for rights recognition and rights reconciliation’; and ‘recognising and giving effect to Māori proprietary rights in their water bodies (or compensating for them where that is not possible)’, Waitangi Tribunal (2012).

Parallels of the claim with implementation of the fisheries quota system

The Māori Council claim has some parallels with Waitangi Tribunal claims surrounding the implementation of a quota management system for New Zealand’s fisheries (Fisheries Management Act 1983) which showed that issues surrounding privatisation and property rights are crucial to Māori. This Act changed commercial fishing rights by establishing Individual Transferable Quotas (ITQs), aiming to manage commercial species sustainably, that restricted commercial fishing to ITQ holders. However, Māori had the ‘unextinguished rights to the use of marine resources’ (Lock & Leslie 2007). The issue of Māori fisheries rights were resolved by legislation approximately nine years later (Treaty of Waitangi Settlement Act 1992). Another 12 years passed until commercial allocation to Māori was resolved with the Māori Fisheries Act 2004 (Lock & Leslie 2007).

Whilst the Government’s proposal to part-privatise SOEs does not include a change in property rights associated with water consents, the Fresh Start for Fresh Water programme (Land and Water Forum 2010) recommended that the Government consider reviewing property rights associated with water permits including payment for permits, freer transfers and an increase in the duration of water consents for rural infrastructure beyond the current 35-year maximum.

Discussion

The Māori Council claim to the Waitangi Tribunal is a significant event for water management in New Zealand and there-

fore some discussion is warranted on the future implications for water management in this country. However, much is yet to be resolved with a definition of Māori residual proprietary rights in regards of water awaited from the second stage of the Waitangi Tribunal hearing and key legislative outcomes from the Government’s Fresh Start for Fresh Water programme, e.g. any changes of property rights in regards of water consents, yet to be gazetted.

Māori are playing an increasing role in water management, with developing co-management of water resources between regional councils and Māori authorities (see above). Any assignment of Māori residual proprietary rights is likely to further expand the management role of Māori and would be consistent with Māori kaitiakitanga (or guardianship) of the natural environment and not inconsistent with the RMA. This increased role for Māori could bring, in my opinion, a number of benefits, for Māori and other water users, in regards of water management in New Zealand.

Māori are key stakeholders in water resources and future recognition of residual proprietary rights by legislation may assuage deep political concerns, sometimes fundamentally as a result of the democratic system, by Māori in regards of alienation from water management processes. Māori have much to offer to water management decision-making with a long-term view of the past, and future, of the resource that is generally consistent with RMA aims to manage resources sustainably. In my experience, Māori also have much to add to policies that aim to protect water resources, e.g. for food-gathering and recreation.

Recognition of Māori residual proprietary rights and resolution of historical grievances could result in some changes to water resource management, and some new challenges could result. Firstly, Māori capabilities will be required for the management and science of fresh water and geothermal resources. Māori are currently not well represented in either of these fields. Secondly, water and geothermal management could become more complex, with more groups than at present holding legal mandates to be part of the decision-making process, and a more complex process could deter investment in water-related infrastructure.

In part, this complexity could result from the parallel roles of Māori as guardians and developers. Like any community, Māori have aims that include environmental quality and economic development. Resolution of these sometimes conflicting aims will become a key issue for Māoridom. Unitary authorities, with functions that include economic development and water resource management, probably provide an analogy to what Māori could become with expanded water management roles. Individual Māori groups are typically natural monopoly providers of Māori expertise within a geographic area. Therefore, some policy development will probably be required to integrate this natural monopoly into the decision-making process.

Water ownership is one of the issues considered in the claim, with clear cultural differences (between Māori and English) in the meaning of ownership. Ownership clearly has financial implications, as the Māori Council sought payment for the commercial use of water in which Māori have property rights. Generally, it is reasonable for owners to expect a return on the investment. However, the notion of payment for commercial use of water would become a new, and highly controversial, facet of water management.

Lastly, it seems that New Zealand is in for a long period of discussion about some fundamentals of water management, should the time scale of the ITQ system implementation be a guide. Māori residual proprietary rights, and Māori grievances in regards of fresh water and geothermal resources, are complex issues. Therefore, resolution of these issues will most probably involve the Government and the courts which could contribute to uncertainty in water management in New Zealand.

Concluding remarks

The Māori Council claim to the Waitangi Tribunal, associated with the partial privatisation of the power-generating SOEs and the Government's Fresh Start for Fresh Water programme, represents an important step in the evolution of Māori involvement with water management in New Zealand. The claim has potentially important implications for communities throughout the country. However, much has yet to be resolved. In particular, the Waitangi Tribunal has yet to make recommendations on the nature of 'Māori residual proprietary rights' to the Government.

One thing is clear, and that is involvement of Māori in water management will increase in the future, and in my opinion this is a good thing. Current developments, including co-management of water resources between regional councils and Māori authorities, may indicate the future pathway of water management. Increased responsibilities for Māori are likely, which should result in capability development by Māori in water management and science.

Revisions to the role of Māori in water resources management following the Waitangi Tribunal claim will probably be considered over a time period of several decades, should privatisation of property rights to water be proposed for water resource management in New Zealand. This is the approximate time period for implementation of New Zealand's fisheries management system, between 1983 and 2004, that included privatised fishing rights and recognised Māori property rights. A key unknown factor is the definition of property rights in regards of water. Revision of these rights could have significant economic and financial implications on users and the community and will require serious consideration by government.

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