

# RIGHTS AND INTERESTS IN WATER: HOW MIGHT GOVERNMENT DECISIONS AFFECT WATER SUPPLIERS?

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## ABSTRACT

Resolving the question of rights and interests in water remains difficult because water is a resource that is essential for our economic, environmental, cultural and social well-being and a number of different stakeholders claim rights to water, each with potentially competing interests. The Land and Water Forum highlighted the need for a resolution to this question, and the National Policy Statement for Freshwater Management requires local authorities to engage with iwi around managing water resources. Clearly the Treaty of Waitangi and the implications of tino rangatiratanga are critical to any discussion. Additionally some political parties have indicated a need resource rentals to be paid for water that is extracted from the environment. These matters have considerable implications for water suppliers who it seems have been absent from the debate. Water suppliers will benefit from understanding the issues if they are to negotiate changes to the circumstances that their activities depend on.

## KEYWORDS

**Māori, Treaty of Waitangi, taonga, rangatiratanga, fresh water, national policy statement, resource rental, rights and interests.**

## 1 INTRODUCTION

Successive Governments have grappled with the question of rights and interests in water, particularly in relation to Māori. It remains a difficult question because water is a resource that is essential for our economic, environmental, cultural and social well-being. As a result a number of different stakeholders claim rights to water, each with potentially competing interests. But drinking-water suppliers have been largely absent from the debate, in spite of the fact that a number of government decisions and suggestions from opposition parties have the potential to considerably affect how they go about their business.

## 2 RIGHTS AND INTERESTS IN WATER

Māori frustration at the Governments assumption of rights of power and control over water, were expressed in 2012 when the Government indicated its intention to partially privatise Meridian Energy and other electricity generation enterprises. This resulted in an urgent claim by the Māori Council to the Waitangi Tribunal which argued that the Treaty of Waitangi protected Māori commercial proprietary interests in water and that a breach would occur if the Crown proceeded with the share sales. The Tribunal decision supported the Māori claimants and found that Māori had rights and interests in water bodies for which the closest English equivalent in 1840, was ownership. It also found that these rights were confirmed, guaranteed, and protected by the Treaty of Waitangi (Waitangi Tribunal, 2012).

The government, in its defence, stated clearly that it acknowledged that Māori had interests and rights in freshwater resources, but claimed the sale of shares in the state owned enterprise would not compromise Māori compensation for any future claims they made over those resources (Ruru, 2012).

The Māori Council took their case to the High Court where their claims were rejected and then to the Supreme Court where again the claims were rejected.

Rights and interests in fresh water have long been expressed by Māori and many claims to the Waitangi Tribunal have a fresh water aspect to them. When commenting on a 1996 Wellington Regional Council proposal to export excess bulk water, Te Whiti Love (1996) pointed out that water, by its nature, is one of the most difficult resources to determine rights and interests for, particularly as it is difficult to characterise exactly what is sought in Māori claims to ownership. Local Tangata Whenua challenged the Wellington Regional Council's proposal because they claimed that ownership of the water had not been determined and the Council did not have rights of sale and export.

But iwi are not the only group that have expressed rights and interests in water. Increasingly farmers and farm enterprises, recreational users and the general public have expressed concerns about how water is used and what it is used for. This was seen recently in Ashburton when the Ashburton District Council tried to sell land in its business estate which included a consent to extract 4.1 billion litres of water a year from aquifers beneath the town for a water bottling plant. 40,000 people signed a petition opposing Councils intentions and the Council then abandoned the sale.

The current government's concern about the management of fresh water resources was made clear when, in 2009 it set up the Land and Water Forum, a diverse group of organisations considered by the Crown to have a stake in freshwater management. The objective was to develop a shared vision and common way forward for the management of fresh water resources. To date the forum has released three reports, intended to provide direction for future government initiatives in water resource management. The first report acknowledged that Māori have interests and rights in water resource management without clarifying what they may be or how they may be expressed (Land and Water Forum, 2010).

The second report reiterated Māori have rights and interests in water and strongly promoted the need for iwi to be involved in decision making about fresh water resources, importantly noting that iwi values and interests should be addressed on a catchment-by-catchment and relationship specific basis. (Land and Water Forum, 2012a). The third report focusing on managing water quality and allocation, clearly stated a need for Māori rights and interests in water to be identified and resolved, if an enduring management system is to be achieved. (Land and Water Forum, 2012b).

Though the reports of the Land and Water Forum strongly advocate for the acceptance of a Māori view of water resources, inclusion of Māori in the management of water resources and acknowledgment of the importance of Māori to the resolution of issues, they consider Māori as one of a number of stakeholders, all of whom have interests in fresh water resources.

The Ministry for the Environment National Policy Statement for Fresh Water Management 2014 (MfE, 2014) highlights the importance of water to all New Zealanders, identifying that fresh water is essential to New Zealand's economic, environmental, cultural and social well-being and that fresh water gives our primary production, tourism, and energy generation sectors a competitive advantage in the global economy. It also highlights that fresh water is highly valued for its recreational aspects and underpins important parts of New Zealand's biodiversity and natural heritage. The Policy statement also notes that fresh water has deep cultural meaning to all New Zealanders but identifies that the Treaty of Waitangi is the underlying foundation of the Crown-iwi/ hapū relationship with regard to freshwater resources. It suggests that addressing tāngata whenua values and interests and the involvement of iwi and hapū in the overall management of fresh water is key to meeting obligations under the Treaty of Waitangi.

The policy statement places the following requirements onto local authorities

Local authorities shall take reasonable steps to:

- a) involve iwi and hapū in the management of fresh water and freshwater ecosystems in the region;
- b) work with iwi and hapū to identify tāngata whenua values and interests in fresh water and freshwater ecosystems in the region; and
- c) reflect tāngata whenua values and interests in the management of, and decision-making regarding, fresh water and freshwater ecosystems in the region.

The basis for Māori rights and interests in water is found in article two of the Treaty of Waitangi which states that *The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship (tino rangatiratanga) over their lands, villages and all their treasures.....* Water has been acknowledged by governments to be a treasure or taonga under article two. This understanding underlies the reference to obligations under the Treaty of Waitangi in relation to water.

But what is tino rangatiratanga in the 21<sup>st</sup> century and how should it be expressed? Recently the government has sought to provide for tino rangatiratanga by strengthening the role and authority of Māori in resource management as seen in the 2009 Waikato Tainui settlement in relation to the Waikato River and the co-management arrangement in the Te Arawa Lakes Act 2006. But for many Māori this is less than the level of tino rangatiratanga sought and they question whether co-management or co-governance are really expressions of tino rangatiratanga (Te Aho, 2012). Many argue that the power imbalance between Māori and Pākehā, particularly due to a lack of Māori resources, means that co-management arrangements remain Pākehā dominated.

Drinking-water suppliers, users of considerable quantities of fresh water have been largely absent from the debate, but the National Policy Statement identifies municipal and domestic water supply as a national value use for fresh water. It is likely that water suppliers will eventually be drawn into the debate and negotiations about rights and interests in water. A full understanding of the issues and a mutually respectful relationship with iwi will be essential for the negotiation of successful outcomes.

In 1996 when the Wellington Regional Council proposed the export of bulk fresh water, Te Whiti Love (1996) identified that differing concepts of ownership confuse the matter and he suggested a need to develop a set of common terms and understandings for rights and interests in water resources, including the right to allocate, the right to use, the right to regulate, the right to gain rent, the right to access, the right to conserve and the intrinsic rights of the resource itself.

This raises the question of property rights over water. Bruns and Meinzen-Dick (2005) and Meinzen-Dick and Mendoza (1996) identify access to water resources as a property right, but argue that the rights are only as strong as the institutions that stand behind them. They suggest three broad water property rights classifications as public, private and common property. They don't identify any specific indigenous water property rights.

Water used for a water supply would fall under the definition of public property use. Water used by farmers is considered to be private property use and water, for example in a lake or river that is used for swimming and recreational use would be considered to be a common property use.

In New Zealand, the Resource Management Act (MfE, 1991) provides statutory rights to use water resources through water permits which have many of the characteristics of property rights (Hawke, 2006).

In Australia where water shortages and over allocation have caused widespread concern the Council of Australian Government Agreement of 1994 allowed a water market and privatisation of water bodies (Alston & Mason, 2008). The key elements of the agreement were to reform pricing, clarify water property rights, allocate water to the environment and adopt water transfer mechanisms

If the right to take and use water has some or many of the characteristics of property rights, some argue that the right to on-sell and the allocation of monetary values to water would benefit the way we use water. They suggest it would mean that water use would migrate to the highest value use, promoting both water conservation and returning the best economic value from water. What is clear is that those who gain an effective property right from water, for example those who have a consent to take water for irrigation, can attain an economic value from that right. A good example of this is where a water bottling firm, as was proposed in Ashburton, abstracts water from the ground, paying no price for the water itself, then on-sells that water for a profit. The natural environmental capital, the water, has been obtained free, and profit generated from it.

In Australia, not all of the response to the reforms was favourable. Baldwin (2008) who argues for treating water as a public good seeks a change from seeing water as a commodity to be exploited, often at the expense of the environment, to seeing water as a fragile shared resource that should be used for the benefit of all. Baldwin sees a need for governance approaches that are participatory, deliberative and take account of community values of justice and equity. She notes a lack of input in water debates from those who are not easily heard, including Aboriginal people, those who are not members of groups and those who are distant from major centers.

Some political parties and others have suggested that those who take water from the environment should have to pay for it. This is referred to as a resource rental. It has not been made clear how resource rentals would be charged, who would be charged and how much. But it is very possible that in future, some or all of those who take water from the environment would be required to pay to do so. This could include drinking-water suppliers.

### 3 CONCLUSIONS

What is clear is that water suppliers will need to develop mutually respectful relationships with iwi if they are to realise their responsibilities under the National Policy Statement for Fresh Water Management in relation to abstraction of water from the environment. Water suppliers will benefit from understanding the implications of a number of the facets of the discussion about rights and interests in water, if they are to negotiate with iwi and manage potentially changing circumstances which will affect the abstraction of the water that their activities are dependent on.

They include:

- That water has been identified as a taonga under article two of the Treaty of Waitangi and Māori assertion of their rights and interests in water is based on a legitimate claim of tino rangatiratanga over that taonga.
- The Treaty of Waitangi is the underlying foundation of the Crown–iwi/ hapū relationship with regard to freshwater resources. Addressing tāngata whenua values and interests and the involvement of iwi and hapū in the overall management of fresh water is key to meeting obligations under the Treaty of Waitangi.
- The importance of Māori to the resolution of water issues and need for inclusion of Māori in the management of water resources.
- That the Government expects that iwi values and interests should be addressed on a catchment-by-catchment and relationship specific basis. This suggests that each water supplier would be required to negotiate independently with iwi in their district in relation to the abstraction of water for municipal water supplies.
- Several political parties have indicated the need for resource rentals to be paid on water that is abstracted from the environment, which could change the ‘free’ access to water resources that water suppliers currently enjoy.

### REFERENCES

- Alston, M., & Mason, R. (2008). Who turns the taps off? Introducing social flow to the Australian water debate. *Rural Society*, 18(2), 131-139.
- Baldwin, C. (2008). Governance and justice in water. *Social Alternatives*, 27(3), 3-7.
- Bruns, B. R., & Meinzen-Dick, R. S. (2005). *Water rights reform: Lessons for institutional design*. Washington DC, USA: International Food Policy Institute.
- Hawke, R. (2006). *Improving the water allocation framework in New Zealand: Enhanced transfer (MED OP 06/09)*. Wellington: Ministry of Economic Development.

- Land and Water Forum. (2010). *Report of the Land and Water Forum: A Fresh start for freshwater*. Wellington, New Zealand.: The Land and Water Trust. Retrieved from <http://mfe.govt.nz/issues/water/freshwater/land-and-water-forum/>.
- Land and Water Forum. (2012a). *Second report of the Land and Water Forum: Setting limits for water quality and quantity freshwater policy and plan-making through collaboration*. Wellington, New Zealand.: The Land and Water Trust. Retrieved from <http://mfe.govt.nz/issues/water/freshwater/land-and-water-forum/>.
- Land and Water Forum. (2012b). *Third report of the Land and Water Forum: Managing water quality and allocating water*. Wellington, New Zealand.: The Land and Water Trust. Retrieved from <http://mfe.govt.nz/issues/water/freshwater/land-and-water-forum/>.
- Meinzen-Dick, R., & Mendoza, M. (1996). Alternative water allocation mechanisms: Indian and international experiences. *Economic and Political Weekly*, 31(13), 25-30.
- Ministry for the Environment. (1991). *Resource Management Act 1991*. Wellington, New Zealand: Ministry for the Environment.
- Ministry for the Environment. (2014). *National Policy Statement for Fresh Water Management 2014*. Wellington, New Zealand: Ministry for the Environment.
- Ruru, J. (2012). Māori rights in water – the Waitangi Tribunal’s interim report. *Māori Law Review* (Sept).
- Te Aho, L. (2012). Ngā Whakataunga waimāori: Freshwater settlements. In N. R. Wheen & J. Hayward (Eds.), *Treaty of Waitangi settlements* (pp. 102-113). Wellington, New Zealand: Bridget Williams.
- Te Whiti Love, M. (1996). Private rights to water: A Treaty issue. *New Zealand Engineering*, 51(11).
- Waitangi Tribunal, (2012). *Stage 1 Report on the National Freshwater and Geothermal Resources Claim*. Wai 2358. Wellington: Ministry of Justice Retrieved from <http://www.justice.govt.nz/tribunals/waitangi-tribunal/>.