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Who Owns the Water?

Mihi.

Ko ngā hau ki ētahi wāhi, ko ngā kai ki Ōrāriki

No matter from which way the wind blows, kai is always abundant at Ōrāriki,
Taumutu.

Whakataukī like this one encapsulate the values of tangata whenua associated with the environment, of particular resources, places, activities, people and events, and show us a glimpse of the world as it was to our tūpuna.

Water is one of those resources and is a central component in the identity of Ngāi Tahu. Water is a taonga provided to us by our ancestors – the elements of life.

Our relationships with water, however, have been eroded over the last 5 generations, in spite of the Treaty of Waitangi, and other judicial mechanisms, such as Fenton Entitlements, which guaranteed Māori full rights and ownership of their lands and associated natural resources as long as they wished to retain them.

Around the world Indigenous peoples' connections with water have been largely severed. Ironically though the long-standing sustainable nature of indigenous cultures offer key lessons that can be drawn to better manage our resources in a modern context.

I wanted to begin by briefly outlining the importance of the relationship Maori has with water, because it underpins our relationships with the natural world.

Water is the tears of Raki (Sky Father) which fall upon our sacred mountains and lands to feed lakes, rivers and streams, providing sustenance for the valleys and plains of Papatuanuku - Earth Mother and ultimately flow out to the seas of Takaroa. These traditions encapsulate the key principle of whakapapa, the connectedness and interdependence between all living things within the natural world: ki uta – ki tai – but if think Maori want to own water you must be CRAZY!!!!

The risks and liability that come with actually owning water are at the very least - hazardous.

I would challenge any individual, group, organisation or iwi, for that matter, in its right mind who would want to put their hand up after the Waimakariri River had blown it's banks and flooded half the city and say – “I own that water!”

The risks and liabilities that come with outright ownship of water – are too numerous and onerous for any lawyer to contemplate drawing up that contract!

Obviously there are ways that a person can own “rights” to a resource like water, and with that there is always the potential to make them a tradable commodity, but I'm not here to debate that – as the question is “who owns the water?” And the answer to that in it self is simple - nobody does! Or maybe, more to the point – the Crown doesn't!

Any debate around ownership should be about our individual responsibility to own our actions in the management and use of the water we have. From our homes to the halls of industry we share collective ownership of water and the responsibility that comes with that.

Māori environmental philosophy does not extend to owning natural resources in the sense of ownership or title as interpreted in the popular press or at the time of the Seabed & Foreshore debate. Rather, our place in the natural

order is equal to all other living things and we have the privilege of being able to sustainably use other resources for our sustenance and needs. This ethic is encapsulated within the term *kaitiakitanga* which most of you here will be familiar with.

It's a point made in a report prepared for MAF Policy and the Ministry for the Environment in 2003 – it says “The key issue with a property rights framework is that it is not the property which is owned, it is the rights to use the property which is owned...Water is not owned, but the rights to use the water in various ways are owned.

It is impossible to have a conversation about water without reference to customary rights and the voice this accords Maori in the water debate.

In New Zealand the Crown has always recognised that all lands of the colony were subject to a Māori customary title. Whether this customary title extends to lakes and rivers continues to be a matter of question, and for the best part it has been given various and inconsistent application.

This approach seems to be closely related to the perceived need in New Zealand for certain lands and waterways to be vested in the Crown to secure public access.

Some would argue that New Zealand legislation over time has progressively extinguished Māori Treaty rights or aboriginal title to water, such as the Soil and Water Conservation Act 1967 that vested the sole right to use water in the Crown. The Crown has also assumed ownership over the beds of navigable rivers, through a number of statutes passed since 1903. However, these statutes are directly comparable to the statutes relied upon in relation to the foreshore and seabed, which the Court of Appeal found to be insufficient to extinguish Māori customary title.

So it's more than likely that these statutes have not extinguished customary rights to the beds of rivers. As yet, it is unknown how they apply to the actual

water in the river, but it is arguable that they are similarly insufficient to extinguish rights over the water.

So what of the Resource Management Act and our relationship with water? What part does it play in the perceived ownership debate?

It's a moot question really. But if you look at the right examples - arguably it does provide Maori with ways to have a say in regional water management.

A report in 2003 relating to property rights and how the RMA deals with them in relation to water states: "Maori would appear to have aboriginal title to water under customary use, but how this translates in practise is not well established."

I'm sure you could build a formidable pile of reports that contain statements to that effect - but you can commission as many reports as you like, in my experience I believe there are a number of fundamental impediments that blur the line between the Maori notion of ownership, vis-à-vis customary rights, and outright ownership in the modern day context.

- lack of understanding and education?
- fear of the unknown?
- lack of guidance from the Crown, which struggles with understanding the nature and extent of customary rights?
- fear that Māori will rape and pillage the resource?
- Fear that Māori won't allow the resource to continue to be raped and pillaged?

I'll leave you to ponder those questions.

It can be said though that in the main the Crown has provided little direction since 1991 as to how to adequately provide for it's Treaty obligations to Māori, particularly the Crown's duty to actively protect their rights.

And in the water debate, this point is crucial as from my perspective this would need to include at a minimum:

- Active participation of tangata whenua in water planning and policy development, environmental flow setting and significant water use decisions;
- National monitoring of the effectiveness of tangata whenua participation;
- Adequate and effective protection of water quantity and quality;
- Initiatives to address currently over-allocated water resources;
- Provisions that ensure that customary out of river use rights are provided for within allocation mechanisms;
- That water management must actively protect the in-river customary rights of tangata whenua, including customary rights to freshwater fish and other aquatic life;
- That tangata whenua are effectively enabled and resourced to fulfil their hereditary kaitiaki role and responsibilities;
- Developing tools with local government that facilitate local engagement of tangata whenua.

Tangata whenua values in relation to water have already enriched our society and the debate about resource management and sustainable development. The insistence of Māori that the environment is important to Māori cultural and spiritual well being and that pumping effluent into the rivers or the sea is therefore culturally unacceptable has been an important factor in the protection of the waters of this country in recent years.

The ownership question is a red herring – the question facing us all is one we have to ask ourselves when we look in the mirror – and it's - will you take responsibility for our water?

Because if we don't ask the hard questions we all loose.

Tena koutou, tena koutou, tena tatou katoa