

DISCUSSION ON FRESHWATER A WAI MAORI PERSPECTIVE

Historical Context

- Water regulated by whanau and hapu as vital resource for pa and kainga. It is an integral political, spiritual and economic resource.
- Health of the water reflects health of people and is intimately linked with identity.
- Undivided entity – included lakes, lagoons, rivers, swamps, their associated beds and the adjoining land.
- Colonisation introduced a new way of managing the freshwater resource. Maori concept of water systematically fragmented.
- Crown's interpretation of Treaty is that they maintain sovereignty over water.

Present State

- Evolution of statute in New Zealand has led to uncertainty regarding rights in freshwater creating a tension between the Maori and Crown world views.
- Iwi have sought recognition of their tino rangatiratanga through the Waitangi Tribunal and the Treaty settlement process.
- In 1991 the introduction of the Resource Management Act manages all water resources.
- In 2003, the introduction of the Sustainable Water Programme of Action to improve the management of freshwater, protect freshwater resources into the future and acknowledge the fundamental importance of water to all New Zealanders.
- Iwi and Maori continue to have a strong interest in water quality and quantity and the life supporting capacity of water and will continue to have economic aspirations in water.

Pathways for freshwater discussion – Wai Maori perspective

- Rights based approach
 - Maori customary rights in water
 - Maori customary rights of In land waterways
- Management and use of water
 - Development of a robust management framework
 - Participation in the management of freshwater
- Habitat sustainability
 - Protection and enhancement of freshwater environment
 - Freshwater research

Purpose

1. The purpose of this paper is to discuss the significance of freshwater to iwi and Maori and describe the present state of freshwater management in New Zealand. This paper also identifies key strategic areas for iwi and Maori for their own discussions on freshwater.

Background

2. On 12 November 2007 Te Wai Maori Trustee Limited (Wai Maori) hosted a freshwater wananga in Wellington. The participants provided the mandate for Wai Maori to develop a guiding document that scopes iwi and Maori future in freshwater. This paper is also in response to the numerous conversations that are occurring amongst iwi and Maori regarding freshwater in light of the proposed policy change to water management in New Zealand.

Historical Context

Maori and Water

3. Maori regulated fresh water and freshwater fisheries through kaitiaki and tohunga, whanau and hapu as vital resources for pa and kainga. What developed was a complex system of management including the use of rahui or temporary restriction and tapu for more permanent bans on the use of a water resource. Many iwi have proverbs about the unity of people and water. For example in the Whanganui area there is a saying 'ko au te awa, ko te awa ko au' (I am the river and the river is me).
4. Water formed part of an undivided entity whereby iwi did not distinguish between lakes, lagoons, rivers, swamps, their associated beds or the adjoining land. Maori land was not restricted to the waters edge but extended to the bed of the water body.
5. Waters were also ranked. From the sacred puna wai to the water in common use, wai maori and those of very limited use such as wai kino. Water and identity are intimately linked. For Maori certain things are believed to have or could be imbued with a mauri, or life essence and water or water bodies were believed to have a mauri of its own. Water with a healthy mauri will sustain healthy ecosystems and support cultural uses.

6. Mahinga kai was pertinent to the survival of iwi. They depended upon the knowledge of mahinga kai and participation in gathering from mahinga kai was important for maintaining traditional practices. It was also important that water quantity and quality was maintained as they impacted on these cultural values and traditional knowledge and practices.
7. Particular rights regarding natural resources are reflected in the Treaty of Waitangi through Article Two and in particular in the Maori version, the terms whenua, kainga and taonga and in English through the meaning of lands, estates and 'their fisheries'. Article Two of the Treaty of Waitangi guaranteed Maori full rights of ownership (exercise of tino rangatiratanga) of their lands, estates, forests, fisheries and other property. These rights exist until extinguished by the Crown.

Crown and Water

8. Since colonisation, the Maori concept of water as an undivided entity and as part of a system of lakes, rivers, lagoon's, swamps, their associated beds, and adjoining lands has been systematically fragmented. The Crown's interpretation of the Treaty of Waitangi is that they maintain sovereignty over Maori interests in water and since the Treaty of Waitangi it appears that considerable effort, primarily through statutory intervention, has been made by the Crown to vest ownership of water resources in itself (Durette, 2007).
9. Early statutes such as the Water Power Act 1903 vested in the government the 'sole right to use water in lakes, falls, rivers or streams' for the purposes of generating electricity. Also the Water and Soil Conservation Act 1967 vested in the Crown the 'sole right to dam any river or stream, or to divert or take natural water, or discharge natural water or waste in to any natural water, or use natural water'. Under the Coal Mines Act all beds of navigable rivers have been vested in the Crown.
10. For non-tidal, navigable¹ rivers there is the English common law presumption above the tidal limit whereby, the owners of the riparian land (land with river frontage) own the river to the centre line or in the case of lakes to the centre point. The ownership regime only applied to the beds of the river and not the water. This is the *ad medium*

¹ Navigable rivers were a river of sufficient width and depth to be used for the purpose of navigation by boats, barges, punts or rafts.

filum aquae rule and therefore the beds of non-tidal navigable rivers are privately owned unless a particular Act has stated otherwise.

11. The practices of early Pakeha settlers conflicted with Maori law. For example a number of activities such as the transportation of logs down rivers which destroyed eel traps, and the introduction of trout, which decimated indigenous species of fish, destroyed Maori practices around food collection, as well as disrupting resource use rights (Bargh, 2007). This leads to the loss of traditional practices relating to the management of these entities.

Present Situation

12. The Maori and Pakeha conflicting positions regarding water has created a tension between these two world views. Iwi and Maori still maintain tino rangatiratanga over water and seek to manage as an undivided entity. However the impact of colonisation and the subsequent imposition of a statutory regime have meant that iwi and Maori have had to adapt and develop a completely different way of managing the freshwater resources. The interconnected Maori model of river, lakes, swamps, lagoons, river/lake beds and the adjoining land has been fragmented and replaced with a Pakeha model that had strong rules about land ownership with water being a common commodity.

Ownership and Rights to Water

13. Iwi have sought recognition of tino rangatiratanga through the Waitangi Tribunal and the Treaty settlement process. The Waitangi Tribunal in the Whanganui River Report found that the river was property that Maori possessed and it was claimed in the Mohaka River, Te Ika Whenua Rivers and the Whanganui River claims that rivers are taonga. In all three claims, the Waitangi Tribunal found that these rivers were unquestionably taonga of the claimants, over which they exercised dominion and were thus subject to the treaty guarantees.
14. The Treaty claim process provides one avenue for negotiation and clarification of water rights and can potentially provide opportunities for Maori to influence management of water resources (Durette, 2007). Treaty settlements with respect to water are limited but have included mechanisms with respect to lakes such as Waihora and Wairewa (Lakes Ellesmere and Forsyth) in Ngai Tahu's rohe, Lake

Taupo with Ngati Tuwharetoa, Te Arawa Lakes, and Waikato River with Tainui waka and geothermal water in Ngati Tuwharetoa ki Kawerau tribal boundaries.

15. These include models of co-management such as the Waikato -Tainui Agreement in Principle that sets up bodies to work from a shared and agreed vision while the Te Arawa Lakes model provides for a degree of ownership of the bed of the lakes and some role in management.
16. These will form the basis of likely future arrangements but fall short of true co-management where the iwi will be co-consent authorities and co-approve regional policies, plans and consents. Future settlements on water will struggle not to follow the two large precedents of Te Arawa Lakes and Waikato-Tainui, however these must be carefully examined to see if they are appropriate in other circumstances.
17. These negotiations are in keeping with the Crown's interpretation of the Treaty of Waitangi and full control of water is never quite transferred to Maori. But the settlements represent a means for Maori to secure meaningful rights in water that are made into legally binding documents and legislation (Durette, 2007).

Management

18. Maori have adopted a number of ways to deal with the management of water resources in the current environment such as kaitiakitanga, rahui, wai tapu and wai maori. Kaitiakitanga gives the responsibility of specific iwi appointed representatives to carry out particular functions, to keep and guard iwi interests and taonga while rahui is an act of prohibition used to conserve or replenish a resource and is often temporary.
19. Wai tapu and wai maori is where water may be considered tapu, or sacred because of its properties in relation to other water, tapu places or objects. Water bodies may be designated for common use as wai maori, and are not restricted by the prohibitions of tapu.
20. Within modern Maori resource management, restoring the ecological and spiritual integrity of degraded waterways is an important principle. This includes replenishing water quantity, improving water quality, and habitat restoration.

21. Within New Zealand, freshwater is managed by regional councils who are responsible for the water bodies within their boundaries through implementation of the Resource Management Act 1991 (RMA). They manage water allocation and quality issues by means of regional policy statements and regional plans (which can specify the amount of water that can be taken from certain water bodies and state how the water is allocated to users) and through the resource consent process.
22. There are two types of provisions that provide for Maori participation in the RMA. The first type is the provisions in part ii of the Act, namely Section 6(e), 7(a) & 8. The second type of provision arises as a direct result of the sections which require local authorities to consult or inform iwi or tangata whenua.
23. Section 6(e) specifically refers to water. It states that as a matter of national importance authorities shall recognise the 'relationship of Maori and their culture and traditions with their ancestral water'. Section 7(a) refers to kaitiakitanga as another 'matter' to have regard to in exercising their functions, and powers under the RMA. Section 8 is the specific reference to the principles of the Treaty of Waitangi as another matter to recognise in exercising their functions and powers. The Waitangi Tribunal has also articulated a number of resource specific principles one of which states that the spiritual and cultural significance of a freshwater resource to Maori can only be determined by tangata whenua who have traditional rights over the river.
24. However, Maori participation in environmental management depends, to an extent on the commitment of local authorities to follow the spirit of the legislation. Many Maori expect that they will be involved in environmental management processes relating to water and one of the main issues for them is the incorporation of cultural values into water management (Bargh, 2007).
25. The water rights and water management debate has gained momentum with the introduction of the Sustainable Water Programme of Action (SWPoA) in 2003. The government agreed to a strategy to improve the management of freshwater, protect freshwater resources into the future, and acknowledge the fundamental importance of water to all New Zealanders (Ministry for the Environment, 2006). The strategy focuses on three national outcomes for freshwater:

- Improve the quality and efficient use of freshwater by building and enhancing partnerships with local government, industry, Maori, science agencies and providers and rural and urban communities;
 - Improve the management of the undesirable effects of land use on water quality through increased national direction and partnerships with communities and resource users; and
 - Provide for growing demands on water resources and encourage efficient water management through increased national direction, working with local government to identify options for supporting and enhancing local decision making, and developing best practice.
26. The SWPoA aims to improve Maori engagement and participation in water management but Maori expressed concerns as to whether it will protect cultural values in water, provide a role in decision-making about water allocation that reflects the Treaty relationship, and allow for economic access (Ministry for the Environment, 2005).
27. It is the third outcome that contains the bulk of any likely legislative change and could have potentially the greatest impact on Maori interests in water as it is centred on processes for deciding who can have access to the water and how much water needs to be reserved for in-stream values such as environmental values and cultural uses (Bargh 2007).
28. The RMA provides the ability to transfer resource consents to take and use water from one location to another within the same catchment, and to discharge contaminants into water bodies. Transfers can currently only occur within the boundaries established by regional water plans. All the conditions, expiry dates, monitoring requirements or environmental performance standards, that attach to the consent are transferred with it.
29. The SWPoA proposes to investigate the current practice for transferring water consents and to determine whether separating the “take” and “use” aspects of consents will assist councils in using the transfer provisions in the RMA. Currently water permits are issued in many different forms. Some grant a certain volume of water for a specified use while other permits are issued without stating a specific use. The SWPoA will examine whether separating the “take” and site specific “use”

components of the permit could facilitate a focus on the different effects of the take of the water from the water body and the site-specific effects of the use of the water.

30. Separating the “take” and “use” aspects of water consents could also facilitate the use of “cap and trade” solutions, such as the proposed regime for Lake Taupo, to ensure a percentage reduction over time of nutrients entering the lake. This approach involves setting a maximum amount of discharge allowed to enter the lake and then providing for the transfer of discharge consents between land-users. The transfer of consents would occur within the total level of discharge allowed for the catchment (the cap). This approach could be more readily applied to other catchments where water quality is a problem, and could also be applied to transferring water use permits within set allocation limits for specific water bodies. The separation of “take” and “use” aspects of consents could help facilitate the trading within allocation limits, or maximum levels of discharge.
31. Bargh (2007) has concerns regarding the ‘cap and trade’ strategy and believes that will encourage the further introduction of the market mechanism to the use and allocation of water. Market mechanisms have already been introduced in some areas of the country to water allocation which has facilitated the establishment of public-private partnerships and privatisation. While some proponents of the efficiency of market mechanism believe that it promotes conservation and ensures greater choice for the consumer, the concern is that companies are driven by profit and there are uneven levels of power and influence in the water sector when the market mechanism is used. Maori tend to be at the end of this influence.
32. The establishment of a water market would also require both the recognition of customary rights in water but also the consideration of innovative approaches that give such rights commercial (or quasi-commercial) status (Schroder, 2004). Water strategies have focussed on the protection of indigenous customary values rather than using the emerging water markets to advance the economic position of indigenous people.

33. This is possible as evidenced in New Zealand's experience with fisheries. The fisheries experience has demonstrated that claims to water resources could eventually develop into some significant rights through judicial and legislative action, combined with strong government policy aimed at securing meaningful rights for Maori (Durette 2007). At the very least, it has served to bring Maori resource issues to the fore in New Zealand. It demonstrates how claims to water resources could be resolved in a mutually beneficial manner. It is arguable that Maori fishing rights have evolved to such an extent that it would be difficult to argue a historical connection anymore in many aspects of their participation in the fishing industry.
34. Given the evolution of water law in New Zealand whereby the government used a range of legislation to define water rights and vest in itself the ability to manage and allocate the water, where does this leave iwi and Maori?

Pathways for freshwater discussions

35. While this document focuses significantly on the historical and contemporary context of freshwater for iwi and Maori, this section aims to assist iwi and Maori in identifying their own pathways for discussions in freshwater.
36. Identified are three areas including; rights based approach, use and management of freshwater, and habitat sustainability. Wai Maori believes these are strategically important areas for iwi and Maori that occur at a regional level and national level. Iwi and Maori need to consider who is the most appropriate body to represent iwi and Maori interests.
37. Discussion is already occurring through a Te Taumata Korero comprising of iwi with strong interest in freshwater. This group has engaged with Ministers and the Prime Minister - specifically in relation to the SWPoA - to discuss iwi and Maori interests in freshwater. On particular issues, a collective effort is required to strongly influence of development of, for example, policy reform. Te Ohu Kaimoana Trustee Limited (Te Ohu) and/or Wai Maori have experience (Shared Fisheries) and capability to engage on these issues.

Rights based approach

Maori Customary Rights in Water

38. Tino rangatiratanga for Maori is reaffirmed in the Treaty of Waitangi and is therefore the starting point for determining Maori resource rights. Currently, there is legal uncertainty about the nature and extent of any Maori rights in freshwater and the use of market-based instruments for the allocation of freshwater resources raises the issue of freshwater ownership. This therefore questions whether it is possible for the Crown to create a property right in water that they do not own.

39. Any proposals to extinguish Maori customary rights in water must be negotiated with Maori as prior to colonisation, Maori held all the rights and simply possessed a river or lake or other water body including the bed, banks and the flow as a single entity.

Maori Customary Rights of In land Waterways

40. The introduction of the Foreshore and Seabed Act 2004 (FSSB) has parallels to the clarification of ownership and treaty rights in water for iwi and Maori. The FSSB was introduced in 2004 as a result of the application to the Maori Land Court by the iwi of Te Tau Ihu in 1997 for a declaration that the foreshore and seabed of the Marlborough Sounds was Maori customary land under Te Ture Whenua Maori Act 1993 (Te Ope Mana a Tai, 2003). This was to prevent tendering of coastal space by the Crown.

41. The result was the Crown legislated, imposing their ownership over the foreshore and seabed and provided pathways for iwi to determine territorial rights order or customary rights order. To date, Ngati Porou and Te Whanau a Apanui have signed heads of agreement that describe a range of tools and instruments to recognise Ngati Porou and Te Whanau a Apanui's customary interest in their seabed and foreshore. Ngati Pahauwera has an application for a customary rights order and the same acknowledgement given to Ngati Porou and Te Whanau a Apanui has been provided by the Crown. However, the Crown is still to respond to remaining issues including the ownership of the river and whether this has been extinguished (Powell, 2008).

42. It is on this basis that iwi and Maori could consider applying for declaration that the bed of a water body is Maori customary land or that held in a fiduciary capacity on behalf of the customary owners. This approach was followed by the iwi of Te Tau Ihu in the Marlborough sounds and has been utilised by a number of iwi in relation to lakes.
43. By asserting tino rangatiratanga over in land waterways Maori can potentially have a substantial involvement in the decision making relating to the management of that particular water body. Owners would be able to undertake their own developments (still pursuant to the RMA) but these could be given priority.

Management and Use of Water

Development of a robust management framework

44. Maori rights to participate in management of water are recognised through both legislation and recent Treaty settlements. The control of water and water resources has traditionally been vested in the government however there can be a coordinated effort for stronger role in the management of water from co-management arrangements, devolution of responsibilities, and involvement in the development of national policy statements. Co-management structures have a strong legal basis that obliges the government to engage Maori in natural resource management.
45. Iwi and Maori have a right to participate in the preservation of water resources for future generations. The development of an appropriate framework for interacting with iwi on key matters including issues of national importance to Maori are important to ensure better input into the decision making process (Te Ohu Kaimoana, 2004).

Participation in the Management of Freshwater

46. Iwi and Maori can continue to engage with regional councils under the provisions that provide for Maori participation in the RMA. The first is the provisions in part ii of the Act and the second arises as a direct result of the sections which require local authorities to consult or inform iwi or tangata whenua.
47. When regional and territorial authorities prepare or change plans required under the RMA, they must notify the relevant iwi authorities. They must also take into account any relevant planning document recognised by an iwi authority and lodge with the

council, the extent that it's content has bearing on resource management issues of the area. These planning documents are commonly referred to as 'iwi management plans'. Regional coastal plans are prepared by the regional council concerned, in consultation with the Minister of Conservation and the iwi authorities of the region (Te Puni Kokiri, 2006). Co-management is also available under the RMA but to date, no Maori group has been delegated this responsibility.

Habitat Sustainability

48. There are whanau and hapu groups that continue to protect and enhance their freshwater, freshwater species, and the adjoining land regardless of the discussions occurring around ownership. Wai Maori is aware that there is a strong desire that iwi and hapu reassert their mana over their freshwater fisheries recognising that restoring habitats is the foundation upon which fisheries can develop. These groups participate in central and local government processes to ensure the sustainability of their waterways.
49. Whakaki Lake Trust is an example of this. Their vision included restoration of their wetland, a secure economic future and providing for future generations. The project started in 1996 with the restoration of the natural flow of the main Rahui river flowing from the Whakaki Lake and opening it back to the sea.
50. Whanau and hapu also undertake a range of freshwater research to achieve their freshwater aspirations. This research is an effective way to advance Maori interests in freshwater. The research contributes to a broadening of Maori knowledge on freshwater fisheries restoration, protection, management and/or development.

Summary

51. This document discusses the significance of freshwater to iwi and Maori and provides the contemporary context for water ownership, use and management in New Zealand. Wai Maori consider this the start of the conversation on freshwater.
52. There exists a plethora of issues that effect iwi and Maori interests in freshwater however, Wai Maori has presented options that serve to assist iwi and Maori in their own discussions in freshwater.

Summary

53. This document serves as an over-arching discussion on freshwater by providing a historical and contemporary context for water ownership, use and management in New Zealand. Wai Maori consider this the start of the conversation on freshwater.

54. There exists a plethora of issues that effect iwi and Maori interests in freshwater and this document attempts to provide options for iwi and Maori in their own discussions in freshwater.



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