

MAORI LEGAL RIGHTS TO WATER: OWNERSHIP, MANAGEMENT OR JUST CONSULTATION?

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INTRODUCTION

The Government is currently reviewing the governance of water law and policy. As part of this review, the National-led Government is aware of the critical issue of how ought the law provide and recognise for Maori interests in freshwater. For instance, in a 2009 dated Cabinet paper it states:ⁱ

The rights and interests of Maori in New Zealand's freshwater resources remain undefined and unresolved, which is both a challenge and an opportunity in developing new water management and allocation model.

This paper explores what rights Maori have currently secured, or could potentially secure, in regard to the ownership, management and governance of freshwater.

Ownership

The Resource Management Act 1991 (RMA) is Aotearoa New Zealand's pre-eminent natural resources statute.ⁱⁱ It puts forward an all-encompassing regime for the sustainable management of land, air and water.ⁱⁱⁱ Central government retains some responsibility to influence this regime, primarily through setting national environmental standards, national policy standards and New Zealand coastal policy statements.^{iv} However, day-to-day control is vested in regional government and territorial authorities. These bodies prepare plans^v that contain rules concerning the use of land, air and water where appropriate, and stipulate when and where proposed activities may require resource consents to permit the use. Significantly, the RMA is silent on the issue of ownership, simply assuming that Parliament has the authority to vest management responsibilities in local authorities. Is this political assumption legally correct?

Aotearoa New Zealand's legal system has at its core an inherited and adopted English common law. As part of this common law there exists the doctrine of native title. Essentially, the doctrine holds that on the acquisition of the territory, whether by settlement, cession or annexation, the colonising power, here the United Kingdom, acquires a radical or underlying title which goes with sovereignty. Radical title is vested in the Crown and subject only to existing native rights.^{vi} This English common law

doctrine was first introduced into Aotearoa New Zealand in a 1847 case where the court held that “it cannot be too solemnly asserted that [native title] is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers”.^{vii} However, in a 1877 case, the court held that the doctrine had no application in Aotearoa New Zealand because there were no laws or rights in property existing before the Europeans arrived.^{viii} That precedent remained until 2003 where the Court of Appeal, in *Attorney-General v Ngati Apa*, reintroduced the doctrine’s applicability holding that “[w]hen the common law of England came to New Zealand its arrival did not extinguish Maori customary title ... title to it must be lawfully extinguished before it can be regarded as ceasing to exist”.^{ix} Thus the question that has since arisen is whether Maori customary title to fresh water remains the property of Maori in accordance with the doctrine of native title? The courts have not yet been asked to directly answer this question, and in recent cases that have had the potential to touch on this issue, the courts have stayed clear of it.^x While the Crown claims that at common law no-one ‘owns’ water for it is common property, like air, the Court of Appeal warned against such presumptions (albeit in obiter and in the context of the foreshore and seabed):^{xi}

The common law as received in New Zealand was modified by recognised Maori customary property interests. If any such custom is shown to give interests in the foreshore and seabed, there is no room

for a contrary presumption derived from English common law. The common law of New Zealand is different.

If a court in Aotearoa New Zealand was asked to determine if a tribe still had native title in a specific stretch of freshwater, it is likely that a series of interrelated issues would be canvassed. First, is native title applicable to water? Second, can the doctrine of native title trump other common law doctrines, specifically the doctrine of *publici juris* of fresh water (the idea that at common law the water cannot be owned because it is a common good). Third, can the tribe prove that, according to its *tikanga* (law, values and custom), that the tribe has a recognised customary property interest in a precise river. Fourth, can the Crown identify any statute law that has clearly and plainly extinguished that native title property right? Only if the tribe win on the first three points, and the Crown fails on the fourth point, will it be possible for a court to recognise native title in freshwater.^{xii} But in doing this, native title itself encompasses a wide spectrum where exclusive ownership falls to the far right. It is possible that a tribe might get to this point, and the court finds that they simply have a bundle of rights to use and access the water that are already provided for to all citizens. This is essentially what the majority decision of the High Court of Australia did to an Australian Indigenous group in 2002.^{xiii} However, *Ngati Apa* does suggest the possibility of exclusive ownership by recognising how the doctrine has developed in Canada. Elias CJ stated:^{xiv}

The Supreme Court of Canada has had occasion recently to consider the content of customary property interests in that country. It has recognised that, according to the custom on which such rights are based, they may extend from usufructuary rights to exclusive ownership with incidence equivalent to those recognised by fee simple title.

And, President Gault reflected that the Resource Management Act provisions “are not wholly inconsistent with some private ownership”^{xv} of the coastal marine area. Keith and Anderson JJ, in their joint judgment, suggest an approach that Kirby J, in the High Court of Australia, has been advocating for some time: Indigenous qualified exclusive ownership. They stated “[s]ubject to such qualifications arising from the circumstance of New Zealand, property in sea areas could be held by individuals and would in general be subject to public rights such as rights of navigation”.^{xvi} It is possible that a court might conclude similarly in the context of freshwater, assuming of course that those first four hurdles could be successfully crossed. Yet, the prospects for Maori launching a claim in the High Court are daunting because of the costs and time involved, including the uncertainty of the judicial decision plus how Parliament may then react to a possible judgment in favour of Maori. Parliament is supreme and can enact legislation that in effect nullifies a court decision.^{xvii}

The Government has already dismissed the Waitangi Tribunal's vision for iwi ownership of the Whanganui River. This 1999 published report concerned the claim by the Atihaunui-a-Paparangi people that they had possession and control of the Whanganui River and its tributaries at 1840, and that they never freely and willingly surrendered it. They argued that the Whanganui River is a living taonga (treasure), seen as a living entity with its own personality and life force, and is an indivisible whole not to be analysed in terms of constituent parts of water, bed and banks, or tidal and non-tidal, navigable or non-navigable sections.^{xviii} The Tribunal agreed that the Crown had breached its Treaty obligations and recommended one of two options be implemented. One, that the river, in its entirety, be vested in an ancestor of Atihaunui, with the Whanganui River Māori Trust Board acting as a trustee for the river. All applications for resource consent affecting the river would have to first obtain approval from the trust board before progressing through the RMA processes.^{xix} Alternatively, the Whanganui River Māori Trust Board be recognised as a 'consent authority', as provided for in the RMA, to act jointly and severally with the consenting local authority in cases involving the river.^{xx} To date, the Crown has not advanced any of these specific recommendations. Thus, while the Tribunal can, and has, put forward forceful and interesting solutions to better involve Maori in the governance of water, its

power is only recommendatory. The government can and does ignore some recommendations.

To date, the Government has only acknowledged iwi ownership of lakebeds via Treaty of Waitangi claim settlement statutes. For example, in the Ngai Tahu Claims Settlement Act 1998, the bed of Te Waihora (Lake Ellesmere) was vested in Ngai Tahu.^{xxi} However, the Act expressly stipulates that this does not confer any rights of ownership, management or control of the waters or aquatic life in the lake to the tribe.^{xxii} The Act does provide for the possibility of a joint management plan for the lake that has since been developed and implemented.^{xxiii} This concession leads nicely to the second strand of this paper: management.

Management

The RMA provides the rules for managing water. The common starting point in the RMA regime is that no person may do anything with land (including their privately owned land), air or water that contravenes a rule in a district plan unless the activity is expressly allowed by a resource consent, or coastal permit, granted by the territorial authority responsible for the plan, or a rule in a regional, or regional coastal, plan.^{xxiv} The RMA gives regional and local councils the power to assert rules and guidelines for the take, use, damming, and diversion of freshwater.^{xxv} Regional councils have specific duties in regard to water. These include controlling

the use of land for the purpose of the maintenance and enhancement of the quality and quantity of water in water bodies. The functions also include controlling the taking, use, damming and diversion of water for the purposes of setting maximum and minimum, and controlling the range of change, of water levels and flows. Regional councils need to control discharges of contaminants into water, and discharges of water into water. Regional councils can also, if appropriate, establish rules in a regional plan to allocate the taking or use of water, as long as the allocation does not affect the activities authorized in the Act.^{xxvi}

In formulating district and regional plan rules, and issuing resource consents, the RMA directs local authorities to recognise the Māori relationship with water. Section 6(e) mandates that all persons exercising functions and powers in relation to managing the use, development, and protection of natural and physical resources must recognise and provide for matters of national importance, including the relationship of Māori and their culture and traditions with water.^{xxvii} However, this is one of several factors that local authorities must weigh in reaching decisions. Section 6 in full reads (with emphasis added):

6 Matters of national importance

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall

recognise and provide for the following matters of national importance:

(a) The preservation of the natural character of the coastal environment (including the coastal marine area) wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

(d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:

(e) The **relationship of Māori and their culture and traditions with** their ancestral lands, **water**, sites, waahi tapu, and other taonga.

(f) the protection of historic heritage from inappropriate subdivision, use, and development.

(g) the protection of recognised customary activities.

Additionally, section 7(a) of the RMA directs that all persons exercising functions and powers in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to kaitiakitanga (the exercise of guardianship by Maori).^{xxviii} Again, it is one of several factors that must be considered. Section 7 in full reads:

7 Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

(a) Kaitiakitanga:

(aa) The ethic of stewardship:

(b) The efficient use and development of natural and physical resources:

(ba) the efficiency of the end use of energy:

(c) The maintenance and enhancement of amenity values:

(d) Intrinsic values of ecosystems:

(e) [Repealed]

(f) Maintenance and enhancement of the quality of the environment:

(g) Any finite characteristics of natural and physical resources:

(h) The protection of the habitat of trout and salmon:

(i) the effects of climate change:

(j) the benefits to be derived from the use and development of renewable energy.

Moreover, section 8 states:

8 Treaty of Waitangi

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

Sections 6(e), 7(a) and 8 provide a strong base for Māori to voice their concerns relating to the use of freshwater. In addition, several other sections in the RMA create mandatory requirements on local authorities to listen to Māori. For example, in 2003, the RMA was amended to direct that a regional council, when preparing or changing a regional policy statement, must:^{xxix}

take into account any relevant planning document recognised by an iwi authority, and lodged with the council, to the extent that its content has a bearing on resource management issues of the region.

Section 62(1)(b) directs that a regional policy statement must state the resource management issues of significance to iwi authorities in the region. Moreover, since 2005, all local authorities must keep and maintain, for each iwi and hapu within its region or district, a record of:^{xxx}

- (a) the contact details of each iwi authority within the region or district and any groups within the region or district that represent hapu for the purposes of this Act; and
- (b) the planning documents that are recognised by each iwi authority and lodged with the local authority; and
- (c) any area of the region or district over which 1 or more iwi or hapu exercise kaitiakitanga.

The RMA also provides for some substantial possibilities for Māori to be more actively involved in the governance of natural resources, including water. For example, the RMA empowers a local authority to transfer any one or more of its functions, powers, or duties to any iwi authority.^{xxxii} The RMA also enables a local authority to make a joint management agreement with an iwi authority and group that represents hapu for the purposes of the RMA.^{xxxii}

The National Party has just refused to make more forceful one of these provisions. On 4 August 2010 the Resource Management (Enhancement of Iwi Management Plans) Amendment Bill failed its first reading. The Bill had been proposed by Hon. Nanaia Mahuta (Labour – Hauraki-Waikato MP) to strengthen the directive that local authorities must ‘recognise and provide for’, rather than simply ‘take into account’, relevant iwi authority planning documents when preparing and changing their own policy plans.^{xxxiii} The National Party opposed the Bill on the basis that one of the four objectives of the phase two RMA reforms is achieving the efficient and improved participation of Māori in resource management processes “[S]o there is no need for a separate amendment bill”.^{xxxiv} In contrast, the Labour Party MP Hon Steve Chadwick supported the Bill and said this:^{xxxv}

when Mark Solomon gave a plea to the Local Government and Environment Committee, in its consideration of the Resource

Management Act, that as far as Ngāi Tahu were concerned they were not involved in the resource consent process, and that due recognition of iwi management plans was simply not happening, at either local council level or regional council level. I think it is really sad that National is saying that because the Act is strong enough now, it therefore works. National is saying that because it has done a lot about streamlining and turbo-charging the Resource Management Act, and taking away the regulatory barriers to the consenting process, the Act therefore works for iwi; I do not think so. That is not what we heard at the select committee.

It will be interesting to see what amendments the National Party do propose under phrase 2 of the RMA reforms in regard to Maori. In the meantime, progress has occurred on the Treaty of Waitangi settlement front in the context of providing managing freshwater. The *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010* has at its heart the Crown recognition that Waikato-Tainui regard the Waikato River as a tupuna.^{xxxvi} The Act endorses that a new vision and strategy “is intended by Parliament to be the primary direction-setting document for the Waikato River and activities within its catchment affecting the Waikato River”.^{xxxvii} Key components of the Vision and strategy include: “(a) the restoration and protection of the health and wellbeing of the Waikato River; (b) the restoration and protection of the relationships of Waikato-Tainui with the Waikato River, including their economic, social, cultural, and spiritual relationships”.^{xxxviii} The Waikato River Authority is the new statutory body responsible

for setting the primary direction through the vision and strategy for the Waikato River.^{xxxix} The Authority consists of ten members, including one member appointed from each of the iwi that link with the river (Te Arawa, Tuwharetoa, Raukawa, Maniapoto, a member appointed by the Waikato River Clean-up Trust, and 5 members appointed by the Minister for the Environment in consultation with other Ministers such as Finance, Local Government, Maori Affairs.^{xl} The Act gives power to the new Waikato River Clean-up Trust. The Trust's primary object is "the restoration and protection of the health and wellbeing of the Waikato River for future generations".^{xli} The Trust must also be involved in preparing a new integrated river management plan, along with relevant central departments, local authorities and other appropriate agencies.^{xlii} The integrated river management plan must have conservation, fisheries, and regional council components.^{xliii} Moreover, a joint management agreement must be in force between each local authority and the Trust in the near future.^{xliv}

While the *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010* sets a significant standard of co-management between Maori and local authorities, there is much uncertainty as to whether a similar commitment to co-management will be negotiated over another river. The achievement here for the Waikato River is admirable although the battle has been hard won, does not address all of the concerns of the tribes, and the proof of

its success will be in its implementation. Whether this agreement marks a new era and hope for other tribes to negotiate respectful cooperative agreements to govern water is still too early to judge.

Hence, the legislative picture put here is that there is a legal footing for Maori to have a right to be involved in the decision-making regarding the use and management of water. How the courts have interpreted those rights is now discussed.

Litigation

In Aotearoa New Zealand, persons can appeal council decisions relating to issuing or not issuing resource consents to the Environment Court.^{xlv} Thereafter, appeals are restricted to points of law, and go, in order, to the High Court, Court of Appeal, and lastly to the Supreme Court.^{xlvi} There are several instances where Māori, as objectors, have appealed council decisions that approved resource consents to take water, discharge wastewater into water, or dam water. In all of these cases Maori speak of the importance of the water to them culturally, including the belief that water has its own mauri (life force), and the importance of these places for food gathering, namely fishing.

In a survey of RMA cases concerning Maori and water, only two of the identified 19 relevant cases resulted in clear wins for Maori and both do not concern the typical water take facts of most of the other cases.^{xlvii} While the RMA was enacted in 1991, the first clear win did not occur until 2002. This case concerned an argument posed by the Federated Farmers of New Zealand in

the North Canterbury Province that a man-made drain channel was not subject to minimum flow requirements.^{xlvi} The Environment Court accepted Te Runanga o Ngai Tahu's argument that it was subject to the requirements because the drain was linked to the Cust River and had capacity to support traditional use and values. The other case involved Ngati Tamaoho Trust's concern that the decision to grant resource consent to the Papakura District Council to construct and operate tidal gates on a specific tidal estuary inlet for the purposes of creating recreational opportunities would interfere with the natural flow of the tide.^{xlvii} The Court agreed that to Ngati Tamaoho, if the water was interfered with, the wairoa (spirit) of the water would decay. The resource consent was revoked.

Several of the identified cases did result in partial wins for Maori. The most recent one concerned the Bay of Plenty Regional Council reissuing to the Rotorua District Council a resource consent to take up to 3500 cubic metres of water per day over the summer months from the Taniwha Springs.¹ Ngati Rangiwewehi appealed the decision, relying on section 6(e), stating that their relationship with this water was a matter of national importance. The Court partially agreed by reducing the term of the resource consent from 25 to 10 years. The maximum daily volume and rate were not reduced. Another case, decided back in 1996, involved the Mangakahia Maori Komiti challenging the resource consents issued to 17 diary farmers to take water from the Opouteke River for irrigation.^{li} The Komiti contended that the water permits

would adversely affect their right to catch fish in the river. The Court found a middle ground where the consents in most cases were slightly increased by one year, but the total level of water take permitted was reduced. Kai Tahu were partially successful in a case where they argued that the issuing of resource consent to a particular jetboat company to operate 10 additional trips on the Dart River for tourism purposes would adversely impact on their relationship with the river. The Court reduced the number of jetboat trips to four.^{lii} In another handful of cases, Maori were successful in protecting part of a lake from an aerial spray of weedkiller,^{liii} and a fish passage where consent had been granted for flashboards to be replaced by hydraulically controlled gates to manage a dam's water levels.^{liv}

However, in some cases Maori lost their appeals outright. For example, Tautari lost their challenge of a resource consent that had been granted for the construction of a farm irrigation dam on the Waiopitotoi Stream. The consent also allowed the applicant to take up to 2700 cubic metres of water per day. Tautari appealed on behalf of the interests of the Maori people living only 6 km downstream of the proposed dam. Tautari argued that they had not been adequately consulted, the terms of the consent would disrupt the migration of traditional fish species and have a general effect on fish life as traditional sources of food. The Court disagreed.

In a case where Contact Energy appealed the Waikato Regional Council's refusal to grant resource consents for a

proposed geothermal power station, Tauhara Middle Trust argued that the power station should not proceed because consultation had been inadequate and the geothermal resource is a taonga (treasure). The Environment Court found in favour of Contact Energy permitting the power station to be built. In another case, Tainui argued that the resource consents issued to build a 86 ha engineered landfill would have potential adverse effects on the tributaries of the Waikato River, particularly the Clune Stream. The Court concluded that the existing conditions that the design is subject to “will adequately protect the Maori interests”.^{lv}

In another set of cases, Calter Holt Harvey was issued a 21 year term resource consent for discharge-to-water permits for its pulp and paper plant. Ngati Tuwharetoa did not agree with that term. The Environment Court had some sympathy for the tribe and held that they must be given more of a participatory role by reporting to them issues arising.^{lvi} However, the High Court disagreed and held that Tuwharetoa have no consultation interests in the resource consent.^{lvii}

In the most recent case on water where a Maori tribe opposed the issuing of consents to Genesis Power to enable the Tongariro hydroelectric power development scheme to continue operating, the Maori tribe lost. Ngati Rangi Trust opposed the consents primarily because it involved diversion of water from the Whangaehu, Whanganui and Moawhango riveres in Lake Taupo and then into the Waikato River, and that their cultural traditions have been inhibited by a reduced flow of water, reduced water

levels, degraded water quality and a change to the ecological system that affects the food chain in the water. While the Environment Court restricted the consents from 35 years to 10 years,^{lviii} the High Court overruled that decision,^{lix} and the Court of Appeal has since endorsed the High Court's judgment.^{lx}

Thus, while the RMA does provide a platform for Maori to air their concerns, these concerns constitute just one of several factors that the decision-makers and the courts have to consider. The fact that Maori often lose in the courts is not because the courts lack the awareness of the importance of the RMA protections to Maori. For example, Aotearoa New Zealand's then top appeal court, the Privy Council in the United Kingdom, stated in 2002, that sections 6(e), 7(a) and 8 provide "strong directions to be borne in mind at every stage of the planning process",^{lxi} and that if alternative proposals exist that do not significantly affect Maori, then preference should be given to those alternatives even if they are not ideal. However, in that case, which concerned the laying of roads and not the take of water, Maori still lost. Moreover, the courts have been clear in stipulating that section 6(e) "does not create a right of veto"^{lxii} for Maori and that it does not trump other matters.^{lxiii} In a more recent case, however, the Environment Court directed that section 6(e) "should not be given lip service to".^{lxiv} Nonetheless, overall the case law illustrates that while it is definitely a strong starting point to have legislative

rights, those rights remain vulnerable and it requires significant time and resources on the part of Maori to pursue these rights.

Conclusion

This paper has provided an introductory glimpse into the possible and real rights Maori may potentially have or have in fact to water. While Parliament and the courts have not yet recognized Maori ownership of freshwater, it is well accepted as a live issue for many hapu and iwi. The RMA does provide some opportunities for Maori to be involved in the decision-making and planning of water but there is a real concern mounting that these may be not much more than superficial. However, advancement has certainly occurred at the political negotiation level with the the recently enacted *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010*. But the overall impression of water management in this country is still one of mono-cultural decision-making and governance. While decision-makers must have some level of regard to Maori values, often these values are trumped by other development prospects. For the most part, as an overall generalized statement, are iwi and hapu being rendered to merely consultation roles? If this is the direction we are heading towards, then this is not simply unsatisfactory but potentially in breach of the Treaty of Waitangi guarantees and contrary to the common law doctrine of native title.

Acknowledgments

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ⁱ New Start for Fresh Water Cabinet paper, 2009, para 25b (available to download at: <http://www.beehive.govt.nz/speech/agenda+fresh+water+reform>).

ⁱⁱ See David Grinlinton, "Contemporary Environmental Law in New Zealand" in Klaus Bosselmann and David Grinlinton (eds) *Environmental Law for a Sustainable Society* New Zealand Centre for Environmental Law Monograph Series: Vol 1, 2002, pp. 19-46; Derak Nolan (ed) *Environmental and Resource Management Law* 3rd ed (LexisNexis, 2005).

ⁱⁱⁱ See s 5 for a definition of sustainable management.

^{iv} See ss 43 – 58A.

^v Regional policy statements, regional plans, regional coastal plans and district plans – see ss 59-77D.

^{vi} See definition in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 23-24.

^{vii} *R v Symonds* [1847] NZPCC 387, 390.

^{viii} *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) 72.

^{ix} [2003] 2 NZLR 643, 693.

^x For example, see *Te Runanga o Te Karawa v Northland Regional Council* EC Auckland A121/2009, 18 November 2009, [15] "... this Court cannot rule, or even express the most tentative opinion, on whether any individual or grouping of tangata whenua might have a valid claim to native title over any physical resource ..."; and *Paki v Attorney General* [2009] NZCA 584, where the Court of Appeal was careful to make clear that the case by the Pouakani hapu to the ownership of a 20 mile stretch of the Waikato Riverbed had "*not* been put on the basis of aboriginal native or unextinguished customary rights. That cannot be stressed too strongly" [63] (original emphasis).

^{xi} *Ngati Apa* 668.

^{xii} For a detailed discussion on these four points, see Ruru, note **Error! Bookmark not defined.**

^{xiii} *Commonwealth v Yarmirr* [2001] 208 CLR 1 (HCA).

^{xiv} *Ngati Apa* 656

^{xv} *Ngati Apa* 677.

^{xvi} *Ngati Apa* 679.

^{xvii} This is how Parliament reacted to the *Ngati Apa* case, see Foreshore and Seabed Act 2004.

^{xviii} Waitangi Tribunal, *The Whanganui River Report* (Wai 167, 1999), 23.

^{xix} *ibid* 343.

^{xx} *ibid* 343.

^{xxi} Section 168,

^{xxii} Section 171.

^{xxiii} Section 177.

^{xxiv} See ss 9-23. For an overview of the RMA see: K N Scott, 'From the lakes to the oceans: reforming water resource management regimes in New Zealand' (2006) 17 *Journal of Water Law* 231.

^{xxv} Section 14.

^{xxvi} Section 14(3)(b)-(e).

^{xxvii} Emphasis added.

^{xxviii} Section 2 of the RMA defines kaitiakitanga to mean "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship".

^{xxix} Section 61(2A)(a) inserted by s 24(2) of the Resource Management Amendment Act 2003. Note that a similar direction exists for territorial authorities see: s 74(2A)(a) inserted by s 31(2) of the Resource Management Amendment Act 2003. Note that s 2 of the RMA defines an iwi authority as "the authority which represents an iwi and which is recognised by that iwi as having authority to do so".

^{xxx} Section 35A(1).

^{xxxi} Section 33(2).

^{xxxii} Section 36B. See also ss 36C-36E. Note also that the Local Government Act 2002 similarly requires local authorities to have a certain level of regard to Maori and the Treaty of Waitangi.

^{xxxiii} Clause 5.

^{xxxiv} Dr Cam Calder: see http://www.parliament.nz/en-NZ/PB/Debates/Debates/c/5/d/49HansD_20100804_00000900-Resource-Management-Enhancement-of-Iwi-Management.htm.

^{xxxv} see http://www.parliament.nz/en-NZ/PB/Debates/Debates/c/5/d/49HansD_20100804_00000900-Resource-Management-Enhancement-of-Iwi-Management.htm.

^{xxxvi} See Preamble (1) and 17(f), section 8(2) and (3).

^{xxxvii} Section 5(1).

^{xxxviii} Schedule 2, clause 3. Note clause 3 is extensive and lists 13 objectives – only the first two are reproduced here.

^{xxxix} Section 22(2).

^{xl} Schedule 6, clause 2(1).

^{xli} Section 32(3).

^{xlii} See section 36(1).

^{xliii} Section 35(3).

^{xliv} Section 41(1). To understand the scope of the joint management agreement, see section 43. To better understand this settlement, see the work of Linda Te Aho, including: "Contemporary Issues in Māori Law and Society: The Tangled Web of Treaty Settlements, Emissions Trading, Central North Island Forests, and the Waikato River" (2008) *Waikato Law Review* 229.

^{xlv} Kenneth Palmer, "Reflections on the history and role of the Environment Court in New Zealand" 27 (2010) *Environmental Planning Law Journal* 69-79.

^{xlvi} Although note that prior to 2004, the Privy Council in London was New Zealand's last judicial bastion. See Supreme Court Act 2003.

^{xlvii} See Jacinta Ruru, *The Legal Voice of Maori in Freshwater Governance. A Literature Review* (Landcare Research, 2009).

^{xlviii} *Federated Farmers of New Zealand (North Canterbury Province Inc) v Canterbury Regional Council* [2002] 8 ELRNZ 223.

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- ^{xlix} *Ngataki, Ted and Ngati Tamaobo Trust v Auckland Regional Council* [2004] 9 NZED 725.
- ^l *Te Maru o Ngati Rangiwewehi v Bay of Plenty Regional Council* [2008] ELRNZ 331.
- ^{li} *Mangakahia Maori Komiti v Northland Regional Council* [1996] NZRMA 193.
- ^{lii} See *G R Kemp and E A Billoud v Queenstown Lakes District Council* [2000] 7 NZRMA 289 and *Dart River Safaris Ltd v Kemp and Anor* [2000] NZRMA 440.
- ^{liii} *Walker v Hawke's Bay Regional Council* [2003] NZRMA 97.
- ^{liv} *Mokau ki Runga Regional Management Committee v Waikato Regional Council* (Environment Court, Auckland, A046/06, 10 paril 2006, Whiting J).
- ^{lv} *Land Air Water Association v Waikato Regional Council* [2001] 7 NZED 26, [494].
- ^{lvi} *Te Runanga o Tuharetoa ki Kawerau v Bay of Plenty Regional Council* [2002] 7 NZED 363.
- ^{lvii} *Calter Holt Harvey Ltd v Te Runanga o Tuharetoa ki Kawerau* [2002] 8 NZED 335.
- ^{lviii} *Ngati Rangi Trust v Manawatu-Wanganui Regional Council* (Environment Court, Auckland, A67/2004, 18 May 2004, Judge Whiting).
- ^{lix} *Genesis Power Ltd v Manawatu-Wanganui Regional Council* [2006] NZRMA 536. See also *Genesis Power Limited v Manawatu-Wanganui Regional Council* (High Court, Wellington, CIV-2004-485-1139, 22 May 2007, Wild J) and *Ngati Rangi Trust v Genesis Power Limited* [2007] NZCA 378.
- ^{lx} *Ngati Rangi Trust v Genesis* (2009) 15 ELRNZ 164 (Court of Appeal, CA518/07, [2009] NZCA 222, 2 June 2009).
- ^{lxi} *McGuire v Hasting District Council* [2002] 2 NZLR 577, 594.
- ^{lxii} *Chief Executive of the Ministry of Agriculture and Forestry v Waikato Regional Council* 17 October 2006, Environment Court Auckland, A133/06, [49].
- ^{lxiii} *Freda Pene Reweti Whanau Trust v Auckland Regional Council* 21 December 2004, Environment Court Auckland, A166/2004 – (2005) 11 ELRNZ 235,[50].
- ^{lxiv} *Te Maru o Ngati Rangiwewehi v Bay of Plenty Regional Council* 25 August 2008 Environment Court Auckland A095/08 – (2008) 14 ELRNZ 331, [132]. For more discussion of this case see Warren Bangma, 'The decision in *Te Maru o Ngati Rangiwewehi* and the consideration of alternatives under the RMA' (April 2009) RMJ 7.