

# Fresh water: Issues for Maori

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Kia ora koutou

This briefing paper is written for those interested in water and the government's current plans. In 2003 the government began a Sustainable Water Programme of Action to consider how to manage water quality and use. The Programme is now being progressed but it raises a number of unresolved questions.

In this briefing paper I have four key points:

1. Water is a taonga
2. The ownership of water is unclear
3. Government plans = foreshore and seabed revisited
4. Maori rights are not protected under New Zealand's constitutional arrangements.

## **A note about freshwater:**

Regional councils currently manage water quality and resource consents for discharges and allocations.

District and city councils deal with supplying water and managing waste water treatment services such as sewerage.

- Freshwater exists in streams and rivers, lakes, aquifers, pipes and also as bottled water.
- Freshwater is currently affected by pollutants from industrial discharges, farms, chemicals sprayed near waterways, and storm-water drains flowing into streams and rivers.

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## 1. Water is a taonga

- Water has been traditionally and remains an integral political, economic and spiritual resource for Maori.
- For many iwi there are four central categories of water: wai maori, waiora, waikino and waimate. Many iwi have proverbs about the unity of people and water.
- Maori have long expressed concerns about water quality
- In late 1800s cases were taken to the Native Land Court about pollution and ownership of lakes and waterways.
- More recently concerns have been expressed about pollution such as of Lakes Rotorua, Rotoiti, Waikaremoana.
- Waitangi Tribunal stated in the *Whanagui Report* and *Mohaka River Report* that water is a taonga in both cases.

## 2. Ownership is unclear

- To many Maori ownership is not unclear – it belongs to iwi and hapu according to tikanga Maori.
- Even in Pakeha law, some suggest (like the foreshore and seabed) that Maori customary title to water still exists.
- The Waitangi Tribunal *Mohaka River Report* stated that tino rangatiratanga was never relinquished over the Mohaka river by Ngati Pahauwera.
- There is no evidence that customary title has been extinguished by common law or statute law.
- If the Crown wants to extinguish customary title they must negotiate with Maori and must pay compensation
- The Crown claims that at common law no one ‘owns’ water, it is common property (like air). They argue that only ‘use rights’ can be owned - to use or pollute it.
- Also at common law: non-tidal, non-navigatable waterways are held by owners of adjoining land to the centre line of the river. (*ad medium filum aquae*).
- Under tikanga Maori there is no separation of river and lake beds and banks from the water within them.

### 3. Government plans= foreshore and seabed revisited

#### 3 a. Sustainable Water Programme of Action (2003)

- Aims:
  - to improve quality and efficient use of water;
  - to improve management of undesirable effects of land-use on water quality;
  - and cater for greater demand for water.
- Strengthen mechanisms under Resource Management Act 1991
  - Strengthening the use of market mechanism (e.g. involve market mechanisms in auctioning or tendering for water allocations).
  - Supporting greater transferability.
  - Cap and trade strategies (e.g. cap all pollution for a catchment area and allow consent holders to trade their permits to pollute).
  - Separating 'use' and 'take' consents.
- Implications:
  - The government is creating forms of property rights by strengthening the use of market mechanism.
  - They are also encouraging 'public-private partnerships' (Local Councils contracting big companies to supply water/waste water services) which have similar results to privatisation – big companies controlling the market and seeking to make greater profits.
- Internationally the marketisation/privatisation of water has led to:
  - Domination by big transnational corporations
  - Increases in price
  - Disconnection of poor people and communities.
- There were brief 'consultation' hui in 2005.
  - Maori said that the management of water is a Te Tiriti o Waitangi, tino rangatiratanga, kaitiakitanga and ownership issue. The Crown has Te Tiriti obligations and Maori must be involved at the decision-making level – the government has ignored this.
- The government has declared that 'there are no human rights implications' in their Sustainable Water Programme of Action.

**3.b Human rights implications**

If ownership is unclear, as seems to be the case then the government must negotiate with Maori. If customary title rights still exist (and Maori own water under tikanga Maori) then the government must not continue to marketise/privatise something they do not own.

- There are potential human rights breaches in the Programme:

**Domestically :**

1. Te Tiriti o Waitangi
2. Human Rights Amendment Act 1993
3. Bill of Rights Act 1990

**Internationally**

- ii. Universal Declaration on Human Rights 1948
    - ❖ For example right to own property and not be arbitrarily deprived of it.
  - iii. International Convention on the Elimination of all forms of Racial Discrimination
    - ❖ For example freedom from racial discrimination (The Committee that monitors the Convention said the Foreshore and Seabed Act was racially discriminatory)
  - iv. United Nations Committee on Economic and Social and Cultural Rights, General Comment on the Right to Water
    - ❖ For example Indigenous peoples' control and access to water is protected.
- The government is currently considering devising a National Policy Statement and or National Environmental Standards – what real decision-making powers will Maori have in these?

## **5. Maori rights are not protected under New Zealand's constitutional arrangements.**

- The government's unwillingness to discuss i) ownership, ii) sovereignty rights and their limiting of Maori participation in the Sustainable Water Programme of Action raises questions about New Zealand's constitutional arrangements – particularly when at the same time the government is signing sovereignty power away with international trade agreements.
- The government has obligations under 'free' trade agreements:
  1. 'Free' trade agreements aim to facilitate 'free' trade. These agreements focus on the rights of national and international companies.
  2. These agreements already limit the restrictions the government can place on the importing and exporting of water. If control of water is passed out of Crown hands it makes it more difficult for Maori to exercise/regain tino rangatiratanga. In addition in the future when freshwater is likely to become scarce its protection is vital.
- There are alternatives, but it is unclear if the government has seriously considered alternatives.
  1. For example in the Córdoba province in Spain, water is managed by a participatory model that allows community representatives, trade unions and opposition political parties to participate in the organisation's decision-making processes. Water is managed using a technically and financially sustainable approach with social and environmental criteria.
- As Maori rights are not protected under the current constitutional arrangements then these arrangements must change to protect tino rangatiratanga, the continuance of which was reaffirmed in Te Tiriti o Waitangi.

## Summary

- Water is a taonga. Maori have long been concerned with water quality.
- The ownership of water is unclear. There are strong indications that customary title still exists. If the Crown wants to extinguish it they must negotiate with Maori and pay compensation for any expropriation.
- Government plans= foreshore and seabed revisited.
  - i. Sustainable Water Programme of Action suggests that the government wants to create forms of property rights in water. They can not do this with regard to a resource they may not own.
  - ii. There are likely breaches of human rights and Te Tiriti o Waitangi if the Programme continues as it is. This Programme must be reconsidered.
- Maori rights are not protected under New Zealand's constitutional arrangements.
  - i. The government is not interested in discussing Maori ownership/tino rangatiratanga.
  - ii. The government pays little regard to their Te Tiriti, domestic and international human rights obligations but are happy to sign governing power away under international 'free' trade agreements.
  - iii. For Maori it becomes even more difficult to exercise/regain tino rangatiratanga over resources when resources are transferred out of Crown control.