Dealing with the Maori cultural and spiritual imperatives in the 21st Century in water resources

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New Zealand society learned only very recently that their long held belief that the Crown owned the foreshore and seabed around New Zealand, was wrong in law. This came as a bit of a shock to most New Zealanders, but to many Maori it was the confirmation of what they had always believed. Court cases over the years testify to this belief and finally, not through a piece of judicial activism, but through a careful examination of the law, the Court of Appeal in New Zealand dropped its bombshell. Maori could have customary title to parts of the foreshore and seabed of New Zealand and it would be up to the Maori Land Court to determine by interpretation of Maori custom, who should be entitled to it. Where this will end up is anybody’s guess. This event is not the last of what has been a line of Governments in particular misreading the impact of either Treaty of Waitangi rights still held by Maori or customary rights still held in the common law.

Over the years Maori have used the law or quasi-judicial bodies to make the point that they retained rights that had persisted from before the time of colonisation. These rights were regulated through lores and practices that had developed over the centuries. Many of these lores and practices continued after colonisation in the Maori enclaves where custom ruled largely unaffected by the European system of law and regulation, event into the 20th century. As European influence moved even into these enclaves, Maori saw the resources that the customs had protected, being seriously affected by land development, forest removal and stocking of the land, to the point where the resources had, either became unusable, or were simply forgotten. Food stocks such as eels and birds of various sorts, weaving resources such as kiekie, pingao and harakeke, and the tall forests with their habitat for birds.

The lores and practices remained largely within the Maori world until around 1980. As a result of the workings of the Waitangi Tribunal, and to some extent by the predecessor of
the Environment Court, the Town and Country Planning Tribunal, Maori cultural and spiritual beliefs and practices\(^1\) somehow suddenly emerged as a significant matter to be considered. They became matter of national importance and ancestral land could include land not owned by Maori, but be land associated with Maori ancestors. This sudden emergence of the Maori perspective in natural resource management in the 1980s is perhaps similar to the emergence of the Maori claim to the foreshore and seabed. Waitangi Tribunal findings such as in the Motunui - Waitara case\(^2\), where the giant ‘think big’ projects in Taranaki were in danger of being stopped in their tracks by Maori cultural practices in the seas off the Taranaki foreshore. The case in the Kaitorete Spit around Waihora/Lake Ellesmere\(^3\) in the South Island that established that Maori did not need to own land for that land to have cultural and spiritual significance that should be acknowledged. This is old ground now and I don’t wish to go much further into the many cases, claims and examples where the Maori voice, Maori rights, customary practices and cultural and spiritual matters became a normal part of the management of waterways and the land. For water managers these considerations are now very normal and are well understood. In an increasingly secular world, which is striving to be culturally blind, there are now serious questions being asked as to whether this recognition has gone too far. Where will it all end, and what place do cultural and spiritual matters have to do with modern management practice.

An example of this came with the issue of the taniwha that got in the path of a motorway. How could some primitive myth get in the way of such an important object as a motorway funded by the taxpayer? I do not wish to enter into the details of the case but rather to talk more generally about what was driving the issue and how ‘taniwha’ may be accommodated in modern practice. Building motorways in the modern era is a much more sensitive process than was the case up until around 1970. The motorway in Wellington drove directly through the very historic Bolton Street cemetery where the old grave of Maori and Pakeha alike were dug up and re-interred in a large mass grave. The headstones were spread around the remaining area left after the completion of the

\(^1\) See *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 227  
\(^3\) *Habgood v Royal Forest and Bird Society* [1987], unreported M pp 655 - 686
motorway. Many would say that is a very pragmatic response to the need for the
motorway. In this latest case however the lair of the taniwha was well recognised in
tradition in an area where the Waikato River and its people have the identifying saying,
he piko, he taniwha, at every bend in the river there is a taniwha, Waikato taniwha rau,
Waikato the people of a thousand taniwha. Knowing that it is hardly surprising that in
this particular bend there is a taniwha, a kaitiaki if you like, that would protect the
resources available from this source. The taniwha was a part of the traditional resource
management system – an indicator of the health of the resource or its surroundings.

The taniwha and water resources also arose in the Waitangi Tribunal case dealing with
the Ngawha geothermal report⁴. The Tribunal reported:

Taniwha loom large in Ngapuhi thinking and are referred to by many of their elders. The
most relevant taniwha for this case is the log Takauere. Professor Hohepa says they are
regarded as “esoteric minders”, protectors of important places, which then have their
importance enhanced by the presence of taniwha. Taniwha have their own idiosyncracies,
sexual characteristics and innate powers. They may create their own routes (above and
below ground) and their own forms. Thus Takauere not only travels underground to
nearby Lake Omapere, he can also expand so that his head is there and the presence of his
tail may be seen ‘whipping’ in the lakes adjoining the springs as noted above.

One of the more profound aspects of the taniwha phenomenon is that it expresses the
traditional view, confirmed by kaumatua Karewa Marsh, Ronald Wihongi, Anaru Sarich,
Ngatihaua Witehira and others, that the underground resource and its surface
manifestation is holistic and undivided. There can be no springs with all their miraculous
healing powers that do not derive from a source deep within Papatuanuku. Karewa Marsh
quotes the following aphorism:

Ko te Ngawha te kanohi o te taonga, engari ko tona whatumanawa, ko tona mana
hauora, no raro.

Ngawha is the eye of the taonga, but its heart, its life giving power, lies beneath
(the surface).

And she adds that “I know in my heart that this is so”.

What then are we to make of these matters and how should they be dealt with. This taniwha again raised its head when the Corrections Department decided to locate a prison near the lair of the taniwha. I will say no more about that case as many of you will know much more about it than I do, however sensitive consideration of the underlying cultural underpinning of what only appears to many as a mythical beast of no relevance today. To understand this a little further I would like to use the following example to try to understand how we might approach Maori tradition and beliefs.

Dr Margaret Orbell, a Senior Lecturer in Maori at University of Canterbury, in an expansion of a Macmillan Brown lecture delivered in 1983\(^5\) looks at the question:

How then should we approach Maori tradition in general – this enormous collection of narratives, songs, beliefs and customs\(^6\) - and what assumptions should we bring to bear upon it?

Some time in the last decades of the last century, a politician, poet and Polynesian scholar named Edward Tregear had a conversation with a Maori friend, which I think sheds some light upon this question. It was an encounter of a kind that must once have been not uncommon. Tregear was unusually thorough, in that he recorded it carefully and thought about its implications:

“There many years ago, I was walking with a Maori on the bank of the Waikato River, near the village of Te Whetu. The native chief said to me, ‘I will show you something that no white man has ever yet seen. I will show you our ancestor, Raukawa.’ This Maori belonged to the Tribe of Ngati-raukawa. We left the riverside and proceeded up a narrow valley. Turning a sharp angle in it, we came upon a huge conical stone. It was about 30 ft. in height, if my memory serves me. About 20 ft. up was a bright patch of red ocre. The

\(^{5}\) Margaret Orbell, *Hawaiki – a new approach to Maori tradition*, University of Canterbury, 1985, pp. 1-3

\(^{6}\) Orbell is looking at the extraordinary literary outpouring of Maori tribal authorities of the second half of the nineteenth century recorded in great detail of their mythology, history, poetry and folklore. Most of this work remains untranslated but is preserved in various collections.
Maori said, ‘Do you see the kura (red mark)?’ I answered ‘Yes, what is it?’ He relied, ‘That is the blood that flowed from the wound when he was killed. That is my ancestor, Raukawa. He was a giant; he leapt across the Waikato River at the place where Cambridge now stands.’ I said, ‘I should like to understand exactly what you mean. Do you want me to know that this stone was set up in memory of your ancestor, and made sacred for him.’ He answered, ‘No, this is my ancestor himself.’ I then said, ‘You must know that you are talking nonsense. A stone cannot give life to a race of men, nor could it leap across the Waikato. You mean that the stone has been named for Raukawa, or else, perhaps, that your giant forefather was turned into stone by the gods and the petrified hero stands in this spot.’ ‘No,’ he relied doggedly, ‘that is Raukawa, and the red mark is the place where he was mortally wounded.’ I shook my head in despair. I could not follow this thought, but I feel sure that he believed in some queer idea of personality in the stone.’

Orbell continues: As Tregear seems to have realised, the difficulty for the European lay in learning to accept literally what he was told, rather than turning it into something else by rationalising and reinterpreting it. With Maori tradition this is still a difficulty today for all of us, whether we are Pakeha or Maori. Indeed, the traditions changes so fast under the influence of Western thinking that if we are to understand the thought and religion of the Maori of the eighteenth century it is essential to work mainly with traditions recorded in the early years of contact with Europeans. And one must begin by paying patient and respectful attention to what is actually said.

As someone who has practiced in this field for some time I would fully support this last comment. One must begin paying patient and respectful attention to what is actually said when matters are raised. These traditions handed on in the oral tradition usually have a basis that goes back many generations.

Two taniwha, who are well known, resided in my tribal area, in what is now known as Wellington Harbour. These two taniwha, known as Nake and Whataitai lived in what was then a lake. Whataitai was an easy-going taniwha who lived at the northern shallow end of what was originally a great lake, while Nake lived at the southern end and was

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7 Edward Tregear, ‘Thoughts on comparative mythology’ TPNZI 30, 1898: 56 -7
vigorous and turbulent. Nake decided to try and get free of the lake and join the deep water he could hear crashing on the other side. He moved to the northern end of the harbour and built up speed across the harbour to try to break out at a place around Seatoun and in fact succeeded to get into Te Moana o Raukawa (Cook Strait), never to be heard of again. Nake left in his wake the rock Te Aroaro-a-Kupe (Steeple rock), and the rock, Tangihanga o Kupe (Barrett Reef). Whataitai went to push of from Ngauranga where he became stuck in the mud and sand. He was finally uplifted by the earth upheaval known as Te Hao Whenua around 1460 and became dehydrated and died. The Wairua or soul of Whataitai left in the form of a manuwairua called Te Keo who flew to the hilltop Matairangi over the harbour and the plaintive wailing caused what is now known as Mt Victoria, to be named Tangi Te Keo. Whataitai’s presence is still recalled in the Wellington suburb of Hataitai. Although these taniwha caused great disturbances in the harbour back many generations their presence is little felt today, however the myth is remembered and the marks in the landscape remain.

The story is a fascinating one, however these two taniwha have not had to be accommodated in modern resource management to my knowledge, however they were guardians of a resource (the harbour) that most Wellingtonians agree has been mismanaged. These ancient kaitiaki now rely on modern kaitiaki (iwi members largely) to achieve their traditional purpose. That is to more carefully manage the resource that is Wellington Harbour or Te Whanganui a Tara.

This discussion of matters on the foreshore and in the seabed bring me back to where I had started. It is useful to look at a summary of the reasoning of the Court of Appeal in reaching its decision.

1. Customary rights are not derived from the Crown.
2. Before the extension of British sovereignty iwi/hapu held the whole of New Zealand according to their customs.
3. English common law applied in New Zealand only so far as applicable to the circumstances and its modification by pre-existing Maori customary rights created an instant New Zealand common law.
4. New Zealand common law and legislation presumes the continuation of customary rights unless clearly extinguished on the facts of a particular case. Those facts could include previous investigations of the land, particular legislation and/or the terms of previous transactions affecting the land.

5. None of the legislation put forward by the Crown could be said to have extinguished Maori customary rights to the foreshore and seabed. Legislation that declared that the foreshore and seabed and territorial waters are vested in the Crown does not affect Maori customary rights that remain.

6. With the extension of sovereignty over New Zealand the Crown acquired an underlying interest to the foreshore and seabed of New Zealand but customary rights to the foreshore and seabed remain. Therefore the assumption that the Crown owns the foreshore and seabed of New Zealand is wrong in law.

7. Maori customary rights to the foreshore and seabed must be proven and further questions of law could arise. It is a matter of fact to be investigated (not of legal assumption) whether a statutory grant of title from the Maori Land Court involved an investigation and determination of title below high water mark.

8. Land, as defined in Te Ture Whenua Maori Act, includes land below the water.

Although this case is about the land element of the foreshore and seabed and not specifically about the water body it can have a significant impact on land covered by water. The beds of Lakes and Rivers have a similar consideration however their management regime is somewhat different as in most cases any customary title consideration has been overtaken by legislation, such as the Coal Mines Act for the beds of navigable rivers. The ownership of harbours for instance could be subject to title investigation and this may well have some impact on the management of the water resource above it.

Whether it is taniwha, determination of customary title, Māori cultural and spiritual matters or the impacts of kaitiakitanga careful consideration of Māori values in the use and management of water resources will remain very important. It is hoped that the
development of the understanding of these matters continues, however more importantly 
that properly and sensitive allowance is made for a set of values which may not be easy 
to understand from Western standpoint. Tools such as Iwi Resource Management Plans 
when produced in a very comprehensive form will serve to give notice of where 
important sites are and the nature of that importance however many are not clearly 
identifiable as yet and only time will provide the definition required to easily deal with 
them. This work by Iwi Authorities has been slow to emerge because many do not have 
the necessary resources, many are caught in the day to day running of the Resource 
Management Act in a very reactive way and still others are trying to establish a resource 
base through the Treaty claims process to enable them to put together planning document. 
It may be some years before there are comprehensive documentation of significant sites 
and influences from the Maori cultural and spiritual perspective become available to 
resource managers with the majority only appearing in reaction to some proposal that 
disturb the lair of the taniwha. Hopefully though a better understanding of what these 
things mean will develop along with the sensitivity to deal with them in a real and 
meaningful way.

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