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## Indigenous Restitution in Settling Water Claims: The Developing Cultural and Commercial Redress Opportunities in Aotearoa, New Zealand

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# INDIGENOUS RESTITUTION IN SETTLING WATER CLAIMS: THE DEVELOPING CULTURAL AND COMMERCIAL REDRESS OPPORTUNITIES IN AOTEAROA, NEW ZEALAND

**Jacinta Ruru<sup>†</sup>**

*Abstract:* Water is important to all peoples, including indigenous peoples. In recent years, the government in Aotearoa, New Zealand has utilized various cultural redress-type legal mechanisms to recognize and revive the importance of water to the Maori people's identity, health, and wellbeing. These mechanisms create revolutionary modern opportunities for Maori to participate in the decision-making of how specific waters are used and protected. In particular, the negotiated agreements for the Te Arawa Lakes, and the Waikato, Waipa, and Whanganui rivers are studied in this article as prominent examples of how the government has agreed to, for example, co-management regimes. With the government working with Maori to resolve water claims, why—in 2012—have the government and many Maori come head-to-head about Maori rights to water, to the extent that urgent proceedings in the Waitangi Tribunal and now the High Court have been called? Part of the explanation lies in the government's tactics for reconciliation, which focus on cultural redress solutions that concentrate on management opportunities. To date, the Government has refused to address possible Maori commercial and proprietary redress for water even though it is something that many Maori want resolved. This 2012 clash has starkly illustrated that despite the creation of several notable cultural redress water settlements, real reconciliation in a decolonized context will remain elusive until fair, complete, and holistic restitution for water grievances is offered across all redress spectrums, including cultural, commercial, and proprietary.

## I. Introduction

Something was stolen, lies were told, and they have never been made right. That is the crux of the problem. If we do not shift away from the pacifying discourse of reconciliation and begin to reframe people's perceptions of the problem so that it is not a question of how to reconcile with colonialism that faces us but instead how to use restitution as the first step towards creating

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justice and a moral society, we will be advancing colonialism, not decolonization.<sup>1</sup>

These words are the words of indigenous leader Professor Taiaiake Alfred. Alfred is speaking about the experiences of indigenous peoples in Canada. In this article, I ponder his warning in the context of the experiences of the indigenous Maori peoples living in Aotearoa, New Zealand—my home country. New Zealand, Canada, and many other British colonized countries—including the United States—share similar histories of stealing indigenous lands and waters.<sup>2</sup> Some countries are seeking to make amends with indigenous peoples, and New Zealand is one of the leading countries to do so. Since the mid-1980s, New Zealand has been seriously committed to reconciling with Maori. More than twenty settlement statutes have now been enacted with Maori tribes throughout the country, providing financial, commercial, and cultural redress for Crown actions or inactions that breached the principles of the Treaty of Waitangi—a document signed between the British Crown and Maori in 1840. This treaty guaranteed Maori continued ownership of their lands and treasures.<sup>3</sup> Many of these current settlement statutes recognize the specific importance of water to Maori tribes; some have been particularly revolutionary in developing cultural redress options that give tribes co or joint environmental management responsibilities for lakes and rivers.<sup>4</sup> Despite these milestones, at the time of finalizing this writing (November 2012) the Government and Maori are at loggerheads about water in a manner not seen before. In early 2012, the New Zealand Maori Council led a claim in the Waitangi Tribunal arguing that the Government's intent to partially sell shares to the public in hydropower-generating, state-owned enterprises would breach the principles of the Treaty of Waitangi because “. . . Maori have unsatisfied or

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<sup>1</sup> Gerald Taiaiake Alfred, *Restitution is the Real Pathway to Justice for Indigenous Peoples*, in WASÁSE: INDIGENOUS PATHWAYS OF ACTION AND FREEDOM 182 (2005), available at [http://chrr.info/files/AHF\\_reconciliation\\_paper.pdf](http://chrr.info/files/AHF_reconciliation_paper.pdf).

<sup>2</sup> Some comparative work between the countries exists. See generally ROBERT J. MILLER, JACINTA RURU, LARISSA BEHRENDT & TRACEY LINDBURG, *DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES* (2010); PAUL MCHUGH, *ABORIGINAL TITLE: THE MODERN JURISPRUDENCE OF MODERN TRIBAL LAND RIGHTS* (2011); PAUL MCHUGH, *ABORIGINAL SOCIETIES AND THE COMMON LAW: A HISTORY OF SOVEREIGNTY, STATUS AND SELF-DETERMINATION* (2004); STUART BANNER, *POSSESSING THE PACIFIC: LAND, SETTLERS AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA* (2007).

<sup>3</sup> To view the Treaty, see Treaty of Waitangi Act 1975, First Schedule (N.Z.). To view New Zealand legislation, see *New Zealand Legislation*, PARLIAMENTARY COUNSEL OFFICE [www.legislation.govt.nz](http://www.legislation.govt.nz). For a list of these Treaty settlement statutes, see *infra* note 90.

<sup>4</sup> See, e.g., Te Arawa Lakes Settlement Act 2006 (N.Z.); Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (N.Z.); and Nga Wai o Maniapoto (Waipa River) Act 2012. See also *infra* Part IV.

unrecognized proprietary rights in water, which have a commercial aspect, and that they are prejudiced by Crown policies that refuse to recognize those rights or to compensate for the usurpation of those rights for commercial purposes.”<sup>5</sup>

In late August 2012, the Waitangi Tribunal released an interim report that accepted the Maori claimants’ arguments and recommended that the Government delay the share sales until it negotiates and settles all Maori rights to water.<sup>6</sup> The Government’s response has been to delay the share sales until early 2013, and the Government refuses to negotiate with Maori in the manner that the Tribunal suggested.<sup>7</sup> Some Maori now seek judicial review and injunction proceedings in the High Court.<sup>8</sup> Needless to say, the issue is politically hot and legally tangled. The current controversies over water, including who owns water—Maori, the Crown, or no one—aptly highlight Alfred’s warning: without meaningful restitution, decolonization will never eventuate.

It is worthwhile to focus on water as a test resource for reconciliation and restitution because water is a tough resource to settle. This is because water is fundamentally important to all peoples, has an increasing economic value, and moves in a flowing nature. Throughout the world, including in New Zealand, water is essential for the welfare of people, plants, livestock, farming activities, industry and power generation.<sup>9</sup> In New Zealand, water, which is abundant but in some regions is becoming scarce due to over allocation of use rights,<sup>10</sup> is described as an essential resource for the

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<sup>5</sup> WAITANGI TRIBUNAL, THE INTERIM REPORT ON THE NATIONAL FRESHWATER AND GEOTHERMAL RESOURCES CLAIM 1 (2012), available at <http://www.converge.org.nz/pma/wai2358.htm>.

<sup>6</sup> See *id.*

<sup>7</sup> Press Release, Rt. Hon. John Key, P.M. of N.Z., Mighty River Power IPO to Go Ahead Early Next Year (Sept. 3, 2012) (available at <http://www.national.org.nz/Article.aspx?articleId=39315>). See *infra* Part V.

<sup>8</sup> See *infra* Part IV.

<sup>9</sup> Carter Holt Harvey Ltd. v Waikato Reg’l Council [2011] NZEnvC 380, para. 2.

<sup>10</sup> For example, freshwater resources are limited in the region of Canterbury. Environment Canterbury, the Regional Council, faced ever-increasing pressure for freshwater allocation from conflicting and competing interests. Environment Canterbury failed to implement an operative region-wide planning framework, which led to a piecemeal, fragmented, and inefficient approach to the management of fresh water. This situation led to the New Zealand Government enacting the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (N.Z), which replaced the council with Government appointed commissioners. For more information, see WYATT CREECH, MARTIN JENKINS, GREG HILL & MORRISON LOW, INVESTIGATION OF THE PERFORMANCE OF ENVIRONMENT CANTERBURY UNDER THE RESOURCE MANAGEMENT ACT & LOCAL GOVERNMENT ACT (Feb. 2010), available at <http://www.mfe.govt.nz/publications/rma/investigation-performance-environment-canterbury/investigation-performance-environment-canterbury.pdf>; and Cameron Holley & Neil Gunningham, *Natural Resources, New Government and Legal Regulation: When does Collaboration Work?*, 24 N.Z. UNIV. L. REV 310, n.3 (2011).

country's economic, environmental, cultural, and social well-being.<sup>11</sup> The law takes this seriously. The statute that regulates water use, the Resource Management Act 1991, requires that water be safeguarded for its life-supporting capacity. The Government recognizes the potential of water, a resource that is described as New Zealand's "liquid gold."<sup>12</sup> For instance, in 2012, the Minister for Local Government and Primary Industries stated, "[w]ater is possibly the biggest opportunity to grow our economy."<sup>13</sup>

Maori, who first arrived on the shores of New Zealand at some point on or after 800A.D.,<sup>14</sup> have developed their own strong rules for protecting the *mauri* (the life force) of water. For instance, according to Maori law it is abhorrent to mix waters from different catchments and to mix waters with human sewage.<sup>15</sup> All of the approximately forty distinct tribes and hundreds of subtribes that constitute the Maori people derive their identity from the mountains, rivers, and lakes.<sup>16</sup> For instance, in greeting someone new, we might ask, "*Ko wai koe?*," which queries "Who are you?," but more literally translates as "Who are your waters?" The answer will depend on which tribe and sub-tribe that person belongs to. For example, for me, the Waikato River is one of my ancestral waters, which I identify with through my *whakapapa* (genealogy) on my paternal grandfather's side (*Ngati Raukawa*). All tribes have these geographical identity markers linked to water. The link between land and water and humans is a common feature of the Maori language. For instance, *iwi* means both "tribe" and "bone;" *hapu* means both "subtribe" and "to be pregnant;" *whanau* means both "extended family" and "to give birth;" *whenua* means "land" and "afterbirth;" and *wai* means "water," but also "memory," and "who."<sup>17</sup>

<sup>11</sup> N.Z. GOV'T, NATIONAL POLICY STATEMENT FOR FRESHWATER MANAGEMENT 2011 (2011), available at <http://www.mfe.govt.nz/publications/rma/nps-freshwater-management-2011/docs/nps-freshwater-mgmt-2011.pdf>.

<sup>12</sup> David Carter, Minister for Local Gov't and Primary Industries, Speech to Beef and Lamb New Zealand at Future Farming Conference (Mar. 22, 2012) (transcript available at <http://www.beehive.govt.nz/speech/speech-beef-%20-lamb-nz-future-farming-conference>).

<sup>13</sup> When turning to discuss water, he stated, "I'd like to talk briefly now about water—New Zealand's 'liquid gold.' Water is possibly the biggest opportunity to grow our economy." *Id.*

<sup>14</sup> RANGINUI WALKER, KA WHAWAHI TONU MATOU: STRUGGLE WITHOUT END 24 (2004). Others put it at about 1200A.D. See MICHAEL KING, THE PENGUIN HISTORY OF NEW ZEALAND 48-49 (2003).

<sup>15</sup> See WAITANGI TRIBUNAL, THE INTERIM REPORT ON THE NATIONAL FRESHWATER AND GEOTHERMAL RESOURCES CLAIM Wai 2358 72 (2012).

<sup>16</sup> For an introduction to Maori mythology, see ROSS CALMAN & A.W. REED, REED BOOK OF MAORI MYTHOLOGY (2d ed. 2004).

<sup>17</sup> For more information on the Maori language, see HERBERT W. WILLIAMS, A DICTIONARY OF THE MAORI LANGUAGE (1971). For an introduction into the Maori worldview, see HIRINI MOKO MEAD, TIKANGA MĀORI: LIVING BY MĀORI VALUES (2003). Note that the Maori language has been recognized as an official language of the country since 1987. See Maori Language Act 1987, § 3 (N.Z.).

Parliament, the courts, government policy makers, and others do not doubt the importance of water to Maori. There are ample official sources that accept that Maori regard water as a *taonga* and that water is fundamental to Maori cultural identity and wellbeing.<sup>18</sup> The controversies arise in attempting to define and resolve the exact nature of Maori rights to water.<sup>19</sup> This article explores how the country is presently seeking to create reconciliation with Maori in regard to water through the Treaty claim settlement process. Part II provides an introductory insight into the cultural and political make-up of New Zealand focusing on the relation between Maori and the New Zealand Government. Part III explains water regulation in New Zealand in order to better understand the context within which claim settlements to water are made. Part IV studies the three recent legislative approaches utilized to settle claims to water: 1) the Te Arawa Lakes settlement, 2) the co-management Waikato and Waipa River settlements, and 3) the agreement that will vest the Whanganui River with legal standing. All three approaches have been heralded as revolutionary. Part V focuses on the present controversial proprietary and commercial claim to water made by many Maori in the Waitangi Tribunal. Part VI concludes by reflecting on New Zealand's legal journey towards indigenous restitution.

## II. Relations Between Maori And Government

The relationship between Maori and the Government, and the legal experiences of Maori, is somewhat different to that of other indigenous peoples, such as the American Indians. One of the most obvious differences concerns numbers and legal identity. Those who identify as being of Maori descent constitute about fifteen percent of New Zealand's total four-million population. This population make-up is clearly different than the United States where American Indian and Alaskan Native peoples account for just 1.7 percent of the total 308.7 million country population.<sup>20</sup> In New Zealand,

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<sup>18</sup> See, e.g., Section 6 of the Resource Management Act 1991 (N.Z.) [hereinafter RMA]. See also LAND & WATER FORUM, REPORT OF THE LAND & WATER FORUM: A FRESH START FOR FRESH WATER (2010) [hereinafter REPORT OF THE LAND & WATER FORUM].

<sup>19</sup> See, e.g., CABINET, NEW START FOR FRESH WATER para. 18b (2009), available at <http://www.mfe.govt.nz/issues/water/freshwater/new-start-for-fresh-water-paper.pdf> ("The rights and interests of Māori 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 models.").

<sup>20</sup> See TINA NORRIS, PAULA L. VINES & ELIZABETH M. HOEFFEL, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010 (Jan. 2012), available at [www.census.gov/prod/cen2010/briefs/c2010-br-10.pdf](http://www.census.gov/prod/cen2010/briefs/c2010-br-10.pdf).

Maori are visibly present throughout the country, integrated into all parts of society and share a long history of intermarriage with Europeans and others.<sup>21</sup>

Legislation simply defines Maori as “a person of the Maori race of New Zealand; and includes a descendant of any such person.”<sup>22</sup> This is perceptibly different to the detailed legal definitions used to define American Indians, Alaskan Natives, and Native Hawaiians.<sup>23</sup> The contemporary descent definition, rather than the historically utilized legal blood quantum classification,<sup>24</sup> is much more aligned to the Maori perspective of identification: “When children are born with whakapapa they are grandchildren or ‘mokopuna of the iwi.’ They are Māori.”<sup>25</sup> However, for Māori people, while descent from a Maori ancestor is a minimum requirement, being Maori is primarily a matter of subjective social identification with other Maori and particular Maori tribes and sub-tribes.<sup>26</sup>

The inclusive descent definition for who is Maori works because few legislative rights hinge on being classified as Maori.<sup>27</sup> The British colonizers did not do as they did in North America where they drew arbitrary survey lines on the land in the pursuit of creating reservations for its indigenous peoples to reside. Instead, in New Zealand, the general colonial starting point

<sup>21</sup> Paul Callister, Robert Didham & Anna Kivi, *Who are we? The Conceptualisation and Expression of Ethnicity* 4 OFFICIAL STATISTICS RESEARCH SERIES (2009), available at <http://www.statisphere.govt.nz/official-statistics-research/series/vol-4.htm>.

<sup>22</sup> Te Ture Whenua Maori Act 1993 (N.Z.); Section 4 of the Maori Land Act 1993, § 4, para. 21 (N.Z.).

<sup>23</sup> Rose Cuisson Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma* 96 CALIF. L. REV. 801, 805-13 (2008); COHEN’S HANDBOOK ON FEDERAL INDIAN LAW § 3.03 (Neil Jessup Newton ed., 2012).

<sup>24</sup> Some such definitions include the following: “an aboriginal Native of the Colony of New Zealand and shall include all half-castes and their descendants by Natives,” The Native Lands Act 1865, § 2 (N.Z.); “a male aboriginal native inhabitant of New Zealand at the age of twenty-one years and upwards and shall include half-castes,” The Maori Representation Act 1867, § 2 (N.Z.); “an aboriginal native inhabitant of New Zealand, and includes any half-caste living as a member of a Native tribe according to their customs and usages, and any descendants of such a half caste by a Maori woman,” Section 7 of the Qualification of Electors Act 1879 (N.Z.); “an aboriginal inhabitant of New Zealand, and includes half-castes and their descendants by Natives,” Section 148 of the Electoral Act 1893 (N.Z.); “an aboriginal native of New Zealand and includes half-castes and their descendants,” Section 2 of the Native Land Court Act 1894, (N.Z.); “a person belonging to the aboriginal race of New Zealand; and includes a half-caste and a person intermediate in blood between half-castes and persons of pure descent from that race,” Section 2 of the Native Land Act 1931 (N.Z.); Section 2 of the Births and Deaths Registration Act 1951 (N.Z.), and Section 2 of the Maori Affairs Act 1953 (N.Z.).

<sup>25</sup> Moana Jackson, *The Part-Māori Syndrome*, MANA MAG., June-July 2003, at 52, 62.

<sup>26</sup> See Natalie Ramariria Coates, *Kia tū ko Taikakā Let the Heartwood of Māori Identity Stand: An Investigation into the Appropriateness of the Legal Definition of ‘Māori’ for Maori* (Oct. 2008) (unpublished Bachelor of Arts dissertation, University of Otago), available at <http://eprintstetumu.otago.ac.nz/67/>.

<sup>27</sup> One exception to this concerns voting. Māori voters can choose to either register on the General electoral role or the Maori electoral role, where they vote for representatives on a dedicated number of Maori seats. See Section 76(1) of the Electoral Act 1993 (N.Z.).

was that all land was Maori land, and such land was available for the British to take for their own settlers' purposes. The flagship moment in founding these early relations derives from the signing of a single bilingual treaty, the Treaty of Waitangi.<sup>28</sup> This is the document that the British Crown and many Maori chiefs signed in 1840 stating that, according to the English version, Maori ceded sovereignty to the British Crown but retained full exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties.<sup>29</sup> The Maori language version has some significant translational differences to the English version. According to the Maori version, Maori retained *tino rangatiratanga* (commonly translated as Maori sovereignty, self-determination, chieftainship) over their lands and treasures but otherwise gave *kawanatanga* (governance) rights to the British Crown. Both versions endorsed that the British Crown had the right of pre-emption in regard to Maori land.

Less than twenty years after the treaty was signed, the British Crown had acquired most of the land in the South Island and the lower part of the North Island (constituting about sixty percent of New Zealand's land mass and where about ten percent of Maori lived).<sup>30</sup> In the 1860s, Parliament enacted legislation enabling the acquisition of most of the remaining lands in the North Island through outright confiscation and the more subtle but equally successful waiver of the British Crown's right of pre-emption in favor of the creation of Maori freehold land titles.<sup>31</sup> The Native Land Court was established with the primary purpose of encouraging Maori landowners to

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<sup>28</sup> Note that the Maori language began to be presented in written form as early as 1814. The first book to be written in the Maori language was THOMAS KENDALL, *A KORAO NO NEW ZEALAND; OR, THE NEW ZEALANDERS' FIRST BOOK: BEING AN ATTEMPT TO COMPOSE SOME LESSONS FOR THE INSTRUCTION OF THE NATIVES* (1815). See PARLIAMENTARY LIBRARY, *THE MĀORI LANGUAGE: SELECTED EVENTS 1800-2010* (Dec. 16, 2010), available at <http://www.parliament.nz/NR/rdonlyres/CAFFFF6F-70F6-4A82-99D5-C7D007312D00/177773/MaoriLanguage2013.pdf>; T. M. Hocken, *Some Account of the Beginnings of Literature in New Zealand: Part I, the Maori Section*, in 33 *TRANSACTIONS AND PROCEEDINGS OF THE ROYAL SOCIETY OF NEW ZEALAND 1868-1961* 472 (1900), available at [http://rsnz.natlib.govt.nz/volume/rsnz\\_33/rsnz\\_33\\_00\\_007510.pdf](http://rsnz.natlib.govt.nz/volume/rsnz_33/rsnz_33_00_007510.pdf); and JUDITH BINNEY, *THE LEGACY OF GUILT: A LIFE OF THOMAS KENDALL* 57, 63, 175-176 (2005).

<sup>29</sup> To view a copy of the Treaty of Waitangi, see Treaty of Waitangi Act 1975 First Schedule, (N.Z.). For discussion on the Treaty see CLAUDIA ORANGE, *THE TREATY OF WAITANGI* (Wellington, 1987).

<sup>30</sup> James Belich, *The Governors and the Maori (1840-72)*, in *THE OXFORD ILLUSTRATED HISTORY OF NEW ZEALAND* 84 (Keith Sinclair ed., 2d ed. 1996). Note that many of these early sales included clauses that promised to set aside some land for reserves, but it was rarely done and even where it was done, Maori were not forced to reside on the reserved lands. See WAITANGI TRIBUNAL, *TE WHANGANUI A TARA ME ONA TAKIWA: REPORT ON THE WELLINGTON DISTRICT*, ch. 8 (2003).

<sup>31</sup> See the now repealed statutes: New Zealand Settlements Act 1863, No. 8 (N.Z.); and Suppression of Rebellion Act 1863, No. 7 (N.Z.). See generally Richard Boast, *The Law and the Maori*, in PETER SPILLER, JEREMY FINN & RICHARD BOAST, *A NEW ZEALAND LEGAL HISTORY* 122 (Brooker's, 2d ed. 2001).



transfer their customary holdings into a freehold title that would then enable them to alienate their lands as they wished.<sup>32</sup> In reality, many owners were forced to sell their lands to pay for financial debt incurred in the transaction process.<sup>33</sup> Today, there is said to be virtually no Maori customary land remaining and less than six percent of the country is held in Maori freehold land titles.<sup>34</sup> Much of this Maori freehold land today is in remote areas and uninhabited by Maori. This colonial experience is obviously different to that of the American Indians, which involved reserves and the consequent discourse of sovereign nations, identity, and reserved rights.<sup>35</sup>

Unlike in the United States, New Zealand has a unicameral legislature where Parliament is supreme and has no formal limits to its law-making power.<sup>36</sup> The country's appellate courts constitute (in order): the High Court, Court of Appeal, and—since 2002—the Supreme Court.<sup>37</sup> Maori, as parties to the Treaty of Waitangi, have no specific constitutional rights to rely on in the courts. This is in part because New Zealand does not have an entrenched formal constitution that recognizes Maori rights. The Treaty of Waitangi is not part of the domestic law of New Zealand.<sup>38</sup> It is commonly said that the Treaty forms part of our informal constitution along with the New Zealand Bill of Rights Act 1990 and the Constitution Act 1986. Therefore, for the judiciary or those acting under the law, the Treaty itself usually only becomes relevant if it has been expressly incorporated into statute.<sup>39</sup> Even so, statutory incorporation of the Treaty of Waitangi has been a relatively recent phenomenon. New Zealand's legal history once endorsed the Treaty of Waitangi “as a simply nullity.”<sup>40</sup> Several statutes

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<sup>32</sup> See the now repealed statutes: Native Lands Act 1862, No. 42 (N.Z.); and Native Lands Act 1865, No. 71 (N.Z.).

<sup>33</sup> See DAVID WILLIAMS, *TE KOOTI TANGO WHENUA: THE NATIVE LAND COURT 1864-1909* (Wellington, Huia Publishers 1999); and Robert J. Miller & Jacinta Ruru, *An Indigenous Lens into Contemporary Law: The Doctrine of Discovery in the United States and New Zealand*, 3 W. VA. L. REV. 111 (2009).

<sup>34</sup> *Id.*

<sup>35</sup> See COHEN'S HANDBOOK ON FEDERAL INDIAN LAW, *supra* note 23.

<sup>36</sup> Some recent general comparative work on the United States and New Zealand has been conducted. See generally DAVID HACKETT FISCHER, *FAIRNESS AND FREEDOM: A HISTORY OF TWO OPEN SOCIETIES: NEW ZEALAND AND THE UNITED STATES* (2012).

<sup>37</sup> See Supreme Court Act 2003 (N.Z.). Prior to 2002, the Privy Council was New Zealand's last judicial bastion.

<sup>38</sup> To better understand New Zealand's constitutional system, see PHILLIP JOSEPH, *CONSTITUTIONAL & ADMINISTRATIVE LAW IN NEW ZEALAND* (3d ed. 2007); see also Matthew S.R. Palmer, *Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution*, 29 DALHOUSIE L.J. 1, 1 (2006).

<sup>39</sup> *Hoani Te Heuheu Tukino v. Aotea Dist. Maori Land Bd.* [1941] NZLR 591 (P.C.).

<sup>40</sup> *Wi Parata v Bishop of Wellington* [1877] 3 NZLR (NS) 72 (S.C.).

now reference the Treaty, including the main statute that regulates rights to water—the Resource Management Act 1991, discussed later in this article.

Since the 1860s Maori have had guaranteed representation in the House of Representatives<sup>41</sup> with four electoral seats set aside for Maori voters.<sup>42</sup> It was not until 1975 that Maori had the choice to enroll in either the Maori or the general roll.<sup>43</sup> Since the 1990s, when the country moved from a first-past-the-post to a mixed-member proportional voting system, the Maori seats have been adjusted to reflect the number of persons enrolled in the Maori seats. There are currently seven Maori seats, and an increasing number of Maori being elected to Parliament on party lists, representing the spectrum of political ideologies. The Maori Party (first established in 2004) has a confidence and supply agreement with the National Party that currently leads government.<sup>44</sup>

In 2010, the New Zealand government announced that it supports, with conditions, the Declaration of the Rights on Indigenous Peoples.<sup>45</sup> Article 25 of the Declaration specifically mentions water: “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.” But this Declaration is not binding on our domestic courts because it is not a binding instrument in international law and also because most international instruments are not binding in New Zealand unless Parliament legislates them. The constitutional principle, to repeat, is one that positions Parliament as supreme. Thus, Maori have no general constitutional rights to water.

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<sup>41</sup> The Parliament of New Zealand has two parts. One is the head of state, Queen Elizabeth II, who is represented by the Governor-General. The other part is the House of Representatives. This comprises members of Parliament who are elected every third year.

<sup>42</sup> Maori Representation Act 1987 (N.Z.). For insight into the history of the Maori seats, see Andrew Geddis, *A Dual Track Democracy? The Symbolic Role of the Maori Seats in New Zealand's Electoral System*, 5 *ELECTION L.J.* 347 (2006).

<sup>43</sup> Section 2 of the Electoral Amendment Act 1975 (N.Z.) (repealing the previous definition in section 2 of the Electoral Act 1956, and enabling any Maori, under section 41, no matter what level of blood-quantum, to choose to register on either the General or Maori electoral roles).

<sup>44</sup> For information about this Party, including this agreement, see the Maori Party website at <http://www.maoriparty.org/>.

<sup>45</sup> Media Release, Hon. Dr. Pita Sharples, Min. of Maori Affairs, Supporting UN Declaration Restores NZ's Mana (Apr. 20, 2010), available at <http://www.beehive.govt.nz/release/supporting-un-declaration-restores-nz039s-mana>. For a discussion on New Zealand's position towards the Declaration, see Jacinta Ruru, *Finding Support for a Changed Property Discourse for Aotearoa New Zealand in the United Nations Declaration on the Rights of Indigenous Peoples*, 15 *LEWIS & CLARK L. REV.* 951 (2011). Note that the United States now supports the Declaration. See Barack Obama, President of the U.S., Remarks by the President at the White House Tribal Nations Conference (Dec. 16, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference>.

Nonetheless, there is some domestic statutory recognition of the relationship Maori have with water, as is now explored.

### III. Overview Of Water Law Regulation

The central statute that manages the use of water in New Zealand is the Resource Management Act 1991 (“RMA”).<sup>46</sup> The RMA is the pre-eminent natural resources statute.<sup>47</sup> It puts forward an all-encompassing regime for the sustainable management of land, air, and water.<sup>48</sup> Central government retains some responsibility to influence this regime, primarily through setting national environmental standards, national policy standards, and the New Zealand coastal policy statement.<sup>49</sup> However, day-to-day control is vested in regional government and territorial authorities.<sup>50</sup> These bodies prepare plans that contain rules concerning the use of land, air, and water where appropriate, and stipulate when and where proposed activities may require resource consents permitting use. The RMA requires that these decision-makers and the courts have some level of regard for Maori including their relationship with water as is now briefly explained.

The common starting point 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 contravenes a rule in a regional, or regional coastal, plan.<sup>51</sup> The RMA gives regional and local councils the power to assert rules and guidelines for taking, using, damming, and diverting freshwater.<sup>52</sup> 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.<sup>53</sup> The councils’ functions also include control over taking, using, damming, and diverting of water for the purposes of setting maximum and minimum, and controlling the range of change, of water levels and flows.<sup>54</sup> Regional councils need to control

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<sup>46</sup> Other statutes are also relevant. *See, e.g.*, Environment Act 1986 (N.Z.); Conservation Act 1987 (N.Z.); Fisheries Act 1996 (N.Z.); Maori Fisheries Act 2004 (N.Z.).

<sup>47</sup> D.P. Grinlinton, *Contemporary Environmental Law in New Zealand*, in ENVIRONMENTAL LAW FOR A SUSTAINABLE SOCIETY 19 (K. Bosselmann & D. P. Grinlinton eds., 2002); ENVIRONMENTAL AND RESOURCE MANAGEMENT LAW (D. Nolan ed., 3d ed. 2005).

<sup>48</sup> *See* RMA § 5.

<sup>49</sup> *Id.* §§ 24-29A, 43-58A.

<sup>50</sup> *See* RMA §§ 30-31.

<sup>51</sup> *Id.* §§ 9-23; *see also* Karen N. Scott, *From the Lakes to the Oceans: Reforming Water Resource Management Regimes in New Zealand*, 17 J. WATER L. 231 (2006).

<sup>52</sup> RMA § 14. But note the exception in Canterbury. *See supra* note 10.

<sup>53</sup> RMA § 30(1)(c) (ii) and (iii).

<sup>54</sup> RMA § 30(1)(e).

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.<sup>55</sup>

Water regulation differs in the United States. In the United States, the allocation of water is for the states and not for the federal government to determine.<sup>56</sup> Thus, no one statute such as the RMA exists. Two different regional state approaches have emerged in the United States to regulate water.<sup>57</sup> In the eastern states, a riparian system whereby water rights attach to the land adjoining bodies of water dominates. The riparian landowner has the right to a reasonable use of the water. If water supply is short the available supply is distributed equitably among all the riparian owners. In the western states a prior appropriation system operates whereby one can acquire a right to use water for a beneficial use and it is irrelevant if that person owns the land adjoining the water source. If water supply is short, then the rights to use the available supply are determined according to the date of acquisition of the right to take water.<sup>58</sup> The prior appropriation system is similar (but not the same) to the New Zealand regime. The first in time, first in right principle shares characteristics with New Zealand's first in time water regulation regime under the RMA. Unlike in the United States, there is no comparable Indian reserved water rights doctrine.<sup>59</sup> Owners of

<sup>55</sup> RMA § 14(3)(b)-(e).

<sup>56</sup> See e.g., A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES (C. Boardman ed., 1988); JOSEPH L. SAX, BARTON H. THOMPSON, JR., JOHN D. LESHY, & ROBERT H. ABRAMS, LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS (4th ed. 2006); DAVID H. GETCHES, WATER LAW IN A NUTSHELL (4th ed. 2009); ROBERT E. BECK, WATERS AND WATER RIGHTS (Michie, 3d ed. 2010); and Kali Murray, *Changing Conceptions of Water in the Law*, 95 MARQ. L. REV. 1 (2011).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> For more information about American Indian's claims to water, see THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS: THE WINTERS CENTENNIAL (Barbara Cosens & Judith V. Royster eds., 2012); David H. Getches, *Defending Indigenous Water Rights with the Laws of a Dominant Culture: The Case of the United States*, in LIQUID RELATIONS: CONTESTED WATER RIGHTS AND LEGAL COMPLEXITY 44 (Dik Roth, Rutgerd Boelens & Margreet Zwarteveen eds., 2005); Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 CALIF. L. REV. 1133 (2010); Hope M. Babcock, *Reserved Indian Water Rights in Riparian Jurisdictions: Water, Water Everywhere, Perhaps Some Drops for Us?*, 91 CORNELL L. REV. 1203 (2006); Charles Carvell, *Indian Reserved Water Rights: Impending Conflict or Coming Rapprochement Between the State of North Dakota and North Dakota Indian Tribes*, 85 N.D. L. REV. 1 (2009); Sean M. Hanlon, *A Non-Indian Entity Is Polluting Indian Waters: "Water" Your Rights To The Waters, And "Water" Ya Gonna Do About It?*, 69 MONT. L. REV. 173 (2008); A. Dan Tarlock, *Tribal Justice and Property Rights: The Evolution of Winters v. United States*, 50 NAT. RESOURCES J. 471 (2010). Some comparative work between the United States and New Zealand on Indigenous rights to water has been conducted. See, e.g., Lloyd Burton & Chris Cocklin, *Water Resource Management and Environmental Policy Reform in New Zealand: Regionalism, Allocation, and Indigenous Relations (Part 1)*, 7 COLO. J. INT'L ENVTL. L. & POL'Y 75 (1996); Lloyd Burton & Chris Cocklin, *Water Resource Management and Environmental Policy Reform in New Zealand: Regionalism, Allocation, and*

Maori freehold land have no special rights to water adjoining their lands. The only recognized rights to date that Maori have to water are those found in legislation, namely the RMA and Treaty of Waitangi claim settlement statutes.

In formulating district and regional plan rules and issuing resource consents, the RMA directs local authorities to recognize 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 recognize and provide for matters of national importance, including the relationship of Maori and their culture and traditions with water. 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 recogni[z]e 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;

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*Indigenous Relations (Part 2)*, 7 COLO. J. INT'L ENVTL. L. & POL'Y 331 (1996); Melanie Durette, *A Comparative Approach to Indigenous Legal Rights to Freshwater: Key Lessons for Australia from the United States, Canada and New Zealand*, 27 ENVTL. PLAN. L.J. 296 (2010).

- (f) The protection of historic heritage from inappropriate subdivision, use, and development;
- (g) The protection of recogni[z]ed 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).<sup>60</sup> 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.

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<sup>60</sup> 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.” See Section 2 Resource Management Act 1991.

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 Maori to voice their concerns relating to the use of fresh water. In addition, several other sections in the RMA create mandatory requirements on local authorities to listen to Maori. For example, in 2003, the RMA was amended to direct that a regional council, when preparing or changing a regional policy statement, must “take into account any relevant planning document recognized 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.”<sup>61</sup>

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

- (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 recogni[z]ed 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 Maori 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 tribal authority.<sup>62</sup> The RMA also enables a local authority to make a joint management agreement with a tribal authority and group that represents sub-tribes for the purposes

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<sup>61</sup> RMA § 61(2A)(a) (inserted by section 24(2) of the Resource Management Amendment Act 2003 (N.Z.)). Note that a similar direction exists for territorial authorities. *See* RMA § 74(2A)(a) (inserted by section 31(2) the Resource Management Amendment Act 2003). Note that section 2 of the RMA defines an iwi authority as “the authority which represents an iwi and which is recogni[z]ed by that iwi as having authority to do so.” Section 2 Resource Management Act 1991.

<sup>62</sup> *Id.* § 32(2).

of the RMA.<sup>63</sup> Some of the new treaty claim settlement legislation utilizes these options within the RMA in regard to water, as will be discussed later in this article.

Hence, the RMA provides a legal basis for Maori interests to be considered in making decisions about the use of water. But the base has done little to significantly protect Maori interests. Since the enactment of the RMA in 1991, there have been about twenty instances where Maori, as objectors, have appealed council decisions that approved resource consents to take water, discharge wastewater into water, or dam water.<sup>64</sup> 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 most of these cases, Maori have lost—sometimes outright, sometimes partially—where for example the duration for the resource consent has been reduced in accordance with some of the concerns raised by Maori.<sup>65</sup>

The Environment Court hears appeals relating to the issuing of resource consents; thereafter appeals are restricted to points of law to the higher courts.<sup>66</sup> The most recent Environment Court decision concerning Maori and water illustrates the frustration that Maori often experience in these cases. In *Wakatu Inc v. Tasman District Council*,<sup>67</sup> the Wakatu Incorporation and other Maori tribal groups appealed a resource consent issued by the Tasman District Council to permit the local authority to take a large amount of groundwater per day from an aquifer hydraulically connected to the Motueka River to provide for a community water scheme. The scheme would supply piped-water to unreticulated homes in the wider region. Maori opposed the proposal because they believed the taking of water from one catchment and using it in another “would have significant impacts upon the mauri [life force] of the river.”<sup>68</sup> The Council agreed that Maori valued the Motueka River as a treasure and ancestor, and they have “kaitiaki [guardian] responsibilities to protect the mauri and mana [authority] of the river.”<sup>69</sup> The dispute was whether the use of the water

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<sup>63</sup> *Id.* § 36B. See also §§ 36C-36E. The Local Government Act 2002 (N.Z.) similarly requires local authorities to have a certain level of regard to Maori and the Treaty of Waitangi.

<sup>64</sup> For a discussion of these cases, see Jacinta Ruru, *Undefined And Unresolved: Exploring Indigenous Rights In New Zealand's Freshwater Legal Regime*, 20 J. WATER L. 236, 238-240 (2010).

<sup>65</sup> *Id.*

<sup>66</sup> For an excellent insight into the workings of the Environment Court, see Kenneth Palmer, *Reflections on the History and Role of the Environment Court in New Zealand*, 27 ENVTL. & PLAN. L.J. 69 (2010).

<sup>67</sup> *Wakatu Inc v Tasman District Council* [2012] NZEnvC 75.

<sup>68</sup> *Id.* at para. 4.

<sup>69</sup> *Id.* at para. 58.



would affect the life force of the river. The Council argued no; Maori of this region said yes; or as the Environment Court framed it, “What is essentially at issue is whether in the absence of any physical effect on the river that is more than negligible, there can be a spiritual effect on the mauri of the river, or on the relationship of the tangata whenua with it.”<sup>70</sup>

The case addressed the Maori law about transferring water between catchments and “whether any broad principle in tikanga [Maori law] could be applied to a new situation enabled by more advanced technology,”<sup>71</sup> namely pipes. The Court concluded in favor of the resource consent (thus against Maori) by resolving that any spiritual or metaphysical effects could be addressed by requiring the Council to establish a Maori “consultation group convened regularly by the Council to consider matters relating to the exercise and monitoring of the consent.”<sup>72</sup>

The Government is aware of general Maori dissatisfaction with water governance and, in 2009, accepted that Maori interests in water were “undefined and unresolved.”<sup>73</sup> For example, the Government’s Fresh Start for Fresh Water policy program, first launched in 2009, signaled a new strategy for water governance and acknowledged the need to address Maori interests in water.<sup>74</sup> Part of the initiative included establishing the Land and Water Forum that brings together representatives from a range of industry groups, electricity generators, environmental and recreational non-governmental organizations, Maori tribes, scientists, and other organizations with a stake in freshwater and land management.<sup>75</sup> The Forum’s first report, published in 2010, accepted that “[w]ater is a *taonga* [treasure] which is central to Maori life . . . The obligation to protect freshwater and to maintain and express the spiritual and ancestral relationship with freshwater so as to leave a worthy inheritance for future generations is fundamental to *iwi* [tribal] identity.”<sup>76</sup>

Moreover, the inaugural National Policy Statement for Freshwater Management 2011 records as a key objective:

To provide for the involvement of *iwi* and *hapu*, and to ensure that *tangata whenua* values and interests are identified and

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at para. 65.

<sup>72</sup> *Id.* at para. 74.

<sup>73</sup> CABINET, *supra* note 19, at cl. 18b.

<sup>74</sup> *Id.* at paras. 1, 18, 25, 46. Note that the program was renamed Fresh Start for Fresh Water in 2011. See *Freshwater Reform: Fresh Start for Fresh Water*, MINISTRY FOR THE ENVIRONMENT (Nov. 15, 2012), <http://www.mfe.govt.nz/issues/water/freshwater/fresh-start-for-fresh-water/>.

<sup>75</sup> For information about this Forum, see its website at <http://www.landandwater.org.nz/>.

<sup>76</sup> REPORT OF THE LAND & WATER FORUM, *supra* note 18, at 7, 9.

reflected in the management of fresh water including associated ecosystems, and decision-making regarding freshwater planning, including on how all other objectives of this national policy statement are given effect to.<sup>77</sup>

The Fresh Start for Fresh Water work program accepts the need to negotiate with Maori. The program records the Government's preference to converse with the Iwi Leaders Group (a group established in 2005 that consists of tribal chairpersons):

Reform will not be achievable without *iwi*/Maori buy-in. To meet Treaty obligations and unlock the potential of alternative allocation regimes, issues relating to *iwi* rights and interests need to be resolved. Although a wider discussion with Maori is required, the Iwi Leaders Group has been an important partner in the policy process. Its mandate for cooperative engagement with the Crown may be challenged unless there is meaningful discussion. This will require conversation between *iwi* leaders and Ministers alongside improving *iwi* involvement in regional council decision-making processes. The reforms will also need to protect the arrangements already agreed upon through the Treaty settlements process.<sup>78</sup>

This article now turns to focus on the significant contemporary cultural redress Treaty settlements.

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<sup>77</sup> N.Z. GOV'T, *supra* note 11, Objective D1, at 10. National policy statements are instruments drafted and implemented by Ministers of the New Zealand Crown under the RMA. Their purpose "is to state objectives and policies for matters of national significance that are relevant to achieving the purpose of the [RMA]." National policy statements are available to help local authorities decide how competing national benefits and local costs should be balanced. Local authorities must recognize relevant statements and implement them in their plans. *See* Sections 45-55 of the Resource Management Act 1991.

<sup>78</sup> THE NATURAL RESOURCES SECTOR BRIEFING FOR INCOMING MINISTERS 7-8 (Dec. 2011), available at <http://www.mfe.govt.nz/publications/about/briefing-incoming-minister-2011/> (prepared collectively by government agencies concerned with natural resources and the environment). Note that this aspiration was included in the original implementation work plan. The Cabinet Paper that launched the implementation of the program stated:

... [T]hat there is a need to make real progress in the unresolved area of Māori rights and interests in water, and that while wider engagement with Māori will also be necessary, the issues would be progressed in the first instance through a group of *iwi* leaders ("Iwi Leaders Group") and their advisors ("iwi advisors") [references omitted].

*See* CABINET, IMPLEMENTING THE NEW START FOR FRESH WATER: PROPOSED OFFICIALS' WORK PROGRAMME, cl. 13 (June 2009), available at <http://www.mfe.govt.nz/issues/water/freshwater/new-start-for-fresh-water-paper.html>. For more information on the Iwi Leaders Group, see *Kaupapa*, IWI CHAIRS FORUM <http://www.iwichairs.maori.nz/Kaupapa/> (last visited Feb. 11, 2013); Press Release, Freshwater Iwi Leaders Grp., Iwi Leaders Group receives unanimous support (Sept. 14, 2012), <http://www.scoop.co.nz/stories/PO1209/S00203/iwi-leaders-group-receives-unanimous-support.htm>.

#### IV. Three Cultural Redress Case Studies

The establishment of the Waitangi Tribunal in 1975, and its extended jurisdiction in 1985 to report on historical claims dating back to 1840, signifies that the Crown now accepted that “the historical grievances of Maori about Crown actions that harmed *whanau*, *hapu* and *iwi* are real.”<sup>79</sup> The Waitangi Tribunal’s work has been “at the forefront of a nation coming painfully to terms with its past for the first time.”<sup>80</sup> It is symbolic of biculturalism, appointing both Maori and non-Maori as members, and comfortable in both Maori and Pakeha (European) environments. The Tribunal has released numerous reports on tribe-region specific claims alleging historical breaches in the South Island, North Island, and Chatham Islands, and has reported on an array of generic issues ranging from the use of the Maori language, customary fishing, to the allocation of radio frequencies, petroleum, aquaculture, and water.<sup>81</sup> Of the generic claims that it has recommended for government action, in some instances the government has accepted such claims and enacted appropriate legislation (for example, the Maori Language Act 1987 and the Maori Commercial Aquaculture Claims Settlement Act 2004), but denied several others (for example, the reports on petroleum, and the foreshore and seabed).<sup>82</sup>

In regard to historical claims,<sup>83</sup> the Crown’s response has been to engage in a “fair and final” settlement process. The Crown does not require claimants to go to the Tribunal first, but many claimants find value in doing so. The settlement process itself is conducted through the Office of Treaty Settlements as a separate unit within the Ministry of Justice. There are five steps in the claims process encompassing several preliminary agreements, often including terms of negotiation, agreement in principle, deed of settlement, and finally, settlement legislation.<sup>84</sup> The settlements aim to

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<sup>79</sup> Treaty of Waitangi Act 1975 (N.Z.). See OFFICE OF TREATY SETTLEMENTS, KA TIKA A MURI, KA TIKA A MUA: HEALING THE PAST, BUILDING A FUTURE 83 (2d ed. 2002), available at [www.ots.govt.nz](http://www.ots.govt.nz).

<sup>80</sup> Paul Hamer, *A Quarter-Century of the Waitangi Tribunal: Responding to the Challenge*, in THE WAITANGI TRIBUNAL: TE ROOPU WHAKAMANA I TE TIRITI O WAITANGI 3, 6 (Janine Hayward & Nicola Wheen eds., 2004).

<sup>81</sup> To view the reports, see the Tribunal’s website at <http://www.waitangi-tribunal.govt.nz>.

<sup>82</sup> WAITANGI TRIBUNAL, THE PETROLEUM REPORT (2003); WAITANGI TRIBUNAL, REPORT ON THE CROWN’S FORESHORE AND SEABED POLICY (2004).

<sup>83</sup> Defined as claims arising from actions or omissions by or on behalf of the Crown or by or under legislation on or before September 21, 1992.

<sup>84</sup> See OFFICE OF TREATY SETTLEMENTS, *supra* note 79. For an insight into tribal governance entities, see N.Z. L. COMM’N., WAKA UMANGA: A PROPOSED LAW FOR MAORI GOVERNANCE ENTITIES (2006), available at <http://www.lawcom.govt.nz/project/maori-legal-entities/publication/report/2006/waka-umanga-proposed-law-maori-governance-entit>; Waka Umanga (Maori Corporations) Bill 2007, No. 175-2 (N.Z.) (now discharged); Meredith K. Gibbs, *What Structures are Appropriate to Receive Treaty of*

provide the foundation for a new and continuing relationship between the Crown and the claimant group based on the Treaty of Waitangi principles. Settlements thus contain Crown apologies of wrongs done, financial and commercial redress, and cultural redress. Cultural redress seeks to recognize the claimant group's spiritual, cultural, historical, or traditional associations with the natural environment, often through creating opportunities for Maori to be involved in management decision-making of the natural resource in question.

There have been two nationally significant pan-tribal settlements to date: one concerns commercial fisheries, and gives Maori cash compensation, fifty percent shareholding in Sealord Products Limited, ten percent of fish stocks introduced into the quota management system in 1986, and twenty percent of all new stock brought into the system thereafter;<sup>85</sup> the other concerns central North Island forestry, and gives Maori cash compensation and ownership of large forests.<sup>86</sup> In addition, more than twenty tribal groups have now received redress.<sup>87</sup> Despite these successes, several Crown-set parameters have determined the scope of negotiations that serve to undermine some of this progress: the Crown “strongly prefers to negotiate claims with large natural groupings rather than individual whanau and hapu,”<sup>88</sup> aspires to settle all grievances within a tight budget and

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*Waitangi Settlement Assets?*, 21 N.Z. UNIV. L. REV. 197 (2004); and Robert Joseph, *Contemporary Maori Governance: New Era or New Error?*, 22 N.Z. UNIV. L. REV. 628 (2007).

<sup>85</sup> See Treaty of Waitangi (Fisheries Claim) Settlement Act 1992 (N.Z.) and Maori Fisheries Act 2004 (N.Z.). For commentary on the settlement and legislation see Te Ohu Kaimoana's website: TE OHU KAIMOANA, <http://teohu.maori.nz/index.htm> (last visited Sept. 27, 2012).

<sup>86</sup> Central North Island Forests Land Collective Settlement Act 2008 (N.Z.). For newspaper coverage, see Fairfax NZ News, *Treelord Treaty Deal 'Could be done in June'*, STUFF.CO.NZ (Jan. 5, 2008), [www.stuff.co.nz/4505192a8153.html](http://www.stuff.co.nz/4505192a8153.html).

<sup>87</sup> Completed historical settlements have been made with the following tribes (listed in order of most recent first): Ngāti Manawa (\$12,207,780); Ngāti Whare (\$9,568,260); Ngāti Porou (\$90 million); Ngāti Pahauwera (\$20 million); Ngāti Apa (North Island) (\$16 million); Taranaki Whanui ki Te Upoko o Te Ika (\$25 million); Central North Island Forests Iwi Collective (\$161 million, on account against comprehensive settlements with members of the Collective); Affiliate Te Arawa Iwi and Hapu (\$38.6 million); Te Roroa (\$9.5 million); Ngati Mutunga (\$14.9 million); Te Arawa (Lakes) (\$2.7 million, plus \$7.3 million to capitalize the annuity Te Arawa received from the Crown and address any remaining annuity issues); Ngaa Rauru Kiihahi (\$31 million); Tuwharetoa (Bay of Plenty) (\$10.5 million); Ngati Awa (\$42.39 million); Ngati Tama (\$14.5 million); Ngati Ruanui (\$41 million); Te Uri o Hau (\$15.6 million); Pouakani (\$2.65 million); Ngati Turangitukua (\$5 million); Ngāi Tahu (\$170 million); Waikato/Tainui Raupatu (\$170 million); and pan-iwi Commercial Fisheries (\$170 million). See *Claims Progress*, OFFICE OF TREATY SETTLEMENTS (Jan. 9, 2013), <http://nz01.terabyte.co.nz/ots/fb.asp?url=livearticle.asp?ArtID=-1243035403>. These settlements have been enacted in legislation. See Sections 45-55 Resource Management Act 1991, *supra* note 77. The Crown has agreed to settlements for the following parties, but these settlements are not yet enacted in legislation: Te Maunga (\$129,032); Rotoma (\$43,931); Waimakuku (\$375,000); Ngati Whakaue (\$5.21 million); Hauai (\$715,682); Ngati Rangiteaorere (\$760,000); and Waitomo (\$1 million loan).

<sup>88</sup> OFFICE OF TREATY SETTLEMENTS, *supra* note 79, at 32. Note cross-claim boundary disputes are often at issue. See, e.g., *N.Z. Maori Council v. Att'y Gen.*, [2007] NZCA 269; *Te Runanga o Ngai Tahu v.*

timeframe,<sup>89</sup> and mostly refuses to negotiate Maori ownership of natural resources including freshwater.

Many of the tribal settlements recognize the importance of freshwater to Maori identity, health, and wellbeing.<sup>90</sup> These settlement statutes provide an additional avenue for Maori to advance their interests and connection to water than that offered through the RMA. These water redress settlements are now case-studied.

#### A. *Case Study One: Te Arawa Lakes*

In 2006, Parliament enacted the first Treaty claim settlement statute focused entirely on water: Te Arawa Lakes Settlement Act 2006.<sup>91</sup> This Act recognizes the significant relationship between the North Island tribe Te Arawa and fourteen lakes that lie within the Te Arawa traditional geographical boundaries.<sup>92</sup> These lakes are situated in and around Rotorua and have, for more than a century, been a major international and national tourist destination. The Act settles Te Arawa historical claims to these lakes; in doing so, it records a Crown apology to Te Arawa for past wrongdoings, vests the ownership of the lakebeds in Te Arawa, and establishes new relationships between Te Arawa and other government official bodies that have responsibility for the lakes. While the mechanisms used in this Act were not nationally novel—in other regions, other statutes had already

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Waitangi Tribunal [2001] 3 NZLR 87 (H.C.). See also WAITANGI TRIBUNAL, THE REPORT ON THE IMPACT OF THE CROWN'S TREATY SETTLEMENT POLICY ON TE ARAWA WAKA (2007); WAITANGI TRIBUNAL, TĀMAKI MAKARAU SETTLEMENT PROCESS REPORT (2007).

<sup>89</sup> See Section 6AA of the Treaty of Waitangi Act 1975 (N.Z.). This section was inserted by Section 6 of the Treaty of Waitangi Amendment Act 2006 (N.Z.).

<sup>90</sup> These are: Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008 (N.Z.); Central North Island Forests Land Collective Settlement Act 2008 (N.Z.); Maori Commercial Aquaculture Claims Settlement Act 2004 (N.Z.); Maraeroa A and B Blocks Claims Settlement Act 2012 (N.Z.); Ngāa Rauru Kiihahi Claims Settlement Act 2005 (N.Z.); Ngāi Tahu Claims Settlement Act 1998 (N.Z.); Ngāi Tāmanuhiri Claims Settlement Act 2012 (N.Z.); Ngāti Apa (North Island) Claims Settlement Act 2010 (N.Z.); Ngāti Awa Claims Settlement Act 2005 (N.Z.); Ngāti Māhino Claims Settlement Act 2012 (N.Z.); Ngāti Manawa Claims Settlement Act 2012 (N.Z.); Ngāti Mutunga Claims Settlement Act 2006 (N.Z.); Ngāti Pāhauwera Treaty Claims Settlement Act 2012 (N.Z.); Ngāti Porou Claims Settlement Act 2012 (N.Z.); Ngāti Ruanui Claims Settlement Act 2003 (N.Z.); Ngāti Tama Claims Settlement Act 2003 (N.Z.); Ngāti Tūrangitukua Claims Settlement Act 1999 (N.Z.); Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005 (N.Z.); Ngāti Whare Claims Settlement Act 2012 (N.Z.); Port Nicholson Block (Taranaki Whānui ki Te Upoko o Te Ika) Claims Settlement Act 2009 (N.Z.); Pouakani Claims Settlement Act 2000 (N.Z.); Rongowhakaata Claims Settlement Act 2012 (N.Z.); Te Arawa Lakes Settlement Act 2006 (N.Z.); Te Roroa Claims Settlement Act 2008 (N.Z.); Te Uri o Hau Claims Settlement Act 2002 (N.Z.); Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (N.Z.); Waikato Raupatu Claims Settlement Act 1995 (N.Z.); Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (N.Z.); Waitutu Block Settlement Act 1997 (N.Z.); and Whanganui Iwi (Whanganui (Kaitoke) Prison and Northern Part of Whanganui Forest) On-account Settlement Act 2011 (N.Z.).

<sup>91</sup> Te Arawa Lakes Settlement Act 2006 (N.Z.).

<sup>92</sup> See Section 12 of the Te Arawa Lakes Settlement Act 2006 for a definition of “Te Arawa.”

recognized Maori tribal ownership of some lakebeds<sup>93</sup> and had begun processes for joint management opportunities<sup>94</sup>—this Act was the first comprehensive statute to separate redress for water from other resources.<sup>95</sup>

### 1. *Acknowledgements and Apology*

All of the claim settlement statutes begin with extensive Crown apologies to Maori. These apologies include acknowledgements of the importance of land and water to Maori. The apologies are often recorded in Maori and English although some are only in Maori with no English translations. The acknowledgements are sometimes recorded using Maori language features such as *whakatuaki* (proverbs), *waiata* (songs), poetry, and creation stories.

Section 7 of the Te Arawa Lakes Settlement Act is devoted to the Crown acknowledging Te Arawa's relationship with the lakes and past Crown actions that have affected that relationship. Section 7(1) records that the "Crown recogni[z]es that Te Arawa value the Te Arawa lakes and the lakes' resources as taonga. The Crown acknowledges the spiritual, cultural, economic, and traditional importance to Te Arawa of the lakes and the lakes' resources." Some of the past Crown actions noted in the Act include introducing exotic fish species into the lakes that then depleted indigenous species and prosecuting Te Arawa members for fishing without licenses.<sup>96</sup> Section 8 records an apology that runs for five sentences in the Maori language. Section 9 translates this apology into English. Part of the apology reads:

The Crown profoundly regrets that past Crown actions in relation to the lakes have had a negative impact on Te Arawa's rangatiratanga over the lakes and their use of lake resources, and have caused significant grievance within Te Arawa. Accordingly, with this apology, the Crown seeks to atone for these wrongs and begin the process of healing. The Crown

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<sup>93</sup> The bed of Lake Taupo was vested in Ngati Tuwharetoa through a deed dated August 28, 1992. This was superseded by a deed executed on September 10, 2007. See Press Release, Hon. Parekura Horomia, Min. of Māori Affairs, Hon. Chris Carter, Min. of Conservation, Hon. Mark Burton, Min. of Local Gov't, New Deed of Settlement for Lake Taupō (Sept. 10, 2007), available at <http://www.scoop.co.nz/stories/PA0709/S00153.htm>. The bed of Te Waihora (Lake Ellesmere), a large lake in the South Island, was vested in Te Runanga o Ngai Tahu ownership. See Section 168 of the Ngai Tahu Claims Settlement Act 1998.

<sup>94</sup> See, e.g., the provisions for joint management of Te Waihora (Lake Ellesmere) between Te Runanga o Ngai Tahu and the Department of Conservation in Sections 177-181 of the Ngai Tahu Claims Settlement Act 1998.

<sup>95</sup> The later Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008 (N.Z.) records the settlement of historical claims to resources including lands and forestry.

<sup>96</sup> See Section 7(2) of the Te Arawa Lakes Settlement Act 2006, (N.Z.).

looks forward to building a relationship of mutual trust and co-operation with Te Arawa in respect of the lakes.

## 2. *Lakebed Ownership*

Section 23(1) vests the fee simple estate in each Te Arawa lakebed in trust in the trustees of the Te Arawa Lakes Trust.<sup>97</sup> Other sections ensure clarity by explaining that it is only the lakebeds that are vested in Te Arawa. Section 23(2) does this by stating that the Crown retains the ownership of the Crown stratum (defined as the space occupied by water and the space occupied by air above each Te Arawa lakebed)<sup>98</sup> as Crown land. Section 25 states that the vesting of the lakebeds in Te Arawa does not confer any rights or obligations to Te Arawa in relation to the water or the aquatic life in the lakes that float free of the lakebeds. Importantly, Te Arawa is not responsible for the control of the weeds growing from the lakebeds.<sup>99</sup> The Act restricts Te Arawa from permanently alienating the lakebeds including granting or creating a mortgage over the lakebeds, but does allow Te Arawa to grant leases to others to use the lakebeds for not more than thirty-five years, and to grant licenses and easements for any term.<sup>100</sup> All persons still have the same rights to navigate the lakes and recreationally use the lakes as they had before the Act was enacted, and no persons need to seek the consent of Te Arawa in doing so.<sup>101</sup> Moreover, all persons with lawful existing structures in or on the lakebeds may remain and be used or demolished without the consent of Te Arawa and without charge by Te Arawa.<sup>102</sup> The same applies for existing commercial activities.<sup>103</sup> However, all new structures and commercial activities require the written consent of Te Arawa.<sup>104</sup>

### B. *Management Representation, Protocols, and Statutory Acknowledgements*

A core component of the Act is the legislated mandate to establish the new Rotorua Lakes Strategy Group:

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<sup>97</sup> For a definition of the “Te Arawa Lakes Trust,” see Section 11 of the Te Arawa Lakes Settlement Act 2006. For more details, see Deed of Trust of Te Arawa Lakes (Oct. 12, 2009), *available at* <http://www.tearawa.iwi.nz/files/startersite/keydocuments/SignedTrustDeed12October2009FINAL.pdf>.

<sup>98</sup> See Te Arawa Lakes Settlement Act 2006, § 11 for this definition of “Crown stratum.”

<sup>99</sup> *Id.* at Section 26.

<sup>100</sup> *See id.* at Section 24(3).

<sup>101</sup> *See id.* at Sections 31, 32.

<sup>102</sup> *See id.* at Section 33.

<sup>103</sup> *See id.* at Section 36.

<sup>104</sup> *See id.* at Section 41.

The purpose of the Group is to contribute to the promotion of the sustainable management of the Rotorua lakes and their catchments, for the use and enjoyment of present and future generations, while recognising and providing for the traditional relationship of Te Arawa with their ancestral lakes.<sup>105</sup>

The Group has since been established with two members from each the Rotorua District Council, the Bay of Plenty Regional Council and Te Arawa.<sup>106</sup> The Group provides leadership by implementing the Vision of Lakes of Rotorua district 2000 document.<sup>107</sup> Other roles include identifying significant existing and emerging issues for the lakes, and preparing, approving, monitoring, evaluating, and reviewing agreements, policies, and strategies related to the lakes.<sup>108</sup>

The Act also provides for four other cultural redress tools. One concerns the new ability for the Department of Conservation, the Ministry for the Environment, and Minister of Fisheries to set out in protocols how to interact with the Trustees of the Te Arawa Lakes Trust.<sup>109</sup> A second concerns the statutory acknowledgement made by the Crown in acknowledging the associations Te Arawa have with the lakes.<sup>110</sup> The local authorities, the Environment Court and the Historic Places Trust must “have regard to” this statutory acknowledgement.<sup>111</sup> The statement of association captures the vast relationships Te Arawa have with the lakes including the spirits in the lake, the cultural laws relating to the lakes, and uses of the lakes as food cupboards and main highways. Third, the Act records official Maori place

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<sup>105</sup> *Id.* at Section 49.

<sup>106</sup> See the Rotorua Lakes Strategy Group Terms of Reference document adopted by the Bay of Plenty Regional Council on November 11, 2010: ROTORUA TE ARAWA LAKES STRATEGY GROUP, TERMS OF REFERENCE (2010), available at <http://www.boprc.govt.nz/media/73612/rotorua%20te%20arawa%20lakes%20strategy%20group.pdf>.

<sup>107</sup> *See id.* cl. 1.1.5(1).

<sup>108</sup> *See id.* cl. 1.1.5(2)–(7).

<sup>109</sup> *See* Sections 52–58 Te Arawa Lakes Settlement Act 2006 (N.Z.). To view the protocols, see Schedules to the Deed of Settlement of the Te Arawa Lakes Historical Claims and Remaining Annuity Issues, Te Arawa & Arawa Māori Trust Bd.–Her Majesty the Queen in Rt. of N.Z., First Schedule, pt. 2 (Dec. 18, 2004), available at <http://nz01.terabyte.co.nz/ots/DocumentLibrary%5CTeArawaLakesSchedule.pdf>.

<sup>110</sup> Sections 59 through 70 all relate to statutory acknowledgements. To view the statutory acknowledgements, see *id.* sched. 2, pt. 3.

<sup>111</sup> Section 61(1)(a) of the Te Arawa Lakes Settlement Act 2006.



names for the lakes.<sup>112</sup> Fourth, the Act provides customary and commercial fisheries redress.<sup>113</sup>

Overall, the Te Arawa lakes settlement provides the means to build new, more respectful relationships between the local authorities and Te Arawa. This is important and significant. Still the settlement is rather pedestrian because it does not give any real decision-making power to Te Arawa.

### C. *Case Study Two: Waikato and Waipa Rivers*

Heralded as revolutionary are the settlements enacted in 2010 to co-manage the Waikato River—New Zealand’s longest river (425 kilometers): the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 and the Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010. In early 2012 another similar and linked statute was enacted for the Waipa River which is a significant contributor to the Waikato River: Nga Wai o Maniapoto (Waipa River) Act 2012. These three statutes—referred to here as the “co-management river statutes”—present an entirely different water redress package than that offered in the Te Arawa Lakes Settlement Act 2006. These statutes are premised on a vision that seeks to restore the health and wellbeing of the Waikato and Waipa Rivers through providing for cooperative management of the rivers with those tribes that genealogically link to it. These are the first statutes in New Zealand to elevate Maori to co-management roles with the Crown in regard to fresh water. A key component of the vision is to restore and protect the relevant tribal relationships with the two rivers in accordance with their tribal laws “including their economic, social, cultural, and spiritual relationships.”<sup>114</sup> These statutes rely on co-management tools rather than the mechanisms used in the Te Arawa Lakes settlement.

#### 1. *Acknowledgements and Apology*

The co-management river statutes record at length the cultural tribal relationships with the relevant waters, including the tribal belief that the Waikato River is a *tupuna* (ancestor)<sup>115</sup> and the Waipa River is a spiritual

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<sup>112</sup> *Id.* at Section 71. For discussion on the political importance of place naming and how controversial it can be, see Lyn Carter, *The Big ‘H’: Naming and Claiming Landscapes*, in MAKING OUR PLACE: EXPLORING LAND-USE TENSIONS IN NEW ZEALAND 57-69 (Jacinta Ruru, Janet Stephenson & Mick Abbott eds., 2011).

<sup>113</sup> See Sections 72-79 of the Te Arawa Lakes Settlement Act 2006.

<sup>114</sup> Nga Wai o Maniapoto (Waipa River) Act 2012, First Schedule, cl. (3)(c) (N.Z.).

<sup>115</sup> See Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, pmbl. cls. (1) and 17(f), Sections 8(2) and (3), and First Schedule, cl. 1 (N.Z.). For descriptions of tribal relationship with the relevant waters, see pmbl., Sections 8(2) & (3), 56, First Schedule, cls. 2 and 3, and Second Schedule; see

guardian.<sup>116</sup> For example, reproduced below is a large part of the apology and acknowledgment from the Nga Wai o Maniapoto (Waipa River) Act 2012:

*Te Mana o te Awa o Waipa*

(8) The Waipa River is of deep, cultural significance to Maniapoto. It is a *taonga* to Maniapoto and respect for it lies at the heart of their spiritual and physical wellbeing and their tribal identity and culture.

(9) To Maniapoto, the essence and wellbeing of the Waipa is Waiwaia, a spiritual guardian of all things that are the Waipa River. Its importance to Maniapoto is boundless.

(10) To Maniapoto, the Waipa River is a single indivisible entity that flows from *Pekepeke* to its confluence with the Waikato River and includes its waters, banks, bed (and all minerals under it) and its streams, waterways, tributaries, lakes, fisheries, vegetation, floodplains, wetlands, islands, springs, geothermal springs, water column, airspace and substratum as well as its metaphysical elements with its own *mauri*.

(11) Maniapoto have a deep felt obligation to restore, maintain, and protect the quality and integrity of the waters that flow into and form part of the Waipa River for present and future generations and to the care and protection of the *mana tuku iho o Waiwaia*.

(12) To Maniapoto, their relationship with the Waipa River, and their respect for it, gives rise to their responsibilities to protect *Te Mana o Te Wai* and to exercise their *kaitiakitanga* in accordance with their long established *tikanga*.

*Te Mana o te Wai*

(13) *Te Mana o Te Wai* is paramount to Maniapoto. Historically, *Te Mana o Te Wai* was such that it would provide all manner of sustenance to Maniapoto including physical and spiritual nourishment that has over generations maintained the quality and integrity of Maniapoto *marae*, *whanau*, *hapu* and *iwi*.

(14) The obligations are intergenerational and extend to Nga Wai o Maniapoto—all waters within the Maniapoto rohe—whether the waters are above, on, or underground.

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also Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010, First Schedule, (N.Z.); Nga Wai o Maniapoto (Waipa River) Act 2012 pmb., cls. (8)-(16), Sections 4(4) and (11), 7, and First Schedule.

<sup>116</sup> Nga Wai o Maniapoto (Waipa River) Act, pmb., cl. (9) and Section 3.

*Te mana tuku iho o Waiwaia*

(15) The obligation to the care and protection of *te mana tuku iho o Waiwaia* extends to instilling knowledge and understanding within Maniapoto and the Waipa River communities about the nature and history of Waiwaia.

*Te Awa o Waipa–i nga wa o mua*

(16) The relationship between Maniapoto and the Waipa River is historic, intellectual, physical, and spiritual and is expressed by the people of Maniapoto in various ways–

(a) The *awa* was a playground, a place to fish for *inanga* and for tuna, for freshwater crayfish, watercress, taraute and parera. During World War II and rationing, the *awa* was the source of kai. Significant tuna pa structures could be seen if the river level dropped during a dry spell. The 1958 flood changed that.

(b) The Waipa is a sacred river where the *tohi* rituals were performed, where the umbilical rites were observed and where the purification rituals were undertaken.

(c) The river chants its farewells to our departed ones, its murmuring waters bid welcome to our newborn and to our illustrious visitors from afar.

(d) Like an *atua* I wing my way into the heavens above! I gaze down below! There below lies my river Waipa, cutting her way over the breast of my native land. My eyes brim with tears at the vision of splendour, 'tis the love for my river that meanders away. My eyes gaze intently upon the deep pools of the river they are the myriad lairs of Waiwaia; the *atua* who gathers food for the people. The rocks of the river are an easy pillow for my head. The deep stretches of the river are a bed that rejuvenates my spirit and body. I am sustained by the river, by taking the waters of the ancients, drawing the waters from the *atua*, by procuring the very water of life!

(e) The rippling waters are clearly heard by my ears. Within the rippling I hear the murmurs of the past, of days gone, of times long ago! Thus the heart is prompted to proclaim, “The river is an institution of tradition, an institution of knowledge, a festal board of treasured wisdom!”

(f) Waipa she is the life blood of the people. Waipa she is the life blood of the land, verily she is! Indeed she is the unfailing spring of the earth! She is the water that anoints the

thymos of man to bind to the tribe the waters of life that issues forth from the lineage of the *atua*. She is the water that blesses the umbilical cord to ensure the health of the descendants of Maniapoto. 'Tis the water that permanently renders the knot of the navel cord secure and fast.

(g) The source of my river is at the foot of Rangitoto, it is *Te Pekepeke!* Let her flow on she is the *Kauhanga-nui* (the Great passage) the *Kauhanga-roa* (the Long passage)! The waters ploughed by the paddles of the many flotillas of Maniapoto of times passed. Let her flow northwards to where the currents do mingle within the Waikato there before the countenance of my King.

(h) Flow on oh waters to the north and to the west! Go out from *Te Puaha* to *Tangaroa* who lies broken upon the shore, and to the courtyard of *Hine-kirikiri*. Go on! Go on depart for distant place far away!

(i) Describing the likeness of Waiwaia . . . as having an amazing appearance . . . the ripples of the water reflecting in the sun under the moonlight . . . Rainbows that appear in the waterfall . . . But the most important part of Waiwaia is that it is the water itself and without it man could not survive.

*Te Awa o Waipa–i enei ra*

(17) The pollution, degradation, and development of the Waipa River have resulted in the decline of its once rich fisheries and other food sources which had for generations sustained the people of Maniapoto, and their way of life, and their ability to meet their obligations of *manaakitanga*; and the decline has been a source of distress to Maniapoto.

(18) The deterioration of the health of the Waipa River, while the Crown has exercised overall responsibility for the management of the Waipa River, has been a source of distress for the people of Maniapoto.

(19) The acquisition of land along the Waipa River has disassociated the people of Maniapoto from their River. It has led to the flooding of particular culturally significant sites and impeded and altered the natural flow of the Waipa River; this is a further source of distress to Maniapoto.

(20) *Kei enei ra, kua kore haere te mana o nga tupuna, kua ngoikore te mauri o te awa. He ahakoa taku noho patata tonu ki a ia i tenei ra tonu nei, kua kore ahau me aku huanga e haere ki*

*te awa ki te mahi kai, ki te kori, ki te whai oranga wairua ranei.*  
 (21) *Hei whakamutunga ake i enei kupu korekore noa aku, me kaha tatou ki te whakahoki i te oranga tinana, te haringa ngakau, te pikinga wairua ki to tatou nei awa. Pai marire.*<sup>117</sup>

Making a true apology is an essential first step towards reconciliation, and as the above portrays, the Crown has taken this responsibility seriously. The apologies are extensive and respectful, providing a central basis for reconciliation. But one aspect of these apologies provides a clue for why many Maori and the Crown have clashed over water in 2012. This aspect concerns the language of property. Proprietary language is usually contentious between Maori and the Crown and has since come to a head in 2012 in the context of the government legislating for the partial sale of hydro-generating state owned enterprises, as is discussed later in this article.<sup>118</sup> The context for this battle is evident even in these settlement statutes. The river co-management statutes take a neutral stance where they record that both parties believe that they own, or have responsibility, for the river but then “converge in the objective to restore and maintain”<sup>119</sup> the health and wellbeing of the river.<sup>120</sup> These river settlements clearly stipulate that they are concerned with the management aspects of the water, and not the ownership of the water. The river settlements accept that the Crown and the tribes have different views as to the ownership of the water and state that the settlements “are not intended to resolve these differences.”<sup>121</sup> In comparison, while the Te Arawa Deed of Settlement records that Te Arawa believe that they “own” the lakes, the settlement statute is then silent on this aspect but makes clear that it is a full and final settlement.<sup>122</sup> Despite the tension as to ownership, these settlements illustrate how partial reconciliation can occur by focusing on cultural redress namely management.

<sup>117</sup> Nga Wai o Maniapoto (Waipa River) Act, pmb., cls. (8)–(21).

<sup>118</sup> Public Finance (Mixed Ownership Model) Amendment Act 2012 (N.Z.). *See discussion infra* Part IV.

<sup>119</sup> Nga Wai o Maniapoto (Waipa River) Act 2012 pmb., cl. 27 (N.Z.).

<sup>120</sup> *See also* Deed in Relation to a Co-Management Framework for the Waikato River, Raukawa & The Raukawa Settlement Trust—The Sovereign in Rt. of N.Z., cls. 1.2 - 1.4, Dec. 17, 2009, *available at* <http://www.raukawa.org.nz/LinkClick.aspx?fileticket=47mM2r4vSmQ%3D&tabid=413>. Note that the Waikato River settlement records that Waikato-Tainui “possessed” the river. *See* Waikato-Tainui Raupatu Claims (Waikato River) Act 2010 pmb., cl. 3 (N.Z.).

<sup>121</sup> *See* Section 64(1)(b) Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010; *see also* Deed in Relation to a Co-Management Framework for the Waikato River, *supra* note 120, at cl. 1.2 (indicating that the document “does not address nor preclude further discussion about title and ownership”).

<sup>122</sup> Section 15 of the Te Arawa Lakes Settlement Act 2006 (N.Z.).

## 2. *Co-Management Redress*

The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 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.”<sup>123</sup> 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.”<sup>124</sup>

The Waikato River Authority is the new statutory body responsible for setting the primary direction through the vision and strategy for the Waikato River.<sup>125</sup> The Authority consists of ten members, including one member appointed from each of the tribe 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).<sup>126</sup> The Act gives power to the new Waikato River Clean-up Trust. The Trust’s primary objective is “the restoration and protection of the health and wellbeing of the Waikato River for future generations.”<sup>127</sup> The Trust must also prepare a new integrated river management plan, along with relevant central departments, local authorities and other appropriate agencies.<sup>128</sup> The integrated river management plan must include consideration of conservation, fisheries, and regional council components.<sup>129</sup> Moreover, the legislation required the development of a joint management agreement to be in force between each local authority and the Trust.<sup>130</sup>

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<sup>123</sup> Section 5(1) of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act. *See also* Section 5(1) of the Ngati Tuwharetoa, Raukawa, Te Arawa Iwi Waikato River Act 2010 (N.Z.). Note that the Nga Wai o Maniapoto (Waipa River) Act replicates much of the Waikato River settlement. *See* Nga Wai o Maniapoto (Waipa River) Act 2012 (N.Z.).

<sup>124</sup> Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, Second Schedule, cl. 3. Note clause 3 is extensive and lists thirteen objectives; only the first two are reproduced here.

<sup>125</sup> *Id.* at Section 22(2).

<sup>126</sup> *Id.* at Sixth Schedule, cl. 2(1).

<sup>127</sup> *Id.* at Section 32(3).

<sup>128</sup> *Id.* at Section 36(1).

<sup>129</sup> *Id.* at Section 35(3).

<sup>130</sup> *Id.* at Section 41(1). The joint management agreement is now in force. *See* Joint Management Agreement, The Waikato Raupatu River Trust–Waikato Dist. Council, Mar. 23, 2010, *available at* <http://www.waikatodistrict.govt.nz/CMSFiles/37/37ce0ceb-c0c5-4e0d-bbe4-62c14d10eb65.pdf>. For a discussion of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act, see Linda Te Aho,

The river settlement statutes embrace reconciliation and partial restitution. The settlement illustrates one way in which co-management can be achieved within the confines of existing resource management legislation.

*D. Case Study Two: Waikato and Waipa Rivers*

On August 30, 2012, the Whanganui tribe and the Crown entered into an agreement concerning the Whanganui River—a significant river in the North Island and New Zealand’s third longest river.<sup>131</sup> The negotiated agreement is not yet law but it records an intent that is different than the previous water settlements and therefore is worth discussing. The agreement accepts that the Whanganui tribe “view the Whanganui River as a living being, Te Awa Tupua (the whole of the Whanganui River); an indivisible whole incorporating its tributaries and all its physical and metaphysical elements from the mountains to the sea.”<sup>132</sup> On its own, it was not unusual for previous water settlements to also acknowledge specific waters as living ancestors. But this agreement is revolutionary for what it does next: it states that the Crown will enact statutory recognition of Te Awa Tupua “as a legal entity with standing in its own right.”<sup>133</sup> The United States law professor Christopher Stone first championed the idea that natural resources ought to have legal standing in the early 1970s.<sup>134</sup> Even though this idea has been present for some decades, few (if any) governments throughout the world have actually adopted the idea in legislation.<sup>135</sup> New Zealand will do so with the Whanganui River.<sup>136</sup>

One consequence of legally acknowledging the legal personality of the Whanganui River is that the riverbed will be vested in Te Awa Tupua

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*Indigenous Challenges To Enhance Freshwater Governance And Management In New Zealand-The Waikato River Settlement*, 20 J. WATER L. 285, 291 (2010).

<sup>131</sup> For media coverage, see Kate Shuttleworth, *Agreement Entitles Whanganui River to Legal Identity*, N.Z. HERALD, Aug. 30, 2012, available at [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10830586](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10830586), and Sandra Postel, *A River in New Zealand Gets a Legal Voice*, NAT’L GEOGRAPHIC, Sept. 4, 2012, available at <http://newswatch.nationalgeographic.com/2012/09/04/a-river-in-new-zealand-gets-a-legal-voice/>.

<sup>132</sup> Tūhu Wakatupua, Whanganui Iwi–N.Z. Crown, cl. 1.2, Aug. 30, 2012 available at <http://nz01.terabyte.co.nz/ots/DocumentLibrary%5CWhanganuiRiverAgreement.pdf>.

<sup>133</sup> *Id.* at cls. 2.1.2 & 2.6-2.9.

<sup>134</sup> CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? TOWARDS LEGAL RIGHTS FOR NATURAL OBJECTS (1974). James Morris and I have argued that the legal personality idea should be considered for rivers. See Jacinta Ruru & James Morris, *Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples’ Relationships with Water?*, 14 AUSTL. INDIGENOUS L. REV. 49 (2011). Note that the Journal of Human Rights and Environmental Law has published a relevant special issue entitled SHOULD TREES HAVE STANDING?: 40 YEARS ON (Anna Gear ed., 2012).

<sup>135</sup> The only country that I am aware of that has officially embraced a similar related idea is Ecuador whose constitution acknowledges that nature has rights. Ecuador’s constitution can be viewed at <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

<sup>136</sup> See Postel, *supra* note 131.

rather than in a Whanganui tribal entity.<sup>137</sup> A formal Te Pou Tupua (guardian) will be created to “provide the human face of Te Awa Tupua.”<sup>138</sup> Two people will fulfill this guardian role—one appointed by the Crown, the other by the Whanganui tribe.<sup>139</sup> The Te Pou Tupua will “owe its responsibilities to Te Awa Tupua, not the appointors.”<sup>140</sup> The primary functions of the Te Pou Tupua will be to protect the health and wellbeing of the river and speak on behalf of the river.<sup>141</sup>

This agreement signals that law can be used creatively to find redress solutions in the quest for reconciliation. It will mark a new legal era for the Whanganui tribe and the Whanganui River. But the wider public has little to fear from this agreement. The agreement notes that public rights of use and access to the River, existing private rights in the River, and final decision-making functions of local government, will be preserved.<sup>142</sup> This reassurance is in fact common to all the water settlement statutes.<sup>143</sup>

This part of this article has described the three legal mechanisms currently used in seeking reconciliation between the Crown and Maori. They all represent important Crown and Maori negotiations in a contemporary context. Importantly, the agreements provide the means for the partial revival of Maori values and interests in water management. With the government obviously working with Maori to resolve water claims, why then is the country now in a national conflict about Maori rights to water? As discussed here, the current settlements have all addressed water claims within the context of what the government labels cultural redress. But it is the commercial and proprietary redress issue that has ballooned into a national crisis as is now discussed.

#### V. Commercial and Proprietary Redress?

All of the settlement statutes to date concerning water are almost exclusively focused on providing cultural redress options as discussed above.<sup>144</sup> The possibility for large-scale commercial redress for water has

<sup>137</sup> Tūhu Wakatupua, *supra* note 132, at cl. 2.1.3.

<sup>138</sup> *Id.* at cl. 2.20.2.

<sup>139</sup> *Id.* at cl. 2.18.

<sup>140</sup> *Id.* at cl. 2.20.3.

<sup>141</sup> *Id.* at cl. 2.21.1, 2.21.3.

<sup>142</sup> *See id.* at cl. 1.10.

<sup>143</sup> *See* Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, Sections 66, 90, Second Schedule, cl. 2(1) 2010 (N.Z.); Ngati Tuwharetoa, Raukawa, Te Arawa Iwi Waikato River Act 2010, First Schedule, cl. 2(1) (N.Z.); Nga Wai o Maniapoto (Waipa River) Act 2010, First Schedule, cl. 2(1).

<sup>144</sup> There is an exception in the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act. Here, if the owner of the Huntly Power Station wishes to transfer it, or any part of it, to someone other than the New Zealand Crown or a person with a legal right to acquire it, the Waikato River Raupatu Trust has



not occurred because the Crown has refused to negotiate for such redress.<sup>145</sup> The Crown's position is that most natural resources, such as water, are a public good to benefit all New Zealanders and such resources are incapable of being owned.<sup>146</sup> Many Maori tribes challenge these policy positions. On one front, in February 2012, the New Zealand Maori Council<sup>147</sup> along with other sub-tribe co-claimants (and subsequently supported by more than 100 other Maori North Island groups referred to as interested parties) filed two claims with the Waitangi Tribunal arguing that "Maori have unsatisfied or unrecognized proprietary rights in water, which have a commercial aspect, and that they are prejudiced by Crown policies that refuse to recognize those rights or to compensate for the usurpation of those rights for commercial purposes."<sup>148</sup> The Crown accepts that Maori have legitimate rights and interests in water but asserts no one owns water and therefore the best way forward is not to develop a framework for Maori proprietary rights but to strengthen the role and authority of Maori in resource management processes. In March 2012, the Waitangi Tribunal agreed to hear the claim but in two stages. The Tribunal heard under urgency the part of the claim that was most pressing: the government's desire to convert Mighty River Power (a State Owned Enterprise ("SOE")) into a Mixed Ownership Model ("MOM") company by making available for sale up to forty-nine percent of the company's shares in the third quarter of 2012.<sup>149</sup> The Interim Report provides the recommendations for this first stage of the hearing.<sup>150</sup> The Interim Report, apparently truncated but obviously extensive, reaching two-hundred pages with another seventy pages attached as appendices, is a truly

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the right of first refusal. See Sections 81-84 of Waikato River Raupatu Trust. Similarly the trust has the same right of refusal over licenses under the Sections 85-87 of the Crown Minerals Act 1991 (N.Z.).

<sup>145</sup> Under the Office of Treaty Settlements policy, large-scale commercial redress, as well as ownership, is not an option for cultural redress in respect to water. The policy is to provide other mechanisms of redress. This may include iwi specific commercial redress for a particular water resource. See Tania Ott, Deputy Director at the Office of Treaty Settlements, Remarks before the Waitangi Tribunal, Wai 2358 paras. 10-25 (June, 29, 2012) (on file with author). Note here that New Zealand has provided large-scale commercial redress for other natural resources, notably fish. See the Maori Fisheries Act 1989, now repealed and replaced by the Maori Fisheries Act 2004.

<sup>146</sup> There is an exception. All *pounamu*, a type of jade found only in the South Island, is vested in Section 3 of the Ngāi Tahu iwi: Ngāi Tahu (Pounamu Vesting) Act 1997 (N.Z.).

<sup>147</sup> The New Zealand Maori Council was established under Section 17 of the Maori Welfare Act 1962 (N.Z.), now renamed the Maori Community Development Act 1962, to be a body to represent all Maori, and to assist and promote Maori social and economic advancement. See *id.* at Section 18.

<sup>148</sup> See WAITANGI TRIBUNAL, *supra* note 5, at 1.

<sup>149</sup> See Press Release, Rt. Hon. John Key, P.M. of N.Z., Mighty River Power IPO to go ahead early next year (Sept. 3, 2012) available at <http://www.beehive.govt.nz/release/mighty-river-power-ipo-go-ahead-early-next-year>. In order to achieve its desire, the Government has passed two statutes: State Owned Enterprises Amendment Act 2012 (N.Z.) and Public Finance (Mixed Ownership Model) Amendment Act 2012 (N.Z.).

<sup>150</sup> WAITANGI TRIBUNAL, *supra* note 5.

significant report for our country in understanding indigenous restitution. It illustrates that despite the existence of several notable cultural redress water settlements, real reconciliation in a decolonized context will remain elusive until fair, complete and holistic restitution for water grievances is offered. This part of the article thus focuses on the arguments and recommendations arising in this proprietary and commercial claim to water.

A. *The Arguments*

All of the arguments presented to the Tribunal were necessarily sourced in the Treaty of Waitangi.<sup>151</sup> The Maori claimants accepted that the Treaty “gives the Crown *kawanatanga* [governance] rights, including a legitimate role in the management of water resources” but that *tinorangatanga* (Maori sovereignty/chieftainship) is “a standing qualification upon the Crown’s sovereignty.”<sup>152</sup> In comparison, the Crown stressed its own *kawanatanga* right to manage water as a general right but accepted that Maori *kaitiakitanga* (guardianship/stewardship) rights exist in particular water bodies.<sup>153</sup>

The essential Maori argument was that in 1840 Maori had full, undisturbed, and exclusive possession of all water and the closest English cultural equivalent to express this Maori customary authority is “ownership.” The Maori claimants explained: “Maori have little choice but to claim English-style property rights today as the only realistic way to protect their customary rights and relationships with their *taonga*.”<sup>154</sup> The claimants introduced a twelve-point “indicia of ownership” framework for establishing customary proof of ownership:

1. The water resource has been relied upon as a source of food;
2. The water resource has been relied upon as a source of textiles or other materials;
3. The water resource has been relied upon for travel or trade;
4. The water resource has been used in the rituals central to the spiritual life of the *hapu*;
5. The water resource has a *mauri* (life force);

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<sup>151</sup> The Waitangi Tribunal has the exclusive authority to determine the meaning of the Treaty, and to decide issues raised by the differences in the two texts. See the Treaty of Waitangi Act 1975 § 2(1) (N.Z.). These differences are in fact a common feature of many Waitangi Tribunal claims. See Jacinta Ruru, *The Waitangi Tribunal*, in *WEeping WATERS: THE TREATY OF WAITANGI AND CONSTITUTIONAL CHANGE* 127 (Malcolm Mulholland & Veronica Tawhai eds., 2010).

<sup>152</sup> See WAITANGI TRIBUNAL, *supra* note 5, at 40.

<sup>153</sup> *Id.* at 47.

<sup>154</sup> *Id.* at 38.

6. The water resource is celebrated or referred to in *waiata*;
7. The water resource is celebrated or referred to in *whakatauki*;
8. The people have identified *taniwha* as residing in the water resource;
9. The people have exercised *kaitiakitanga* over the water resource;
10. The people have exercised *mana* or *rangatiratanga* over the water resource;
11. Whakapapa identifies a cosmological connection with the water resource; and
12. There is a continuing recognized claim to land or territory in which the resource is situated, and title has been maintained to ‘some, if not all, of the land on (or below) which the water resource sits.’<sup>155</sup>

The Maori interested parties preferred a Maori *kaupapa* (worldview) framework<sup>156</sup> rather than the claimants’ ‘indicia of ownership’ framework because “the rights of indigenous cultures must be judged within their own cultural framework, not that of England, and that this can be accommodated by the common law.”<sup>157</sup> The interested parties had this to say about ownership:

. . . [I]t is not that English-style property rights are offensive to Maori or unknown to Maori, but rather it is offensive that Maori rights should not be considered to have given rise at the very least to English-style property rights. This is because the obligations imposed on Maori as part of their reciprocal relationships with their *taonga* require them to care for those *taonga* (*manakitanga* and *kaitiakitanga*). And such care cannot take place without rights of access, rights to control the access of others, rights to place conditions on access, and the authority to control how the *taonga* (water) will be used. In all of these ways, property rights are essential and the “rights of Maori to their waterways are akin to ownership.”<sup>158</sup>

Moreover, commercial rights are integral to this framework. The interested parties stated that as Europeans began to arrive in the country

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<sup>155</sup> See *id.* at 38.

<sup>156</sup> *Id.* at 42.

<sup>157</sup> *Id.*

<sup>158</sup> WAITANGI TRIBUNAL, *supra* note 5, at 43-44.

Maori began to control “the use of waters as trade routes and even charging fees for the use of water.”<sup>159</sup> The interested parties, in a similar manner to the claimants, emphasized:

. . . [T]he Treaty right of development and the choice of Maori to walk in two worlds: to resist assimilation and protect their matauranga Maori and *tikanga* (knowledge and law) but also to benefit commercially from development.<sup>160</sup>

The Maori claimants argued that any framework for rights recognition and reconciliation must recognize Maori “ownership rights” where it is practical. Maori proprietary rights could include the ability to exclude the public from *wahi tapu* (sacred sites), or to control or veto uses of water.<sup>161</sup> If it is not possible to recognize Maori “ownership rights” because the water resource is used by a power-generating SOE, then the power company must pay compensation for ongoing use of the water and compensation for the loss of use by Maori owners.<sup>162</sup> If it is not possible to recognize Maori “ownership rights” because there is extensive reliance on water by, for example, agriculture or urban drinking supplies, or because the water is so degraded, then Maori still need to be compensated.<sup>163</sup> The interested parties argued that if the Crown proceeds with the share sales on the assumptions that no one owns water and therefore water has a zero value, the government would not be able to provide for rights recognition after the share sales. These assumptions deny the inescapable link that the “value of the shares come from the use of the water.”<sup>164</sup>

The Crown’s essential argument repeated that no one can own water, Maori have rights and interests in water but the full nature and extent of those rights and interests have not yet been defined, and even when defined the Crown will still be able to recognize these rights because the rights are not affected by the partial privatization of power companies.<sup>165</sup> The Crown accepted the claimants’ framework but as “customary indicia of something *other than* ownership.”<sup>166</sup> The Crown asserted that “this process of rights definition is best left to collaboration between iwi and the Crown”—something it believes is already happening with the Iwi Leaders Group in the

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<sup>159</sup> *Id.* at 44.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 113.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> WAITANGI TRIBUNAL, *supra* note 5, at 116.

<sup>165</sup> *Id.* at 45.

<sup>166</sup> *Id.* at 46 (emphasis in original).

Fresh Start for Fresh Water program.<sup>167</sup> The Crown also argued “English-style ownership is not in fact the best English cultural equivalent for Maori rights” and rather the “true and practical expression of Maori rights in respect of environmental matters, including water resources” is *kaitiakitanga*.<sup>168</sup> The Crown denied that the Treaty right of development applies “if the claimants’ position is that ‘iwi-Maori have a proprietary (or other) right to water and this becomes a right to ownership of energy companies based on a notion of a development right.’”<sup>169</sup>

The Crown argued that the sale of minority shares would not compromise the Crown’s capacity to recognize the rights and interests of Maori in water. The Crown stated that it would be a “very serious step” to halt the planned sale of shares in Mighty River Power.<sup>170</sup> The Crown argued that the Tribunal must be guided by principles developed in court cases concerning the Treaty: the Treaty does not unreasonably restrict the right of *kawanatanga*; the Crown’s policy agenda can only be halted if there is a direct nexus between the assets and the Crown’s ability to fulfill its Treaty obligations; and if there are a number of Treaty-compliant options available, the Crown is free to choose which option to pursue.<sup>171</sup> In essence, “the Crown argued that shares are not the right remedy but they can be repurchased if that is what Maori ultimately want.”<sup>172</sup>

### B. *The Tribunal’s Findings*

The Tribunal prefaced its findings by stressing that at this stage the Tribunal is simply being asked “to determine the *nature* of Maori rights at 1840, not *who had the rights*.”<sup>173</sup> The Tribunal favoured the Maori parties’ evidence. The Tribunal held that “te tino rangatiratanga was *more than ownership*: it encompassed the autonomy of hapu to arrange and manage their own affairs in partnership with the Crown.”<sup>174</sup> The Tribunal agreed that both the Maori and English Treaty texts support a finding of ownership

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 47. In fact, the Crown relied heavily on a previous Waitangi Tribunal report on Maori culture and identity that had stressed *kaitiakitanga* for this assertion. See WAITANGI TRIBUNAL, KO AOTEAROA TĒNEI: A REPORT INTO CLAIMS CONCERNING NEW ZEALAND LAW AND POLICY AFFECTING MĀORI CULTURE AND IDENTITY 262 (2011), available at <http://www.waitangi-tribunal.govt.nz/reports/downloadpdf.asp?reportid={BF981901-5B55-441C-A93E-8E84B67B76E9}.pdf>.

<sup>169</sup> WAITANGI TRIBUNAL, *supra* note 5, at 48.

<sup>170</sup> *Id.* at 120.

<sup>171</sup> *Id.* at 121.

<sup>172</sup> *Id.* at 123.

<sup>173</sup> *Id.* at 100 (emphasis in original).

<sup>174</sup> *Id.* (emphasis in original).

at 1840<sup>175</sup> and *tino rangatiratanga* was the closest cultural expression of full-blown ownership in 1840.<sup>176</sup> The Tribunal added that *tino rangatiratanga* is “a standing qualification of the Crown’s kawanatanga”.<sup>177</sup>

The Tribunal stated that the Treaty changed the relationship of Maori with water in three ways. First, the Treaty enabled non-Maori to settle in New Zealand and therefore Maori “consented that settlers would have access to and use of New Zealand’s waters.”<sup>178</sup> Second, the Treaty gave the Crown a right to govern which entails balancing interests of the nation and the environment. But Maori Treaty rights cannot be balanced out of existence.<sup>179</sup> Third, the Treaty created a bicultural nation and thus gave “Maori the option of walking in two worlds,” meaning that “the Treaty conferred a development right on Maori as part of the quid pro quo for accepting settlement.”<sup>180</sup>

The Tribunal noted that Maori owed the Crown the Treaty duties of reasonableness and cooperation and stressed that the Crown owes to Maori the Treaty duties of active protection and redress. The redress duty is relevant not just in addressing historical Treaty breaches but also in present day breaches. The Tribunal stated:

If the claimants and the interested parties have residual proprietary rights (as the case examples suggest that they do), then the Crown’s Treaty duty is to undertake in partnership with Maori an exercise in rights definition, rights recognition, and rights reconciliation.<sup>181</sup>

The Tribunal added:

Our generic finding is that Maori had rights and interests in their water bodies for which the closest English equivalent in 1840 was ownership rights, and that such right were confirmed, guaranteed, and protected by the Treaty of Waitangi, save to the extent that there was an expectation in the Treaty that the waters would be shared with the incoming settlers.<sup>182</sup>

The Tribunal then went on to consider the crux of the claim: will the Crown be in breach of the Treaty of Waitangi if it goes ahead with selling up

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<sup>175</sup> WAITANGI TRIBUNAL, *supra* note 5, at 102.

<sup>176</sup> *Id.* at 103.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 105.

<sup>180</sup> *Id.* at 106.

<sup>181</sup> WAITANGI TRIBUNAL, *supra* note 5, at 107.

<sup>182</sup> *Id.* at 110.

to forty-nine percent of the shares in Mighty River Power? The answer to this question involved four parts. First, as the Crown asserted and the Tribunal accepted, it was important for the Tribunal to consider if there is “a nexus between the ‘asset’ (the shares) and ‘the claim’ (to rights in water)” in order to consider recommending the halt of the minority shares in the power-generating SOEs.<sup>183</sup> The Crown strongly argued that there was no direct nexus because the planned share sale is about shares in a corporation that does not purport to own water.<sup>184</sup> The claimants’ view was that the nexus is “not simply between shares and proprietary rights in water, but in shares that give a significant element of control over the companies that use their waters, without paying.”<sup>185</sup> The Tribunal agreed with the claimants that there was sufficient nexus because “a shareholders’ agreement between Maori and the Crown, in conjunction with a jointly written or jointly amended company constitution, could potentially provide what they are seeking in partial remedy of their claims.”<sup>186</sup>

Second, the Tribunal had to consider affect; that is, what extent, if any, will the options for rights recognition be affected by partial privatization? In other words, is it essential that Maori be offered shares in the new power-generating MOM companies in partial recognition of their rights to water? Do Maori need to be offered shares now or could it occur later at a point after privatization? The Tribunal held yes, now.<sup>187</sup> The Tribunal thought it unlikely that new private investor shareholders would agree to amend their company’s constitution to reflect a Treaty settlement<sup>188</sup> and thus potential remedies “by way of share issues or transfer of existing shares on terms involving any form of preference as to voting rights, capital or income distributions, pre-emptive rights, or appointment of directors, to name but some possible remedy considerations” would be lost.<sup>189</sup> The Tribunal agreed that:

. . . [P]artial privatization will make a crucial difference to the Crown’s ability to act. Private shareholders will resist the introduction of any kind of levy, charge, resource rental or

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<sup>183</sup> *Id.* at 142.

<sup>184</sup> *Id.* at 143.

<sup>185</sup> *Id.* at 154.

<sup>186</sup> *Id.* at 161.

<sup>187</sup> WAITANGI TRIBUNAL, *supra* note 5, at 166-70.

<sup>188</sup> *Id.* at 168.

<sup>189</sup> *Id.* at 169.

royalty that impacts on the profitability of the company and (as a result) their income and the value of their shares.<sup>190</sup>

Third, the Tribunal had to consider if the Crown proceeds with partial privatization, will it be in breach of Treaty principles? The Tribunal held yes and in doing so, clarified for the Crown what it did not previously know—the extent of Maori interests in water. The Tribunal said:

We have now found, upon inquiry into the facts (and as other Tribunals have found before us) that Maori have rights for which full ownership was the closest cultural equivalent in 1840. Today, Maori have residual proprietary rights where that can be established on the facts and—the Crown having stated that it does not claim ownership and that no one else can claim ownership—the Treaty entitles them to the recognition of those rights today.<sup>191</sup>

The Tribunal clearly endorsed the right to development:

As we see it, a right to develop one's properties is a right possessed under the law by all New Zealand property owners. What is unique about this claim is that Maori citizens were guaranteed the property that they possessed in 1840. That right of property was not constrained by what could be legally owned in England. Rather it depended on what Maori possessed at the time in custom and in fact. As we have found, they possessed (and in the English sense owned) their water bodies in 1840. And inherent in their proprietary interests is the right to develop their properties, and to be compensated for the commercial use of their properties by others. There is nothing unusual or novel in this finding.<sup>192</sup>

The Tribunal had this message for New Zealanders:

We think that most New Zealanders, if properly informed as to the nature of Maori rights, would not disagree that the owners of property rights should be paid for the commercial use of their

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<sup>190</sup> *Id.* at 170. The Tribunal then focused on a question that will apparently be more extensive in the final full report but still takes up eight pages of this truncated interim report: will “the Crown be ‘chilled’ from providing commercial recognition of Maori rights by the prospect of expensive litigation on the part of overseas investors who have purchased shares in the MOM companies?” *Id.* at 177. The Crown held no. *Id.* at 181. The Maori interested parties thought that it was “more than simply a possibility.” WAITANGI TRIBUNAL, *supra* note 5, at 177. The Tribunal did not ultimately determine this point. *Id.* at 184.

<sup>191</sup> *Id.* at 190.

<sup>192</sup> *Id.* at 193.



property. Otherwise there would be no landlords and no tenants, no joint ventures, no leases, no commercial property arrangements of any kind. That seems to us to be absolutely basic to the way in which New Zealand society operates. We think that the Article 3 rights of Maori entitle them to the same rights and privileges as any other possessors of property rights.<sup>193</sup>

The Tribunal concluded its Interim Report by recommending that the Crown urgently convene a national *hui* (meeting) in conjunction with tribal leaders, the New Zealand Maori Council, and the parties who asserted an interest in this claim, to determine a way forward.<sup>194</sup>

### C. *The Reactions*

Ten days after the release of the Tribunal's Interim Report, the Prime Minister John Key announced that his government would delay the partial sales of SOEs until early 2013 and in the meantime "undertake a short period of consultation with [relevant] iwi on the 'shares plus' concept."<sup>195</sup> The government rejected the idea of a national *hui*. Maori were pleased that the government decided to delay the share sales,<sup>196</sup> but skeptical that the government's consultation would be genuine. The Maori King took the initiative to call for a national Maori *hui* that was attended by more than 1000 Maori leaders from throughout the country.<sup>197</sup> The Maori King reaffirmed that Maori own water and that Maori proprietary rights to water must be settled before the share sales commence and that if negotiations with the government fail, then tribes will support the New Zealand Maori Council taking a case to the High Court seeking an injunction to stop the government proceeding with the share sales.<sup>198</sup> In October, the government announced that it would not proceed with the shares plus proposal. The New Zealand Maori Council (with the support of most but not all tribes)

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<sup>193</sup> *Id.* at 189.

<sup>194</sup> *Id.* at 199.

<sup>195</sup> Press Release, Rt. Hon. John Key, P.M. of N.Z., Mighty River Power IPO to go ahead early next year (Sept. 3, 21012), available at <http://www.national.org.nz/Article.aspx?articleId=39315>.

<sup>196</sup> *Asset Sale Delay Pleases Maori*, 3 NEWS (Sept. 4, 2012) available at <http://www.3news.co.nz/Asset-sale-delay-pleases-Maori/tabid/1607/articleID/267905/Default.aspx>.

<sup>197</sup> In the 1850s, some Maori tribes formed a Maori monarchy as one response in the attempt to halt the colonial taking of Maori land. The Maori monarchy remains an important Maori ceremonial institution.

<sup>198</sup> Media Statement, Hon. Bill English, Min. of Finance, "Shares Plus" Consultation Begins, Sept. 17, 2012, available at <http://www.national.org.nz/Article.aspx?articleId=39414>; Audrey Young, *We own the water—Maori King*, N.Z. HERALD, Sept. 14, 2012, [http://www.nzherald.co.nz/mighty-river-power/news/article.cfm?o\\_id=361&objectid=10833926](http://www.nzherald.co.nz/mighty-river-power/news/article.cfm?o_id=361&objectid=10833926).

reacted by announcing it would seek an injunction from the High Court to halt the government's planned partial sale of the hydropower generators.<sup>199</sup> The High Court will hear this case in late November 2012.

## VI. CONCLUSION

Taiaiake Alfred, in his work, has identified a real challenge for countries such as New Zealand committed to creating new respectful relationships with their indigenous peoples. According to Alfred, reconciliation is a "pacifying discourse."<sup>200</sup> Alfred believes that it is restitution that must be sought if there is any hope for decolonization to occur. It is not common to use the legal language of restitution within the context of indigenous settlements. What then is restitution? The law of restitution is the law of gains-based recovery and occurs when a court orders the defendant to give up his or her gains to the claimant. Essentially, restitution orders seek fairness in the act of restoration and are claimant focused. The experience in New Zealand in regard to settlements of water appears to illustrate Alfred's argument. Even though the government has enacted varied legal provisions (via the RMA and Treaty of Waitangi settlements) that have created platforms for Maori to revive some of their governance roles in caring for water, the redress solutions have been cultural, rather than proprietary or commercial. To date, the control of, and power over, water has for the most part remained with the government. Maori and the Crown are at loggerheads today because the government has failed to take seriously reconciliation in a holistic manner. For reconciliation to be real, governments throughout the world, including the government in New Zealand, needs to address *all* of the concerns of the indigenous groups including the hard ones about ownership of natural resources and rights of development in the modern era. It is only in addressing these hard questions that our colonized countries can legitimately begin the journey toward reconciled futures.

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<sup>199</sup> Radio New Zealand (Oct. 20, 2012, 6:34AM), available at <http://www.radionz.co.nz/news/national/118556/maori-council-to-challenge-soe-sales-in-court>. See also RadioLive, *Maori Council Readies for Court Action*, 3 NEWS (Sept. 17, 2012), available at <http://www.3news.co.nz/Maori-Council-readies-for-court-action/tabid/1607/articleID/269494/Default.aspx>; Kate Chapman, *Maori Council Still Backs Water Unity Plan*, WAIKATO TIMES, Sept. 17 2012, <http://www.stuff.co.nz/waikato-times/news/7688437/Maori-Council-still-backs-water-unity-plan>.

<sup>200</sup> ALFRED, *supra* note 1.

## GLOSSARY OF MAORI WORDS

Aotearoa	New Zealand
<i>hapu</i>	sub-tribe, to be pregnant
<i>iwi</i>	tribe, bone
<i>kaitiakitanga</i>	guardianship, stewardship
<i>kaupapa</i>	worldview, subject
kāwanatanga	governance
mana	authority
<i>manaakitanga</i>	hospitality, kindness
Maori	the Indigenous People of New Zealand
<i>Matauranga Maori</i>	knowledge
<i>mauri</i>	life force
mokopuna	grandchild
Pakeha	European
rangatiratanga	sovereignty, chieftainship
<i>tangata whenua</i>	people of the land, indigenous people
<i>taonga</i>	treasure
Te Pou Tupua	guardian
Tikanga	Maori custom and values, Maori law
tino rangatiratanga	sovereignty
<i>tupuna</i>	ancestor
<i>wāhi tapu</i>	sacred place
<i>wai</i>	water, memory, who
<i>waiata</i>	songs
<i>whakapapa</i>	genealogy
<i>whakatuaki</i>	proverbs
<i>whanau</i>	family, and to give birth
<i>whenua</i>	land, afterbirth