

Strang, V. 2014. 'The Taniwha and the Crown: defending water rights in Aotearoa/New Zealand', in *WIREs Water*. Wiley. 1. pp 121-131. Published Online: Dec 03 2013. DOI: 10.1002/wat2.1002

The Taniwha and the Crown: defending water rights in Aotearoa/New Zealand

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Abstract

Through the sale of hydroelectric and water company shares, the building of dams to impound and control freshwater supplies, and via water trading schemes, there is continual acceleration in the privatization of water resources around the world. Key opponents to the enclosure of this 'common good' are indigenous communities who, having had their land and water appropriated by colonial societies, are now seeing these subjected to further economic colonization, exploitation and ecological degradation, often by transnational corporations with little or no local social or environmental accountability. Their protests about commercial appropriation are not merely attempts to assert prior rights of ownership and managerial responsibility. They are also a critique of ideologies oriented towards unlimited growth and development which, they argue, conflict with their more sustainable and reciprocal relations with place, and with the non-human environment.

This paper considers some of the efforts of indigenous people to uphold their traditional rights to own and manage water. It focuses particularly on a recent case brought by the Māori Council against the Crown in New Zealand/ Aotearoa. Taking this to the Waitangi Tribunal, to the High Court and finally to the Supreme Court, Māori tried to prevent the Government from privatizing a major hydro-electric company and thus its water allocations. As well as initiating a lively national discussion about water ownership and governance, the case articulated a bi-cultural dialogue which resonates with wider national and international debates about human-environmental relationships and what constitutes 'the common good'.

Introduction

Fig. 1. 'Right to Water' poster, Mexico City.

Historically, water has been widely regarded as a 'common good', either under the aegis of the state or within the localized common property regimes of indigenous societies.¹ This status recognizes its literal essentiality to human health and well-being, and its centrality to all economic and social practices, as well as the material difficulty of

containing it with sufficient certainty to enable the imposition of exclusive property rights. Framed as a property right, the notion of a 'common good' defines public rights of access to and use of material resources. However, this conventional legal frame tends to obscure its moral foundation: that it constitutes a social contract to uphold collective societal well-being. Along with other researchers critical of the anthropocentricity that characterizes many human-environmental engagements,² I would argue that the concept of a 'common good' can also be extended to debates about bioethics, having the potential to encompass the interdependence of humans, non-humans and ecosystems, and an understanding that sustainability is reliant upon reciprocal relations – ie. a social contract – between them.³ This more egalitarian bioethical position draws inspiration from some of the indigenous worldviews noted in this article, in which the non-human is seen to have agency and power, and thus to occupy a collaborative position in relation to human societies. In the colonial appropriation of indigenous land and resources, such subaltern worldviews have been subsumed but, as the events described below illustrate, they resurface in debates about the ownership and management of water.

Still, in the mainstream, a utilitarian, human-centred view of the material world has prevailed. Over the last several centuries, and in the last three decades in particular, new material and legal technologies and the dominance of neo-liberal ideologies have continued to widen disparities in power between humans, and between humans and other species. Water has been increasingly commodified, privatized and controlled by elite groups and, more recently, by transnational corporations. While privatization has been promoted in the political arena as a route towards more 'efficient' water use, in reality it has tended to go hand-in-hand with intensified use of land and resources and – particularly with the transferal of control to non-local organizations – disregard for the local social and ecological impacts of exploitative practices.

Fig. 2. Wivenhoe Reservoir, Queensland, Australia.

Many indigenous peoples, already dispossessed of their customary relationships with water, have observed these effects with deep concern. Anxious to regain not only former rights but also managerial responsibilities that express more sustainable environmental values, they are some of the most committed opponents of efforts to transform water from a common good into private and purely economic assets. Interdisciplinary collaborations between indigenous communities, anthropologists and legal experts have also highlighted the connections between current conflicts over water and wider debates about the bioethics and sustainability of contemporary water use and management.

In Australia and New Zealand, for instance, such collaboration has generated ways to translate the different tenets of indigenous Law into European style legislation comprehensible to all parties. In the course of such knowledge exchange, national laws have expanded to accommodate explicit notions of long-term affective attachments to

place; the ways that social and cultural identity are encoded in material environments; ideas about living water and spiritual connections.⁴ This has supported the development of broader legislation, for example, valorizing diverse cultural heritages and the protection of environments and non-human species. Debates within the legal arena have also enabled indigenous groups to offer a critique of introduced forms of land and resource management, highlighting the transitions through which their more reciprocal relations with other species and ecosystems have been overridden by unsustainable modes of environmental engagement prioritizing human needs and giving primacy to human agency and direction.

Water Power and Material Democracy

Within the wider frame of theories about property,^{5,6,7} explorations of the relationship between water and political power^{8,9} and more recent analyses of water privatization,^{10, 11, 12, 13, 14, 15} have made it clear that the ownership and governance of water is directly expressive of social and political relations. No form of production is feasible without water, and control of the generative 'stuff of life' is fundamentally empowering.¹⁶ The loss of such control is commensurately disenfranchising, and every colonial invasion has thus prioritized the seizure of water sources. Early Roman imperialism not only introduced new infrastructures for controlling and directing water but also established the foundations of a legal framework for individuated and more alienable forms of property rights.¹⁷ In the Christianization of Europe, water sources were appropriated and 'converted', and powerful abbeys and monasteries controlled and disbursed water supplies.¹⁸ The establishment of colonial empires by European nations has invariably entailed the appropriation of reliable water sources, for example by the graziers who settled Australia.¹⁹

Despite falling under new regimes of governance, water's status as a common good persisted until the last century, in which it became subject, in industrialised societies, to an increasingly intensive tug-of-war. Managerial control shifted between public/municipal agencies and private water supply companies in concert with changing political climates, as governments committed to promoting equality and collectivity alternated with those adhering to market-oriented ideologies.

In the late 1900s, the extreme right-wing policies that emerged in the UK, coupled with new physical and legal technologies for establishing property rights in water, enabled the Thatcher government to initiate a major international trend towards water privatization. This has taken various forms: despite major protests, the water industry in England and Wales was privatized in 1989, and over 40% of supply companies are now partly or wholly owned by transnational corporations. For example, Northumbrian water is now owned by Cheung Kong Holdings in Hong Kong; Thames Water by the Australian Macquarie Group; Bristol water by the Canadian company, Capstone. In each decade since privatization, customers' water bills have risen by approximately double the rate of inflation, at an average of over 60%, and in the last decade by up to 82%.

Companies in public ownership (Scottish Water and the – re-organised into a not-for-profit company – Welsh company Glas Cymru) have during the same period been able to freeze water prices or impose much smaller rises. In 2013, a 3.5% average bill rise in England generated particular outrage when Corporate Watch pointed out that six of the major private water companies had also avoided paying millions of pounds of UK tax.

In Australia, water trading schemes have effectively transformed state water allocations into private assets, and there has been a similarly rapid accumulation of these by foreign corporations. An example is provided by the notorious Cubbie Station, which owns 28 miles of dams along the Culgoa River and diverts into these a quarter of the water that would otherwise flow into the Darling River and so into the desperately degraded Murray-Darling Basin. Having accumulated over 50 water licenses, the station recently sold 80% of its shares to a Chinese consortium. In New Zealand/Aotearoa, as well as proposing new water trading schemes, John Key's Government focused on plans to sell off shares in publicly owned hydro-electricity companies (and thus their vast water allocations).

While major profits have been made by those able to buy tradable allocations or shares, and by the directors of the companies concerned, there are several areas of cost to consider. One is to the wider populations of these countries, whose previously inalienable common ownership of water has, at least in *de facto* terms, been handed to a privileged minority. Recognition that the material control of essential resources is intimately connected to political and social power raises important questions for societies, not only about who owns the water, but about who really owns the State.⁷ Clearly there are long-term implications in transferring the ownership of such a vital resource to an elite network of highly mobile individuals and transnational corporations.

Another set of costs is to the human and non-human inhabitants of the waterways and catchment areas subject to the decisions of absent water owners whose aims are largely commercial. Such investors' concern for the well-being of local communities and ecosystems rarely rises above – and frequently falls below – the minimum duty of care defined by legislation and (in theory) enforced by notoriously weak regulatory bodies. This underlines the point that the ownership and control of water is not merely indicative of social and political arrangements between humans, but also reflects the ideas, values and practices that construct each society's mode of engagement with the material environment, its non-human inhabitants and its ecosystemic processes. It offers, in other words, a distinct profile of a particular bioethical position.

Fig. 3. Alma Wason, fishing in the Mitchell River, north Queensland, Australia.

A third major area of cost is to the minority indigenous populations in settler societies, whose customary forms of land and water ownership, and thus their capacities for political and economic participation, have been appropriated first by the Crown and, further, by processes of privatization. This dispossession and disenfranchisement has

not only had devastating social, economic and political effects on these communities, it has also prevented them from enacting their own bioethical values. It is important not to romanticize these: even the most subtle engagements, for instance those of Australian hunter-gatherers, have had significant long-term environmental effects, for example in opening up the landscape and encouraging fire-reliant plant species, and in hastening the demise of mega-fauna. In New Zealand/Aotearoa, Māori cleared major areas of forest to establish a horticultural economy prior to European settlement; in some Pacific Islands even low-key forms of production proved unsustainable.²⁰

However, it is fair to say that small-scale 'place-based' societies, whose relationships with specific areas are intimate, long-term and based on collective forms of ownership, have generally given strong priority to sustainable practices. With worldviews in which land and waterscapes and their non-human inhabitants are seen as sentient partners with whom human societies must negotiate on equal terms, their traditional bioethical positions – and their views on water management – are radically different from those of the societies in which they are now minorities.

Fig. 4. Nelson Brumby, one of the first Aboriginal Rangers in the community of Kowanyama, north Queensland.

Conflicts over water are therefore concerned not only with property rights, but also with managerial responsibilities and deeply felt affective concerns about human-environmental relations. It is these fundamental differences that form the basis of contemporary indigenous claims to water. Their common factors may be summarized as follows:

- Individual and collective identity is based on shared substantial connections to specific ancestral beings or deities, places and the waters of those places.
- Collective rights of water ownership and use are based on this connection.
- There is no place, in these cosmological schemes, for the alienation of people from their land and resources.
- Human well-being and environmental well-being are connected, and disturbance of the environment, such as the impediment of proper water flows, is understood to have social, ecological and spiritual impacts.^{Reference 21, p 8.}

Water Resistance

Indigenous communities have many shared experiences of colonization: exploratory contacts that were often alarming and disturbing; periods of cross-cultural negotiation and collaboration; more extreme and violent colonization and dispossession; and decades of paternalistic domination and marginalization which included the imposition of new languages, religions, social and economic practices. In a purportedly post-colonial period – or a period characterized by economic rather than direct colonization –

indigenous rights and values began to be re-established with the advent of the civil rights and land rights movements in the 1960-70s. These encouraged significant legal developments internationally: the Convention Concerning Indigenous and Tribal Peoples in Independent Countries;²² the Declaration of Rights of Indigenous Peoples;²³ the International Covenant on Economic, Social and Cultural Rights;²⁴ and the Declaration on the Right of Development.²⁵

Nationally, indigenous rights to water are embedded in more complex social, political and legal arrangements. In Australia, for instance, it took 200 years for the Federal Government to acknowledge, partially via the 1976 Aboriginal Land Rights Act (Northern Territories) and more fully in the 1993 Native Title Act, that Aboriginal people had their own systems of land ownership prior to European settlement. The Native Title Act was sufficiently radical to bring down the Keating government, and in the lengthy period of right-wing governance that followed, the efficacy of the legislation was greatly reduced. Still there have been occasional successes, including several cases in which some rights to water have been regained. For example, the Lardil people of Croker Island near Darwin were able to establish some non-exclusive rights to the foreshore fishing zone through the Australian High Court in 2001 (*Yarmirr v Commonwealth* 2001). But courts have tended to apply very narrow definitions to such rights, limiting native title to non-exclusive, non-commercial uses. The Blue Mud Bay decision in 2008 went a little further: though still focusing on customary usages, the Australian High Court ruled that the Arnhem Land Indigenous Land Trust (representing the Yolngu people) should have exclusive ownership of waters to the low tide mark, including the tidal areas of rivers and estuaries.²⁶

Notably, both cases related to sea water. With water trading schemes, other forms of privatization and massively intensified competition, regaining indigenous rights in freshwater has proved more elusive. Altman and Cochrane observe that although the Australian Native Title legislation made some provision for the acknowledgement of sea rights, it also confirmed Government ownership of freshwater and minerals.²⁷ Nevertheless, the legal battles have achieved some gains in demonstrating indigenous interests in freshwater and tying these to legislative efforts to protect cultural rights relating to water use and management. They have fed, for example, into Indigenous Land Use Agreements (ILUAs) which provide a cheaper, more achievable alternative to Native Title claims which can cost over \$15 million AUD and take a decade to conclude. They have also influenced the recommendations of the National Water Commission, requiring the inclusion of indigenous communities in water planning processes, and demanding that the water plans required from commercial users should incorporate indigenous issues such as customary use, spiritual and social objectives. As this implies though, these developments have confined both land and water rights to 'traditional' subsistence usages that pertained in the pre-settlement period. And while reinstating some rights in resources, the Native Title process has failed to account for the effects of increasing freshwater abstraction on these: for example, the degradation of major wetland areas on which customary economic practices depend.²¹

Canada offers some useful parallels. The Canadian Constitution Act of 1867 gave the Canadian Parliament exclusive jurisdiction over 'Indians, and Land reserved for the Indians'. 115 years later, the Canadian Constitution Act of 1982 signaled some real change in stating that 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed' and promising 'a restructuring of power and responsibility with regard to natural resources' (1982: Section 35). Legal debates (eg. *Sparrow v R* 1986) have reestablished native Canadians' fishing rights,²⁸ and although, like Australia, Canada has tended to limit such rights to 'traditional' practices, it has been robust in supporting co-management agreements. With a focus on provincial rather than federal negotiations, such agreements range from tokenistic arrangements to those in which indigenous peoples have asserted quite significant levels of sovereignty with 'a fundamental rethinking of rights and relationships'. Reference 29, p 207.

Despite achieving some recognition of their rights, however, First Nation groups in many parts of Canada continue to experience problems that mirror those of indigenous communities elsewhere: poor access to safe drinking water; exclusion from decision-making and, above all, continually expanding demands on freshwater from powerful interest groups involved in hydropower, oil and gas extraction, and other forms of mining, many of which have significant ecological and social impacts.³⁰ The 'Idle No More' First Nations protest movement, which has campaigned for the last thirty years, was recently revitalized to oppose the efforts of a right-wing Federal Government to reduce the legislation protecting the rights of indigenous people and those of the environment. The First Nations were particularly concerned that Bill C-45 (2012), in revising the Navigable Waters Protection Act (1882), would remove existing requirements for indigenous consultation and approval of construction in or around navigable waterways:

By releasing private companies from the duty to notify the federal government when undertaking infrastructure projects, the new act in turn takes away the federal government's duty to consult with First Nations before approving new projects such as the Enbridge Northern Gateway Pipeline. Reference 31, p 1.

Annita McPhee, head of the Tahltan First Nation council described this as 'a direct attempt to undermine the protection of those lakes and waters and to allow access for developers'. Reference 31, p 1. Idle No More's current campaign asks all Canadians to join in a 'peaceful revolution' against what the organization regards as exploitative developments, for example of the Athabasca Tar Sands:

Our people and our mother earth can no longer afford to be economic hostages in the race to industrialise our homelands. It is time for our people to rise up and take back our role as caretakers and stewards of the land. (Eriel Deranger, Athabasca Chipewyan First Nations)³²

Idle No More's own vision statement encapsulates the bioethically inclusive nature of human-environmental relations that such 'caretaking' and 'stewardship' promotes:

The Vision [...] revolves around Indigenous Ways of Knowing rooted in Indigenous Sovereignty to protect water, air, land *and all creation* [my emphasis] for future generations.^{Reference 31, p 1. See also 33.}

The Taniwha and the Crown

In New Zealand/Aotearoa, Māori have also been quite successful in negotiating co-managerial roles, for example, in the signing of an equal co-management agreement for the Waikato River in 2009.³⁴ Their negotiating position is strengthened by having substantial tribes (*iwis*) rather than widely scattered clans, and by the reality that they have always composed a sizeable percentage of the population currently estimated at 14.6% of the whole,³⁵ compared to the 2.5% represented by Aboriginal people in Australia.³⁶

Their most critical tool for negotiation has been the Treaty of Waitangi (*te Tiriti o Waitangi*) (1840) which acknowledged their ownership of land and resources at a foundational stage in the nation's history. Although much Māori land was bought – often through coercive practices – by Europeans, and the Treaty is less explicit about water rights, it established clearly that Māori were land and resource owners, and provided the basis for a bi-cultural society. Conceding that Māori had some customary rights in water, the Crown has argued that these are accommodated in the Resource Management Act (1991), which provides 'substantial recognition of Māori interests' and a 35 year limitation on the term for water permits.^{Reference 37 paras 135, 136.} More recently, the Deputy Prime Minister, Bill English, summarized the Crown position as acknowledging that Māori have 'rights and interests in water and geothermal resources'. He suggested that these are being addressed through an 'ongoing Waitangi Tribunal Inquiry' and a number of 'parallel mechanisms'.³⁸

As in Australia and Canada though, 'rights and interests' in water are carefully distinguished from 'ownership'. The New Zealand government, like those in other settler societies, has resisted signing international legislation aimed at reinstating indigenous rights more fully. Still, these agreements form the basis for discussions. The International Convention on Economic, Social and Cultural Rights stresses the importance of sacred sites, and social and spiritual issues often take center stage. This is partly because these are less legally and politically contentious than economic rights, but also because affective relations to places and sentient beings are central to indigenous environmental relationships, and, as noted above, form the basis for their claims.

In New Zealand/Aotearoa, a Māori bioethic of partnership with the non-human is well expressed in descriptions of the *taniwhas* that are believed to inhabit key water places. A *taniwha* is:

...a living being whose spirit remains present at the spring and at specific places along the stream.... The *taniwha* is a generative 'life essence' of people and places... encapsulating ideas about shared substance and social connections between people and places. The well-being of the *taniwha* is connected to the well-being of the people... and harm to the *taniwha* or its home is believed to have an impact on [their] health and well-being.^{Reference 21, p 4}

Fig. 5. Taniwha, Rotorua Court House.

In 'living water', which has its own life force or *mauri*, resources are seen as the gift of the river, rather than as commodities. The ritual performance of special *karakia* is necessary in anticipation of these gifts, and to thank the river when they are received. Parts of the river and land are not separable from each other or from the human communities that they connect, and this sense of linkage is demonstrated in the term that local *iwis* used traditionally to describe the Waikato River, *Tupuna Awa*, which defined it as 'an important tribal ancestor'.^{Reference 34, p ii.} Springs (*puna wai*) have particularly strong relations with *whanau* [extended kin groups]:

The water from the *puna wai* [water of the spring] of a *whanau* is considered a *taonga* to that *whanau* as it carries the *Mauri* [life force] of that particular *whanau*... In essence then the very spiritual being of every *whanau* is part of the river... In this sense the river is more than a *taonga*[;] it is the people themselves.
Reference 39, Section 2.4.

The concept of *taonga* is important. It has been defined as 'treasure' and on more than one occasion the Waitangi Tribunal, set up in 1975 to hear claims brought in relation to the Treaty, has ruled that rivers are *taonga*. Critically, such treasures can be passed from one generation to the next – a key definition of ownership. As the late Ariel Aranui of Ngāti Pahauwera put it

To the Māori water is the essential ingredient of life, a priceless treasure left by ancestors for the life sustaining use of their descendants. The descendants are in turn, charged with a major *kaitiaki* (stewardship) duty, to ensure that these treasures are passed on in as good a state or indeed, better, to those following.
Reference 40, Section 2.2.

Taniwhas, as river guardians, are said to become angry when developments take place along rivers without the permission of local Māori. In 2011, for example, the *taniwha* inhabiting a river that runs underground through Auckland was said to be disturbed by plans for a city metro system. Thus *taniwhas*, like other indigenous water beings around

the world, are brought into play in the political arena to both demonstrate and make the case for indigenous environmental values, and for their rights to enact these through ownership and management.^{41,42}

There have been long-running debates in New Zealand about whether traditional Māori ownership of land and resources encompassed freshwater. Co-management agreements with the Crown have taken varying forms, and there is clear understanding that the control of water represents political power:

The Waikato River lies at the heart of tribal identity and chiefly power and has therefore become a key focus of ongoing local struggles for prestige and *mana* among Waikato Māori.^{Reference 34, p i}

The restitution of indigenous sea rights, as across the Tasman, has proved to be more achievable. There was a major Māori claim aimed at regaining control of the foreshore in the early 2000s which the government resisted by introducing the Foreshore and Seabed Act (2004). Interestingly, the Crown's argument against Māori claims, that the foreshore had to remain publicly accessible to all New Zealanders, also served as some defense against major commercial privatizations and exclusion along the seashore, thus preserving another form of 'common good'.

Fig. 6. Sea taniwha or marikihau, carving on Moana Marae, Auckland.

John Key's right-wing government, brought into power via coalition with the Māori Party in 2008, repealed the 2004 Act with their help in 2011. Its replacement, the Marine and Coastal Area (*Takutai Moana*) Act (2011), gave Māori some customary rights in relation to parts of the coastline. But because opposition to this move focused on fears that increased Māori rights would exclude others, this act also protected public access, underlining the communal ownership of the public marine and coastal area. Thus the clauses intended to limit Māori rights continued to frame access to the shoreline as a common good. With some exclusion for retaining Crown control over national parks and conservation areas, the Act states that:

Neither the Crown nor any other person owns, or is capable of owning, the common marine and coastal area.^{Reference 43. Clause 11.2.}

A similar argument has recurred in relation to freshwater throughout a series of Māori efforts to re-establish rights in rivers and lakes. Freshwater, the government has maintained, is a public good. It either belongs to all, or simply cannot be owned. However, having embraced Thatcherism warmly, governments in New Zealand, as elsewhere, have tended to fund pre-election tax cuts by selling off state owned 'enterprises'. In 2011 John Key's government turned its attention to major hydro-electricity generators with extensive water allocations, including Mighty River Power, Solid Energy, Meridian Energy and Genesis Energy. It proposed transforming Mighty

River Power into a 'mixed ownership model company' with sales of 49% of its shares, in effect ceding, if not a controlling interest, at least significant control of water to private shareholders, and paving the way to further such sales. With low public engagement in political debates, there was little opposition until the New Zealand Māori Council and other Māori organisations raised a major challenge, arguing that such a move by the Crown was inconsistent with the principles of the Treaty of Waitangi.¹ This highlighted efforts by Māori to assert, in accord with their own interpretation of the Treaty, that they have proprietary rights over freshwater.

There is no space here to unpack the multiple legal and cultural complexities of this case, but in making its way through the legal system it followed a predictable course. The Waitangi Tribunal recommended delaying the sale of Mighty River Power shares until negotiations between the Crown and Māori could be completed, and noted that:

Our generic finding is that Māori 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.^{Reference 44, p 110}

The Government remained determined to proceed with the sell-off in the first quarter of 2013.

The Crown accepts that Māori 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 Māori proprietary rights but to strengthen the role and authority of Māori in resource management processes.^{Reference 45. Electronic resource.}

The case went to the High Court in October 2012, by then raising considerable national debate. This articulated a mixture of concern about the sale of public assets in general, and anxiety about Māori claims and their potentially exclusive outcomes. For many non-Māori New Zealanders, the status of water as a common good was threatened by any form of enclosure, whether by private shareholders or by Māori, highlighting a difficult point of tension for indigenous communities hoping that sympathetic sectors of majority populations will support their claims. With this in mind, Māori representatives offered reassurance that their customary views of water ownership are not exclusive. Observing that in moving towards asset sales the government had not addressed the issue of Māori rights in water, the Honourable Sir Edward Taihakurei Durie, former High Court Justice and Chair of the Waitangi Tribunal, and now co-Chair of the Māori Council, commented on Marae TVNZ that:

¹ I note that I assisted the Māori Council in the preparation of their case.¹⁴ I also acted as an expert witness in responding to queries from the Waitangi Tribunal and to cross-examination by the Crown Counsel. This work built on earlier research and an advisory document (co-authored with Mark Busse) for Maori *iwis*.²¹

This is not a claim to the ownership of all water... This is a claim to proprietary interests.... We are looking at particular areas and what we need to do is define how far it can and should go so that it doesn't intrude on the general public interests... The ultimate goal in all of this is to get recognition – it is very much a cultural issue.⁴⁶

However, Māori concepts of proprietary rights do not readily fit the concepts of 'ownership' contained in the (essentially Roman) property law prevailing in most industrialized societies. Nor do they accommodate a wider reality that water ownership, despite governments' arguments that privatization is confined to 'allocations' or 'supply companies' and does not entail selling the water itself, have become a significant source of anger and resentment to populations well acquainted with the adage that 'possession is nine-tenths of the law'.

In the event, the High Court supported the Crown's case, ruling that the law being employed to effect the proposed sale of assets 'is achieved by primary legislation which cannot be questioned for compliance with the principles of the Treaty in the courts', and that in any case, the sale of 49% of the company's shares 'would not materially prejudice Māori claims and interests in the water'.⁴⁷

The Māori Council's appeal then went directly to the Supreme Court, 'at the request of the Crown to meet the time constraints it has in finalising the IPO and realising up to 49 per cent of the value of Mighty River Power for important government purposes'.^{Reference 48, Introduction p 5.} The Supreme Court made some concession to Māori interests, noting that the decision to transfer Mighty River Power (and other state owned enterprises) into a 'mixed-ownership' regime, and any subsequent sales of shares in mixed ownership companies, should remain subject to an obligation to act consistently with the principles of the Treaty. But it supported the Crown's aims and dismissed the Māori appeal, concluding that although Crown ownership and control of the power-generating companies 'will undoubtedly be diminished', and that privatization might 'preclude or limit the possibility of some options for redress which would otherwise be possible',^{Reference 48, p 135} the sale would 'not impair to a material extent the Crown's ability to remedy any Treaty breach in respect of Māori interest in the [Waikato] river'.^{Reference 48, p 7} Such remedies have, in the past, focused on compensation, and the case therefore generated accusations in the New Zealand media, from right-wing politicians and members of the public, that this was in fact the major purpose of Māori claims in relation to water.

This is a long-running argument, and will doubtless continue. It would be naïve to suppose, after centuries of 'assimilation', that contemporary indigenous peoples around the world retain a wholly pre-colonial view of their relationships with water, or to suggest that they should. Nor are their views homogenous. But despite the political noise, Māori concern is for more than direct economic ownership or financial redress.

Underpinning their efforts is an ongoing commitment to values and ways of living that support close connections between people and places, and to practices that are sustainable and respectful of the needs of non-human species and environments. Such relationships are plainly at odds with a narrow view of water as a purely economic resource, and resonate more closely with the notion of water as a common good. Ironically, though, it seems that the only way to be able to promote such values is to regain some degree of control over water.

Groundswell

As resource use intensifies and climate change adds further pressures, rising competition for freshwater around the world will result in the loss of legal and material control of water for many groups, not just indigenous communities. Large dam schemes are dispossessing millions around the world; powerful irrigation companies are diverting water away from smaller farmers; transboundary rivers are becoming intense sources of conflict. As noted at the outset, majority populations are being disenfranchised as governments sell publicly owned water to private elites, simultaneously dissolving their own capacities to uphold the common good. Thus the water that formerly connected communities is increasingly dividing them.

Fig. 7. Protest against mining along the New Zealand/Aotearoa coast, Auckland, 2010.

Māori struggles to uphold their long-term relationships with water link with international, pan-indigenous efforts to critique the values and practices of the societies that now dominate decision-making in shared material environments. Their resistance resonates with that of other subaltern groups concerned about equity and justice between human groups, and between humans and other species. For such counter-movements in New Zealand, Māori activism is seen less as a threat to public access and more as model of collective and sustainable lifeways. In this respect, their relatively powerful bi-cultural position and their resistance to water privatization can be seen as a last bastion against the rule of the market. But as recent events illustrate, the tide is now running against subaltern bioethical positions: whether suborned by neo-liberal values, or losing out in the courts, this bastion is crumbling. Processes of enclosing water and appropriating a 'common good' continue in New Zealand and elsewhere.

Previous academic research has focused mostly on the legal issues in relation to property, or on ecological issues relating to sustainability. There is a need for more interdisciplinary research that considers the ways that particular bioethical stances cohere with specific cultural values and practices and their manifestation in law. Though simmering discontents internationally have produced some 'joined up' talk about degrowth economics, social and ecological justice and the need to reaffirm and expand ideas about the common good, these voices have been largely drowned out by anxieties about economic collapse and by the dogged commitment of powerful groups to

maintaining 'business as usual'. And it appears that 'business as usual' entails further measures to appropriate, commodify and privatize water.

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ACKNOWLEDGEMENTS

I would like to thank Mark Busse whose collaboration on the research underpinning this article was hugely supportive, as were his comments on this particular piece. I am also grateful to The Honourable Sir Edward Taihakurei Durie, Co-Chair of the Māori Council, for his support in this work, and to Donna Hall and her legal colleagues for their help and advice. My former colleagues in the Departments of Anthropology and Law at the University of Auckland provided useful feedback at various stages, as have my current colleagues at Durham University. I would also like to thank the anonymous reviewers for their helpful comments and suggestions.

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