THE WATER BOTTLE BATTLE – WHOSE WATER IS IT?

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ABSTRACT

If no-one owns water, why do we get so worked up when it is "given away"?

This paper will consider the question of who owns fresh water, focusing on the implications the answer might have on water managers and users, using recent debates around topics such as water bottling as the context. For example, if no-one owns water, then on what basis could anyone purport to charge for its taking and use? On the other hand, if water is a collective resource, should it be central government or regional councils who are empowered to charge for water takes, perhaps by analogy to the royalty regimes that are commonplace in other extractive industries? Or would iwi have the best claim to ownership?

A further oar in the water is Te Awa Tupua (Whanganui River Claims Settlement) Act, which declares the Whanganui River to be a legal person with all the rights, powers, duties, and liabilities of a legal person. The Act indicates it does not create or affect any right to or interest in water, but could that change in the future and what if it does? Is this Act a high water mark or a sign of things to come? Does it demonstrate that our view of water is out of step with our cultural heritage?

Whatever the answer to these questions, this paper will examine whether our water management regime appropriately balances the interests of all people in fresh water, what the purpose of any charging regime for water takes would be, and whether charging might have unintended consequences.

KEYWORDS

Water ownership, water bottling, water charges

PRESENTER PROFILE

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1 INTRODUCTION

The ongoing publicity around the profits companies are making from bottling and selling water from New Zealand aquifers demonstrates continuing unease about letting a select few profit from what is seen as a public resource. Examples are cited of companies paying just a few hundred dollars in resource consent application fees to obtain a resource consent to take hundreds of thousands of litres of water per day, which is then sold to people here and overseas for $5 per bottle. There have been repeated calls for water charges or royalties to be imposed as a way of ensuring some pay back for New Zealanders from these activities.

The legal position in New Zealand, and the position consistently maintained by the government in response to calls for water charges, is that no one owns water. While technically correct, this position leaves many unsatisfied because it does not grapple with the fact that once a person takes water and bottles it, they can then sell it at a profit. Is this unfair, or is it just a missed opportunity by the rest of us (either collectively or individually) to assert ownership and make a profit ourselves?

The idea of introducing a charging regime would not necessarily be inconsistent with the current fresh water management regime under the Resource Management Act 1991 (**RMA**). Retention of a greater share of water-related profits within New Zealand could also be consistent with the recognition in the National Policy Statement for Freshwater Management that water is essential to New Zealand's economic, environmental, social and cultural well-being.[i]

Some key ownership-related questions need to be addressed if a charging regime is to succeed. If no one owns water, on what basis could there be a charge for its taking and use? Moreover, who would be entitled to collect those charges? On the other hand, if there are property rights in water, who has the best claim to ownership and collection of charges, and on what basis?

More fundamental, however, is the question of what the purpose behind a water charging regime would be. Properly defining the problem would have a significant impact on the way in which a charging regime would be designed, or if one was even pursued. If it was solely to address profits from water bottling going offshore, would the charge only apply to water bottling and, if so, could such a singling-out of one particular activity be justified? On the other hand, if the purpose of a charging regime is to protect fresh water and ensure its efficient use, it may be that any charges need to be imposed more widely.

This paper outlines the current regime for fresh water management in New Zealand. The conceptual framework of ownership is then assessed, with a focus on how it might act as a barrier to establishing a charging regime for water takes, and to freshwater management more generally. The paper then suggests that viewing water under a conceptual framework of stewardship or guardianship, rather than ownership, is likely to be less divisive and should lead to a more sustainable and durable regime, regardless of whether that regime is to include water charges.

2 NEW ZEALAND'S WATER MANAGEMENT REGIME

2.1 HISTORICAL CONTEXT

Consistent with the government's current position on ownership, historically there were no private property rights in fresh water in New Zealand under common law. Access to surface water was regulated under the doctrine of riparian rights whereby riparian owners had no ownership in water which flowed through or past their land,[ii] but were entitled to use that water for ordinary or domestic purposes (such as drinking, cleaning and washing, or feeding and supplying the ordinary quantity of cattle on the owner's land), or for "extraordinary" purposes (such as irrigation or trade purposes), provided the take was reasonable.[iii]

There was no restriction on the ordinary usage of water flows, meaning riparian owners could completely exhaust the resource.[iv] However, riparian owners were under considerable restrictions when exercising extraordinary use rights in that the purpose for

which the water was taken had to be connected with their land, and the water taken had to be restored "substantially undiminished in volume and unaltered in character".[v]

Interestingly, riparian owners had an enforceable right regarding water quality unless another owner could prove that they had a legal entitlement to discharge contaminants into water.[vi]

The position at common law differed slightly in relation to groundwater depending on whether or not it was flowing through defined channels. For groundwater flowing through known and defined channels, landowners held the same rights as riparian owners. However, where landowners were entitled to take and use groundwater that was percolating through undefined channels "*without regard to the effect this may have on the supply of water to spring or other wells or boreholes*".[vii]

The enactment of the Water and Soil Conservation Act in 1967 (**WSCA**) marked a change in approach to the regulation of fresh water in New Zealand. Section 21 of the WSCA vested "*the sole right to dam any river or stream, or to divert or take natural water… or to use natural water*" in the Crown, subject to the provisos that any person could take or use natural water reasonably required for his or her domestic needs and the needs of animals which he or she had responsibility for, or for firefighting purposes.[viii] While not expressed as ownership, the rights vested in the Crown were essentially all of the valuable rights that a property right would have conferred. The WSCA also provided for the conservation and protection of fresh water, to a degree, by permitting regional authorities to fix minimum flows.[ix]

2.2 CURRENT REGIME

The WSCA was repealed with the coming into force of the RMA. The RMA introduced the overarching statutory purpose of the sustainable management of natural and physical resources, and a number of subordinate principles designed to achieve that purpose.[x] The RMA delegated the control of fresh water[xi] to regional councils for the purpose of giving effect to the sustainable management purpose of the RMA.

In line with the sustainable management purpose of the RMA, when making decisions regarding fresh water regional councils must recognise and provide for the preservation of the natural character of lakes and rivers,[xii] the maintenance and enhancement of public access to and along lakes and rivers,[xiii] and the relationship of Māori and their culture and traditions with their ancestral waters.[xiv] Under section 7 of the RMA, regional councils must also have particular regard to:

(a) kaitiakitanga;

(b) the ethic of stewardship;

(c) the efficient use and development of natural and physical resources;

(d) the intrinsic values of ecosystems;

(e) the maintenance and enhancement of the quality of the environment;

(f) any finite characteristics of natural and physical resources; and

(g) the protection of the habitat of trout and salmon.

The functions of regional councils for the purposes of giving effect to the purpose of sustainable management are set out in section 30 of the RMA and include:

> (c) the control of the use of land for the purpose of:
>
> (ii) the maintenance and enhancement of the quality of water in water bodies…;
>
> (iii) the maintenance of the quantity of water in water bodies…; and
>
> (iiia) the maintenance and enhancement of ecosystems in water bodies…;
>
> (e) the control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—
>
> (i) the setting of any maximum or minimum levels or flows of water;
>
> (ii) the control of the range, or rate of change, of levels or flows of water;
>
> (iii) the control of the taking or use of geothermal energy.
>
> (f) the control of discharges of contaminants into or onto land, air, or water and discharges of water into water:

One way in which regional councils give effect to these functions is by including rules in regional plans. Section 30(1)(fa)(i) of the RMA provides regional councils with the ability to, if appropriate, establish rules in regional plans to allocate the taking or use of water. If a regional council uses this power it must record how it has allocated the take and use of water in its regional plan.[xv]

The management and control of water resources is primarily dealt with through sections 14 and 15 of the RMA. In relation to fresh water,[xvi] section 14 provides that no person may take, use, dam or divert any water, or heat or energy from water or from material surrounding geothermal water unless the taking, using, damming or diverting is:[xvii]

> (a) expressly allowed by a national environmental standard, a rule in a regional plan or proposed regional plan or a resource consent; or
>
> (b) the water, heat or energy is required to be taken or used for an individual's reasonable domestic needs or the reasonable needs of a person's animals for drinking water; or
>
> (c) the water is required to be taken or used for firefighting purposes.

Aside for charges for processing resource consent applications and monitoring charges, the RMA is silent on the matter of imposing charges for water takes. In order to establish a sustainable and durable water charging regime, legislative change and a unified national approach to charging would be necessary.

3 CONCEPTUAL FRAMEWORKS

As will be discussed, the ownership framework is not necessarily consistent with the sustainable management purpose of the RMA, and tends to force people into one of three positions – either no-one owns fresh water, everyone owns fresh water, or a select group owns fresh water. Each position, and its consequences for the fresh water charging debate, is addressed below.

3.1 NO-ONE OWNS WATER

The position that no one owns water stems in part from the nature of water itself. As articulated in Blackstone's Commentaries on the Laws of England:[xviii]

> water is a moveable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein: wherefore if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immoveable; and therefore in this I may have a certain, substantial property, of which the law will take notice, and not of the other.

As described by Professor Joseph Sax, the physical characteristics of water present "unique challenges" for ownership in that, unlike other resources, it cannot be bounded and exclusively possessed.[xix] Property rights may apply to the land lying under fresh water, but cannot be comfortably applied to the water which flows over it.

The position that no-one owns water can be compared with the status of the common marine and coastal area. Section 11(2) of the Marine and Coastal Area Act 2011 states that:

> Neither the Crown nor any other persons owns, or is capable of owning, the common marine and coastal area, as in existence from time to time after the commencement of this Act.

Even if no one "owns" fresh water in New Zealand, all New Zealanders have an interest in securing access to water. These interests are often competing and must be managed and balanced. At a fundamental level, access to fresh water is essential to satisfy basic human needs of water for drinking and sanitation. Beyond meeting basic human needs, water is also a vital ingredient for domestic and commercial purposes.

In order to manage and balance these competing interests in access to water, New Zealand law allocates property-like entitlements in fresh water through the granting of water permits.[xx] However, because no one "owns" the water, there is no immediate basis upon which a charge can be imposed for the taking and use of water in accordance with a water permit, despite the fact that water permits grant property-like entitlements, and often confer an ability to make significant commercial gain.

3.2 EVERYONE OWNS WATER

Alternatively, fresh water could be characterised as a common resource which is "owned" by everyone. Whilst it might have some attraction, care also needs to be taken in assuming that common ownership will lead to better water management. In reality, there are pitfalls of a common ownership arrangement – according to the oft cited economic theory of the "tragedy of the commons", individual users of a shared and unregulated resource will act in their own interests, contrary to the common good of all users, by depleting or spoiling that resource through their actions. If common or shared ownership is to be the basis of freshwater management, it will still be necessary to have a body established to regulate the use of water (in our current system, this is regional councils).

Characterising fresh water as a common resource owned by all results in the same barriers to charging for its take and use as the "no one owns it" model. If everyone owns fresh water, individuals could object to being charged for taking it on the basis that it already belongs to them. Perhaps there could be a basis for charging for water takes

beyond what would be considered a "fair share", but who determines what a "fair share" is, and who would be entitled to collect the payment of that charge?

Under a framework where everyone owns water, it would seem logical for the Crown, in its governance capacity, to have a more central role in fresh water management. However, such a move would be contrary to the clear intention of the RMA to reduce the role of central government in relation to the active management of fresh water resources, and to empower regional councils to decide on policy in their own regions.[xxi]

3.3 A SELECT GROUP OWNS WATER

The third option under the ownership umbrella is the ownership of fresh water by select individuals or a group of individuals. This approach may make water charging simpler, but New Zealand's recent history contains a number of examples of ownership claims that illustrate the potential for division and controversy to result from such an approach.

The Crown Minerals Act 1991 illustrates one way in which this option could potentially be implemented; namely that the Crown might simply declare itself entitled to ownership of all fresh water.[xxii] Permit holders would then be required to pay royalties to the Crown in accordance with the relevant permit, the Crown Minerals Act and its associated regulations.[xxiii] Although it concerned the coastal marine area rather than fresh water, experience with the Foreshore and Seabed Act 2004 suggests that such an approach is likely to be unpopular and politically unpalatable.

The Foreshore and Seabed Act arose out of a 2003 Court of Appeal finding in *Ngati Apa v Attorney-General*[xxiv] that native property rights in the foreshore and seabed may not have been extinguished.[xxv] The Court considered that the Māori Land Court had jurisdiction to determine the status of the foreshore and seabed.[xxvi] Despite the fact that the ruling granted only a right for claimants to pursue establishing an interest in the foreshore and seabed, the public perception was that the prospect of successful claim in the Māori Land Court could threaten public access to beaches and waterways.

In response to the *Ngati Apa* decision, the Crown released a foreshore and seabed policy. The Waitangi Tribunal held an urgent inquiry into the policy, and found that it was a clear breach of the principles of the Treaty of Waitangi, and also fell short of wider norms of international and domestic law including the rule of law, principles of fairness and non-discrimination such that it gave rise to serious prejudice.[xxvii] Despite the Waitangi Tribunal's findings, the government enacted the Foreshore and Seabed Act 2004 vesting the "full legal and beneficial ownership of the public foreshore and seabed in the Crown".[xxviii]

The Foreshore and Seabed Act was repealed and replaced with the Marine and Coastal Area (Takutai Moana) Act 2011, which restored any customary interests in the common marine and coastal area that had been extinguished by the Foreshore and Seabed Act, and instead allowed applications to be made for orders recognising customary interests in the common marine and coastal area.[xxix]

Given the range of interests in New Zealand's fresh water, including customary interests, any attempt to vest ownership of fresh water in the Crown could well suffer the same fate as the Foreshore and Seabed Act.

The National Freshwater and Geothermal Resources claim before the Waitangi Tribunal also illustrates the potential divide caused by a focus on the ownership concept. In the Stage 1 Report on the National Freshwater and Geothermal Resources claim, the

Waitangi Tribunal highlighted that "*a fundamental gulf remained between the Crown, which argued that no one can own natural water, and the claimants who contended that English style-ownership is the closest cultural equivalent to Māori customary rights and that what they possessed (owned) in 1840 was guaranteed to them in the Treaty*".[xxx]

The Tribunal recognised that the western concept of ownership is not one which is a "comfortable fit" with Māori customary authority, kaitiakitanga and control of particular resources, but rather:[xxxi]

> 'ownership' is the closest English cultural equivalent. Māori 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.

Given that access to water is vital for survival, a further issue with vesting ownership of water in a select individual or group is how access to water is secured for those without ownership rights in it. Vesting ownership or the ability to charge in a select individual or group has the potential to create a monopoly over fresh water and a resulting risk, whether perceived or real, that others may be excluded from accessing a resource which is vital to human life.

3.4 CONCLUSIONS ON THE OWNERSHIP FRAMEWORK

We are led to the conclusion that the ownership framework is ill-fitting in the context of water, particularly in light of New Zealand's bicultural foundation. Individual property rights and ownership are a western concept, and ownership in the western sense was a foreign concept to Te Ao Māori. Framing the debate in terms of ownership tends to force Māori who wish to uphold their relationships with ancestral waterways into redefining those relationships as property interests.[xxxii]

Despite the debate around fresh water charging in New Zealand often being framed in terms of ownership, our current fresh water management regime does not call for ownership to be ascribed to any party or individual, and doing so is not necessary to sustainably manage water in accordance with the overriding purpose of the RMA. Rather, not only does the ownership framework give rise to difficulties when considering the possibility of introducing a charging regime for fresh water takes, the fact that the ownership model views fresh water solely as property may actually hinder the achievement of sustainable management.

3.5 ANOTHER WAY OF LOOKING AT THE ISSUE?

In order to move forward, a shift away from an ownership framework may be required. Rather than being viewed solely as something that can be owned, fresh water needs to be recognised as a life source upon which all humans depend for survival and in which all humans have an inherent interest.

In this regard, significant insight can be gained by looking at the concept of Te Mana o te Wai. Te Mana o te Wai refers to the intrinsic relationship between te hauora o te wai (the health and the mauri of the water) and te hauora of te taiao (the health and the mauri of the environment), and their ability to support each other and sustain te hauora o te tāngata (the health and Mauri of the people).[xxxiii] A river acts as kaitiaki (guardian) for people, rather than the other way around – acknowledging that humans depend on fresh water for survival.[xxxiv]

Te Mana o te Wai emphasises the importance of the health and mauri of water and the environment for the health and mauri of the people. It is perhaps the inverse of the

common ownership approach – rather than water being owned by all people, all people depend upon and belong to the water.

Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 is an example of a unique approach to fresh water management outside of the ownership framework. The Act does not create or affect any right to or interest in water,[xxxv] but declares the Whanganui River to be a legal person with all the rights, powers, duties, and liabilities of a legal person.[xxxvi] The Act recognises Te Awa Tupua as "*an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements*,"[xxxvii] and that the iwi and hapū of the Whanganui River have an inalienable connection with, and responsibility to, Te Awa Tupua and its health and well-being – captured in the phrase *Ko au te Awa, ko te Awa ko au*: I am the River and the River is me.[xxxviii]

Te Awa Tupua (Whanganui River Claims Settlement) Act is perhaps a step towards recognition that the ownership framework in relation to water is out of step with our cultural heritage. Although the Act is still within the confines of the Westminster system, it looks past the concept of ownership to find a unique solution that protects and enhances the health / mauri of the Whanganui River and in turn the health of the surrounding environment and people.

Whether a similar approach to that taken in Te Awa Tupua (Whanganui River Claims Settlement) Act could be applied more widely to form the basis for water management or charging regimes in respect of specific water bodies remains to be seen. The approach taken in the Act could be used if water charging was introduced on a case by case basis rather than across the board, with the purpose of protecting or restoring specific water bodies. If specific water bodies are identified that require protection and restoration, legislation could be used to give that water body legal personality and perhaps rights to receive royalties for water takes or discharges. These royalties could paid into a fund dedicated to restoring or enhancing the water body.

4 WHAT PROBLEM WOULD WATER CHARGING SEEK TO ADDRESS?

Regardless of whether the water management framework should be recast as one with an ownership focus, one with more emphasis on Te Mana o te Wai, or something else, before a decision can be made about whether a charging regime for water takes would be useful, the nature of the problem such a regime would seek to address needs to be defined with precision. Very different charging regimes (or none at all) could be designed depending on whether the goal is to:

(a) prevent, or reduce the volume of, water being sold overseas;

(b) keep more of the profit from water exports within New Zealand;

(c) provide revenue to fund water enhancement projects; or

(d) create an incentive to take less water or use it more efficiently.

Each of these possible goals is addressed in turn.

4.1 PREVENT, OR REDUCE THE VOLUME OF, WATER BEING SOLD OVERSEAS

The recent debates around the bottling and selling of fresh water suggest that the goal of some in New Zealand might be to prevent water being sold overseas, or at least "tax" such sales so that more of the proceeds remain within New Zealand. Water takes for the purposes of irrigation do not seem to draw the same response from the public, despite the volumes being taken for water supply and irrigation greatly exceeding the volumes taken for water bottling. In light of these volumes, if reduction in volumes sold overseas is the primary goal, we question whether water bottling is actually an issue of sufficient scale to warrant a charging regime in response.

4.2 KEEP MORE OF THE PROFIT FROM WATER EXPORTS WITHIN NEW ZEALAND

On the other hand, if the problem is defined as being that a small part of the New Zealand community (or overseas companies) is profiting unfairly from the taking of a public resource, a charge targeted at the activities in question could be a suitable response. The challenge would then be determining which particular activities to charge for – only those that involve water bottling, or also activities where water is taken and used to produce another product? If it is the latter, then drawing the line is likely to be very difficult and contentious. For some water users, the water is a direct input into their product (eg soft drinks), whereas for others it is used for irrigation to increase the productivity of the land.

4.3 PROVIDE REVENUE TO FUND WATER ENHANCEMENT PROJECTS

One problem that is clear is that New Zealand's fresh waters are under increasing stress as a result of what we do in and around them.[xxxix] The Freshwater Improvement Fund has been established as part of the Government's ongoing fresh water reforms to improve the quality and availability of water in New Zealand's lakes, rivers, streams, groundwater and wetlands. Money collected through a water charging regime could potentially be applied towards protecting and restoring New Zealand's fresh water through initiatives connected to the Freshwater Improvement Fund.

4.4 CREATE AN INCENTIVE TO TAKE LESS WATER OR USE IT MORE EFFICIENTLY

More broadly, if the concern is to incentivise reductions in volumes taken or more efficient use of water, a water charge could be useful but would likely need to apply to all water takes. Consideration needs to be given to whether implementing a water charging regime would lead to a more efficient and sustainable use of water, or simply to water being taken by the users who can make the most profitable use of it. A global charge may also have unintended consequences such as increasing the cost of other products produced using water (for example, dairy products and crops).

5 CONCLUSION – A WAY FORWARD?

The ownership framework often clouds the debate around water charging in New Zealand, because it forces people into positions that are polarising and not necessarily reflective of New Zealand's cultural heritage.

As demonstrated in the concept of Te Mana o Te Wai and the approach taken in Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, water is not solely property. Any

framework that treats water solely as property that can be owned is therefore at risk of failing to provide a robust and sustainable approach to water management in New Zealand.

Before considering whether a charging regime for fresh water takes is needed, it is important to have the correct frame of reference by which the purpose of any such regime will be determined. The purpose of a charging regime under the ownership framework is likely to be (or at least be perceived to be) profit for an individual or group. On the other end of the spectrum, the purpose of a charging regime under a concept like Te Mana o Te Wai is more likely to revolve around protection and restoration.

Only once there is greater clarity, and ideally consensus, about what problem is sought to be addressed, should the debate turn to whether water charging is a suitable tool. As the House of Lords has said, the word "suitable" is an empty vessel which is filled with meaning by context and background.[xl] That context and background is complex with respect to water, in light of the myriad interests in it, but that does not mean a way forward cannot be found.

An evaluation akin to an RMA section 32 evaluation would be needed before proceeding with any charging regime. An evaluation would need to articulate what the purpose of any charging regime for water takes would be, and carefully examine, using a cost benefit analysis, the extent to which any proposed regime would be the most appropriate way to achieve that purpose, and how efficiently and effectively it would achieve that purpose.

By setting the ownership concept aside, the door is opened to consider how we might act as effective stewards of fresh water and ensure that water bodies can be used in an appropriate and beneficial manner as well as being protected for future generations. The question that is yet to be decided is whether charging for water takes would facilitate this stewardship role or simply be a distraction.

REFERENCES

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[i] Preamble to the National Party Statement for Fresh Water Management, July 2014.

[ii] *Glenmark Homestead Ltd v North Canterbury Catchment Board* [1975] 2 NZLR 71 at 81.

[iii] See *McCartney v Londonderry & Lough Swilly Railway Co* [1904] AC 301 at 306-307 and *Glenmark Homestead Ltd v North Canterbury Catchment Board* [1975] 2 NZLR 71 at 81.

[iv] *McCartney v Londonderry and Lough Swilly Railway Co Ltd* [1904] AC 301 (HL) at 306-307.

[v] *McCartney v Londonderry and Lough Swilly Railway Co Ltd* [1904] AC 301 (HL) at 306-307.

[vi] P Salmon and D Grinlinton *Environmental Law in New Zealand* (Thomson Reuters, Wellington, 2015) at 647.

[vii] DAR Williams *Environmental Law in New Zealand* (Butterworths, Wellington, 1980) at 89 as summarised in P Salmon and D Grinlinton *Environmental Law in New Zealand* (Thomson Reuters, Wellington, 2015) at 648.

[viii] Water and Soil Conservation Act 1967, section 21.

[ix] Water and Soil Conservation Act 1967, section 14(3)(o).

[x] Resource Management Act 1991, section 5.

[xi] The term "water" is defined broadly in the RMA as "water in all its physical forms whether flowing or not and whether over or under the ground" and "includes fresh water, coastal water, and geothermal water" but does not include water while in any pipe, tank, or cistern (Resource Management Act 1991, section 2(1)).

[xii] Resource Management Act 1991, section 6(a).

[xiii] Resource Management Act 1991, section 6(d).

[xiv] Resource Management Act 1991, section 6(e).

[xv] Resource Management Act 1991, section 67(5).

[xvi] "Open coastal water" is treated differently under section 14(1), so that the taking, use, damming or diversion of open coastal water or the taking or use of heat or energy from open coastal water is only prohibited where it will contravene a rule in a regional plan or national environmental standard, unless, in one of these cases, the activity is expressly allowed by section 20A.

[xvii] Sections 14(2) and 14(3).

[xviii] Blackstone's Commentaries on the Laws of England, 10th edition, 1787.

[xix] Professor Joseph Sax "Our Precious Water Resources: Learning from the past, securing the future", RMLA, 2009.

[xx] See *Aoraki Water Trust v Meridian Energy Limited* [2005] NZRMA 369 where the High Court held that a consent authority did not have jurisdiction to grant further resource consents for the same resource if that further consent would "derogate" from existing resource consents.

[xxi] Derek Nolan *Environmental and Resource Management Law*, 5th Edition, (2015) at page 192-193.

[xxii] Crown Minerals Act 1991, section 10 provides that "all petroleum, gold, silver, and uranium existing in its natural condition in land (whether or not the land has been alienated from the Crown) shall be the property of the Crown".

[xxiii] Crown Minerals Act, section 99H.

[xxiv] [2003] 3 NZLR 643.

[xxv] [2003] 3 NZLR 643 at paragraph [57].

[xxvi] [2003] 3 NZLR 643 at paragraph [57].

[xxvii] Waitangi Tribunal "Report on the Crown's Foreshore and Seabed Policy" (2004).

[xxviii] Foreshore and Seabed Act 2004, section 4(a).

[xxix] Marine and Coastal Area (Takutai Moana) Act 2011, section 6.

[xxx] Waitangi Tribunal Stage 1 Report on the National Freshwater and Geothermal Resources Claim, at page 62.

[xxxi] Waitangi Tribunal Stage 1 Report on the National Freshwater and Geothermal Resources Claim, at page 32.

[xxxii] Dame Anne Salmond "Tears of Rangi: Water, power and people in New Zealand", (2014) *HAU: Journal of Ethnographic Theory (3)*, 285-309 at page 302.

[xxxiii] Office of the Prime Minister's Chief Science Advisor "New Zealand's fresh waters: Values, state, trends and human impacts", 12 April 2017, page xx.

[xxxiv] Dame Anne Salmond "Tears of Rangi: Water, power and people in New Zealand", (2014) *HAU: Journal of Ethnographic Theory (3)*, 285-309 at page 399.

[xxxv] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, section 16(b).

[xxxvi] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, section 14(1).

[xxxvii] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, section 12.

[xxxviii] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, section 13(c).

[xxxix] Office of the Prime Minister's Chief Science Advisor "New Zealand's fresh waters: Values, state, trend and human impacts", 12 April 2017, page xxx.

[xl] *Quintavalle v Human Fertilisation and Embryology Authority* [2005] UKHL 28, Lord Hoffmann at paragraph 33.