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RECEIVED
Waitangi Tribunal
16 Apr 2012
Ministry of Justice
WELLINGTON

16 April 2012

Chief Judge W Isaac
Chairman, Waitangi Tribunal
Presiding Officer WAI 2357&2358 inquiry
c/- Fax 04 9143043
Registrar, Waitangi Tribunal **Faxed - original to follow in Post**
Level 3 , Fujitsu House, The Terrace, Wellington

Sir

Re:Wai 2357 – Sale of Generating SOEs Claim
Wai 2358 – the National Water & Geothermal Resources Claim

1. I act on private instruction for Savage Whanau Trust , who are a whanau, hapu maaori ; and who have been for last 14 years actively involved in the development of geothermal resources at Kawerau., over their jointly owned lands, and their solely owned lands in and around Kawerau. Kawerau is New Zealands' largest proven field for power generating geothermal use.

2. On their behalf formal objections were filed in Environment BOP last December in regards an application for resource consent for "take" and "use" of virtually ¼ the remaining known available geothermal resource.

3. In the Kawerau region Mighty River Power have already built either jointly with some Tuwharetoa Iwi members a geothermal power station, or in their sole capacity Mighty River Power supply to the local mill power which uses already 1/2/ known geothermal resource capacity.

4. My clients have been working towards building their own power station, and one of the major grounds of their resource consent objection is that by monopolising the resource consent application process MRP has accrued to itself monopolistic control of, knowledge of, the total geothermal resource.

5. My clients are concerned that missing from the statements of claim filed thus far is this aspect of "resource consenting process" becoming in itself a property right[1] for future trading thus derogating from traditional first peoples property interests .

6. Given that Mighty River Power is the first of the SOEs on the selling block, and given an urgent hearing has been granted they have instructed and asked that I register with your Tribunal by way of this letter their interest in your inquiry . I note to your Honour that Counsel in preparation for this finalised instruction, has since early March been placed by Registrar on list of persons for receiving documentation in this inquiry. Having said that, apologies for filing some late beyond your directed timetable deadlines, but submit that no prejudice has occurred and ask your Honours leave for acceptance of my clients as "an interested affected party."

7. It is submitted that their interest is such as being more than that of general public, and having regard for the memorandum filed by claimant counsel as to timetabling and role of interested parties; having regard for filed submissions of some other "interested claimant parties" as filed by for example Ms Mason, Mr Naden, Ms P Walker, Mr Ferguson; I indicate that for my clients part we seek simply to participate in a similar fashion as was accorded "other" parties in the recent WAI 262 inquiry , whereby other parties could receive e-copies of all filed and served documentation; and make a submission. To that end rather than as private retained Counsel not wishing to place my clients at huge

[1] Annexed to this letter, is a two page article recent e-published which expands and supports this submission of management equating to ownership.

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expense, Counsel also suggests that during any 4 week hearing audio files and/or podcasts of proceedings be daily dispatched by Registrar to all parties.

Yours faithfully

P T Harman BA LL B

cc. Ms V Hardy, Crown Law Office

Water, Water Everywhere, But Not a Drop for Free

The Treaty and its Impact on Fresh Water

by Paul Harman, BA (NZ History), LL.B. (Pictured with colleague - right)

It is the central thesis of this article that the Treaty of Waitangi is the only constitutional document which stands between all citizens and an out of control State, in the context of freshwater. The author is a civil litigator who has practised public law and Treaty law since 1992 with appearances at the Privy Council, and the 2nd US Federal Circuit of Appeals, New York.

In this article – my first article for elocal – I am going to write as though I am talking directly to the reader. This article will have all footnoted or cited material available by hyperlink (on www.elocal.co.nz). I write therefore asking that the reader will if required read the material and engage in some thinking for themselves rather than just accept as concluded fact, or legal fact, that which I write. Since Pukekohe from which this publication springs is an agricultural/horticultural locale, I have decided my first e-article will concern fresh water.

> "we... concluded ...that a privatisation juggernaut was being foisted on New Zealand; and that a stand needed to be made to stop it dead using the Treaty"

I write in the context of a feature article entitled Water rights: A big and growing issue (1) - Dominion Post article 27/12/10, By Jo Appleyard pB7. I read this article with alarm as it represented the continuation of a relentless effort to treat "interests in water" as a private property "right". This theme of privatising of public property was to an extent reiterated by Connor English (CEO of Federated Farmers, and brother of the current Minister of Finance) in the NZ Herald the very next day which stated "This year, Federated Farmers has been focused on getting the balance right with environmental sustainability, infrastructure, and water (its ownership, allocation... .)"

This privatisation of water theme was, in my opinion, a major undercurrent to the central government removal of Environment Canterbury (ECan), ie. the Canterbury Regional Council, in breach of best Rule of Law practice. The New Zealand Law Society in an open letter of September 28 2010 to the Attorney-General (on behalf of all lawyers) voiced its concerns with how government had in regards to ECan flouted the rule of law (2). "Flouted" is legalese equivalent of saying 'Acted in manner inconsistent with good law.' A layperson might go so far as to simply call this "breaking the law."

The removal of ECan in its democratically elected decision-making role as regards water allocation resource management, was because ECan, according to Ms Appleyard in her article, was "struggling" with its workload, ie. RMA water allocation resource consent processing. No mention or acknowledgment is disclosed by Ms Appleyard of perhaps the weight of those struggles being dominantly influenced by the 5-8 years length of litigation by such clients of her firm as Meridian Energy and others, who either as parties, interested parties, or interveners, were the principal causes of that delay. Such litigation appellate / intervener right is of course proper due process, seeking certainty of legal rights, so it cannot be said that ECan was struggling or indeed failing in its tasks.

Any person, before investing one dollar or multi-millions in dairy farm conversion, dairy-process factory building, large or small scale irrigation and/or hydro scheme development is entitled to know exactly what their legal position is, having made RMA application to take and use the water "necessary" for that project. One would hope that South Canterbury Finance, in financing dairy farm conversions, loaned only to those who had already obtained the resource-consented water permits (but that is another fight for another day.) This hope would of course be doubly so for the protection of the $1.8b reinvested by Minister Bill English in saving South Canterbury Finance.

The writer refers the readers in particular to one NZ Supreme Court proceedings (3). After first reading the March 26 2009 interim ruling of the Supreme Court, I was disturbed that this was privitisation on a scale I had not witnessed since the SOE Maori Lands Case hearings of May 4-8 1987 (4). Amongst my clientele is a couple whom I met and sat with during every minute of the SOE case of May 4-8 1987 at the New Zealand Court of Appeal, Sir Graham and Lady Emily Latimer. On March 26 2009 we discussed what that interim Supreme Court judgment meant, and concluded as we did in May 1987, that a privatisation juggernaut was being foisted on New Zealand; and that a stand needed to be made to stop it dead using the Treaty (5).

Acting pro bono, I obtained Intervener status at Supreme Court level in the SC 15/2008 for the NZ Maori Council arguing that widest possible discretion ought to reside in the then-ECan as decision-maker in choosing between competing applicants for the same water, not some fixed priority rule as to hearings, which would then have given the upheld party some sort of property right as to RMA process (6). Ms Appleyard and her law firm had earlier obtained Intervener status in the same proceeding for their client Meridian Energy. Interestingly, one hour before our written submissions were due for filing, the litigating parties withdrew in an out of court settlement arrangement. This means the ability to settle the legal issue at Supreme Court precedent level remains open.

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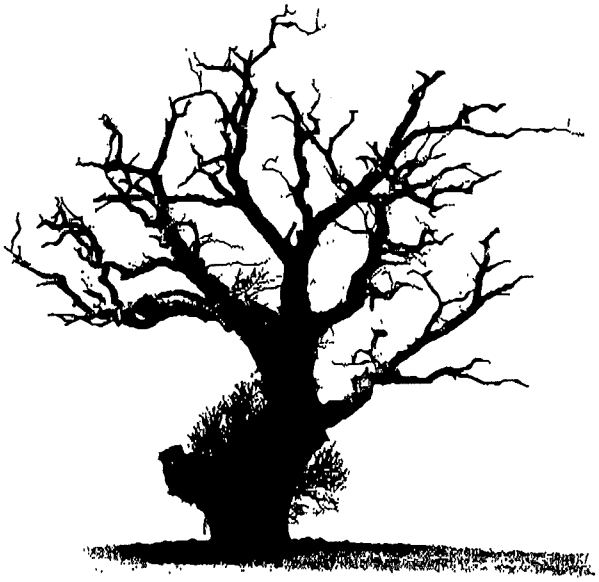
Legal Rights to Fresh Water

Since "rule of law" was established in 1840, NZ has treated water as different from other objects of private ownership. Water for domestic consumption has been a recognised legal right. Beyond that, water exploitation was conditional upon such matters as the water body from which extraction is made, other "downstream" users, and public, navigational, and recreational interests. Section 14 of the Resource Management Act states that no person shall take, use, dam or divert water without Crown permission.



"To give away the public interest in freshwater is not emotive, it is life-threatening"

"...it is sheer stupidity to impose that regime on the basic element that gives and sustains life"

As to the bolded sentence in Ms Appleyard's article that reads "It is hard for permit holders to allow others access to any surplus they may have," this, to my mind, is a mistaken assumption of the nature of RMA sanctioned permits, in that that which is permitted for taking or using must be used for the specific purposes applied for. Who says the permit holder has any legal right to retain any surplus? The leading law case on this debate is Aoraki Water Trust v Meridian Energy Ltd given in 2005. I recently attended in April 2009 an international environmental law conference held at the University of Auckland and was privileged to hear Mr Phillip Milne (partner at another major NZ law firm, Simpson Greirson), and Lead Counsel for Aoraki Water Trust, deliver a paper and lecture entitled Allocating Water after Aoraki: The Implications of characterising water permits as property rights (7), which highlighted the dangers of such assumptions.

To give away the public interest in freshwater is not emotive, it is life-threatening. The dilution of democratic decision-making will turn into a torrent as this particular iceberg melts.

The writer refers the reader to an article provided to him by Professor Tony Arnold who presented a draft at the same law conference mentioned above. This article, in my opinion, emphasises from the atypical US capitalist experience the weakness of continuing down a pathway establishing private property rights over water, because the world's peoples, populations and problems are causing so much change so rapidly that it is sheer stupidity to impose that regime on the basic element that gives and sustains life.

In my opinion, Ms Appleyard's and Connor English's articles are "softening-up" articles similar to those put out by the NZ fishing industry in the years of 1980-1985 which sought to equate "licence to fish" into a "fishing property right." The Waitangi Tribunal Muriwhenua Fisheries Report WTR 22, 1988 (8) saw those same fishing industry players receive – based on a five year catch history – Quota Management System allocations which equated to a $400m gift from the NZ public. Whilst one can choose to not buy sea fish, one cannot live without fresh water. The fisheries Quota Management System was of course the precursor to the Big Con job (9) pulled off on public property ownership interests by the Douglas/ Prebble SOE policies of the mid-80s, stopped by Sir Graham using the Treaty, given a tea break by David Lange, and repeated in some guise ever since by paid public servants democratically elected.

We are being asked to believe that privatisation is not Cabinet policy, only public-private partnership. Privatisation is here, it is happening, and ratepayers ought to be asking "Is my regional council a Titanic whose iceberg has arrived?" The writer is not anti-privatisation, it's simply that the necessities of life, of which water is one, are too precious to place into the hands of private ownership. The Treaty and a restored 'commons' sense demand that good governance requires democratic decision making in regards to allocation of this life-giving resource.

In the words of Milton "Water, water everywhere, but not a drop to drink." We add "only to sell plus gst!"

Footnotes:

1 Dominion Post article 27/12/10 – 'Water Rights a Big and Growing Issue' By Jo Appleyard pB7

2 Office of the Attorney General letter to Jonathan Temm, President, NZ Law Society 14/10/2010

3 15/2008 SC 15 /2008 transcript and March 26 2009 interim judgment

4 New Zealand Maori Council v Attor-Gen & Ors [1987] 1 NZLR 241

5 Application for intervenor - Supreme Court Transcripts – AC 15/2008

6 April 25 2009 Minute of SC / 2008

7 Philip Milne – 'Allocating Water after Aoraki' paper ref 9200691.

8 Google "Waitangi Tribunal follow your e-nose to reports and read it. The writer discloses as a research officer, Justice Department, Tribunals Division he was entrusted in May-June 1988 with the production control of that report, and did from 1986 -1988 various research analysis tasks for that Tribunal.

9 Refer 'The Big Con' by Gordon McLauchlan (1992) GP Publications

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