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Waitangi Tribunal
20 JUL 2012
Ministry of Justice
WELLINGTON

Tradable Water Regime?

1.1. Currently, the Government is undertaking a policy review of water allocation rights. Although the review has not yet crystallised into government policy, the word on the street is that the government is looking at the possibility of a tradable regime for water allocation. The launch of the Sustainable Water Programme of Action will, according to a press release from the Minister for the Environment, see the development of a "*strategic and nationally consistent approach to managing our valuable freshwater resources*".[1] We are told that the "*days of taking the unlimited use of water for granted are over*". This is because the demands on freshwater (especially irrigation) have exceeded what is available or sustainable in some regions. The three national outcomes to be achieved through the Sustainable Water Programme of Action sound innocuous enough:

1.1.1. Improve the quality and efficient use of freshwater by building and enhancing partnerships

1.1.2. Improve the management of the undesirable effects of land-use on water quality

1.1.3. Provide for growing demands on water resources and encourage efficient water management.

1.2. The following principles will guide the development of the package:

1.2.1. *water will continue to be managed as a public resource*;

1.2.2. freshwater management will be improved under the Resource Management Act;

1.2.3. regional councils will continue to have primary responsibility for managing freshwater;

1.2.4. clear environmental limits will be set for water quality and the quantity available for allocation;

1.2.5. enhancements to existing mechanisms and the provision of incentives will improve efficiency of water use;

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[1] Press release from Hon David Benson-Pope, Minister for the Environment, "Charting dynamic new course to manage our water", 10 April 2006; available on Ministry for the Environment website at www.mfe.govt.nz. See also the Cabinet paper: *Sustainable Water Programme of Action – Implementation Package*, also available on the MFE website.

1.2.6. resource users will be encouraged to take responsibility for their actions and will be given the flexibility to develop appropriate solutions;

1.2.7. nationally outstanding natural water bodies will be identified and better protected;

1.2.8. the best available information will be used for decision-making processes;

1.2.9. community involvement and confidence in decision-making processes will be maximised, building on the opportunities for participation in the regional planning process.

1.3. The principle that water will continue to be managed as a public resource indicates that the Government is continuing to adhere to the philosophy that this review is only about 'management' of a resource, and that 'ownership' issues will be kept off the table. As the Minister explains it:

> Mr Anderton said the Programme is about water management, not water ownership: "*Water will remain in public ownership. We want to ensure that every New Zealander has fair and equal access to water. We also want to ensure that economic growth occurs in a sustainable way, with our environment protected.*"[2]

1.4. This begs the question, of course, as to whether water can remain 'publicly owned', when the interests of Maori have not been catered for. And although the law may state that water cannot be 'owned', it is telling in my submission that the perception even at a government level is that it is a publicly owned resource.

1.5. The Government's pretence at a 'neutral' stance is, it is submitted, deceptive. The blurring of the distinction between ownership and management means in effect that ownership rights are being steadily eroded by strengthening the rights of consent holders under the water allocation model. Taking 'ownership' off the table amounts to little more than a means of deflecting Maori attention from the still unresolved issues regarding the legal and Treaty rights of tangata whenua in the freshwater resource. The Government's Cabinet paper on the Sustainable Water Programme adverts to Maori concerns:

> Maori will raise concerns about projects that could be viewed as raising the issue of ownership of water. Many Maori also consider that their Treaty interests go beyond solely ownership of water resources – extending to the

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2 Press release, "*Charting dynamic new course to manage our water*", ibid.

> protection of Maori cultural values in water, equitable access to the use of water for economic and cultural benefit and a role in decision-making about water allocation that reflects the Treaty relationship. While the actions proposed do not represent a substantial change to the existing rights regime, or preclude any future changes, Maori may consider that their interests need further recognition.[3]

1.6. Of course, the fact that the existing rights regime is wholly unsatisfactory from a Maori point of view suggests that Maori concerns will not be assuaged by assurances that the existing regime will remain substantially intact.

1.7. In my submission, the potential future introduction of a regime that prioritises rights of access to water provides an opportunity for the Crown to make long overdue recognition of Maori rights to water. The negotiation of a national settlement could perhaps provide a statutory basis for providing for Maori rights, and enable the Crown to continue regulating water rights.

American recognition of water rights

1.8. The proposition that Maori Treaty and customary rights to water could be provided for in some way has some precedent at the international level. The Tribunal may be interested to know that the United States has a long history of reserving water rights for indigenous Americans, stretching back to 1908 decision in *Winters v United States.*[4] The jurisprudence does not recognise aboriginal title as such, but rather a prior right to water allocation. The *Winters* doctrine assures tribes the right to use sufficient water to fulfil the purposes of their reservations, a prior right that takes priority over all uses that began from the date after the reservation was established.[5] Nor can the rights be forfeited for nonuse. The rationale for this doctrine is that the purpose of the reservations was to provide a place where the tribes could be self-governing and economically self-sustaining.[6] In the arid south-west, this was not possible without water being reserved for the tribes. The amount of water to be reserved must satisfy future as well as present needs, which is determined by the amount of water required to irrigate all the 'practically irrigable acreage' on the reservations.[7]

1.9. There is divergent case law on the right of indigenous Americans to economic development by means of the reserved water rights. In one case, the tribes were denied a reserved water right for mineral and industrial development,

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3 Cabinet paper: *Sustainable Water Programme of Action – Implementation Package,* para 59.

4 *Winters v United States*, 207 US 564 (1908), p796.

5 Getches, Wilkinson & Williams, *Cases and Materials on Federal Indian Law* (1998), 4ed, p791.

6 Getches, ibid, p807.

7 *Arizona v California*, Supreme Court of the United States, (1963), 373 US 546, 83 S.Ct. 1468, 10 L.Ed. 2d 542; in Getches, ibid, pp800-804.

notwithstanding the valuable mineral estate underlying their lands, but were reserved water rights for agricultural, muncipal, domestic and commercial uses.[8] However, the right to water is tied inexorably to the principle of self-determination for indigenous peoples, as explained by the Supreme Court in the following quotation, albeit one that is a modest expression of the principle:

> As in Arizona v California and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood – that is to say, a moderate living.[9]

1.10. The right of tribes to market their water by sale or lease for uses off the reservation has apparently not been the subject of determination by the courts, although there are no legal prohibitions on the practice. It is argued on the basis of the existing jurisprudence, however, that if the purpose of reservations is to provide a permanent homeland where the tribe can be economically self-sufficient, this goal could be promoted through the sale or lease of water.[10] The marketing of water has now in fact become commonplace, a development that has been facilitated by the increasing tendency for water rights to be the subject of settlements with the state, rather than fought through the courts. Water settlements are funded by the federal government, often to the tune of tens of millions of dollars, and make provision for water use rights, and marketing rights.[11] Of the 26 western tribes that have established water rights, representing more than 5.9 million acre-feet of water, at least 13 of them have off-reservation lease agreements with municipalities, industries or irrigators.[12] It is thought that water marketing has the potential to provide impoverished tribes with opportunities to generate revenue and manage their water resources.

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8 *In re General Adjudication of all Rights to Use Water in the Big Horn River System*, Supreme Court of Wyoming, (1988), 753 P.2d 76, affirmed sub nom Wyoming v United State, 492 US 406, 109 S. Ct. 2994, 106 L.Ed. 2d 342 (1989); in Getches, ibid, pp824-830, at p829.

9 *Washington v Washington State Commercial Passenger Fishing Vessel Association*, 443 US 658 (1979), p882; in Getches, p815.

10 Getches, ibid, p853.

11 Getches, pp849-850.

12 Landry & Quinn, 'Untapping Tribal Waters', in *The Water Report*, Issue #35, 15 January 2007, p1, at p2.