

1-1-2013

New Zealand Maori Council v. Attorney General, SC 98/2012 [2013] NZSC 6 (Supreme Court of New Zealand)

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Will Stenzel & Dr. Jacinta Ruru, Court Report, New Zealand Maori Council v. Attorney General, SC 98/2012 [2013] NZSC 6 (Supreme Court of New Zealand), 16 U. Denv. Water L. Rev. 508 (2013).

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fact. As a result, the Court remanded the issue of the quantification of the Nation's practicably irrigable acreage.

Next, the Court addressed the question of whether previous agreements or cases provided a right to the Nation for water storage in the Yakima River. The Court held a plain language reading of the Pope Decree, the most recent federal court opinion on the Yakima River Basin, granted such a right to the Nation. The Court remanded that issue, as well, to the trial court to include a storage right in its calculations of the Nation's irrigable acreage.

The Court then turned to the question of whether the Northside users had a right to take in any excess water from the Yakima River after the Nation received its share of the water. The Court upheld the trial court's ruling granting excess water to qualifying Northside users, stating their right to excess water existed regardless of whether or not there would, in reality, ever be excess water.

The Court also upheld the limitations the trial court placed on excess water rights. Based on its reading of the Pope Decree, the Court held Northside users only have excess water rights until July 10th of each year. Additionally, the Pope Decree imposed a time limit of either thirty or forty-five days, during which the Northside user could collect excess water. The Court upheld the trial court's ruling validating the forty-five day period because the trial court based its decision on a sufficient amount of evidence, including ten years of water flow data that indicated when there was usually excess water. The Court, however, refused to extend an allowance of excess water rights to junior rights users, which are those users not recognized by the Pope Decree. The Court reasoned that entities not party to the Code Agreement were not included in the Pope Decree and, as such, do not have a place in the allocation of water rights for the Yakima River Basin.

After settling the issues of water use, the Court turned to the question of how to correctly apply the "future development exception." The Court reversed the trial court on this issue, which had found that the resumption of irrigation fit within the definition of the exception. The Court held the trial court had applied the exception too broadly. The Court further held the exception applied narrowly to those instances in which steps toward actual development within a defined span of time are satisfied. Merely resuming irrigation does not suffice.

Accordingly, the Court remanded the case to the trial court for further factual findings on the Nation's practicably irrigable acreage and excess water rights; upheld the Northside users' rights to excess water, within certain limitations; and reversed the trial court's determination on an individual Northside user's future development excuse for nonuse of its water rights.

Shannon Love

INTERNATIONAL

NEW ZEALAND

New Zealand Māori Council v. Attorney General, SC 98/2012 [2013] NZSC 6 (Supreme Court of New Zealand) (holding (i) the partial privatization

of Mighty River Power will not impair to a material extent the New Zealand government's ability to remedy any breach of the Treaty of Waitangi with respect to Māori water rights; (ii) the proposed sale of shares in Mighty River Power is consistent with the principles of the Treaty; (iii) the proposed sale of shares is reviewable by the Court for consistency with the principles of the Treaty; (iv) the proposed sale of shares is not in breach of the Waikato-Tainui Raupatu Claims Settlement Act 2010; and (v) the consultation between the New Zealand government and Māori following the recommendation of the Waitangi Tribunal was consistent with the principles of the Treaty).

In this case, the New Zealand Supreme Court upheld the Government of New Zealand's ("Government") partial privatization of a major hydroelectric power producer, despite valid Māori claims to ownership and control over the underlying water rights. The decision has national and international implications for freshwater management and the nature of water rights.

Mighty River Power Limited ("Mighty River Power") produces and markets 15-18% of New Zealand's electricity, with 60% coming from hydroelectricity.¹ Mighty River Power is currently a state-owned enterprise. In 2012, the Government sought to privatize 49% of the company pursuant to the State-Owned Enterprises Amendment Act 2012. The Government will also seek to partially privatize Meridian Energy Limited and Genesis Energy Limited, accounting for an additional 47% of New Zealand's energy production, again with a substantial portion of this coming from hydroelectricity.² These privatizations will involve similar issues.

The Māori parties claimed privatization of Mighty River Power is inconsistent with the Government's obligations under the 1840 Treaty of Waitangi ("Treaty").³ Partial privatization would impair the Government from settling ongoing misuse and misappropriation of Māori proprietary water rights, which would in turn violate the Treaty.

The permanent Waitangi Tribunal ("Tribunal"), which was established to determine Treaty breaches, recommended that the privatization should not proceed until nationwide consultation with Māori could be held. One approach considered by the Tribunal was "shares plus," a combination of Māori-held shares and control in the partially privatized company.

The Government disagreed with the Tribunal's recommendations and the dispute proceeded to litigation. The High Court found in favor of the Gov-

1. Mighty River Power Commerce Committee, *Financial Review FY2011/2012*, Mighty River Power (April 5, 2012), http://www.mightyriver.co.nz/PDFs/Results/Presentations/MIGHTY-RIVER-POWER_CommerceCommittee_financial-rev.aspx. 30% of Mighty River Power's energy production is geothermal.

2. New Zealand Ministry of Economic Development, *New Zealand Energy Data File, 2011 Calendar Year Edition*, New Zealand Government (2012), <http://www.med.govt.nz/sectors-industries/energy/pdf-docs-library/energy-data-and-modelling/publications/energy-data-file/energydatafile-2011.pdf>.

3. The Treaty of Waitangi recognized Māori ownership of lands and properties, gave Māori the rights of British subjects, and ceded to the Crown a right of governance. The parties to the treaty differ as to the nature of that governance, as well as other issues. The Treaty is generally considered the founding document of New Zealand.

ernment, as did the Supreme Court on direct appeal and in a unanimous opinion. The Supreme Court heard the case on a “tight timetable” and cautioned, “that circumstance and the fact that some of the arguments touch on fundamental elements of the New Zealand legal order prompt caution in straying beyond matters essential to disposition of the appeal.” In the weeks following the decision, hundreds of thousands of New Zealand citizens registered to purchase shares in the privatized portion of Mighty River Power, to be listed on the New Zealand and Australian stock exchanges. One estimate of the money that will be raised by the sale equates to US \$1.5 billion.⁴

The Supreme Court’s decision considers, among other issues, whether the Government followed the proper procedure for privatizing a major state-owned enterprise, the Court’s power to review the Government’s decision to do so, and whether the Government properly considered the Tribunal’s recommendations. This Special Court Report focuses on a major water rights issue, of interest to US practitioners, specifically the nature of water rights in New Zealand, and how Māori water rights may fit within that legal framework.

The Tribunal found that Māori rights and interests in water bodies were essentially ownership rights, and that the Treaty guaranteed those rights.⁵ Specifically, the Tribunal identified the proprietary water rights guaranteed by the Treaty as the exclusive right to control access to and use of water. These rights are based on historical control and management of water bodies, such as restrictions on travel over waterways. Māori do not claim sole or exclusive ownership and control over water, but maintain that there are ongoing breaches of their residual water rights as established and protected by the Treaty.

The Government does not dispute that Māori have water rights established by the Treaty. The Government also concedes that, at least in some cases, these claims can be described as “residual property rights.” However, the Government claims that, under Common Law, “no one owns the water” until contained (for example, put in a tank or bottled), and that New Zealand law does not provide for ownership of water in rivers and lakes.

Consistent with this view, perpetual water rights do not currently exist under New Zealand law. Water resource consents granted pursuant to the Resource Management Act (“Act”) are limited to a maximum of thirty-five years. Water resource consents are considered limited proprietary interests. However, depending on their terms, resource consents can be subject to modification, limitation for instream flow protection or other values (through water

4. David Hargreaves, *Ensuring Strong Demand for Mighty River Power shares in Australia is key to the Government’s partial privatization plan*, INTEREST.CO.NZ, (March 5, 2013, 8:17 AM), <http://www.interest.co.nz/opinion/63413/opinion-ensuring-strong-demand-mighty-river-power-shares-australia-key-government%E2%80%99s-pa>.

5. The Tribunal made its recommendations in the form of an interim report. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim, WAI2358*, New Zealand Waitangi Tribunal (December 7, 2012), <http://www.waitangi-tribunal.govt.nz/scripts/reports/reports/2358/C2257DAB-CB5D-481F-9018-6A4F35044D0B.pdf>.

conservation orders),⁶ negative impact due to granting additional consents,⁷ or as pertinent to this case, to redress the Government's Treaty obligations. Mighty River Power's hydropower resource consents contemplate for review due to any Treaty settlement.

The High Court found "there can be no doubt" that the Māori have "claims of a type of proprietary interest in freshwater . . . including . . . the source of water used by [Mighty River Power] to generate electricity." However, the High Court also supported the Government's view that, "There are only two forms of property in New Zealand, real and personal. A resource consent is neither."

The High Court added that, in the case of Mighty River Power, "[t]he hoped for Māori control . . . is expressly prohibited, citing that the Māori would have at best a minority interest in the resulting privatized company," that the hydropower project is already in place, and that there are corporate issues with granting one group of shareholders greater rights. The High Court suggested that the Māori could gain greater say in the New Zealand-wide management of water through revision of the Act rather than through the privatization process. The Act is in fact going through extensive review and revision, as described below.

Like the High Court, the Supreme Court confirmed the Māori water rights, but struggled with what forms those rights could take. One problem cited by the Court is that "the [Māori] were not very specific as to . . . relief which is substantially in prospect and would become materially harder to obtain post-privatization." The Court summarized the possible forms of settlement as: (i) the "shares plus" concept; (ii) "modern water rights" in the form of water permits issuable by the Māori as a regulating authority; or (iii) royalty payments for water use.

The Supreme Court also agreed with the High Court that, in this instance, granting the Māori exclusive control over water may be practically impossible, finding, "The [Māori] are not seeking, and in any event the [Government] could not agree to, settlements which would be inconsistent with the continuing efficient operation of the current power-generating capacity." The Court added, "Since it is however implausible to suggest that the use of the water could be withheld from the generation of electricity . . . in effect proprietary recognition through the water permits is likely to be of value as reparation only to provide a basis for payment to Māori of royalties in respect of the particular waters used . . ." and that both Mighty River Power minority shareholders and other power producers would resist such payments.

6. A water conservation order is essentially "a national park for a river," encompassing wild and scenic, recreational, fisheries, and other values. Maree Baker-Galloway, Public Lecture, March 21, 2013, 7:00 p.m., Burns Hall, Dunedin, New Zealand. See Resource Management Act, Part 9.

7. *But see Aoraki Water Trust v. Meridian Energy Ltd.*, 2 NZLR 268 [2005] (citing that subsequent water permit is subject to priority in time, and not to be devalued by subsequent permits during the permit term).

Nevertheless, the Court cited previous settlements broadly recognizing Māori rights to water and waterways as indicative of the Government's willingness to recognize those rights subsequent to privatization. In particular, the Court found that Māori claims to the Waikato River "have received substantial redress," while nevertheless remaining incomplete. The Supreme Court also noted that the thirty-five-year limit for water resource consents was established by the Act to ensure that the Government could remedy Treaty violations even if the Government transferred water rights.⁸

The Supreme Court's decision could be interpreted as tacitly supporting essentially a dual system of water rights in New Zealand. "Modern water rights" (for example, resource consents), will remain subject to the Government's "no one owns the water" view; while Māori proprietary rights may be recognized, at least in some instances, as possessing greater ownership indicia of ownership and control.

This approach would be somewhat analogous to Native American tribal water rights established by *Winters v. United States*, 207 U.S. 564 (1908), in the sense that the Māori rights are established by the Treaty independent of any subsequent permitting process. However, this approach would be different than that established by *Winters* in that the rights granted to the Māori would be an different type of water right than those granted through the subsequent permitting process. An additional interpretation of the decision is that Māori ownership of permanent water rights could be recognized unless exclusive control would be practically impossible, for example due to prior establishment of a major hydroelectric project.

This case is one component of major changes to, and arguably a crisis in, New Zealand freshwater management. First, the issues in this case will arise in negotiations and/or litigation regarding the upcoming partial privatization of Meridian Energy Limited and Genesis Energy Limited. Second, the Tribunal will continue its inquiry into remedying the Government's treaty violations of Māori water rights. The Supreme Court noted that the Government "will be required to respond to" the Tribunal's recommendations.

Third, the Government is in the midst of revising the Act, including the sections governing water allocation and quality.⁹ This process involves Māori stakeholders on multiple levels, and Government has committed not to issue additional water resource consents until this process is finished. Shortly after the Supreme Court's decision, the Government released a framework for "freshwater reform for 2013 and beyond" discussion, proposals, and com-

8. One issue in this case is whether the Government was in fact transferring water rights; the Supreme Court said that it was not because the resource consents will continue to be owned by Mighty River Power.

9. New Zealand Ministry of the Environment, *Fresh Start for Fresh Water reforms 2012*, New Zealand Government (2011), <http://www.mfe.govt.nz/issues/water/freshwater/fresh-start-for-fresh-water/>.

ment.¹⁰ Possible changes to freshwater management include limitations on or changes to water conservation orders.

Fourth, the Court issued its decision in the midst of an historic drought, which has reduced agricultural production and brought a renewed concern for areas of the New Zealand with over-allocated water supplies.¹¹ The drought has heightened calls for changes to freshwater management.¹² The question of “who owns water,” and what water rights are, will remain an important issue in the course of these changes, which in turn will provide examples for other countries seeking to effectively manage a limited freshwater resource.

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10. New Zealand Ministry of the Environment, *Freshwater reform 2013 and beyond*, New Zealand Government, (March 2013), <http://www.mfe.govt.nz/publications/water/freshwater-reform-2013/freshwater-reform-2013.pdf>.

11. BBC News Asia, *New Zealand North Island hit by worst drought in 30 years*, BBC News Asia (March 15, 2013, 5:45 GMT): <http://www.bbc.co.uk/news/world-asia-21797095>.

12. Brian Fallow, *From here on every drop counts*, The New Zealand Herald (March 14, 2013, 5:30 AM), http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10871078.

13. Will Stenzel, Esq. is a Colorado water law attorney visiting New Zealand with his spouse, who is on a US State Department Fulbright grant at the University of Otago. Stenzel is a visiting staff member at the law school. Dr. Jacinta Ruru is an Associate Professor at the University of Otago Law School in New Zealand. Her research focuses on exploring indigenous peoples' legal rights to land and water.