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Submission on Water Issues in Aotearoa New Zealand

By Dr Maria Bargh¹

This submission is provided in two Parts:

Part One: Overview of the significance of water to Māori and current national legislation relating to water.

Part Two: Overview of the potential impacts of the New Zealand government's proposals on Māori, including with regard to private sector provisions of related services.

Introduction

In 2003 the New Zealand government established a Sustainable Water Programme of Action to consider how to maintain the quality of New Zealand's water and its sustainable use. One of the models being proposed for the more efficient management of water is the market mechanism. Dominant theories internationally put forward the market as the best mechanism by which to manage resources efficiently. Given that all life on the planet needs water for survival its appropriate management, use and sustainability is of vital concern. However many communities, including Indigenous peoples, have widely critiqued the market, and the neoliberal policies which promote it, highlighting the responsiveness of the market to money rather than need.

In the case of Aotearoa, moves to further utilise the market mechanism in the governance of water raises questions, not simply around the efficiency of the market in this role but also around the Crownⁱ approach which is one of dividing the issues of marketisation, ownership and sustainability in the same manner in which they assume the river/lake beds, banks and water can be divided. Many Māori iwi (tribes) and hapū (subtribes) have argued, since at least Te Tiriti o Waitangi 1840ⁱⁱ (Te Tiriti), that water, river/lake beds, banks and water constitute an undivided entity.

¹ Te Arawa, Ngati Awa. Lecturer in Maori Studies, Victoria University of Wellington, Aotearoa, New Zealand.

It follows, therefore, that many iwi and hapū also argue that the issues of water 'management', sustainability, marketisation and ownership can not be adequately dealt with as segregated issues.

The tensions between these understandings and the New Zealand government's moves to limit the extent of Māori participation raises deeper questions about New Zealand's constitutional arrangements whereby currently the New Zealand government refuses to discuss the divisibility of sovereignty with Māori while at the same time signing significant powers of sovereignty away in neoliberal trade agreements.

In this submission I firstly examine the question of water ownership and the ways in which many iwi and hapū conceptualise water and water rights. This raises a second issue regarding the New Zealand government's Sustainable Water Programme of Action, the efficacy of the market mechanism and whether the utilisation of the market mechanism is justified in light of the human rights and Te Tiriti breaches.

PART ONE

An undivided entity

For Māori fresh water has been traditionally and is a valuable political, economic and spiritual resource. It is a source of food, part of a transportation system, and used for protocols related to tapu. Water use and ownership is governed by tikanga, customary law, and is connected with the rules for governing the surrounding land. River and lake beds and banks are therefore not viewed by many hapū and iwi as separate from the water within and beside them (Waitangi Tribunal, 1999b). In the Waitangi Tribunal'sⁱⁱⁱ *Te Ika Whenua Rivers Report*, lawyer Kathy Ertel argued that the river, beds, banks and water constitute an undivided entity (Waitangi Tribunal, 1998: 85). The Tribunal in that case stated that "Claimant evidence shows that rivers were and still are a taonga^{iv} (treasure) that provide material and spiritual sustenance and a strong continuing bond. The people belong to the river and the river belongs to the people" (Waitangi Tribunal, 1998: 86). Gail Tipa has further highlighted the connections of iwi and hapū and waterways, including through the development of a Cultural Health Index for water based on Māori science (Tipa, 2002).

Many iwi have proverbs about the unity of people and water. For example in the Whanganui area there is a saying "Ko au te awa, ko te awa ko au" (Turia in Selby 2005: 17) I am the river and the river is me. In the tribal areas of Te Arawa and Waikato there are differing versions of the proverbs "Haere ake nei au, tō ake te tatau ki te whare" (Mead and Grove, 2004: 51) and "He huahua he kai pai! He wai te kai pai!" (Mead and Grove, 2004: 71) which refer to incidences around people firstly disagreeing and then finally agreeing over the preciousness of water to nourish the people.

Freshwater has been traditionally and is defined by many Māori in a number of categories: wai Māori, waiora, waikino, waimate, wai wera and waitai. Wai Māori is defined by Hirini Mead as water available for ordinary purposes (Mead 2003: 66).

Jim Williams describes waiora, waikino and waimate in the following ways. Waiora as the “waters of life” (Williams, 1997: 1) including:

rainwater or tears, as well as springs, holy water and water in certain special places where exceptional events have occurred in the past. Waiora can often rejuvenate the damaged mauri [life force] of other things.

Waikino is defined as “bad water” and is

“a dangerous place such as a stretch of water with rapids or snags, or water which has become polluted, either physically or spiritually. In each case the mauri has changed and is susceptible to being changed again” (Williams, 1997: 1).

Waimate is “dead water” and “cannot support humanity or human food. It can absorb or contaminate the mauri of living things or of the waters” (Williams, 1997: 1)

Wai wera is hot water, generally associated with geothermal activity and is sometimes “tapu for ceremonial or practical reasons related to its medicinal uses” (Llewell in Harris 2004: 480). Waitai is sea water. Rules relating to mauri, which under the traditional Māori view is inherent in all things, tapu, mana, rahui, utu and muru are also important in regulating use of water (Schroder 2004).^v

Given Māori understandings of the different types of water contemporary attempts by the Crown to mix water types, particularly waste water or sewage with fresh water has resulted in a number of cases to the Tribunal and the courts.

Tensions between Crown and Māori worldviews

Issues surrounding the quality of freshwater and its sustainability are of vital importance globally and nationally, as the stress human activity places on the environment becomes ever more visible. Freshwater in many rivers and lakes in Aotearoa is now no longer drinkable due to pollution (Department of Conservation, 2000:45- 51). The discharge of effluent and other pollution into lakes and streams has promoted the spread of algae bloom and made a number of lakes toxic (Environment Bay of Plenty, 2006). The dumping of toxic waste in the ground, industrial discharges into water discourses, and the spraying of fertilisers containing harmful chemicals near or across waterways has also decreased water quality.^{vi}

Māori have long expressed concerns regarding the quality and use of water nationwide. Since the 1800s Māori have objected to activities related to freshwater which have impacted negatively on the environment, Māori livelihoods and law (Waitangi Tribunal, 1997). One common example across the country which demonstrates the different views that the Crown and Māori have regarding governing water is the drainage of swamps which gave rise to numerous difficulties such as flooding and drought. In the Ngāti Awa tribal area, between Matatā and Whakatane the land was originally swamp. Across the swamp land three significant rivers merged, forming Te-Awa-o-te-Atua (the river of God) which met the sea at Matatā. The swamp was a vitally important resource for the hapū of the area with

each hapū governing their own section to collect flax, fish and birds (Waitangi Tribunal, 1999a: 103-105). After the Crown confiscated most of Ngāti Awa land in 1866 (245,000 acres)^{vii} they decided to drain the swamp for farmland. The drainage of the swamp took away this important resource from Ngāti Awa and demonstrated the different understandings regarding the relationship between people and the environment held by Māori and the Crown.

European uses of water in waste disposal including using it as a means by which to transport, dilute or assimilate waste, is fundamentally contrary to Māori traditional law around the maintenance of separated types of water (Schroder: 2004: 36). This has led to a number of cases over the years. In the more contemporary of these, such as the *Kaituna River Report*, numerous witnesses supported the claimants by providing evidence that to “mix waters that had been contaminated by human waste with waters that were used for gathering food was deeply objectionable on Māori spiritual grounds” (Waitangi Tribunal, 1984: 9).

Other practices of early Pakeha settlers also conflicted with Māori law. For example a number of activities such as the transportation of logs down rivers which destroyed eel traps, and the introduction of trout, which decimated Indigenous species of fish, destroyed Māori practices around food collection, as well as disrupting resource use rights. Different iwi took numerous claims to the Native Land Court in the late 1800s in order to have questions around ownership, particularly of lakes resolved (Waitangi Tribunal, 1997: 347).

In the Te Arawa tribal area Te Arawa have had a long struggle to have tino rangatiratanga and concerns over lakes management heard. At the time Te Tiriti o Waitangi was signed in 1840 Te Arawa had clear tino rangatiratanga over the lakes in the Rotorua district. The lakes provided food, shelter, transport routes, economic resources as well as a means to provide for visiting guests (Deed of Settlement, 2004) The lakes were governed according to the tikanga of Te Arawa with clear rules around which hapū governed particular aspects. In the 1870s Te Arawa were heavily involved in tourism and were often the owners of enterprises around a number of the lakes. Te Arawa was also at this time actively resisting land sales and pressure from the Crown to have lands passed through the Native Land Court. The Native Land Court was eventually set up in Rotorua however and Te Arawa lost a great deal of land shortly thereafter. A number of negotiations with Crown officials also resulted in the Fenton Agreement and the Thermal Springs Districts Act 1881 which gave a great deal of control over the lakes to the Crown where Te Arawa hapū thought that their rangatiratanga was reaffirmed (Deed of Settlement 2004). Trout was then introduced to the lakes and had a devastating effect on native fish and koura thus decimating food for Te Arawa (Deed of Settlement 2004). Thereafter Te Arawa took numerous cases^{viii} to have their ownership of the lakes reaffirmed and after much delay and cost an agreement was finalised with the Crown although it subsequently proved unjust and Te Arawa continued challenging the Crown (Deed of Settlement, 2004).

The tension between Crown and iwi understandings of water in the Te Arawa case provides one example of many which continue to the present day. The Te Arawa Lakes Settlement Act was passed in 2006 and in many ways epitomises the ongoing Crown approach to the issue in regard to Te Arawa. The Act returns the beds of a

number of lakes in the Te Arawa area to Te Arawa ownership. It also vests the “space occupied by water and the space occupied by air above each Te Arawa lakebed” (Te Arawa Lakes Settlement Act 2006: 1(2)) (‘Crown Stratum’) in Crown ownership. “The Crown retains the ownership of the Crown stratum as Crown land under the Land Act 1948” (Te Arawa Lakes Settlement Act 2006: 1(2)).

Ownership

As the Te Arawa and Ngāti Awa cases emphasise it is difficult to remove concerns surrounding freshwater ownership, sustainability and marketisation from the current political context. The Crown continues to breach human rights and Te Tiriti o Waitangi, as in the case of the foreshore and seabed^{ix}, while limits and restrictions are being placed on the redress possible for these breaches. Recent negotiations have seen some iwi accept Treaty Settlements with the Crown including the Te Arawa Lakes Settlement relating to the lake beds. However the manner in which these ‘agreements’ are negotiated is unequal, with the Crown in a significant position of power - determining the negotiation framework, limits on possible redress and with very little to lose.

The wording in the Te Arawa Lakes Settlement, whereby it is not specifically the water and air which is vested in the Crown, but the *space* occupied by these, enables the Crown to reaffirm their position that water can not be owned per se while simultaneously seeking to benefit from water as though it is owned and refusing Māori arguments that it is an undivided entity.

Despite supposedly not being able to be owned there are a range of rules governing its use and associated rights (Waitangi Tribunal, 1999b). Under the Water and Soil Conservation Act 1967 the Crown specifically establishes its sole right to govern water use. Under common law there are also other stipulations relating to water:

Ownership of riparian land determined ownership of the beds of water bodies, which in turn determined rights to the flow and use of water, to discharge water and to the natural drainage servitude (Wheen, 1997: 79).

English common law presumes that non-tidal, non-navigable waterways are held by the owners of adjoining land to the centre line of the river, with no ground public right of use or access (*ad medium filum aquae* rule) (Waitangi Tribunal, 1999b).

In the *Whanganui Report* the Waitangi Tribunal stated that the Crown has

gradually assumed control over many... [water] rights and that has continued under the Resource Management Act 1991...in which the Crown assumed the right to control, manage and allocate water uses (*Māori Law Review*, 1999).

Crown assumptions of sovereignty, and attitudes about the absence or inferiority of Māori law; have resulted in a presumption of Crown ownership of waterways. Crown assumptions have been expressed in a number of somewhat contradictory assumptions in regard to water. The first is that by signing Te Tiriti Māori ceded

sovereignty and customary title over waterways to the Crown. The second is that once land passed through the Native Land Court the common law rule of owners of adjoining land owning to the middle of the river took precedence over Māori law rules about water, river/lake beds and banks constituting an undivided entity (Waitangi Tribunal, 1998). A number of Waitangi Tribunal reports have found many of these Crown assumptions not only to be flawed but also to be breaching Te Tiriti o Waitangi (Waitangi Tribunal, 1998).

A number of Waitangi Tribunal reports have indicated that Māori customary rights in rivers and freshwater are far more extensive than the Crown recognises. In the *Te Ika Whenua River Report* the Tribunal found no evidence that Māori had willingly given up customary title rights to water ways and therefore potentially to the tino rangatiratanga over water itself (Waitangi Tribunal, 1998). Te Tiriti o Waitangi stated that Māori could retain their whenua, kainga and taonga for as long as they wished to keep them (Te Tiriti o Waitangi, 1840, Article 2). Water is clearly a taonga for Māori and this has been supported in a number of Waitangi Tribunal reports. In the *Whanganui Report* the Tribunal found that for the Whanganui people, the river and its water are a taonga (Waitangi Tribunal, 1999b). In the *Mohaka River Report* the Tribunal concluded that “the Mohaka River was a taonga of Ngati Pahauwera, who had never relinquished te tino rangatiratanga over it” (Durie, 1998: 39). In the *Kaituna report* the Tribunal found that the Kaituna River had been “owned for many generations by the Ngati Pikiaio sub-tribe and the Te Arawa” (Waitangi Tribunal, 1984: 31).

Waitangi Tribunal and other legal research also suggest that Māori customary title rights have not been extinguished by common law or statute law (Waitangi Tribunal, 1997: 348).^x Therefore, by passing laws creating policies assuming that they own waterways the Crown is further breaching Te Tiriti. In a legal research paper on Indigenous title to water resources, Mark Schroder argues that,

In relation to the surface waters and sea in New Zealand, Māori Indigenous title rights clearly remain. Māori title rights to the water resources have not been extinguished by the common law or statute law. ...Any attempt by the Crown to infringe or extinguish these rights will raise issues relating to the fiduciary duty that exists in respect of Māori. Consent and compensation will be required to abrogate any rights to water (Schroder, 2004: 53-54).

The extent of Crown or Māori ownership rights to water is therefore contested and could be addressed by the courts. Given Māori experiences with the *Ngati Apa*, (foreshore and seabed) case however, if a court ruling was favourable it is likely the Crown would simply legislate to impose their own ownership.

Sustainable Water Programme of Action

The New Zealand government’s Sustainable Water Programme of Action began in 2003 and is part of a broader Sustainable Development Programme of Action which responds to a number of commitments made by the New Zealand government including as part of the Convention on Biological Diversity (Department of Conservation, 2000).

The Programme of Action highlights three areas of national concern - improving the quality and efficient use and management of freshwater, improving the management of the undesirable effects of land-use on water quality and catering for greater demand for water (Ministry of Agriculture and Forestry, et. al, 2004b). The Programme sets out that Regional Councils will continue to manage water including allocations, as stipulated by the Resource Management Act 1991 (RMA), but that greater national direction is required to lead the overall plan (Ministry of Agriculture and Forestry, et. al, 2006: 21-22). The national direction is likely to take the form of a National Policy Statement and/or National Environmental Standards (Ministry of Agriculture and Forestry, et. al, 2004b).

The Programme of Action proposes a range of potential remedies for the precarious situation water resources are in. A number of strategies revolve around conducting research to identify at-risk catchments, to protect biodiversity and improve methodologies for further research (Cabinet Paper, 2006).

The Programme of Action also proposes a number of ways in which the market could be further utilised including strengthening the transferability for resource consents (cap and trade strategies) that are currently possible under the RMA, by using auctions or tenders to allocate water (Ministry for the Environment et. al, 2004a: 22- 23), and charging for the management of water on a volumetric basis to “encourage efficiency” (Cabinet Paper, 2006). To increase the transferability of allocated water, a key proposal has been for an initial volume to be set, then to allow auctioning or tendering for re-allocating or transferring consents (Cabinet Paper, 2006).

In addition, to encourage transferability, ‘cap and trade’ strategies set limits (or a ‘cap’) on the total level of discharges possible in a particular catchment. Resource consent holders within that area are then able to trade, for example some of their rights to discharge particular contaminants.^{xi} This separates resource consents related to using water for particular purposes (‘use’ consents) and consents which simply allow a particular volume of water (‘take’ consents). The New Zealand government argues that resource users will be encouraged to “take responsibility for their actions and will be given the flexibility to develop appropriate solutions” (Cabinet Paper, 2006). In so-called consultation meetings conducted by the New Zealand government, Māori expressed concerns that a ‘cap’ on discharges might simply encourage people to pollute up to the cap rather than reducing overall discharges (Ministry of Agriculture and Forestry, et. al, 2005: 12).

The ‘cap and trade’ strategies encourage the further introduction of the market mechanism to the use and allocation of water. Market mechanisms have already been introduced in some areas of the country to water allocation. The metering of water has occurred in many areas and has facilitated the establishment of public-private partnerships and privatisation. In Auckland Watercare, (a company owned by Auckland City and a number of Auckland District Councils), supplies water to retailers (including Metrowater and United Water) who sell water and wastewater services to Auckland customers/citizens. These kinds of practices are considered to be ‘public-private partnerships’ (Toleman, 2002). The Ruapehu District Council has a similar agreement with United Water (Toleman, 2002). United Water is also

contracted by the Wellington City Council to deliver wastewater services. United Water's prevalent presence in these initial areas using the market processes to provide water through 'public-private partnerships' suggests a trend here of large company dominance as has been experienced in other countries.

Market efficiency

Underpinning the New Zealand government's approach are particular assumptions about the benefits of the market mechanism. Advocates of the market claim it is efficient in promoting conservation and ensuring greater choice for the consumer (Young, 2005).

Advocates argue that the market provides for the more efficient use of water because once people have to pay for it they conserve it or put it to its "most productive uses" (Young, 2005: 12). This claim is complicated however by what is often a central aim of large businesses, to increase profits. In the case of water supplies, companies generate increased profit through increased consumption and or increased prices; therefore it is unclear what levels of conservation they would encourage. Metrowater in Auckland has recently announced increases in water prices which reflect experiences overseas where water has been privatised (Metrowater, 2006). In Bolivia water was privatised in 1999 which led to significantly increased water prices and subsequently huge protests (Shultz, 2003).

If companies deliberately restrict the supply of water this can also significantly increase water prices. Experiences in California indicate that companies have hoarded water supplies until the price has increased so that they can generate huge profits (Barlow and Clarke, 2004: 74). In areas where water is metered, those unable to pay risk being disconnected.

The aim of increasing profits is also facilitated through 'public-private partnerships'. Water companies save by not having to buy or maintain the water supply infrastructure as this remains the responsibility of the council involved. These companies are therefore able to generate large profits which are essentially subsidised by the public. Experience in countries such as Bolivia and Argentina, suggest that the claims that private sector management of water will produce extra revenue for governments (including local government) and increase efficiency have been unfounded (Transnational Institute, et. al 2006). Often government still has to finance water delivery after the introduction of the private sector (Transnational Institute, et. al 2006).

Experiences in Canada indicate that there are also uneven levels of power and influence in the water sector when the market mechanism is used. Large companies can negotiate discounts in fees or increases in consumption with councils while smaller cooperatives and communities struggle to negotiate comparable increases and to save water supplies (Barlow and Clarke, 2004: 75).

PART TWO

Human rights

In consultation meetings regarding the Sustainable Water Programme of Action the Ministry for the Environment reported that Māori had argued that simply “enhancing Māori participation is not enough - Māori want a role in decision-making” (Ministry for the Environment, 2005). Many Māori have long argued that the Crown’s relationship with Māori must be based on Te Tiriti o Waitangi; and that requires the Crown to act in good faith and actively protect Māori interests, rather than simply assuming Māori are one unitary stakeholder amongst many (Durie, 1998). Information released under the New Zealand Official Information Act reveals that the Ministry for the Environment had conducted research which confirmed these values and views from Māori well before the Programme was fully underway (Easthope, 2005).

In the New Zealand government’s Cabinet Paper on the Sustainable Water Programme of Action it states that “there are no human rights implications associated with the recommendations made in this paper.” (Cabinet Paper, 2006). As has been explained elsewhere Te Tiriti o Waitangi specifically reaffirms Māori tino rangatiratanga, including over lands, homes and treasures (Durie, 1998, Jackson, 1991). There are therefore, serious human rights implications which arise from the Programme. In the Cabinet paper itself it is stated that

Māori will raise concerns about projects that could be viewed as raising the issue of ownership of water. Many Māori also consider that their Treaty interests go beyond solely ownership of water resources - extending to the protection of Māori 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 (Cabinet Paper, 2006).

Questions of ownership inevitably raise human rights issues around rights that are protected under the Human Rights Amendment Act 2001 and the Bill of Rights Act 1990 such as the freedom from racial and other discrimination and the right to justice. Given that the form of ownership some Māori would be likely to claim relating to freshwater would be customary ownership, another set of human rights are invoked regarding the common law rules relating to the need for customary title to be clearly extinguished by legislation before it can be removed, as well as the need to compensate for extinguishment.

The Cabinet paper on the Programme also states that “While the actions proposed do not represent a substantial change to the existing rights regime, or preclude any future changes, Māori may consider that their interests need further recognition” (Cabinet Paper, 2006). I would argue that the Programme does constitute a substantial change, particularly if that change means the creation of property rights in a resource the Crown does not own, at the expense of Māori ownership rights without appropriate consent or compensation.

At an international level there are a range of human rights standards which may be breached through the New Zealand government’s Sustainable Water Programme of Action. In relation to the ownership of water, the Programme impacts on the right to own property, individually or in association with others, and not be arbitrarily deprived of property as guaranteed in the Universal Declaration of Human Rights 1948. There are a number of aspects of the Declaration on the Rights of Indigenous

Peoples such as the right of self determination which may be impacted. Furthermore if there is evidence that Māori rights alone are detrimentally affected, then the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) ratified by New Zealand in 1972 is likely to be breached as it was by the Foreshore and Seabed Act 2004.

There also exists a range of international standards specific to water rights which indicate the potential inappropriateness of the market mechanism to manage a resource as essential as water. The 2002 General Comment of the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) on the Right to Water stated, amongst other things that:

water is a limited national resource and a public good fundamental for life and health...The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for persons and domestic uses" (UNCESCR, 2002: 2)^{xii}

Regarding the affordability of water the Committee stated that parties to the International Covenant are obliged to "adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups" (UNCESCR, 2002: 8). Violations of the right include "failure to effectively regulate and control water service providers" and

arbitrary or unjustified disconnection or exclusion from water services or facilities...discriminatory or unaffordable increases in the price of water...pollution and diminution of water resources effecting human health" (UNCESCR, 2002: 12).

If the New Zealand government is intent on strengthening the role of the market in the water sector, then stricter legal guidelines need to be established for District and City Councils and companies involved in the sale of water and provision of wastewater services.

Of particular relevance for debates regarding Māori rights is the Committee's statement that

Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for Indigenous peoples to design, deliver and control their access to water (UNCESCR, 2002: 6).

The Indigenous Peoples Kyoto Water Declaration supported this approach stating that

We Indigenous Peoples have the right to self-determination. By virtue of that right we have the right to freely exercise full authority and control of our natural resources including water...Indigenous Peoples' interests on water customary uses must be recognized by governments, ensuring that Indigenous rights are enshrined in national legislation and policy (Indigenous Peoples Kyoto Water Declaration, 2003).

While the RMA allows Māori a limited degree of input in water management it would be difficult to describe this influence as 'control'. If the New Zealand government is unable to take adequate interest in recognising Māori rights as Indigenous peoples this does not bode well for the kinds of broader rights Māori are seeking to have reaffirmed.

'Free' trade agreement restrictions

While the New Zealand government refuses to discuss issues of resource ownership and sovereignty with Māori (in general and specifically in regard to water), their current commitments to 'free' trade agreements already restrict the kinds of governance possibilities relating to water. The New Zealand government's commitments under General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) are typical of such agreements including bilateral ones. Both these Agreements tightly restrict the New Zealand government's ability to make their own decisions about how to regulate trade and this has a significant negative impact with regard to the New Zealand government's ability to control the management of water, and thus a subsequent impact on Māori ability to negotiate ownership issues with the New Zealand government.

Under World Trade Organisation rules water is defined as a tradable good under the GATT, and as a service under GATS; signed by the New Zealand government in 1994 and 1995 respectively. As a 'good', water is defined under GATT as "natural or artificial and aerated waters" (Barlow and Clarke, 2004: 165). Under the GATS, water is defined as a service, which includes fresh water services, sewer services, treatment of waste water, irrigation, dams, water transportation and the construction of pipes (Barlow and Clarke, 2004: 167). These Agreements have a number of features in common. Under both these Agreements it is taken for granted that water is and should be a commodity. As with all neoliberal agreements, they also take for granted that liberalisation, and the introduction of market mechanisms, is a process which is beneficial.

According to its proponents, GATT aims to reduce barriers to trade in order to facilitate 'free' trade.^{xiii} Once governments sign GATT they are ironically restricted from altering this 'liberalised' position and must continue to make commitments to maintaining 'free' trade and adhering to the principle of 'National Treatment'. National Treatment is common to GATT and GATS and stipulates that nationally owned companies must be treated in the same manner as foreign companies.

If a government wishes to place restrictions on, for example, the import or export of water, they must prove that they are acting in a manner that is 'least trade restrictive' and adhering to National Treatment. This poses difficulties for governments who may wish, for example, to conserve their water supplies and restrict exports, or who wish to limit imports from companies/countries which may be involved in unsustainable water practices, such as, draining aquifers (Barlow and Clarke, 2004: 166).

When considering future situations which may involve a scarcity of freshwater supplies the abilities of large companies to export water, without a strong concomitant New Zealand government's ability to place restrictions on that poses

some difficulties. This transfer of power over one of our most vital necessities raises serious questions around the continued ability of the New Zealand government to maintain sovereignty. For Māori, full privatisation of water would mean that the ability to exercise tino rangatiratanga over this resource would be extraordinarily difficult, if not impossible.

There are some exceptions to National Treatment and progressive liberalisation rules. In GATT there is an Article (XX) which states that,

nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...necessary to protect human, animal or plant life or health;...relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption...(WTOa)

This clause however requires governments to prove that they have adhered to the National Treatment principle and have treated national companies in the same manner as international companies and are not using the measures to disguise a 'trade barrier'.

Under the WTO GATS, water is a service, which includes fresh water services, sewer services, treatment of waste water, irrigation, dams, water transportation and the construction of pipes (Barlow and Clarke, 2004: 167. Under GATS governments commit to abide by two sets of rules. The first set of rules (General Obligations) applies to all service sectors.^{xiv} The second set (Specific Commitments) are more detailed commitments and apply only to sectors the government lists in GATS. Supposedly exempt from these sets of rules are any services the government provides directly to citizens. Governments are able to regulate water services and are, in particular circumstances, allowed exemption from GATS provisions if the water service is being delivered directly from the government to people (Ministry of Foreign Affairs and Trade). However, if there is any commercial, private sector or community involvement, such as the paying of rates, privatisation or community delivery then the service is no longer exempt as it is not simply a 'government service'. In Aotearoa many water services now involve public-private partnerships and would not be considered solely government services.

While water services may not have been listed as a Specific Commitment by the government for the full range of rules to apply to them, the assumption underpinning all WTO agreements is that all services and goods will eventually be covered. This in turn is premised on beliefs in the efficiency of the market to govern.

The New Zealand government's commitments under GATT and GATS have significant implications for the ability to control water locally. While the WTO does not directly tell the New Zealand government what to do, there is pressure to ensure that when creating or revising legislation, measures are not implemented contrary to WTO rules. The WTO has strong enforcement powers. If a claim of a breach of WTO rules is brought before the WTO Disputes Settlement Body, a panel of 'trade experts' is created to investigate the case. Once the panel has made a ruling the Disputes Settlement Body "monitors the implementation of the rulings and recommendations, and has the power to authorize retaliation when a country does not comply with a

ruling” (WTO). If a government is found guilty and yet refuses to amend its legislation/policy/program, then the WTO has the authority to enforce economic sanctions.^{xv} These are extensive enforcement powers which contrast with the limited legal enforcement of human rights and environmental standards internationally. Furthermore the New Zealand government does not give those standards the same emphasis.

Defending Against the Market

While neoliberal practices are often put forward as the only option, there are many places in the world which manage water in efficient, sustainable and participatory ways. Bolivia, Argentina, Brazil, France, Malaysia and Spain provide many successful examples of managing water efficiently without privatising. (Balanyá et al, 2005). In the province of Córdoba, Spain, for example, water is managed by a public utility (EMACSA) which follows a participatory model that allows “civil society representatives, trade unions, opposition political parties to participate in the organisation’s decision-making processes” (Ortega, et al 2005: 4). EMACSA combines a technically and financially sustainable approach with social and environmental criteria (Ortega, et al 2005: 7). In other parts of the world, including New Zealand the government needs to provide evidence that alternatives to the use of the market mechanism have been seriously considered before proceeding on a path which essentially creates privatisation by another name. It is not sufficient to present the extension of the market mechanism as the most efficient and sustainable option without also presenting the broad range of alternatives.

Conclusions

Maintaining the quality of water and ensuring its fair distribution are laudable goals. It is however, doubtful whether these goals will be achieved by utilising the market mechanism. The application of the market to the water sector worldwide has produced similar results wherever it has occurred: increases in the price of water, domination of supply and distribution by large companies, and marginalisation of already vulnerable groups.

While the New Zealand government claims that there are no human rights implications in the Sustainable Water Programme of Action, they have clearly failed to give adequate attention to Māori concerns and potential human rights breaches. Tino rangatiratanga for Māori is reaffirmed in Te Tiriti o Waitangi. Māori customary rights under common law may be subservient to, and subject to extinguishment by, the Crown however it is not clear that these rights have been extinguished in the case of water. It is further questionable therefore whether the Crown can create property rights in water that they may not own. Any proposals to extinguish Māori customary rights in water must be negotiated with Māori. If the Crown is intent on extinguishing Māori rights then compensation needs to be paid.

The Sustainable Water Programme of Action must be reconsidered and such reconsideration must include an examination of the alternatives to marketisation, including local and cooperatively managed options.

It is deeply ironic that while the New Zealand government pays scant regard to international human rights standards, domestic human rights legislation, and ignores Te Tiriti o Waitangi, they are signing away their own authority for the governance of services, including water, in neoliberal trade agreements. There is little consideration and there has been no public discussion of this transfer of power.

For Māori it becomes even more difficult to have tino rangatiratanga recognised if resources pass out of Crown ownership. Large corporations do not owe allegiance to Māori or other citizens, only to their shareholders. This poses obvious and significant dangers.

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ⁱ The terms "the Crown" and "the New Zealand government" are interchangeable. Both are used throughout this paper.

ⁱⁱ Te Tiriti o Waitangi was signed between the British Crown and Māori hapū in 1840. Two versions of the Treaty exist, one in English one in Māori. Most Māori signed the Māori language version, in which sovereignty/self-determination was specifically retained by Māori, where in the English text it is ceded to the British. Under the *contra proferentum* rule in international law, in times of disputes regarding versions of treaties, a decision is made against the party that drafted the document and the indigenous text takes preference. Therefore the Māori text takes preference hence my reference specifically to Te Tiriti.

ⁱⁱⁱ The Waitangi Tribunal was established in 1975 by the Treaty of Waitangi Act and hears claims brought by Māori relating to Crown breaches of the principles of the Treaty of Waitangi and makes recommendations to the Crown for redress.

^{iv} Under Te Tiriti o Waitangi Māori absolute sovereignty over treasures, homes and lands was reaffirmed.

^v Tapu (sacred), mana (customary authority), rahui (are restrictions or prohibitions imposed over particular resources), utu (to maintain a balance between things which are given and taken).

^{vi} For example in Lakes Rotorua, Rotoiti, Rotoma. See People Poisoned Daily website www.peoplepoisoned.net Accessed 22/08/2006.

^{vii} The Crown did eventually return portions of the swamp land.

^{viii} See for example *Tamihana Korokai v Solicitor General 1909*.

^{ix} In 2003 the New Zealand Court of Appeal ruled that Māori tribes could take claims regarding the foreshore and seabed to the Māori Land Court to establish if customary title continued to exist. The Crown announced shortly after that they had always assumed they owned the foreshore and seabed and would legislate to make that so. In 2004 the Foreshore

and Seabed Act was passed despite widespread opposition by Māori and many principled Pakeha supporters.

^xIt also indicates the inadequacies in our constitutional arrangements that allow parliament and the Executive such a breadth of power.

^{xi} The 'cap and trade' proposal is reminiscent of the trade in carbon credits that has begun since the Kyoto Protocol.

^{xii}The right to water is also recognised in the Convention on the Elimination of All Forms of Discrimination Against Women, Article 14 (2) ("right to enjoy adequate living conditions, particularly in relation to...water supply"), Convention on the Rights of the Child, Article 24 (2) (requires States parties to combat disease and malnutrition "through the provision of adequate and nutritious foods and clean drinking water").

^{xiii} See WTO website, www.wto.org

^{xiv} Services are often defined in WTO areas as "everything you can buy and sell but can't drop on your foot. See Jane Kelsey, *Serving Whose Interests*, Christchurch: ARENA, 2003, p. 16.

^{xv} Maude Barlow and Tony Clarke, *Blue Gold: The Fight to stop the Corporate Theft of the World's Water*, New York: The New Press, 2004, p. 169- 170. See also World Trade Organisation website,

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