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CHAPTER 7

RIPARIAN RIGHTS

7.1 Riparian Ownership in the Claim Area

'Riparian land' is land that runs along the margins or banks of rivers and streams. While the term is commonly used, there is no defined separate title or strip of land that comprises riparian title. The owner of land, no matter how large the area, whose title includes riparian land – that is, land on the bank of a river or stream – is known as a riparian owner.

The variety of riparian land ownership in the claim area was demonstrated by Ms Ertel in her opening submissions as follows:

> (i) State forest land subject to a Crown Forest Licence (Flaxy Creek, Whirinaki, Heruiwi and Northern Boundary Blocks)
> (ii) State forest land not yet subject to a Crown Forest Licence. The fee simple being vested in the Forest Corporation of New Zealand Ltd (a State-Owned Enterprise)
> (iii) Maori land owned by individuals represented by Te Ika Whenua
> (iv) General land owned by individuals represented by Te Ika Whenua
> (v) General land owned by individuals not represented by Te Ika Whenua (Pakeha)
> (vi) General land owned by the Tasman Pulp and Paper Company
> (vii) The Aniwhenua Dam itself is owned by the Bay of Plenty Electric Power Board. Next to this, on the left bank, is an SOE (Forest Corporation of New Zealand Limited). Tasman Forestry owns land on the bank between Forestcorp's land and the end of the scheme. This is the Matahina Forest. On the right bank the owners are either:
> (a) Pakeha—M Treloar, K R Wilcox, P J Savage, Neil, Duggan and Baker; or
> (b) Maori—A Reha, Muriwa Charles White, Hapurona, Ted Maki and Others, Te Arai Maki and Others and Te Kani Rangi and Others.[1]

Approximately 90 percent of the left bank of the Wheao River was subject to the Flaxy Creek Crown forest licence and approximately 50 percent of the right bank was subject to the Whirinaki Crown forest licence, Ms Ertel continued; other owners on the right bank were either Maori or Forestcorp (the land not yet being subject to a Crown forest licence); and there were possibly some Pakeha owners with land bordering the Wheao, but in such case this would involve a very small portion of the river.[2]

1. Document B5, pp 55–56
2. Ibid, p 56

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In her submissions, Ms Ertel also advanced the hypothesis that part of the river system could be classed as navigable and part non-navigable.[3] In the former instance, the bed of the river would belong to the Crown by virtue of section 261 of the Coal Mines Act 1979,[4] while in the latter, the *ad medium filum* rule would apply and the bed to the middle of the river would belong to the owner of the area of bank adjoining the river. Ms Ertel was prepared to argue her case so as to cover both principles of law.

Early during the first hearing at Tipapa Marae, Murupara, the claimants arranged for the Tribunal to view the area. It then appeared to the Tribunal that it would be difficult to classify any of the rivers as navigable in accordance with the provisions of English common law. Accordingly, it initiated its own inquiry of the Department of Survey and Land Information at Hamilton. In a letter dated 16 March 1994, the department, after reviewing the authorities, stated:

> In the case of the Rangitaiki River bed, I am unable to find relevant file evidence to support any assertion that it was navigable (in 1903). Neither can I find relevant file evidence to the contrary. Examination of the earliest available aerial photographs and relevant plans does not assist.
>
> In the absence of persuasive evidence either way, I am bound to recommend in favour of applying the presumption of *ad medium filum aquae*.
>
> It would be wrong of the Crown to assert ownership without convincing evidence of navigability – evidence that would stand up in a Court of law.
>
> Further, I cannot identify a compelling reason for carrying out the possibly protracted and complicated research required to prove such navigability.
>
> In the absence of instruction and funding to determine navigability I stand by my recommendation to apply the principle of presumptive ownership by adjoining owners (some of whom will be the Crown) to the middle line of the river bed.[5]

When this correspondence was put to the parties, counsel for the Crown conceded that it had not made any claim to the bed of these rivers under the Coal Mines Act 1979 or prior legislation and regarded the rivers as non-navigable with the *ad medium filum* rule applying. Counsel for the claimants accepted this proposition, and the Tribunal proceeded on the premise that it was dealing with non-navigable waterways to which the *ad medium filum* rule applied.

7.2 *Ad Medium Filum Aquae* Rule

Ms Ertel commented in her submissions that New Zealand common law riparian rights had their source in the English Laws Act 1858. She quoted from section 1 of that Act as follows:

> The laws of England as existing on [14 January 1840] shall so far as is applicable to the circumstances of . . . New Zealand, be deemed and taken to have been in force therein

3. Document B5, pp 33–36
4. Repealed by s 120(1) Crown Minerals Act 1991 but reaffirmed by s 354(1)(c) Resource Management Act 1991
5. Paper 2.52

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> on and after that day and on that day, and shall continue to be there and apply in the administration of justice accordingly.[6]

The principle of the rule of *ad medium filum aquae*, which is commonly referred to as the *ad medium filum* rule, is simply stated by Hinde, McMorland, and Sim in *Introduction to Land Law*:

> Where land is bounded by a non-tidal, non-navigable river the presumption is that the boundary is the centre line of the stream; but this presumption may be rebutted by the terms of the grant or by the surrounding circumstances.[7]

Applied to the lands within the rohe of Te Ika Whenua, this presumption means that the owners of riparian lands own to the middle line of the rivers. No suggestion or argument that the presumption has been rebutted or does not apply was put to us, and we therefore proceed on the basis that the presumption applies.

7.3 Natural Water Incapable of Ownership

At common law, ownership of the bed of a river does not confer ownership of the water above. The position is stated in *Introduction to Land Law* as giving riparian owners the following rights:

> (1) To take stream water in any quantity for 'ordinary' purposes in the use of the riparian land:, ie for domestic purposes and for stock;
> (2) To take stream water (subject only to returning it substantially undiminished in volume and unaltered in character) in the reasonable use of the riparian land for 'extraordinary' purposes, eg irrigation or industrial use; and
> (3) To receive the unimpeded flow of stream water unaltered in volume and quality from higher riparian owners.[8]

These rights are now affected by the Resource Management Act 1991, where section 14(3)(b) and (e) give power for the taking and use of water when:

> (b) In the case of fresh water, the water, heat, or energy is required to be taken or used for—
> (i) An individual's reasonable domestic needs; or
> (ii) The reasonable needs of an individual's animals for drinking water,—
> and the taking or use does not, or is not likely to, have an adverse effect on the environment; or . . .
>
> . . . . .
>
> (e) The water is required to be taken or used for fire-fighting purposes.

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6. Document B5, p 36
7. Hinde, McMorland, and Sim, *Introduction to Land Law*, 2nd ed, Wellington, Butterworths New Zealand Ltd, 1986, sec 2.201
8. Ibid, sec 12.011

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Notwithstanding these rights of user, natural water, which includes water in rivers, is regarded as incapable of ownership. *Introduction to Land Law* states:

> Natural water includes all water whether on or below the surface of the land and whether in a defined channel or not. It is incapable of ownership, unless it has been confined in a receptacle, but there were certain rights to use natural water, and certain rights and obligations in respect of its flow.[9]

The rights and obligations referred to in this quotation are those we have cited above.

7.4 Maori View of Ownership

As already established in other Tribunal reports, the traditional Maori view of ownership is completely different from that of the common law. Conceptually, a river is a taonga, a valuable food resource to those who possess it, which carries its own separate mauri (life force) and is guarded by the taniwha that inhabit it. The physical cannot be divorced from the metaphysical; the two are inseparable (see sec 2.4).[10]

In her opening submissions, Ms Ertel stated:

> The claim of the claimants to ownership and rangatiratanga over their rivers as an undivided entity is consistent with Maori custom and is supported by the evidence currently before the Tribunal and yet to be presented.[11]

Her reference to the rivers as 'an undivided entity' contrasts with the separate concepts of bank, bed, and water that apply at common law. In the Court of Appeal decision in *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20, Cooke P in delivering the judgment of the court referred to this at pages 26 and 27:

> The Maori Affairs Act 1953, s 155, enacts that except so far as may be otherwise expressly provided in any other Act the Maori customary title to land shall not be available or enforceable by proceedings in any Court or in any manner against the Crown. The provision goes back to 1909 and the draftsmanship of Sir John Salmond. It is not clear that the provision extends to water; and in their *Te Ika Whenua – Energy Assets Report* in 1993 and *Mohaka River Report* in 1992 the Waitangi Tribunal have adopted the concept of a river as being taonga. One expression of the concept is 'a whole and indivisible entity, not separated into bed, banks and waters'. The vesting of the beds of navigable rivers in the Crown provided for by the Coal-mines Amendment Act 1903 and succeeding legislation may not be sufficiently explicit to override or dispose of that concept, although it is odd that the concept seems not to have been put forward in quite that way in the line of cases concerning the Wanganui River, the last of which was the decision of this Court in *Re the Bed of the Wanganui River* [1962] NZLR

9. *Introduction to Land Law*, sec 12.011
10. See *Report of the Waitangi Tribunal on the Manukau Claim*, secs 9.2.6, 9.3.8; *The Mohaka River Report 1992*, 2nd ed, Wellington, GP Publications, 1996, secs 2.6, 6.3
11. Document B5, pp 43–44

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600. Perhaps the approach which counsel for Maori argued for in that line of cases, emphasising the bed and the adjacent land more than the flow of water, is an example of the tendency against which the Privy Council warned in *Amodu Tijani* (at 403) of rendering native title conceptually in terms which are appropriate only to systems which have grown up under English law. Similarly, as the Waitangi Tribunal bring out in their *Mohaka River Report* at 34–8, the *ad medium filum aquae* rule applied in the 1962 case is inconsistent with the concept and may well be unreliable in determining what Maori have agreed to part with.[12]

In the above extract, the Court of Appeal suggests that the reason the Whanganui River litigation concerned the bed of the river and not the river as an undivided entity could arise from the tendency of rendering native title conceptually in terms that are appropriate only to systems that have grown up under English law. We believe this to be the case. Since the establishment of title through the Maori Land Court, Maori have had to frame their argument as to the title to rivers in accordance with English common law. It is only since the 1985 amendment to the Treaty of Waitangi Act 1975 that Maori have had a forum in which to argue their own customary laws and rights instead of English law, which was arbitrarily imposed regardless of the guarantees under article 2 of the Treaty of Waitangi.

Ms Ertel in her opening submissions referred to two parallels to the present claim to the rivers as 'an undivided entity'. The first was Judge F O V Acheson's statement in the 1929 *Lake Omapare* decision of the Native Land Court:

The bed of any lake is merely a part of that lake, and no juggling with words or ideas will ever make it other than part of that lake. The Maori was and still is a direct thinker, and he would see no more reason for separating a lake from its bed (as to the ownership thereof) than he would see for separating the rocks and the soil that comprise a mountain. In fact, in olden days he would have regarded it as rather a grim joke had any strangers asserted that he did not possess the beds of his own lakes.

A lake is land covered by water, and it is part of the surface of the country in which it is situated, and in essentials it is as much part of that surface and as capable of being occupied as is land covered by forest or land *covered by a running stream*.

All the old authorities are agreed that the whole surface of the North Island of New Zealand was held in definite ownership, according to ancient Maori custom and usage, by the various tribes and their component parts. [Emphasis in original.][13]

The second was Judge H H Carr's 1944 Native Appellate Court judgment, cited in the 1950 report of the royal commission on the Whanganui River:

It must be conceded that the pre-treaty Maori never concerned himself with the abstruse question as to whether or not a river or lake was land covered by water. In many ways the mind of the Maori works inversely to that of the European. The Courts of the latter have laid it down to him that to possess the exclusive use of a lake or river he must own the bed thereof. To the Maori the water would be the predominating factor and the exclusive use of that water would carry with it everything below. If the land was

12. Document C14(b), pp 26–27; for the original judgment, see doc C1, p 11
13. Document B5, pp 47–48; B5(a)(10), p 7

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> below, then that land. If a taniwha was below, then that taniwha: and the Wanganui River was not an exception to the widely held belief as to fabulous reptiles inhabiting unfathomable depths and acting as tribal guardians. The water and the land underneath it are to the Maori indivisible . . .
> . . . the Wanganui Tribe did exercise an exclusive right of ownership over this body of water and over its bed of land below and that this exercise of ownership was in accord with customs and usage existing at the date of the Treaty of Waitangi.[14]

Similarly, the Tribunal in its report on the Mohaka River claim concluded that the river as a living, indivisible entity was tribal property.[15]

7.5 Customary Rights of Hapu

Maori communities in the early contact period consisted of hapu – that is, kin groups linked by descent from an eponymous ancestor and commonly known as subtribes. In the case of the hapu of Te Ika Whenua, evidence shows that they exercised tino rangatiratanga over their lands and resources and customary rights to use particular resources at prescribed times for particular purposes. Such use rights included papakainga, mara, mahinga kai (fishing places), and pa tuna (eel weirs) (see sec 2.6).

Customary rights of the hapu of Te Ika Whenua to use, occupy, and control their land and resources are recognised by the Maori text of the Treaty of Waitangi, which in the preamble and article 2 refers to rangatira and hapu and in article 2 confirms and guarantees te tino rangatiratanga (the unqualified exercise of chieftainship) over whenua (land), kainga (villages), and taonga (properties of special significance).

Clearly, the customary and Treaty rights of rangatira and hapu and tangata katoa (all the people) of Te Ika Whenua are part of their tino rangatiratanga and are in conflict with Crown assertions on the ownership of rivers by virtue of statute or common law. Claimant evidence shows that rivers were and still are a taonga that provides material and spiritual sustenance and a strong continuing bond. The people belong to the river and the river belongs to the people.

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14. Document B5, pp 50–51
15. *The Mohaka River Report 1992*, secs 2.12, 6.3

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