

A background to the  
NZMC water policy framework

12 December 2014

## SECTION 1. ETHICS, RESPONSIBILITY AND LAW

This section examines the ethical content of the policy. Other sections will be added as the work is progressed.

### The Proposal in Brief

The New Zealand Māori Council proposes that national water policy protects three classes of water interests, the natural environment interest, the general public interest and the Māori interest. A Commission is proposed to allocate water rights and to provide for each interest from a levy on commercial water usage.

### The Natural Environment interest

The Natural Environment interest is the environment's own interest in the planet's survival. The concept aligns with the Māori customary view of the environment as composed of living beings, and is a reminder to users of natural resources to respect the environment in the same way as they would respect a person from whom they seek a critical favour.

The conception of the environment in these terms has led to an ethic of responsibility in dealing with the environment, which emulates the ethic of responsibility in dealing with one another. The ethic is evident in the Māori respect protocols when formally greeting one another, or when cropping, planting, gathering, hunting, fishing or extracting natural materials.

When using water bodies there are similar rules to prevent physical or spiritual contamination that might compromise their use by others or the generations to come. The rule against discharging waste to water is an example.

The concept of the Natural Environment interest also aligns with a growing, national concern for environmental protection.

### The general public interest

The general public interest embodies the interest of all people in maintaining reasonable access to the land and waters of their country in a condition suitable for their physical and spiritual sustenance, for themselves and the coming generations. It means that the enjoyment of natural resources should not be compromised by excessive exploitation or despoliation. Significant land and natural water-bodies should be seen to exist for the common good, available to all and in the most beneficial condition for all.

Unlike the specific Māori interest in water deriving from long term usage before the Treaty of Waitangi, the general public interest derives from the alienation of land for European settlement as a consequence of the Treaty. The alienation of land as predicted and provided for in the Treaty, implied a sharing of access to water bodies connected to the alienated land.

Access to water bodies may be reasonably constrained by their inclusion within private, land titles. In the case of some isolated springs and lakes, access may be constrained by their reservation for Māori by the Native Land Court. The extent of privatisation should also be reasonable however. The Council considers that in every district an adequate, public estate should be maintained.

The general public interest also requires that all people should have free access to reasonable water supplies for personal, domestic needs as a basic human right, and reasonable access to natural water bodies for recreation. This does not mean that people may access unlimited water supplies. New Zealanders access a disproportionate volume of water for domestic purposes and increasingly, there is a need to impose constraints.

## The Māori interest

The Māori interest is in maintaining an ongoing association with and benefit from water bodies which they have used from time immemorial. These interests have been compromised today through the despoliation of the resource, land alienations without a free and informed consent, and the failure to respect the Māori proprietary interests in water bodies arising from long term use.

To give effect to the Māori interest today the Council proposes that the Commission will allocate a proportion of funds from the levy on commercial users to enable district Māori entities to manage water related projects. These would include the provision of water to marae, papakainga and Māori homes through reticulation or tanking facilities, and the engagement of labour on the restoration of natural, water bodies.

## The basis for the Māori interest

The Māori interest derives from the systematic and extensive use of water bodies prior to the Treaty of Waitangi.

Whether on land or in water, Māori interests derived from access to and the use of natural resources. The access was generally secured through an association with a hapū holding political authority over a district.

The water body was in turn intersected by layers of individual or whānau use rights. The same applied to the inland seas and foreshore. These were all resources which were treated in the same way as land with different persons having specified uses of parts at given times and for varying purposes.

Since the primary source of food for Māori was fish and water fowl, use rights for fishing and other purposes were as intensively distributed within water bodies as they were on land. This applies throughout the Pacific.

The protection due to such rights, on colonisation, is acknowledged in the Treaty of Waitangi, the UN Declaration of the Rights of Indigenous Peoples and the common law.

Māori ownership existed in the authority to access water bodies, to use them, to enhance their use through weirs and other contraptions, and as a tribe, to control access from outside.

### The nature of the Māori interest

#### The two aspects

The Council considers the Māori interest is both proprietary and cultural. It comprises:

- proprietary interests in water resources derived from the customary use of water bodies;  
and
- cultural interests in the preservation of healthy water bodies derived from the Māori spiritual comprehension of natural water resources and the associated ethic of responsible use.

#### The proprietary interest

The “proprietary” interest means an interest that is owned as property. The property that is owned is the right to access and use particular water bodies.

The Waitangi Tribunal has upheld the Māori Council view, and that of certain iwi, that the interest which Māori have in water bodies is indeed proprietary. As something that was owned in accordance with Māori custom, it should have been legally provided for on the European settlement of New Zealand, as was provided for in colonial law.

For example land use rights were recognised and provided for in titles issued by the Native Land Court, based upon Māori customary usages. The same should have been done for water bodies, but with a few exceptions it was not. This was possibly because England had no equivalent for the extensive use rights in respect of fresh and sea waters amongst Māori and Pacific islanders. The English focus was on land as the primary source of food and English law reflected that. While

the Native Land Court in fact recognised and provided for some use rights in relation to certain lakes, springs, shellfish beds and mudflats, the Court was a creature of statute and government was to remind the Court that in terms of its statute its jurisdiction was limited to land.

The government overlooked however that in English colonial law, the native people owned that which they owned according to their own law, and not the law that had grown up in England. The government omission was despite the Treaty of Waitangi which purported to protect the Māori interests in natural resources.

Accordingly, in giving practical effect to the Māori proprietary interest today, the Council has considered that the provision for Māori should be based on that which ought to have been secured for them and not what was ultimately retained.

Also associated with the Māori proprietary interest in water resources is the right to develop customary resources.

### The cultural interest

The “cultural” interest refers to an interest in the way that natural water bodies are managed having regard to the Māori conception of water bodies and the customary ethic of responsibility in utilising them.

The ethic of responsibility derives from spiritual sanctions on usage. In Māori law all things within a given ecosystem, even a significant landform or a waterway, have a life-force or mauri and a spirit or wairua which constitute the authority or mana of that being or phenomenon. To access the resource the mana of the resource should be understood and respected. The kaitiaki serve to warn and advise people on proper resource use. The taniwha serve to remind of the mana of the resources which they inhabit.

The customary ethic effectively treats the right of access to natural resources as a right held in trust for future generations. This ethic is also common throughout the Pacific. It has also been provided for in other Pacific jurisdictions as in Hawaii where the concept of a public trust is constitutionally entrenched to protect both public and native interests in water.

In New Zealand the Māori cultural interest has been recognised in a number of co-management arrangements. The Council considers that the Māori interest goes much further than management and that the difficulty has been in the failure to recognise the proprietary interest.

### [A new framework](#)

The Council seeks a framework for a law which recognises the environmental, general public and Māori interest in water bodies and which promotes a responsible use for the benefit of present users and the generations to come.

The framework should allow for the restoration of balance where a water body has been degraded. Water bodies have been treated as a limitless, free resource for domestic use, waste disposal and commercial profit. It has led to over-utilisation and pollution of water bodies, and losses for Māori communities.

The framework should have general application. Particular settlements in respect of the Whanganui and Waikato rivers have given imaginative effect to the cultural interest in those cases but other settlements on the same basis seem unlikely.

The framework must deal with social justice issues. A number of water-use stakeholders meeting as the Land and Water Forum, have agreed on some necessary measures in water management. However, the Forum does not address the Māori status as indigenous peoples with pre-existing customary interests, and the respect due to such interests.

The framework should ensure that a charge for the commercial use of water does not confer a right to pollute. It must provide for conditions on commercial use.

The framework should question the confines of existing legal systems. In contrast with the Māori law, the government law does not expressly state a concern for future generations and current consumption and short term growth appears to be favored at the expense of sustainable development. Further, the expression that no-one can own water has fostered a view that water

is free for all on a first come first served basis. That this is not a sound principle on which to develop a responsible framework.

When officials say no one owns the water, they are not speaking a universal truth but are expressing an opinion based on a legal system which treats a lake or river as water on land, and which fails to recognise a water body as a separate and valuable resource capable of supporting a range of usages.

The Treaty of Waitangi is also a source of principle when reconciling the two laws. On the one hand it sought to protect the Māori authority over the customary, natural resources which they retained. On the other it provided for European settlement following land alienation. It is apparent from ancillary documents however, that land alienation was premised on Māori retaining a fair share of the resource.

The framework should assume that claims in respect of the proprietary interest in water bodies have not been settled. The issue was not for negotiation as the government ruled that there were no such proprietary interests. The position would be different for example, if the government acknowledged the proprietary interest and compensated the loss of it.

The proposed framework is that the ordinary use of water for domestic purposes is free; but a commercial use should be controlled and paid for. The funds should be applied for the purposes specified in the Council's framework policy.