

The freshwater challenge

Jacinta Ruru

A pressing issue arising in Aotearoa New Zealand concerns what property rights Maori (the Indigenous peoples here) have to freshwater. A 2009 Cabinet paper has recognized that these rights “remain undefined and unresolved”. This paper explores what possibilities the common law doctrine of native title might provide Maori to recognise their claimed property rights to own, manage and govern freshwater. But can this doctrine, with its early jurisprudence influenced by the United States of America *Johnston v M’Intosh* 21 US (8 Wheat) 543 (1823) case, apply to flowing freshwater? Importantly, can native title trump a common law assumption that has historically characterised water as *publici juris* (common to all who have access to it)? This paper explores the 19th century developments of native title and water related cases and then examines the significance of the *Attorney-General v Ngati Apa* [2003] 2 NZLR 643 decision that re-imagines much of this case law by asserting that “[T]he proper starting point is not with assumptions about the nature of property ... but with the facts as to native property” (661). *Ngati Apa* stressed, first, “the entire country was owned by Māori according to their customs and that until sold land continued to belong to them” (657) and, second, the “common law of New Zealand is different” (668) to the English common law. This paper argues that these precedents reconfigure our historical understanding of the legal possibilities for recognising Indigenous claims to property rights in water. These conclusions have implications for all countries where Indigenous peoples are asserting rights to water, including the United States, Canada and Australia.

Bio: Jacinta Ruru (Ngati Raukawa ki Waikato, Ngati Ranginui, Pakeha) B.A. (Well), L.L.M. (Otago), senior law lecturer and coordinator of the Research Cluster for Natural Resources Law (www.otago.ac.nz/law/nrl), University of Otago. Jacinta’s research interests focus on exploring the legal rights and responsibilities of Indigenous Peoples to own, manage and govern land and water. Jacinta is co-author of *Discovering Indigenous Lands. The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2010), guest editor of the special issue of (2010) 21 (5/6) *Journal of Water Law* themed ‘Contemporary Indigenous Peoples’ Legal Rights to Water in the Americas and Australasia’, author of *The Legal Voice of Maori in Freshwater Governance. A Literature Review* (Landcare Research, 2009), and co-editor of *Beyond the Scene. The Landscape and Identity in Aotearoa New Zealand* (Otago University Press, 2010).

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Economic Development, Logging and Riparian Rights: The Definition of a Navigable Waterway in 19th Century Ontario, Wisconsin and New Zealand

Guy Charlton and Barry Brunette

The 19th century witnessed the rapid exploitation of pine and hardwood forest lands in Central Canada, the American Great Lakes states of Michigan, Wisconsin and Minnesota and the Kauri podocarp-hardwood forests in northern New Zealand. While accompanied by tremendous waste and environmental destruction the cut-over continued until the forests were only a remnant of their original cover. Focusing on the now-disestablished Province of Auckland kauri industry, Wisconsin and Ontario's white pine forest, this paper compares the use of the law as an instrument of economic development. It explores how the courts rearticulated riparian rights, particularly the concept of navigability to assist the logging industry. These changes were premised on a particular idea of economic development which contrasted with indigenous conceptions of resource use, the role of the courts within the political system, and the desirability and scope of governmental policies to conserve or preserve natural resources or regulate economic activity which were an important backdrop to increased governmental activism in economic and social policy which accompanied the beginning of the 20th century in all these states.

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Baptism by Fire: James Prendergast and the New Zealand Wars, 1865-1881

Grant Morris

James Prendergast's views toward Maori are well known to New Zealand lawyers and historians. In *Wi Parata v Bishop of Wellington* (1877) Chief Justice Prendergast and Justice Christopher William Richmond infamously described the Treaty of Waitangi as "a simple nullity" and Maori as "savages" and "primitive barbarians". This paper argues that Prendergast's experience during the latter stages of the New Zealand Wars was an important contributing factor in creating his attitudes toward Maori. Firstly as Attorney-General and then as Administrator, Prendergast played a key role in the increasingly bitter conflict between Maori and colonial forces. In his legal opinions, state prosecutions and actions as Administrator, Prendergast took a hard-line approach towards Maori dissent and resistance. While acknowledging that Prendergast's views were also held by many in the settler community, this paper argues that Prendergast was in a privileged position to implement his views with devastating results for Maori society. Prendergast's legacy to Maori is one of lost property rights, economic dislocation and constitutional marginalisation.

This paper focuses on Prendergast's defining experiences in the New Zealand Wars: his legal opinions as Attorney-General relating to the latter stages of the New Zealand Wars (1865-1870), his prosecutions as Attorney-General in 1869 and his authorisation as Administrator of the invasion of Parihaka in 1881. These experiences show how Prendergast used the law as another means of pursuing political and economic ends.

Bio: Dr Grant Morris is a senior lecturer in law at Victoria University of Wellington. His specialty areas include nineteenth century New Zealand legal history and law and literature in a New Zealand context. He has also published in the area of legal education and is the recipient of a Victoria University 'Excellence in Teaching' Award. Before joining the law school, Grant was a government negotiator for the Office of Treaty Settlements and worked on the Taranaki claims resulting from the events discussed in this paper.

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