THE RESOURCE MANAGEMENT ACT AND GEOTHERMAL RESOURCES

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I.0 INTRODUCTION

The Resource Management Act 1991 repealed virtually all of the Geothermal Energy Act 1953 and the whole of the Water and Soil Conservation Act 1967. The 1991 Act has led to some changes to the legal framework governing geothermal resources. In this paper we will describe these changes and will attempt to assess their significance, beginning with a brief description of the salient features of the former legal regime. The Resource Management Act is complex and poses many problems of interpretation. In a short paper of this kind it is not possible to do very much more than highlight some of the main difficulties.

2.0 THE FORMER REGIME

The history of the legal framework governing geothermal resources is covered fully in a report prepared for the Waitangi Tribunal by one of the present authors (Boast, 1991).

The first statutory provisions affecting this resource pre-date official awareness of the utility of geothermal resources for electricity generation. The Thermal-Springs Districts Acts of 1881 and 1883 were designed to give effect to two agreements entered into between the Crown and some of the Arawa tribes of the Rotorua region, these being the Fenton agreement of 25 November 1880 and the Clarke agreement of 25 February 1883. The Acts also reserved to the Crown a monopoly of land purchasing from Maori in a huge area of the central North Island, partly in order to prevent thermal areas from falling into the hands of private developers. (Cruickshank, 1940, 136-37, Rockel, 1986, 6-7, Boast, 1991, 16-24.) This objective was furthered by the Scenery Preservation Acts which allowed thermal areas to be taken compulsorily, as was done at Waiotapu and Awakeri (Boast, 1991, 28-9, Maxwell, 1990, App. E).

The first official announcement of an intention to investigate geothermal resources for electricity supply was in the annual report of the State Hydro-Electric department in 1947 (Semple, 1947). Geothermal investigation was given added impetus by DSIR support for a project to extract heavy water from geothermal steam following a request for assistance from the British government in 1952, although for unknown reasons the heavy water project was later abandoned (Boast, 1991, 59-64). The Geothermal Steam Act of 1952 was modelled on the Water-power Act of 1903 and amounted to a nationalisation of rights to generate electricity from geothermal energy. The 1952 Act was replaced by the more comprehensive Geothermal Energy Act 1953.

The 1953 Act vested the sole right to "tap, take, use and apply geothermal energy" for any purpose in the Crown (s 3). This meant in effect that any development required a licence from the Crown (s 9). Users were required to pay a resource rental to the Crown. In 1967 the Water and Soil Conservation Act swept away common law rules relating to water, replacing them with a statutory system of water rights administered by Catchment Boards. There was nothing in the 1967 Act which excluded geothermal water from its controls, and in Keam v Minister of Works and Development [1982] 1 NZLR 319 it was settled by the Court of Appeal that would-be developers needed not only a licence from the Ministry of Energy under the Geothermal Energy Act but also a water right from the local catchment board. Thus the principles governing water law developed by the courts and the planning tribunal came to be applicable to geothermal systems. The principal regulatory authorities became in effect the catchment boards (now regional councils). This trend has been culminated by the Resource Management Act 1991 which, apart from the powers of the Minister for the

Environment to issue national policy statements and to consider the use of economic instruments to achieve sustainable development; vests the management of the resource wholly in regional councils.

A degree of national co-ordination for geothermal resources was achieved by the National policy and management framework (Ministry of Energy, 1986). As the principal regulatory bodies the catchment boards by the mid-1980s were already developing management plans for geothermal fields (Davenport, Huser and others, 1 987).

3.0 COMMON LAW RULES

The common-law rules governing geothermal ownership are obscure, and have not been of much practical importance due to the nationalisation of management rights in 1953. As far as is possible to judge, the courts would view geothermal resources as similar in kind to groundwater and petroleum, and would recognise no property in the resource until it had been abstracted. At common law there would be no right of access to the resource, control over it being effectively vested in landowners.

As the repeal by the Resource Management Act of s 3 of the Geothermal Energy Act 1953 appears to be accompanied by a trend towards competing developers seeking to exploit the same field, common-law rules may increase in importance. These include in particular the so-called rule or doctrine of "capture".

The other aspect of common-law rules which is of relevance is the common-law doctrine of aboriginal title. Arguably Maori aboriginal title in this resource has never been extinguished and thus could be asserted in the courts today. If this were to happen the court would have to determine the scope of Maori aboriginal title, if any, including in particular whether commercial as opposed to subsistence use of the resource is protected. (For a discussion of aboriginal title and geothermal resources see Boast 1991 48-56; see generally McHugh, 1984, 1987; McNeil 1989, Boast 1990.)

The Resource Management Act is not concerned with, and has no bearing on, ownership of the resource except to the extent of abolishing the principle of Crown ownership of development rights.

4.0 EFFECTS OF THE RESOURCE MANAGEMENT ACT 1991

The extent to which the Resource Management Act marks a decisive. break from earlier statutory planning regimes such as the Town and Country Planning Act is difficult to assess. Certainly there is now a unified set of criteria and guidelines applicable to the whole range of resource management. Local authorities now have much more flexibility than formerly as to the means by which they are to bring about the effects required by the Act. But the actual consequences of the general objectives in Part 11, including that of "sustainable management" remain to be seen. Nor is it clear that the much. greater flexibility now available to local authorities will lead . to significant changes to management practice on a day-to-day basis. Specifically in relation to geothermal issues the main changes are:

(a) The whole of the Geothermal Energy Act 1953 is repealed except sections 2, 5 and parts of 15 and 16. In effect, nothing of any practical importance remains.. The Crown's monopoly of management rights and that part of the consent process controlled by the former Ministry of Energy no longer exist.

(b) The whole of the Water and Soil Conservation Act 1967 is repealed.

(c) Geothermal licensing is now controlled by regional councils (s 30 (e) gives to regional councils the control of the taking and use of water - which includes geothermal water - and s 30 (e) iii specifically vests in regional councils "the control of the taking or use of geothermal energy"). To take or use any water (which includes geothermal water) or the heat or energy surrounding any water requires a water permit (s 14) and discharge into a river or lake or re-injection into a geothermal system requires a discharge permit (s 15; and see the definitions of "geothermal energy", "geothermal water", "water" and "contaminant" in s.2).

(d) The former Water and Soil Conservation Act 1967 made no attempt to define the criteria to govern applications for water rights, and thus the Planning Tribunal and the courts were obliged to work criteria out for themselves (the "benefit/detriment" test). Now there is an elaborate code of statutory criteria. These include: those matters identified in s 104, being the "matters to be considered" for all resource consents; as well as the general purposes and principles identified in Part II (ss 5-8) of the Act. These are: the "sustainable management of natural and

physical resources" (s 5); the "matters of national importance" listed in s 6 (including the preservation of the "natural character" of wetlands, lakes and rivers, the "protection of areas of significant indigenous vegetation" and "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga"); the "other matters" listed in s 7 (kaitiakitanga, the efficient use and development of natural and physical resources); and, lastly, the Treaty of Waitangi (s 8). The intent of the Act appears to be to list these in descending orders of importance.

(e) It is now possible to obtain a water conservation order for a geothermal system, not possible under the 1967 Act. (Boast, 1989, 22).

(f) The Minister for the Environment may issue a national policy statement stating policies on matters of national significance (s 45). A National Policy statement regarding geothermal resources could certainly be made and such a policy statement would then become binding on regional authorities (s 55). Some of the factors which may assist the Minister in determining a policy statement is desirable seem particularly relevant to the geothermal resource; (in particular paras. (c), (d), (g) and (h)). However as far as we are aware it is not currently proposed to introduce a national geothermal policy statement.

(g) In our view the most important change is that management planning for geothermal resources is now given a firm statutory basis. Before 1991 the management plans prepared by the Waikato and Bay of Plenty Regional Councils were of uncertain legal effect, and could serve as little more than guidelines to be used in the processing of water rights applications. One of the most distinctive features of the Resource Management Act is its elaborate hierarchy of national policy statements and regional policy statements and plans. The principal planning instruments will be those made at a regional level under s 65. Although it is not obligatory for regional councils to prepare geothermal management plans (only regional coastal plans and regional policy statements are obligatory) geothermal management planning processes, particularly well advanced with the Waikato Regional Council, will lead to regional geothermal plans being finalised reasonably soon. (Waikato Regional Council, 1992) It is in regional councils are obliged to at least consider the desirability of such a plan under s 65(3) in any event.

(h) There are some important specific changes relating to questions of Maori control and consultation apart from the general obligation to take into account the principles of the Treaty of Waitangi required by s 8 and the related requirements in ss 6 and 7. Geothermal water may be taken without needing permission (although not discharged) if "the water, heat, or energy is taken or used in accordance with tikanga Maori for the communal benefit of the tangata whenua of the area and does not have an adverse effect on the environment" (s 14(3)(c)).

5.0 CONTENTS OF A REGIONAL GEOTHERMAL PLAN

A regional plan aimed specifically at the management of geothermal resources would need to identify and resolve the following issues:

(a) Firstly it is important to define carefully the "resource" that is being managed. What is meant by the "geothermal resource" within a defined region? By giving to regional councils the power to control geothermal water and geothermal. energy it seems quite clear that councils are required to manage the resource both as a water resource and as an energy resource. Thus management planning must address much wider issues than conservation of surface features and certainly extending to energy management.

(b) Conservation of the flora and fauna surrounding geothermal surface features and of the geothermal surface features themselves must form an important part of management planning. Section 6(a) treats as a matter of national importance the preservation of the "natural character" of wetlands and lakes, which certainly could include some geothermal surface features. Section 6(b) gives similar status to "the protection of outstanding natural features". This poses the problem the meaning of "outstanding". Since on an international scale geothermal surface features are quite rare should all geothermal surface features be treated as "outstanding"? Or just some of them? Is a comparison to be made on a national or regional level? What an outstanding natural feature might be is also uncertain, and could range from the Warbrick terrace at Waimangu to Mount Tarawera. It is likely that many and indeed perhaps most geothermal surface features will be regarded as "outstanding". Section 6(c) refers to "the protection of areas of significant indigenous vegetation and significant habitants of indigenous fauna". It is well-known that geothermal surface features support unique and

specialised ecosystems and therefore section 6(c) is therefore also applicable.

(c) Such a plan must take account of the specific objectives of Part II and rank and weight them appropriately in the formulation of specific policies. It seems to us that such a task is fraught with difficulty. Interpreting Part II of the Act is a very difficult task. It appears to us that the sections are in fact ranked in descending order but until the matter has been determined authoritatively by the courts it is impossible to be certain. If they are ranked then it is necessary to determine the relative rankings and interpreting them alongside the definition of "sustainable management" contained in s.5. Since it appears that geothermal systems can be managed sustainably, albeit with some difficulty, this should be the aspiration of any management plan. For the reasons we have identified geothermal surface features fit within at least three of the matters of national importance listed in s 6 and thus particular emphasis must be placed on conservation of surface features. Of even more difficulty are the provisions relating to the relationship of Maori with their ancestral lands etc., kaitiakitanga and the Treaty of Waitangi (ss 6(e), 7(a) and 8).

6.0 RESOURCE RENTALS

Although the resource rental provisions of the Geothermal Energy Act 1953 have been repealed, s 360(1)(c) of the Resource Management Act allows the Governor-General to make regulations prescribing the circumstances and manner in which holders of resource consents shall be liable to pay for the use of geothermal energy. The regulations currently operative are the Resource Management (Transitional Fees, Rents and Royalties) Regulations 1991. In addition the Minister for the Environment also has the function of considering and investigating the use of economic instruments (such as rentals, royalties, charges and other fiscal measures) to achieve the sustainable management of the geothermal resource (s 24(h)). The Ministry for the Environment is currently inviting views on whether resource royalties are suitable mechanisms to help achieve sustainable management of geothermal resources, and it is planned to have a new regime in place by the middle of 1993.

7.0 MAORI CLAIMS

There are in existence numerous claims lodged by Maori from Rotorua, Taupo,

Hawkes Bay and the Bay of Islands relating to geothermal resources. The interests of the claimants are quite divergent and not all major landowning trusts or tribes are involved. The claim is still being researched. Some reports have already been written on behalf of the claimants (Maxwell, 1990, Boast, 1991) and by staff of the Waitangi Tribunal decision itself (Bennion, 1991). Dr Evelyn Stokes has prepared a valuable study on the Wairakei geothermal area (Stokes, 1991). Further research reports have been commissioned on traditional Maori use of the resource and on the legal history of White Island (Whakaari). The first of these claims is set down to be heard in October of this year and relates to Ngawha Springs. No doubt all grounds for Maori claims to this resource will be canvassed as well as concerns about past management of the resource and present management under the Resource Management Act.

In 1991 Manatu Maori released a discussion document entitled The Ownership, Management and Development of the Geothermal Resource (Manatu Maori, 1991) which identified a number of key issues, including tribal management of the resource, the possible need for a geothermal commission, income from resource rentals, assistance to enter the geothermal industry and protection of defined areas. Obviously these questions are principally matters touching on issues of ownership and national policy and are not capable of resolution through the mechanisms of the Resource Management Act.

As indicated, the Act allows Maori to abstract geothermal water without the need for a water permit. The scope of this provision is yet another uncertainty: what is meant by being "taken or used in accordance with tikanga Maori for the communal benefit of the tangata whenua"? Does this extend to commercial use and if so on what kind of scale? Further complexities are posed by s.8, the Treaty of Waitangi section. The provision requires all persons exercising powers and functions under the Act to "take into account the principles of the Treaty of Waitangi". This immediately poses the problems as to what those "principles" might be and their relationship to resource management by local authorities. (See the discussion by Edmunds regarding the parallel requirements of the Crown Minerals Act 1991: Edmunds, 1991 pp B1-35, B1-36).

The "principles" of the Treaty can be derived from an analysis of judicial decisions on other statutory references

(such as that contained in the State Owned Enterprises Act 1986) and from the various reports of the Waitangi Tribunal. It should be noted that the Courts have so far refrained from stipulating that there is a general duty to consult, but of course in most situations some consultation will be required, almost certainly in the case of the preparation of geothermal management plans. . The more care taken with consultation, the less likely it is that the plans will be subject to legal challenge.

8.0 CONCLUSIONS

The Resource Management Act has introduced a considerable degree of uncertainty into the law regarding geothermal resources. The two most significant uncertainties are (i) the difficulties involved in interpreting and applying Part II of the Act, and (ii) the effects of the statutory references to the Treaty of Waitangi and related aspects of the Maori dimension of resource management. The Act does not address the complex problems of ownership at common law and the consequences of the common law doctrine of aboriginal title in relation to this resource. The Act does however introduce a number of important and useful changes, for example the extension of water conservation orders to geothermal systems and the introduction of a system of management planning founded on a secure statutory base.

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