The Politics of Science in the Land the Law Forgot

Ann Brower, Luna-May Hart
University of Canterbury
Environmental Science

Photo: Alice Moss-Baker
Nothing is apolitical

There are few areas more political and conflict-ridden than the ability of individuals and corporations to exploit, use, modify, or destroy natural resources.
Politics loves a vacuum

*ambiguous enough to please all parties,
*vague enough to be difficult to enforce,
*and ill-defined enough so that failures to implement the goal will be difficult to detect and impossible to litigate.
*sound lofty but accomplish little.
Problem – encroachment
Cause – forgotten
Solution – opportunity
Over the line: Rivers being whittled away

Problem – encroachment
Cause 1 -- UCL
Cause 2 -- ECan v Dewhirst
2016

Please can I clear and dig?

No.

Flood protect zone.
Ecan’s Flood protection boundaries

Dewhirst Gravel Bund Veg Track
DEWHIRST: PLEADS GUILTY, DISPUTES FACTS, HIRES QC

- Location and extent of river bed (murky at best)
- Interaction between "fullest flow" and "overtopping banks" in RMA definition
- Relevance of Selwyn flow rate in determining banks
- Flood channels or braids?
• Acknowledges role of science in defining river bank
• Favours ECan method
• Braid, not flood channel
• Expansive braidbed, narrower freehold, definitions mean earthworks were in bed of the river Selwyn/Waikirikiri
2ND CASE
ECAN BANKS
DEWHIRST BANKS
COURT DECISION: "IT IS SIMPLY NOT APPROPRIATE TO MAKE FACTUAL FINDINGS ABOUT WHAT CONSTITUTES THE BED OF A RIVER HERE BASED ON THE EVIDENCE PROVIDED BY EXPERTS."
• Don’t need science to define bank
• purely a legal question
• Not a braid, it’s flood channel
• Narrow braidbed, expansive freehold
• Earthworks not in bed of Selwyn/Waikirikiri
3rd Decision
Flood not braid
Narrow bed

LAW NOT SCIENCE
RMA'S AMBIGUITY

2013, NO BRAIDS
1905
1903
1891
1887
Politics loves a vacuum

*ambiguous enough to please all parties,
*vague enough to be difficult to enforce,
*and ill-defined enough so that failures to implement the goal will be difficult to detect and impossible to litigate.
*sound lofty but accomplish little.
OPPORTUNITY

ADD A DEFINITION TO THE RMA FOR THE LAND THE LAW FORGOT?

WHAT SHOULD IT SAY?
The latest decision from the court of appeal endangers braided rivers. The Court of Appeal has stuck with a narrow definition that while it works for many rivers such as straight channels, it is not easily applied to braided rivers.

The approach used to fulfil the definition in the RMA allows for many features to be mistaken as banks, constricting the river bed. In this case a large side braid, which returns to the main channel is discounted due to the the identified bank. This issue will continue to arise in other areas of braided rivers.

As entire braids are at discounted from being included as river bed, the Regional Council has less control over the area which will now be deemed as river margin or floodplain. As the land surrounding the now river margin is already established as farmland, further encroachment is likely to occur.
COUNCIL’S ABILITY TO PROTECT BRAIDED RIVERS IN LIGHT OF THE NEW DECISION
“ONE IMMEDIATELY THINKS OF THE SELWYN RIVER IN CANTERBURY. MANY CANTABRIANS HAVE NEVER SEEN WATER IN THAT RIVER BED. IT DOES NOT MEAN THAT THE RIVER DOES NOT HAVE A FUNCTION AND A NEED FOR IT TO BE PRESERVED” – FOGARTY J CARRUTHERS V OTAGO REGIONAL COUNCIL
• With an overhaul of the RMA in sight, it may be wishful thinking to hope that a separate interpretation for braided rivers may be included in the amendment.

• Regional Councils are forced to change their rules and regulations in order to clarify land use surrounding braided rivers, namely the newly labeled river margins.

• In some instances the best Regional Councils can hope for is that landowners will express their plans to develop their land adjacent to a river margin. Canterbury Regional Council expressed caution in changing land use such as further intensification for farming or constructing buildings.
WHAT NOW?

- Legislation in place to protect these areas now falls under s9 of the RMA and there are many exceptions which allow land use and development.
- More collaboration is needed between Regional Councils, Department of Conservation and Land and Information New Zealand which all monitor and protect different areas of rivers to best facilitate protection of braided rivers.