

Property adjoining water

- is private property in a public resource still defensible?
- the boundary issues



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In Aotearoa New Zealand we expect strongly protected **private property rights**, but also **public rights** to land and water

Private property

- The great achievement of capitalism
- The reason for colonial immigration
 - And the primary aspiration of most kiwis
- The storehouse of most of our wealth
 - And indeed the vehicle for social advancement – on the ladder!
- The source of many conflicts
 - Mine / Yours. Ours / Theirs.



Public Land / Property

- Early settlers expected a more equitable land policy
 - Access to land
- Some effort to avoid the privatisation of waterways and access to rivers and lakes
 - Royal instructions, Queen's chain
- When there is a public reserve adjoining waterway then the waterway is also public
- Over 30% of Aotearoa is public land



Balancing public / private ?

- But all land also has a public character
 - What individuals do on their private land impacts us all
 - Freedom to exercise property rights often conflicts with public policy goals* – e.g. sustainability, biodiversity, ecology, landscapes
 - Planning law is often ineffective in protecting public values

* There is a regular and conscious assertion of the freedoms of land use decisions on private property that is in conflict with developing expectations about environmental protection, sustainability, and public policy concerns (like enhancing natural character and landscapes, protecting public access rights, restoring ecosystems, protecting rivers, ...)



River property



Common law

- Tidal, navigable – necessarily **public** to protect the public rights of navigation and fisheries
- But by default – subject to **private** ownership by the adjoining owner (ad medium filum)



Legislation

- Ownership - Navigability (Coal-Mines Acts, RMA)
- Control – hazard management (RMA) – old River Boards, Catchment Boards, now Regional Councils
 - Note – Public ownership is not required for management authority.

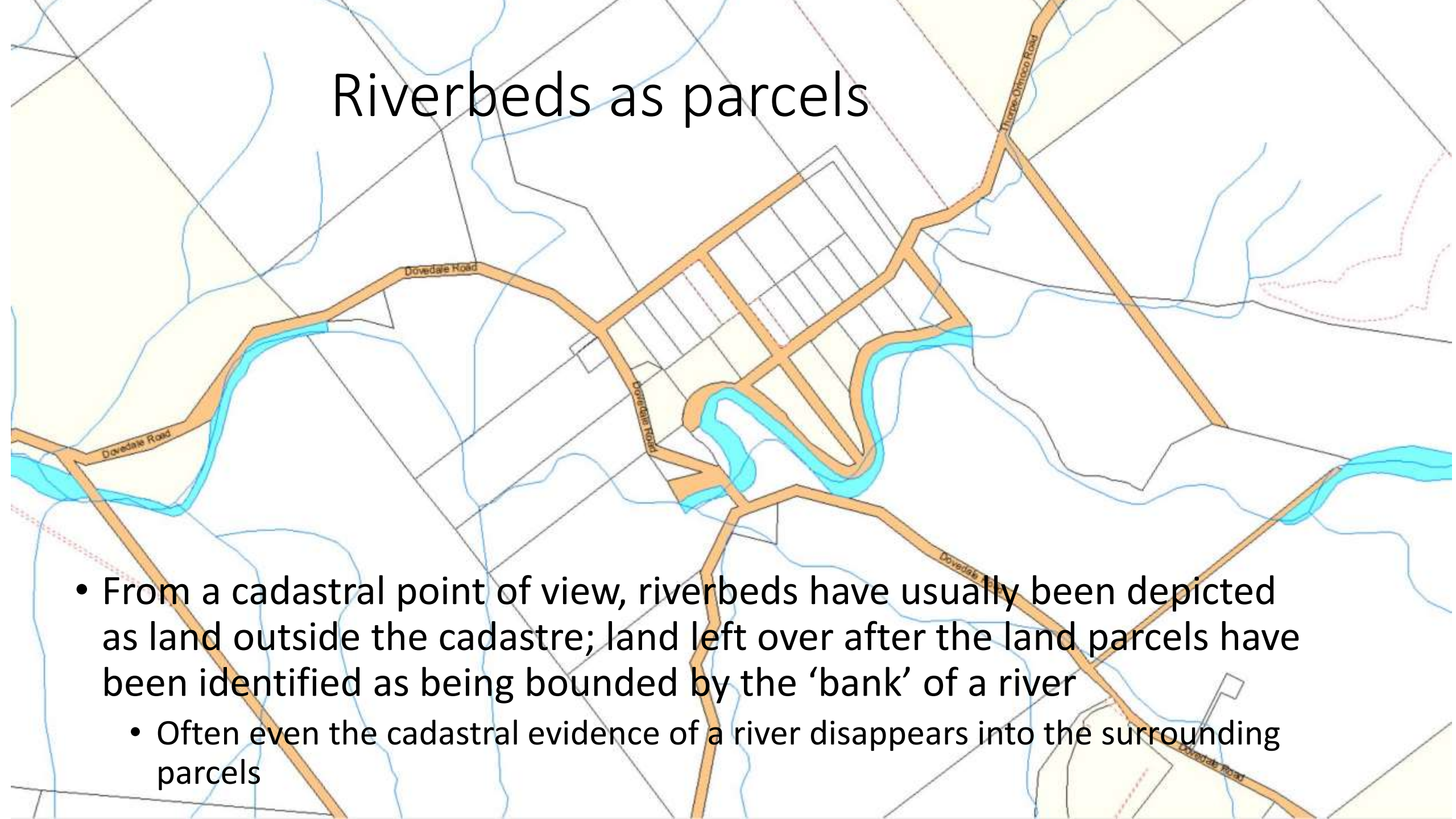
Alternative tenure arrangements

- Riverbeds may remain **Maori Customary land** (not been alienated by the Crown)
 - see the *Paki v AG* 2012, 2014 cases
- Riverbeds can own themselves
 - see Te Awa Tupua Act 2017
- The Crown could claim all rivers as Crown land
 - (Declaratory? Confiscatory?)
- Rivers could become Common to all
 - Like the public foreshore and seabed – Marine and Coastal Areas (Takutai Moana) Act 2011



Riverbeds as parcels

- From a cadastral point of view, riverbeds have usually been depicted as land outside the cadastre; land left over after the land parcels have been identified as being bounded by the 'bank' of a river
 - Often even the cadastral evidence of a river disappears into the surrounding parcels



Riverbeds as parcels

- More recently some parts of rivers may be shown as hydro parcels
- Riverbeds (like many lakes) could be surveyed as parcels, given a unique appellation, and a fee simple title issued
- Te Awa Tupua Act provides for “the fee simple estate in the Crown-owned parts of the bed of the Whanganui River vests in Te Awa Tupua.”
 - But ... The Whanganui riverbed is not defined by survey; there is no identified parcel; there is no record of title.
 - LINZ Guideline: “We understand Te Awa Tupua will not apply, and the RGL will not issue, a CR for those parts of the Riverbed for which there was no CR at Settlement date.”

River boundaries

- Riparian parcels are ambulatory (but only when the bank moves slowly gradually imperceptibly)
- The upland parcel (and the river) boundary is depicted as the **bank** (ignoring the question of amf)
- That depiction is just a record of that point in time
- That depiction is only roughly measured, and then casually drawn as a freehand line (so cannot be reproduced with any accuracy)
- The bank is very subjectively identified – see *CRC v Dewhirst* 2019
 - “the banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the banks, by the character of the soil, or vegetation, or both ...”

River Control

- River Control Boards
- Catchment boards
- Regional councils

- But control does not require ownership?
 - “The ability of the Council to control the diversion of water is not dependent on the area in question being treated as riverbed.” (*Dewhirst* at [71])

- Responsibility to ‘control’ river flows
 - Protection from floods, erosion, inundation
 - It can undertake such protection works on private land





Pleasant Point July 2022

Ashburton river
May 2021



Braided Rivers – see BRaid.org

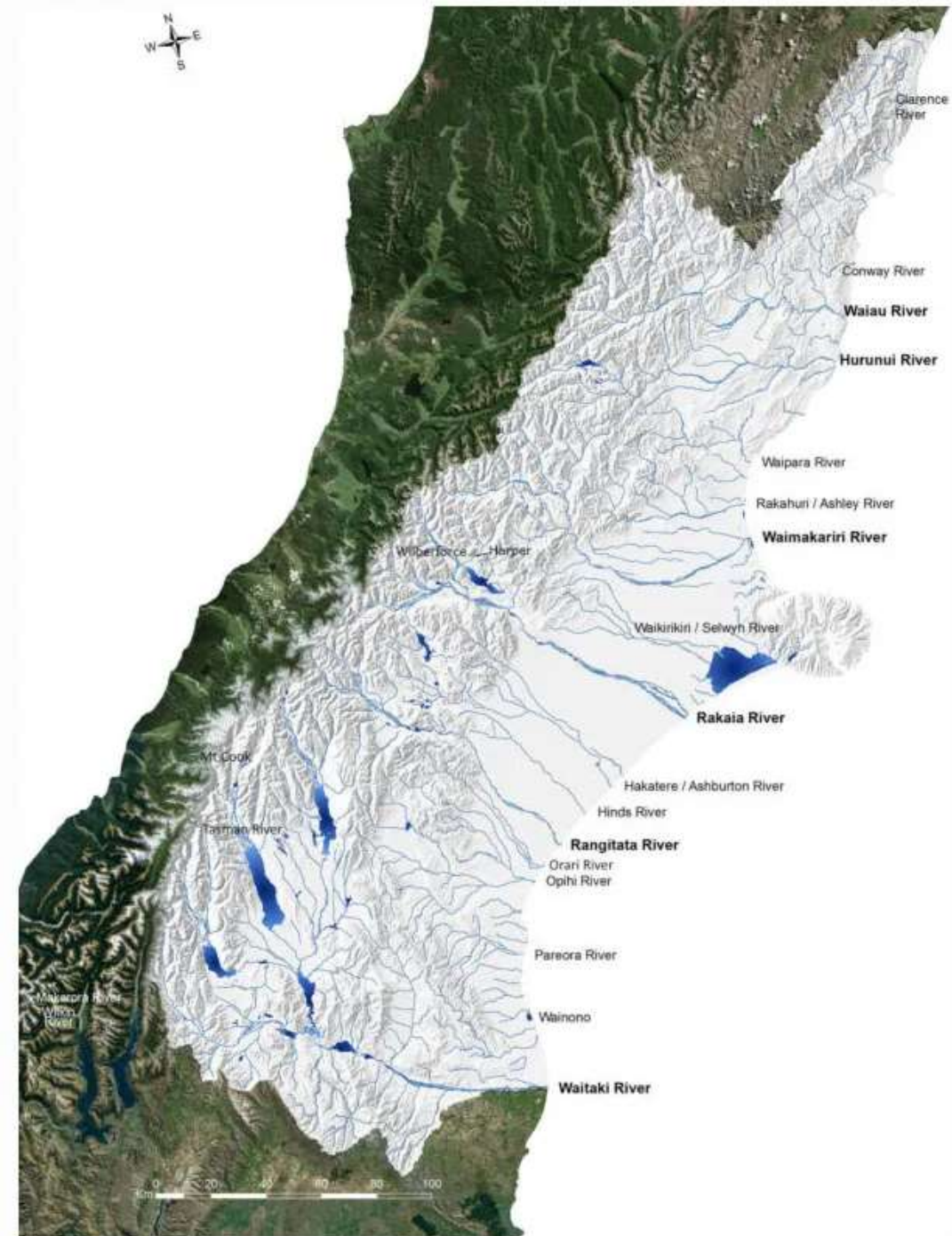
- New Zealand's braided rivers are networks of ever-changing channels weaving between islands of gravels. They are home to an extraordinary diversity of birds, fish, invertebrates and plants that have adapted to live in this challenging and dynamic environment.
- Globally, braided rivers are rare. They occur only where a very specific combination of climate and geology allows rivers to form ever-changing and highly dynamic 'braided' channels across a wide gravelly riverbed.
- New Zealand is a braided river hot-spot. Almost 64% of our braided rivers are in Canterbury, with a catchment of over 164,170ha. The entire Canterbury Plains was formed by sediment and gravel carried from the Southern Alps by braided rivers as they flowed to the coast.



Rakaia River

Braided Rivers

- Most of our rivers are controlled one way or another:
 - hydro dams,
 - water races and pumps extracting water
 - stop banks restricting flow
 - increased weed growth because no regular floods
 - significant gravel accumulation
 - willows and poplars planted to protect land and increase accretion
- So they are losing space to perform their natural functions



But back to the question ... what's public, what's private?

- The *Dewhirst* case was essentially about what an owner could do on land adjoining a riverbed (or whether in fact, that land was riverbed)
- It did not even look at the question about whether Dewhirst actually owned the riverbed amf
 - Would that have made a difference? ... no
- But many riparian owners are pushing their landuse activities into river margins to the detriment of the natural flow and ecosystems of the rivers – particularly braided rivers
- Property is encroaching on the rivers ... leaving no room for natural river processes (including floods, erosion, accretion ...)

Wairau River and Braidplain 1966



Wairau River and Braidplain 2019





1942

2020

<https://theconversation.com/why-we-should-release-new-zealands-strangled-rivers-to-lessen-the-impact-of-future-floods-153077>

20th Century management

focus on production

- Braidplains were wastelands waiting to be developed for production
- Flood Control – building stop banks (recent events show that these are vulnerable)
- Gravel extraction to deepen channels and speed water flow
- Tree planting to stabilise banks (and reclaim land)
- Uncontrolled expansion of weeds (lower/fewer floods to clear braidplains)
- Dams for hydro storage (interrupts sediment quantity and quality)
- Water abstractions
- The effects – and even the explicit goal – reduce bed width, straighten channel
- For adjoining property – protect property, expanding productive area, provide security from flood risk
- Agricultural encroachment

21st Century management

focus on sustainability

- Making room for rivers (allowing rivers to flow across their braidplains)
- Restoring habitats
- Limiting infrastructure damage
- May require property purchases for ecosystem services

- Will the recent government **Adaptation Plan*** for responding to climate change change things?
 - It suggests managed retreat as one of the useful adaptation tools

- *Adapt and Thrive: Building a climate-resilient New Zealand.* (August 2022) MfE ME1660

The boundary issue

- The survey fix of the 'bank' is still very subjective (causes conflict)
- The 'bank' definition is unhelpful for ecosystem services
- The 'bank' definition is unhelpful for flood management
- The 'bank' definition is unhelpful for determining the extent of production

Reflections / questions

- Is the 'bank' an appropriate dividing line between private and public?
- Should we establish 'setback' provisions (like we will need to do more of on the coast to allow for sea level rise)?
- Should we recognise a setback (no-development) zone?
 - not an esplanade reserve – more like a building line restriction
- How do we manage Riparian owners' expectations of their property rights?
- How do we accommodate public interests in rivers?
 - Access, use , recreation, eco-services, landscapes

References

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- Strack, M. 2021. Where are the banks of a river? Property and the extent of rivers. *Journal of Water Law*. Vol 27:2:66-74
- New Zealand Productivity Commission. 2019. Local government funding and financing: Final report. Available from www.productivity.govt.nz Box 9.5 Making room for rivers
- See <https://braidedrivers.org/>
- <https://www.stuff.co.nz/national/125732991/the-gravel-wars-farmers-vs-council-on-who-pays-for-flood-cleanup>
- *Canterbury Regional Council v Dewhirst Land Company Ltd* [2019] NZCA 486