

TE UREWERA

TE UREWERA

VOLUME VI

WAI 894

WAITANGI TRIBUNAL REPORT 2017



National Library of New Zealand Cataloguing-in-Publication Data
*A catalogue record for this book is available from the National
Library of New Zealand*

ISBN 978-1-86956-325-7 (pbk)

ISBN 978-1-86956-326-4 (PDF)

www.waitangitribunal.govt.nz

Typeset by the Waitangi Tribunal

This report was previously released online in pre-publication format in six parts
between 2009 and 2015 as *Te Urewera – Pre-publication Version*

This edition published 2017 by Legislation Direct, Lower Hutt, New Zealand

Printed by Printlink, Lower Hutt, New Zealand

Reprinted with corrections 2018

21 20 19 18 5 4 3 2

Set in Adobe Minion Pro and Cronos Pro Opticals

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ABBREVIATIONS

AC	<i>Appeal Cases</i> (England)
AJHR	<i>Appendix to the Journals of the House of Representatives</i>
app	appendix
art	article
ATL	Alexander Turnbull Library
BPP	<i>British Parliamentary Papers: Colonies New Zealand</i> , 17 vols (Shannon: Irish University Press, 1968–69)
CA	Court of Appeal
ch	chapter
comp	compiler
DNZB	<i>The Dictionary of New Zealand Biography</i> , 5 vols (Wellington: Department of Internal Affairs, 1990–2000)
doc	document
DOC	Department of Conservation
DOSLI	Department of Survey and Land Information
DSIR	Department of Scientific and Industrial Research
ECEF	East Coast Expeditionary Force
ECLTIA	East Coast Land Titles Investigation Act
ECNZ	Electricity Corporation of New Zealand
ed	edition, editor
encl	enclosure
fn	footnote
fol	folio
GPS	global positioning system
GV	Government valuation
ha	hectare
intro	introduction
LINZ	Land Information New Zealand
ltd	limited
MA	Department of Maori Affairs file, master of arts
no	number
NZED	New Zealand Electricity Department
NZFS	New Zealand Forest Service
NZ ConvC	<i>New Zealand Conveyancing Cases</i>
NZLR	<i>New Zealand Law Reports</i>
NZPD	<i>New Zealand Parliamentary Debates</i>
p, pp	page, pages

ABBREVIATIONS

para	paragraph
PC	Privy Council
PEP	Project Employment Programme
pt	part
RDB	<i>Raupatu Document Bank</i> , 139 vols (Wellington: Waitangi Tribunal, 1990)
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
sec	section (of this report, a book, etc)
sess	session
SGGSC	Sir George Grey Special Collections
TEP	Temporary Employment Programme
trans	translator
UCS	Urewera Consolidation Scheme
UDNR	Urewera District Native Reserve
UDNRA	Urewera District Native Reserve Act 1896
UNESCO	United Nations Educational, Scientific, and Cultural Organisation
v	and
vol	volume
Wai	Waitangi Tribunal claim

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the Wai 894 (Te Urewera) record of inquiry, a select copy of which is reproduced in appendix II. A full copy is available on request from the Waitangi Tribunal.

CHAPTER 18

TE KAUPAPA AHU WHENUA ME TE WHAKAAUKATI RAKAU – LAND DEVELOPMENT SCHEMES AND RESTRICTIONS ON THE USE OF NATIVE TIMBER

18.1 INTRODUCTION

This chapter is concerned with claims about two forms of Crown intervention in the economic opportunities available to the peoples of Te Urewera. One intervention was positive: as a result of a new policy in 1929, development schemes were established that channelled State funds into Maori farming. The other intervention was negative: as we outlined in chapter 16, the Crown greatly restricted the logging of native timber from the 1930s on, so as to prevent erosion and flooding in the farmlands of the Bay of Plenty and to protect electricity generation at Lake Waikaremoana. The full range of economic opportunities that arose in the twentieth century, including employment in forestry and the leasing of Maori land for exotic forestry, will be discussed in further chapters. In this chapter, we concentrate on the claims about these two very specific but far-reaching Crown interventions in the economic opportunities available to the claimants in the twentieth century.

We take as our starting point the completion of the Urewera Consolidation Scheme (UCS) in 1927, after which Maori owners and the Crown finally knew the extent and location on the ground of their lands in the former Urewera District Native Reserve (UDNR). Tuhoe, Ngati Whare, Ngati Manawa, and Ngati Kahungunu between them retained about one-quarter of the UDNR lands. Much of it was of poor quality, rugged, and bush-covered, unsuitable for farming. In the 'rim' blocks, Maori had less than 19 per cent of their original land holdings by 1930, and retained only 12.5 per cent of their forests (see chapter 10). In both the UDNR and the rim blocks, title had been converted to individual shares governed by the native land laws.

The UCS marked the end of any legal mechanisms for Maori autonomy in Te Urewera, the end of the inalienable reserve, and the end of Crown purchasing. But it was also a beginning. Maori interests were, in theory, consolidated into usable holdings, delineated on the ground, and vested in individuals. The peoples of Te Urewera now had to pick themselves up after the long and debilitating processes of piecemeal purchases, title investigation, and consolidation, and see if they could survive or perhaps even prosper on the land that was left to them. There were relatively small areas of land suitable for cropping, pasture, or dairying. The great majority of the land, however, was still covered in native bush. Some of it would be suitable for farming once it was cleared, but much of it would not. These were

the assets available to the peoples of Te Urewera in 1930; their turangawaewae. The promised roads, it was believed, would both assist farming and make it possible to mill inaccessible timber.

But there were significant obstacles to the realisation of either of these economic opportunities. Farm development was hindered by the state of native land titles, especially in the rim blocks but even in the UCS lands. Most importantly, banks and lending institutions would not risk their money on land held in multiple title. It was virtually impossible for Maori to get loan finance, but it was also almost impossible to develop land without it, even the good quality dairying land at Ruatoki. Also, Maori at the time lacked the necessary business and farming expertise; they simply had had no chance to acquire it.

When he became Native Minister in 1928, Sir Apirana Ngata instituted a Maori land development policy that would see Government loan finance and expertise (supervision) made available to Maori farmers, with the Crown taking direct control of the farming until the land was developed and its investment had been repaid from the proceeds. With the Crown's assumption of control came what Ngata, in a statement quoted by Crown counsel,¹ called an 'over-riding condition implied in the circumstances of the inception of the schemes and expressed in conferences with communities, that lands should be administered in the interests of their owners and in general accord with their wishes and aspirations.'² This is the standard by which we measure the Crown's performance in respect of Ngata's development schemes.

Four development schemes were established in Te Urewera in the 1930s, at Ruatoki, Ruatahuna, Waiohau, and on the Ngati Manawa lands in the Whirinaki and Karatia blocks. Few could have imagined that the schemes would drag on for many decades, but they did. While the injection of Government money and development assistance was welcomed by Maori, issues did develop about the degree and the quality of the control assumed by the Government, especially after the 1930s. We received claims from Tuhoe, Ngati Haka Patuheuheu, and Ngati Manawa about these matters, particularly because the degree of Crown control was seen as a denial of their tino rangatiratanga.³ The Crown, on the other hand, defended its record in land development, arguing that State money was made available and the investment had to be protected by a degree of State supervision, that farms were developed and handed back to Maori that otherwise would not have been developed, and that its administration was competent given the knowledge available to officials at the time.⁴

In the meantime, while Maori struggled to establish farms on their cleared land, the prospect of getting an income from milling the bush (and then bringing more

1. Crown counsel, closing submissions, June 2005 (doc N20), topic 32, p 5

2. Apirana Ngata, 'Maori Land Settlement', in *The Maori People Today: A General Survey*, ed ILG Sutherland (Wellington: Whitcombe and Tombs, 1940), p147

3. Counsel for Wai 36 Tuhoe, closing submissions, pt A, overview, 31 May 2005 (doc N8), pp 62–63; counsel for Ngati Haka Patuheuheu, closing submissions, 31 May 2005 (doc N7), pp 125–126; counsel for Ngati Manawa, closing submissions, 2 June 2005 (doc N12), pp 66–72

4. Crown counsel, closing submissions (doc N20), topic 32, pp10–14

land into farm development) was the only other light on the economic horizon. Here, the claim is essentially that the Crown sacrificed Maori interests in favour of the wider public interest, but without compensating the claimants for not being allowed to mill their timber. The Crown's original plan for Te Urewera, which Professor Richard Boast described as '350 or so struggling sheep farms on eroding hillsides',⁵ was abandoned in the 1920s. Governments remained interested in milling some of the timber on Crown land at Te Whaiti and in the rim blocks where feasible, but there was a basic shift of policy towards preserving the bush in the interests of scenic preservation and of water and soil conservation. Both purposes, as we saw in chapter 16, dovetailed in the later establishment of the national park.

But, as Government officials MJ Galvin and DD Dun observed in 1935, the bush was to be protected in the public interest, which was essentially a 'European' interest (especially in the case of the downstream farmers). They suggested that, '[a]s the preservation of the Urewera is in European interests desired to an extent which must impose certain restrictions on the Maori's use of their own bush, they are obviously entitled to something in return'.⁶

This was obvious to Lands and Survey Department and Forest Service officials in 1935, and it seems obvious to us. This is a key standard by which we judge the Crown's performance in relation to timber restrictions. The claimants have not challenged the proposition that water and soil conservation was a valid concern, although they did challenge the idea that scenery should be preserved at the choice of others, imposed on them in their own rohe (see chapter 16). Here, the claim that we are concerned with is essentially that the Crown imposed restrictions on timber milling without consultation or consent, and without paying compensation. The Crown has argued that it was flexible in its restrictions (allowing milling where appropriate), and that the law did not require it to pay compensation until 1959, after which – the Crown concedes – it failed to do so. Otherwise, the Crown rejects the claim, suggesting that it acted properly under its article 1 powers and obligations.⁷

18.2 ISSUES FOR TRIBUNAL DETERMINATION

We note first that there are a number of claim issues which are associated with development schemes yet raise matters that are either tangential to the schemes or require consideration and determination in their own right. Such issues, including the Ruatoki–Waiohau consolidation scheme, the Ngati Manawa claim that consolidation should have preceded development, and the Te Mahurehure claim

5. Richard Boast, 'The Crown and Te Urewera in the 20th Century: A Study of Government Policy' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A109), p 61

6. MJ Galvin and DD Dun to Conservator of Forests, 'Report by Officers of the Lands & Survey Department and the State Forest Service on the Urewera Forest', 29 April 1935 (Klaus Neumann, '... That No Timber Whatsoever Be Removed': The Crown and the Reservation of Maori-Owned Indigenous Forests in the Urewera, 1889–2000' (commissioned research report, Wellington: Waitangi Tribunal, 2001) (doc A10), p 74)

7. Crown counsel, closing submissions (doc N20), topic 31, pp 4–6, 12–13, 18–20

about the Ruatoki water supply, are dealt with in a later chapter. Also, we have already examined the Crown's purchase of Manuoha and Paharakeke in chapter 16. Since Ngati Kahungunu's claim about timber restrictions is encompassed in the purchase of these two blocks, we do not consider it again in this chapter.

In the present chapter, we have structured our analysis around the following key questions:

- ▶ Why was Crown assistance necessary for Maori farm development?
- ▶ How far were Maori involved in decisions about the development schemes, and were the schemes conducted in their best interests?
- ▶ To what extent were the peoples of Te Urewera prevented from milling their native timber, and were they compensated accordingly?

Before proceeding to analyse and answer these key questions, we first set out a basic narrative of the facts about land development schemes as they operated in Te Urewera, and then summarise the essence of the difference between the positions of the Crown and claimants on the issues before us.

18.3 KEY FACTS: LAND DEVELOPMENT SCHEMES

18.3.1 Land development schemes

As a starting point, we note that the Crown's policies and practices in regard to development schemes have already been described in some detail by the Waitangi Tribunal and we refer readers to those reports for more information.⁸

In December 1928, Sir Apirana Ngata became Native Minister in the United Government. The next year, the Crown launched new major development initiatives, involving the direct use of State funds to bring two forms of 'marginal' land into production: State development of marginal Crown land *before sale* so that it could be made available to settlers as viable farms; and State assistance to Maori to develop their (often marginal) remaining land. The latter initiative was the work of Ngata, piggybacking on enthusiasm for the Crown land initiative. In brief, Ngata's aim was to enable rural Maori communities to stand on their own two feet, economically speaking, alongside Pakeha communities. As Ngata saw it, this outcome offered the best hope for Maori retaining ownership of the lands they had left after almost a century of large-scale alienation. But this could not happen, he thought, without the support of strong tribal leadership and equally without overcoming the existing obstacles to Maori farm development. These obstacles were seen as the problems of multiple titles; the lack of access to finance (mostly because of the titles); and a lack of opportunities to acquire business and farming expertise.⁹

8. See Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 3, ch 14; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 2, chs 6, 7.

9. Ngata, 'Maori Land Settlement', pp 139–145; David Alexander, 'The Land Development Schemes of the Urewera Inquiry District' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A74), pp 13–16; Ashley Gould, 'Maori Land Development Schemes: Generic Overview circa 1920–1993' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc M7), pp 31–46

The Value of £1 and \$1 in Today's Terms

In this chapter, we discuss the level of financial investment in, and the returns from, the four farm development schemes that were established in Te Urewera in the 1930s, the last of which was wound up in 1990. We also discuss the value ascribed to timber on Te Urewera lands in the period from 1927 to the 1980s, particularly in light of the milling restrictions imposed by the Crown and its failure to pay compensation to Maori landowners for timber that it became unlawful to mill.

Our focus on these financial matters means that readers will be assisted by having a sense of the significance of the amounts involved, in today's terms. For this reason, we include here a table that allows a ready translation of past values into today's dollars. The table uses figures from the Reserve Bank of New Zealand's inflation calculator, which, it must be noted, are guides, not official calculations. The figures are taken from the general (CPI) category of the inflation calculator, which uses the 'all groups' Consumer Price Index (CPI) published by Statistics New Zealand.

The figures presented are the estimated cost in the first quarter of 2012 of a basket of goods and services that would have cost £1 in the first quarter of each of the years listed. (For example, a basket of goods and services that cost £1 in 1930 would cost \$92.09 today.) We remind readers that New Zealand adopted decimal currency in July 1967 and that, at that time, £1 was equal in value to \$2.

Year	Cost in 2012 dollars
1920	\$86.48
1930	\$92.09
1940	\$90.55
1950	\$67.93
1960	\$42.31
1970	\$14.94
1980	\$4.73
1990	\$1.65

Cost in 2012 dollars of £1 of goods and services, 1920–90

In 1929, the Native Land Amendment and Native Land Claims Adjustment Act empowered the Native Minister to take over the management of areas of Maori land, and develop it using Crown loans and expertise. The costs incurred by the Crown were to be met by a charge on the earnings from the improved land. Once the developed land was in profit and the Crown had been repaid, it was, at least in theory, to be returned to the control of the owners. The Act also provided for the appointment by the Minister of local advisory committees. While the Crown was developing the land, the Native Land Court was only allowed to exercise its

jurisdiction with the permission or at the request of the Government (except for successions or the appointment of trustees for people under disabilities). Also, the owners could not sell or lease their interests, except to the Crown.¹⁰ Until 1949, there was no guarantee that the Crown would not take land in satisfaction of debts.¹¹

Under this legislative framework, with or without a consolidation scheme, Ngata's aim was to sidestep title problems by providing Government finance and supervision to 'units', that is, dairy or sheep farms with a nominated farmer or 'unit occupier'. These units were simply superimposed upon the lands and their complex titles. The intention was to create family farms wherever possible, and to ensure that the nominated farmers developed the technical and business expertise to carrying on farming after the Crown withdrew. At the same time, Ngata intended the schemes to serve community and cultural purposes, including the development of the wider community of owners, the improvement of their housing, and the restoration of their marae.¹²

Within a decade of Ngata's policy being introduced, four Maori land development schemes had been established in Te Urewera: Ruatoki (1930), Ruatahuna (1931), Waiohau (1933), and Ngati Manawa (1937). The intention of the Ruatoki, Waiohau, and Ngati Manawa schemes was to establish dairy farms, whereas Ruatahuna's scheme was to develop the land for sheep farming. At Ruatoki, the unit farms were based largely on the post-consolidation titles, but in the other three schemes, the resulting unit farm boundaries did not rely on the underlying titles. (Consolidation at Waiohau, which we discuss in chapter 19, was carried out after the inauguration of the development scheme.)

Once the land had been developed sufficiently for settlement of the unit farms, each scheme farm was run by a unit occupier who was generally one of the owners of the land who had been chosen by his/her co-owners. In the 1930s, the wider community of owners was also employed preparing land for settlement. Much of this pre-settlement work was undertaken at the time of the Great Depression, and in fact all the schemes except for Ruatoki were started as a means of providing unemployment relief. This was a significant factor in the early success of the schemes, since the wages paid to workers on relief work was not charged against the scheme accounts. These subsidies had appeared on the balance sheets, but after an investigation at the start of the 1950s into whether they ought to be repaid from any surpluses that were made, Treasury agreed in 1952 that they could be written off.¹³

10. Ngata, 'Maori Land Settlement', pp 144–145; Gould, 'Maori Land Development Schemes' (doc M7), pp 116–130

11. Gould, 'Maori Land Development Schemes' (doc M7), pp 25, 79–80

12. Ngata, 'Maori Land Settlement', pp 147–150; Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 1014–1017

13. Brian Murton, 'The Crown and the Peoples of Te Urewera, 1860–2000: The Economic and Social Experience of a People' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc H12), pp 653–666

In 1934, Ngata resigned as Native Minister following sustained criticism of his handling of land development schemes. The new Labour Government, however, continued his Maori land development policies, with substantial investment going into scheme housing. At the same time, control of the schemes became centralised under the Board of Native Affairs. The Native Land Amendment Act 1936 removed any formal role for local advisory committees and gave the board discretion over who should be the unit farm occupiers.¹⁴

After the Second World War, the board's focus, in relation to Te Urewera schemes, moved away from unit farm establishment to improving their financial performance, as the board wanted to ensure that the Crown's investment in the schemes was protected. This was accompanied by a shift from developing Maori communities to developing Maori land. Increasing farm mechanisation meant that small farms were ceasing to be viable, so the Crown's response was to encourage the amalgamation of small farms into larger ones. Likewise, the belief among Crown officials that unit occupiers would be more committed to farm improvement if they had better security of tenure also led to landowners being encouraged to accept the granting of leases to unit occupiers. The landowners were not a party to these leases, though, as the Board of Maori Affairs was meant to act on the owners' behalf. At the same time, the Crown also began handing over more farming responsibilities to unit occupiers (this was described as 'relaxed control'). The availability of non-farm employment opportunities in the surrounding regions also led the Crown to stop granting labour subsidies to the development schemes during this period, while other social responsibilities which had been part of the development schemes, such as the provision of housing, increasingly shifted to other Government agencies.¹⁵

The first lands where settlement was thought sufficiently advanced for their release back to the control of the owners were the Waiohau A farms. These were released in 1941, although their owners still had to repay debts to the Crown.¹⁶ Development of new farmland, conversely, came to an almost complete halt during the 1940s, owing to shortages of materials. The resumption of development work on the Owhakatoro blocks (Ruatokei scheme), Waiohau C, and Ngati Manawa lands became a major source of friction between owners and the Crown, as Crown concerns that farm sizes must be much bigger than originally planned led to the number of proposed unit farms in these areas steadily decreasing. In addition, with there being not nearly as much development work available, the board encouraged owners to seek work outside their home communities. In essence, it did not see the need for subsidised relief work when unemployment levels were low in the wider region.¹⁷ As it turned out, one of these potential alternative sources of employment

14. Gould, 'Maori Land Development Schemes' (doc M7), pp 15–17, 178–196

15. For these general developments, see Gould, 'Maori Land Development Schemes' (doc M7); and Alexander, 'Land Development Schemes' (doc A74).

16. Alexander, 'Land Development Schemes' (doc A74), pp 200–202, 249

17. Alexander, 'Land Development Schemes' (doc A74), pp 95, 101–107, 128–132, 204–211, 350–355

The Board of Native / Maori Affairs

In 1932, the Government created the Native Land Settlement Board, chaired by the Native Minister, to give several Government departments, including Treasury, Agriculture, Lands and Survey, and Valuation, a role in the administration of Maori land development schemes. In 1933, the board's powers were extended to give it control of Maori Land Board and Maori Trustee farming operations. Ngata was concerned that the board created too much bureaucracy in decision-making for the development schemes, and that farming business should not be run by Government departments.

After Ngata's resignation, the Native Land Settlement Board was replaced by the Board of Native Affairs in 1935. This revamped board governed Maori land development schemes for the next 50 years, although its composition (and its name) changed from time to time. At its inception in 1935, the board consisted of the Native Minister, the Under-Secretary for the Native Department, the Secretary for the Treasury, the Under-Secretary for Lands, the Valuer-General, the Director General of Agriculture, and three members to be appointed by the Governor-General in council. Until 1947, the board had no Maori members. In 1948, its composition was amended to provide for the Member of the Executive representing the Maori Race to be a member, but this position was discontinued by the National Government in 1949. In the 1950s and 1960s, the Government appointed Maori leaders to unofficial positions on the board, but unofficial (and Maori) members were a minority. In 1972, the secretary for the Treasury was removed and replaced by a nominee of the New Zealand Maori Council.

– the proposed Murupara mill – created problems for the Ngati Manawa scheme. From 1948 until 1952, after which time Kawerau was chosen as the mill's location, the development scheme was in limbo as scheme officials did not want to invest in operations on lands that might be needed for the mill.¹⁸

The Crown further moved to reduce its involvement in the development schemes at the start of the 1950s, by offering 'relaxed control' to Ruatoki and Ruatahuna unit occupiers whose farm accounts were in credit. This was the case for many unit occupiers, as a result of the high prices for farm produce at the time of the Korean War. Under relaxed control, unit occupiers were responsible for managing most farm operations and finances themselves, although the Crown retained the authority to step in if required.¹⁹

18. Alexander, 'Land Development Schemes' (doc A74), pp 356–362; Heather Bassett and Richard Kay, 'Ngati Manawa and the Crown, c1927–2003' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc C13), pp 51, 63, 78

19. Alexander, 'Land Development Schemes' (doc A74), pp 145–147, 299–300, 303–305

Then, Matiu Rata as Minister of Maori Affairs in the third Labour Government redesigned the board in 1974 and renamed it the Maori Land Board. The Minister remained the chairperson but official membership was reduced to three: the secretary for Maori Affairs, the Director-General of Lands, and the Valuer-General. The board was to contain five unofficial Maori members, three to be appointed by the Minister, a Maori member of Parliament (to be nominated by the Maori members of Parliament), and a nominee of the New Zealand Maori Council. By this time, the Ruatoki, Waiohau, and Ngati Manawa development schemes had been wound up, so, for our purposes, the revamped board was only of relevance to the Ruatahuna development scheme.

In 1982, the Maori Land Board was renamed the Board of Maori Affairs, and its unofficial Maori membership was again expanded. From then on, it consisted of the Minister, the secretary, the Director-General of Lands, the Valuer-General, a Maori member of Parliament, the president of the New Zealand Maori Council, the president of the Maori Women's Welfare League, the chairperson of the Maori Education Foundation, and six (Maori) ministerial appointees. The Maori Trustee was added in 1985. The board's previous focus on Maori land development was expanded to include other aspects of Maori affairs, until its abolition as part of the fourth Labour Government's iwi devolution policy in 1989. The board's responsibilities were transferred to the general manager of the Iwi Transition Agency in 1989.¹

1. Ashley Gould, 'Maori Land Development Schemes: Generic Overview, c1920–1993' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc M7)

Equally, now that many unit farms had favourable account balances, which made them candidates for release in the short- to medium-term, the board became concerned to secure the ongoing position of the unit occupiers (as it feared that productivity might fall if occupiers did not have any stake in their farms' future). To this end, it encouraged owners to accept formal leases (or alternatively, occupation licences), which guaranteed the position of unit occupiers for periods of between 10 and 42 years, and gave them partial ownership of the improvements. This was a big step for the peoples of Te Urewera, as generally they had been adamantly opposed to any idea of leasing the land to unit occupiers. Ruatoki owners were gradually persuaded over the course of the 1950s to accept leases, while meetings of Ruatahuna and Waiohau owners in 1951 agreed to 10-year occupation licences and 21-year leases (with right of renewal for a further 21 years) respectively. Both the Ruatahuna and Waiohau owners retained ownership of the improvements to the land under these agreements. This ownership of improvements had important ramifications for owner incomes, as rather than the owners receiving rental from the unit occupiers for the value of the land and the improvements, the rental was

collected by the Crown which used it to service the debt owed by the owners for the improvements.²⁰

Arrangements also began to be made in the early 1950s for the Ruatoki lands to pay rates to the Whakatane County Council; as an interim measure, the Crown collected a set levy each year which it passed on to the council. The Whakatane County Council began asking for Ruatahuna rates too in the late 1950s, and consequently the previous exemptions on rates payments on Te Urewera lands were removed in 1964.²¹

The Ruatoki and Waiohau development schemes entered their final stages in the mid-1950s, with the farm settlement of unit occupiers on the Owhakatoro block occurring during 1954–55, and likewise the settlement of the Waiohau c farms between 1961 and 1967. In the mid-1950s, the Crown also began releasing areas of bush and scrub-covered land, which it had chosen not to develop, to the original owners. The Crown then ceased development funding for Ruatoki and Waiohau in 1966 and 1970 respectively, although it was not until 1971 and 1976 respectively that control of the unit farms not already released from the two schemes was returned to the owners.²²

The Crown's response to the unfavourable economic climate which had affected all the schemes was rather different in the case of the Ngati Manawa and Ruatahuna development schemes. When given the option of the Crown pulling out of the schemes or amalgamating the scheme lands into a single-title farm (or station), the owners opted for amalgamation. For the Ngati Manawa lands, this change took effect in 1960, while for Ruatahuna it occurred two years later.²³

The Ngati Manawa lands proved just as hard to make profitable under the station regime, and consequently the Crown agreed to wind up the development scheme in 1972. This allowed the lands to be used instead for afforestation purposes, with the owners signing up to the Te Manawa o Tuhoe afforestation lease in 1978. The Ruatahuna farm block performed rather better, and the Crown moved to begin transferring control to the owners in 1981. They placed the farm title in a section 438 (Maori Affairs Act 1953) trust. The Ruatahuna farm block was eventually released to the owners in 1990.²⁴

20. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 681–682; Alexander, 'Land Development Schemes' (doc A74), pp 124, 164

21. Alexander, 'Land Development Schemes' (doc A74), pp 120, 157–158, 291

22. Ibid, pp 101–107, 128–132, 159–162, 176–177; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 637–638; Steven Oliver, 'Ruatoki Block Report' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A6), pp 155–156; Kathryn Rose, 'A People Dispossessed: Ngati Haka Patuheuheu and the Crown, 1864–1960' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A119), p 226

23. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 694, 718; Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), pp 130–131; Heather Bassett and Richard Kay, 'Ruatahuna: Land Ownership and Administration, c1895–1990' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A20), p 252; Alexander, 'Land Development Schemes' (doc A74), pp 311–312

24. Alexander, 'Land Development Schemes' (doc A74), pp 326, 329, 399, 401; Tama Nikora, 'Te Urewera Lands and Title Improvement Schemes' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc G19), p 48; Bassett and Kay, 'Ruatahuna' (doc A20), pp 264–267

The above account gives an overview of some of the commonalities and contrasts in the history of the four Te Urewera schemes. We turn next to provide a more detailed account of the operation of each scheme.

18.3.2 The course of land development at Ruatoki

In the first decade after the establishment of the Ruatoki Development Scheme in 1930, the results were overwhelmingly positive. There was a rapid increase in agricultural production, building on the foundation of pre-scheme dairy farming. Land under pasture trebled (from less than 1,700 acres to more than 5,400 acres), the number of dairy cows quadrupled, and butterfat production rose four-fold as well.²⁵ In order to support this increased production, a water supply system was constructed in the 1939–40 year, although it took a few years to connect all the farms.²⁶ A housing programme was also commenced in 1935, with some 131 houses, or nearly one for every unit farm, having been built by 1940. Some 93 milking sheds had also been constructed in the decade.²⁷

Most of the Government finance, which amounted to almost £110,000 by March 1938,²⁸ was made up of advances to unit occupiers for grass seed, livestock, fertiliser, and fencing.²⁹ These advances had to be paid back to the Crown, which at first took one-third of the occupiers' milk cheque. After the mid-1930s, the Crown's deduction was typically 40 or 50 per cent.³⁰ At the same time, much of the labour-intensive part of early development was funded by unemployment subsidies. These subsidies, as with other unemployment relief schemes of the era, did not have to be paid back.³¹ In effect, the Government used the development scheme to combat the effects of the Depression.³² By the late 1930s, subsidised relief work was still being provided for 50 or so labourers, together with about 40 unit occupiers whose properties were too small to provide their entire income.³³

The scheme's financial performance over the first decade was reasonably promising. While total scheme debt had grown to around £78,000 by 1941, this compared with a rise in income from scheme lands from around £6,300 in the 1931–32

25. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 573

26. Alexander, 'Land Development Schemes' (doc A74), p 92

27. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 574

28. Oliver, 'Ruatoki' (doc A6), p 149

29. During the 1933–34 year, for example, out of total expenditure of £29,220, the advances for livestock, fertilisers, and grass seed amounted to £8,145, £4,074, and £5,669 respectively, and fencing costs amounted to £4,901: see Oliver, 'Ruatoki' (doc A6), p 148. Some of this cost (especially the fencing costs) would have been generated by land under development; this would not have been assigned to any particular occupier until farm settlement occurred, and for the time being would have been added to the general scheme debt, which occupiers paid off collectively rather than individually.

30. See SKL Campbell, 'Land Alienation, Consolidation and Development in the Urewera, 1912–1950' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1997) (doc A55), pp 130–131; Alexander, 'Land Development Schemes' (doc A74), p 124

31. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 656–657

32. Alexander, 'Land Development Schemes' (doc A74), p 66

33. *Ibid.*, pp 88, 90–91; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 657–658

Ngata on the Start of the Development Scheme at Ruatoki

THIS is the first example of a scheme which comprises a large extent of farmed land as well as of undeveloped land. Here is a large community living in several villages on the block engaged in milking and maize growing. The Maoris supply about 130–135 tons or one-third of the product of the Ruatoki Cheese Factory. But the farming is not of a high standard; the cows are culls from pakeha herds, the fencing is of a poor type. The first job is to improve existing farms and herds – a less costly job than developing from bed-rock, but more difficult in view of vested rights, the fact that your farmers are in situ, selected on different considerations altogether and that slovenly methods are not easily corrected. There is not the same appeal in repairing and extending an existing structure as in building on new foundations. But the scheme is the more interesting because we may have to tackle more of the same kind of thing elsewhere. Everything has to be realigned, fences, drains, village sites, buildings and better stock gradually introduced to replace the worst now on the farms. The consolidation scheme has as a consequence of the introduction of the development scheme been speeded up immensely. I have approved the first instalment and the second is on the way. In other districts the same speeding up is taking place. An area is selected for a development scheme. The consolidation officers pounce upon it, concentrate on it and make their locations radiate from it, as if it were the nucleus of a concretion.

Ruatoki is buzzing. A central Tuhoe papakainga or marae of ten acres has been fixed near the school, with a tribal title like Porourangi. A carved house is proposed.

year to as much as £30,000 in the 1938–39 year.³⁴ Seventeen out of 130 units were already in credit, and a further 77 had shown a reduction in debt during the 1940–41 year.³⁵ Individual incomes varied widely, although those at the lower end of the scale could supplement their incomes through subsidised relief work. Murton noted that even the highest incomes were substantially less than the income of a typical Pakeha dairy farmer but were comparable with shearers' income.³⁶ Indeed, some unit occupiers preferred labouring jobs over their farm work where such jobs were better paid, which hampered farm development.³⁷

The good progress made in the scheme during the 1930s halted during the Second World War and the immediate post-war years. Relief work was cut back to essential activities. Many Tuhoe were involved in the armed services so this was not such a problem initially, but the reduced level of subsidised employment

34. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 573; Oliver, 'Ruatoki' (doc A6), p 151

35. Alexander, 'Land Development Schemes' (doc A74), p 96

36. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 645–646

37. Alexander, 'Land Development Schemes' (doc A74), pp 90, 104

The smaller marae will I think gradually disappear. The new marae will indeed be the tribal meeting place and centre of influence. The supervisor or farm manager has been installed with the goodwill of the people – a Cape Runaway sheep farmer, married to a Whanau-a-Apanui wife and keen on work among our people. His tenure of office is assured as he was selected by KS Williams. Already £1300 worth of heifers-in-calf has been authorised, and £700 of weaner heifers. Fencing material is being assembled, manure, seed & c. Topographical surveys are under way to locate drains and an undeveloped low fern-hill area west of the area now occupied. Allocation of finance £7750. On your next visit you may find the new marae going and a valley as well settled as Waiapu with a vigorous people reaching forward on the one hand to the best that modern civilisation can provide and back on the other to the finest in the old regime.

'The Ruatoki population is about 500–550 and every family will be benefitted by what is being done. The area under cultivation is already congested and we must take in hand another 2000 acres of arable country to relieve the pressure of young families wanting to hive off.'

Apirana Ngata¹

1. Apirana Ngata to Peter Buck, 22 May 1930 (MPK Sorrenson, ed, *Na Ta Hoa Aroha / From Your Dear Friend: The Correspondence between Sir Apirana Ngata and Sir Peter Buck, 1925–50*, 2 vols (Auckland: Auckland University Press, 1987), vol 2, pp 28–29)

continued after the war. In general, the post-war policy of the Native Department was that unemployed people at Ruatoki should seek work in other areas, rather than staying in Ruatoki.³⁸ Scheme output was also affected by the war. Unit occupiers were put to considerable expense because the war effort demanded that they produce cheese rather than butter.³⁹ Overall butterfat production fell from 1943–44 and did not recover to pre-war levels until 1948–49. This loss of productive capacity was due both to a lack of fertiliser during the war years, and the replacement of some of the dairy cattle by sheep in order to control ragwort growth.⁴⁰

A further significant impact of the slowdown in the scheme was on settlement of the Owhakatoro Valley. Here, development of new farms had got under way in 1937–38, and by 1943 settlement seemed imminent – to the extent that owners of the Owhakatoro lands were asked to nominate occupiers. However, shortages of materials, and thereafter repeated revision of the settlement proposals by anxious

38. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 659

39. Campbell, 'Land Alienation, Consolidation and Development' (doc A55), p 138

40. Alexander, 'Land Development Schemes' (doc A74), pp 99, 117; Oliver, 'Ruatoki' (doc A6), p 152

Ruatoki and Waiohau Block and Scheme Designations

In the course of the Ruatoki Consolidation Scheme, four series of blocks were created. The arable flats were divided between the A-series blocks to the east of the Whakatane River, and the B-series blocks to the west. The C-series blocks then encompassed all the fernland and bush-covered hill country between Ruatoki and Tuararangaia (including the Owhakatoro Valley), while six large bush reserves, created from the hill country on the eastern boundary of the block, became the Ruatoki D series. A list of the various blocks (exclusive of the Crown award), and their correspondence with the Native Land Court partitions they replaced, was published in the *New Zealand Gazette* on 9 May 1940 at pages 1036 to 1039.

When the development scheme was commenced at Ruatoki, it was organised in three sections. The A scheme was concerned with the development of the arable flats, while the object of the non-urgent B scheme was to develop the hill country flanking the arable flats to the east as supplementary winter grazing. Two areas of

Crown officials (in order to ensure that economic farms were created), meant settlement did not in fact proceed until 1954–55.⁴¹

One area in which the scheme did not suffer during the 1940s was in its financial returns. By way of example, scheme earnings for the year stood at £42,000 in 1942 and £56,000 by 1949.⁴² A review of unit accounts in 1943 found that a large number were in credit or in a very healthy position, while, as Murton observed, of the 74 accounts for which there is data for the 1949–50 year, 23 were in credit. The largest credit amount was £340, while most levels of debt were less than £200, although a handful of occupiers owed in excess of £1,000.⁴³ Despite this reasonably positive financial outlook, by 1945 at least, there had not been any requests from Ruatoki owners to release their lands from the Native Department's control.⁴⁴ This did not mean that relations between the owners, occupiers, and scheme officials were entirely happy though. Costs of scheme works (since these had to be paid back), and inadequate supervision were both the subject of complaints during the decade, and restrictions imposed by the Board of Native Affairs on the culling of stock during 1941 led 48 individuals to petition the Native Minister via Ngata.⁴⁵

After 1950, the course of land development at Ruatoki underwent further significant changes, as the Crown, having earlier begun to withdraw from subsidising

41. For an account of the delays in settling the Owhakatoro farms, see Alexander, 'Land Development Schemes' (doc A74), pp 101–107, 128–132.

42. Ibid, p 98; Campbell, 'Land Alienation, Consolidation and Development' (doc A55), p 139

43. Campbell, 'Land Alienation, Consolidation and Development' (doc A55), pp 138–139; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 633

44. Campbell, 'Land Alienation, Consolidation and Development' (doc A55), p 139

45. Ibid, pp 136–138

low fernclad hills west of the Whakatane River, including the Owhakatoro Valley, came under the c scheme.

At Waiohau, consolidation also led to the creation of an A, B, C, and D series. The A- and C-series blocks were composed of the respective flat lands to the west and east of the main road, while the hill country adjoining the C-series flats became the B-series; the D-series was confined to some reserves. In contrast to the situation at Ruatoki, the development at Waiohau was not divided into sub-schemes. For commentary on issues associated with consolidation at Ruatoki and Waiohau, readers should refer to chapter 19 of this report.¹

1. David Alexander, 'The Land Development Schemes of the Urewera Inquiry District' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A74), pp 29–31, 195–196; Steven Oliver, 'Ruatoki Block Report' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A6), pp 127–129; 'Report on Native-Land Development Schemes', no date, AJHR, 1932, G-10, pp 36–37

employment, now began to withdraw from development funding and support as well. This was evidently prompted by an informal review of the scheme held in 1950, and a rating deal struck with the Whakatane County Council at about the same time, which ultimately made the Ruatoki blocks liable for local body rates from 1960 onwards.⁴⁶ In the wake of the review, scheme officials began to offer 'relaxed control' to unit occupiers whose farm accounts were in credit. This meant that unit occupiers would be managing farm operations and finances themselves, although the Crown would retain the ultimate authority to step in if required.⁴⁷ The review also concluded that the percentage that the Crown was taking of the milk cheque, which typically was either 40 or 50 per cent, could now be reduced to something closer to the 25 per cent requested by the occupiers.⁴⁸

From the mid-1950s, the Crown also began releasing debt-free areas from the scheme where no more development was intended – either because it was now finished, or because it had never been started. The first areas released were undeveloped bush-covered C and D sections, and house sites which had been partitioned out from the unit farms.⁴⁹ In 1959, unit farms began to be released from

46. Alexander, 'Land Development Schemes' (doc A74), pp 120, 157–158

47. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 575–576

48. Alexander, 'Land Development Schemes' (doc A74), pp 124, 126

49. Ibid, p 176; 'Releasing Land from the Provisions of Part XXIV of the Maori Affairs Act 1953 – Ruatoki Development Scheme', 1 July 1954, *New Zealand Gazette*, 1954, no 41, p 1087 (David Alexander, comp, supporting papers to 'Land Development Schemes of the Urewera Inquiry District', 7 vols, various dates (doc A74(g)), vol 7, p 2008). Partitioning out of quarter-acre house sections made occupiers eligible to apply for assistance under the terms of the Maori Housing Act 1935: Alexander, 'Land Development Schemes' (doc A74), pp 113–114.

the control of the scheme as well.⁵⁰ Scheme officials were concerned, however, that occupiers should be given secure tenure, and at least part-ownership of the improvements, before any farms were released from the scheme.⁵¹ Despite the misgivings of owners, by the 1960s, as Murton observed, leasing was becoming 'normalised' in all of the development schemes in the Urewera region. As of 1961, 3,305 acres of Ruatoki farmland were subject to 21- to 42-year leases, and it was proposed to put another 1,360 acres under leasehold tenure.⁵²

In addition to the introduction of relaxed control, and the modification of tenure arrangements, the years leading up to the cessation of the development scheme in 1966 were marked by falling levels of production and a rapid decline in the number of occupiers. Annual output of butterfat exceeded 400,000 pounds for the last time in the 1957–58 year, and by the early 1960s it was closer to 350,000 pounds; this compared to a 1961 assessment by the field supervisor that potential production was 655,000 pounds.⁵³ Whereas there had been around 110 occupiers in 1950, by 1957 there were only 81 under either relaxed or strict supervision by the Crown, and by 1963 supervision only applied to 51 unit occupiers.⁵⁴

Although the release of unit farms would have been responsible for part of the reduction in the number of unit occupiers after 1960, this was driven to a much greater extent by unfavourable economic circumstances. As Murton observed, unit occupiers at Ruatoki had to produce at least 8,000 pounds of butterfat per year to match the median New Zealand wage of around £650; most Ruatoki farms were too small to achieve this level of production, with 48 out of 53 farms under Crown supervision failing to do so in 1959. Of these 53 farms, 20 in fact provided an income of less than £225 per year.⁵⁵ Given these circumstances, many unit occupiers had to seek work elsewhere, with the unit farm becoming a secondary source of income, if it was farmed at all;⁵⁶ not surprisingly, this had a negative effect on the standard of farming, and both inadequate fertiliser usage and ragwort infestations became an increasing problem.⁵⁷

Where there was no hope of a unit farm being economic, owners meanwhile tended to either allow the amalgamation of unit farms (as scheme officials

50. 'Releasing Land from the Provisions of Part xxiv of the Maori Affairs Act 1953 (Ruatoki Development Scheme)'; 7 January 1959, *New Zealand Gazette*, 1959, no 2, p 33 (Alexander, supporting papers to 'Land Development Schemes' (doc A74(g)), p 2051); Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 577

51. Alexander, 'Land Development Schemes' (doc A74), p 124

52. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 682; Alexander, 'Land Development Schemes' (doc A74), p 164

53. Alexander, 'Land Development Schemes' (doc A74), pp 149, 164; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 576–577

54. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 576–577; Alexander, 'Land Development Schemes' (doc A74), pp 124, 147, 169

55. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 648–649, 651

56. In 1963, a report on the scheme found that several occupiers whose units were uneconomic had full-time off-farm employment: see Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 651.

57. Alexander, 'Land Development Schemes' (doc A74), pp 147–148

Tama Nikora's Assessment of the Ruatoki Development Scheme

NGATA'S ECONOMICS was 1 acre could carry one cow and 25 cows could sustain one family. The Ruatoki Valley became highly productive with everyone milking cows and sharing equipment on a cooperative basis. Each morning saw a parade of springcarts and horses taking their cans of milk to the dairy factory. However, even at the time of consolidation in the 1930s the farms were barely economic. Our family was typical where our father had to work off our small farm in order to sustain the family.

'For the period of about 1930–1945 the Ruatoki–Waiohau Land Development Scheme gave the unit farmers a basic living. However, the aspirations of the balance of owners were not met in terms of the hope for a farm of their own or to get a fair return for what they owned. They then had to move and seek employment elsewhere.'

Tama Nikora¹

1. Tama Nikora, brief of evidence, 12 January 2005 (doc J40), pp 2–3

advocated), or informally leased the area to other occupiers, or to Pakeha farmers in neighbouring areas.⁵⁸ Informal leasing was a better option for owners than amalgamation, for there was ultimately no difference in the share of the land they owned, but unlike amalgamation, it provided them with a regular income in the form of rental.⁵⁹ Even though informal leasing to Pakeha farmers without the consent of the Board of Maori Affairs was, strictly speaking, a breach of the legislative provisions prohibiting alienation of scheme land, 1,000 acres was being leased to Pakeha by 1963.⁶⁰

Government investment in the Ruatoki development scheme came to an abrupt end in 1966. The general release of remaining scheme lands took place in 1971, although unit farms which still had accounts in debt remained subject to new Crown debt notices thereafter. It is not clear from the available evidence why the Board of Maori Affairs chose in 1965 to close down the scheme, particularly when Ruatoki owners in 1962 had expressed their wish for it to continue and for more land to be developed, albeit with more emphasis on cropping and less on dairying.⁶¹ One factor which may have facilitated the decision was that general scheme debt was low enough from the Crown's perspective to make a partial write off palatable. As of 1962, the total debt was £33,015, of which £20,199 was due to

58. *Ibid*, pp 148–149, 167

59. *Ibid*, pp 167, 169

60. Oliver, 'Ruatoki' (doc A6), p 155; Alexander, 'Land Development Schemes' (doc A74), p 169

61. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 704

the development of the Owhakatoro Valley blocks, while the remaining £12,816 belonged to the Whakatane River farms. The latter amount, most of which was unpaid interest, could not be divided among the unit farms as some had already been released from the scheme,⁶² so in 1965 this was written off.⁶³

Similarly, scheme officials also felt there was little more that could be done for the people of Ruatoki in terms of farm development work if unit farms were to remain their current size. Ideally, they would have liked the more successful of the unit farms to keep having more land added to them, but ironically plans to create larger farms were stymied by the grant of formal leases to unit occupiers which the Crown had encouraged in the 1950s. These could not be overturned without the establishment of a new Ruatoki Consolidation Scheme, but the Ruatoki owners were strongly opposed to this route being taken. For the time being, therefore, scheme officials had to rely on farm amalgamations achieving this end. Given that this was slowly occurring, and scheme staff were making headway on achieving more efficient farm production during the early 1960s, the move by the Board of Native Affairs came as something of a surprise. One other factor which might have been behind this decision was the dilapidated state of the scheme housing stock. These would have had to be soon replaced if the scheme had continued, which would have required considerable new investment without much gain in farm output in return.⁶⁴

18.3.3 The course of land development at Waiohau

Work on the Waiohau Development Scheme began in 1933, and development work was sufficiently advanced for two unit occupiers to begin dairying on the A-series blocks in the 1935–36 year; at this point in time, the final titles had still to be awarded in the consolidation scheme.⁶⁵ By 1940, 18 houses and 16 cowsheds had been built, and 505 dairy cows were being grazed by 13 unit occupiers on 960 acres.⁶⁶ In terms of income generation, the butterfat produced during the 1939–40 year amounted to just over 55,000 pounds, which meant that the average quantity per unit occupier exceeded production at Ruatoki. That year it had earned the Waiohau occupiers some £3,761, although £1,561 of this total was taken as debt repayment by the Crown, so that the average income for the unit occupiers was only about £170 per year.⁶⁷

If the same test that Crown officials applied at Ruatoki is used in the Waiohau

62. JE Cater, assistant district officer, to secretary for Maori Affairs, 11 January 1963 (David Alexander, comp, supporting papers to 'Land Development Schemes of the Urewera Inquiry District', 7 vols, various dates (doc A74(e)), vol 5, pp 1209–1210)

63. Alexander, 'Land Development Schemes' (doc A74), pp 160–162

64. Alexander, 'Land Development Schemes' (doc A74), pp 163–167

65. *Ibid*, p 198

66. 'Statistical Data on Waiariki District Schemes (Scheme, Unit, and Farm)', in Board of Native Affairs, 'Report on Native Land Development and the Provision of Houses for Maoris, Including Employment Promotion', 31 March 1940, AJHR, 1940, G-10, p 31

67. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 580

case, namely that unit occupiers earning less than around £150 per year would need to supplement their income to support a family, then it is likely that some of the unit occupiers needed additional assistance. The Waiohau community did benefit from considerable employment subsidies during the 1930s, which also assisted development since the farms were being broken in from scratch.⁶⁸

The Waiohau Development Scheme underwent major changes, however, in the early 1940s. First, the Crown ceased providing development funds to the A-series unit farms in 1941. Each unit occupier also received individual farm accounts from this time, and, with the Crown having already made a deal with the Whakatane County Council for levying rates, the only relationship they needed to have with the Crown thereafter was the repayment of their portion of the development debt.⁶⁹ Secondly, owing to the reduction of funding and materials shortages arising from the Second World War, the settlement of 16 unit occupiers on C-series unit farms, which was supposed to occur in 1942, was postponed. Owner requests for the Ngati Haka Patuheuheu land at Matahina to be developed at this time were also rejected.⁷⁰ Indeed, from 1941 the scheme operated on a maintenance-only basis, with no new development work being done;⁷¹ this meant that unemployment subsidies, on which a large proportion of the Waiohau population had previously depended, were also cut back. Finally, the house construction programme wound down as well; whereas six houses had been built on the C-series blocks by 1940, only two more had been added by 1946.⁷²

The settlement of unit occupiers on the Waiohau C unit farms was further delayed in the wake of the Second World War. Although the land had been developed sufficiently for unit occupiers to begin dairying in 1949, by this time the A-series farms were running into difficulties, and the field supervisor decided in consequence that they ought to be enlarged so as to make them more economic. To do this, land had to be taken from the C-series blocks, and thus the number of proposed C-series farms was revised down from 15 to 10.⁷³ The C-block owners resisted amalgamation, as it meant that after waiting for almost a decade for settlement, some unit occupier nominees would now never get their own farms. Over the next two years both sides were unable, even with the involvement of the Native Land Court, to reach a comprehensive agreement. Eventually, the Crown decided in early 1951 to proceed with six amalgamations that had been agreed to by the owners, leaving the remainder of the land under Crown management.⁷⁴ Scheme officials also pushed for the unit occupiers of these six C-series farms to accept leases. As they had no previous experience of leasing, the affected owners were

68. Ibid, pp 656–660; Rose, 'A People Dispossessed' (doc A119), p 200

69. Alexander, 'Land Development Schemes' (doc A74), pp 200–202, 249

70. Ibid, pp 205–210

71. Ibid, p 212; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 660

72. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 690–691

73. Alexander, 'Land Development Schemes' (doc A74), pp 216–217

74. Ibid, pp 218–222, 224

uncomfortable with this arrangement,⁷⁵ but eventually agreed to 10-year leases, with a right of renewal for a further 11.⁷⁶

From the mid-1950s, the Board of Maori Affairs released land from the scheme that it no longer wished to develop,⁷⁷ while scheme officials began to negotiate with the owners about the possibility of settlement of the remaining developed land in 1958.⁷⁸ Once again, however, the issue of farm amalgamation was a sticking point, and there were also two new points of dispute, with the owners objecting to the use of development funds to build a house for a manager, while Crown officials refused to accept one of the owners' unit occupier nominations (Potaua Anderson) as they regarded him as being too old.⁷⁹ Ultimately, in 1961 some 403 acres of scheme land were 'settled', but this gave rise to only one new unit farm, as 239 acres of this total were added to existing unit farms.⁸⁰

The Crown's enthusiasm for expanding the unit farms was a reflection of the declining viability of many of the Waiohau unit farms. Two of the c unit occupiers had in fact given up their leases by 1960, thereby causing the management of these farms to temporarily revert to the Crown.⁸¹ According to an assessment of both the A- and c-series unit farms, 'most of the settled farms' were 'going back' in terms of economic performance,⁸² and only two were regarded as having satisfactory production.⁸³ Even the unit occupiers of those two farms had, as of 1957, incomes of only £473 and £538 respectively once the Crown had extracted its share of the milk cheque. This was quite modest given that the median New Zealand income at the time was £650.⁸⁴ Nevertheless, the farm accounts for most of the A-series unit farms were paid off during the 1950s; this was because of the large proportion of the milk cheque (commonly 50 per cent) that the Crown was taking to repay scheme debts.⁸⁵

After the 1961 distribution of 403 acres, the Crown was left in control of 644 acres, which Maori Affairs staff decided was sufficient to create three farms

75. Alexander, 'Land Development Schemes' (doc A74), p 222

76. Ashley Gould, 'Topic 32: Development Schemes; Evidence' (commissioned research report, Wellington: Crown Law Office, 2005) (doc M6), p 6. In relation to the leases taken on by Maia Atarau and Haumate Mika, see the appendix to the Waiohau Development Scheme submission to the Board of Maori Affairs, 22 September 1962 (Alexander, supporting papers to 'Land Development Schemes' (doc A74(e)), p 1382), and district officer to Waiariki District Maori Land Committee, recommendation on lease to Haumate Mika, 29 August 1956 (Brian Murton, comp, supporting papers to 'The Crown and the Peoples of Te Urewera, 1860–2000: The Economic and Social Experience of a People', various dates (doc H12(a)(c)), [p 29]).

77. Alexander, 'Land Development Schemes' (doc A74), p 227

78. *Ibid*, pp 228–229

79. *Ibid*, pp 229–237

80. *Ibid*, p 237

81. *Ibid*, pp 228, 237

82. Waiohau Development Scheme submission to Board of Maori Affairs, app, 22 September 1962 (Alexander, supporting papers to 'Land Development Schemes' (doc A74(e)), p 1382)

83. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 582

84. *Ibid*, pp 648, 650

85. *Ibid*, pp 651, 653

Ani Hare's Account of Development Scheme Farming at Waiohau

HOWEVER, as a result of the Farming and Development Schemes, we ended up living on a farm with our mother in Waiohau. We had no vehicles, just a horse drawn cart, no power, no water and our kitchen was an open fireplace outside. We walked everywhere and as a result we rarely ventured out of Waiohau.

'The farm had approximately thirty cows and some pigs, and the cows had to be milked day and night by hand. Our mother worked hard to keep the family together and send us away to boarding school as well as trying to run the farm and somehow keeping everyone clothed and fed. It wasn't easy and there wasn't any money to buy anything. On many nights, our mother would go down to the Rangitaiki to bob for eels and that would be our food source for weeks on end . . .

'Because of the poor conditions our mother also started working at the Kaingaroa logging camp single men's dining room. Often she would bike from Painoaiho to the township everyday over a gravel road. On many occasions she would be carrying left over food on her bike. Later, she changed jobs and went to work for shearing gangs as a cook. These are all examples of how necessary it was to try and work in as many jobs and as often as possible in order for us to survive because the farming situation just did not sustain our family, or those children around us.'

Anitewhatanga Hare¹

1. Anitewhatanga Hare, brief of evidence, 15 March 2004 (doc C17(a)), pp 23–24

from, as well as providing some extra land to one of the Waiohau A unit farms. Settlement of the three farms was delayed, however, by uncertainty over whether land would be needed for the Kopuriki Dam project (which was abandoned in 1964), and the ongoing dispute over whether Potaua Anderson should be made a unit occupier (which was resolved in 1962 by his being taken on as a probationary employee). In 1965, Anderson was finally made a unit occupier, while the other two farms were placed in the hands of two more probationary employees. These two employees were then replaced in 1967 by two farmers who took over the farms on three-year occupation licences.⁸⁶

This brought the Crown's involvement with the Waiohau scheme to an end. It took a further four years, however, for the Waiohau farms to be formally released from the scheme. This happened gradually from 1971. At the time, the collective debt of the unit occupiers amounted to \$113,640, although this was partly offset by

86. Alexander, 'Land Development Schemes' (doc A74), pp 240–244

a credit in the general scheme account of \$13,334.⁸⁷ This credit had been created by the difference between the value and cost of scheme improvements, and resulted in a lengthy debate as to how to assign the credit among the units and the owners. This was not resolved until 1979.⁸⁸

18.3.4 The course of land development at Ruatahuna

The implementation of development at Ruatahuna differed from that of the other three schemes in the Urewera region, as it did not involve breaking in large areas of undeveloped land for farms. Instead, it depended on the improvement of land that had been cleared of bush but was no longer carrying livestock. Ruatahuna was also the only development scheme in Te Urewera based on sheep rather than dairy cattle.

In the first few years, there had been little direction given to the scheme, with Apirana Ngata observing in late 1933 that work had ‘more or less drifted along.’⁸⁹ The only significant step taken during this period had been the purchase of around 2,500 East Coast sheep; this transaction, which was heavily criticised at the time, will be discussed in greater detail later.⁹⁰ In 1934, however, there began to be signs of progress on the scheme, with the placement of 19 unit occupiers on farms, and the individualisation of farm accounts.⁹¹ These new unit farms were based on the blocks created during the UCS, and varied greatly in both their total size, and their initial grassed area. Pakitu Wharekiri and Te Ahu Morehu, for example, both had 400 acres of pasture to utilise on their unit farms, situated on the Apitihana block, whereas at the other end of the scale, Wi Horohau’s unit farm on the Te Tawai block, which had a total size of 236 acres, had only 36 acres under grass.⁹²

Native Land Court and Native Affairs staff recognised that isolation, the harsh winter climate, and stock losses from ragwort conspired to ‘make it very difficult for this country to pay its own way.’⁹³ Consequently, both unit farmers and the local unemployed needed additional work to support themselves. These difficulties were compounded when officials decided in 1936, in the wake of Dun and Galvin’s report, that no more forest should be cleared in the Ruatahuna area.⁹⁴ Nevertheless, labour subsidies for farm development work (fencing, regrassing, and so forth), fern and scrub clearance, and the extension of the Mataatua road provided employment for as many as 40 workmen and 23 unit farmers in any

87. Rose, ‘A People Dispossessed’ (doc A119), p 226

88. Alexander, ‘Land Development Schemes’ (doc A74), pp 246–250

89. Native Land Settlement Board, minutes, 21 December 1933 (Alexander, ‘Land Development Schemes’ (doc A74), p 269)

90. Alexander, ‘Land Development Schemes’ (doc A74), p 262

91. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), p 618

92. Ibid; Bassett and Kay, ‘Ruatahuna’ (doc A20), p 241

93. Registrar, Native Land Court, Rotorua, to Native Under-Secretary, 9 June 1939 (Tuawhenua Research Team, ‘Te Manawa o te Ika, Part Two: A History of the Mana of Ruatahuna from the Urewera District Native Reserve Act 1896 to the 1980s’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc D2), p 312)

94. Tuawhenua Research Team, ‘Te Manawa o te Ika, Part Two’ (doc D2), p 278

Gregor Rietzmaier (Archives New Zealand, A AQT 6539 A78705)



Mustering sheep on a farm near Ruatahuna, 1966. The Ruatahuna Development Scheme was one of four established in Te Urewera (but the only one to be based on sheep) after Sir Apirana Ngata became Native Minister in 1928 and embarked on a Maori land development policy. But unit farms established in Te Urewera were too small to be viable because there was not enough land available. In 1961, owners of farms in the Ruatahuna scheme, lacking the means to invest in their farms, had agreed to the amalgamation of the farms into a single-title farm block so that it could be managed under a new development scheme as a farm station.

given year.⁹⁵ This collective effort of unit occupiers and scheme workers enabled 3,500 sheep and 535 cattle to be grazed on 3,880 acres of developed land by 1940.⁹⁶ Yet in spite of the impressive progress in terms of stock numbers, and the substantial labour subsidies (which were not charged against the scheme), the combined debt of the unit occupiers and the scheme still stood at £15,191 as of 1941.⁹⁷

As was the case with development at Ruatoki and Waiohau, the Crown's response to wartime financial pressures during the early 1940s was to cut back on scheme expenditure. The Ruatahuna scheme was more of a concern than most because it offered little hope of immediate profitability, and, the Under-Secretary

95. These figures relate to the 1938–39 year. While numbers of workmen employed fluctuated, there seem to have been at least 20 throughout the late 1930s. Unit occupiers' earnings from subsidised scheme work varied considerably; Murton noted one case in 1939 when an occupier earned £51, but in 1938 another unit occupier was able to earn £199: Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 661–662.

96. Alexander, 'Land Development Schemes' (doc A74), p 276

97. *Ibid*, p 286

for Native Affairs suggested in 1941, the department could 'not go on making losses in perpetuity'.⁹⁸ In an attempt to make unit farms more economic, scheme staff encouraged amalgamation, with the result that the number was reduced to 16.⁹⁹ For a time, three unit farms were also taken over by the Crown, but after protests each was reinstated.¹⁰⁰ The labour subsidies also fell victim to cost cutting. An abrupt reduction in the number of Ruatahuna workers from 45 to 20 was ordered in 1943, although subsequent intervention by the Manpower Office meant that at the time only single men were directed from Ruatahuna to other jobs (namely Murupara-based forestry work).¹⁰¹ Even so, no employment subsidies were available to the development scheme after 1944.¹⁰² In addition, ownership of the scheme's cattle was transferred from the scheme account to the unit farm accounts in the hope that this would make unit occupiers take better care of them.¹⁰³ In combination, these measures proved effective at reducing the combined debt of the scheme and the unit occupiers to £12,026 by 1945.¹⁰⁴

Apart from the provision of a subsidy to extend farm tracks in 1946,¹⁰⁵ the development scheme maintained this new direction throughout the rest of the 1940s. This was frustrating to owners, who questioned whether sheep-based unit farms were the best farming option, and who wanted the land that the Crown did not want to develop released from the scheme.¹⁰⁶ In 1949, the idea of developing land further down the Ruatahuna Valley (beyond Mataatua) was considered by the scheme officials, but the pressures the scheme was under were soon relieved by the high wool prices which occurred at the start of the Korean War.¹⁰⁷ These prices resulted in 14 out of 16 unit occupiers having their accounts (including unsold wool) in credit by 1951.¹⁰⁸

Scheme officials were unsure as to who should own these credits, since much of the stock handling work was done by a scheme shepherd, rather than by unit occupiers, who were working away from Ruatahuna to supplement their income.¹⁰⁹ At a meeting with owners in 1951, it was decided that the credits should belong to the owners. Scheme officials also used this meeting to encourage owners to accept that unit occupiers should be given secure tenure and partial ownership of improve-

98. Native Under-Secretary to registrar, Native Land Court, Rotorua, 21 November 1941 (Alexander, 'Land Development Schemes' (doc A74), p278). For Crown attitudes generally to the scheme, see Alexander, 'Land Development Schemes' (doc A74), pp276–278.

99. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p314; Bassett and Kay, 'Ruatahuna' (doc A20), p235

100. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p317

101. Alexander, 'Land Development Schemes' (doc A74), pp280–283

102. Gould, 'Development Schemes' (doc M6), p56

103. Alexander, 'Land Development Schemes' (doc A74), pp285–286

104. *Ibid*, p286

105. Gould, 'Development Schemes' (doc M6), p63

106. Bassett and Kay, 'Ruatahuna' (doc A20), pp235–236

107. Alexander, 'Land Development Schemes' (doc A74), pp290–291, 305; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p599

108. Gould, 'Development Schemes' (doc M6), pp74–76

109. Alexander, 'Land Development Schemes' (doc A74), p291

ments. The scheme officials' proposals were not fully endorsed, but owners agreed to give unit occupiers 10-year occupation licences, and ownership of stock, housing, and machinery (but not land-based improvements).¹¹⁰

Two years later, Maori Affairs officials encouraged unit occupiers to accept relaxed control. Under this regime, the resident supervisor/manager was withdrawn, and supervision was only provided via occasional visits from Rotorua-based departmental staff.¹¹¹ Some unit occupiers coped well with this change, although those who needed to supplement their income with outside work tended to let the condition of their farms deteriorate.¹¹² This deterioration had become more general by the late 1950s, owing to a combination of increasing costs of farming materials and depressed wool prices. Several unit occupiers had also taken on large development debts in order to pay for houses.¹¹³ As a 1960 report concluded, unit occupiers were still able to support themselves (thanks to the timber royalties being paid at this time to Ruatahuna owners), but they did not have money to invest in their unit farms, especially when they would not be compensated for improvements to the land (through, for example, fertiliser application).¹¹⁴ Over the decade since 1951, the area under grass had fallen from 3,459 to 2,958 acres, while total stocking (5,178 sheep and 626 cattle in 1961 compared with 5,400 sheep and 476 cattle in 1951) had only marginally increased.¹¹⁵

Maori Affairs staff considered that there were two possible responses to this turn of events. The first option was to implement a new development scheme while managing the Ruatahuna scheme land as a single farm station. If a further 1,300 acres were brought under development, this had a projected cost of £63,220. This figure included £15,000 for fertiliser, and £22,800 for buying back stock from unit occupiers, which gave them a means of clearing their debts. The second option was amalgamation of the 15 unit farms into seven larger, more economic farms.¹¹⁶

When presented with the first option at meetings in October and November 1961, the owners narrowly agreed to support a development scheme based on a single farm station, and amalgamation of all the unit farm titles into the Ruatahuna farm title, on the condition that once development was completed, control of the farm would be given to an incorporation of owners.¹¹⁷ The development phase, the owners were told, would last at least five years.¹¹⁸

During the second half of 1962, scheme officials received approval for their plan for Ruatahuna farm from the Board of Maori Affairs – this envisaged eight years'

110. *Ibid*, pp 291–293

111. Gould, 'Development Schemes' (doc M6), pp 86–88; Alexander, 'Land Development Schemes' (doc A74), p 299

112. Bassett and Kay, 'Ruatahuna' (doc A20), pp 242–243

113. Gould, 'Development Schemes' (doc M6), pp 89–91, 93–95, 97–98

114. *Ibid*, pp 99–100

115. Alexander, 'Land Development Schemes' (doc A74), pp 293, 306

116. Gould, 'Development Schemes' (doc M6), pp 101–102, 107–108; Alexander, 'Land Development Schemes' (doc A74), pp 306–307

117. Alexander, 'Land Development Schemes' (doc A74), pp 308–309

118. *Ibid*, pp 308, 314



The Ruatahuna farm block, 1960s. In light of the block's slowly improving financial health during the 1970s, the Crown began steps to transfer it back to its owners in 1980. Only after this did Ruatahuna owners gain any real influence over the conduct of their scheme.

development, and a further 10 years of Crown management – and the Maori Land Court made the necessary orders for title amalgamation.¹¹⁹ After an adjustment of its boundaries in 1965, the farm block, which had 1,019 co-owners, had an area of 4,954 acres.¹²⁰

The new phase of development got under way in November 1962, with the initial priorities being replacement of livestock and the upgrading of fencing, although by the mid-1960s a house for the manager, a new woolshed, and shearers' quarters were also built.¹²¹ The 1962 plan allowed for four permanent staff (the manager and three shepherds). Seven local people were also taken on as casual workers. In the early years of the scheme, the latter were employed full-time on work such as fencing and scrub clearance.¹²²

119. Bassett and Kay, 'Ruatahuna' (doc A20), p 252; Alexander, 'Land Development Schemes' (doc A74), pp 311–312

120. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), pp 420, 423

121. Alexander, 'Land Development Schemes' (doc A74), pp 316–317

122. Gould, 'Development Schemes' (doc M6), p 111; Alexander, 'Land Development Schemes' (doc A74), p 316

In terms of boosting stock numbers, the scheme made considerable progress, with the farm supporting about 9,000 sheep and 1,600 cattle by 1970.¹²³ Otherwise, however, development was not going to plan. Lower lambing percentages and higher stock losses than were anticipated, together with unfavourable wool prices, meant that the scheme's financial performance was poor. Far from producing a profit by 1970, as had been expected in 1962, it was calculated in 1969 that the final development debt would be \$522,507 (or \$58 per ewe).¹²⁴ This amount represented 183 per cent of the farm's estimated value.¹²⁵

The Crown's response to the indebtedness of the Ruatahuna farm was to stop further development work, and replace the Romney flock with new Perendale sheep. By doing so, scheme officials gave up on their highly ambitious performance targets, and settled for hardier sheep which were better suited to the farm in its present state.¹²⁶ The owners, meanwhile, fearing that the debt would never be paid off, asked the Crown to write down the debt to a level where farm income would be sufficient to start paying off the principal. Local Maori Affairs staff supported this request, but their superiors in Wellington wanted to see what effect the management changes would have on farm finances before taking this step; as a result, they only agreed not to compound the interest owing for the next three years.¹²⁷

The management changes had the desired effect. In 1973, the Ruatahuna farm produced its first annual profit, of \$50,530. In a scheme review the following year, it was projected that the debt would take almost 30 years to repay (by 2002).¹²⁸ Again, local staff supported the idea of debt remission but this was rejected since the scheduled 10-year post-development period under Crown management, approved by the Board of Maori Affairs in 1962, still had six years to run.¹²⁹ Better wool and stock prices also helped matters, so that by 1977 the projected date for debt repayment had moved forward to 1992. By this time, the debt was down to approximately \$430,000, while the farm valuation, including stock, was approximately \$570,000.¹³⁰

The positive turnaround in scheme finances continued in the early 1980s, and by 1985 the debt was at last paid off. In anticipation of this outcome, the district officer, H Martin, told the owners in 1980 that the Crown would 'very shortly' hand control of the farm back to them. Martin also advised the owners to form a

123. Alexander, 'Land Development Schemes' (doc A74), p 323

124. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), pp 416, 424

125. The most recent farm valuation came to \$356,000, but scheme officials considered that this was about \$50,000 too much: Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), pp 424–425, 427.

126. Bassett and Kay, 'Ruatahuna' (doc A20), p 262; Alexander, 'Land Development Schemes' (doc A74), p 323

127. Bassett and Kay, 'Ruatahuna' (doc A20), pp 262–263; Alexander, 'Land Development Schemes' (doc A74), p 324

128. Bassett and Kay, 'Ruatahuna' (doc A20), p 263; Alexander, 'Land Development Schemes' (doc A74), p 325

129. Alexander, 'Land Development Schemes' (doc A74), pp 325–326

130. Bassett and Kay, 'Ruatahuna' (doc A20), pp 263–264

Noera Tamiana's Account of Development Scheme Farming at Ruatahuna

THE WHAKATANE RIVER flowed through the farm to cut it in two. On the eastern side was Waiparuparu, where the small homestead stood with only about an acre of flat land. To get to the other side, there was a canyon that divided the land. The western side of the farm is known as Parekaeaea, and this was the main part of the farm. Thus, we had to cross the river to work our farm.

'The whole farm was about 300 acres. Most of the flat land was across the river at Parekaeaea, but the flats were not a big area. There were two terraces. The bottom one was 12–15 acres and the top flat was 8 acres. The rest of the land was quite hilly.

'Government officers would say the people were lazy in developing their farms but they weren't at all. They were up before daybreak and worked all day until after dark. When my father began on the farm, only 100 acres was cleared. The old man cleared another 200 by the end of the farm development in 1962. He cleared and burned the hills in around 1948. He then ploughed the hills, using a special hill plough.

'When clearing the manuka, others would help. They would cut it down, then gather it into a pile and set it alight. As kids, we would wait for the fire to burn down and then collect the ashes in kerosene tins and use them for a heater in our home.

'The whole farm had to be fenced off. Dad would split matai for posts and battens for boundary fences. We also had one paddock for our plantations of potatoes, turnips and maize. Dad would rotate the crops. We had another paddock for stock that was mainly pigs and dry stock sheep and cattle.

'My father worked hard to make the farm work. We would fertilise the ground with manure that was transported across in bags to Parekaeaea on the flying foxes. Then he would make a sledge using a pronged tree for the horse to pull, and on it would go about 4 or 5 bags. Then the spreaders would use the manure bags to make a carry bag for the manure. Your arms would be free to spread the manure. Dad would drop the bags of manure along certain points so that when you finished spreading one bag the second was there ready to go.

'We had crops on the flats at Parekaeaea. We mainly planted potatoes, about one to two acres to feed the whanau. We also planted turnips for stock food.

'All the discing and harrowing was done with horses. We got horses from Pakitu sometimes and from Temara. The harvest had to be transported back over the canyon by flying fox, although some was held for feeding stock there.

'We had orchards as well on the other side – a big cherry grove there for everyone, also apples, plums and quinces.

'Whilst we were developing the other side of the farm, my father built temporary housing for us at Parekaeaea. He built two shelters for us there at different times. They were made from kaponga trees and a tin roof and he did a good job. They had a

window and a door. They were lined with chaff bags from the horse feed. We also used the chaff bags for flooring. The first was on the flat near the river, and water was handy nearby for our home. The other home was further up on the higher terrace. We had to have these homes for shelter because we were working on the side of the farm away from the homestead.

'There was a natural spring there across the river that we used as a fridge. There was also a large cave – it was a wonderful place. Dad would store the farming implements there like a natural shed. It had three rooms. One was fairly deep and that was where the harvest went. It was quite elevated and kept our potatoes dry. Down below there were two spaces where the horse gear and other farming material was kept.

'In addition to farming, people needed to hunt to provide for their families. My Dad went hunting about twice a week to get pigs and deer. The old man would go out hunting and tell our mother where to meet him. In the afternoon we would go down to the river with the old lady and she would fish for eels. It was her responsibility to provide the eels for the family. Then our father would light a fire at the meeting point and we would go to meet him with his catch.

'We would also catch raumahehe, a native fish that lived in the bush creeks, which are about 8–9 inches long.

'The preparation for eeling would take some time. I will explain the details of how we prepared for eeling to show that it was not a simple matter. It all took time and effort, which we put in to survive. It was all time and effort on top of the work of developing the farm.

'In the early hours of the morning we would go worm digging. This is the best time, when the worms are close to the surface of the earth. This was a job for the kids according to the old lady. Manatepa was the place that had the big worms – about 8 inches long and they were long and flat. We would collect them in a tin and then prepare the hitau. The hitau is the fibre from the flax that is extracted in a special way. You have to know how to scrape the flax to get the fibre. Strands of hitau are used because when the eel bites onto it their teeth get caught on it. Once you have the flax fibre you form a thread and use a little piece of manuka that acts like a needle to push the thread through the worm. Then you bundle 6 or 7 together and hang the bundle at the end of a stick.

'To fish for the eels you hang the worm bundle into the water and when you feel a bite you know the eel will be caught and you just pull it out and drop the eel into your bag, then go back for more. The best time to fish is from about 8–10.30 at night, that is, during their feeding time.

'After this, they go to sleep in the shallow. Then you use another fishing tool, the matarau. It is a thin bit of steel cut into a comb with prongs on it. You tie it firmly on a length of wood like a spear and you push onto the eel to secure it and then grab it.

'After their sleeping time, late at night, they begin 'running'. This is the time you can catch them by gaffing them, using a hook and swinging them out of the water.

'Torches for our eeling expeditions also had to be prepared during the day. We

would gather gummy wood, which we called mapara. The rimu heart is the best. You have to wait for the wood to mature and let the weather prepare it for you. It takes 6 or 7 years for nature to prepare it for you. We used to just find it on the ground. When you split it and put a match to it, it will burn brightly, and you can use it for a torch. If we knew we would be eeling that night we would go out during the day to leave the mapara along the stream at different points so we would have a continuous supply along our fishing expedition.

‘My parents were self-sufficient and worked hard to feed our family and to develop the land. We all worked hard to make the land provide our sustenance. But we did need to and had the skills to get food from the bush. The food from the farm was never enough.

‘There was a great deal of preparation and time that went into hunting for food. This meant that we spent time away from the farm. The skills and traditional tools we have are skills that everyone here knows. These things are part of our life, self-sufficiency and sustainability.

‘Eventually my father did other things to make extra money. He would rent out the horses to hunters. He also hunted deer for the skins, for which he got cash.

‘In our community we all helped each other, it was part of how we lived. If we finished our spud harvest then we would go to the next farm and help them. They would do the same. Everyone pitched in at each other’s farms when there were the big jobs to do.

‘A team of workers would go around to help clear the land. If you were good at cross cutting or with the axe then you would become part of the teams with those responsibilities. The teams then went to Rurehe’s land to clear the bush, and then on to the next block.

‘When the farm went into the amalgamation for the Ruatahuna farm, Dad was downhearted. When you look at all the work he did to get it to a stage where it could make money. But in another way there may have been some relief because of the debt he had to accrue to make the farm manageable.

‘When I look at the land now, there are blue gum trees planted on the land my father cleared and it makes me mourn. All the land my father developed and that my mother worked so hard to clear has now been replanted. The [Ruatahuna] farm has taken away the work of our parents.’

Noera Tamiana¹

1. Noera Tamiana, brief of evidence, 10 May 2004 (doc D15), pp 2–8

management trust, and accordingly a section 438 trust was established in March 1981.¹³¹ The trust's takeover was deferred, however, by the agreement of the Crown and the owners to embark on new capital expenditure in the mid- to late 1980s. The main items requiring funds were the replacement of 27 kilometres of fencing erected in the 1960s – a task that also provided local employment – and the provision of a new house and replacement farm vehicle.¹³² It was also thought reasonable to give some reward to the owners, who had not received any direct income from the farm since the occupation licence regime ended in 1961; to this end, an annual payment for three years to every owner aged 65 or over was approved in 1985.¹³³ The farm also began to diversify, with the establishment of a deer unit (which had originally been approved back in 1982), and a seed potato venture. This diversification was reflected in the livestock mix, with the 3,536 acres under grass in 1987 supporting 10,816 sheep, 116 cattle, 582 goats, and 20 deer.¹³⁴

With the withdrawal of supplementary minimum prices by the Labour Government, farm incomes generally fell in the late 1980s, and this, coupled with the new spending, led to a rapid build up of debt again. By 1990, the debt level had reached \$457,710.¹³⁵ By this time, Government policy was that the Maori Affairs Department (then the Iwi Transition Agency) must divest itself of its farming operations. Rather than trying to manage the farm back out of debt, the Crown opted to hand control back to the owners' trust.¹³⁶ The trustees asked for the debt to be written off but the Crown chose instead to write it down to \$263,000, maintaining that this was what the owners could afford. In addition, the Crown required the owners to pay \$150,637 for a new debt which arose due to expenditure in the last six months of the scheme. Ultimately, the amount paid by the trust to the Crown was therefore \$413,637.¹³⁷ At the time, the Ruatahuna farm, which by then had 1,500 owners, had a value of approximately \$2.4 million, although \$1.1 million of this was for the unimproved value of the land.¹³⁸

18.3.5 The course of land development on the Ngati Manawa lands

The early years of the Ngati Manawa Development Scheme saw the Crown breaking in new farmland on much the same basis as was occurring at Waiohau. Development work began in December 1936, and by mid-1939 there were around

131. Minutes of meeting at Tatahoata Marae, 20 November 1980 (Bassett and Kay, 'Ruatahuna' (doc A20), pp 264–266)

132. Alexander, 'Land Development Schemes' (doc A74), pp 328–329

133. Bassett and Kay, 'Ruatahuna' (doc A20), pp 265–266; Alexander, 'Land Development Schemes' (doc A74), p 328

134. Bassett and Kay, 'Ruatahuna' (doc A20), p 265; Alexander, 'Land Development Schemes' (doc A74), pp 328–329

135. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 628

136. Alexander, 'Land Development Schemes' (doc A74), p 329

137. Ibid, p 330; Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p 547

138. Gould, 'Development Schemes' (doc M6), p 118; Alexander, 'Land Development Schemes' (doc A74), p 330

1,700 acres under pasture, on which about 2,000 sheep and 500 cattle were being grazed.¹³⁹ After a further year, livestock numbers had increased to 2,415 sheep and 484 cattle.¹⁴⁰ In preparation for the completion of development, 42 occupiers had been nominated by 1939 to take up unit farms.¹⁴¹ In addition to farm development, nine houses had been built on the scheme lands by mid-1939; around 13 had been planned for but they had proved more expensive than anticipated. The construction of a gravity-fed water-supply scheme was also considered, but on cost grounds, scheme officials decided to pursue the use of bore water instead.¹⁴² Like the other Urewera schemes, this development work relied on subsidised employment, with around 30 to 40 workers being employed in each year of the late 1930s.¹⁴³ The combined debt in the unit occupiers' accounts stood at £13,778 in 1939. It was divided among the unit occupiers according to the amount of grassland on their family block, even though the livestock were actually being managed as if the developed land was a single farm.¹⁴⁴

Apart from two unit occupiers who had begun dairy farming using their own cows, no 'settlement' had occurred by the start of the 1940s, and it continued to be deferred owing to a shortage of resources during wartime.¹⁴⁵ At the same time the scheme suffered from disappointing pasture growth, while noxious weed control, and the long, narrow shape of the scheme lands, added further to costs. As a result, the amount spent on the scheme (excluding employment subsidies) had climbed to £45,000 by 1941.¹⁴⁶

Consequently, the Native Land Court deputy registrar argued in 1943 that, in order to control costs, the scheme should not expand beyond the area already developed. Although the Under-Secretary for the Native Department was still intent on pursuing the original plan (of dividing up around 4,000 acres of developed land into dairy farms of 80 to 100 acres), the deputy registrar's view ultimately prevailed. When scheme officials approached the owners in 1945 about future settlement, they proposed just 12 unit farms with a combined developed area of 2,000 acres.¹⁴⁷ The continuing provision of a labour subsidy (which was available, at a 75 per cent level, until 1944 at least) also helped control costs, although far fewer workers must have been employed, given that new development had stopped.¹⁴⁸

139. Alexander, 'Land Development Schemes' (doc A74), p 341; Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), p 33; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 584

140. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 585

141. Alexander, 'Land Development Schemes' (doc A74), p 346

142. *Ibid*, pp 341, 346–347. The houses had cost £350 instead of £300 as expected.

143. See Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), pp 32–33; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 657, 660.

144. Alexander, 'Land Development Schemes' (doc A74), pp 346–347; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 585

145. Alexander, 'Land Development Schemes' (doc A74), pp 349–350

146. *Ibid*, pp 349, 351; Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), p 40

147. Alexander, 'Land Development Schemes' (doc A74), pp 351–352, 354

148. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 629, 660–661; Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), p 40

The farm supervisor responsible for the scheme, then based in Rotorua, was keen that unit settlement should take place as soon as possible after the war.¹⁴⁹ Little advance, however, was made on the wartime situation for the rest of the 1940s. In addition to the ongoing short supply of materials, settlement was delayed while work resumed on title consolidation. Although Native Land Court hearings were held in 1947, both settlement and title consolidation were held up from 1949 by Crown plans to establish a pulp and paper mill at Murupara.¹⁵⁰ The Crown planned to take land for the mill from the Karatia blocks. The question of the mill remained uncertain until 1952, so decisions about title and unit farm boundaries were delayed accordingly.¹⁵¹ The scheme operated for the time being on a maintenance-only basis, and not even that was carried out on the Karatia lands that the Crown was thinking of acquiring.¹⁵²

The deferral of settlement caused a problem for the scheme housing. In the absence of any unit farms, scheme officials had treated the houses as belonging to the scheme as a whole, rather than belonging to the would-be unit occupiers living in them. As a result, none of the rent these individuals paid went towards purchasing these houses. At the same time, the Crown was doing nothing to maintain the houses; given the change in settlement plans, they had become as much a hindrance to the scheme as an asset.¹⁵³ In the circumstances, those living in the scheme houses became progressively less inclined to pay rent over the course of the late 1940s and early 1950s.¹⁵⁴

With so little development activity going on, there were few job opportunities for local people. In 1948, for example, only a shepherd and six casual workers were employed.¹⁵⁵ Similarly, the prospects of owners ever becoming unit occupiers were diminishing, with the Crown's proposed number of unit farms being reduced further, to eight, in 1951.¹⁵⁶ The only positive aspect of the scheme during this period was the reduction in debt between 1943 and 1951, although this obscured the fact that the scheme lands were a deteriorating asset.¹⁵⁷ The district field supervisor observed in 1952 that the current debt of £23,549 was high considering maintenance had 'been allowed to get in arrears'.¹⁵⁸

149. Alexander, 'Land Development Schemes' (doc A74), pp 354–356

150. *Ibid*, pp 356–357; Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), pp 51, 55

151. Alexander, 'Land Development Schemes' (doc A74), p 357; Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), pp 63, 78

152. Alexander, 'Land Development Schemes' (doc A74), pp 357, 360

153. Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), pp 41–42, 119–120

154. In 1948, rent was only being collected from nine out of 11 scheme houses, and collection rates apparently dropped in subsequent years: see Alexander, 'Land Development Schemes' (doc A74), p 403.

155. Alexander, 'Land Development Schemes' (doc A74), p 357; Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), p 41

156. Alexander, 'Land Development Schemes' (doc A74), p 359

157. *Ibid*, p 373

158. District field supervisor to district officer, Rotorua, 7 October 1952 (Alexander, 'Land Development Schemes' (doc A74), p 360)

The prospects of settlement seemed to improve in mid-1952, with the owners being asked to nominate a new set of unit occupiers. Scheme officials were disappointed, however, by the lack of farming experience of the individuals nominated.¹⁵⁹ By the end of the year, the Crown proposal for settlement had also changed, with the new plan being to settle four mixed dairy cattle and sheep farms.¹⁶⁰ Before this modified proposal could be put into effect, however, the district field supervisor concluded that the pasture condition was so poor that settlement could not be contemplated until 1954–55 at the earliest. As a result, the only changes to farm operations over the next few years were a change in the stocking policy and the mix of fertiliser that was being applied.¹⁶¹ There was some progress on the housing question though, with tenants being given the opportunity to purchase their houses after 1953.¹⁶²

The future of the scheme next came into sharp focus in 1956. The Crown needed small areas of the scheme's land for a railway station and log storage yard, and this caused the district officer to canvass owners about whether they wanted it wound up.¹⁶³ As happened with the other Te Urewera schemes at about this time, areas which the Crown no longer wanted to develop were released from the scheme in 1956 and 1957. Altogether, these releases reduced the area that was subject to the scheme from 6,300 acres to 3,300 acres.¹⁶⁴ With the scheme suffering from high stock losses (which were variously attributed to drownings in unfenced drains, dog worrying, escapes via unfenced waterways, and unauthorised home butchery by Murupara residents), Maori Affairs officials also pondered whether it would be worth appointing a manager who could take over operational responsibility from the lone Ngati Manawa stockman.¹⁶⁵ The owners, meanwhile, expressed their collective opinion on the fate of the scheme through meetings in late 1957 and early 1958. Their initial thought was to wind up the scheme, but when told they would still owe £12,000 to the Crown after it was wound up, they decided first to reject leasing (the preferred option of Maori Affairs), and instead asked the Crown to manage the scheme out of its then £30,000 debt.¹⁶⁶ In 1958, the owners also asked the Minister of Maori Affairs to cancel this debt, but their request was declined.¹⁶⁷

Maori Affairs officials responded to the owners' wishes by stepping up their investment in the scheme. This entailed hiring a manager in 1959, introducing lucerne as a feed crop, improving fencing, and resowing and establishing new pasture. The owners also played their part by restricting disruption from dogs and horses. By 1964, 2,337 acres had been developed, of which 2,200 were under

159. Alexander, 'Land Development Schemes' (doc A74), pp 359–360

160. Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), p 109

161. Alexander, 'Land Development Schemes' (doc A74), pp 364–365

162. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 695

163. Alexander, 'Land Development Schemes' (doc A74), pp 365–366

164. *Ibid*, p 367

165. *Ibid*, pp 367–369

166. *Ibid*, pp 369–372

167. *Ibid*, pp 372, 375

pasture.¹⁶⁸ As a condition of this revived development scheme, the owners had to agree to an amalgamation of the farmed area into a single block. A 3,045-acre block (Ngati Manawa B) and a 22-acre block for housing and cultivations (Ngati Manawa A) were established in 1960.¹⁶⁹ The amalgamations also raised again the issue of the scheme houses. Eventually, in 1965, the Crown and owners agreed on a plan which entailed partitioning out all but one of the scheme houses that had been purchased, and demolishing the rented scheme houses (together with a number of houses erected independently on the scheme lands) once the occupants had died.¹⁷⁰

The efforts of Maori Affairs officials to rejuvenate the scheme proved to be in vain. Problems with high stock losses and low soil fertility continued during the 1960s. The debt level remained largely unchanged during the early 1960s but it ballooned from £53,284 to \$190,774 (equivalent to £95,387) between 1964 and 1969.¹⁷¹ This contrasted starkly to the prediction in 1960 that debt would be paid off by 1975.¹⁷² The scheme lands also derived income from two non-farm sources during this period, the first being royalties on shingle taken from the Whirinaki River, and the second being \$6,500 granted as compensation for taking 25 acres of scheme land for the Murupara sewage treatment works.¹⁷³

In 1970, Maori Affairs staff began exploring uses for the scheme lands other than farming, and after positive feedback was received from the New Zealand Forest Service, the owners gave their backing to a forestry scheme.¹⁷⁴ As an owners' meeting in 1971 made clear, however, they did not want the Maori Affairs Department to have any involvement in the forestry scheme, and they also wanted the development scheme wound up, and the development scheme debt cancelled.¹⁷⁵

With there being no sign of improvement in scheme debt, the Minister and Board of Maori Affairs agreed to wind up the scheme, with control being passed to an incorporation of owners. They did not agree to write off any debt though, as there was still positive equity in the scheme (that is, the value of the farmed area and its assets was greater than the debt).¹⁷⁶ A small concession was nevertheless made to the owners, whereby the scheme debt (which was to be taken over by the Ngati Manawa Incorporation) would not attract interest for two years, and the shingle royalties as well as the compensation for the sewage farm area were

168. *Ibid*, pp 387–389

169. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 694, 718; Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), pp 130–131

170. Alexander, 'Land Development Schemes' (doc A74), p 406

171. *Ibid*, p 389

172. *Ibid*, p 384

173. *Ibid*, pp 388, 390

174. *Ibid*, pp 390–391, 393; Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), pp 136, 167

175. Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), pp 167–168

176. *Ibid*, pp 167–169. As of 1971, scheme debt stood at \$188,862, but the total value of the scheme lands and the other scheme assets came to \$285,295, thus giving the owners equity worth \$96,433: Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), p 167.

reallocated from the scheme to the Incorporation to cover its set-up costs.¹⁷⁷ The final debt, after the scheme had been wound up and the livestock sold in 1972, amounted to \$122,471. Once this was paid off by the incorporation in 1978, the Crown consequently released the Ngati Manawa blocks from the development scheme.¹⁷⁸

Having outlined the inception of the development schemes and their long, chequered histories, we now turn to discuss the claimants' and Crown's legal submissions.

18.4 THE ESSENCE OF THE DIFFERENCE BETWEEN THE PARTIES

18.4.1 Why was Crown assistance necessary for Maori farm development?

The Crown accepted the claimants' position that, by 1929, Government assistance was essential for Maori farm development because of the problems created by the native title system and the impacts of Maori land loss. Put simply, it was almost impossible for Maori to obtain finance for farm development if the Crown would not provide it.¹⁷⁹ The parties also agreed that one Government objective was, as Crown counsel put it, to 'bring the predominantly rural Maori population of the time into a full engagement with the prevailing agriculturally based economy'.¹⁸⁰ There is further agreement between the parties that Maori welcomed Crown assistance at the time and, initially at least, benefited from it.¹⁸¹ The Crown accepts that Ngata's start-up objectives are important in measuring the success of the schemes, but suggests that they were not all achieved because of factors that could not necessarily have been anticipated and were outside of the Crown's control.¹⁸²

18.4.2 How far were Maori involved in decisions about the development schemes, and were the schemes conducted in their best interests?

The parties agreed that the Crown exercised extraordinary powers over the land once it was placed in development schemes, which greatly reduced the claimants' ownership rights. For the most part, they also agreed that Maori benefited from the schemes in a variety of ways (the Tuawhenua claimants dissented from this position).¹⁸³ There were fundamental differences, however, as to whether:

- ▶ the Crown's assumption of such extensive powers made it a virtual trustee for the Maori owners;

177. Alexander, 'Land Development Schemes' (doc A74), pp 398–399

178. *Ibid*, pp 399, 401

179. Crown counsel, closing submissions (doc N20), topic 32, pp 2, 10

180. *Ibid*, p 2

181. See, for example, counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 62; counsel for Wai 36 Tuhoe, closing submissions, pt B, response to statement of issues, 30 May 2005 (doc N8(a)), pp 184, 186.

182. Crown counsel, closing submissions (doc N20), topic 32, pp 2–3, 4–5, 12–13, 15–16

183. See counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), pp 215–216, 224–235, 250–256, 266–269.

- ▶ the disadvantages of the development schemes outweighed the benefits;
- ▶ the schemes were poorly managed by the Crown, and avoidable mistakes were made;
- ▶ the schemes were ultimately a success;
- ▶ the objective of creating small family farms was the correct model; and
- ▶ the owners had sufficient (or any) say in the decisions that were made.

As a result, significant issues remain in contention between the claimants and the Crown.

18.4.2.1 *Did the Crown assume the duties and obligations of a trustee?*

In the view of Wai 36 Tuhoe and Ngati Haka Patuheuheu, the Crown's extensive powers over Maori land in development schemes made it virtually a trustee. According to claimant counsel, the owners had a right to 'determine when and in what amounts the land might become indebted'.¹⁸⁴ Since the Crown denied them that right and made decisions unilaterally over a long period of time, it 'assumed the duties of agent and trustee of the owners, and it is against the standards of a prudent trustee that the Crown's performance must be measured'.¹⁸⁵ Counsel for Ngati Haka Patuheuheu suggested that while Maori retained ownership in theory, the Crown assumed such full powers that its practical control was absolute, creating 'a relationship analogous to a fiduciary duty'.¹⁸⁶ The Crown did not specifically deny this argument in its closing submissions, but the inference to be drawn from its submissions is that it did not have obligations equivalent to those of a trustee in its management of the development scheme lands.

18.4.2.2 *Did claimants benefit from the development schemes and, if so, did the benefits outweigh the disadvantages?*

The Tuawhenua claimants denied that they received any real benefit from the Ruatahuna development scheme.¹⁸⁷ Other claimants, including Wai 36 Tuhoe and Ngati Haka Patuheuheu, accepted that they had benefited from the schemes but argued that the disadvantages outweighed the advantages. In part, this was because they saw the schemes ultimately as failures in terms of their original social and economic objectives.¹⁸⁸ The Crown, on the other hand, argued that the schemes were a success and that there were significant benefits for the owners with no appreciable drawbacks. Two matters – the heavy load of debt and the length of time taken to clear it, and the uneconomic size of early units – might possibly be considered disadvantages, but only with hindsight. It is not possible, we were told,

184. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p185

185. Ibid

186. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p127

187. See counsel for Tuawhenua, closing submissions (doc N9), pp 215–216, 224–235, 250–256, 266–269.

188. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp185–188; counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp125–130; counsel for Tuawhenua, closing submissions (doc N9), pp 215–216, 224–235, 250–256, 266–269

to say that any other way of structuring land development would have worked any better in the circumstances.¹⁸⁹

18.4.2.3 *Were the schemes poorly managed by the Crown, and were avoidable mistakes made?*

In Ngati Manawa's view, the key issue is that the schemes were poorly managed by the Crown.¹⁹⁰ Other claimants shared this view but differed as to its relative importance. The Crown argued that its administration only appears poor in hindsight, and that much of the explanation for why the schemes remained in debt for decades lay in economic and other factors outside the Crown's control.¹⁹¹ Counsel for Ngati Manawa suggested that neither hindsight nor anachronistic criticism was required to indict the Crown; its decisions had mostly been criticised by claimants at the time, and its administration was clearly poor, lacklustre, and unenthusiastic, with the ultimate results being 'unspectacular'.¹⁹² The Crown denied this allegation, again pointing to forces outside its control, such as the impacts of the Second World War and downturns in the farming economy.¹⁹³

18.4.2.4 *Were the schemes ultimately successful?*

The Crown suggested that 'The development schemes are by and large a success story.'¹⁹⁴ Loans were provided at Treasury rates of interest, enabling Maori farmers to overcome the barrier that their titles had placed in the way of access to finance. Land was developed that otherwise could not have been, and, as a result, Maori retained land and were presented with significant assets when the schemes were wound up.¹⁹⁵ Ngata's objective was met of Maori 'participation in the modern economy on an equal standing with Europeans'.¹⁹⁶

In the claimants' view, however, the schemes were ultimately unsuccessful. Inadequate supervision and training meant that the owners were not sufficiently upskilled in business and farming management. Unnecessarily high levels of debt, combined with insufficient write-off of debt, meant that assets were handed back still encumbered and long after they should have been debt-free. Much development work was wasted because, ultimately, land-use had to be diversified and sometimes forestry was the better option.¹⁹⁷

189. Crown counsel, closing submissions (doc N20), topic 32, pp 2-3, 9-16

190. Counsel for Ngati Manawa, closing submissions (doc N12), pp 71-72

191. Crown counsel, closing submissions (doc N20), topic 32, pp 2-3, 12-16

192. Counsel for Ngati Manawa, closing submissions (doc N12), pp 67, 71-72

193. Crown counsel, closing submissions (doc N20), topic 32, pp 2-3, 12-16

194. *Ibid*, p 3

195. *Ibid*, pp 2-3, 12-16

196. *Ibid*, p 12

197. Counsel for Ngati Manawa, closing submissions (doc N12), pp 71-72; counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 125-130; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 185-188

18.4.2.5 Were small family farms an appropriate model?

The claimants have levelled two criticisms at one of the core aspects of development schemes: Ngata's original emphasis on creating small family farms. According to counsel for Wai 36 Tuhoe, this was the only option on offer but it was a 'eurocentric model' that caused the department to focus wrongly on unit occupiers instead of the community of owners, and did not accord with the claimants' needs or aspirations.¹⁹⁸ In particular, the small family farm model created uneconomic holdings.¹⁹⁹ The Crown suggested that this model failed because of economic developments after the Second World War, and not because it had been inappropriate at its inception.²⁰⁰ Also, even though it failed, it did not prevent long-term improvement of the land and 'wealth creation', such that 'sustainable ongoing economic returns' were a 'tangible benefit obtained by most owners'.²⁰¹

18.4.2.6 Did the owners have sufficient (or any) say in the decisions that were made?

For Ngati Manawa, this was not the key issue; in their view, the problem was not lack of consultation but poor performance in financial and farming management.²⁰² The Wai 36 Tuhoe claimants, the Tuawhenua claimants, and Ngati Haka Patuheuheu saw it differently, arguing that their tino rangatiratanga was denied by the Crown's assumption of absolute control. Not only did Tuhoe lose all control and have no say in the levels or accumulation of debt, but they were denied a key opportunity to obtain business management knowledge and experience.²⁰³ This view was shared by Ngati Haka Patuheuheu.²⁰⁴ The Crown accepted that it had taken over many of the rights of the owners but submitted that this was the necessary 'quid pro quo' for investing public money without any other form of security. Statutory management was essential.²⁰⁵ On the other hand, the Crown argued that the position was not static but changed over time. At first, it provided for owners' advisory committees, and Ngata relied on local leaders to work directly with him in planning and managing the schemes. After Ngata's resignation, the provisions for 'cooperative management' were removed from the legislation but owners still found practical ways of making their views known locally and in Wellington. In the 1950s, a process of annual meetings of owners was established, and unofficial advisory committees were restored in the 1960s. From 1971, with official advisory

198. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 63

199. Counsel for Wai 36 Tuhoe, closing submissions, pt C, schedule of primary findings and recommendations sought, 2005 (doc N8(b)), p 11

200. Crown counsel, closing submissions (doc N20), topic 32, p 13

201. Ibid

202. Counsel for Ngati Manawa, closing submissions (doc N12), p 71

203. See, for example, counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 62.

204. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 129

205. Crown counsel, closing submissions (doc N20), topic 32, pp 2, 9

committees, there was an attempt to make sure that owners had a real and meaningful say in the operation of the remaining schemes.²⁰⁶

18.5 TRIBUNAL ANALYSIS OF LAND DEVELOPMENT SCHEMES

18.5.1 Why was Crown assistance necessary for Maori farm development?

SUMMARY ANSWER: In our inquiry, the parties agreed that it was almost impossible for Maori to obtain finance for farm development in the first half of the twentieth century if the Crown would not provide it. Why was this so? The Crown's Maori land title system was generally agreed at the time to be the problem. Private lenders would not risk loans on the security of multiply owned Maori land. So, compounding other problems (including common ownership with undivided shares, no corporate management structure, and relative inexperience in business and farming), Maori across the country could not get finance to develop their lands. And, in the wake of massive Crown purchasing, Maori were often left trying to subsist on the more marginal parts of their tribal estates. Developing marginal land without assistance was impossible, whether for Maori or settlers. In 1929, the United Government recognised this fact by introducing a scheme to develop marginal Crown land for settlement before it was put on the market. Sir Apirana Ngata as Native Minister was finally able to obtain a similar scheme for Maori the same year, piggybacking on this initiative: title problems would be bypassed by the Crown taking over Maori land, designating it under a scheme, and then providing the finance and expertise to establish farm development on it. For the next 50 years, New Zealand Governments assisted Maori by means of such schemes.

But financial assistance for Maori farming came late compared to that for settlers. While some limited sources of 'Maori' money were available before 1929, Maori did not have the benefit of the substantial loans and cheap credit that the Crown made available to settlers from 1894 onwards, through the 'advances to settlers' scheme. The Maori need for development assistance, and the barrier that the Crown's titles posed to obtaining such assistance, was brought to the attention of governments by Maori, the Maori Land Court, and commissions of inquiry. Yet nothing was done until 1929. By then, in the view of the Wai 36 Tuhoe claimants, the Crown owed the peoples of Te Urewera a large development debt because of the time that elapsed between assistance being first sought (from Seddon in the 1890s) and when it was first provided (in the 1930s). In the meantime, much Maori land had been alienated. Ngata commented in 1940 that a development scheme such as the one at Ruatoki could not succeed in the long term unless the Crown provided additional assistance in the form of land. Although he recommended that governments provide either Crown or private land to supplement struggling development schemes, justifying it on the basis that the Crown had been purchasing Maori land for a century to assist settlers, no such land was provided in Te Urewera.

206. Crown counsel, closing submissions (doc N20), topic 32, pp6-9

L AND DEVELOPMENT *promised work and high hopes of a better future.*

Rangiura Briggs¹

1. Rangiura Briggs, brief of evidence, 9 August 2004 (doc F17), p 2

Also, as Ngata observed, Maori had to pay a high price for development assistance. They had to give up control of their land for an unknown period (in some cases, such as Ruatahuna, for in excess of half a century). According to Ngata, the Crown's assumption of control was qualified by an 'over-riding condition implied in the circumstances of the inception of the schemes and expressed in conferences with communities, that lands should be administered in the interests of their owners and in general accord with their wishes and aspirations.' This is the standard by which we measure the Crown's conduct of Ngata's development schemes.

Counsel for Wai 36 Tuhoe submitted that the Crown owed the claimants an enormous 'development debt' by 1929, because its actions had been primarily responsible for the inability of Tuhoe to develop their lands:

However, it must be remembered that in 1895 Seddon had promised development of land as one of the benefits of the UDNRA. Furthermore, the Crown was the cause of many of the impediments to development of Tuhoe's land. For example, it is generally accepted that Maori were severely restricted from obtaining development finance to develop their lands. Furthermore, within the UDNRA there were significant restrictions on leasing and timber rights, and roading had been deliberately withheld. In addition much of Tuhoe's best arable lands had been confiscated. So, it is argued that the Crown owed a large development debt to Tuhoe for the stalled development of Tuhoe lands.²⁰⁷

Crown counsel did not dispute that Maori needed the Crown's help to develop their lands for farming. Proposals for such assistance were made as early as 1895 during the negotiations that led to the Urewera District Native Reserve Act, when Carroll and the Urewera delegation agreed to propose it to Seddon. As we saw in chapter 9, the Premier agreed that pastoral farming might be a development opportunity, and that help was needed with agriculture, but this was not reflected in the UDNRA Act or its schedule, or in any specific measures designed to assist farming in Te Urewera. Problems identified during these negotiations included titles and roading, both of which – it was agreed – could be improved to the benefit of farm development. Wi Pere, as an independent observer at the meeting,

207. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 62

suggested that money be given to help the proposed Maori committees develop their land for farming. As we noted in chapter 9, no response was made to this suggestion and – as we also noted in chapter 13 – the committees were never actually set up that would have enabled collective management of Te Urewera lands. Instead, title problems, lack of roads and infrastructure, and lack of finance were still hampering Maori farming efforts in Te Urewera by the 1920s.

Clearly, this had not been unforeseen. In addition to the above (Te Urewera-specific) instances, the Mohaka ki Ahuriri Tribunal noted that successive commissions of inquiry (Rees–Carroll in 1891 and Stout–Ngata in 1907) had recommended that Maori be given assistance to, as Stout and Ngata put it, ‘occupy [their lands] with profit to themselves and the State’. In 1923, the East Coast commissioner had echoed this advice.²⁰⁸

Fred Biddle (Erueti Peene) summed up the pre-UCS frustrations in Te Urewera in 1921:

We wish to know where our land is. That is important. The young people want to see some document evidencing their titles, to have something tangible to indicate their ownership of a defined piece of land. I am sorry that you have come now when you see the nakedness of our land; we regret that it is not cultivated. There is a two-fold reason. (1) We are not the acknowledged owners of any piece of land – we have no title in the pakeha sense. (2) Even if we had a title we have no money and the banks and other lending institutions will not lend to Maoris.²⁰⁹

As we saw in chapter 14, consolidation of titles in the UDNR lands was conceived as a fix for at least some of these problems, as well as benefiting the Crown by concentrating the land that it wanted to deliver to settlers. At this stage, the Government’s vision for Te Urewera was the clearing of most of the bush and the establishment of small family farms. In the view of the consolidation commissioners and Apirana Ngata, all of them instrumental in the UCS, this vision needed to include Maori. The commissioners reported in 1921 that ‘among the younger Natives of the Urewera country’ there was ‘a strong and a genuine desire to be put in a position to farm some of their lands’. In the past, this had been hampered ‘by the unsatisfactory nature of the titles’, which they described as having been in turmoil since 1896 (which, as we noted in chapter 13, was mostly due to the Crown’s purchase of undivided interests and its refusal to have those interests located and partitioned until it had reached the limits of what it could buy).²¹⁰

208. Robert Stout and Apirana Ngata, ‘Interim Report of the Commission Appointed to Inquire into the Question of Native Lands and Native-Land Tenure’, 20 March 1907, AJHR, 1907, G-1, p 10 (Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 472)

209. *Whakatane Press*, 19 February 1921 (Campbell, ‘Land Alienation, Consolidation and Development’ (doc A55), p 35)

210. R J Knight, H Carr, and Raumoia Balneavis, ‘Report on Proposed Urewera Lands Consolidation Scheme’, 31 October 1921, AJHR, 1921–22, G-7, p 7

In any case, the commissioners expected in 1921 that the UCS would fix the problem. Apirana Ngata, however, foresaw that more was needed in the form of financial assistance and business expertise from the Crown:

I go further than the [other] officers in urging that the State should inaugurate in this district a special scheme for rendering financial and other assistance to the young Urewera farmers. The human material is good. The men are good bushmen, efficient in all that relates to work in bush country. They require not only financial assistance, but above all business assistance. It would not be sufficient – in fact, it would be risky – merely to lend them money on the security of their lands. There must be business guidance as well to see that the money is applied to the best use to secure the best return.²¹¹

Ngata's was not entirely a lone voice. In 1917, Judge Browne had also advised the Government that Ruatoki farmers were

in want of expert guidance and advice in the matter of purchasing stock and as to proper methods of cultivation, and from a productive point of view it would be worth the Government's while to pay some attention to them, and show them how best to stock and utilize their land.²¹²

Even so, Ngata's advice fell on deaf ears at this stage of events. Perhaps that was inevitable, while consolidation schemes were being carried out in the UDNR lands and then at Ruatoki–Waiohau. In other words, the first step seemed to be to fix the titles, and consolidation was the Crown's (and Ngata's) preferred method of doing so in Te Urewera, rather than promoting alternatives such as incorporations. As we saw in chapter 14, the Crown's motivation was primarily self-interest in respect of the UCS. Nonetheless, experts agreed that Maori farm development could not progress until title problems were fixed. It was not until the late 1920s and early 1930s that Ngata conceived of development schemes as a way of bypassing title difficulties, allowing a new form of land-use without regard to the fractionating titles underneath it. But that lay in the future. In the early 1920s, consolidation was seen as the first step to fixing title problems. As we shall see in the next section, a consolidation scheme was inaugurated at Ruatoki and Waiohau from 1924 and 1930 respectively, in addition to the scheme already discussed in chapter 14. Specific claim issues about the Ruatoki–Waiohau consolidation scheme are addressed in chapter 19.

211. Memorandum by the Hon AT Ngata, attached to RJ Knight, H Carr, and Raumoia Balneavis, 'Report on Proposed Urewera Lands Consolidation Scheme', 31 October 1921, AJHR 1921–22, G-7, p 7 (Boast, 'The Crown and Te Urewera in the 20th Century' (doc A109), p 80)

212. 'Judge Browne, Enumerator for the Counties of Opotiki, Whakatane, Tauranga, Rotorua, and East Taupo', undated, AJHR, 1917, H-39A, p 3 (Campbell, 'Land Alienation, Consolidation and Development' (doc A55), p 111)

In the meantime, access to finance remained an insoluble problem. Commenting on Ruatoki in 1932, Ngata noted the struggles to establish dairy farming, even on the best Urewera land, when the only source of funds was a local dairy company, local settlers, or storekeepers. Banks and lending institutions were not interested. The results were bleak:

The fences were of poor material and of indifferent construction, but were sufficient for the purpose of enclosing and defining pastures; good fences were not possible without good titles. The dairy herds, laboriously built up from the culls of the district and fed on poor pastures, were well below the average in butter-producing capacity. The farm buildings, cow sheds, yards, and dairy equipment left much to be desired. Maize-growing and the cultivation of food crops without fertilizing had impoverished the soil, and too often no attempt was made to establish pastures after crops, so that the low-producing herds starved through the winter months on corn stubble and weeds. To add to the difficulties, there was a marked increase in the population.²¹³

The native title system was generally agreed to be the main problem. Not only were ownership issues hindering Maori from making improvements, it was stopping people from lending to them. Gordon Coates, who had been Premier and Native Minister for much of the 1920s, still had to say in 1929 when in Opposition: 'it is hopeless generally for the Maori to get assistance from private sources, because the security is regarded as being not altogether satisfactory from the viewpoint of private lenders.'²¹⁴ So what had Coates' Government done to solve or compensate for this problem? The short answer is: not much.

For a full account of the history of pre-1929 State development assistance, we refer readers to the Tribunal's report *He Maunga Rongo*.²¹⁵ We rely mainly on the historical evidence presented to us by Mr Alexander, Professor Murton, and Dr Gould, and also on the writings of Sir Apirana Ngata himself. From 1894, predating the UDNR agreement, the Liberal Government had established an 'advances to settlers' scheme which provided cheap development finance to struggling settler farmers. Although Maori were not ineligible by reason of race, they were effectively so because of their different and inferior Crown titles. The advances scheme was designed with owners of individual fee simple titles in mind. Very few Maori farmers were eligible for assistance under its terms, and to borrow against their land from Crown agencies at the time, individual Maori farmers had to get the approval of both the Governor in Council and the Native Land Court.²¹⁶

213. 'Report on Native-Land Development Schemes', no date, AJHR, 1932, G-10, p 36 (Alexander, 'Land Development Schemes' (doc A74), p 15)

214. Hon Mr Coates, 1 November 1929, NZPD, vol 223, p 1105 (Gould, 'Maori Land Development Schemes' (doc M7), pp 127-128)

215. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 932-1001

216. 'Native Land Development: Statement by the Hon Sir Apirana T Ngata, Native Minister', no date, AJHR, 1931, G-10, p iii; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 464, 469-470

Alternatively, legislative amendments provided Maori farmers with mechanisms to secure finance collectively, namely by forming an incorporation of owners, by vesting their land in a trust, or by borrowing against their combined livestock and chattels. All three mechanisms (enacted in 1894, 1897, and 1903 respectively) were seldom used.²¹⁷

In part, this was because these mechanisms were excluded by law from the UDNR, which was supposed to have its own alternative system of committees. When the UDNR Act was repealed in 1922, Maori owners could apply for a mortgage (which hitherto had been unlawful), but in effect no owner had a secure enough title to even consider trying to raise finance until the completion of the UCS in 1927. Effectively, title problems remained dominant in Te Urewera in the 1920s. The only solution seemed to be to get around the titles: Tuhoe established an incorporation on their Tuararangaia lands, but these were not suitable for farm development (see chapter 10), while Tahora 2 owners had placed their lands in a trust that ended up being part of the mammoth East Coast trust, which was able to raise finance and develop land (see chapter 12).

For other Maori owners who still had pieces of land in the rim blocks, outside the UDNR, some Government-arranged finance became possible in the 1920s. The Native Trustee Act of 1920 empowered the Native Trust Office to use the revenue generated from native reserves to provide loans, secured by mortgage, to Maori landowners. The same powers were subsequently given to District Maori Land Boards, which earned income from leasing Maori land, under the Native Land Amendment and Native Land Claims Adjustment Act 1922. Further legislative changes in 1926 and 1928 respectively allowed these boards to first provide development assistance to individual Maori landowners, the cost of which was to be charged against the developed land, and later to institute their own small Maori land development schemes, using their own financial reserves (including loans).²¹⁸

Even so, as David Alexander observed, what money the Native Trust Office and District Maori Land Boards were able to put towards development was coming from the relatively small income they derived from Maori land, so in effect the investment amounted to recycling of Maori money, rather than the Crown arranging access to external sources of cheap finance (as it did in the advances to settlers scheme) or providing finance of its own.²¹⁹ Also, Alexander could find no evidence of any loans or mortgages in Te Urewera under the limited pre-1929 avenues.²²⁰

217. 'Native Land Development: Statement by the Hon Sir Apirana T Ngata, Native Minister', no date, AJHR, 1931, G-10, piii; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 472-473, 986

218. The relevant pieces of legislation were section 21(c) of the Native Trustee Act 1920; section 19 of the Native Land Amendment and Native Land Claims Adjustment Act 1922; section 8 of the Native Land Amendment and Native Land Claims Adjustment Act 1926; and section 3 of the Native Land Amendment and Native Land Claims Adjustment Act 1928. See also Alexander, 'Land Development Schemes' (doc A74), p 4; 'Native Land Development: Statement by the Hon Sir Apirana T Ngata, Native Minister', AJHR, 1931, G-10, pp iii-v.

219. Alexander, 'Land Development Schemes' (doc A74), pp 4-5

220. *Ibid.*, p 4 n

Unless the financial resources of the Treasury could be tapped, it was obvious that Maori land development would not stretch far.

Ngata finally got his opportunity to remedy this problem when the United Government under Ward came to power in 1929. This Government, in which Ngata assumed the post of Native Minister, favoured the idea of a more direct approach to Crown funding of land development. Its Land Laws Amendment Act 1929 was the first piece of legislation to allow taxpayer funds to be spent developing Crown land, prior to its sale to settlers. The Government was particularly concerned to ensure that land previously considered marginal would be developed by this means, acknowledging that it otherwise might pose insurmountable problems to individual, private farmers. The result was a political atmosphere in which large-scale development of Maori land, also considered marginal for many reasons, could make it onto the Government's agenda.²²¹

Ngata took advantage of this pro-development mood by introducing a more comprehensive Maori land development policy (enacted in the Native Land Amendment and Native Land Claims Adjustment Act 1929), which similarly allowed direct Crown lending for the purposes of Maori land development for the first time.²²² As stated in section 23(1), the purpose of this policy, in broad terms, was to enable better settlement and utilisation of Maori land, and to assist Maori to advance their own farming endeavours.

Looking back in 1940, Ngata explained the main features of his development schemes as follows:

1. To overcome delays or difficulties arising from the nature of the land titles, the Native Minister was authorized to bring such lands under the scheme. The difficulties as to title were literally stepped over and the development and settlement of the lands made the prime consideration.
2. The funds for development were provided by the State, and were expended under the supervision of Government officers.
3. Private alienation of any land within a scheme was prohibited.
4. The jurisdiction of the Native Land Court in all matters affecting title, other than succession and trusteeship of persons under disability, was exercisable only with the consent or at the instance of the appropriate Government Department.
5. The main aim was the training of Maoris to be efficient farmers in the course of developing their lands, and to assist them when they settled down to the business of farming.²²³

221. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 1013–1014

222. The key section of this Act is section 23: see 'Native Land Development: Statement by the Hon Sir Apirana T Ngata, Native Minister', AJHR, 1931, G-10, pp v–vi; Gould, 'Maori Land Development Schemes' (doc M7), pp 15–16; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 475; Alexander, 'Land Development Schemes' (doc A74), pp 4–5.

223. Ngata, 'Maori Land Settlement', p 144

This is not the place to discuss more broadly the roles considered appropriate for the State at various times. Here, we note that Government assistance of Maori economic development remained a feature of Crown policy for at least the next 50 years. The need for that assistance was obvious, although its exact mode – and who would control it – were issues that were debated strenuously at the time and during our hearings. But the farm development schemes as they operated in Te Urewera were very much shaped by the decisions taken by Te Urewera communities and Ngata in the late 1920s and early 1930s. One key factor was the relationship between the schemes, with their ‘unit’ dairy farms, and the underlying titles of the owners, and their respective rights. A second factor was the creation of the development schemes at the beginning of the Great Depression. Ngata’s way of operating and his objectives was a third factor which shaped the schemes, while a fourth was the specific agreement that Te Urewera communities gave to the schemes at this particular period of time. From these key factors we derive the standards by which we judge the development schemes in the following section.

Ngata’s vision was that title problems would be overcome by consolidation or circumvented by creating ‘unit’ farms regardless of underlying titles, that access to finance would be solved by Government loans, and that the lack of opportunities for learning modern farming and business practices would be solved by direct Government training and supervision.²²⁴ Government supervision was an integral part of the schemes from the start, but it had the wider purpose of training Maori farmers and owners as well as protecting the Crown’s investment. Training was especially necessary because Ngata encouraged Maori to take up dairy farming, an industry in which quality control was paramount. Ngata believed that the high per-area labour requirement (thereby creating employment), and generally high per-area income, would allow Maori communities to be supported by the compact areas of land that they still possessed.²²⁵

By 1940, after he had ceased to be Minister, it was clear to Ngata that this land base was not going to suffice. In an essay about Maori land settlement (which is how he characterised his development schemes), he singled out Ruatoki as an example where a scheme was going to run out of land. There were, he suggested, three choices for such communities as the Ruatoki people, so long as farm development continued: migration; more intensive land use, with diversified forms of cultivation; or the provision of additional land by the Crown. Ngata urged the Crown to take the next logical step, proposing that it reverse a hundred years of policy and provide Maori with land instead of taking it from them. If no suitable Crown land was available, then the State should buy private land for Maori farmers, just as it had been doing for settlers for a century.²²⁶ Ngata’s view was shared

224. Ibid

225. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), pp 699–700; Alexander, ‘Land Development Schemes’ (doc A74), pp 7–8

226. Ngata, ‘Maori Land Settlement’, p 153

by Tuhoe at this time. In 1948, for example, the struggling Ruatahuna community asked the Native Department that ‘Crown lands at Ruatahuna be given to us to add to our farms.’²²⁷

While he was Minister, Ngata had in fact begun the process of acquiring private land or setting aside Crown land for both development and consolidation schemes, on the expectation that its new owners would pay for it as part of the debt loaded on the development schemes. But any Crown acquisition of land for development schemes was small-scale.²²⁸ It did not become, as Ngata had proposed in 1940,²²⁹ a means of significantly increasing the pool of land available to ‘land-hungry’ communities such as Ruatoki. Only one small block of Crown land, Waiohau C25 (44 acres), was included in the development schemes in Te Urewera.²³⁰

In his evidence, Dr Gould noted that, in the Rotorua district, the Crown did purchase land and set up Maori farm development schemes on it, but that this constituted a ‘small minority’ of the schemes in that district.²³¹ In Te Urewera, of course, the issue was complicated by water and soil conservation policies and the creation of the national park, and we do not have detailed evidence as to exactly what additional high quality Crown land (or private land across the confiscation line if it came onto the market) could have been made available to expand the development schemes. We simply note the general point that by 1940 the future of Maori farming on their circumscribed remaining lands, in Ngata’s view, depended on the Crown providing a kind of assistance that it had been providing Pakeha farmers for a century, but which – in the event – it was unwilling or unable to provide to Maori on any significant scale in the mid-twentieth century.

In the meantime, Ngata noted, unemployment relief was concealing – and cushioning – the extent of the problem.²³² Once the Great Depression had begun, assisting poor Maori communities (and equally, raising national productivity) through the new land development schemes became even more crucial to the Government. The success of the development schemes could not, in Ngata’s view, be achieved by simply improving the condition of land; it also required the simultaneous social and cultural development of the people. To this end, the early development schemes placed a significant emphasis on providing community-wide benefits, and rejuvenating tribal organisation, through measures such as construction of modern housing, and provision of funds for restoring existing marae and whareniui or building them anew.²³³

227. Minutes of meeting at Matatua meeting house, 22 March 1948 (Gould, ‘Development Schemes’ (doc M6), p 64)

228. Gould, ‘Maori Land Development Schemes’ (doc M7), pp 271–280

229. Ngata, ‘Maori Land Settlement’, p 153

230. Alexander, ‘Land Development Schemes’ (doc A74), p 206

231. Ashley Gould, summary of ‘Maori Land Development Schemes: Generic Overview, ca 1920–1993’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc M7(a)), p 6

232. Ngata, ‘Maori Land Settlement’, p 153

233. ‘Native Land Development: Statement by the Hon Sir Apirana T Ngata, Native Minister’, no date, AJHR, 1931, G-10, p vii; Alexander, ‘Land Development Schemes’ (doc A74), pp 8–9; Gould, ‘Maori Land Development Schemes’ (doc M7), pp 35–36

Ngata also recognised that Maori communities, by accepting the wide-ranging powers given to the Crown once development schemes were established, were essentially putting their fate in the Crown's hands for the duration of the scheme. This was necessary because the Crown was, as we said, entitled to protect its investment and ensure a proper return, but also because outside business expertise and training was acknowledged as critical to the short- and longer-term success of the schemes. As we noted in our introduction, Ngata wrote in 1940 that the Crown in return was bound by the 'over-riding condition implied in the circumstances of the inception of the schemes and expressed in conferences with communities,

Ngata Returns to Ruatoki

'TU and I with my brother Len spent a night eleven days ago with Tuhoē at Ruatoki. That is one of our most vigorous communities. The scheme is worked somewhat on the lines of those north of Auckland, where the Maori farmer is expected to do his own work with minimum assistance. This is practically restricted to seed, fertilizer, wire and stock. We have dodged large scale implements and building.

'The progress has been amazing. The application of the development legislation seems to have synchronised with the maturing of a very fine body of young men, who had their discipline under hard taskmasters like Kereru, Te Pouwhare and others. Ten years ago they were kids who crawled into the maize cribs to sleep. They are as hard as nails and have no illusions about wage rates or the prospects of high prices for butter.

'The most active operations are on the west side of the Whakatane river on the old track over to Waiohau. These people are literally eating up the fern and scrub: licking up the small swampy valleys and turning all into pasture. On the day of our visit there were long queues awaiting the issue of seed mixtures and manure.

'The boast of these people is as you know, "He iti na Tuhoē, e kata te Po." If you saw the crowd that lined up that night I was at Ruatoki, over a hundred young chaps, hard-bitten, fearless yet confidently respectful you would have said that the tribal aphorism stands good to-day, mutatis mutandis [the more things change, the more they stay the same].

'And so with other schemes. I append a list of those that are in operation or authorised to be commenced this year. It is growing apace, accelerated under the circumstances of this year to give work for some of our people and to help them in the winter.'

Apirana Ngata¹

1. Apirana Ngata to Peter Buck, 15 May 1931 (MPK Sorrenson, ed, *Na Ta Hoa Aroha / From Your Dear Friend: The Correspondence between Sir Apirana Ngata and Sir Peter Buck, 1925–50*, 2 vols (Auckland: Auckland University Press, 1987), vol 2, pp 28–29)

Ngata Calls for More Land for Maori for Development Schemes, 1940

*I*N discussing available land resources, native or other, we must not exclude the possibility of the State doing for the competent and deserving among the Maori landless, what it has done in the past for the pakeha immigrants and the land-hungry, namely purchase private lands for them if no suitable Crown lands are available. This is suggesting a reversal of the policy of one hundred years, but it may be urged that State expenditure to assist as many Maoris as possible to become farmers is proving to be the cheapest social service it can give the Maori people.'

Apirana Ngata¹

1. Apirana Ngata, 'Maori Land Settlement', in *The Maori People Today: A General Survey*, ed ILG Sutherland (Wellington: Whitcombe and Tombs, 1940), p 153

that lands should be administered in the interests of their owners and in general accord with their wishes and aspirations.²³⁴

We turn next to the question of whether the 'over-riding condition' was fulfilled, and with what outcomes for Maori and the Crown.

18.5.2 The 'over-riding condition': how far were Maori involved in decisions about the development schemes, and were the schemes conducted in their best interests?

SUMMARY ANSWER: The claimants raised two key issues in respect of the Crown's conduct of the development schemes on their lands. The first was the degree of control which the Crown exercised, and which the claimants said was excessive and lasted too long. The second was the overall poor performance of the schemes, which the claimants attributed to poor management on the part of the Crown. In the Crown's view, its wide-ranging powers were necessary to protect its investment of public money, in the absence of the usual securities. Also, the Crown attributed the poor performance of the schemes to factors outside its control, such as poor quality land and international economic trends.

We accept neither the claimants' nor the Crown's positions in their entirety. The conduct and performance of the development schemes, in some cases over many decades, were complex matters. Crown control and supervision, for example, was supposed to perform the dual role of protecting the Crown's investment and providing Maori owners with necessary training in farming and business management. Nor is it a straightforward matter to disentangle local management

234. Ngata, 'Maori Land Settlement', p 147

decisions and wider economic trends; the degree of Crown culpability for the admittedly indifferent performance of the schemes is not a simple thing to determine. Nor did all schemes perform poorly at all times. Until the Second World War, the Te Urewera development schemes were of significant benefit to their struggling communities.

We begin with the question of whether the schemes were conducted in the best interests of their Maori owners.

First, as the claimants have pointed out, the unit farms established at Ruatoki, Waiohau, and Ruatahuna were too small to be viable over the longer term. While Tuhoe supported Ngata's vision of family farms at the time, there was insufficient land for this purpose. Either the Maori owners had to accept fewer unit farms (as at Ruatoki) or station farming (as at Ruatahuna), or else the Crown had to inject more land, which – as we have seen – the Crown refused to do despite Ngata's recommendation. No matter how the schemes were conducted, the farmable land base was too small to support its communities. Ngata also recommended diversification in 1940 but the Maori Affairs Department remained fixated on 'cows, cows, cows.' Neither the Crown nor the Maori owners could devise a solution acceptable to the other. In the end, a patchwork of small productive and unproductive blocks emerged at Ruatoki and Waiohau, while the other schemes amalgamated their titles and adopted station farming or forestry (despite significant reluctance from resident owners).

Secondly, the Crown accepted that some of its business management may seem poor in hindsight. We agree. In particular, the Ngati Manawa scheme seems to have been managed in a relatively poor and 'lacklustre' manner that, in our view, a body of owners would never have permitted. But no amount of sound management could overcome the fact that there was too little land and much of it marginal in character, although there were certainly some mistakes made by the department. Owners, as we shall see, did not have much say in the running of the schemes for many years, especially the financial decision-making. Given the generally poor performance – which the Crown admits – and the lack of owners' input to financial decisions, it does seem ungenerous of the Crown not to have done more to remit debts and ensure the return of the schemes to owner control earlier and on a less precarious footing. There was pressure from Maori to remit all or part of development scheme debts. The Ngati Manawa scheme only narrowly missed the opportunity of a more generous approach by the third Labour Government. In particular, the winding up of the Ruatahuna scheme in 1990 seems to have saddled the owners with a much greater degree of debt than the Crown itself thought at the time was fair.

Thirdly, there was a greater emphasis on supervision (telling unit farmers what to do) and not enough emphasis on training (teaching them how to do it and upskilling them to run their own farming business). This point was made by the Crown's historian. It seems likely that more training and better quality supervision would have improved the performance of the schemes, but, again, could not have compensated for lack of land, too-small farms, or poor quality land. It might,

however, have enabled the earlier return of schemes to owner control, and facilitated that control when it finally occurred. The claimants were concerned that they had still insufficient expertise in farm and business management when their lands were returned, despite decades of 'supervision.'

The next question is whether the schemes were administered in general accord with the owners' wishes and aspirations – in other words, how much say did they have in the running of the schemes?

The Crown accepts that legislation gave it extremely wide-ranging powers, which it justified as necessary to protect an otherwise unsecured tax-payer investment in Maori land. Ngata intended that the schemes would be inaugurated and managed by consent, and he provided for owner advisory committees. These were discontinued after 1934 and the Crown accepts that there was no statutory provision for owners' input until the 1950s. Nonetheless, aspects of the schemes were still considered to require the agreement of the Maori owners. In particular, Maori owners were consulted over the arrangement of unit farms, the choice of who among the community should become the unit occupiers, the provision of leases and licences for unit occupiers, and important title changes such as the push for amalgamation of the Ruatahuna and Ngati Manawa titles in the 1960s. But when it came to determining farm and financial management strategies, owners were excluded. Long-term planning and decisions were also outside the ability of the owners to influence, until informal advisory committees were reinstated for the Ngati Manawa and Ruatahuna schemes in the 1960s. A battle ensued between the department and the Ngati Manawa advisory committee for control of the wind-up of that scheme, while the Ruatahuna advisory trustees gradually assumed a greater role in decision-making towards the end of their scheme. On the ground, where there were unit occupiers, they were subject to tight or 'relaxed' control depending on circumstances.

Overall, apart from individual decision points such as the choice of unit occupiers, Ruatoki and Waiohau owners were excluded from farm and financial management, Ngati Manawa owners were excluded from management decisions until almost the end, and Ruatahuna owners did not gain real influence over the conduct of their scheme until the 1980s.

According to the Crown, the claimants obtained real benefits in return for their loss of control: 'An assessment of the appropriate balancing of these two issues is complex.' The claimants agreed that they obtained significant benefits from the schemes in the 1930s. The parties also agreed that the schemes provided loan finance without any more loss of land, and that development occurred that would not otherwise have been possible – some unit occupiers at Ruatoki and Waiohau, in particular, benefited. We accept these various points. Overall, the schemes performed poorly and, once the limit of usable land had been reached, could not sustain farming communities over the long term without additional land, which the Crown refused to supply. Problems of insufficient land and poor quality land were inescapable. Diversification, forestry, and station farming have helped the return of viable assets to Maori control, with the last scheme wound up in 1990.

18.5.2.1 Establishment of suitable farms

In 1936 we were told that 40 acres was an economic farm. Later on the Department says they need to be a bit bigger. Today the Department says that unless we increase again, it is no good. If we do not agree to make them bigger, who will finally decide, us or the Department?²³⁵

One of the main complaints of the Tuhoe and Ngati Haka Patuheuheu claimants about the Ruatoki, Ruatahuna, and Waiohau Development Schemes is that the Crown established farms that were too small to be economically viable. Crown actions were thus contrary to one of the original purposes of consolidation and land development schemes; that is, to convert Maori land held under cluttered titles into self-supporting family farms. Also, the Wai 36 Tuhoe claimants suggested that the concept of small family farms was a 'eurocentric model' which 'did not necessarily accord with Tuhoe aspirations or acknowledge the associations of the wider family with the land and actively encouraged those not employed on the Scheme to move out of the community'.²³⁶ A related complaint from Ngati Manawa is that settlement of unit occupiers never occurred, and thus they were not left with family farms either.²³⁷

IH Kawharu's study of the effects of consolidation at Ruatoki, published in 1977, indicates that the number of owners on land titles was reduced by the process but the actual land areas associated with each title changed very little, and some even decreased in size.²³⁸ Many of the family blocks were only 20 to 30 acres in size – which, as Kawharu pointed out, was even at the time only large enough for subsistence level production.²³⁹ In his evidence for the claimants, Frank Vercoe, who was one of the unit farmers at Owihakatoro in the 1950s on a 200-acre farm, described the legacy of the consolidation scheme:

The Consolidation Scheme has left three major problems for those who would wish to farm in Ruatoki. Firstly, the land has been subdivided into blocks that are too small to be farmed independently. Secondly, many of the blocks do not have surveyed titles which prevent the owner accessing development finance. Thirdly, the subdivision boundaries that were laid out in the Consolidation Scheme are very often wrong.

235. Iki Pouwhare, minutes of meeting of owners, 2 October 1958 (David Alexander, 'The Land Development Schemes of the Urewera Inquiry District' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A74), p 229)

236. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 63

237. Counsel for Ngati Manawa, closing submissions (doc N12), pp 68–70. Ngati Manawa mostly blamed the failure to create family farms on the Crown's prevention of a consolidation scheme, which we deal with later in the report (see chapter 19).

238. IH Kawharu, *Maori Land Tenure: Studies of a Changing Institution* (Oxford: Oxford University Press, 1977), pp 93–94, 171–172, 315; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 601–608

239. Kawharu, *Maori Land Tenure*, p 172 (Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 601)

In my own whanau the average block size was about 24 acres. When I was growing up a block that size would have been the average family holding in Ruatoki and would have run about 15 cows. I recall that Kunere Tumoana's family had a block of 34 acres and that was a very large holding. A block of land of less than 50-acres was never enough to farm on for a living, even in the 1930s. Most families milked cows on these small blocks but also had to find work off the farm in order to survive. They were subsistence farms only.

The small sizes of the blocks continue to affect us today and to overcome those difficulties we have had to aggregate our lands under Trusts such as the Owihakatoro and Ngati Rongo Trusts. For the owners of these smaller blocks the only viable alternatives are to commit the land to forestry, or to lease the land for maize, or as a 'runoff' for dairy farming. Ruatoki C46 is a case in point which the owners have leased to the Owihakatoro Trust because of the difficulties of utilising it independently. Much of the land that has not been incorporated into larger Trusts has now reverted.²⁴⁰

It is worth noting that by the late 1950s, 60 to 80 acres was seen as the minimum size for a modern, mechanised dairy farm, while the optimal size was viewed as being 130 acres. At the time, only one-quarter of Ruatoki farms exceeded the minimum requirement.²⁴¹ Similarly, when consolidation at Waiohau was completed in the mid-1930s, several A-series blocks which formed the basis of farms were not much more than 50 acres in size, and many C-series blocks were in the 40- to 50-acre size range.²⁴² By 1958, in contrast, the suggested farm area for the as yet unsettled part of the C-series blocks was 130 to 150 acres.²⁴³

The situation at Ruatahuna was different, as while its unit farms were also based largely on block boundaries, the subdivision of land at Ruatahuna during the Urewera Consolidation Scheme was carried out without a development scheme in mind. As seen above, this had created a marked inequality in farm capacities, with some farms having more than 350 acres under grass, while others had less than 100 acres.²⁴⁴ With respect to the Ngati Manawa lands, meanwhile, if settlement had occurred in the early 1940s, as it might have but for the intervention of the Second World War, the envisaged farm size at that time was 80 to 100 acres.²⁴⁵

When considering why the original unit farms at Ruatoki and Waiohau were so small, it is important to recognise that the rearrangement of titles at Ruatoki and Waiohau into farm-sized blocks was largely in keeping with the owners' collective views. (This will be explained in more detail in chapter 19, where we

240. Frank Rongoiti Vercoe, brief of evidence, 2005 (doc J37), pp 3-4

241. Alexander, 'Land Development Schemes' (doc A74), pp 148, 173; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 653

242. Registrar, Native Land Court, Rotorua, to Under-Secretary, Native Department, 8 July 1936 (David Alexander, comp, supporting papers to 'The Land Development Schemes of the Urewera Inquiry District', 7 vols, various dates (doc A74(a)), vol 1, pp 88-98)

243. Alexander, 'Land Development Schemes' (doc A74), p228; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 608-613

244. Alexander, 'Land Development Schemes' (doc A74), p 295

245. *Ibid*, pp 338-339, 350-352

consider specific claims about the Ruatoki–Waiohau consolidation scheme.) Yet how much choice did they really have? As noted by Ngata in 1940, Maori were ‘very jealous of their rights in land’ even where it afforded them ‘little assistance financially’.²⁴⁶ In its closing submissions, the Crown accepted that land development schemes were an attempt to ‘ameliorate the impact of land sales’ as well as of title problems.²⁴⁷ Put simply, titles were still overcrowded after consolidation, and blocks – while consolidating individual and whanau interests together – were still small, because there was not enough good land left. The only solution to this problem, as Ngata noted in 1940, was for the Crown to provide more land for the development schemes as it became needed. To the contrary, as priorities changed in the wake of the Second World War, even land earmarked for (and capable of) development was left untouched. The schemes were scaled back and the emphasis switched from farm and community development to making the schemes solvent.

In the midst of the Great Depression, of course, it was in the interests of both the owners and the Crown that the land should support as many owners as possible.²⁴⁸ As Dr Gould noted, the availability of subsidies in the 1930s meant that unit farms did not have to be economic in their own right.²⁴⁹ The viability of small unit farms could also improve dramatically as their debt burden became lighter; by the late 1930s, after all, 40 to 50 per cent of income was being taken for debt repayment. The ability to clear debt was presumably what prompted the Crown to make the Waiohau A-series unit farms financially independent in the early 1940s.²⁵⁰ Yet the Under-Secretary noted in 1950, when 33 of 106 Ruatoki occupiers were in credit, that most of them were nonetheless farming ‘uneconomic holdings’.²⁵¹

There is less evidence on the creation of unit farms at Ruatahuna, and their proposed establishment on the Ngati Manawa lands, but as they relied on existing block boundaries, they presumably were influenced by the owners’ wishes as well. The establishment of settlers on small farms was not restricted to Maori land settlement schemes either. On the Galatea settlement, to the north-west of the Ngati Manawa scheme, the minimum farm size from the beginning in 1935 was around 100 acres, but a Small Farms/Relief of Unemployment Act scheme to the south of the Ngati Manawa lands had farm sizes of only 60 acres.²⁵² As Kawharu observed in relation to Ruatoki, and the same would have applied to other Maori and Crown land settlement schemes, the lower living standards and prices during the Great Depression meant farmers were prepared to accept meagre incomes.²⁵³

It did not take Maori Land Court and Crown officials long, however, to conclude that the unit farms created at the start of the development schemes were too

246. Ngata, ‘Maori Land Settlement’, p 152

247. Crown counsel, closing submissions (doc N20), topic 32, p 2

248. Alexander, ‘Land Development Schemes’ (doc A74), p 124

249. Gould, ‘Maori Land Development Schemes’ (doc M7), pp 13, 110

250. Alexander, ‘Land Development Schemes’ (doc A74), pp 200–201

251. Under-Secretary for Maori Affairs to Minister of Maori Affairs, 12 October 1950 (Alexander, ‘Land Development Schemes’ (doc A74), p 124)

252. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), p 460

253. *Ibid.*, pp 601–602

small to be viable in the long term. In 1939, the acting registrar noted with respect to the Ruatoki unit farms on the Whakatane River flats that there were 'far too many small and uneconomic properties' which would have to be 'amalgamated as opportunity arises'.²⁵⁴ Similarly, the property supervisor had decided by 1939, just three years after consolidation, that Waiohau blocks were too small and that the new Waiohau c unit farms would need to be 80 to 100 acres in size.²⁵⁵ Similarly, in 1942 a local official reported that the unit farms at Ruatahuna were too small to make a living from in most cases.²⁵⁶ In response to questions from the Tribunal, Mr Alexander accepted that the uneconomic size of many unit farms ought to have been obvious even at the time of their establishment.²⁵⁷

In general, the remedy advocated by the Crown, once settlement had taken place, was not to provide additional land – as Ngata had suggested²⁵⁸ – but for owners to agree to amalgamation. The number of Ruatoki unit farms on the Whakatane River flats was reduced by this means from 126 in 1937–38 to 106 by 1950, while by 1944 the number of unit farms at Ruatahuna had been reduced from 22 in 1941 to 16.²⁵⁹

In the cases of the Owhakatoro Valley (Ruatoki scheme), Waiohau c, and the Ngati Manawa lands, meanwhile, the Crown ensured that farms became progressively larger by amalgamating proposed unit farms before settlement had even occurred. Amalgamation was a difficult policy, however, for owners to accept. As a Maori Affairs Department officer noted in 1958 with respect to the slow rate of amalgamation at Ruatoki, owners were especially averse to the management of their lands being given to a non-family member; this view was understandable given that the displaced occupier, who typically would have been a family member, would probably have to seek work outside the district.²⁶⁰ Likewise, unit occupiers felt uncomfortable about safeguarding their own position by absorbing the holdings of their less fortunate counterparts. Ripaki Hokotahi explained in the Native Land Court in 1949, in relation to the Waiohau c blocks, 'I do not want to get interests from others to make me successful in the world. That would mean that others would be without land.'²⁶¹

Unit occupiers and owners employed two alternative approaches to cope with the problem of small, uneconomic farms. The first was for the unit occupier to take up off-farm work. For many this would have made economic sense, for as

254. Acting registrar, Rotorua Native Land Court, to Under-Secretary, Native Department, 18 December 1939 (Alexander, 'Land Development Schemes' (doc A74), p 93)

255. Alexander, 'Land Development Schemes' (doc A74), p 204

256. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p 314

257. David Alexander, under questioning by presiding officer, District Court, Wellington, 14 June 2004 (transcript 4.6, pp 51–52)

258. Ngata, 'Maori Land Settlement', p 153

259. Alexander, 'Land Development Schemes' (doc A74), pp 93, 99, 113, 123–124, 286

260. Ibid, pp 124, 148–149, 286

261. Ripaki Hokotahi, notes of meeting, 5–6 October 1949 (Alexander, 'Land Development Schemes' (doc A74), p 219)

Steven Oliver observed in his report on Ruatoki, factory and construction work available at Murupara and Kawerau paid more than dairying. This solution was viewed unfavourably by Crown officials, though, since it meant that many occupiers were not putting in the time necessary for the upkeep of their farms.²⁶²

A second option, practised by owners at Ruatoki, was to lease their unit farm to the neighbouring unit occupier. Again, this had an economic advantage over amalgamation, as the owners were given a direct income in the form of rent, rather than sharing in whatever financial gains (rent or capital gain) the co-owners of a larger unit farm might be left with after the Crown had taken its share of earnings for debt repayment, and the unit occupier's living and farm costs had been met. Leasing also enabled the owners to maintain their title to a distinct area of land, rather than having this subsumed in a larger title. It also satisfied in the short term the Crown's wish for larger farms, but as owners were not prepared to accept lease agreements with longer terms, the future of any farm expansion by this means was uncertain. A variation of the leasing theme was for owners to lease land to Pakeha farmers from neighbouring districts. Strictly speaking, this was illegal, and was frowned upon by scheme officials, who saw it as undermining the integrity and purpose of the scheme.²⁶³

A third alternative explored by the owners, which scheme officials only really took up at Ruatahuna, was altering the type of farming being employed. Ngata had also predicted the need for this in 1940, as another possible means of solving growing population pressure on a limited land base.²⁶⁴ At Ruatahuna, a seed potato operation and a deer unit were established.²⁶⁵

In the case of the Ruatoki scheme, however, proposals for diversification were not accepted. A Western Tuhoe Tribal Executive delegate told the district officer in 1961 that the Maori Department should stop talking about 'cows, cows, cows' and start talking 'carrots and kumaras'.²⁶⁶ As Professor Murton pointed out, the Maori Affairs Department established a Horticultural Section under GH McIndoe during the Second World War. This section was attempting to expand its operations in the late 1940s. McIndoe visited Ruatoki in 1949 and was supportive of its possibilities in terms of horticultural cropping and orcharding. The owners were clearly in favour of exploring alternative land uses. But McIndoe's voice, too, seems to have been drowned out by the 'cows, cows, cows' thinking of the department. He accused it of deliberately stifling his attempts at diversification.²⁶⁷

Horticultural cropping would have suited the small farm sizes, and Ruatoki did have a history of commercial maize cropping that pre-dated the development

262. Oliver, 'Ruatoki' (doc A6), pp 153–154

263. Fred Iopata, minutes of meeting between Western Tuhoe Tribal Executive and departmental officers at Rotorua, 27 September 1961 (Alexander, 'Land Development Schemes' (doc A74), pp 148–151, 163–172); Oliver, 'Ruatoki' (doc A6), pp 153–157

264. Ngata, 'Maori Land Settlement', p 153

265. Alexander, 'Land Development Schemes' (doc A74), pp 327–329

266. *Ibid.*, p 166

267. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 701–703

scheme. Maize itself might not have been the answer: a report from the early 1980s found that it put high demands on the soil, which would have been difficult for small farms to support in the long term. Also, having the sole focus of the scheme on dairying did enable the scheme to benefit from economies of scale. Nevertheless, the department could have done more in the last years of the scheme when the owners and the Tuhoe Tribal Executive sought to add cropping to the mix of land uses (rather than having land left unproductive, as happened).²⁶⁸ As Professor Murton pointed out, there was a need akin to that in the 1930s for a major injection of Government capital and assistance, but this was far less politically likely when the viability of horticulture came to be seriously explored in the later decades of the twentieth century.²⁶⁹

In summary, both the Crown and the owners had recognised that the original unit farms were too small, but neither was able to come up with a solution that satisfied the other. Ultimately the development schemes could not overcome the problem that Crown acquisitions in the region meant that there was only enough land to support a small number of local families through farming. The development scheme officials cannot be blamed for trying to ensure that all unit farms were economically viable and productive. The last thing that was wanted was a patchwork of productive and unproductive blocks, which was what eventually emerged at Ruatoki. At the same time, given its high social cost, the owners cannot be blamed for their reluctance to accept amalgamation. Incremental amalgamation of unit farms, or alternatively, incorporation, represented the two most workable compromises. Both facilitated the productive use of farmland, although both made redundant the hard work of the Crown and owners to put together family-farm sized blocks via title consolidation between the 1920s and 1940s.

A related complaint, from the Ngati Manawa claimants, is that the failure of the Crown to establish dairy farms on their scheme denied them the opportunity to become farmers. As we have discussed earlier, Ngati Manawa pressed for farm settlement from the 1930s through to the 1950s, without success. What made this circumstance worse, we were told, was that Ngati Manawa returned servicemen were also not eligible to go into the ballot for rehabilitation farms at Galatea.²⁷⁰ Due to insufficient evidence, we are unable to report on the issue of rehabilitation farms. In respect of the Ngati Manawa development scheme, it probably made little economic difference to the owners that no dairy farms were established. The poor performance of the Crown's efforts to farm the area suggests that if dairy farms had been established, the unit occupiers would almost certainly have struggled to make their farms succeed and to pay off their debts, and would then have had to give way to forestry in any case.²⁷¹ In the end, as Alexander put it, the development of pasture had been more of a liability for the owners than an asset.²⁷²

268. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 703-707

269. *Ibid*, pp 704-707

270. Counsel for Ngati Manawa, closing submissions (doc N12), pp 66-73

271. Alexander, 'Land Development Schemes' (doc A74), pp 341-402

272. *Ibid*, p 402

The Waiohau Owners Raise Concerns about Management, 1959

‘WE are raising the question of the management of the scheme. We do not wish to be unkind, but the management is not good, the stock is moving around willy-nilly, and it appears that the money moves around willy-nilly too.’

Iki Pouwhare¹

1. Iki Pouwhare, minutes of impromptu meeting, 18 February 1959 (David Alexander, ‘The Land Development Schemes of the Urewera Inquiry District’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A74), p 230)

Having said this, since the 1970s, some of the area not used by the forestry scheme has been used for dairy farming and running cattle, and the development debt has been paid off.²⁷³

18.5.2.2 Farming and business management

Both the Tuhoe and Ngati Manawa claimants have taken issue with Crown management of the development schemes at a practical level. The Crown’s overarching control of the schemes, particularly with respect to the periods prior to settlement of unit occupiers and after the switch to station farming of the Ruatahuna and Ngati Manawa schemes, meant that overall responsibility for the performance of the schemes rests with the Crown. Nevertheless, as the Crown has argued, due allowance needs to be made for the vagaries of the farming economy. In addition, hindsight might have proven past decisions to be wrong, but – the Crown submitted – the Tribunal must consider whether this was obvious or reasonably so to decision-makers at the time, without the benefit of hindsight. Consequently, fault can only be apportioned to the Crown when it was managing the scheme in a way that it knew was contrary to the interests of the owners, or should have known at the time was contrary to the interests of the owners.²⁷⁴ Counsel for Ngati Manawa accepted this point but noted that many criticisms were made at the time, and there is no need to impose ‘anachronistic criteria and standards of behaviour on Crown officials.’²⁷⁵

The Tuhoe claimants have levelled a general complaint about the Crown’s poor management of the development schemes, as well as criticising some more specific aspects of the schemes. One such aspect was the purchase and delivery of

273. Counsel for Ngati Manawa, closing submissions (doc N12), p 72; Rangiuiira Briggs, brief of evidence, 9 August 2004 (doc F17), pp 5–6

274. Crown counsel, closing submissions (doc N20), topic 32, pp 2–3, 13–16

275. Counsel for Ngati Manawa, closing submissions (doc N12), p 67

2,500 or so East Coast cull sheep for the Ruatahuna scheme in 1931, at a cost to the scheme of £1,393. The royal commission into the administration of the Native Department in 1934 concluded that the amount paid for the sheep was excessive, the arrangements for their delivery (they were driven overland from Wairoa) were unbusinesslike, and the sheep themselves were in poor condition.²⁷⁶ In its response to the Tribunal, the Crown has not contested these conclusions.²⁷⁷ The claimants note, however, that despite the royal commission finding fault with the transaction, no redress was given at the time, or evidently has been given since, to the Ruatahuna owners.²⁷⁸ According to the royal commission's report, better quality sheep could have been supplied for 5 to 6 shillings per head cheaper, on which basis the owners would have been overcharged by about £700.²⁷⁹ At the time, this would have been enough to support four farming families for a year, while the impact of this unwarranted debt was also magnified because it was incurred at the very beginning of the scheme, which meant that owners would have been servicing the interest on this debt for longer.

The claimants have also argued that the Crown failed to take into account the particular circumstances of Ruatahuna when managing the scheme. One of the key grievances in this respect is the removal of labour subsidies, and the subsequent encouragement given to the unemployed or underemployed of Ruatahuna to leave the district to seek work elsewhere. This was highlighted by the directive issued by the deputy registrar of the Native Land Court in 1943 to reduce the number of people employed on the scheme from 45 to 20, although after the visit of the manpower officer the number was raised back up to 30. This particular course of action was contrary to the advice of the development officer in 1942 that because Ruatahuna was an isolated backblocks settlement, and the scheme was a sustenance project, 100 per cent labour subsidies should be retained.²⁸⁰

Since one purpose of development schemes was to make rural Maori communities self-supporting, as far as this was possible, they were not meant to provide local employment beyond what the development work, and the developed farmland in the wake of the scheme, might offer. Certainly the early years of the Ruatahuna scheme were a special case, as at this time there were no other employment opportunities for local people in the region, and thus the scheme was used as a vehicle for the wider obligation on the Crown of ensuring that local communities had the chance to support themselves financially. While the deputy registrar's directive was overly harsh, and thus needed to be tempered by the manpower officer, the general principle applied by the Crown of transferring underemployed

276. Alexander, 'Land Development Schemes' (doc A74), pp 257, 262–263

277. Crown counsel, final statement of response, 3 March 2003 (statement of response 1.3.2), sec 0, pp 146–0146

278. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p186; counsel for Tuawhenua, closing submissions (doc N9), p 225

279. 'Report of the Commission on Native Affairs', 20 October 1934, AJHR, 1934, G-11, p 92 (Alexander, 'Land Development Schemes' (doc A74), p 263)

280. Alexander, 'Land Development Schemes' (doc A74), pp 278–283; Bassett and Kay, 'Ruatahuna' (doc A20), pp 232–235

single workers to other employment in the region during wartime does not seem to have been unreasonable. We do not concur with Alexander's presumption that men employed in the Kaingaroa Forest were not engaged in essential work; even in wartime, economic infrastructure did not need an immediate military purpose to be worth maintaining.²⁸¹

The fact that labour subsidies were not re-introduced after the war – the track work on the Mataatua road excepted – ought not to be held against the development scheme officials either, since by the late 1940s there was work available in the surrounding districts if not at Ruatahuna. It may have been better for the cultural integrity of the community if there had been no need for anyone to leave for employment, but post-war rural outmigration was not unique to Ruatahuna. It would be unfair to lay the blame for limited local employment opportunities on the development scheme, when there were other factors, such as the restrictions on local timber milling, and the Crown's failure to build the promised roads, constraining the local economy.

What does seem questionable, in the circumstances, is the post-war decision – in common with other Te Urewera schemes – not to keep expanding land development and thus continuing its role in supporting the wider community. Ngata had hoped that the schemes would keep growing, constantly bringing in new land (supplied by the Crown if necessary) while also diversifying and intensifying the use of the land. But at Ruatahuna only one-third of the 12,000 acres originally intended for development actually ended up in grass. As early as 1943, the Under-Secretary suggested that, 'Owing to the isolation of the district, and the fact that the farming areas are not likely to be extended, every inducement should be given to the young people to move out.'²⁸² In 1949, the idea of developing land further down the Ruatahuna Valley (beyond Mataatua) was considered but rejected by officials; in any case, the high wool prices that coincided with the start of the Korean War soon suggested the existing farms might be able to support themselves.²⁸³ When this assumption proved incorrect, a decision was made in the 1960s to try to develop some additional land within the scheme (and redevelop land that had gone backwards), but again it was with an aim of making the existing farm self-supporting.²⁸⁴

Dr Gould suggested:

During the later period from the mid-1950s various Maori groups and communities sought either new development schemes or extensions to existing ones. Maori Members of Parliament during the 1950s and 1960s expressed an almost universal refrain that the Government should undertake more Maori land development. These requests were often turned down, either because of the cost of development and the

281. David Alexander, answers to questions in writing from the Crown, 12 May 2004 (doc E5), p 14

282. Under-Secretary, Native Department, to registrar, Native Land Court, Rotorua, 16 February 1943 (Alexander, 'Land Development Schemes' (doc A74), p 280)

283. Alexander, 'Land Development Schemes' (doc A74), pp 290–291

284. Ibid, pp 305–312; Gould, 'Development Schemes' (doc M6), pp 66–68, 96–98, 105–108

sheer difficulty of the task, or that a region such as Waiariki had already received its fair share of the budget which was ratcheted back by the Government consistently since 1961. The Government had also become more exacting in its requirements when deciding which lands would be developed after the emergency situation of the 1930s had ended with generally full employment from the war through to the late 1960s.²⁸⁵

The cost of continuing to bring more marginal land into development appears to have been considered prohibitive after the Second World War. Governments decided to spend their tax revenue in other ways and the early basis for farm development in Te Urewera, as agreed with the communities concerned, increasingly took a back seat. Even with the small Maori land base, it is quite clear that more farm development was possible in Te Urewera, but extending development into new areas ceased to be a Government priority after the 1930s. Requests in the 1940s by Waiohau and Ruatahuna owners to bring more land into their respective schemes were denied.²⁸⁶ In the end, limits on the development assistance provided, as well as the inclusion of some unsuitable land in the schemes, meant that none of the schemes even developed all of the land that they encompassed.

The lack of provision of scheme housing at Ruatahuna has also been questioned by the claimants.²⁸⁷ Certainly, this represented a marked difference between the Ruatahuna scheme and the Ruatoki, Waiohau, and Ngati Manawa schemes. Housing programmes were pursued on the latter three schemes during the 1930s, but only one house was built at Ruatahuna during this period, and that was for the foreman (and later the resident supervisor).²⁸⁸ Admittedly, from the 1940s, unit occupiers began to be able to charge housing assistance against their scheme account, and by 1944 eight out of 13 unit occupiers were reported to be living in good to fair housing.²⁸⁹ If the Crown had been more proactive though, fewer unit occupiers would have been living in substandard housing,²⁹⁰ and they would have had to do so for a shorter period of time. The view of Crown officials was that the scheme was not sufficiently profitable to pay for housing, although individuals were encouraged to utilise their timber to build their own houses.²⁹¹ The lower materials and cartage costs for those unit occupiers who had access to timber should have bolstered their case for scheme housing though, as they would have

285. Gould, 'Development Schemes' (doc M6), p 17

286. Ibid, p 66; Alexander, 'Land Development Schemes' (doc A74), pp 207–215, 290

287. Counsel for Tuawhenua, closing submissions (doc N9), p 268; counsel for Tuawhenua, appendix to closing submissions, no date (doc N9(a)), pp 232, 239

288. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 686; Alexander, 'Land Development Schemes' (doc A74), p 272. Ownership of this house, built on a Crown section, was subsequently transferred to Lands and Survey in 1959: Alexander, 'Land Development Schemes' (doc A74), p 302.

289. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p 390

290. In 1945, Temuera Morrison had reported that bad living conditions for the unit occupiers were 'pretty general', with one unit occupier (with a family of seven) living in a one-room hut: Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), pp 390–391.

291. Alexander, 'Land Development Schemes' (doc A74), p 275

had to take on less debt than was usually required. House construction might also have provided much needed demand for labour at Ruatahuna.

Whether the Crown managed the Ruatahuna farm itself appropriately cannot really be judged from the available evidence. Dr Gould has argued that the Crown did improve the unit occupiers' farming methods when the opportunity arose, such as by introducing the Perendale sheep, which could cope with cold weather, soon after the breed was established in the 1950s.²⁹² Farm investment does seem to have been disorganised at the very start of the Ruatahuna scheme though, while the development objectives were still being sorted out. As seen above, the purchase of East Coast sheep imposed undue costs on the unit occupiers, but further losses were suffered after the sheep arrived, probably because there was little or no attempt to improve the inadequate state of the fencing.²⁹³

The complaint of the Ngati Manawa claimants that the Crown mismanaged the Ngati Manawa scheme is borne out in particular by the conduct of scheme staff in the period (1948–52) in which there was a possibility of land being taken for the proposed Murupara pulp and paper mill. According to an observation in 1952 by the Rotorua-based field supervisor, no topdressing had been carried out for some years on a 900-acre area thought to be the potential mill site.²⁹⁴ By opting not to topdress this area, scheme officials were sacrificing the interests of the owners, since this area would have had reduced stock-carrying capacity, in order to minimise the cost of improvements the Crown would have to compensate the owners for if it bought the land. Ironically, as the land was not bought, the owners had to suffer hampered production from this course of action, while the Crown drew no benefit from it. As Alexander observes, what made this conduct worse was the fact that this intentional running down of the scheme coincided with the period when wool prices were at their height.²⁹⁵ If the Ngati Manawa scheme had been stocked with sheep to its potential during these years, then significant inroads might have been made into scheme debt without sacrificing the condition of the scheme lands; after all, this was the period when 14 out of 16 Ruatahuna unit occupiers cleared their debts and ended up in credit, and Ruatahuna was more remote than the Ngati Manawa lands.

Poor resourcing does not seem to have been restricted just to this period though. A letter from the district officer in 1957, for example, noted that a tally of sheep on the scheme at that time had shown more than 200 ewes were missing. While the Crown was not responsible for some causes of stock losses, such as flooding, dog worrying, and owners taking stock for meat, one of the other causes listed was sheep drowning in drains – one owner cleaning out a single drain had found 17 carcasses in it.²⁹⁶ This was clearly a fencing issue, and in the absence of

292. Gould, 'Development Schemes' (doc M6), pp 53–54, 112

293. Alexander, 'Land Development Schemes' (doc A74), p 264

294. *Ibid*, p 360

295. *Ibid*, p 361

296. *Ibid*, p 367; district officer, Rotorua, to secretary for the Department of Maori Affairs, 15 May 1957 (David Alexander, comp, supporting papers to 'The Land Development Schemes of the Urewera Inquiry District', 7 vols, various dates (doc A74(b)), vol 2, p 334)

any settlement of unit occupiers, this aspect of the scheme was solely down to the Crown. Generally, Crown investment in the scheme only seems to have been adequate in its first years, and then in the years after 1958.²⁹⁷ This said, the latter period was marked by a considerable increase in debt, and further mistakes in management. Problems with overgrazing of pastures, which had drawn criticism in 1953, were still being reported in 1957 and in 1963. Some degree of confusion amongst Maori Affairs staff as to how the lands should best be managed at this time is further indicated by the conflicting statements in 1961 on what the ratio of sheep to cattle should be.²⁹⁸ Finally, the Crown's approach to housing was problematic, because the department built houses on the scheme land which became inconvenient later when it wanted to amalgamate the titles. Nor did it want to maintain these houses.²⁹⁹

An unfortunate flow-on effect from the poor investment by the Crown in the Ngati Manawa scheme in the 1940s and 1950s was that it took the whole of the 1960s before scheme officials conceded that alternatives to pastoral farming needed to be considered when it came to getting the best economic return from the land. Prices for wool were very poor during the second half of the 1960s,³⁰⁰ so that the scheme was building up large debts precisely at the time when there was the least chance of paying them off. Had the Crown made a concerted effort to invest in pastoral farming in earlier decades, then it would have been better placed to assess the owners' suggestions in the early 1960s to convert some of the land to forestry. As events proved, this would have been the better option.

The Crown put to us that Crown-controlled and Crown-managed farm development was 'considered to be the most viable option available at the time, and there is little evidence that had any other model been adopted, physical development would have taken a more economically efficient and faster course'.³⁰¹ The Crown relied on the evidence of Dr Gould, who pointed out that this was also the model for marginal land intended for Pakeha farmers, and concluded that accusations of 'systemic incompetence' could not be sustained against the department's development of 'second class Maori land'.³⁰² Sometimes there were individual failings or poor decisions, but the key factors were the small farm sizes, the marginal quality of the land, and wider economic factors outside the Government's control.³⁰³ In Dr Gould's view, it was a mistake to think that title problems could really be stepped

297. In 1958, the acting Minister for Maori Affairs noted the necessity of increasing capital expenditure on the Ngati Manawa scheme: Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), p 117.

298. Alexander, 'Land Development Schemes' (doc A74), pp 364, 370, 388; Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), pp 133–134.

299. In 1953, for instance, the assistant district officer stated that the houses had been a 'major problem ever since erection', and, as they had been 'knocked about badly', the department would be 'well rid of them as a scheme asset': assistant district officer to secretary for Maori Affairs, 19 December 1953 (Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), p 119).

300. Gould, 'Development Schemes' (doc M6), pp 47, 113.

301. Crown counsel, closing submissions (doc N20), topic 32, p 11.

302. Gould, 'Maori Land Development Schemes' (doc M7), p 424.

303. *Ibid.*, pp 424–429.

over, and so the new popularity of trusts and incorporations later in the century was 'fortuitous for the Department and it tapped into an emerging re-think of the place of Maori land, and economic and social development which eventually flowered in the 1970s and 1980s as Maori demanded a degree of independence from State paternalism'.³⁰⁴

But could Maori collectives have improved the situation earlier? Dr Gould's tentative answer was 'yes'. Quite apart from the incorporation model, which was always available, committees of owners were originally provided for by Ngata and could, in fact, have played a much greater role in representing the owners to the department or in running the schemes themselves. A body corporate could have allocated units and treated unit farmers as waged share-milkers, resolving much of the conflict between occupiers, owners, and the department, although local tensions would always have existed between owners and occupiers. This might also have solved some of the problems involved in amalgamating both underlying titles and unit farms, if, of course, incorporation had been acceptable to the owners.³⁰⁵ Given the evidence, it might not have been.

Nonetheless, it is Dr Gould's contention that, whatever the management structure, physical development would have followed much the same course and faced much the same problems. In part, it was a question of how much influence the owners were really able to exert over the course of development, which we consider in a later section. Here, we note that the claimants are essentially correct in their view that the Ngati Manawa scheme, in particular, was managed in a relatively poor and 'lacklustre' manner that – we are certain – a body of owners would never have permitted. While it may not be entirely fair to compare the Ngati Manawa Incorporation's performance in recent times with that of the department, it does seem to us that the Crown's management of the Ngati Manawa scheme was unaccountably poor.

As Dr Gould noted, the diversion of finance away from Maori land development from the 1950s onwards was a problem at a political, not departmental, level – as secretary for Maori Affairs, Jack Hunn called for the development of 50,000 new acres each year in his infamous 1960 report, but there was simply no budget to do it.³⁰⁶ That was not a problem that an alternative management structure could have solved.

We turn next to an issue closely related to the Maori Affairs Department's management of farming – its management of the schemes' finances, and some specific issues which the claimants have raised on that matter.

18.5.2.3 Financial management

There has been no suggestion of malfeasance or incompetence (from an accounting perspective) in the financial management of the schemes. The evidence suggests that the accounts were audited and that administration was generally

304. Ibid, p 426

305. Ibid, pp 29–30, 428–429

306. Ibid, pp 320–321, 341–342, 427

sound.³⁰⁷ Nonetheless, the claimants have raised some specific concerns about financial management, which we address here: first, the Tuawhenua claimants query the charging of rations against the Ruatahuna scheme at its inception, and also the amount of debt that was loaded onto them at its winding up; and, secondly, the Ngati Manawa claimants have challenged the amount of compensation that they received for the taking of land at Murupara, which was paid not to them directly but to the scheme.³⁰⁸

In the former case, the Crown has accepted the owners' argument that the Waiariki Maori Land Board provided food rations to the people of Ruatahuna in January 1931, and then later charged the cost to the development scheme's general account.³⁰⁹ For a time from April onwards, they were also provided food, clothes, and farm equipment through the scheme, the cost of which was met from their development scheme wages.³¹⁰ While the immediate result for the people of Ruatahuna was the same, the key difference was that in April, they were getting wages, and thus had a means of supporting themselves. Before the scheme started, however, they did not have this means of support, and thus the January food rations should have been regarded as emergency relief, the cost of which was not recoverable.³¹¹ While the total cost of food and stores supplied by the Maori Land Board charged against the scheme has not been spelled out, some idea can be garnered from the cost of supplies provided during January 1931, which amounted to £177.³¹² Like the unnecessary debt incurred when the Ruatahuna sheep were purchased, the effect of the amount the scheme should not have been charged was magnified because it occurred at the inception of the scheme.

The claimants' complaint against the Crown at the termination of the Ruatahuna scheme concerns the amount of debt that the owners had to pay when the scheme was wound up. It may be recalled that the Maori Affairs Department (Iwi Transition Agency) agreed in mid-1990 to write down the debt from its then current level of \$457,710 to \$263,000. This amount of remission was based on the anticipated future profitability of the farm. If it achieved a profit of \$50,000 per year (as was expected), and 90 per cent of this profit was put towards debt repayment, then a debt of \$263,000 could be cleared on a mortgage with an interest rate of 15 per cent over the course of 15 years.³¹³

307. Gould, 'Maori Land Development Schemes' (doc M7), p 68

308. Counsel for Tuawhenua, closing submissions (doc N9), pp 214, 276; counsel for Ngati Manawa, closing submissions (doc N12), p 67

309. Crown counsel, final statement of response (statement of response 1.3.2), sec 0, pp 146–0146; see also Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p 267

310. See counsel for Tuawhenua, closing submissions (doc N9), p 213; Alexander, 'Land Development Schemes' (doc A74), pp 259–260.

311. The Maori Land Board had previously attempted to get the Maori Purposes Fund Board to pay the cost: see Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), pp 267, 269–271.

312. Alexander, 'Land Development Schemes' (doc A74), p 255

313. Rural Lending Submission, no date (David Alexander, comp, supporting papers to 'The Land Development Schemes of the Urewera Inquiry District', 7 vols, various dates (doc A74(c)), vol 3, pp 819–822)

When the owners took over the farm in December 1990, however, the Crown asked them to pay \$413,637. Although the Crown has accepted the premise in the claimants' evidence that this additional money was for improvements carried out between 1962 and 1990,³¹⁴ the extra \$150,637 was almost certainly needed to cover the large gap between expenses (\$267,786) and revenue (\$110,514) in the June to December 1990 period.³¹⁵ The deed of agreement between the Crown and the trustees had required the trust to pay the 'residual debt' (the agreed \$263,000) and any 'further debt' entered into between 1 July 1990 and the settlement date (December 1990).³¹⁶ This extra debt was built up because the Crown persuaded the owners' trustees that it should keep on making improvements right up to the time of the handover; if no handover had occurred, the same improvements might have been made more gradually.

The confusion over whether the \$150,637 was payment for improvements over the course of the revamped scheme (starting in 1962), or even the difference between the cost and the value of the improvements (as the Tuawhenua researchers suggested)³¹⁷ has arisen because of the way the current valuations were presented in the final scheme accounts. The valuations of the various scheme assets were portrayed as liabilities against the owners, and the owners' interests in these assets were portrayed as credits. It is hard to make sense of this manner of presentation, since the unimproved value of the land, for example, is shown as a liability against the owners, but it cannot be a liability against the owners for the simple reason that the owners never sold it.³¹⁸

By insisting that the owners immediately make up the extra \$150,637 in debt accrued between June and December 1990, the Crown was not acting in the initial spirit of the development schemes. Even in writing down the debt to \$263,000 in the middle of the year the Crown was somewhat miserly, for this balance between remission and debt outstanding was determined by what the owners could afford, rather than by the Crown taking responsibility for a share of the scheme debt built up in the years since 1962, during which time it had had the overriding say over scheme management. Even though the debt to be settled in 1990 was new debt, incurred since 1985, when the trustees had some authority, the necessity of going back into debt at that time had its roots in the pre-1985 management of the farm.

314. Alexander, 'Land Development Schemes' (doc A74), p 330; Crown counsel, final statement of response (statement of response 1.3.2), sec 0, pp 160–0160

315. Programme manager, Iwi Transition Agency, to accountant, Ruatahuna Development Scheme, 13 December 1990 (David Alexander, comp, supporting papers to 'The Land Development Schemes of the Urewera Inquiry District', 7 vols, various dates (doc A74(f)), vol 6, pp 1537–1539). As additional notes to the main table explain, the expenses and income relate to the period 1 July 1990 to 14 December 1990.

316. Deed of agreement between the general manager of the Iwi Transition Agency and the 'legal owners' (trustees) of the Ruatahuna Farm, 5 December 1990 (Alexander, supporting papers to 'Land Development Schemes' (doc A74(f)), pp 1530–1536)

317. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p 547

318. Programme manager, Iwi Transition Agency, to accountant, Ruatahuna Development Scheme, 13 December 1990 (Alexander, supporting papers to 'Land Development Schemes' (doc A74(f)), p 1538)

Also, as Heather Bassett and Richard Kay noted, the owners had been told that about half their debt could be remitted³¹⁹ – which would have resulted in them paying a sum of \$228,855. Even if the larger sum of \$263,000 was held to be what the owners could reasonably afford, then \$413,637 must have stretched their financial resources to the limit. Moreover, because the owners had to raise this amount by taking on a commercial mortgage, their continuing ownership of the land was put at risk; this contradicts one of the key planks of Ngata's development schemes, which was that Maori land could be developed without the owners being at risk of losing their land.

Two points, however, should be made in defence of the Crown. First, although the spending in the last six months may have been excessive, relative to the owners' ability to pay, there is nothing in the evidence to suggest that this investment in improvements was wasteful or unnecessary. Secondly, the owners' trustees had accepted the necessity of making the improvements and had agreed to the work being done.

A financial matter raised by the Ngati Manawa claimants is that they were poorly compensated by the Crown when it took 136 acres from several Karatia blocks in order to establish the Murupara railhead and timber logyard. The claimants have argued that this needs to be considered in relation to the Ngati Manawa Development Scheme, since the amount paid was used to reduce the level of scheme debt.³²⁰ In a memorandum of 1 July 2003, the presiding officers of the Te Urewera and Central North Island inquiries jointly stated that all issues with regard to this land, with the exception of the development scheme, were to be dealt with in the Central North Island inquiry, including the public works taking.³²¹ We do not accept claimant counsel's submission that, because the compensation was later used to pay off development scheme debt, the question of its adequacy should therefore be dealt with in our inquiry.

18.5.2.4 Remission of debt at the wind-up of the schemes

In the previous section, we considered the Tuawhenua complaints about writing off debt at the wind-up of the Ruatahuna scheme, because that claim included questions about financial management of the scheme, such that the debt jumped from \$263,000 (after a partial write-off) to \$413,637 before the handover. In this section, we consider the general issue of remission of debt at the handover of the four Te Urewera schemes.

The historical evidence suggests that the remission of debt was an issue for the Maori owners throughout the history of the schemes. The Tuawhenua researchers, for example, outlined a number of occasions across several decades in which the Ruatahuna community asked the department or the Minister for reduction or

319. Bassett and Kay, 'Ruatahuna' (doc A20), p 267

320. Counsel for Ngati Manawa, closing submissions (doc N12), pp 66–67

321. Presiding officers, memorandum, 1 July 2003 (paper 2.321), p 4

remission of debt.³²² Dr Gould's evidence indicated that this was an issue for Maori nationally, and that there were initiatives to gain mass reduction or remission of debt for development schemes.³²³ The history of Te Urewera development schemes would have been very different if these various requests had been granted. Crown counsel put to us, however, that the Crown neither intended nor was required to make free grants for farm development. On occasion, we were told, a 'substantial' write-down or a write-off of debt was made if it was 'warranted'.³²⁴

What principle did the Crown apply in deciding whether or not to agree to a reduction or remission of debt? According to Dr Gould, the first statutory provision for remitting debt came in 1960. On the recommendation of a Board of Maori Affairs subcommittee, the Maori Affairs Act 1953 was amended to allow the board to postpone or remit interest payments if the money spent on improvements exceeded their value, or if any 'person owing money to the Board . . . establishes a case of hardship to the satisfaction of the Board'.³²⁵ Nonetheless, the department's preference in the 1960s was to take over struggling schemes and farm them directly as stations until they were out of debt, rather than writing off any debt.³²⁶

In the late 1960s and early 1970s, in response to difficult conditions and pressure from Maori, the Government considered amending the Act again to provide for greater remission of interest and also for remitting repayment of the principal.³²⁷ In the end, however, the Minister decided in 1970 that this was 'not on'³²⁸ for a 'single group of farmers', and that the present power to suspend repayments or remit interest (only) was adequate.³²⁹ This was the point at which a contrary decision by the Minister could have provided relief to Ngati Manawa and some of the Ruatoki and Waiohau farmers whose lands were about to exit their respective schemes.

Dr Gould suggested that the Minister could never have agreed to the New Zealand Maori Council's 50 per cent write-off proposal because it was 'based on a racial determination of policy application and of course the Department could not consider such a move', and also because it would have destroyed 'the security credibility of Maori land and enterprises in the eyes of commercial financial institutions'.³³⁰ We find these arguments unconvincing. The Minister referred to the development schemes as a 'single group of farmers'; all kinds of targeted subsidies were created in the 1970s, and indeed had been possible earlier (as when debt was remitted for the soldier rehabilitation schemes). Also, the Labour Government did

322. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), pp 319, 322, 424–428, 547

323. Gould, 'Maori Land Development Schemes' (doc M7), pp 357–360, 367–379

324. Crown counsel, closing submissions (doc N20), topic 32, pp 11–12

325. Maori Affairs Act 1953, ss 383b; Maori Purposes Act 1960, s 13; Gould, 'Maori Land Development Schemes' (doc M7), pp 323–324, 357

326. Gould, 'Maori Land Development Schemes' (doc M7), p 68

327. *Ibid*, pp 357–358

328. Minister of Maori Affairs to G Latimer, no date [circa June–July 1970] (Gould, 'Maori Land Development Schemes' (doc M7), p 358)

329. Gould, 'Maori Land Development Schemes' (doc M7), p 358

330. Gould, 'Development Schemes' (doc M6), p 23

write off a large amount of debt for Maori development schemes in the 1980s, and commercial lenders were not put off as a result (as the Ruatahuna case shows). The real barrier to private lending, which had inspired the schemes in the first place, was the state of Maori land titles.

The issue of debt remission remained a live one after 1970 and the Board of Maori Affairs decided in 1974 that the circumstances of schemes were so different nationwide that 'rigid' guidelines about how far to go in terms of debt relief were impossible.³³¹ The furthest the Government was willing to go before the election of the third Labour Government at the end of 1972 was to change the 'hardship' criterion to one of satisfying the board that 'the affording of relief would be reasonable and equitable.'³³² Nonetheless, the new Labour Government had identified 'debilitating debt' as a key problem for development schemes.³³³ The Minister of Maori Affairs, Matiu Rata, wanted the 'newly minted Maori Land Advisory Committees to review the levels of debt pertaining to schemes in their districts and recommend reductions or write-offs in appropriate circumstances.'³³⁴ There is no suggestion in the evidence that Labour's new policy was impossible because it was racially motivated. Rata also wanted a speedier return of schemes to the control of their owners, which required 'where necessary favourable consideration to the reduction of or writing off of crippling indebtedness.'³³⁵ Thus, there were additional factors in play by the mid-1970s: not merely hardship in meeting interest repayments (1960) but now faster handover of schemes and substantive relief from 'crippling' or 'debilitating' debts could be valid reasons for reducing or writing off some of the principal as well as the interest.

According to Dr Gould, Labour's election campaign may have created an impression that there would be a general write-off of debt.³³⁶ This was not in fact the result. In the event, it was not until the election of the fourth Labour Government in 1984 that, along with the decision to withdraw from State farming in the late 1980s and to devolve Maori matters to iwi, there was a decision that this would need to be accompanied by substantial write-off of debts for both Maori land development schemes and the Maori Affairs rural lending portfolio.³³⁷ In 1988, the Government decided to remit any debt in excess of what the farms could pay at 90 per cent of net annual profits for a 10-year period, with all farms to be handed back by 1990.³³⁸ In fact, most debt remission for Maori development schemes did take place between 1988 and 1991.³³⁹ Thus, while this was too late for

331. Board of Maori Affairs, 'Concessions Granted to Development Schemes', 9 May 1974 (Gould, 'Maori Land Development Schemes' (doc M7), pp 376–377)

332. Maori Purposes Act 1972, s 9

333. Gould, 'Maori Land Development Schemes' (doc M7), p 376

334. *Ibid*, p 377

335. Minister of Maori Affairs to secretary for Maori Affairs, 23 October 1973 (Gould, 'Maori Land Development Schemes' (doc M7), p 378)

336. Gould, 'Maori Land Development Schemes' (doc M7), p 383

337. *Ibid*, p 21

338. *Ibid*, pp 21, 419

339. *Ibid*, pp 15–21

the majority of Te Urewera schemes, there was still a significant opportunity for Ruatahuna.

Within this changing policy framework, Te Urewera schemes were handed back at different times. In 1971, just after the Minister had rejected the New Zealand Maori Council's proposal for remission of 50 per cent of development scheme debts, the Ruatoki scheme was wound up and all remaining lands were released. Some blocks had been released much earlier as they came into credit, and new investment had ceased back in 1965. At that time, two-thirds of the debt (£19,266) had been generated by the recent development of the four Owhakatoro units. A further £12,817 was owed by the other Ruatoki units.³⁴⁰ In 1962, the department had decided to create four separate loan accounts for the Owhakatoro units, and to write off the remaining debt. In 1966, the board approved this proposal and a sum of £12,817 was written off.³⁴¹ The Owhakatoro unit occupiers had to repay their full debts as individual loans after the wind-up of the scheme.

For Waiohau, the Crown began to wind the scheme up in 1967. From 1971, farms began to be formally released. Those that were no longer in debt were released immediately in that year, but although the general scheme account was in credit to the sum of \$13,334, some unit occupiers still owed a collective debt of \$113,640. None of this debt was written off.³⁴²

The winding up of the Ngati Manawa development scheme saw a battle between the owners on the one hand, and the department, the board, and the Minister on the other, as to whether outstanding debt would or could be written off. This battle began in 1958, when the owners first considered ending the scheme, and asked the Minister to write off all remaining debts. The Minister refused to do so and the outcome instead was fresh Government investment and attempts to farm the scheme out of debt, as we have described earlier. The result was unsuccessful and the debt increased rapidly in the 1960s. In 1971, the owners agreed to switch to forestry, but they wanted the scheme wound up and – again – the outstanding debt cancelled. As we saw above, calls for debt remission were coming from Maori nationally at this time but the Minister stood firm against them. The board still had power to remit interest if a case of 'hardship' could be proven, or if the debt exceeded the value of the improvements, but there was still positive equity in the Ngati Manawa scheme and the board was unconvinced (presumably) that their situation justified exercise of its 'hardship' discretion.³⁴³

A 'little grace' was nonetheless given to the owners in 1972, whereby the scheme debt (which was to be taken over by the Ngati Manawa Incorporation) would not

340. K Morrill, assistant district officer, to secretary for Maori Affairs, 3 July 1965 (Alexander, supporting papers to 'Land Development Schemes' (doc A74(e)), p 1218)

341. Alexander, 'Land Development Schemes' (doc A74), pp 159–162, 176–177; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 637–638; Oliver, 'Ruatoki' (doc A6), pp 155–156; 'Report of the Department of Maori Affairs, the Maori Trustee Office and the Board of Maori Affairs for the year ended 31 March 1967', AJHR, 1967, G-9, p 36 (Alexander, supporting papers to 'Land Development Schemes' (doc A74(g)), p 1952)

342. Rose, 'A People Dispossessed' (doc A119), pp 226–227

343. Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), pp 114–118, 166–169

attract interest for two years.³⁴⁴ The final debt, after the scheme had been wound up and the livestock sold in 1972, amounted to \$122,471.³⁴⁵ A few months later, the Labour Government came to power on a platform of remitting ‘crippling’ or ‘debilitating’ debt. Matiu Rata’s emphasis on swift return of schemes to their owners (and on remitting debt to facilitate this), as well as this new Labour policy, came just too late for Ngati Manawa.

The only scheme in a position to benefit from the fourth Labour Government’s desire to get out of State farming in the 1980s, and to remit debt as one of the costs of doing so, was the Ruatahuna farm, still heavily in debt in 1990. We have discussed this case in some detail in the previous section. In April 1990, the farm’s trustees asked the Crown to write off the entire debt.³⁴⁶ In the claimants’ view, this was not unreasonable given the long history of the scheme and the degree of Crown responsibility for the accumulation of debt since 1962.³⁴⁷ Dr Gould commented:

While some debt was written off in accordance with the policy developed in 1987, the value of the owners’ equity and the projected profits from the operation meant that calls for total debt write-off fell outside of the policy guidelines and agreement was reached that some would be written off with the owners funding the balance.³⁴⁸

It seems to us, however, that the Government did not follow its ‘90 per cent rule’ for ‘how much debt the schemes could reasonably be expected to carry’;³⁴⁹ after calculating this at \$263,000, the total went back up to virtually the original amount (see above). Thus, we cannot agree that the sum negotiated with the Ruatahuna trustees did fall within the parameters of Government policy at the time. We note, however, that none of the technical witnesses, including the Tuawhenua researchers, Mr Alexander, Dr Gould, Dr Bassett and Mr Kay, and Professor Murton, could provide us with any information about what actually happened in the 1990 negotiations. Nonetheless, the write-off of \$194,710 was still a substantial sum.³⁵⁰

18.5.2.5 *Supervision and training*

Another common theme in the claimants’ complaints is the failure of the Crown to provide sufficient supervision and training to unit occupiers. This was vital if there was to be any hope of establishing self-supporting farms on Te Urewera schemes, given that most owners had little or no experience of pastoral farming before their establishment. By way of example, the Board of Native Affairs was

344. Board of Maori Affairs, ‘Ngatimanawa Development Scheme’, 9 March 1972 (Bassett and Kay, ‘Ngati Manawa and the Crown’ (doc C13), p169)

345. Bassett and Kay, ‘Ngati Manawa and the Crown’ (doc C13), p170

346. Tuawhenua Research Team, ‘Te Manawa o te Ika, Part Two’ (doc D2), p547

347. Counsel for Tuawhenua, closing submissions (doc N9), pp267–269, 276

348. Gould, ‘Development Schemes’ (doc M6), p118

349. Ibid, p115; Gould, ‘Maori Land Development Schemes’ (doc M7), pp21, 421–422

350. Alexander, ‘Land Development Schemes’ (doc A74), p330; Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), p594

told in 1936 that ‘with strict supervision’ the Waiohau A farms ‘should make [a] reasonable success.’³⁵¹ After leasing was introduced on the Ruatoki, Ruatahuna, and Waiohau schemes in the 1950s, the Crown had an added obligation to provide adequate supervision, since the formal leases were between the Board of Maori Affairs (acting as agent for the owners) and the unit occupier, rather than between the owners and the unit occupiers; consequently, the primary responsibility to enforce the terms of the leases lay with the Crown.³⁵²

Despite its importance, the supervision that was actually provided to the Urewera schemes was often deficient. This was in large part because of the Crown’s desire to keep staffing levels to a minimum to save on scheme costs. In the case of the Ngati Manawa scheme, Mate Wharehuia complained about ‘half-time superintendence’ as early as 1938,³⁵³ but the Native Land Court registrar reported to the Native Department that further expenditure on supervision was not warranted until scheme development was more advanced.³⁵⁴ When similar complaints were made by owners at meetings with the Under-Secretary and Minister of Maori Affairs in 1949 and 1950 respectively, it resulted only in responsibility for supervision being shifted from an assistant supervisor in Rotorua (who visited only monthly) to the supervisor at Ruatahuna.³⁵⁵ It was not until the manager took over the single farm station after 1959, therefore, that the overall control of the scheme lands rested with somebody local.

The Waiohau scheme also had to make do with supervision from afar, with the local foreman taking direction from the supervisor resident on the Ruatoki scheme.³⁵⁶ The effects of this at-a-distance oversight of the Waiohau c unit farms are revealed in the 1958 comment by the assistant controller for Maori land settlement that the ‘management and supervision’ were ‘both rather indifferent.’³⁵⁷ The Crown’s immediate solution to this difficulty was to propose a resident farm manager, but by this time the Waiohau owners had decided, given that their land was already burdened by considerable debts, that they did not want to add the cost of a salary and new house for a manager.³⁵⁸ Until 1935, Waiohau had relied on the Ruatoki foreman, Fred Biddle. Interestingly, the Whakatane property supervisor recommended that Biddle should continue visiting Waiohau after Iki Pouwhare’s appointment, but did not think he should get any wage from the Waiohau scheme.³⁵⁹

351. Board of Native Affairs, ‘Waiohau DS – Report & Estimates’, 18 June 1936 (Alexander, ‘Land Development Schemes’ (doc A74), p198)

352. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), p680; Alexander, ‘Land Development Schemes’ (doc A74), p313

353. Mate Wharehuia to F Langstone, acting Minister of Native Affairs, 6 June 1938 (Bassett and Kay, ‘Ngati Manawa and the Crown’ (doc C13), p32)

354. Alexander, ‘Land Development Schemes’ (doc A74), p344

355. *Ibid.*, pp 357–358

356. *Ibid.*, p209

357. Assistant controller, Maori Land Settlement Division, file note, 4 June 1958 (Alexander, ‘Land Development Schemes’ (doc A74), p228)

358. Alexander, ‘Land Development Schemes’ (doc A74), pp 229–231

359. *Ibid.*, pp 187–189

Despite its initial status as a Maori land development showpiece, the Ruatoki scheme also had its technical supervision problems. In 1952, for instance, the director of Maori land settlement acknowledged that supervision at Ruatoki 'had not been good', owing in part to the assistant field supervisor at Ruatoki being overworked.³⁶⁰ Supervision was also reduced during the period of relaxed control in the 1950s, with the inspecting field supervisor commenting in 1957 that supervision was 'limited at the moment to materials provided'.³⁶¹ It appears that improved supervision could still make a difference though, as in 1963 an increase in productivity was ascribed in part to 'good supervision efforts'.³⁶² Even so, Frank Vercoe, who was a unit farmer in this period, recalled that supervisors' 'practical guidance and advice' would have been welcome but was only in fact 'real basic'.³⁶³

The Ruatahuna scheme, meanwhile, seems to have had the best supervision record, though the removal of the local supervisor in the early 1950s – after which time it became dependent on occasional visits from Rotorua-based staff – seems to have allowed a slip in farming standards. As the Rotorua field supervisor observed in 1956, following the opening of the timber mill at Ruatahuna, 'some of the units are already working there and neglecting their farms',³⁶⁴ while in 1960, the chief field supervisor remarked that reports from the responsible supervisor led him to believe that farming generally at Ruatahuna was 'anything but efficient'. The 'occupiers whose licences are soon to expire are not paying very much attention to the maintenance of the improvements'.³⁶⁵ It should be noted that the unit occupiers had in 1954 requested the restoration of a resident manager or supervisor who could advise them and take charge of scheme property, such as the woolshed, which had recently been broken into.³⁶⁶ The Crown failed to agree to this request. Four years later, an aggrieved Pakitu Wharekiri, who had made the request on behalf of the unit occupiers in 1954, observed that:

Today we are seeing the immediate ill-effects of the policy of relaxed control. This policy has caused a set back to farming in Ruatahuna. Because of this policy it is now difficult on my own farm to find skilled labour. This has caused a decline in production. When the Department was running the whole scheme production was good but now it is slipping.³⁶⁷

360. Director of Maori land settlement to Under-Secretary for Maori Affairs, 15 February 1952 (Alexander, 'Land Development Schemes' (doc A74), p145)

361. Inspecting field supervisor, 'Notes on Ruatoki', no date [circa mid-1957] (Alexander, 'Land Development Schemes' (doc A74), p147)

362. Inspecting field supervisor to field director, 5 June 1963 (Alexander, 'Land Development Schemes' (doc A74), p169)

363. Vercoe, brief of evidence (doc J37), p 2

364. Field supervisor, Rotorua, to administration officer, Rotorua, 22 November 1956 (Alexander, 'Land Development Schemes' (doc A74), p300)

365. Chief field supervisor to assistant secretary for Maori Affairs, 17 August 1960 (Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p 328)

366. Alexander, 'Land Development Schemes' (doc A74), p 299

367. Minutes of meeting, 17 July 1958 (Gould, 'Development Schemes' (doc M6), p95)

Thus, the historical evidence suggests a degree of consensus among unit occupiers, owners, and the department that technical supervision was vital for developing and maintaining a high standard of farming. It is not the case, of course, that better provision of advice and guidance on the ground could have fixed all of the problems identified. As we noted earlier, small farm sizes sometimes forced unit farmers to neglect their farms because they had to seek outside work; there was not much that tighter supervision could have done to prevent it. But where technical problems arose, hands-on advice was essential.

With respect to the Crown's provision of training, which is a related issue, it must be realised that when the development schemes commenced in the 1930s, it was common for farmers not to have had any formal training in agriculture. If they had been given some training, it would most likely have been in an agricultural high school. Few farmers, as Dr Gould observed, ever attended an agricultural college, or even instruction courses at one of the Department of Agriculture's farms.³⁶⁸ It is evident that children of owners on some of the Urewera development schemes were getting high school level training. In 1951, while making a case for development of the Matahina c block, Henry Bird told a Crown representative at Murupara that 'we have many lads at Secondary School who are studying agriculture.'³⁶⁹ Bird does not specify where they were studying, although it may have been at the farm school for Maori youths established by the Presbyterian Church at Te Whaiti in 1937. At least one of the Ruatahuna unit occupiers sent her son there.³⁷⁰ In 1947, Prime Minister (and Native Minister) Peter Fraser described this school as 'doing a work of national importance.'³⁷¹

After the Second World War, 277 Maori returned servicemen were given agricultural training (which was a higher proportion than the number of Pakeha servicemen getting training), but it is unclear how many of these would have come from Te Urewera scheme lands.³⁷² In the latter years of Maori land development schemes, the Crown would also establish instructional farms on some of the larger schemes, such as at Pouakani.³⁷³ Given the low rate of participation in formalised training by farmers in general, and the existence of the farm school at Te Whaiti, Crown officers probably thought that no additional provision of formal training was specifically required for future Te Urewera farmers. In his evidence for the Crown, Dr Gould concluded: 'My impression, and one I argued in CNI, is that the Department did not do enough to train prospective Maori farmers after

368. Gould, 'Development Schemes' (doc M6), pp 24–25

369. Minutes of meeting held at Murupara to discuss Crown offer to purchase Matahina c South and c1B blocks, 26 July 1951 (Rose, 'A People Dispossessed' (doc A119), p 228)

370. Gould, 'Development Schemes' (doc M6), p 25; John Hutton and Klaus Neumann, 'Ngati Whare and the Crown, 1880–1999' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2001) (doc A28), p 474

371. Fraser to Minister of Education, 30 December 1947 (Hutton and Neumann, 'Ngati Whare and the Crown, 1880–1999' (doc A28), p 477)

372. Gould, 'Development Schemes' (doc M6), p 26

373. Ibid

introducing land development schemes. Instead it expected that close supervision by its staff would provide this.³⁷⁴

We agree that local, technical supervision was the only viable alternative at the time. Crown officials were aware of the ‘development “gap”’ (as Murton termed it)³⁷⁵ created by the owners’ lack of farming background and the past lack of capital for farm investment. To this end, on-the-farm instruction was expected to be provided by the scheme supervisors.³⁷⁶ As the Under-Secretary for Maori Affairs put it in 1950, at a time when relaxed control was starting to be introduced, the department’s job was to ‘to train the [Maori] settlers to manage their own affairs and to purchase their own supplies’.³⁷⁷

From the reports of Crown officials, however, it is evident that the Crown failed to provide the necessary training for current and would-be unit occupiers. At Ruatoki, the need for some level of specialist instruction first became apparent in 1934, after the Opouriao Dairy Company complained about the poor quality of the milk they were receiving.³⁷⁸ The appointment of a dairy instructor to the scheme in 1935 evidently helped rectify matters, although it is worth noting that prior to his appointment Crown officials had unsuccessfully asked the dairy company to meet the cost of his salary.³⁷⁹ In 1942, however, James Merritt, who replaced the first dairy instructor in 1937, took over as field supervisor for the scheme, and no new instructor seems to have been appointed.³⁸⁰ By 1957, the inspecting field supervisor (whose comment on Ruatoki supervision has been referred to above) observed that there was ‘practically no work of actual instruction’ being carried out at Ruatoki.³⁸¹ In the case of the Waiohau scheme, training in stock handling was obviously deficient, as reports by Maori Affairs staff in both 1947 and 1958 complained that there was no one on the scheme proficient at moving livestock – in the earlier year, a farm manager from Putauaki had to visit regularly to manage the stock.³⁸² Such training in stock work was eventually begun at Ruatahuna in 1939 but it is not clear how long it continued. In 1961, PD Platt, the assistant

374. Gould, ‘Development Schemes’ (doc M6), p 26. Dr Gould’s reference to CNI was to his generic overview report on development schemes, which was prepared for the central North Island inquiry, and which was filed on our record of inquiry as document M7.

375. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), p 973; Gould, ‘Development Schemes’ (doc M6), p 24

376. Gould, ‘Development Schemes’ (doc M6), p 26

377. Under-Secretary for Maori Affairs to Minister of Maori Affairs, 12 October 1950 (Alexander, ‘Land Development Schemes’ (doc A74), p 124)

378. Alexander, ‘Land Development Schemes’ (doc A74), p 74

379. *Ibid*, p 79

380. *Ibid*, pp 91–92; A McIntyre, development officer, Rotorua, report, 17 June 1942 (David Alexander, comp, supporting papers to ‘The Land Development Schemes of the Urewera Inquiry District’, 7 vols, various dates (doc A74(d)), vol 4, p 959)

381. Inspecting field supervisor, ‘Notes on Ruatoki’, no date [circa mid-1957] (Alexander, ‘Land Development Schemes’ (doc A74), p 147)

382. Alexander, ‘Land Development Schemes’ (doc A74), pp 216, 229

field officer, reported that one of the reasons for the reversion of farmland at Ruatahuna was the lack of unit occupier knowledge of stock and pasture management methods.³⁸³

Even though settlement of unit occupiers never occurred during the Ngati Manawa scheme, a lack of training opportunities affected it as well. When Ngati Manawa owners were asked to nominate prospective unit occupiers in 1952, the district officer argued that there was no urgency for settlement to occur, as most of them would 'require further training or experience' before the Board of Maori Affairs could confidently make development funds available.³⁸⁴ This comment suggests that whatever training Ngati Manawa owners in general could access, it was not sufficient for them to take up farming immediately on their own without assistance.

Given the apparent influence of supervision and training on production levels, there seems little doubt that the Crown's indifferent record in this regard adversely affected the earnings of the four Urewera development schemes, at least before the Ngati Manawa and Ruatahuna schemes switched to a station format. Whether it always adversely affected debt levels carried by the unit occupiers (and ultimately by the owners) is more difficult to judge, since the Waiohau scheme (and perhaps the Ngati Manawa scheme) may have been too small for the benefits to outweigh the additional costs. Certainly, this is what the Waiohau c owners thought in 1959, when they opposed paying for and housing a resident manager.³⁸⁵

Overall, it seems unlikely that better supervision and training would have affected the ultimate outcomes of the four schemes. No amount of training or supervision could overcome the problem of lack of land, and in consequence small farms, or – in the Ngati Manawa case – poor quality farmland. On the Waiohau scheme, for example, even the two best performing unit occupiers in 1957, Simon Ripaki and Walter Savage, were only making a modest living from their farms.³⁸⁶ In the same era, all of the Ruatahuna units were judged uneconomic, with no margin for capital improvements. The smaller ones were 'going back so rapidly now with no money for improvements,' while occupiers either survived on pensions or could only afford to be part-time farmers.³⁸⁷ In essence, while officials and owners both observed that lack of supervision and training hampered the productivity of the schemes at various times, the more serious problems lay elsewhere.

383. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p 313; Gould, 'Development Schemes' (doc M6), p 101; Bassett and Kay, 'Ruatahuna' (doc A20), p 245

384. District officer to secretary, Ngati Manawa Tribal Committee, 16 July 1952 (Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), p 75)

385. Alexander, 'Land Development Schemes' (doc A74), pp 229–239

386. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 648–651

387. Field supervisor, Rotorua, to district field supervisor, 8 February 1960 (Alexander, 'Land Development Schemes' (doc A74), pp 305–306)

18.5.2.6 *Administering the schemes 'in general accord with' the owners' 'wishes and aspirations'*

We begin our discussion of owner-input to development schemes with the submissions of Ngati Manawa, which differed from those of Tuhoe and Ngati Haka Patuheuheu. In Ngati Manawa's view, problems with development schemes were not the result of a lack of consultation. Ngati Manawa had consented to the establishment of a development scheme. The problems that followed 'seem not so much to have been consultative but rather of poor performance'.³⁸⁸ In essence, the claimants accepted that they had had input, and that their scheme 'promoted the interests of the owners', but suggested that its results were 'unspectacular' due to 30 years of poor departmental management.³⁸⁹

There was, however, one important exception to this submission. Ngati Manawa had also wanted a consolidation scheme to precede the establishment of development scheme farms, and this they were denied. In the claimants' view, the Crown deliberately denied them a consolidation scheme so as to protect its own forestry interests.³⁹⁰ As this issue did not affect the development scheme (which 'literally stepped over' underlying titles),³⁹¹ we address it in chapter 19.

Unlike Ngati Manawa, Tuhoe and Ngati Haka Patuheuheu did have a problem with the degree to which they were involved in decision-making about the development schemes on their land. Also, counsel for Wai 36 Tuhoe suggested that the degree of control and effective ownership rights taken by the Crown put it in the role of a trustee; a 'prudent trustee', we were told, gains consent for major decisions.³⁹² We turn now to consider the degree of owner input to decision-making in the Ruatoki and Waiohau schemes, which essentially came to an end in the 1960s, and then the Ruatahuna scheme, which had a second phase of development through to 1990.

18.5.2.6.1 A PRELIMINARY ISSUE: DID THE CROWN ASSUME THE DUTIES AND OBLIGATIONS OF A TRUSTEE?

As noted earlier, the Wai 36 Tuhoe claimants suggested that the Crown had taken so many ownership rights away from the landowners, and had assumed such full decision-making powers over their lands, that it had in effect assumed the duties and obligations of an agent and trustee for the owners.³⁹³ Ngati Haka Patuheuheu agreed with this position, submitting that the Crown assumed so much power over the owners' land as to 'create a relationship analogous to a fiduciary duty'.³⁹⁴ The Crown neither accepted nor denied this suggestion in its closing submissions.

388. Counsel for Ngati Manawa, closing submissions (doc N12), p 71

389. Ibid

390. Counsel for Ngati Manawa, closing submissions (doc N12), pp 68–70

391. Ngata, 'Maori Land Settlement', p 144

392. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 185–188

393. Ibid, p 185

394. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 127

As we see it, we are not required to determine this point. The Treaty already creates a relationship akin to a fiduciary duty on the part of the Crown, as has long been established by the courts and this Tribunal. The Crown's duty of active protection, in conjunction with its obligation to protect and respect the claimants' tino rangatiratanga, is the standard that we apply. Such standards, in our view, are encompassed (in the language of the day) by Ngata's statement in 1940 that the Board of Maori Affairs had an overriding obligation to administer the schemes in the interests of the owners and according to their wishes and aspirations.³⁹⁵

18.5.2.6.2 THE RUATOKI AND WAIIOHAU DEVELOPMENT SCHEMES

As has been described above (see the Key Facts), the Crown was given extremely wide-ranging powers by the various laws facilitating Maori land development. To briefly recap, the rights of owners to alienate their lands were effectively suspended for the duration of the scheme, and the Native Minister, acting through the scheme staff, was authorised to carry out farm works, buy and sell livestock and farm produce, erect buildings, and employ farm labour, and to levy all the costs for these operations against the earnings of the scheme lands and their owners. In the Crown's submission, these wide powers were justified in order to protect the investment of public money in the absence of the usual securities for a lender, such as taking ownership of land and assets if the borrowers defaulted.³⁹⁶

At the time of the establishment of the Ruatoki and Waiohau Development Schemes, a limited voice was preserved for the owners through the advisory committees appointed under the terms of section 23 of the Native Land Amendment and Native Land Claims Adjustment Act 1929. These committees could conduct inquiries into (and make recommendations on) matters affecting the schemes at the Minister's behest. The potential use and role of such committees is shown by the role they played in representing owners and facilitating community input to the Ruatoki–Waiohau consolidation scheme (see chapter 19). This suggests that the advisory committees might have gone on to develop an extensive – though largely informal – role in the management of the development schemes.

This potential, as well as the formal, restricted role that advisory committees might have played, was foreclosed with the passage of the Native Land Amendment Act 1936. The Crown accepts that 'following Ngata's resignation in 1934 there were no statutory mechanisms available for owners to have their concerns addressed until the 1950s'.³⁹⁷ Under the changes to the Maori land development provisions, the powers given to advisory committees were removed entirely.³⁹⁸ Not surprisingly, it seems that both Te Komiti Ahuwhenua o Tuhoe at Ruatoki and its counterpart at Waiohau ceased to function after this time. Certainly, Te Komiti Ahuwhenua o Tuhoe was not employed when there were

395. Ngata, 'Maori Land Settlement', p147

396. Crown counsel, closing submissions (doc N20), topic 32, pp2, 9–11

397. *Ibid*, p9

398. Campbell, 'Land Alienation, Consolidation and Development' (doc A55), p115

complaints about development scheme operations at Ruatoki in 1936 and 1937; these were instead investigated by a judicial inquiry headed by Judge Carr (the former Urewera Consolidation commissioner).³⁹⁹ It is worth noting that one of the unfortunate consequences of doing away with the advisory committees was that it tended to turn complaints about the scheme into personalised confrontations between the owner(s) concerned and the scheme supervisor and foreman, which made them not only difficult to evaluate, but also difficult to resolve.

The scheme landowners at Ruatoki and Waiohau nevertheless continued to have considerable say over the arrangement of land titles and unit farms, and the identity of the unit occupiers who were placed upon their land. Whenever scheme officials wanted to increase farm sizes by amalgamating titles, meetings of affected owners were called, as occurred in the case of the Owhakatoro unit farms in 1953 and 1954, and with the Waiohau unit farms in 1949, 1960, and 1963. Crown proposals were not always accepted. The Waiohau owners, for example, rejected outright Crown plans for title amalgamation in 1960.⁴⁰⁰ If any title changes were to be made, these also needed to be confirmed through Maori Land Court hearings, such as those held in 1950 and 1951 in the wake of the Crown's meeting with owners in 1949; these hearings provided a further opportunity for affected owners to express their views.⁴⁰¹

Owners supplied the names of individuals needing work when land was being developed into new unit farms, and they also nominated the unit occupiers, who took over these farms once they were ready for settlement (which could happen immediately at Ruatoki, where farming was under way before the scheme started). These unit occupiers were almost always co-owners themselves, or failing that, members of the owners' family.⁴⁰² This right of nomination was not unrestricted though, and in 1959 the Crown used its powers (first granted by section 16 of the Native Land Amendment Act 1936)⁴⁰³ to challenge the suitability of one Waiohau nominee, Potaua Anderson. Officials were concerned that Mr Anderson may have been too old to take up farming, although he was subsequently approved as a unit occupier in 1965.⁴⁰⁴

Leases were another aspect of the schemes which owners could express their views upon before the Crown put them into effect. Provision had first been made for the introduction of formalised leases in section 24 of the Native Land Amendment Act 1936, which allowed the Board of Native Affairs (acting as agent for the owners) to enter into a lease with the unit occupier. Until the passage of the Maori Affairs Act 1953, these leases could then be scrutinised by the Maori Land Court, which ensured that owners' views were taken into account. It was not until 1949, however, that the Board of Maori Affairs adopted a nationwide policy that

399. Alexander, 'Land Development Schemes' (doc A74), pp 83–84

400. *Ibid.*, pp 130–132, 218–219, 236, 242–243

401. *Ibid.*, pp 220–221

402. *Ibid.*, p 10; Campbell, 'Land Alienation, Consolidation and Development' (doc A55), pp 119, 126

403. Gould, 'Maori Land Development Schemes' (doc M7), p 189

404. Alexander, 'Land Development Schemes' (doc A74), pp 232, 243–244

unit occupiers ought to have secure tenure and compensation for improvements.⁴⁰⁵ The first proposals regarding leasing at Ruatoki, which concerned house sites, were put to owners in 1948, although by 1950 the leasing of unit farms at Ruatoki was also being discussed by officials. Towards the end of that year, a deputation from Ruatoki expressed opposition to leases when meeting the Under-Secretary for Native Affairs.⁴⁰⁶ This opposition was consistent with the understanding that had existed between the Native Department and Ruatoki owners at the start of the Ruatoki Development Scheme that Ruatoki land would not be leased. Similarly, although owners agreed to the leasing of a few Waiohau blocks in 1940 because they were too small to be farmed otherwise, the notion that unit farms should be leased was viewed as a novelty by Waiohau owners when the Crown presented it to them in 1951.⁴⁰⁷

Although the Crown was successful in persuading both the Ruatoki and Waiohau owners to accept the granting of leases to unit occupiers, it did have to alter its standard leasing conditions to meet the owners' concerns. Among the Ruatoki community, the Owhakatoro owners agreed to 21-year leases in 1952, with a right of renewal for another 21 years. In addition, 75 per cent of the improvements would belong to the unit occupiers. This was similar in effect to the Board of Native Affairs' 1949 policy, which had sought 42-year leases but which officials had believed were impossible to get from Tuhoe.⁴⁰⁸ On other Ruatoki unit farms, the Crown also had to make do with shorter-term leases. Often these leases were based on capital value (and the improvements were regarded as the owners' property). Even so, owners' complaints in 1962 indicate that the Crown was still promoting 42-year leases.⁴⁰⁹ The Waiohau owners, meanwhile, persuaded the Maori Land Court in 1951 that the Waiohau unit leases should be for just 10 years, with right of renewal for a further 11. Unit occupiers were only to be regarded as owners of the improvements that they had made themselves.⁴¹⁰

When it came to determining farm and financial management strategy, the historical evidence is clear that Ruatoki and Waiohau owners had much less say in the matter. At first, Ngata took responsibility for the Ruatoki Development Scheme almost entirely upon himself, even down to the level of preparing budget estimates.⁴¹¹ After Ngata's resignation in 1934, this role in both the Ruatoki and Waiohau Schemes was taken over by the various scheme supervisors, acting in concert with the Board of Native Affairs.⁴¹² In the first two decades of development at Ruatoki and Waiohau, scheme officials also oversaw the management of all the unit farms. After that, the Crown's policy of 'relaxed control' in the early 1950s

405. Gould, 'Maori Land Development Schemes' (doc M7), p 231

406. Alexander, 'Land Development Schemes' (doc A74), pp 114, 122–123, 125–126

407. *Ibid*, pp 205, 222

408. *Ibid*, pp 129, 131–132; Gould, 'Development Schemes' (doc M6), pp 12–13

409. Alexander, 'Land Development Schemes' (doc A74), pp 149, 165–166

410. Gould, 'Development Schemes' (doc M6), p 6; Alexander, 'Land Development Schemes' (doc A74), pp 222–224; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 681

411. Alexander, 'Land Development Schemes' (doc A74), pp 56–58

412. *Ibid*, pp 80–81; Gould, summary of 'Maori Land Development Schemes' (doc M7(a)), p 14

meant that unit occupiers who were performing well were left largely to their own devices.⁴¹³

The Ruatoki and Waiohau owners had no control over the appointment of scheme supervisors. Ruatoki owners had some input to the appointment of junior scheme staff, such as the scheme's first foreman (Fred Biddle) in the early 1930s, and a later scheme overseer.⁴¹⁴ The first dairy instructor at Ruatoki, a Mr Longwell, was also replaced following disputes with unit occupiers in 1937.⁴¹⁵

An illustration of the owners' lack of influence on long-term scheme planning was the battle to get farm settlement completed in the Owhakatoro Valley. Even though owners were invited to nominate occupiers in 1943, and made approaches to Native Land Court and Department staff in 1945 and 1950 asking for the process to be speeded up, farm settlement did not take place until 1954.⁴¹⁶ Similarly, when the department decided to change its employment policy in the 1940s, by withdrawing employment subsidies from the Ruatoki and Waiohau schemes, it did so unilaterally. Subsequently, the two groups of owners asked officials to rethink this policy, but neither was successful. Similarly, relaxed control of unit occupiers was brought in on the Ruatoki scheme in 1951, even though there is no evidence that it was discussed with owners until late 1953.⁴¹⁷

Even when it came to deciding when the schemes should be wound up, the Crown did not necessarily abide by the owners' views. At Ruatoki, during a meeting with the Minister of Maori Affairs in 1962, the owners had asked that further land development take place, only with more emphasis on cropping, so that unit occupiers, who were being displaced when uneconomic unit farms were combined to make larger ones, could take up small, horticulture-based holdings. At the time, the preferred Crown option for schemes like Ruatoki was amalgamation, but officials recognised that too much land had been released from the Ruatoki Development Scheme (and was under lease) to implement it. Instead, they settled for as much rationalisation of unit farms as was possible.⁴¹⁸ In 1966, however, a change of Board of Maori Affairs policy denied Ruatoki further funding, which was to be confined to 'sound economic units where the settler [unit occupier] has freehold tenure, or leasehold tenure with compensation for improvements.'⁴¹⁹ Although the owners had wanted the scheme continued and even expanded, their wishes were disregarded.

Perhaps the only aspect of expenditure which Ruatoki and Waiohau owners did have a real influence over was housing. In 1948, Ruatoki owners persuaded the chief supervisor of Maori land development that they should be able to access funds through the regular housing assistance programme run by the

413. Alexander, 'Land Development Schemes' (doc A74), pp 145–146

414. *Ibid*, pp 56, 67, 112; Oliver, 'Ruatoki' (doc A6), p 147

415. Alexander, 'Land Development Schemes' (doc A74), pp 91–92

416. *Ibid*, pp 101–107, 128–132

417. *Ibid*, pp 110–111, 143, 145–146, 207–208

418. *Ibid*, pp 159–171

419. *Ibid*, p 171

department,⁴²⁰ while in 1959 an impromptu meeting of Waiohau owners halted the Crown's plan to build a house for a resident manager.

In the absence of any advisory committees, meetings between Crown officials and Ruatoki and Waiohau owners occurred at infrequent intervals, and were sometimes years apart. Many were about specific issues, such as when the Crown informed Ruatoki owners about its policy of relaxed control in 1953, although owners could conceivably raise other issues at such meetings. Commonly, however, owners had to take the initiative themselves and make an approach to the Government. David Alexander's report for the claimants contains many examples, especially from the 1950s. A deputation from Ruatoki, for instance, went to Wellington in 1950 to complain about the introduction of leases and the Crown taking too much of the milk cheque from the unit farms. Similarly, Ngati Haka Patuheuheu representatives took advantage of the Under-Secretary for Native Affairs' visit to Rotorua in 1940 to meet with him and ask that development take place at Matahina, and to press for unit settlement. Tuhoe tribal committees (established in accordance with the Maori Social and Economic Advancement Act 1945) also raised development issues in 1945 and 1961, on behalf of the Ruatoki owners. The issue in 1945 was the settlement of the Owhakatoro blocks. In 1961, it was title amalgamation and the duration of leases.⁴²¹ Overall, the evidence suggests that there was a lack of consideration for owners' views, and that the post-war administration lost sight of Ngata's goal of promoting community development in economic, social, and cultural forms.

For the claimants, the near exclusion of owners from strategic farming and financial decision-making, together with the limited provision of financial information by scheme officials,⁴²² raises the issue of what responsibility the owners ought to have had for scheme debts. Unit occupiers were also somewhat powerless when it came to financial matters, as scheme officials seem to have had complete discretion as to what percentage of the milk cheque would go to the Crown. Ultimately, it is not possible to say conclusively that the Ruatoki and Waiohau Development Schemes would have performed much better financially with greater owner input, given that debt recovery grew to be the Crown's primary objective. Nevertheless, by denying the owners input into the management of scheme finances, the Crown was preventing them from developing the independent farm business skills which the development schemes had originally been intended to foster. Furthermore, given the long duration of both the Ruatoki and Waiohau development schemes, it would have been appropriate for the Crown to offer the owners greater flexibility in realising the value of their (usually) appreciating asset. Numerous owners felt compelled by their asset-rich, income-poor position to lease their land (thereby at

420. Ibid, pp113–114; 'Ruatoki Development Scheme: Housing Policy', case to Board of Maori Affairs, no date (Alexander, supporting papers to 'Land Development Schemes' (doc A74(d)), p999); report of meeting held at Ruatoki, 3 November 1948 (Alexander, supporting papers to 'Land Development Schemes' (doc A74(f)), pp1607–1608)

421. Alexander, 'Land Development Schemes' (doc A74), pp105, 125–126, 145–147, 165–166, 207–210

422. Alexander, answers to questions in writing (doc E5), p17

least getting a rental income from it), but the resulting piecemeal leasing was not in the interests of the scheme as a whole.

Two final issues relating to owner consent and scheme finances also deserve mention. The first relates to the relaxation of control at Ruatoki. In this instance, officials asked unit occupiers but not owners about whether they wanted this change in the Crown's supervision of their lands to occur. Leah Campbell has suggested that this is indicative of the fact that Crown officials were beginning to regard their relationship with the occupiers as more important than that with the owners.⁴²³ Potentially, the owners of land thought eligible for relaxed control at Ruatoki might also have been asked whether they wanted their lands released from the scheme, since the farms involved were not only 'developed', but were also paying their way. This did not occur because Crown officials did not want land released until the contributions of each unit account to the lump sum rates were sorted out. In the end, confusion about how to handle such general scheme debt (which was not ascribed to any particular unit account, and with many units having exited the scheme in the meantime) left the Crown with no option but to write it off when the scheme was wound up in 1966.⁴²⁴

The second issue is the disposal of the Waiohau Development Scheme credit in the 1970s. Unlike that at Ruatoki, the Waiohau general account had a positive balance when development was wound up, and the Crown therefore had to consider how to distribute this surplus amongst the owners. Despite an instruction from the secretary for Maori Affairs that the distribution method ought to be approved by the owners before it was implemented, this never took place. The Waiohau owners also suffered from the Crown's move to change the winding-up date (in light of the destruction of earlier financial records), which in turn lessened the credit balance by about one-sixth. The total loss suffered by Waiohau owners due to this accounting bungle was about \$2,000.⁴²⁵

18.5.2.6.3 THE RUATAHUNA DEVELOPMENT SCHEME

For the first half of the duration of the Ruatahuna Development Scheme, the relationship between owners, occupiers, and the Crown was similar to what it had been in the Ruatoki and Waiohau schemes. It was initially run by Ngata and then, between 1934 and the early 1950s, farming decisions at Ruatahuna were made by the scheme supervisor. It is perhaps indicative of this situation that when several owners requested a meeting in 1946 to discuss whether 'unit farming' was suitable, since the Ruatahuna scheme farms were running sheep rather than dairy cattle, the Native Department did not respond to their request.⁴²⁶ Yet the department relaxed its control of the Ruatahuna occupiers from 1951 to 1961. While this had its disadvantages, it did allow the community to manage farming in its own way; on

423. Campbell, 'Land Alienation, Consolidation and Development' (doc A55), pp 141–142

424. Alexander, 'Land Development Schemes' (doc A74), pp 130–131, 157–162, 176–177

425. *Ibid*, pp 246–250

426. Unsigned letter to registrar, Native Land Court, Rotorua, 11 May 1946 (Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), pp 318–319)

the whole, freedom from tight control was not considered worth the cost of lost expert advice and the deterioration of some of the units. When officials came in 1961 to put new proposals to the owners, they were welcomed as a 'serpent from the deep' and accused of having 'thrown people away' during the period of relaxed control.⁴²⁷

The unit occupiers were given, at the Crown's behest, 10-year occupation licences, which were essentially short-term leases, although officials were 'careful' to 'avoid making any reference to the tenures or occupation rights that might be interpreted as being a lease'.⁴²⁸ These 10-year terms for Ruatahuna, with no rights of renewal, were a significant departure from the Board of Maori Affairs' normal leasing policy. The board was advised that the 'spirit of Tuhoe still survives . . . their lands have always been their sacred domain, and any suggestion of alienation, whether by sale or lease, is strongly opposed by them'.⁴²⁹ In respect of ownership of improvements, the department also conceded to the owners that improvements to the land (such as fencing and grassing) should belong to them. Buildings, on the other hand, as well as machinery, livestock, and any credit in the unit farm account, were to belong to the unit occupiers when the scheme was wound up. Nonetheless, the officials' goal was to try and get longer-term tenure for occupiers at the end of the 10-year licences, hopefully from a younger, more modern generation of owners.⁴³⁰

In general, Ruatahuna owners had much the same input to decision-making as their whanaunga in the other two schemes. They had some say in the appointment of the scheme foremen, they put forward names of unemployed men to work on preparing land for farm settlement, and they nominated occupiers for the settlement of the various scheme farms. The purpose and frequency of meetings between officials and owners mirrored those at Ruatoki and Waiohau; that is, they were principally concerned with nominating occupiers and tenure arrangements. The historical evidence is thus consistent that, in all Te Urewera schemes at issue, Tuhoe and Ngati Haka Patuheuheu had a significant role in the decisions about title and occupation. But, as was the case for development schemes more generally, the Ruatahuna community had no ability to influence the Crown's employment policies, and in particular, its withdrawal of employment subsidies. Even so, as noted above, the abrupt withdrawal of subsidies at Ruatahuna in 1943 had such a severe impact that the wartime manpower officer decided that there was a case for effectively rehiring some of the scheme workers who had been laid off.⁴³¹

427. 'Minutes of Meeting of the Owners of various farming lands at Ruatahuna held at Te Poho o Parakaki Meeting House, Umuroa Pa, Ruatahuna on Monday 9 October 1961 commencing at 12.20 pm' (Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), pp 414, 416)

428. Registrar, Maori Land Court, Rotorua, to Under-Secretary for Maori Affairs, 13 June 1951 (Alexander, 'Land Development Schemes' (doc A74), p 294)

429. 'Case to Board of Maori Affairs, approved 11 December 1951' (Alexander, 'Land Development Schemes' (doc A74), p 294)

430. Alexander, 'Land Development Schemes' (doc A74), pp 291-295

431. Tuawhenua Research Team, 'Te Manawa o Te Ika' (doc D2), pp 315-317; Alexander, 'Land Development Schemes' (doc A74), pp 281-283

The Crown is Welcomed Back to Ruatahuna, 1961

Welcome: Three Ruatahuna Elders extended a welcome to the district officer and his staff.

Kaho Rurehe: Said that this meeting was overdue but 'better late than never'. He hoped that the people could now get some agreement on the future of the small amount of farming land that they had left.

Paratene Manihera (Dan Manihera): Explained that the Tuhoe people were greatly attached to their land because they had so little of it. He said the Department had thrown people away before, but he hoped now that they would be welcomed back to 'the fold'.

Pakitu Wharekiri: Spoke of the Department as 'a serpent from the deep'. He welcomed the district officer as about the 6th or 7th Registrar to visit Ruatahuna over the last twenty years to discuss the future of the land. He thanked the district officer for coming to this meeting, personally. 'If', he said, 'your plans are good, we can only listen, and we hope that you will also give us a good hearing for any suggestions we may make, and that what we decide today between us will be as enduring as the rafters of this house.'

Reply by district officer [JHW Barber]: The district officer extended greetings from the whole of Waiariki District and thanked the Ruatahuna people for their welcome. He said that this was not his first visit, as he had been here before in the Honourable Minister's party, but this was the first time that he came in his own right as Registrar. He explained that because of the isolation of Ruatahuna it was not possible for him

One critical question for the claimants was the degree and quality of consultation and input to the decision in 1962 to abolish the unit farms and establish a single amalgamated farm.⁴³² Maori Affairs staff had reviewed the scheme's performance in 1960. They found that more funding was needed because some unit farms had deteriorated during the period of 'relaxed control', but that this could only be justified if the number of unit farms was reduced to seven (or about half the previous number), or alternatively if the department took over running of the scheme lands and farmed them as a single station.⁴³³

Ultimately, the department's head office rejected the idea of retaining a smaller number of unit farms, so that when scheme officials met with Ruatahuna landowners in October 1961, the only option presented to them, if they wanted the new funding, was to accept the creation of a single station. Even though scheme officials saw it as a prerequisite, Ruatahuna landowners were not told that they needed to amalgamate the areas encompassed by the unit farms into a single title

432. Counsel for Tuawhenua, closing submissions (doc N9), p 267

433. Alexander, 'Land Development Schemes' (doc A74), pp 305-307

to get there often, but he assured the people of the Department's good intentions towards them. He had heard much good spoken of the Ruatahuna people by his old friend John Dicken who had lived in Ruatahuna for so long, and because of this it was all the more a shock to hear the people speaking of 'serpents from the deep', 'throwing away' and so on. He personally had never acted in any way which could justify such talk, and the Department as a whole was not like that either. Things, he said, were changing in Maoridom. Increasing populations in country districts had made it impossible for the whole Maori Race to get a living from the land, and many Maori people were having to leave country areas and work in town. This had to happen in Ruatahuna too. The Department's intention was to assist in making farmers of those who were able to farm, and it would help the others who could not get their living from the land to get employment elsewhere if they so wished. As far as the Ruatahuna farm lands were concerned, the Department had prepared some proposals, but before putting these to the meeting he would prefer to hear what the people had to say. He emphasised, however, that whatever was done the basic policy of the Department was that any farms established must be economic, that is to say, they must return a good living to the occupiers, not merely a subsistence 'on the bread line'.¹

1. 'Minutes of Meeting of the Owners of Various Farming Lands at Ruatahuna Held at Te Poho o Parakaki Meeting House, Umuroa Pa, Ruatahuna on Monday 9 October 1961 Commencing at 12.20 pm' (Alexander, supporting papers to 'Land Development Schemes' (doc A74(c)), pp 726-727)

until a second meeting took place in November 1961. At this second meeting, further pressure was put on the owners. Officials told them that there was no guarantee that the funds set aside for Ruatahuna's development would be available again in the next financial year. Having got the owners' agreement to proceed with the amalgamation, the officials' urgency subsided somewhat, as it took another eight months before they presented a proposal based on the single scheme station to the Board of Maori Affairs for approval.⁴³⁴

We accept, therefore, that the owners were only offered a single option and that they were pressured to agree to it. We cannot, however, accept counsel for the Tuawhenua claimants' proposition that owners were 'duped . . . into agreeing to amalgamation of titles and a single station scheme through false, incomplete and unexplained information on the nature, conditions and implications of the Ruatahuna Farm Scheme'.⁴³⁵ That appears to us to greatly overstate matters.

434. Ibid, pp 305-315; Gould, 'Development Schemes' (doc M6), pp 105-112

435. Counsel for Tuawhenua, closing submissions (doc N9), pp 253, 267

As in the case of the Ngati Manawa scheme, the amalgamation of the farmed area into a single farm title had been the initiative solely of the Crown. The Ruatahuna owners did, however, obtain some important amendments to the original Crown proposal. First of all, they got scheme officials to agree to the Ruatahuna farm being handed over to an incorporation of owners once the revamped development scheme was wound up, rather than its being divided up into a small number of leased farms.⁴³⁶ As the Tuawhenua researchers noted, the conditions specified at the 1961 hui showed that there was still confusion as to whether the ultimate plan was to settle unit farmers on the scheme or to keep it as a station.⁴³⁷ But any such decision would be made by the incorporation (eventually a section 438 trust) rather than the department.

Secondly, Crown officials also accepted the need to partition out parts of the blocks which were going to make up the Ruatahuna farm so as to allow for marae, urupa, cropping areas, and sites for private homes. These partitions were subsequently approved by the Maori Land Court, although the court did reject some applications for large areas to be cut out where it thought that these would interfere with the scheme. Generally, the total area cut out of the Ruatahuna farm was reduced in size in return for the undertaking by the Maori Affairs Department that landowners would be able to crop some areas of the farm on a rotational basis.⁴³⁸

Thus, the owners had agreed to amalgamation but it came at a high social cost for those who had been farming the land. In our hearings, we heard of great distress from several witnesses whose whanau had had to give up their unit farms, such as Ada Ataimihia Lambert.⁴³⁹ Korotau Tamiana told us that 'All that hard work and the farm went back under the Maori Affairs . . . Today our family looks at the farm that went into the amalgamation and we mourn for the hard work our father and mother put in to break the land in.'⁴⁴⁰ Yet, even with a second farm at Ohaua, the whanau had struggled to survive and lived in poverty, eking out a subsistence existence in which fishing and hunting made a crucial difference.⁴⁴¹ We also heard, therefore, of mixed feelings because the seemingly never-ending debt and the difficulties of farming marginal land with poor access had placed great pressure on the unit occupiers and their whanau.⁴⁴² Dr Gould, in his report for the Crown, observed: 'people who had an immediate relationship with their land for some thirty years were being asked or told to get lost, without any consideration of the emotional impact this would have, particularly on the family members who had grown up on the farms.'⁴⁴³ The department promised to find work elsewhere

436. Gould, 'Development Schemes' (doc M6), p110; Alexander, 'Land Development Schemes' (doc A74), p314

437. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), pp 414–418, 429–430

438. Bassett and Kay, 'Ruatahuna' (doc A20), pp 248–257

439. Ada Ataimihia Lambert, brief of evidence, 10 May 2004 (doc D13)

440. Korotau Tamiana, brief of evidence, 10 May 2004 (doc D20), p 8

441. Ibid

442. Airini Kathleen Tahi, brief of evidence, 11 May 2004 (doc D24); Noera Tamiana, brief of evidence, 10 May 2004 (doc D15)

443. Gould, 'Development Schemes' (doc M6), p110

for the unit occupiers,⁴⁴⁴ but we have no evidence as to whether this promise was kept.

Nonetheless, the relationship between Ruatahuna owners and the Crown underwent a significant change in 1962, when the various units were amalgamated into the Ruatahuna farm. There were no longer any occupiers in the equation, only the Crown and owners. Presumably in light of this change, the Crown supported the establishment of an advisory committee for Ruatahuna in 1962;⁴⁴⁵ this was Ruatahuna's second advisory committee, as – like those at Ruatoki and Waiohau – its earlier committee had not survived the Crown's rejection of a role for such bodies in 1936. Along with the advisory committees, annual meetings of owners were also instituted. Nonetheless, the new committee does not appear to have been as effective for owners as they might have hoped. At a 1971 meeting of owners, Rei Wirangi complained that the local advisory committee had ceased to exist because 'it had never been consulted by the department in the management of the scheme', and he concluded that 'the department's process of consultation appeared to be "lip service only"'.⁴⁴⁶ Heather Bassett and Richard Kay suggested that this was an 'accurate assessment in light of the acknowledgement in 1970 that advisory committees were "purely consultative"'.⁴⁴⁷

In 1980, however, the Ruatahuna owners were told that 'very shortly' they 'would be taking control' of the Ruatahuna farm.⁴⁴⁸ This followed better than expected financial performance, which raised the hopes of Maori Affairs staff that the Crown would be able to recover the debt owing on the scheme. In preparation for the return of their land, the owners were advised to form a trust, whereby the appointed trustees would be able to work in conjunction with the Maori Land Board⁴⁴⁹ in running the farm until it was released from the development scheme. A section 438 (Maori Affairs Act 1953) trust was duly established in March 1981.⁴⁵⁰

By the 1984–85 season, the debt owing on the Ruatahuna farm had in fact been cleared, raising the prospect that it might be returned to the owners at this stage. However, the Crown persuaded the trustees to agree to a programme of fencing and machinery replacement, in the expectation that these would quickly be paid off by farm earnings; some of this fencing cost was required by the establishment of a deer unit, which in part was an owner initiative.⁴⁵¹ When returns in the late 1980s proved less than expected, the scheme debt quickly rose again, but by this time the policy of the Maori Affairs Department was to divest itself of its farming

444. Bassett and Kay, 'Ruatahuna' (doc A20), p 249

445. *Ibid.*, p 258

446. Minutes of meeting at Te Umuroa Marae, 25 August 1971 (Bassett and Kay, 'Ruatahuna' (doc A20), p 262)

447. Deputy secretary, Board of Maori Affairs, 25 February 1970 (Bassett and Kay, 'Ruatahuna' (doc A20), p 262)

448. District officer, minutes of meeting at Tatahoata Marae, 20 November 1980 (Bassett and Kay, 'Ruatahuna' (doc A20), p 264)

449. The Maori Land Board had replaced the Board of Maori Affairs in 1974.

450. Bassett and Kay, 'Ruatahuna' (doc A20), pp 264–265

451. *Ibid.*, pp 264–266; Alexander, 'Land Development Schemes' (doc A74), pp 327–329

operations. Accordingly, Ruatahuna farm was returned to the owners' trust in December 1990, notwithstanding the considerable debt it was carrying. At the time, the trustees put forward a case that the whole debt should be written off by the Crown, but this was rejected. As we discussed earlier, the Government of the day developed a policy of handing back schemes that were still in debt on a basis of charging what the particular owners could afford, rather than either insisting on full repayment or remitting the entire debt.⁴⁵² Thus, it wrote off \$194,710. This left the owners to pay the balance of \$263,000, which the Crown thought was affordable for them, but the Crown then asked the owners to repay a further \$150,637 of debt incurred in the last six months of the scheme.

The Crown did not have absolute control of the financial management of the Ruatahuna scheme in the latter part of its existence. Occupiers had considerable leeway over the finances of their individual scheme farms during the period of relaxed control (1951 to 1961). After 1981, the trustees were involved in approving scheme expenditure; one of their initiatives, in 1985, was a \$100 payment to be made to every owner over 65 years of age for each of the following three years, which was the first payment in cash to owners since the start of the station-based Ruatahuna farm in 1962.⁴⁵³ The record of financial reporting by the Crown to owners was also better than at Ruatoki and Waiohau, thanks to the annual meetings of owners in the wake of amalgamation.⁴⁵⁴ Excerpts of earlier owner meetings in the reports of Gould and Alexander, meanwhile, indicate that the Ruatahuna owners were aware of the broad details of scheme finances by 1948 at the latest.⁴⁵⁵ It is more difficult to tell, however, how well financial accounts were explained to the owners. Mick Rurehe, for example, commented in 1977 that the Ruatahuna accounts had finally been made explicable in Maori.⁴⁵⁶ There was also room for confusion with some reporting, as in 1969, when the assistant district officer told owners that the scheme was 'reaching the stage' where it was likely to generate a profit, while at the same time the district accountant was concluding that debt levels were so high that 'repayment chances' were 'well nigh impossible'.⁴⁵⁷

In conclusion, the Ruatahuna development scheme (at least until 1981) suffered from the same failing, in terms of owner input into decision-making, as was experienced in the Ruatoki and Waiohau Development Schemes. By reserving to itself all the significant decision-making powers, the Crown failed to provide owners with the farm planning and financial experience which was one of the outcomes Ngata had hoped to achieve in his schemes. The Ruatahuna owners could

452. As noted above, the Government's formula for calculating affordability was 90 per cent of estimated annual farm profits for a 10-year period.

453. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 624–628; Alexander, 'Land Development Schemes' (doc A74), p 328

454. Alexander, 'Land Development Schemes' (doc A74), p 11

455. Gould, 'Development Schemes' (doc M6), pp 64–65; Alexander, 'Land Development Schemes' (doc A74), pp 289–290

456. Bassett and Kay, 'Ruatahuna' (doc A20), p 264

457. District accountant to district officer, 31 March 1969, and assistant district officer, minutes of meeting, Tatahoata Marae, 19 November 1969 (Bassett and Kay, 'Ruatahuna' (doc A20), p 260)

Unknown



Paratene Dan Manihera, rangatira of Ngati Kakahutapiki and Ngati Tawhaki, in front of Te Whai-a-te-Motu, circa 1950s. Mr Manihera was an early unit holder in the farming development scheme.

also have made a relatively strong argument that their lack of input in financial decisions caused them economic losses, although it would be difficult to quantify how large these losses might have been. The purchase of poor quality East Coast sheep (discussed above) loaded the Ruatahuna owners with unnecessary debt at the very start of the scheme. On a final note, it is worth observing that the only time that the Crown followed the original intent of the Maori land development schemes, as far as owner participation goes, was in the last 10 years of the Ruatahuna farm. In particular, as the Government developed policy to return all

such schemes in the late 1980s, there was a sustained effort to make the trustees ‘thoroughly conversant with farm operations before the farm was transferred to them.’⁴⁵⁸

18.5.2.7 *What were the benefits of the development schemes?*

Crown counsel submitted: ‘The loss of control over land came with benefits. An assessment of the appropriate balancing of these two issues is complex.’⁴⁵⁹ In the Crown’s view, land was developed that otherwise could not have been, ownership was retained, and valuable assets were handed back to owners when the schemes were wound up. The degree of benefit, however, was circumscribed by various factors, including some outside the Crown’s control. These included environmental factors and land quality, vagaries and changes in the wider economy, the type of farming undertaken, and the number of people with interests in blocks. Within these parameters, the Crown argued that Maori obtained loan finance at last, along with cheap, efficient administration and an opportunity for unskilled owners to get farming experience. Unit farms supported whanau. Better houses were built and maintained. Also, there was a collateral benefit in the support given to Te Urewera communities by means of employment subsidies in the 1930s and 1940s.⁴⁶⁰

Overall, one of Ngata’s objectives, which was that Maori farmers should stand on an equal footing with Europeans, was achieved. Ultimately, however, his vision of small family farms simply could not survive post-war economic realities.⁴⁶¹ In sum, the Crown submitted that ‘over the long term, wealth creation in the form of improvements upon lands and the means for sustainable ongoing economic returns was a tangible benefit obtained by most owners from the schemes.’⁴⁶²

The claimants agreed with the Crown that they obtained significant benefits from development schemes before the Second World War. They were less convinced, however, of the ultimate utility of the schemes in the post-war decades. In Ngati Manawa’s view, for example, it ‘is not denied that the scheme promoted the interests of the owners but the fact is that the outcomes of over 30 years of Maori Affairs management were unspectacular.’⁴⁶³ Claimant counsel referred to ‘sluggish progress’, ‘lacklustre management’, and ‘little enthusiasm on the part of the government’. Ultimately, the results were ‘unspectacular.’⁴⁶⁴ In the claimants’ view, as expressed by Mrs Rangiuiira Briggs, the Ngati Manawa Incorporation has done a much better job with the land since it took over, with mixed land-use including forestry, cattle for beef, and some dairy farming.⁴⁶⁵ Although we have no independent verification of the point, Mrs Briggs and others felt that a neighbour-

458. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), p 628

459. Crown counsel, closing submissions (doc N20), topic 32, p 11

460. Ibid, pp 2–3, 6–16

461. Ibid, pp 2–3, 12–13

462. Ibid, p 13

463. Counsel for Ngati Manawa, closing submissions (doc N12), p 71

464. Ibid

465. Briggs, brief of evidence (doc F17), pp 4–6

ing Lands and Survey development scheme was much better managed than their own.⁴⁶⁶

In the case of Ruatahuna, the Tuawhenua claimants argued that the development scheme was so comprehensively mismanaged that it still had enormous debts after 60 years of Crown management, and that it had ‘delivered virtually no return to the owners’.⁴⁶⁷ The Tuawhenua claimants do not accept that they obtained any benefits from the Ruatahuna development scheme.⁴⁶⁸ The Wai 36 Tuhoe claimants, however, suggest that there were tangible benefits from the Rautoki, Waiohau, and Ruatahuna schemes: major economic assistance for whole communities in the 1930s; access (at last) to loan finance at relatively low interest; ‘affordable advice (of varying quality)’; and administration. In particular, unit farmers and their whanau secured significant economic advantages. For the ‘overwhelming majority’ of owners, however, there was very little in the way of direct economic benefits. All these benefits, in the submission of claimant counsel, need to be weighed against a long-term loss of control that amounted to ‘extended alienation’, and the heavy debts loaded on the units and owners by poor management.⁴⁶⁹

In respect of the Waiohau scheme, Ngati Haka Patuheuheu agreed that a key benefit was the provision of development finance for land in multiple title, which had previously been virtually impossible to obtain, and the development of farmland. They concurred with most other claimants that the initial development work in the 1930s, funded by unemployment relief schemes, was a significant benefit for their community. They also agreed (with Wai 36 Tuhoe) that the powers taken by the Crown were so full that this ‘created a relationship analogous to a fiduciary duty’.⁴⁷⁰ But although there were tangible benefits, the claimants pointed out that training was inadequate and farming still extremely difficult on the small amounts of relatively marginal land left to them.⁴⁷¹

Apart from the Tuawhenua claimants, therefore, there is substantial agreement between the parties that the development schemes delivered tangible benefits to the Rautoki, Ruatahuna, Waiohau, and Ngati Manawa communities.

Overall, the economic performance of the schemes was disappointing. Admittedly, as the Crown submits, the schemes did allow for improvements to be made to the farmland of the communities concerned, improvements which we are certain could not have been made otherwise. The schemes also provided communities with subsidised employment at their time of greatest need. In the cases of Rautoki and some of the Ngati Manawa lands, the long-term benefit of farm improvements was lost through land reversion and conversion of land to forest. Nonetheless, the land became more of an asset to its owners than would otherwise have been possible. Even the Ruatahuna farm, despite 60 years of indebtedness, was still a valuable asset when it was finally returned to the owners’ trust in 1990.

466. *Ibid*, p 3

467. Counsel for Tuawhenua, closing submissions (doc N9), p 268

468. *Ibid*, pp 215–216, 224–235, 250–256, 266–269

469. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 186–188

470. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 127

471. *Ibid*, pp 121, 125–130

Laughton on the Benefits of the Ruatahuna Development Scheme, 1953

In 1953, when the Ruatahuna unit farms were riding high on a temporary wool boom, the Presbyterian minister the Reverend JG Laughton addressed a meeting of owners, at which the Minister of Maori Affairs was also present:

[Since my arrival at Ruatahuna] I have witnessed, in their life and social circumstances, the operation of a human transition of considerable magnitude.

At that period [1918], these people because of their isolation were living a life more closely related to the traditional pre-European way of life of the Maori than perhaps any other section of the race were then. They raised a few cattle, and sold a few head now and again to occasional dealers. Groups of the younger people annually went out to seasonal summer work like shearing and scrub cutting. These were practically the only sources of money to provide clothing and the few articles of the staple diet like flour, sugar and tea, not locally produced. The climate here is too cold for the cultivation of the kumara, and therefore the main article of diet was the potato, and when that crop failed in those days, there was great hardship. They were still partly dependent on the forest fare of their ancestors – hinau bread, tawa berry conserve, and the succulent heart of the mamaku fern – and their meat supply came from the hunt and kill.

Education and European contacts have changed the standard of living. Although the Land Development Scheme which was carried out here was on a limited scale, it transformed the standard of living of these people, and stabilised their life in the historic setting, and in the environment that contains for them the traditional content of life and its satisfactions. To my mind, the inauguration of the Land Development Scheme here prevented the break up of the social fabric of their life, with all the disastrous consequences which inevitably follow that calamity in the life of any people.

The success of the Ruatahuna Land Development Scheme has been referred to by another speaker. That success, Sir, owes considerable credit to the officers of your Department of Maori Affairs, but also to the fact that these people are an industrious race, and that the Land Development Scheme here has had and still has a good opportunity, in that it is further removed from many of the distractions of modern life than are most of the other established undertakings of the Department. The success is, of course, also due to the fact that this land is suitable for such development as has already been carried out on parts of it. Good cattle and sheep are raised on it.¹

1. Minutes of Meeting of Tuhoe Land Owners with EB Corbett, Minister of Maori Affairs and Lands at Ruatahuna, 10 December 1953 (David Alexander, 'The Land Development Schemes of the Urewera Inquiry District' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A74), pp 297–298)

In terms of profitability, all the schemes must be regarded as failures. To some extent, this was not the fault of the Crown, as twice the timing of development work on the schemes was unfortunate. Just as the schemes were delivering significant production gains at the end of the 1930s they were stymied by the Second World War, which stalled farm settlement and deprived the schemes of materials (notably fertiliser for maintaining pastures and building supplies for the construction of dairy sheds) as well as labour. Again, in the 1960s, there was a period of intense development and hence build-up of debt on the Ngati Manawa and Ruatahuna schemes, but this coincided with a downturn in the farming economy. It could also be argued that high levels of investment and poor farm incomes coincided again in the last years of the Ruatahuna scheme, although this was partly the responsibility of the Crown's policy of removing farm subsidies.

In terms of Ngata's goal of self-supporting family farms that could sustain Maori communities, which seems to have been shared by these Te Urewera communities at that time, the development schemes had mediocre results. The development of Waiohau probably came closest to this goal. Ruatoki was also left with family farms, but most were too small to be economically viable and thus they tended to revert as time passed, if not leased out or merged. As we shall see in our chapter on specific claims, where we discuss the Ruatoki–Waiohau consolidation scheme, Maori landowners in the 1930s shared Ngata's vision of small farms that could accommodate as many whanau as possible. By holding on to this goal, rather than cutting back the number of farms so that each would be economic, the people of Ruatoki must share with the Crown some responsibility for the poor fortune of its farmers (although ultimately this was due to the Crown's acquisition of more land than Tuhoe could afford to alienate).

As we noted earlier, Ngata could already see in 1940 that all development schemes had inbuilt limits and would need both diversified, increasingly intensive land-use and the injection of additional lands to make them work in the longer term. The Crown provided hardly any additional land to the schemes, and even cut back on the earlier goals for how much marginal Maori-owned land would be developed. Ngata's vision, in which Governments reversed their long drive to acquire Maori land and instead restored some of it for Maori farming, was not fulfilled. Indeed, after the creation of the national park, there was no longer even a possibility that Crown land might be used in this way.

As a result, and as counsel for Wai 36 Tuhoe pointed out, a limited number of unit farmers and their whanau were the main beneficiaries of the development schemes. These selected owners were provided with significant opportunities and benefits, although the evidence of tangata whenua witnesses who lived on these farms reminds us that because some of the farms were so small and marginal, other forms of work (and customary food supplies) had to be sought.⁴⁷² Ani Hare, for example, explained how her mother's farm at Waiohau had 30 dairy cows

472. See, for example, Kaa Kathleen Williams, brief of evidence, 14 March 2004 (doc c16); Hare, brief of evidence (doc c17(a)); Lambert, brief of evidence (doc D13); Tamiana, brief of evidence (doc D15); Tamiana, brief of evidence (doc D20).

and some pigs, and her mother had to work part-time as a cook at the Kaingaroa logging camp and for shearing gangs, as well as fishing for eels at night; the eels ‘would be our food source for weeks on end’.⁴⁷³ Ultimately, too, the process of merging properties and creating trusts has resulted in a patchwork of economic and uneconomic, owner-occupied, unoccupied, and trust-run farms for the former Ruatoki unit farms.⁴⁷⁴

On the Ngati Manawa and Ruatahuna schemes, in contrast, Ngata’s vision of family farms was abandoned in favour of amalgamated farms run by an incorporation and a trust. In Professor Murton’s evidence, this represented the best achievable result, ‘whereby those who have stayed at home, or who have returned, as well as those who remain away, can maintain a link to their ancestral lands, and potentially receive some, albeit small, economic benefit’.⁴⁷⁵ Balanced against this view is that put by the Tuawhenua researchers: what the Ruatahuna community wanted was land settlement, their resident whanau living on their land and farming it, not just land development.⁴⁷⁶ But two of Ngata’s other objectives were met. Land loss was prevented and, at the end of the schemes, the land was sufficiently developed for the owners to secure private sector financing. The final decade of the Ruatahuna scheme, meanwhile, marks the only part of the scheme where the Crown came close to fulfilling Ngata’s other goal, that of leaving Te Urewera communities with a pool of people adept at farm and financial management. Generally, the Crown had tried to skimp on supervision, and made little effort to upskill owners to the point where they could manage the schemes themselves.

In a general sense, then, the Crown emphasised that loss of control of these lands came with benefits; claimants emphasised that benefits came with significant costs, especially loss of control of their lands. We turn next to consider the outcome in Treaty terms.

18.5.3 Treaty analysis and findings: development schemes

It will be clear from our discussion so far that the arguments for and against the Crown’s conduct are more finely balanced than for any other issue raised by the claimants thus far in our report.

Ngata wanted to develop communities as well as farms. He hoped that the development schemes would enable the repair and rebuilding of marae, the strengthening of the cultural underpinnings of Maori communities, and the economic and social development of those communities. In the post-war years, the Crown took a narrower view of the schemes as being purely about developing land and recouping its financial investment. We are not concerned in this chapter with the broader aspects of Maori development, to which the schemes originally contributed; that will be addressed in later chapters dealing with wider, socio-economic issues.

473. Hare, brief of evidence (doc C17(a)), pp 23–24

474. Vercoe, brief of evidence (doc J37), pp 3–6; Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), pp 577–579

475. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), p 721

476. Tuawhenua Research Team, ‘Te Manawa o te Ika, Part Two’ (doc D2), p 431

Also, we will consider the question of whether the Crown's actions before 1929 created an irreversible 'development gap' later in the report. In this chapter, we are concerned with the claim that the Crown's conduct of the development schemes (but not their inception) breached the principles of the Treaty of Waitangi.

Most claimants agree with the Crown that the development schemes were a welcome initiative that helped overcome otherwise insuperable barriers to land development, and which resulted in significant benefits. The Crown also argued that some form of 'statutory management' was inevitable, given the use of public funds without security. The claimants do not challenge this contention, but argue that the Crown took such sweeping powers that it made itself into a virtual trustee, and was therefore bound to act as a trustee, in the best interests of the beneficiaries and – for major decisions – after consulting them and obtaining their agreement. The Crown in its turn did not deny this argument, nor did it dissent from Ngata's statement that there had been an 'over-riding condition implied in the circumstances of the inception of the schemes and expressed in conferences with communities, that lands should be administered in the interests of their owners and in general accord with their wishes and aspirations.'⁴⁷⁷ Indeed, the Crown quoted Ngata on this point, in support of its argument that he had obtained meaningful consent to the schemes.⁴⁷⁸

The essential disagreement between the parties, it seems, is over how well the Crown performed its role as 'statutory manager'. In the claimants' view, they were not consulted sufficiently about decisions and their tino rangatiratanga was systematically violated. The Crown's performance was poor, schemes remained debt-ridden for decades and, in some cases, it refused to write off that debt even at the very end. The Crown disagrees with this assessment, arguing that economic and other forces outside its control meant that some admittedly poor decisions were made, but only in hindsight. Indeed, the Crown found it difficult to defend its management record, otherwise than by arguing that officials made what seemed like good decisions at the time (but sometimes were not). Counsel for Ngati Manawa agreed that it is 'important to assess development schemes in a fair manner which does not involve imposing anachronistic criteria and standards of behaviour on Crown officials.'⁴⁷⁹ Officials could not, for example, prevent the damaging effects of the Second World War, nor could they necessarily have predicted that farm technology would require ever-larger blocks for sustainable dairying. But many criticisms were levelled at the schemes by owners at the time. In particular, the department resisted calls for diversification and insisted on amalgamation of farms as the price for its continued assistance.

Counsel for Wai 36 Tuhoe argued that the small family farm model was inconsistent with tikanga and its imposition on Tuhoe was a breach of the Treaty.⁴⁸⁰ We do not accept this claim. The historical evidence shows that Ngata's vision,

477. Ngata, 'Maori Land Settlement', p 147

478. Crown counsel, closing submissions (doc N20), topic 32, p 5

479. Counsel for Ngati Manawa, closing submissions (doc N12), p 67

480. Counsel for Wai 36 Tuhoe, closing submissions, pt c (doc N8(b)), p 11

even if it was the only one on offer, was shared by Te Urewera communities in the 1930s. In contrast, counsel for the Tuawhenua claimants argued that the abolition of unit farms and the amalgamation of the Ruatahuna farm was imposed on the owners without proper information or genuine consent.⁴⁸¹ We accept that claimants were under some pressure and were only presented with one option, but we do not accept that they were ‘duped’. In the event, as Professor Murton suggested, this model of ownership may have been the only option that allowed all owners to maintain their ancestral connection with the land and also obtain some small economic benefit from it.⁴⁸²

In any case, the owners made at least some of the key decisions, including choice of unit occupiers and other tenure decisions, but their views were disregarded in much of the farming and financial management of the schemes. The exception for the latter point was the Ruatahuna farm in the 1980s, when the trustees had powers of approval and developed experience in the running of the station. We have detailed these matters above. The Crown argues that it had to take on the powers that it did to protect its investment. In the claimants’ view, the Crown wanted to have its cake and eat it too: to maintain absolute control of the schemes yet to make the owners absolutely responsible for all debts incurred and accumulated as a result of decisions for which they had had no responsibility. Crown counsel accepts that a write-off of debt was sometimes ‘warranted’, implying that whenever it happened it was warranted, and whenever it did not happen it was not warranted. The Crown appears to have relied on a single, unsupported statement from Dr Gould: ‘Later benefits [of the schemes] included substantial write-off of debt *where this was warranted*’ (emphasis added).⁴⁸³ Since the Crown also submitted that its loans were not (and should not have been) free grants, we are left uncertain as to what circumstances the Crown thought did warrant debt remission, and what circumstances did not.

It does seem to us that, given the overall ill-fortune and indifferent financial success of Te Urewera schemes, and the Crown’s sole responsibility for their management, more debt could have been written off when the schemes were wound up. This was especially so in regard to the Ngati Manawa scheme, on which the Crown did not write off any debt, even though it had denied Ngati Manawa the opportunity to take advantage of the profitable years during the early 1950s (when it was thinking of acquiring their land for the pulp and paper mill complex). Similarly, after writing off a large chunk of Ruatahuna debt on the basis that the owners could not afford to pay it, the loading of fresh debt to virtually the old amount seems indefensible. We are concerned that the Crown did not take account of the fact that it was persuading the owners to take on substantial new debt when it was at the same time remitting debt, so that the two more or less cancelled each other out. Given that the Crown itself had been managing Ruatahuna as a single station

481. Counsel for Tuawhenua, closing submissions (doc N9), pp 252–254

482. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), p 721

483. Gould, ‘Development Schemes’ (doc M6), p 16

for more than a generation, it might reasonably have accepted greater responsibility for the scheme debt that was still to be paid off.

On the other hand, there is no doubt that the development schemes were a good-faith initiative, characterised by honest administration and well-intentioned paternalism. On balance, even though the Crown was not making free grants and had to protect its investment, we think that owners could and should have had a greater role in decision-making. We agree with Ngata's conclusion, looking forward in 1940, that there was an over-riding obligation on the Crown to administer the schemes in the best interests of the owners, and – as much as possible – in accordance with their wishes and aspirations. Now, looking back in 2012, did the Crown meet that obligation? While we agree with the claimants that the management of the schemes could have been better, and that they should have had more say, we also accept the Crown's submission that it sought to act in their best interests and delivered tangible benefits which otherwise could not have been obtained.

Have the principles of the Treaty been breached? Again, we think that the evidence is finely balanced, and it is a question of judgement and, perhaps, of degree. Some of the wishes and aspirations of the owners could not have been met no matter what. In part, this was because the economics of farming made their small family farms too small. Ultimately, trusts and incorporations proved an acceptable compromise for Ngati Manawa and at Ruatahuna, as well as for parts of the Ruatoki lands. Nonetheless, as Dr Gould noted, 'only a limited number of owners could have achieved Ngata's idealised future – there was simply too little land left to Maori generally'.⁴⁸⁴ The Crown largely failed to augment the land in the development schemes, when it was, as Ngata suggested, in its power to do so. Also, there was a fine balance between the Crown's management powers and the need to take the owners' wishes and aspirations into account. In Ngati Manawa's view, this was not really the issue; the key consideration for the Tribunal was the Crown's inadequate management of the schemes.

In the Crown's submission, the development schemes were 'by and large a success story',⁴⁸⁵ and its 'policies and practices in respect of Land Development Schemes ought not to be considered a breach of the Treaty'.⁴⁸⁶ In our view, the development schemes were not a success in financial terms, although they did result in significant benefit to some claimants. We accept that, on balance, the policies and practices involved were not in breach of the Treaty. 'Unspectacular' outcomes and a mixed record of management are not, in themselves, Treaty breaches. The Crown attempted with some success to fulfil its active protection obligations, and to ensure that the peoples of Te Urewera enjoyed opportunities for loans and farm development equally with its European citizens. Some particular Crown actions, such as its refusal to write off debt, its abolition of Ngata's advisory committees, and its refusal at times to abide by the wishes of the owners,

484. Ibid

485. Crown counsel, closing submissions (doc N20), topic 32, p 3

486. Ibid, p 2

came close to breaching its partnership and active protection obligations. In other circumstances, we might have found a Treaty breach. But the claimants wanted the development schemes and were prepared at the time to give up some of their ownership rights to secure them, and the development schemes have ultimately been to the benefit of the communities which succeeded in obtaining them. The situation of those communities today would have been worse in their absence. While we acknowledge the claimants' sense of grievance, and that the Crown sailed close to the wind in some respects, we do not consider Treaty principles to have been breached in the inception and conduct of the schemes.

In part, we have reached this view because, even if the claimants had had greater input into and control of the schemes, there was too little land left for Maori farming to have been assured of success in Te Urewera. This was the result of previous Treaty breaches, as outlined earlier in our report. It was also the result, however, of Crown policies with regard to native timber and the clearing of fresh land for farm development. As we observed in chapter 16, the Crown reversed the views which had seen it acquire land for settlement in Te Urewera with such eagerness in the 1910s and 1920s, and became equally eager to prevent erosion and protect the settler farms of the Bay of Plenty. Tuhoe claim that they were denied the opportunity to log their forests, obtain capital by that means, and then develop newly cleared land for farming or exotic forestry. It is to this aspect of the claims that we now turn.

18.6 KEY FACTS: RESTRICTIONS ON THE USE OF NATIVE TIMBER

18.6.1 Background to the Crown's major change of policy in the 1930s

Before the 1930s, the Crown had three principal policy drivers in its treatment of native timber in Te Urewera. First, Governments were concerned that there was a looming national timber shortage, and that all remaining native forests were a valuable resource that should be used carefully and not simply cleared for farming. Secondly, as we saw in chapter 13, the Crown wanted to acquire and profit from such accessible and millable assets as the Te Whaiti timber. Thirdly, the Crown had entrusted Maori Land Boards with the tasks of facilitating and approving legal transfers of land from Maori to settlers, whether by lease or by sale, and this included licences for timber milling as an 'alienation' that had to go through the relevant board and be approved by it.

In terms of Te Urewera, however, the key issue remained its relative inaccessibility. The potential value of its forests was first recognised in the 1890s, but the remoteness of the region from timber markets, and the reluctance of the peoples of Te Urewera to part with the land – which was reflected in the passage of the Urewera District Native Reserve Act 1896 – meant that for the time being it escaped the attention of either settlers clearing land or of sawmillers.⁴⁸⁷

By about 1905, however, it was becoming evident to all those involved in the timber industry that stocks of native timber from untapped areas were on the

487. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 742–743

decline. The Crown was concerned that sawmillers would rush to exploit forest tracts on Maori land, and thus the Native Land Act 1909 specified that the sale of timber-cutting rights to a sawmiller amounted to an alienation, which needed the approval of the local Maori Land Board.⁴⁸⁸ As this legislation did not apply within the Urewera District Native Reserve, the UDNR Act 1896 was amended in 1909, stipulating that the sale of cutting rights would have to be approved by the General Committee (a representative body constituted under the terms of the 1896 Act), and signed off by Cabinet, before it went to the Maori Land Board for approval.⁴⁸⁹ As we saw in chapter 13, the situation was such that this provision only really restricted timber milling at Te Whaiti, where cutting rights were a live issue, and the matter became bound up with the Crown's purchase policies and tactics (see chapter 13).

The prospect of milling timber in the UDNR was in effect suspended during the decades of Crown purchasing and the arrangement of the UCS (see chapters 13 and 14). The final Crown award at the culmination of the UCS amounted to around three-quarters of the former reserve. The interests of the remaining owners tended to be concentrated in or around cleared land, so the proportion of forest that ended up in Crown hands was higher than it might otherwise have been.⁴⁹⁰ In the case of the Te Whaiti block, of which the Crown was awarded 85 per cent, the value ascribed to the forest was less than £30,000. As we noted earlier, this was much lower than the sawmillers' offers to Te Whaiti residents before the Crown's purchase of interests (see chapters 13 and 14). No value, meanwhile, was given to the less highly prized and less accessible timber on any of the other blocks.⁴⁹¹

Once the UCS was completed in 1927, the remaining Te Whaiti landowners tried to develop what was left of their timber resources. Consequently the Crown granted its first licence to mill forest on Maori land for two blocks at Te Whaiti in 1928. This would have been subject to section 35 of the Forests Act 1921–22, which required consent from the Commissioner of State Forests (later the Minister of Forests) before a milling licence could be confirmed by the Maori Land Board.⁴⁹²

From the 1930s onwards, other parts of the Urewera forests finally began to attract the attention of millers. Commercial milling had thus begun on a block at Ruatahuna by 1934, although in this case it was carried on without a licence until 1940.⁴⁹³ In 1935 and 1936, however, two reports by Crown officials (the Galvin and Dun, and Shepherd and Galvin reports respectively, referred to in chapter 16) concluded that Te Urewera forests had more water and soil conservation value, and scenic value, than they had as sources of timber. The only area where they thought

488. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 346; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 723–724

489. Neumann, "'... That No Timber Whatsoever Be Removed'" (doc A10), p 38; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 764

490. Campbell, 'Land Alienation, Consolidation and Development' (doc A55), pp 44, 105

491. *Ibid.*, pp 102–104; Boast, 'The Crown and Te Urewera in the 20th Century' (doc A109), pp 173–175

492. Neumann, "'... That No Timber Whatsoever Be Removed'" (doc A10), pp 60–61

493. *Ibid.*, p 89

production forestry should continue was in the Whirinaki Valley, where much of the land now belonged to the Crown.⁴⁹⁴ Subsequently, the Crown declined requests for a mill on the Te Waiiti blocks near Ruatahuna in the late 1930s, and also persuaded the Te Whaiti owners in 1938 to reject a milling application in favour of an exchange of land (although this exchange was never completed).⁴⁹⁵ In the meantime, milling of native timber in the Whirinaki State Forest (which included the Crown's forest acquisitions at Te Whaiti) began in 1938. The remaining forest areas that the Crown had acquired through the UCS, in contrast, were to become the basis of Te Urewera National Park, which was established in 1954, and then substantially enlarged in 1957.⁴⁹⁶

18.6.2 Timber restrictions in Te Urewera after the Galvin–Dun report

After the Second World War, the conclusions of the Galvin–Dun and Shepherd–Galvin reports continued to inform Crown policy. From 1945, the Te Waiiti land-owners had again pressed for a mill to be established, but the Forest Service advised the Maori Land Board not to lend money for it.⁴⁹⁷ Demand associated with the post-war construction boom meant, however, that miller interest in Te Urewera timber continued to grow. Consequently, as we saw in chapter 16, Peter Fraser (Prime Minister and Minister of Maori Affairs) attempted in 1949 to purchase 11 blocks for soil and water conservation purposes; five of the 11 were at Te Whaiti, four were at Te Waiiti, and two were in the Waimana Valley. The agreement would have allowed some of the low-lying land at Te Waiiti to be milled.⁴⁹⁸ In the same year, a new Forests Act was passed. Unlike the provisions in the 1921–22 Act, section 65 of the Forests Act 1949 gave the Minister of Maori Affairs input into the Minister of Forests' decision on milling applications, as well as allowing the Government to put conditions on milling which had been approved.⁴⁹⁹

A change of government after the 1949 general election led to the withdrawal of the Crown's offer to purchase the 11 Te Urewera blocks. The new Minister of Forests, of Lands, and of Maori Affairs, EB Corbett, was opposed to any milling within the region. Over the next four years, he routinely opposed new applications for milling licences.⁵⁰⁰ The only licences to mill Maori land that the Crown did grant during these years were for the Tuarangaia blocks, which were on the northern edge of the region.⁵⁰¹

494. Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), pp 72–75, 78–80

495. Ibid, p 81; Boast, ‘The Crown and Te Urewera in the 20th Century’ (doc A109), pp 186–187

496. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), p 767; Boast, ‘The Crown and Te Urewera in the 20th Century’ (doc A109), pp 322–323

497. Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), pp 121–122; Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), pp 771–772

498. Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), pp 88, 100–104, 109

499. SKL Campbell, ‘Urewera Overview Project Four: Te Urewera National Park 1952–75’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 1999) (doc A60), p 38

500. Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), pp 104–105; Campbell, ‘Te Urewera National Park’ (doc A60), pp 33–34, 37–38

501. Peter Clayworth, ‘A History of the Tuarangaia Blocks’ (commissioned research report, Wellington: Waitangi Tribunal, 2001) (doc A3), pp 116–118



The Henderson and Pollard Sawmill, Te Whaiti, 1949. The Te Whaiti owners suffered heavy losses of their valuable timber resource as a result of illegal Crown purchases of individual interests in the 1910s, and the subsequent location of the Crown award by the Urewera consolidation commissioners to include high-value forests. The Crown would mill these forests from the mid-1940s to the mid-1980s. After the consolidation scheme was finalised in 1927, Ngati Whare and Ngati Manawa tried to make the best of their remaining timber resource by making agreements with private millers, who established themselves in the Whirinaki Valley.

In response to Corbett's approach, Maori landowners started to carry out milling of a kind that was not controlled by legislation, either because the blocks concerned had fewer than 10 owners, or because the owners were cutting the timber themselves. After discussions with Tuhoe, Corbett decided in 1953 to agree to their requests to develop a framework whereby limited milling could be allowed by the Crown.⁵⁰² The Urewera Land Use Committee, composed of Crown officials and a Tuhoe representative, was thus established in 1954. This classified Ruatahuna blocks according to their suitability for milling, identifying the areas of forest where milling would not be opposed by the Minister. These classifications were then used as the basis for imposing conditions on milling allowed by section 218 of the Maori Affairs Act 1953 (which had replaced section 65 of the

502. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp773-774; Boast, 'The Crown and Te Urewera in the 20th Century' (doc A109), p195; Neumann, "'... That No Timber Whatsoever Be Removed'" (doc A10), p123

Forests Act 1949).⁵⁰³ Subsequently, milling licences were granted for most of the Ruatahuna blocks.⁵⁰⁴ Between 1955 and 1957, the Crown also pursued exchange and purchase options with respect to those Ruatahuna lands deemed unmillable by the Urewera Land Use Committee, but none of these came to fruition.⁵⁰⁵ A similar, more permissive approach was also adopted in respect to other areas of Te Urewera forest (such as at Te Whaiti), although as this committee's ambit never extended beyond Ruatahuna, there was no mechanism for owner input in these other areas.⁵⁰⁶

The reliance of the Crown on the Urewera Land Use Committee's classifications at Ruatahuna suffered a serious setback in 1957. In a case to test the legality of milling on the Pamatanga block, the Maori Land Court decided that these classifications had no independent legal standing, and thus could not be enforced in cases where no licence was needed for milling to occur.⁵⁰⁷ A new consent system was thus adopted by Eruera Tirikatene, Minister for Forests and for Maori Affairs in 1959. Tirikatene had believed the area classification system to be unfair, as he felt that it marked out areas which Maori would eventually have to sell to the Crown. The new consent, used in relation to a milling application for forest at Maungaphatu, put conditions on the environmental effects of the milling, rather than prescribing where it should be allowed and not allowed.⁵⁰⁸ However, as milling on the Heipipi block highlighted in 1960, the Crown still faced the problem that some milling was exempt from the licence requirements set out in the legislation.⁵⁰⁹

The Crown closed this loophole in 1961. It issued a notice making an area roughly coincident with that of the former Urewera District Native Reserve subject to section 34 of the Soil Conservation and Rivers Control Amendment Act 1959. This notice prohibited any activity (including tree felling) likely to cause erosion, and it applied to all landowners, so it did not matter how many owners there were in a particular block, or whether they were felling the timber themselves.⁵¹⁰ In the same year, as we discussed in chapter 16, the Crown completed the purchase of the Manuoha and Paharakeke blocks in order to add them to Te Urewera National Park. This allayed public concern that timber on the Manuoha block was about to be milled.⁵¹¹ As almost all of the Crown's land which was subject to this notice (and succeeding ones, as they expired every two years) lay within the national park, it had little impact on the Crown, although by the same token, the notices did

503. Boast, 'The Crown and Te Urewera in the 20th Century' (doc A109), pp194, 196–197; Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), p 138

504. See Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p775.

505. See Bassett and Kay, 'Ruatahuna' (doc A20), pp194–196, 198, 219.

506. Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), pp124–125; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp751–752, 776–779

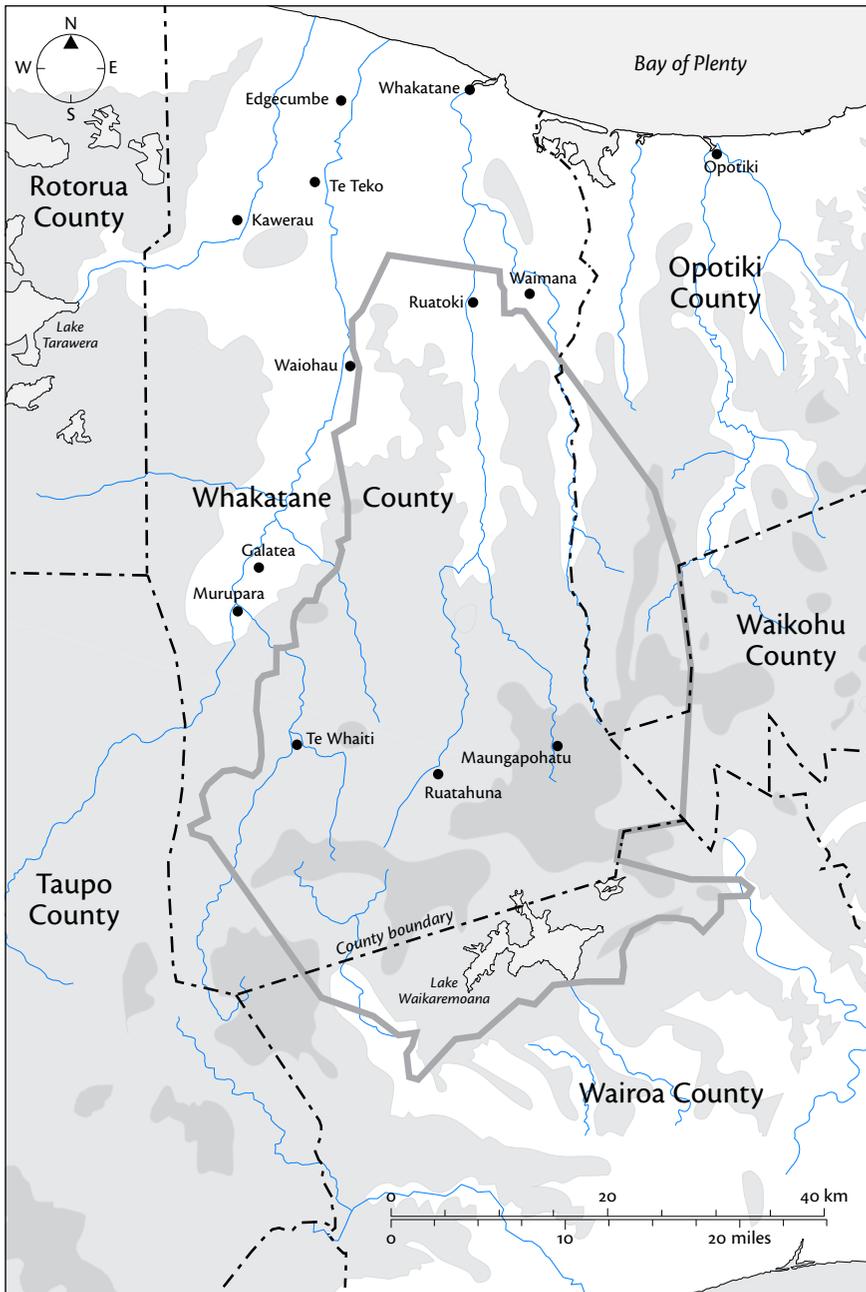
507. Bassett and Kay, 'Ruatahuna' (doc A20), pp197–198

508. Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), pp158–162

509. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp769–770

510. Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), pp166–168

511. *Ibid*, pp178, 187



Map 18.1: The area covered by the first section 34 (Soil Conservation and Rivers Control Amendment Act 1959) notice in Te Urewera, issued in 1961. The boundary of the area covered by the notice, within which timber milling was restricted, coincided largely with that of the Urewera District Native Reserve (see chapter 13) and of Te Urewera National Park (see chapter 16).

not override existing licences to mill forest on Maori land.⁵¹² In some cases, milling licences were also subsequently granted for blocks on which the section 34 notice had stopped unlicensed milling.⁵¹³ The most significant change arising from the introduction of section 34 notices was that landowners could now seek compensation (under section 37 of the Act) for the lost income from timber that was deemed unmillable.⁵¹⁴

Over the course of the 1960s, Tuhoe representatives requested negotiations with the Crown over compensation for the timber which the section 34 notices had made it illegal to mill.⁵¹⁵ It was not until 1971, however, that the Crown entered into these negotiations. Although various deals were proposed, including cash payments and land exchanges, eventually negotiations broke down in the late 1970s without any compensation having been paid.⁵¹⁶ By this time, the last milling operations on Maori land in Te Urewera were winding up, and there were internal differences over land administration within the Tuhoe rohe, so these negotiations were not resumed thereafter.⁵¹⁷ Commercial milling of native timber on Crown land in Te Urewera ended, meanwhile, when the Crown responded to public pressure by halting this activity in the Whirinaki State Forest in 1985.⁵¹⁸

The final acts in the history of Crown regulation of native timber milling in Te Urewera were the passage of the Resource Management Act 1991, and the Forests Amendment Act 1993. The former Act in a general sense through section 5, and section 67D of the latter Act, both prohibited the non-sustainable harvesting of native timber.⁵¹⁹ As no commercial milling of native timber on Maori land in the region has been carried out since the 1970s, these two pieces of legislation have had no practical impact, although they would prevent any attempts to resume milling in the future.

18.7 THE ESSENCE OF THE DIFFERENCE BETWEEN THE PARTIES

18.7.1 What restrictions on milling did the Crown impose and how far were these enforced in practice?

According to the claimants, the Crown's restrictions on their ability to mill timber and develop land have made all of their land a part of the national park, without payment, whether inside or outside its borders.⁵²⁰ They challenge the Crown's

512. Bassett and Kay, 'Ruatahuna' (doc A20), p 199

513. Neumann, " . . . That No Timber Whatsoever Be Removed" (doc A10), pp 165, 189–190

514. Campbell, 'Te Urewera National Park' (doc A60), p 75

515. Ibid; Neumann, " . . . That No Timber Whatsoever Be Removed" (doc A10), pp 200–201; Clementine Fraser, 'Amalgamation of Urewera Lands, 1960–1980s' (commissioned research report, Wellington: Waitangi Tribunal, 2004) (doc F3), pp 24, 33–34

516. Bassett and Kay, 'Ruatahuna' (doc A20), pp 203–206

517. Ibid, pp 352–353

518. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 698

519. Neumann, " . . . That No Timber Whatsoever Be Removed" (doc A10), pp 214, 216; Richard Boast, 'Ngati Whare and Te Whaiti-Nui-a-Toi: A History' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1999) (doc A27), p 237 n 649

520. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 65

right to have imposed these restrictions. According to the Wai 36 Tuhoe claimants, the Crown's policy was in breach of the plain meaning of article 2 of the Treaty, because it 'denies the right of Tuhoe to exploit their lands to the full extent of the guarantee of "full, exclusive and undisturbed" possession of their lands.'⁵²¹ Counsel for Ngati Whare submitted that article 2 recognised and guaranteed the right of Maori to manage and control as well as own their forests.⁵²²

The key question then becomes: was the Crown's policy justified under its kawanatanga obligations in article 1 of the Treaty to protect the environment from soil erosion?⁵²³ In the claimants' view, it was not. As they see it, the Crown's intervention was far wider than it needed to be, effectively prohibiting all milling across the former UDNR, and it was altogether unnecessary. Crown officials knew that 'browsing by introduced pests' posed a far greater threat than milling, yet chose to restrict Maori activities rather than devote the resources necessary to eradicate pests. Even if there had been a genuine need to impose restrictions, however, the Crown's policy still failed to meet the Treaty tests of being justified in exceptional circumstances and as a last resort in the national interest, and of interfering as little as possible in the rights of Maori owners.⁵²⁴ In addition, the claimants contend that the policy breached their article 3 rights because while private Pakeha owners could mill their lands as they pleased, the legislation restricted the rights of the owners of Maori land in multiple title.⁵²⁵

The Crown's response was simple: it is entitled to govern and it must do so in a manner that balances economic and social development with conservation. In this equation, Maori interests are 'private interests' which may be served in the short term 'if their block is deforested and they obtain income', but those same interests may be harmed in the longer term 'if serious erosion, flooding and environmental damage occurs.'⁵²⁶ Prevention of erosion and flooding is a matter of the 'national interest.'⁵²⁷ According to the Crown, it has balanced such matters appropriately. It did in fact permit a 'vast' amount of timber to be milled on Maori land in Te Urewera. Also, in the Crown's view, its partial relaxation of restrictions in later decades served Maori well because the value of their timber had appreciated significantly in the meantime.⁵²⁸ This relaxation of restrictions was negotiated with Tuhoe in the 1950s, and the Urewera Land Use Committee classifications were the outcome. The result was 'sustainable management and sensible harvesting consistent with Treaty principles.'⁵²⁹

The Crown accepted, however, that 'Te Urewera Maori often faced difficult economic circumstances', and that a 'potential side effect' of its policy was to limit

521. Ibid, p 64

522. Counsel for Ngati Whare, closing submissions, no date (doc N16), p 91

523. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 64

524. Ibid, pp 64–65

525. Ibid, p 65

526. Crown counsel, closing submissions (doc N20), topic 31, p 3

527. Ibid, p 9

528. Ibid, p 2

529. Ibid, pp 9–12

the ability of Maori landowners to realise the economic potential of their timber resource.⁵³⁰

18.7.2 What steps did the Crown take to ensure that the peoples of Te Urewera were fairly compensated for restrictions on the milling of their timber?

The claimants argued that the Crown has failed to compensate them for its imposition of timber restrictions. Negotiations proved fruitless, and exchanges of scenic land for farmland were much talked about but never happened.⁵³¹ Even the legal requirement of compensation in the soil and water conservation legislation has never been met.⁵³² The Wai 36 Tuhoe claimants maintain that the Crown chose to limit its compensation options to acquiring or exchanging land, in the hope that the affected owners, not wanting to give up their land, would reject the offer (so that the Crown never had to pay up, so to speak). Financial compensation for ‘injurious affection’ was equally possible, but there appears to have been no ‘political will’ to make it happen.⁵³³ Finally, Tuhoe have asserted that the 1970s compensation negotiations failed because the Crown was unwilling to pay for non-merchantable timber (even though it had paid for this when buying Manuoha and Paharakeke).⁵³⁴

The Crown accepted that it was liable, under section 37 of the Soil Conservation and Rivers Control Amendment Act 1959, for compensating owners whose forest land could not be milled after 1961, and that – to date – no compensation has been paid.⁵³⁵ It also acknowledged that the Crown did not support some earlier compensation deals, such as land exchanges for post-Consolidation blocks at Te Whaiti, through to their completion.⁵³⁶ It nevertheless maintained that it has shown good faith to Te Urewera owners: first, by offering to buy or exchange affected land in the period prior to 1961, when there was a moral but no legal obligation for it to do so; and, secondly, by entering into compensation negotiations with Tuhoe in the 1970s, even though no formal section 37 claims had been lodged against it.⁵³⁷ It also maintained that the only safe recourse for the Crown was to acquire ownership of the land and trees, as that was the only way of ensuring that compensation would in fact result in the permanent protection of the trees.⁵³⁸ The Crown ‘accepts the claim that no compensation has been paid to Tuhoe for any loss of income or injurious effects arising from the statutory restrictions preventing the cutting and

530. Crown counsel, closing submissions (doc N20), topic 31, p 4

531. Counsel for Ngati Whare, closing submissions (doc N16), pp 87, 89, 99

532. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 183; counsel for Ngati Whare, closing submissions (doc N16), p 99; counsel for Ngati Hineuru, closing submissions, 30 May 2005 (doc N18), p 32

533. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 183

534. Ibid, p 180; counsel for Tuawhenua, closing submissions (doc N9), p 258

535. Crown counsel, closing submissions (doc N20), topic 31, p 19

536. Ibid, p 16

537. Ibid, pp 8, 19

538. Ibid, p 19

removing of timber from their land'.⁵³⁹ Nonetheless, the Crown neither accepted nor denied a share of the blame for the breakdown of compensation negotiations in the 1970s, simply attributing it to 'a number of [unspecified] reasons'.⁵⁴⁰

18.8 TRIBUNAL ANALYSIS OF TIMBER RESTRICTIONS

In our definition of issues for Tribunal determination, we highlighted that the key question for us to answer is:

- ▶ To what extent were the peoples of Te Urewera prevented from milling their native timber, and should they have been compensated? If so, were they compensated accordingly?

In order to address this question, we have identified three subsidiary elements, which we examine in turn:

- ▶ What restrictions on milling did the Crown impose and how far were these enforced in practice?
- ▶ What steps did the Crown take to ensure that the peoples of Te Urewera were fairly compensated for restrictions on the milling of their timber?
- ▶ What were the impacts of milling restrictions on the peoples of Te Urewera, block by block?

18.8.1 To what extent were the peoples of Te Urewera prevented from milling their native timber, and were they compensated accordingly?

SUMMARY ANSWER: After the completion of the Urewera Consolidation Scheme in 1927, Maori owners were able to enter into contracts to sell logging rights on their remaining lands to timber companies. At that time, a sale of the cutting rights required the prior consent of the Commissioner of State Forests (later the Minister) and then the approval of the Maori Land Court or Maori Land Board. At first, the Government exercised a protective supervision, ensuring that timber contracts were fair, but soon began to use these powers to prevent milling altogether. In the 1920s, the Forest Service had recommended the abandonment of the original plan to clear and settle Te Urewera for farming. In order to preserve rainfall and prevent erosion, officials recommended a total ban on milling in the former UDNR. In the 1930s and 1940s, this recommendation was put into effect. Almost no milling was allowed. Maori found loopholes in the law, which either permitted them to cut timber themselves (and then sell it) or imposed no restrictions in the case of the small number of blocks owned by 10 or fewer owners. But most milling was prevented in practice.

The Crown's almost total restriction of milling in the 1930s and 1940s was finally relaxed in the 1950s. As we discussed in chapter 16, Ernest Corbett, Minister of Forests, entered into a new arrangement with Tuhoe, to classify the lands at Ruatahuna as: A (suitable for milling, then farming); B (suitable for milling but

539. Ibid

540. Ibid, p 20

not farming); and c (not suitable or appropriate for milling). Corbett accepted that if Maori were, as he put it, not to starve on their remaining lands, they could no longer – in all fairness – be prevented from milling them. The classification system enabled the identification of lands that could be milled safely without threat of erosion and flooding. This resulted in a modified approach, where milling was permitted in certain circumstances and under conditions written into the Minister of Forests' consents. At the end of the decade, however, the new Minister of Forests, Eruera Tirikatene, believed that the classification system was unfair because it seemed to earmark unmillable land for sale to the Crown; the owners were not allowed to do anything else with it. He also believed that the system discriminated against Maori, because only Maori land was subject to these kinds of restrictions. For general land, the Crown had to buy it or acquire it under the Public Works Acts if it wanted to prevent milling. Also, the Government had yet to close the loopholes allowing unlicensed milling on land owned by 10 or fewer individuals, or Maori owners cutting the timber themselves. Nonetheless, the relaxation of restrictions in the 1950s enabled many Maori owners to mill their A and B lands.

In 1961, the period of relaxed restrictions was cut short. A section 34 notice under the Soil Conservation and Rivers Control Amendment Act 1959 was issued, imposing a blanket ban on all new milling arrangements in the former UDNR. In practice, existing contracts were not affected and some new contracts were permitted. Thus, the new regime was less restrictive than it appeared at first sight. Nonetheless, Maori owners were not permitted to take advantage of new technology, which had made some of their c lands millable. Timber worth millions of dollars was shut away from any prospect of milling. By this time, the Government was more concerned with public opinion – a general perception that milling on Maori land in Te Urewera carried a threat of serious erosion and flooding – than with the actual risk of such catastrophes. In reality, controlled milling meant that pests were considered a much more serious threat. Even so, the blanket restriction imposed in 1961 remained in effect until the 1990s, when the section 34 notice was replaced by a general restriction contained in resource management and forestry legislation.

From the 1930s onwards, the Government accepted that it had a moral obligation to compensate Maori owners for these restrictions, imposed upon them 'in the public interest'. Ministers and officials knew that the restrictions had a significant impact on the Maori peoples of Te Urewera in terms of their rights as landowners and their economic well-being. In particular, officials in the 1930s were concerned that the restrictions protected Pakeha farmers and communities at the expense of Maori communities, and that the Government had an obligation to provide compensation. From the 1930s to the 1950s, most officials and Ministers took the view that compensation should take the form of buying the land and trees outright, although less direct measures (such as farm development assistance free of charge) were also considered. But, when it came down to it, Maori were prepared to contemplate land exchanges but not sales, and so no compensation was made during this period.

After 1961, the Crown was legally obliged to compensate landowners when milling applications were declined under the section 34 notice, and an ‘injurious effect’ could be proven. It appears that Maori owners had to apply for compensation each time an application was declined. Eventually, both the Crown and Maori came to prefer a more general process for negotiating compensation in Te Urewera. Although Tuhoe initiatives in this respect were rebuffed in the 1960s, the Crown was willing to negotiate throughout the 1970s. Those negotiations ultimately proved unsuccessful for a number of reasons. In our view, the most important was that the Crown still insisted on obtaining both land and trees, whether by exchange or a lease in perpetuity – a condition to which, in the end, Tuhoe would not agree. While the Government and Tuhoe agreed that land (for farming or forestry) was a better form of compensation than money, the Maori owners ultimately refused to surrender any more ancestral land to the Crown as the price for it. Also, the Government was reluctant to pay more than half the value of non-merchantable timber in any deal. Proposed exchanges fell through (for the most part – the exceptions were Tahora 2G2, part of Tahora 2F2, and Whirinaki 1 4B1B). By the end of the 1970s, the Tuhoe-Waikaremoana Maori Trust Board could no longer represent the Tuhoe Tuawhenua owners in these negotiations, which meant that any arrangement could no longer be comprehensive. As a result of all these factors, the negotiations were abandoned and no compensation has ever been paid, despite the Crown’s acceptance that it had an obligation to do so. While the Crown is not solely to blame for the failure of negotiations in the 1970s, its efforts fell short of what was required to meet its obligation to Maori.

While the claimants have overstated the degree to which milling was restricted – a great deal was permitted in practice – it is still the case that significant millable timber has been locked up in the national interest, without compensation. In our inquiry, the Crown accepted that it had had a moral obligation but rejected the notion of a legal obligation, except for the narrow requirement to compensate individual applicants affected by the section 34 notice, which has long since expired. In our view, there is no denying that the Crown has known of its important obligation to Maori owners from the 1930s to the present day; an obligation which it has not met.

As noted above, we have structured our analysis of this issue question under three subsidiary questions. We begin by outlining the kinds of restrictions imposed by the Crown from the 1930s to the 1990s, and examining how far these restrictions were actually enforced in practice.

18.8.2 What restrictions on milling did the Crown impose and how far were these enforced in practice?

18.8.2.1 Milling restrictions before 1961

By the time the Urewera Consolidation Scheme reached its conclusion in 1927, the Crown had acquired about three-quarters of the land within the former Reserve. It acquired an even higher proportion of its timber resource, since the small areas of cleared land were placed in the remaining owners’ awards. This added to the Crown’s purchases in the rim blocks (see chapter 10), which had enabled the

Crown to acquire most of the forest in the Heruiwi 4 and Whirinaki blocks which bordered on the former Reserve. Even so, there were still numerous enclaves of forested Maori land throughout Te Urewera.⁵⁴¹

With the repeal of the Urewera District Native Reserve Act in 1922, all of these forested areas became subject to a new piece of legislation that restricted milling on Maori land, the Forests Act 1921–22. Section 35(2) of this statute required that consent had to be obtained from the Commissioner of State Forests before any licence to cut timber on Maori land could be granted to a sawmiller by the Maori Land Board. The restriction of milling under this Act was not absolute. Maori were still allowed, as the Crown has noted in its closing submissions, to cut their own timber, and could even employ agents to do this on their behalf, without applying for consent.⁵⁴² This loophole arose from the fact that the Native Land Act 1909 (and an identical section of the Native Land Act 1931) stated that the sale of timber was not deemed to be an alienation if the timber had been ‘severed from the land before the making of the contract.’⁵⁴³ Maori Land Board approval, therefore, was not required. In addition, both Acts stipulated that the legal restrictions on an ‘alienation’ only applied to land that had more than 10 owners.⁵⁴⁴ Again, Maori Land Board approval was not required for the milling of land owned by 10 or fewer individuals.

Nevertheless, as we saw in previous chapters, the Crown had been able to obtain an injunction in 1917 to stop Te Whaiti owners from using their timber. In practice, the peoples of Te Urewera could not consider selling the timber in the former native reserve until the boundaries between Crown acquisitions and remaining Maori land were settled. It was thus not until 1928 that any new sales of Maori-owned timber to sawmillers were proposed. The resulting transaction, which concerned the Kaitangikaka and Tahupango blocks (formerly part of the Te Whaiti block) was unusual, in that it was not authorised under the Forests Act 1921–22, but rather under a regulation governing the sale and cutting of standing timber, which had been issued under section 34(6) of the War Legislation and Statute Law

541. The remaining lands of Tuhoe at Ruatahuna, Maungapohatu, along the Whakatane and Waimana Rivers, and in the Tuararangaia and Tahora 2 blocks, of Ngati Whare at Te Whaiti, of Ngati Manawa in the Heruiwi 4 and Whirinaki blocks, and at Te Whaiti, of Ngati Hinueru in the Heruiwi block, as well as the Manuoha and Paharakeke blocks on the eastern side of the former UDNR, were all partially or wholly forest covered.

542. Crown counsel, closing submissions (doc N20), topic 31, p 5

543. Native Land Act 1909, s 211; Native Land Act 1931, s 262. Section 211 of the 1909 Act reads as follows: ‘For the purposes of this Act a contract of sale of timber, flax, minerals . . . attached to or forming part of Native land (other than industrial crops) shall be deemed to be an alienation of that land, unless the thing so sold or agreed to be sold has been severed from the land before the making of the contract.’

544. See Native Land Act 1909, s 209(1), and Native Land Act 1931, s 258(1). The former begins with the following: ‘When any Native land is owned for a legal estate in fee-simple by more than ten owners as tenants in common, no Native owner thereof shall be capable of making any alienation thereof unless.’

Amendment Act 1918.⁵⁴⁵ The available evidence does not reveal why this was the case.

The terms allowed for the initial timber-cutting licence were very permissive; so much so that the claimants have argued that the Crown failed to protect the owners' interests (see below). The wasteful milling practices employed on these blocks, however, led officials to adopt a more cautious approach during the early 1930s. This meant denying cutting licences if the royalty offer to Maori was too low, or if the milling operation appeared likely to squander the timber. As we will see later in this chapter, an application for cutting rights at Te Whaiti was accordingly declined in 1931, and a post-splitting application in 1934 was approved only after the royalty offer had been raised by 50 per cent.⁵⁴⁶ In 1935, moreover, an official report by Galvin and Dun on the Urewera forests called for 'the most rigid scrutiny' of offers made by sawmillers to Maori owners, in order to prevent the latter's exploitation.⁵⁴⁷

Thus, for the first few years after the completion of the UCS, it seemed as if it would be business as usual: Maori Land Boards and the Commissioner of State Forests would approve timber milling applications with an eye to sensible use of the timber resource and fair dealing for the Maori owners. As we observed in chapter 16, however, the 1920s and 1930s saw a sea change in the Crown's aspirations for Te Urewera forests. Galvin and Dun's report quashed any thoughts that the forest in the heartland of the region should be cleared for farming, stating that they had 'no hesitation in asserting that the farming value of the standing bush land is nil', and that 'not another tree should be felled for this purpose.'⁵⁴⁸ This conclusion was in fact a view that the Forest Service had held since 1921.⁵⁴⁹

Also, and more significantly for the restriction of timber milling on Maori land, they concluded that the region's forests were more valuable for water and soil conservation and scenery preservation than as a timber asset.⁵⁵⁰ This meant that, except where production forestry was already under way (or at least anticipated), the prime rationale for restricting the milling of Maori-owned forest changed from rationalising its exploitation, which was in the owners' interest, to keeping it intact, which was intended more to serve the public interest. By way of

545. The authorisation was conditional on a Forest Service appraisal, but there is no record of the appraisal being carried out. Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), p 65; Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 308, 310.

546. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 317–318

547. MJ Galvin and DD Dun to Conservator of Forests, 'Report by Officers of the Lands and Survey Department and the State Forest Service on the Urewera Forest', 29 April 1935 (SKL Campbell, comp, supporting papers to 'Urewera Overview, Project Four: Te Urewera National Park, 1952–75', 2 vols, various dates (doc A60(a)), vol 1, p 36)

548. MJ Galvin and DD Dun to Conservator of Forests, 'Report by Officers of the Lands and Survey Department and the State Forest Service on the Urewera Forest', 29 April 1935 (Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), pp 72–73)

549. Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), pp 55–56

550. *Ibid*, pp 73–74

example, one of their conclusions was that '[i]t is obviously imperative to preserve all bush adjacent to the road for scenic purposes'. This particular objective was not regarded as being difficult to meet. Galvin and Dun felt that 'by the exercise of tact and consideration on the part of the Europeans, the Maoris will readily co-operate in all efforts to preserve scenery'.⁵⁵¹

As a result of this shift in thinking about Te Urewera forests, sawmillers' applications for cutting rights within the region were almost uniformly rejected by the Crown during the 1930s and 1940s. The Crown's insistence that milling be kept off areas visible from the Rotorua–Waikaremoana road was a major obstacle, given that this was the timber most accessible to millers. In June 1936, moreover, Frank Langstone, Minister of Lands, proposed not only that all of the forest visible from the road be acquired, but also alienations of the land and timber be prohibited under section 442 of the Native Land Act 1931.⁵⁵² Only in one instance during this period, that of an application to mill Mangapai in the Ruatahuna district, did the Crown try to facilitate the exploitation of the timber on Maori land, and this was only because the Crown wanted most of the timber for itself (see below).⁵⁵³ The restrictive policy of the Crown was not wholly effective, however, as a number of small milling operators established themselves in the Whirinaki Valley, by taking advantage of the loopholes in the Forests Act 1921–22 referred to above. Some of these operators were rather wasteful, and this led to a prosecution being taken against one miller, Adam MacLarn, but eventually his right to mill on behalf of the relevant Maori block owners was upheld by the Auckland Supreme Court.⁵⁵⁴

By 1934, unlicensed milling was also going on in the Ruatahuna district, on the Papueru block. The Native Land Court took steps to stop this in 1939, but subsequently granted a licence to a new operator in 1940. Interestingly, the Commissioner of State Forests consented to the 1940 licence application because it excluded an area deemed to have scenic value by the Forest Service;⁵⁵⁵ in effect this meant that the Crown was allowing conditional milling, rather than giving the simple yea or nay response to applications suggested by section 35(2) of the Forests Act 1921–22. Apart from the Mangapai case referred to above, the Crown did not display such flexibility again until 1949, when officials agreed in principle to allow the owners of the Te Waiiti blocks in the Ruatahuna district to mill their low-lying slopes, in exchange for selling steeper areas to the Crown.⁵⁵⁶ Such agreements were facilitated by the passage of the Forests Act 1949. Section 65, which replaced section 35(2) of the previous Act, allowed the Minister of Forests, in conjunction with

551. MJ Galvin and DD Dun to Conservator of Forests, 'Report by Officers of the Lands and Survey Department and the State Forest Service on the Urewera Forest', 29 April 1935 (Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), p 73)

552. Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), p 80

553. *Ibid*, pp 111–114

554. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 325–330

555. Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), p 80

556. *Ibid*, pp 103–104

Section 65 of the Forests Act 1949

65. Sale of Maori-owned forest—(1) After this Act comes into force neither the Maori Land Court nor a Maori Land Board shall grant any right to cut or remove trees or timber or confirm any instrument or grant of such right without the previous consent in writing of the Minister, who may in his discretion with the concurrence of the Minister of Maori Affairs refuse his consent or grant his consent wholly or partly and either unconditionally or upon or subject to such conditions as he thinks fit.

(2) In any consent the Minister may specify the area and kinds and sizes of trees to which the consent relates and also state therein the value of the trees or timber as assessed by the State Forest Service.

the Minister of Maori Affairs, to approve timber milling licences but impose conditions upon them, instead of simply prohibiting milling.⁵⁵⁷

As we discussed in chapter 16, this was all part of wider negotiations between the Crown and Tuhoe over their lands. In the post-war years, the Government's policy had changed from ad hoc restrictions of milling applications to trying to purchase the land and thus ensure its permanent reservation for soil and water conservation. The Fraser Government tried to buy 11 blocks in 1949 but Tuhoe would not agree to such an extensive alienation. The tribe indicated some willingness not to mill certain areas if they were permitted to develop others. Maori Affairs officials negotiated a compromise that combined purchase of some of the land (with payment for both land and timber), reservation of sacred sites, and milling of certain areas. The heads of the Lands Department and the Forest Service rejected this compromise.⁵⁵⁸

The newly elected National Government abandoned these negotiations in 1949. Its attempt in 1951 to purchase just four of the blocks, on the grounds that their acquisition was vital in the national interest, foundered on the owners' determined opposition (see chapter 16). At the same time, the Crown reverted to its policy of opposing almost all milling applications concerning Maori land in the region.⁵⁵⁹ As we saw in chapter 16, EB Corbett, the new Minister of Forests and of Maori Affairs, was the driving force behind Te Urewera National Park and he was in no doubt that preservation should be the Crown's goal with respect to all forests in Te Urewera. As he stated to the Under-Secretary for Maori Affairs in 1950: 'The public welfare in relation to erosion and scenery preservation must be paramount. The

557. Campbell, 'Te Urewera National Park' (doc A60), p 38

558. Neumann, ". . . That No Timber Whatsoever Be Removed" (doc A10), pp 88, 100–104, 109

559. Ibid, p 105; Campbell, 'Te Urewera National Park' (doc A60), pp 33–34, 37–38

question of rights of individuals and land disposal is a secondary one.⁵⁶⁰ Likewise, in 1953, Corbett told Parliament:

no Government with any sense of responsibility would allow these vital areas [Te Urewera watersheds] to be denuded of their forests, endangering our water-supply, creating inevitably a flood menace on the rich, low land [of the Bay of Plenty], and also to a lesser degree removing a scenic beauty that can never be restored. That comes definitely third. The first is the water-supply; the second, soil protection and river control.⁵⁶¹

By this time, sawmiller interest in Te Urewera timber was growing, and the Crown was accordingly declining milling applications on an ever-increasing number of blocks.⁵⁶² In light of this, Maori landowners who had the opportunity to exploit loopholes in the licensing requirements began doing so rather than waiting for the Crown to relax its stance.⁵⁶³ For them, logging the land and then developing it for an ongoing economic return was a matter of survival. That being the case, Tuhoe representative Sonny White offered a compromise to the new Government in the hope that it would recognise the necessity of their logging and developing at least some of their forested lands.⁵⁶⁴ In a letter to Corbett in 1953, White suggested that Tuhoe might be prepared to sell their high country to the Crown if they were allowed to mill their low-lying land, which they could then develop for farming.⁵⁶⁵

Importantly, Corbett accepted in 1953 that a change of policy was needed, and thus informed Cabinet that '[t]he Maoris do not wish to sell their land, and . . . consent to mill timber should not in equity be withheld any longer'. He wanted the Forest Service to draw up working plans for the Ruatahuna forest blocks, which

560. E Corbett to Under-Secretary for Maori Affairs, 20 April 1950, attached to T Ropiha to Minister of Maori Affairs, 14 April 1950 (Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), p105). As the Assistant Director of Forestry, A L Poole, put it in 1960: ‘Until the Hon EB Corbett became Minister of Lands and Forests in 1953, the Forest Service had consistently followed a policy of recommending to its Ministers that no consents be given to applications for the milling of forest on the Maori-owned blocks in the Urewera’. See A L Poole, *Urewera Maori Lands: Summary of Forest Service Activities, 1953–1957 when EB Corbett was Minister of Lands and Forests* (Wellington: New Zealand Forest Service, 1960), p1 (Campbell, supporting papers to ‘Te Urewera National Park’ (doc A60(a)), p111); see also Bassett and Kay, ‘Ruatahuna’ (doc A20), p185.

561. EB Corbett, 24 April 1953, NZPD, vol 299, p264

562. The blocks where milling applications proved unsuccessful between 1949 and 1953 included Waireporepo 2F, Te Huia, Kopuhaea, Te Whakapau, Okete, Ahiherua, Tiritiri, Oraukura, Te Maioro, and Te Hiwiotewera: see Tuawhenua Research Team, ‘Te Manawa o te Ika, Part Two’ (doc D2), p330; Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), pp110, 116–117. Only one application seems to have been successful in Te Urewera, namely that involving Tuararangaia 3B2, which did not belong to claimants in our inquiry: see Clayworth, ‘A History of the Tuararangaia Blocks’ (doc A3), p118.

563. See Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), pp107–108, 110–111.

564. ‘Not All For the Nation: Urewera Park: Maoris Have Hopes of Land Development’, *Rotorua Post*, 24 January 1953 (Campbell, supporting papers to ‘Te Urewera National Park’ (doc A60(a)), p82)

565. Neumann, “. . . That No Timber Whatsoever be Removed” (doc A10), p123

Pseudopanax



Arohaki Lagoon, Whirinaki Forest Park (now Whirinaki Te Pua-a-Tane Conservation Park). The forest is one of the world's last prehistoric rainforests, with rimu, totara, kahikatea (pictured), matai, and miro. Ngati Whare speakers who gave evidence spoke of the dilemma they faced as a result of the widespread loss of land and resources to the Crown. Forestry on their remaining land was one of the few viable economic opportunities left to them, but the costs of logging on their generations-old relationship with the forest were high. They had supported selective logging and sustainable native forestry, and the Government's decision in 1984 to end native forestry was an enormous blow for the community.

would then be discussed with the owners in order to determine their long-term management.⁵⁶⁶ Corbett then met with Tuhoe at the end of the year and found them unwilling to sell any more land to the Crown, despite White's suggestion earlier in the year. Clearly moved by their recital of their history, their relationship with the land, and the long record of broken promises, Corbett raised the possibility of exchanging farmable Crown land in Te Urewera for key Maori lands needed to protect the environment. He accepted that Tuhoe must not be allowed to 'starve' on their ancestral lands and that some development was necessary, but, he said, it must not be at the price of denuding the hills and flooding the farms

566. Minister of Forests to Members of Cabinet, [circa 6 December 1953], p1, attached to AL Poole, *Urewera Maori Lands: Summary of Forest Service Activities, 1953-1957* (Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), p122); Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), pp122-123

of others (see chapter 16 for a more detailed account of this crucial hui between Tuhoe and the Crown).⁵⁶⁷

The new Crown policy of allowing limited milling was given effect by the formation of the Urewera Land Use Committee in 1954. Its task was to identify which areas of forest ought to be preserved intact, and alternatively, which should be able to be cut by sawmillers with the Crown's consent.⁵⁶⁸ Significantly, the committee, by including a Tuhoe representative among its six members,⁵⁶⁹ also involved the peoples of Te Urewera in the decision-making process for the first time in 40 years. It was only employed with respect to the Ruatahuna blocks, however, with a similar approach being employed elsewhere without the local people's input. The committee's A, B, and C classifications (A land being suitable for milling and then farming, B land being suitable for milling but not farming, and C land being unsuitable for milling) were able to be incorporated in timber-cutting licences using the condition-setting powers given to the Minister of Forests by section 218 of the Maori Affairs Act 1953.⁵⁷⁰ This provision had replaced section 65 of the Forests Act 1949.

Under the Land Use Classification regime, cutting rights were able to be granted on at least part of most of the Ruatahuna blocks during the mid- to late 1950s,⁵⁷¹ and there was a similar relaxation of restrictions throughout the rest of the region (with milling licences being granted for the first time at Ruatoki, on the Waimana Valley blocks, the Tahora 2 blocks, and the Heruhiwi 4 blocks). By the end of the decade, however, Crown officials were less satisfied that using the A-B-C classifications to prescribe where milling could take place was achieving the results they wanted.⁵⁷² In particular, when the deputy registrar of the Maori Land Court applied for an injunction against milling of C lands on the Pamatanga block in the Ruatahuna district, he was unsuccessful. This block (403 acres) had three owners. The Maori Land Court determined that, except where these classifications were written into the conditions of a licence, they were not legally binding.⁵⁷³ The Maori Affairs Act 1953 did not require ministerial or land court approval of milling in

567. Neumann, “... That No Timber Whatsoever Be Removed” (doc A10), pp123–124; ‘Meeting of Tuhoe Land Owners with the Hon EB Corbett, Minister of Maori Affairs and Lands at Ruatahuna on Thursday 10/12/1953’, minutes, 10 December 1953, MA 1 19/1/135, pt2, Archives New Zealand, Wellington

568. Tuawhenua Research Team, ‘Te Manawa o te Ika, Part Two’ (doc D2), pp344–345

569. Campbell, ‘Te Urewera National Park’ (doc A60), p 66

570. Neumann, “... That No Timber Whatsoever Be Removed” (doc A10), p125

571. See Evelyn Stokes, J Wharehuia Milroy, and Hirini Melbourne, *Te Urewera Nga Iwi Te Whenua Te Ngahere: People, Lands and Forests of Te Urewera* (Hamilton: University of Waikato, 1986) (doc A111), fig 43.

572. In 1958, for example, A Entrican, Director of Forestry, reported to E Tirikatene, Minister of Forests, that ‘[l]ogging by Maori owners who consider themselves not to be bound by the agreement has, however, increased and much logging is taking place on land which the Forest Service and the joint Committee would class as C country’. See A R Entrican to Minister of Forests, 19 March 1958, attached to AL Poole, *Urewera Maori Lands: Summary of Forest Service Activities, 1953–1957* (Campbell, ‘Te Urewera National Park’ (doc A60), pp72–73).

573. Neumann, “... That No Timber Whatsoever Be Removed” (doc A10), pp135–137; Bassett and Kay, ‘Ruatahuna’ (doc A20), pp197–198; Rotorua Maori Land Court, minute book 105, 15 July 1957, fols 388–390

Section 218 of the Maori Affairs Act 1953

218. Sale of standing timber, flax, etc—(1) For the purposes of this Part of this Act a contract of sale of any timber, flax, minerals or other valuable thing attached to or forming part of any Maori land (other than industrial crops) or any contract, licence, or grant conferring upon any person whether by way of agency or otherwise the right to enter upon any Maori land for the purpose of removing therefrom any timber . . . shall be deemed to be an alienation of that land, unless the thing so sold or agreed to be sold or authorized to be removed has been severed from the land before the contract, licence, or grant is made or granted.

(2) If on application for the confirmation of an alienation to any person other than the Crown of land having any timber trees growing thereon, it appears to the Court that the alienation is primarily or substantially for the purpose of effecting the disposition of any timber, it shall not confirm the alienation except with the consent of the Minister of Forests, which may be unconditional or subject to such general or specific conditions as that Minister may impose.

(3) The refusal of the Minister of Forests to give any consent as aforesaid, or the consent of that Minister and the terms of any conditions attached thereto, shall be forthwith communicated by him to the Minister of Maori Affairs.

the case of blocks with 10 or fewer owners. As we noted in chapter 16, the Maori Affairs Department warned that more milling of such blocks was likely to follow.

In 1959, meanwhile, Eruera Tirikatene, Minister of Forests as well as Maori Affairs since 1957, felt that the A–B–C system was unfair on the peoples of Te Urewera, as it had the effect of compelling them to set aside their land for eventual sale to the Crown.⁵⁷⁴ He thus introduced a new form of consent conditions in relation to an application to mill land at Maungapohatu, which was reactive (rather than prescriptive) in that it gave the Rotorua Conservator of Forests the ability to impose restrictions depending on the effects the milling was having.⁵⁷⁵ On the other hand, by abandoning the Urewera Land Use Committee, the peoples of Te Urewera again lost their voice when it came to the Crown making decisions on milling restrictions. Also, Tirikatene wanted to remove the statutory discrimination against Maori nationally, because theirs was the only private land that required Government permission for milling. As Klaus Neumann pointed out, the new water and soil conservation legislation was not what he had had in mind.⁵⁷⁶ We turn next to the post-1961 regime, which was dominated by this new statute.

574. Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), pp 158–159

575. Ibid, pp 160–161; Campbell, ‘Te Urewera National Park’ (doc A60), p76

576. Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), pp 159–160

18.8.2.2 Milling restrictions after 1961

In the late 1950s and early 1960s, dissenting views had arisen within the Government as to whether it was really necessary to restrict logging on Maori land in Te Urewera. As we discussed in chapter 16, public opinion was influential in the wake of the Rucroft petition of 1959. In the case of Manuoha and Paharakeke, which were purchased for the national park in 1961 to prevent the milling of Manuoha, public fear of an environmental catastrophe seems to have outweighed more technical assessments of whether controlled milling on these lands would have any such outcome (see chapter 16). Opinion within Government, and especially within the Forest Service, was divided. Dr Klaus Neumann noted that there were perspectives which ought, perhaps, to have led the Crown to re-evaluate whether Maori needed to be prohibited from milling their timber in Te Urewera. Foremost among these, he suggested, was the question of whether logging was really the threat that it appeared in the eyes of the public. Within the Forest Service, a view had developed that fire and browsing animals, especially deer and possums, were a much greater threat to water and soil conservation than controlled logging supplemented by replacement forests. The Government's motivation to restrict logging was in part because this was easier than controlling or eradicating noxious animals.⁵⁷⁷

The Director-General of Forests advised his Minister at the start of the 1960s:

If logging was the only agency of destruction in the Urewera the Forest Service would not be seriously concerned because of its ability to supervise the activity so that little if any damage was caused to the water arresting and retaining qualities of the residual forest. Instead the destruction by noxious animals is of such a dangerous character to the well being of most of the upper catchments within the area that whether or not any logging proceeds it is not merely a possibility but a certainty that flooding will increase until noxious animals are brought under control by poisoning etc., etc.⁵⁷⁸

Also, the Forest Service was conscious of what Dr Neumann characterised as the 'hypocrisy' of continuing to mill State forests in Te Urewera while preventing Maori from logging theirs. This consciousness was acute at the time the Government began considering purchase of Paharakeke and Manuoha in the late 1950s, when the Director-General of Forests had recommended that it was only fair that State forests had to be added to the national park if Maori forests were going to be targeted. On the whole, however, the Forest Service continued to mill its timber, and resisted including state forests in the 'acquisitive' national park.⁵⁷⁹

577. Neumann, ". . . That No Timber Whatsoever Be Removed" (doc A10), pp 222–225

578. AR Entrican, 'The Urewera Problem – Policy Review', briefing paper prepared for Minister of Forests, [circa late 1960–early 1961] (Neumann, ". . . That No Timber Whatsoever Be Removed" (doc A10), p 224)

579. D Kennedy to Conservator of Forests, Rotorua, 6 March 1968 (Neumann, ". . . That No Timber Whatsoever Be Removed" (doc A10), pp 221–222)

This point was not lost on Tuhoe, who told Corbett in 1953: ‘We do not understand why we are denied the right of milling the timber and developing the land, when only a few miles from here the State Forest Service sold a large block of standing timber not less than 3 years ago.’⁵⁸⁰

Dr Neumann concluded that there was a political and moral failure on the part of the Crown in the 1950s and 1960s, when it knew – from many officials’ reports – that noxious animals were a far greater threat than logging, but chose to ban logging on the last few scattered pieces of Maori land because ‘the public was largely convinced that irresponsible Maori landowners and rapacious sawmillers were to blame for the silting up and flooding of rivers.’⁵⁸¹ The Crown, we were told, thus avoided its own share of the blame in promoting the introduction of deer and possums, and also avoided taking on the Deerstalkers’ Association and the more difficult task of eradicating pests.⁵⁸²

If Dr Neumann is correct, then this explains why formal restrictions were tightened at the beginning of the 1960s, yet exceptions continued to be made in practice. At that time, both the A–B–C system and the Maungapohatu conditions (discussed above) relied upon the provisions of the Maori Land Act 1953, so the Crown still had no means of controlling milling which did not need a licence. This loophole existed for blocks which had 10 or fewer owners, or where the owners were cutting the timber themselves. In the wake of the Pamatanga case in 1957, this lack of Crown control was further highlighted by the milling on the Heipipi block (also in the Ruatahuna district) in 1960.⁵⁸³ Given that the 19,804-signature Rucroft petition demonstrated there was by this time considerable public opposition to milling in Te Urewera, the National Government decided in 1961 to issue a notice restricting milling under section 34 of the Soil Conservation and Rivers Control Amendment Act 1959.⁵⁸⁴ As this section applied to all landholdings within the specified area, and could be used to prohibit the felling of trees, rather than the selling of the timber, there was no escaping from its provisions.

The section 34 notice issued in 1961 (and those that followed it every two years until 1984) covered an area almost identical to that which was encompassed by the former Urewera District Native Reserve. Accordingly, almost all of the private land it affected was that still held by the peoples of Te Urewera. Elsewhere in the region, milling was still subject to the Maori Affairs Act 1953 and its subsequent amendments. From 1984 onwards, the area subject to section 34 notices increased until by late 1991, when the final notice was issued, it applied to most of the Bay of Plenty region.⁵⁸⁵

580. Sonny White, ‘Meeting of Tuhoe Land Owners with the Hon EB Corbett, Minister of Maori Affairs and Lands at Ruatahuna on Thursday 10/12/1953’, 10 December 1953 (Neumann, ‘... That No Timber Whatsoever Be Removed’ (doc A10), p 221)

581. Neumann, ‘... That No Timber Whatsoever Be Removed’ (doc A10), p 225

582. *Ibid*, pp 222–225

583. *Ibid*, pp 164–167

584. *Ibid*, pp 150–151, 167–169

585. *Ibid*, pp 190–192

Section 34 of the Soil Conservation and Rivers Control Amendment Act 1959

34. Safeguards publicly notified—(1) The occupier of any land in any catchment district or catchment territory shall carry out every operation affecting the land in such manner and by such method as will conform to prudent land use practice, being practice which has proper regard to timing and circumstances and is likely to prevent so far as it is economically practicable, or (if prevention is not economically practicable) likely to mitigate soil erosion, and likely to promote soil conservation, the avoidance of deposits in watercourses, and the control of floods.

(2) No person shall, without the consent of the Catchment Board or the catchment Commission or the [Soil Conservation and Rivers Control] Council, as the case may require, do on or in respect of any such land any act or matter or thing which that Board or Commission or the Council has, by notice publicly notified within the immediately preceding two years, declared to be likely to facilitate soil erosion or floods or cause deposits in watercourses.

(3) Proof that the occupier of any such land has, without any such consent, carried out any operation affecting the land in any manner or by any method that the Council or Board or Commission has, by notice publicly notified within the immediately preceding two years, declared to be an imprudent land use practice in the area where the land is situated shall be conclusive proof that the occupier of the land has acted in contravention of subsection one of this section.

While in theory, the section 34 notice could have been used to impose a highly restrictive regime on milling, this did not happen in practice. Pre-1961 consents continued to be operative until they expired, and indeed during the 1960s some forest land previously judged class c land was deemed millable by the Forest Service thanks to improvements in milling technology.⁵⁸⁶ Only on forest land which had been able to be milled without a licence would the notice have had much immediate effect. Milling was thus allowed to run its course on more or less the same basis as it had been in the 1950s, before it concluded throughout the region during the mid-1970s. New milling opportunities, however, were certainly curtailed, even though they were not completely closed down. As the secretary for Maori Affairs acknowledged in a 1971 report for his Minister, ‘many applications’ to mill had simply never been made ‘because the owners and the millers knew full well that permission would not be granted.’⁵⁸⁷ Also, as we pointed out in chapter 16, Maori had no representation on the body (the Soil Conservation and Rivers

586. Neumann, “... That No Timber Whatsoever Be Removed” (doc A10), pp 167–168, 190

587. Secretary for Maori and Island Affairs to Minister of Maori Affairs, 3 June 1971 (Brent Parker, comp, ‘List of Documents – Compensation for Restrictions Placed on Milling of Native Timber in the Urewera’ (doc M27(b)), p1031)

Control Council) that now decided whether or not it was safe to allow controlled milling on their remaining forest lands.

The amendment in 1993 of the Forests Act 1949, and in particular the insertion of section 67D, brought about the current legislative mechanism for restricting timber milling within Te Urewera (and throughout most of New Zealand). Unlike the pre-1953 restriction under section 65 in the Forests Act 1949, this applies equally to Maori and non-Maori land. Owing to the sustainability requirements imposed on milling indigenous forest, large scale commercial timber production is no longer viable, although very limited cutting by landowners is still possible, subject to the granting of permits.⁵⁸⁸ Since commercial forestry concluded, as noted above, in the region during the mid-1970s, this has not had any practical effect, although it does prevent any new milling of forest which the peoples of Te Urewera have not been able to cut because of restrictions in the past.

We turn next to examine the steps taken by the Crown to ensure that the peoples of Te Urewera have been compensated for this now-permanent halt to their ability to mill and develop their lands.

18.8.3 What steps did the Crown take to ensure that the peoples of Te Urewera were fairly compensated for restrictions on the milling of their timber?

Before 1961, owners of Maori land in Te Urewera did not have a legal right to any form of compensation when they were prevented from selling their indigenous timber by milling restrictions. This was because none of the statutes used to control milling on Maori land (the Native Land Act 1931, the Forests Act 1921–22, the Forests Act 1949, and the Maori Affairs Act 1953) included compensation provisions. To effect the same prevention of milling on non-Maori land, the Crown had to compulsorily purchase the land in question under the terms of the Scenery Preservation Act 1903 or various Public Works Acts. Both these measures could have been used in relation to Maori land, but the Crown chose not to use them (at least in Te Urewera).⁵⁸⁹ Given that water and soil conservation was the Crown's main rationale for wanting the Urewera forests preserved intact, a more level playing field should have been established by the Soil Conservation Regulations 1945, which were issued under the Soil Conservation and Rivers Control Act 1941. Contrary to the claimants' contention, these regulations applied equally to Maori and non-Maori land, but these did not provide for affected landowners to be paid compensation, and consequently Catchment Boards and County Councils, fearing a public backlash, chose not to use these powers, in Te Urewera or elsewhere.⁵⁹⁰

In spite of the absence of legal compulsion, Crown officials accepted, by the 1930s at least, that there was a moral obligation to provide some form of compensation. If restrictions on milling of Maori land were being used primarily to

588. Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), p216; Boast, ‘Ngati Whare and Te Whaiti-Nui-a-Toi’ (doc A27), p237; Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), pp758–759

589. See Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), pp31, 35.

590. Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), pp145–146

serve national interests, such as scenery preservation and soil conservation, rather than the interests of the owners, then they were 'obviously entitled to something in return'. Compensation on this basis of 'entitlement' was first mooted in two reports on Te Urewera forests in 1935 and 1936, the former written by MJ Galvin (Lands and Survey) and DD Dun (Forest Service), and the latter by GP Shepherd (Native Department) and MJ Galvin. The Galvin–Dun report found that Te Urewera forests needed to be kept intact to prevent flooding of valuable farmland downstream and made the following observation: 'As the preservation of the Urewera is in European interests desired to an extent which must impose certain restrictions on the Maoris use of their own bush, they are obviously entitled to something in return.'⁵⁹¹

The officials' suggestion, as a general quid pro quo, was a development scheme for Maungapohatu, accompanied by improved access, as 'an indication of the Pakeha's good faith and regard for Maori interests'.⁵⁹² In dealing specifically with plans by Wilson Timber to mill 1,100 acres in the Whirinaki Valley, Galvin and Dun stated that the Maori owners were 'entitled to a quid pro quo' if the Crown blocked the sale of the timber 'because of consequent disadvantage to the European'. To provide a quid pro quo, they asserted the Crown must take one of two steps: 'Either give them other land of equal value, or buy this Block at Government valuation, based on State Forest Service appraisal'.⁵⁹³ Neither of these options, it is worth noting, allowed the owners to retain possession of the land which was subject to the restriction, whereas the general proposal recognised that if the Crown was going to close off an entire development option, it needed to provide an alternative.

A similar stance was adopted by Shepherd and Galvin's follow-up report, but this also suggested that if the peoples of Te Urewera were not willing to sell up or exchange the land the Crown was wanting to acquire (that is, forest areas alongside the Te Whaiti–Waikaremoana road), then the option of 'taking the land under the Public Works Act for scenery preservation purposes', which entailed the owners having to accept the appraisal value for the land and timber, also had to be considered.⁵⁹⁴

As will be recalled from chapter 13, this acceptance by the Crown that Maori landowners should, by selling their land, be able to gain some economic benefit

591. MJ Galvin and DD Dun to Conservator of Forests, 'Report by Officers of the Lands and Survey Department and the State Forest Service on the Urewera Forest', 29 April 1935 (Campbell, supporting papers to 'Te Urewera National Park' (doc A60(a)), p 41)

592. Galvin and Dun, 'Report by Officers of the Lands and Survey Department and the State Forest Service on the Urewera Forest', 29 April 1935 (Neumann, "'... That No Timber Whatsoever Be Removed'" (doc A10), p 74)

593. Galvin and Dun, 'Report by Officers of the Lands and Survey Department and the State Forest Service on the Urewera Forest', 29 April 1935 (Campbell, supporting papers to 'Te Urewera National Park' (doc A60(a)), p 36)

594. GP Shepherd and MJ Galvin to Under-Secretary for Lands, 'Urewera District Lands (Interim Report)', [circa May–June 1936] (Neumann, "'... That No Timber Whatsoever Be Removed'" (doc A10), p 79)

from the timber growing on it, was a marked advance on the position the Crown had taken when buying up shares in Te Urewera lands in the 1910s. Even so, none of the Crown's proposals in the 1930s to acquire land affected by milling restrictions came to anything. Initially, these proposals were little more than suggestions, with Galvin and Dun arguing that the Crown could compensate the peoples of Te Urewera generally by financing development at Maungapohatu, while Shepherd and Galvin raised the possibility of an exchange of Crown-owned farmland in the Whirinaki Valley.⁵⁹⁵ The latter idea became more real in 1937, when the Crown offered this land in return for the nearby Te Whaiti Residue B block, which was then subject to a milling application, but the exchange was not completed before it was sidelined by the Second World War.⁵⁹⁶

When cutting timber from Maori-owned forest in the region became attractive to sawmillers after the Second World War, the Crown's rebuff of almost all new milling proposals again raised the question of compensation. The Crown continued to follow the policy enunciated by Galvin and Dun, that is, offering land purchase or land exchange where the restriction was to serve the public interest. This continuing acknowledgement that compensation ought to be offered was clearly expressed to a meeting of the owners of the Te Waiiti blocks, in the Ruatahuna district, in 1951:

We are today discussing a matter of National importance which affects both the Maori and Pakeha peoples. On the advice of the State Forest Service the Government has decided that these bush areas should be preserved for all times. . . . If this bush is preserved the land will not slip and we will always be assured of the necessary rainfall. . . . The Government could also see that unless they bought the blocks and the timber it was depriving owners of revenue rightly belonging to them . . . Briefly, the Proposal is that you sell these blocks . . . for the Capital Value thereof plus the value of the timber which is to be appraised by the State Forest Service.⁵⁹⁷

Two years later, the Minister of both Forests and Maori Affairs, EB Corbett, took the opportunity to outline Crown policy on compensation for Te Urewera forest owners even more fully to Parliament:

595. Shepherd and Galvin to Under-Secretary for Lands, 'Urewera District Lands (Interim Report)', [circa May–June 1936] (Campbell, supporting papers to 'Te Urewera National Park' (doc A60(a)), p 56); Neumann, ". . . That No Timber Whatsoever Be Removed" (doc A10), p 78

596. Neumann, ". . . That No Timber Whatsoever Be Removed" (doc A10), pp 81–83

597. 'Minutes of a Meeting of Assembled Owners Held under Part XVIII of the Native Land Act 1931, at Te Whiti Pa Ruatahuna', 8 May 1951 (Neumann, ". . . That No Timber Whatsoever Be Removed" (doc A10), p 106). The same stance was adopted by the Maori Land Court, as is evident by the comment by the Waiariki District Maori Land Court registrar in 1948 that 'Judge Harvey considers certain areas should be reserved but feels that the Government should take the necessary action and purchase such areas when recommended or make suitable exchanges': see JJ Dillon to Under-Secretary, Maori Affairs, 18 May 1948 (Neumann, ". . . That No Timber Whatsoever Be Removed" (doc A10), p 126).

It follows that if the decision is to lock up certain land of the Maori people we must face up to our responsibilities as citizens and as a Government by seeing that fair and adequate compensation is paid. In those instances in which a refusal to mill has been given, the policy is to offer the Maori people the full royalties, or if an offer has been made to purchase the bush – in most instances offers have been made by private millers – we will pay the price that the private miller offers and set up a committee to determine the compensation for the residue of the land. We will pay the Maori people whose assets are locked up for the sake of posterity full value for those assets. . . . As far as this Administration is concerned, any land that is reserved for the purpose I have mentioned will be created a forest sanctuary, such as Waipoua, or a national park, so as to ensure that no logging takes place on that area . . . Then no Government would breach the undertaking given that those lands be reserved for the purpose of perpetually retaining the forest cover. I say to the Maori people that any land we will lock up for this purpose will be rahui – a permanent reserve.⁵⁹⁸

Despite such sentiments, compensation settlements between the Crown and the peoples of Te Urewera continued to prove elusive in the years after the Second World War. This was not due to lack of action in this direction. The idea of an exchange of land was revived by the Te Whaiti Residue B block owners, and was also reportedly favoured by the owners of the Ahiherua block in the Ruatahuna district.⁵⁹⁹

Also, as we described in chapter 16, the post-war Labour Government offered to purchase 11 blocks (five at Te Whaiti, four at Te Waiiti in the Ruatahuna district, and two in the Waimana Valley) in 1949. The Te Waiiti part of the £24,725 offer was also novel because the negotiations involving these blocks resulted in Crown officials agreeing not just to milling of parts of the blocks, but also the creation of a small native reserve, in recognition of the tapu status of Te Huia hill;⁶⁰⁰ in this instance, therefore, the Crown did not insist on the owners selling all their land in order to be compensated for the value of the timber growing upon it. This purchasing package got shelved after the 1949 general election, as EB Corbett, the incoming Minister of both Forests and Maori Affairs, disliked the partial allowance of milling included in the Te Waiiti arrangements, and the Te Whaiti exchange proposal was also abandoned after the Maori Affairs Department rejected the idea of a Whirinaki development scheme in 1951.⁶⁰¹ Crown officials continued in the early 1950s to recommend purchasing of blocks, such as Ahiherua and Tiritiri (both in the Ruatahuna district), where milling had been denied,⁶⁰² but it is not clear in these cases whether Crown initiatives reached the point where a definite cash offer was made.

598. Corbett, 24 April 1953, NZPD, vol 299, p 264

599. Neumann, “‘. . . That No Timber Whatsoever Be Removed’” (doc A10), pp 109, 117

600. Ibid, pp 101–104, 109

601. Neumann, “‘. . . That No Timber Whatsoever Be Removed’” (doc A10), pp 104–105, 109; Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), pp 421–426

602. See Bassett and Kay, ‘Ruatahuna’ (doc A20), pp 186–187.

From 1953 onwards, the Crown's reluctant acceptance of milling in blocks outside the former Urewera District Native Reserve lands of Tuhoe relieved the Crown of its ongoing moral obligation to offer compensation to the landowners of these blocks. This said, the Crown still sought to acquire forested land in these areas, as is evident when it tried to acquire Tahora 2G2 in 1957 (see chapter 12). An application to mill timber on the Manuoha block also prompted the Crown to offer to buy the Manuoha and Paharakeke blocks from their incorporated Maori owners, which was accepted in 1961. The purchase of the Manuoha block thus became the only case where the owners received some form of compensation from the Crown for lost milling opportunities. As we discussed in chapter 16, the purchase of Manuoha and Paharakeke had a lot to do with appeasing public fears about the prospect of erosion and flooding. The main beneficiary was Te Urewera National Park.

Within the Ruatahuna district, large areas were still subject to milling restrictions even after the compromise allowing partial milling of blocks reached between Corbett and Tuhoe representatives in 1953. Tuhoe representatives therefore suggested an exchange of lands as a solution to the compensation problem, so long as these lands were in Te Urewera. Initially Corbett raised the possibility of an exchange with former Tuhoe land now in Crown ownership, but thereafter the Crown chose instead to offer Tuhoe an assortment of land at Minginui (which previously had been set aside for an exchange with Ngati Whare), and in the Te Tuturi, Whirinaki, and Heruiwi blocks; an agreement was reached with Te Maioro and Hiwiotewera owners in 1956 that they would hold off milling areas graded c in return for the Crown setting these areas aside.⁶⁰³ However, the Crown recognised that the value of the lands it was offering for exchange was only about £30,000, and moreover, that these lands could not support more than a fraction of the affected timber owners. Consequently, by 1955 the Crown was also pursuing the option of buying the affected land and timber in a cash-only transaction.⁶⁰⁴ Eventually, in 1957 Corbett gained Cabinet approval for spending up to £300,000 buying b class land and c class land and timber in 44 Ruatahuna blocks.⁶⁰⁵ This was ultimately of no consequence, as the owners felt the price per acre offered for the land underlying the timber was too little, and there was general resistance to

603. The lands involved in the proposed exchange were part Whirinaki 1 section 1 and Whirinaki 2 section 2 (5,865 acres), Whirinaki 1 section 4B1A (1,140 acres), Heruiwi 4B1 and Heruiwi 4A2A (1,960 acres), part Te Tuturi (136 acres), and open areas of Crown land at Minginui (3,125 acres): 'Note for file: Whirinaki Exchanges', 28 April 1972, pp1-2, AAMX W3529 box 3, 22/284, vol 1, Archives New Zealand, Wellington.

604. Minister of Lands to all members of Cabinet, 'Purchase of Maori Land in the Urewera', 24 June 1955 (Campbell, supporting papers to 'Te Urewera National Park' (doc A60(a)), pp126-127)

605. See AL Poole, *Urewera Maori Lands: Summary of Forest Service Activities, 1953-1957*, p3 (Campbell, supporting papers to 'Te Urewera National Park' (doc A60(a)), p113); Minister of Lands to all members of Cabinet, 'Purchase of Maori Land in the Urewera', 24 June 1955 (Campbell, supporting papers to 'Te Urewera National Park' (doc A60(a)), pp125-127); Bassett and Kay, 'Ruatahuna' (doc A20), p194

**Section 37(1) of the Soil Conservation and Rivers Control
Amendment Act 1959**

37. Compensation—(1) Any person having any estate or interest in any land which is subject to a notice given under section thirty-four or section thirty-five of this Act and which is injuriously affected or suffers any damage from the compliance promptly and in a workmanlike manner with the requirements of the notice, shall be entitled to full compensation for the same from the Minister or Board or Catchment Commission, in accordance with the provisions of the principal Act [Soil Conservation and Rivers Control Act 1941] and this section, as if that person were injuriously affected by a public work. Where in the opinion of the Land Valuation Court immediate losses consequent upon compliance with the notice will be offset either wholly or partly by subsequent gains, that Court either shall award such sum only as takes into account both the immediate losses and probable subsequent gains during the ensuing period of fifteen years, or shall award the amount of the immediate losses reserving to the Minister or Board or Catchment Commission the right to recover as a debt . . . so much of the amount so paid as is from time to time during a period of fifteen years from the date of the award offset by gains . . .

selling land in any case.⁶⁰⁶ As the Tuawhenua researchers observed, this was ‘Te Manawa o Te Ika, Te Kohanga o Tuhoe. They didn’t want to sell it in 1919 and they didn’t want to sell it in 1955.’⁶⁰⁷

The case for compensation of Tuhoe landowners whose lands were within the former Urewera District Native Reserve was considerably strengthened in 1961 by the imposition of a notice restricting milling, issued under section 34 of the Soil Conservation and Rivers Control Amendment Act 1959. Landowners who suffered an economic loss because their land use activities were restricted by a section 34 or section 35 notice were eligible to claim compensation, under section 37 of the same Act.⁶⁰⁸ As the Crown has recognised, there was, in consequence, a ‘need for compensation where consent was withheld and loss of income resulted.’⁶⁰⁹

No claims for compensation were ever lodged under section 37 with respect to the milling restrictions in Te Urewera.⁶¹⁰ It appears that the 1959 Act required compensation to be sought on a case-by-case basis, whenever consent to mill was withheld and an ‘injuriously effect’ could be proven. According to Dr Neumann,

606. Bassett and Kay, ‘Ruatahuna’ (doc A20), p 194; Tuawhenua Research Team, ‘Te Manawa o te Ika, Part Two’ (doc D2), pp 349–350

607. Tuawhenua Research Team, ‘Te Manawa o te Ika, Part Two’ (doc D2), p 349

608. Bassett and Kay, ‘Ruatahuna’ (doc A20), p 199

609. Crown counsel, closing submissions (doc N20), topic 31, p 19

610. Neumann, “‘. . . That No Timber Whatsoever Be Removed’” (doc A10), p 170

this ‘minimalist’ interpretation of section 37 prevailed because the Crown took the view that Maori owners had to prove a specific milling exercise was in fact economic before they could be compensated.⁶¹¹ In 1971, however, the secretary for Maori Affairs reported that many likely milling applications never got filed because it was known they would be refused.⁶¹² As is detailed below in the discussion on compensation negotiations in the block-by-block summary, Tuhoe requested general negotiations with the Crown over compensation as early as 1962. It took until 1971 for the Crown to accede to this request, when it began talks with the Tuhoe-Waikaremoana Maori Trust Board, which was representing the landowners of all the Tuhoe lands subject to the section 34 notice (except Maungapohatu).⁶¹³

After meeting with Tuhoe representatives in April 1971, the Minister of Maori Affairs, Duncan MacIntyre, became convinced that an exchange of lands was the best way to compensate Tuhoe for the restrictions to milling on the Ruatahuna, Whakatane Valley, and Waimana Valley blocks, since a cash-based settlement would still leave them with land and timber that they could not use in the future.⁶¹⁴ As Minister of Lands and of Forests, MacIntyre had in 1968 overseen an exchange, prompted by official concerns about a milling application, of land in the Ruakituri State Forest for land in Tahora 2F2.⁶¹⁵ During 1972 and 1973, however, the Crown and Trust Board representatives made the most progress on a proposed exchange of parts of the Te Manawa o Tuhoe block (an amalgamation of largely undeveloped Tuhoe lands at Ruatoki and Waiohau), which were to be added to Te Urewera National Park, in return for Crown land at Waiohau which could more easily be afforested.⁶¹⁶ As was described in chapter 12, another exchange involving Tuhoe lands that were subject to a section 34 notice – namely Tahora 2G2 – was also negotiated at this time. This exchange, in which the Crown acquired Tahora 2G2 in return for parts of State Forest 1, which lay within the old Tuararangaia block, was finalised on 22 November 1973.⁶¹⁷

Despite protracted negotiations, progress towards a settlement ground to a halt in the late 1970s with no compensation having been paid. We discuss these negotiations in more detail in the next section, when we consider the impact of the Crown’s policies on particular blocks. Here, we provide a brief overview.

Matiu Rata, the Minister of Maori Affairs in the third Labour Government, responded favourably to Tuhoe’s appeal to him in 1973 to complete the process started by his predecessor. In 1974, he appointed a Tuhoe–Crown joint committee,

611. *Ibid*, pp 201–203

612. Secretary for Maori and Island Affairs to Minister of Maori Affairs, 3 June 1971 (Parker, ‘List of Documents’ (doc M27(b)), p 1031)

613. See Neumann, “‘. . . That No Timber Whatsoever Be Removed’” (doc A10), pp 200–201; Tuawhenua Research Team, ‘Te Manawa o te Ika, Part Two’ (doc D2), p 446; Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), pp 825–826.

614. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), p 825; Campbell, ‘Te Urewera National Park’ (doc A60), p 111; Bassett and Kay, ‘Ruatahuna’ (doc A20), pp 202–203

615. Peter Boston and Stephen Oliver, ‘Tahora’ (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A22), pp 296–297

616. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), p 828

617. Boston and Oliver, ‘Tahora’ (doc A22), pp 310–312

Tuhoe's Appeal to Matiu Rata, Minister of Maori Affairs, 1973

TO DATE, we have little or no restriction at all as to access by the public to these lands and, in point of fact, most, if not all of these lands are currently used as part of Te Urewera National Park.

We agree entirely with the need to conserve these lands for the protection of the community and for the needs of present and future generations. In making provisions for those purposes, however, we do not and cannot agree that the severity of current restrictions over this vast area is just, or that such a substantial proportion of our last remaining assets be confiscated without compensation for those purposes, in the name of the community and in the public interest.

It is, we believe, one of the principles of a democratic Government that in general what the community acquires from the individual it should pay for.

Of all matters presented to you today, Sir, this matter in particular weighs heavily in our minds and we earnestly pray and ask to be given the right to realise on our assets and for Government to favourably consider compensation.'

Tuhoe-Waikaremoana Maori Trust Board¹

1. Tuhoe, submission to Matiu Rata, 17 February 1973 (Tama Nikora, 'Te Urewera Lands and Title Improvement Schemes', August 2004 (doc G19), p 30)

made up of three Crown and three Trust Board representatives, together with the local Maori member of Parliament,⁶¹⁸ with a view to reaching a comprehensive agreement covering Tuhoe Tuawhenua, Te Pae o Tuhoe, Tuhoe Kaaku (the blocks created by the respective amalgamations orders for the Ruatahuna, Whakatane Valley, and Waimana Valley blocks), and Te Manawa o Tuhoe.⁶¹⁹ The terms of reference for the committee were as follows:

1. To prepare for Government consideration the basis of an agreement between the Crown and the Tuhoe-Waikaremoana Maori Trust Board by which equivalent valued land of the Crown is to be exchanged for the following land owned by the Board [Te Manawa o Tuhoe, Te Pae o Tuhoe, Tuhoe Kaaku, Tuhoe Tuawhenua]
2. To recommend any legislative or other measures which may be necessary to accomplish the above.⁶²⁰

618. The Crown representatives were from Lands and Survey, New Zealand Forest Service, and Maori Affairs: Campbell, 'Te Urewera National Park' (doc A60), p 117; Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), pp 30–31.

619. Campbell, 'Te Urewera National Park' (doc A60), p 115

620. M Rata, Minister of Lands, to Tuhoe Waikaremoana Trust Board, 19 Jul 1974 (Parker, 'List of Documents' (doc M27(b)), pp 944–945)

At the request of Tuhoe, these negotiations would be based on the principle of reciprocal leases,⁶²¹ which would allow Tuhoe to retain legal ownership (and some access) to their lands.

Meetings of the joint committee were held from 1974 to 1976, after which its work was carried on by a working party subcommittee (utilising Crown staff based in Rotorua and Hamilton rather than those in Wellington) from 1977 to 1979.⁶²² Over the course of 1974 and 1975, the main committee was primarily concerned with obtaining valuations of land and timber on the Maori blocks, and identifying Crown lands which would meet the purposes of the trust board.⁶²³ In November 1975, however, the trust board advised the Crown that its preferred option relative to Te Manawa o Tuhoe was to revert to the originally agreed exchange and afforestation proposals.⁶²⁴

By September 1976, the Crown's representatives and the trust board had agreed terms for an exchange of 1,793 hectares of land in Te Manawa o Tuhoe (to be added to Te Urewera National Park), in return for 430 hectares of Crown land (part of Waiohau B9B); this was in addition to an agreement reached earlier in the year that the New Zealand Forest Service would lease and afforest a further 2,110 hectares of Te Manawa o Tuhoe not included in the exchange.⁶²⁵ Cabinet subsequently approved the deal in May 1977,⁶²⁶ and a slightly amended Te Manawa o Tuhoe exchange agreement (which increased the exchanged areas to 469 and 1,803 hectares respectively) was signed by representatives of the Trust Board and Crown on 20 December 1977.⁶²⁷

In mid-1977, the trust board representatives also agreed in principle to a deal which would see the Trust Board lease in perpetuity Crown lands at Matahina and Ashdown in return for the Crown having the lease in perpetuity of undeveloped parts of the Tuhoe Tuawhenua, Te Pae o Tuhoe, and Tuhoe Kaaku, which would be managed as part of the national park. Owing to the large difference in valuations for the lands concerned, the Crown was also to establish and maintain a

621. Bassett and Kay, 'Ruatahuna' (doc A20), p 204

622. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 830; 'Minutes of meeting of Committee set up by Minister of Lands to Investigate Possible Exchanges of Tuhoe Lands', 30 September 1976 (Parker, 'List of Documents' (doc M27(b)), p 908)

623. A Turley, commissioner of Crown lands, to Director-General of Lands, 23 October 1975 (Brent Parker, comp, 'List of Documents – Compensation for Restrictions Placed on Milling of Native Timber in the Urewera', 2 vols, various dates (doc M27(a)), vol 1, p 436)

624. 'Minutes of meeting of Committee set up by Minister of Lands to Investigate Possible Exchanges of Tuhoe Lands', 19 November 1975, and B Briffault, Maori Land Division, to commissioner of Crown lands, Hamilton, 23 December 1975 (Parker, 'List of Documents' (doc M27(b)), pp 414, 419–420)

625. 'Minutes of meeting of Committee set up by Minister of Lands to Investigate Possible Exchanges of Tuhoe Lands' 30 September 1976 (Parker, 'List of Documents' (doc M27(b)), pp 906–907); Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 848

626. Extract from minutes of Cabinet Expenditure Committee, 31 May 1977 (Parker, 'List of Documents' (doc M27(b)), pp 792–793)

627. RM Velvin, commissioner of Crown lands, to Director-General of Lands, 21 October 1977, and agreement between the Tuhoe-Waikaremoana Maori Trust Board and Her Majesty the Queen, 20 December 1977 (Parker, 'List of Documents' (doc M27(b)), pp 711–713, 734)

forest on Matahina and Ashdown until the respective financial contributions balanced out – this was expected to take eight years – after which the New Zealand Forest Service would manage the forest as the trust board's agent. Using contemporary price projections, the Crown negotiators told the trust board that the land and timber could be worth as much as \$14.5 million by the time the trees were ready to harvest.⁶²⁸

Neither the Te Manawa o Tuhoe exchange, nor the reciprocal leases of the Tuhoe bushlands (Tuhoe Tuawhenua, Te Pae o Tuhoe, and Tuhoe Kaaku) and the Crown lands at Matahina and Ashdown, ever went ahead. The exchange foundered when the trust board, on seeking authority to execute the agreement from the Maori Land Court in 1978, only received authority to broker the deal, the court reserving the final say for the owners. Here the deal stalled, as the trust board's efforts to assemble sufficient owners together to affirm the exchange were unsuccessful. Eventually the Crown went ahead and afforested Waiohau B9B itself, which had the effect of undoing the financial equality of the exchange to which the Crown and Trust Board had previously agreed. Negotiations regarding the Tuhoe bushlands and Ashdown-Matahina leases, meanwhile, broke down because the Crown and Trust Board could not agree on the payment for Tuhoe's non-merchantable timber – the Crown stance being that it should only pay half of the New Zealand Forest Service minimum stumpage rate, because it was not going to mill the area. In addition, the owners of the Tuhoe bushlands balked at the idea of giving up the control of so much land to the Crown when meeting to consider the deal in October 1978.⁶²⁹ As Tama Nikora observed,

A reason given for opposition was because the deal favoured by the Crown was 10 to 1; that is, the Crown was giving one acre for ten acres of Tuhoe land. The owners at the meeting would not accept the explanation that ten acres of rugged steep ridges could not be worth the same as ten acres of flat land. I myself believed that a lease-exchange was not possible, because I considered that Tuhoe did not want to lose their association with their land.

The lease-exchange idea stalled here and was not pursued any further. Compensation for the milling restrictions on Tuhoe bushlands as a result of the 1959 Act was never paid, which remains a major standing grievance for Tuhoe today.⁶³⁰

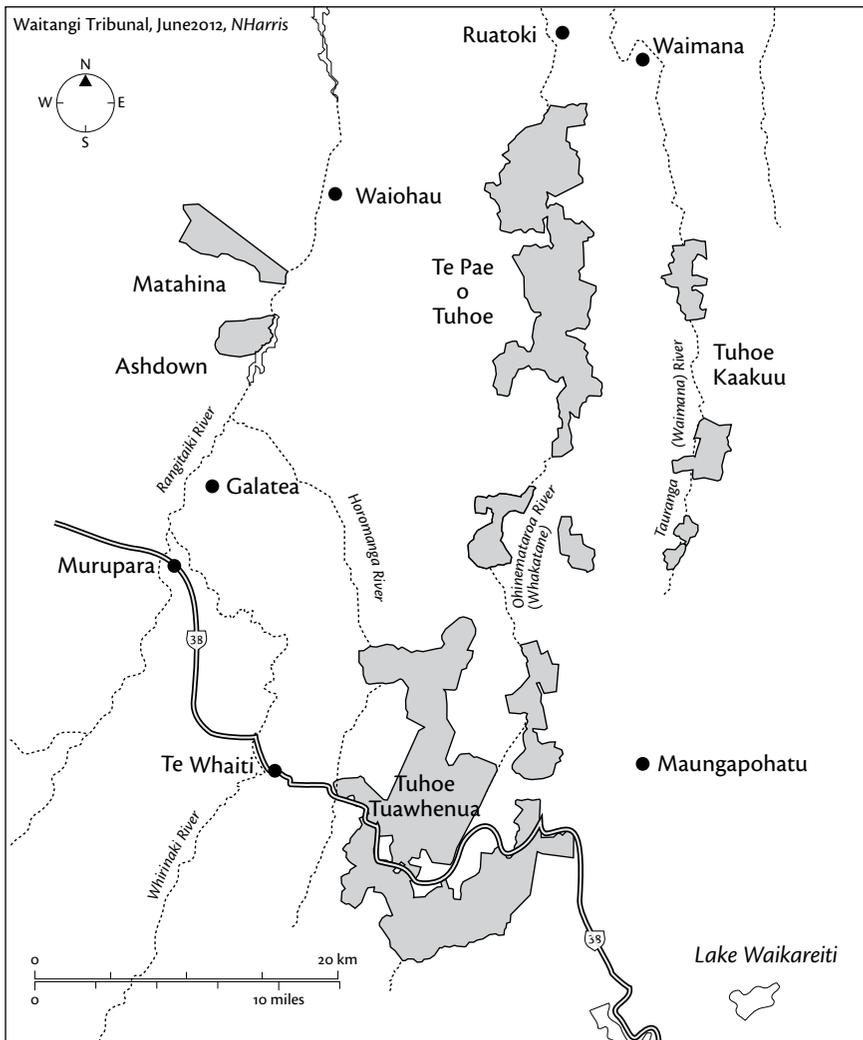
Further negotiations by the trust board then became impossible from 1979 onwards as some of the Tuhoe Tuawhenua owners had challenged the legal standing of the amalgamation of that block. As described in chapter 19, the amalgamation order was finally quashed by the High Court in 1984.⁶³¹

628. Campbell, 'Te Urewera National Park' (doc A60), pp 123–124

629. Bassett and Kay, 'Ruatahuna' (doc A20), p 206; Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), pp 459–461

630. Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), p 31

631. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), pp 521–523



Map 18.2: The Tuhoe bushlands blocks, and the Crown lands (Matahina, Ashdown) offered for reciprocal lease in 1977. The lease proposal was based on value-for-value, with the Crown having to establish exotic forests on Ashdown and Matahina to make up for their much lesser area.

The changed basis for milling restriction brought about by the 1993 amendment to the Forests Act 1949 returned the peoples of Te Urewera to the position of not being able to claim any compensation for the effects of milling restrictions.⁶³²

If the lack of compensation payouts in the 1930s and 1940s has a redeeming feature, it is – as the Crown has argued – that prices for timber were much higher

632. Crown counsel, closing submissions (doc N20), topic 31, p 5

in the 1950s and 1960s than they were in earlier decades, and thus the peoples of Te Urewera were better off retaining their timber assets until this time. It is nevertheless open to question how much these higher prices in later years balance out against the denial of economic opportunities in the 1930s and 1940s. Of course, those landowners who were unable to mill their land even under the more permissive restrictions of the 1950s and 1960s – the owners of Manuoha, Paharakeke, and Tahora 2F2 and 2G2 excepted – still have had nothing to show for it, despite decades of Crown acknowledgement that compensation was due to them.

18.8.4 What were the impacts of milling restrictions on the peoples of Te Urewera, block by block?

The Crown has submitted that a ‘vast’ but unquantified amount of timber was allowed to be milled on Maori land in Te Urewera, thereby reducing the practical significance and impact of its restrictions.⁶³³ In this section, we set out a more detailed assessment of how the timber restrictions were applied on the ground, and with what effect, block by block.

18.8.4.1 Tuhoe ex-UDNR blocks

Milling on the Tuhoe lands within the former Urewera District Native Reserve began with the establishment of a sawmill by B Managh on the Papueru block in the Ruatahuna district in about 1934. As this milling was not licensed, the Native Land Court issued an injunction against it in 1939, but allowed the mill to stay open under a new operator pending a Forest Service appraisal. A new licence was subsequently given to H T Smyth in 1940. This licence has been a cause of concern for the Tuhoe claimants, since Smyth secured a reduction in the original royalty rate (from 2s 9d to 2s 6d per 100 board feet of rimu), while the Crown secured the exclusion from the grant of 35 acres it deemed to be of scenic value.⁶³⁴ Although neither move was beneficial to the owners, as it was a new grant the court was perfectly entitled to confirm conditions that were different from the previous ones, especially if the alternative was the rejection or withdrawal of the grant application. The conduct of the Crown is more questionable though, as it did not offer the owners any compensation for excluding the 35 acres from the grant. Although it was not legally required to do so, the Crown had by this time acknowledged in policy and practice that it ought to offer to purchase land which was subject to milling restrictions on public interest grounds (such as scenic amenity).

The next area in the Tuhoe UDNR lands to be subject to miller interest was the Te Waiti blocks, also in the Ruatahuna district. From 1936, Rewi Petera (of Ngati Kuri hapu) began advocating for a sawmill in order to provide local employment and timber for housing. The latter need was especially pressing, given that the Ruatahuna Development Scheme was making no provision for housing at the time. This was followed in 1938 by a cutting-rights application from Wi Kote and others. However, the Crown’s position was that these blocks ought to be preserved

633. Crown counsel, closing submissions (doc N20), topic 31, p 2

634. Neumann, “... That No Timber Whatsoever Be Removed” (doc A10), p 89

for their scenic and water conservation value, thus the requests were rejected.⁶³⁵ Officials had instead sought to test the interest of the owners of these (and other roadside) blocks in selling them in 1936, but had not had great success as the owners ‘had a very real appreciation of the value of the timber on their lands.’⁶³⁶

The Te Waiiti block owners were again to find themselves burdened by Crown restrictions when they resumed attempts to establish their own mill in 1945. At first, they gained a small concession in gaining a six-month permit for the mill, but this was constrained by the requirement that it not take labour from the nearby Wilson’s mill.⁶³⁷ The Te Waiiti block owners were unable, however, to secure a loan from the Waiariki District Maori Land Board of £14,250 to pay for the mill, or Crown consent for any milling licence concerning the blocks. There were two reports (one by the Forest Service, and the second by the Forest Service with Lands and Survey) in 1946 and 1948 which questioned the economic viability of a sawmill, as well as warning of erosion risks if the Te Waiiti blocks were milled. This was in sharp contrast to a report written for the owners by the Gisborne saw-miller J T Hill in 1945, which was enthusiastic about the prospects of a mill.⁶³⁸

This considerable difference of opinion has led the Tuhoe claimants to question whether the Crown properly considered the owners’ efforts to establish a mill at Te Waiiti. On the one hand, the fact that the Forest Service deemed the timber on the Te Waiiti blocks to be worth £13,000 in an appraisal in 1951,⁶³⁹ suggests that the Maori Land Board was prudent in not approving the loan. On the other hand, the royalty payments paid by Fletcher Timber to the Te Huia block owners between 1958 and 1963 suggest that the market value of the Te Waiiti timber was by that time considerably more than this. These royalties amounted to £22,349,⁶⁴⁰ which was more than three and a half times the Urewera Land Use Committee’s assessment in 1954 of the value of the timber on the Te Huia areas classified A and B (a total of £5,979). The equivalent figure for the timber on land classified A on Kopuhaea in 1954 was £4,662,⁶⁴¹ so if the same proportions were kept when the payout was made, this would have produced royalties of £17,426, and in turn a total for both Te Huia and Kopuhaea of £39,775. Even allowing for two decades of inflation, these royalties suggest that the mill may have been economic, although it cannot be assumed that all of the timber that it was economic to mill in 1960 was necessarily economic to mill in 1945.

By the late 1940s, the attention of millers was shifting beyond the Papueru and

635. Ibid, pp 91–92; Tuawhenua Research Team, ‘Te Manawa o te Ika, Part Two’ (doc D2), pp 284–285, 306–307

636. G P Shepherd and MJ Galvin, memorandum for the Under-Secretary for Lands, ‘Urewera District Lands (Interim Report)’, [circa 1936] (Tuawhenua Research Team, ‘Te Manawa o Te Ika, Part 2’ (doc D2), p 283)

637. Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), pp 93–94, 96

638. Ibid, pp 94–98

639. Ibid, p 105

640. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), p 811

641. Principal committee, ‘Consideration of Land Use Committee Report’, 22 June 1954 (Bassett and Kay, supporting papers to ‘Ruatahuna’ (doc A20(b)), p 103)

Te Waiti blocks in the Ruatahuna district, with applications being made in 1947 for cutting rights on the Mangapai block in the Ruatahuna district, and on the Tarahore 2 and Pahekeheke blocks in the Waimana Valley. Neither application came to fruition. The former was withdrawn by the miller (H T Smyth) because the neighbouring Maori Land Board (Tairāwhiti) was trying to do a deal with him to access this timber and take advantage of lower royalties in the Bay of Plenty. The Mangapai owners then tried to insist on Wairoa royalty rates, which were significantly higher, leading Smyth to withdraw his application.⁶⁴² Tuhoe have claimed that Crown officials were colluding in a way designed to short-change the Mangapai owners.⁶⁴³ This was not, however, the case; there was simply a difference between the royalties that could be claimed in the different districts, due to differences in access and profitability, and the deal fell through when the owners, perhaps not understanding this, tried to obtain a higher royalty than the market could sustain.

The Waimana Valley application was also withdrawn after a joint Forest Service and Lands and Survey inspection suggested that milling would accelerate erosion.⁶⁴⁴ These two Waimana Valley blocks, and the four Te Waiti blocks, were included in the Crown's purchase offer (discussed above), withdrawn after the 1949 election, which would have allowed milling of the low-lying parts of the Te Waiti blocks.

Applications for cutting rights were submitted with respect to several Ruatahuna district blocks in the early 1950s, but in each case ministerial consent was withheld.⁶⁴⁵ Although Crown policy dictated that it should purchase these blocks, by 1953 only the owners of the Te Waiti blocks seem to have been made a formal offer – this being the cause of the Forest Service appraisal in 1951 referred to above. The conditions imposed on this offer were quite strict, namely that it was only valid while the forest on the blocks remained unmilled. The owners of the Te Waiti blocks were determined that they should be able to mill some of their timber though, and accordingly began splitting logs themselves in late 1951.⁶⁴⁶

In the case of the Ahiherua block in the Ruatahuna district, the Tuhoe claimants have expressed concern that Crown officials advised the applicant (Penrose Sawmilling) that their bid would be rejected before it was voted on by the owners, since the normal legal procedure was for the owners to agree to a sawmilling grant first.⁶⁴⁷ However, the responsible Minister, E B Corbett, recommended in 1950 that the Crown should aim to acquire this block.⁶⁴⁸ The fact that Corbett did

642. Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), pp 109, 111–114

643. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 182

644. Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), p 109 n 100

645. Consent for milling was denied within Te Huia, Kopuhea, Te Whakapau, Okete, Ahiherua, Tiritiri, Oraukura, Te Maiora, and Te Hiwiotewera: Tuawhenua Research Team, ‘Te Manawa o te Ika, Part Two’ (doc D2), p 330; Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), pp 116–117.

646. Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), pp 105–108

647. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 182

648. Tuawhenua Research Team, ‘Te Manawa o te Ika, Part Two’ (doc D2), p 339

not formally deny consent, since the application was withdrawn before the process reached this stage, did not therefore alter the way in which the owners of this block were treated.

Elsewhere on the former Urewera District Native Reserve lands, the owners of the Whakatane River blocks were showing interest in having their lands milled, while several blocks included with the land development scheme at Ruatoki became the subject of milling offers. Although the Crown did not prohibit milling absolutely in either case, Forest Service reports written in 1952 and 1956 warned of erosion problems associated with milling the Whakatane blocks. Also, its appraisal of the Ruatoki blocks in 1954 determined that the area that could be milled was only 1,535 acres (and this was later cut to 740 acres on the basis of inspection of aerial photographs).⁶⁴⁹ This seems to have been enough to deter the sawmillers, as no milling licences had been granted by 1959.⁶⁵⁰

From 1953, the Crown relaxed its absolute opposition to new milling in the Ruatahuna district, and instead agreed to identify which parts of each block were suitable for milling. During the mid-1950s, the Urewera Land Use Committee, which included a Tuhoe representative, inspected and classified 45,019 acres of land in the district. The outcome of these classifications as a whole was that 5,482 acres was put in class A, 8,043 acres in class B, and 26,732 acres in class C, while the remaining 4,762 acres had no forest cover.⁶⁵¹ Under this system, conditional cutting rights were able to be sold on almost all blocks by 1955, and a new sawmill was consequently established in Ruatahuna in 1957.⁶⁵² According to the Forest Service appraisals, 119 million board feet of timber (out of a total of 229 million board feet in the Ruatahuna district) remained locked up on C-class land.⁶⁵³ As noted previously, the Crown set aside £300,000 for purchasing the B- and C-class land within the Ruatahuna district in 1957, but the low value the Crown put on the land, as well as Tuhoe's resistance to selling, meant that its offers were rejected.

Despite this relaxation of restrictions, problems still arose with respect to Ruatahuna blocks where timber-cutting grants were not needed, because of the exemptions (described previously) from the controls on milling contained within section 218 of the Maori Affairs Act 1953. One such block was Pamatanga, which had three owners, at least one of whom was involved in timber cutting. The Crown has accepted that it applied for an injunction against milling on the block on the basis that the Urewera Land Use Committee had recommended that 229 out of 233 acres was class C forest land. It is possible that the owners' agreement to the land use committee classification may have led the Crown to believe that a timber-cutting licence was necessary, since this classification had no purpose if the land

649. Neumann, " . . . That No Timber Whatsoever Be Removed" (doc A10), pp 199–200; Oliver, 'Ruatoki' (doc A6), pp 203–206

650. ET Tirikatene, *Facts and Figures of the Urewera Maori Lands in Relation to the Four Catchment Areas, National Parks and State Forests* (Wellington: New Zealand Forest Service, 1959), pp 20–21 (Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), app C, pp 111–112)

651. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p 348

652. *Ibid*, pp 349, 403

653. *Ibid*, p 348

was going to be milled anyway without a licence. The Maori Land Court, however, found that there were no grounds for the injunction. The A-B-C classification had no independent legal standing and could not be enforced unless Maori owners applied to the court for confirmation of their agreement with a timber company, at which point the Minister's prior consent was required (and he could make conditions such as no milling of C-class lands). In this particular case, the block only had three owners, who were therefore exempt from the need to obtain land court confirmation of their agreement.⁶⁵⁴ It is not clear what loss the owners suffered as a result of the injunction, which stopped the sawmiller's operations prior to the court hearing; unfortunately, it is not known whether milling resumed after it.

During the late 1950s, further milling licences were also granted to sawmillers on the Ruatoki blocks and on the Maungapohatu blocks, but restrictions based on the A-B-C classification system were employed in neither. The use of this system had been considered in the Maungapohatu case, but the Crown concluded that the exclusion of totara, tanekaha, and beech species from the milling licence allowed sufficient forest cover to remain that erosion was not likely to be a problem.⁶⁵⁵ As noted above, however, it wrote into the consent the power of the Rotorua Conservator of Forests to intervene if milling became a problem. Much of the forest would also have been left intact by the milling at Ruatoki, as the millable timber was so scattered that the Forest Service decided that an appraisal was not cost effective, and instead a royalty would be paid out on the basis of the log output.⁶⁵⁶

Milling restrictions on the Tuhoe UDNR blocks were transformed by the issuing of a notice under section 34 of the Soil Conservation and Rivers Control Amendment Act 1959 in 1961. The imposition of this notice was prompted in 1960 by milling without the need for a licence on another block in the Ruatahuna district, that is, Heipipi.⁶⁵⁷ From 1961 until 1993, these section 34 notices covered the whole of the former Urewera District Native Reserve. In terms of compensation, this made the Crown liable (under section 37 of the same Act) for the losses incurred by Tuhoe UDNR block owners as a result of the restrictions.

In the Ruatahuna district, the continuation of pre-1961 consents until their expiry date, together with the consistent position of the Forest Service regarding the extent of millable land (although some areas classed C under the A-B-C system were, in time, allowed to be milled), meant that overall the change to restriction via section 34 notices had little practical effect. When in 1972, as part of the compensation negotiations described below, the amount of millable timber remaining in the Ruatahuna district was estimated, the figure arrived at was 108 million board

654. Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), pp 135–137; Bassett and Kay, ‘Ruatahuna’ (doc A20), pp 197–198; Rotorua Maori Land Court, minute book 105, 15 July 1957, fols 388–390

655. Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), pp 157–158

656. Oliver, ‘Ruatoki’ (doc A6), p 207

657. See Neumann, “. . . That No Timber Whatsoever Be Removed” (doc A10), pp 164–168.

feet,⁶⁵⁸ or about 10 per cent less than the estimate for the amount on C-class land 20 years earlier. Since the section 34 provisions applied to all landowners, owners who had been allowed to cut timber without licences under the Maori Affairs Act 1953 were now forced to get them to continue milling. Thus the Waimana River blocks of Paemahoe, Taumataohine, and Opuatawhero were all being milled by a contractor operating without a licence in 1960, but by 1963 licences had been obtained for milling on the first two;⁶⁵⁹ these followed in the footsteps of Opeī and Oueariu, for which milling licences had been granted in 1959.⁶⁶⁰ Unfortunately, it is not clear from the available evidence how much previously licence-exempt milling was curtailed because a licence could not be obtained.

The major instance where new milling proposals were rejected or restricted during the 1961 to 1993 period (when the section 34 notices applied) concerned applications from the owners of the Whakatane River blocks. Following a Forest Service inspection, milling was allowed on 29 of the 34 blocks in question, although the area allowed to be milled was only 5,164 acres (less than a quarter of the area of the 34 blocks).⁶⁶¹ The amount of timber that could therefore be extracted was 34 million board feet, while the amount that was not millable as a result of this decision was 92 million board feet.⁶⁶²

Across the Tuhoe UDNR blocks, commercial milling of indigenous forest ceased in the mid-1970s. The last milling licence, which concerned the Maungapohatu block, expired in 1979.⁶⁶³ By this period, public pressure was such that the Crown had also agreed to halt its own milling in the Whirinaki State Forest, and to enforce a blanket restriction on all milling in Te Urewera. This has meant that the 1993 amendment to the Forests Act 1949, which effectively prohibits commercial milling, did not alter the situation of Tuhoe UDNR landowners, although as it currently stands the Act prevents the landowners from trying to exploit their timber resource through commercial milling in the future.

The Crown's acknowledgement that it has failed to compensate Tuhoe UDNR owners affected by milling restrictions, despite its obligations under section 37 of the Soil Conservation and Rivers Control Amendment Act 1959, is one of the Crown's major concessions with respect to native timber in our inquiry.⁶⁶⁴ Although, as noted above, no claims were lodged by these owners under section 37, the account below demonstrates that there is plenty of evidence that

658. John Ure, Conservator of Forests, to director-general, New Zealand Forest Service, 14 February 1972 (Campbell, supporting papers to 'Te Urewera National Park' (doc A60(b)), p 215)

659. Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), pp 165, 189

660. Tirikatene, *Facts and Figures of the Urewera Maori Lands*, pp 16–17 (Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), app C, pp 107–108)

661. Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), p 200

662. John Ure, Conservator of Forests, to director-general, New Zealand Forest Service, 14 February 1972 (Campbell, supporting papers to 'Te Urewera National Park' (doc A60(b)), p 216)

663. Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), p 198

664. Crown counsel, closing submissions (doc N20), topic 31, p 19

they attempted to secure compensation from the Crown by negotiation instead. As we see it, negotiating a general settlement was recognised by both the Crown and owners to be the only sensible option, rather than each set of owners filing a section 37 application for compensation over each individual block across the whole of Te Urewera. The Crown, which agreed to negotiate with the owners on this basis rather than rely on the formal requirements of the 1959 Act, cannot now use the fact that no formal compensation applications were filed to defend itself.⁶⁶⁵

The first post-1961 request for compensation by Tuhoe representatives occurred at a meeting with the Minister of Maori Affairs at Ruatoki in March 1962.⁶⁶⁶ There is no record of any Crown action in response to this request, and accordingly legal options for claiming compensation were explored by Tuhoe at a hui at Papueru in May 1964. At this hui, organised by John Rangihau, Tuhoe also decided to embark on a course of land amalgamation. It would have been easier for owners to group together under a large amalgamated title to fight what might prove a costly and protracted case, since it would require timber appraisals, than for the owners of each small block to fight separate cases. The solicitor hired by Tuhoe, using money advanced by the Pine Milling Company, had no more success than the Tuhoe representatives in getting 'definite answers from the Government', and in the late 1960s he was 'taken off the job of pursuing compensation.'⁶⁶⁷

Evidently, the Crown was aware of its potential liability under section 37. In 1969, the director-general of the Forest Service concluded that central government funding would be needed to meet compensation claims once they arose.⁶⁶⁸ The process of negotiating with Tuhoe did not commence, however, until April 1971 when Duncan MacIntyre, Minister of Lands, Forests, and Maori Affairs, met with Tuhoe representatives at Ruatahuna.⁶⁶⁹ In discussions that followed between the Forest Service and Maori Affairs Department, it was decided that the Crown should offer land in exchange (in preference to allowing selective logging, as it had been doing).⁶⁷⁰ The owners of the three Tuhoe bushlands blocks (Tuhoe Tuawhenua, Te Pae o Tuhoe, and Tuhoe Kaaku) were also considering their position; a meeting of owners at Ruatoki held in August 1972 endorsed the options of a 99-year lease or lease in perpetuity to the Crown (as opposed to a sale) so long as full compensation for the standing timber was paid.⁶⁷¹ Preliminary estimates in 1972 put the value of the timber on the Ruatahuna blocks at between \$510,000 and \$1,100,000, while the estimate for the Whakatane River blocks was

665. Crown counsel, closing submissions (doc N20), topic 31, pp 18–19

666. Neumann, " . . . That No Timber Whatsoever Be Removed" (doc A10), p 201

667. Tamaroa Raymond Nikora, brief of evidence, 3 September 2004 (doc G8), p 6

668. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p 445

669. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 825; Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p 446

670. Campbell, 'Te Urewera National Park' (doc A60), pp 110–112; Bassett and Kay, 'Ruatahuna' (doc A20), pp 202–203

671. HK Hingston to commissioner of Crown lands, 5 September 1972 (Parker, 'List of Documents' (doc M27(a)), p 164); Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), p 45

\$1,200,000.⁶⁷² Before proceeding further, the Crown also confirmed with the Tuhoe-Waikaremoana Maori Trust Board that the '1956 agreement', which had set aside surplus Crown lands at Te Whaiti and in the Whirinaki block for a future exchange for unmillable areas at Ruatahuna, could be rescinded.⁶⁷³

As is described in chapter 16, Crown officials had also begun looking to acquire areas along the north-western edge of Te Urewera National Park in order to make the park boundary easier to manage. In June 1972 they met with the trust board, which agreed in principle to an exchange for nearby Crown land of equivalent value that could be used for forestry.⁶⁷⁴ This was not a compensation-based exchange, since the lands proposed to be added to the park contained little millable timber,⁶⁷⁵ although the economic opportunities that would be created by exotic forestry on their new lands would potentially replace those that the milling of native timber was no longer able to provide. The trust board was also in talks with Caxton Paper Mills about afforesting parts of Te Manawa o Tuhoe that the Crown was not interested in acquiring.⁶⁷⁶

By March 1973, the Crown and the trust board had provisionally agreed to exchange 1,793 hectares of Te Manawa o Tuhoe along the north-western edge of the park, and 133 hectares of Tuararangaia block land, for 429 hectares of the Waiohau B9B block and 31 hectares of Provisional State Forest 101. At the time, the values of Crown land, and Tuhoe land and timber, both amounted to around \$22,000.⁶⁷⁷ However, in the Manawa o Tuhoe exchange agreement which was drawn up in October 1973, neither the Tuararangaia nor the Provisional State Forest areas were included, and so it became a straight swap of 1,793 hectares of Te Manawa o Tuhoe for 410 hectares of Waiohau B9B.⁶⁷⁸ No exchange application was put forward though, as when the Te Manawa o Tuhoe deal came up for discussion at a hearing covering various Te Urewera matters in March 1974, Judge Gillanders Scott advised the trust board that other options, such as the leases in perpetuity that were being proposed for the three Tuhoe bushlands blocks, ought to be investigated first.⁶⁷⁹

672. Campbell, 'Te Urewera National Park' (doc A60), p 114

673. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 829

674. *Ibid*, p 828

675. According to a New Zealand Forest Service appraisal in early 1973, there was only \$5,650 worth of timber on the Te Manawa o Tuhoe exchange lands: MJ Fromont and EW Williams, for secretary for Maori Affairs, and HA Witty, for Valuer-General, to Board of Maori Affairs, enclosure to MJ Fromont, for secretary for Maori Affairs, to Director-General of Lands, 28 May 1973 (Parker, 'List of Documents' (doc M27(a)), pp 136–138).

676. Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), p 45

677. A E Turley, commissioner of Crown lands, to Hingston and Charters, 28 March 1973 (Parker, 'List of Documents' (doc M27(a)), pp 144–148)

678. B Briffault, Maori Land Division, to district solicitor, Lands and Survey, 1 October 1973, and application for exchange order [draft], [circa October 1973] (Parker, 'List of Documents' (doc M27(a)), pp 109–111)

679. B Briffault, Maori Land Division, and L Jacques, district solicitor, Lands and Survey, 'Maori Land Court Sitting – Ruatoki, Saturday 30 March 1974' (Parker, 'List of Documents' (doc M27(a)), pp 65–67)

Negotiations for both the Tuhoe bushlands and Te Manawa o Tuhoe were subsequently continued by Matiu Rata's newly created joint committee. Rata's preference was for a comprehensive compensation package, and he had in fact halted the Te Manawa o Tuhoe exchange briefly in mid-1973 before the trust board asked that it be allowed to go ahead.⁶⁸⁰ As noted above, the Crown was now prepared to work on the basis of a lease in perpetuity for Te Manawa o Tuhoe as well whereas, in the earlier negotiations, officials had been convinced that any deal must see the Maori-owned forest transferred into Crown ownership.⁶⁸¹ Progress was slow, as officials failed to come up with a fully stocked farm in the vicinity, which was the trust board's preferred option for a reciprocal lease; conversely the trust board rejected Crown proposals that they be given the lease of properties in urban areas.⁶⁸² It also took some time to finalise the necessary valuations, since commercial milling at Ruatahuna only stopped in August 1975.⁶⁸³ Excluding the previously licensed millable area at Ruatahuna, the timber on the four Tuhoe blocks was reported in January 1975 to be worth \$1,032,000, while the combined land value of Tuhoe Tuawhenua, Tuhoe Kaaku, and Te Pae o Tuhoe was found by September 1975 to be \$1,171,320.⁶⁸⁴ Around \$29,000 was then added to the timber total in April 1976 to account for millable timber at Ruatahuna that had been left uncut.⁶⁸⁵

In the meantime, the trust board had been considering afforestation proposals by Caxton and the New Zealand Forest Service for Te Manawa o Tuhoe, and in November 1975 it accepted the latter's bid to lease and afforest 5,000 acres.⁶⁸⁶ This

680. M Rata, Minister of Lands to Director-General of Lands, 30 May 1973, R J MacLachlan, Director-General of Lands, to commissioner of Crown lands, 8 June 1973, T B Nikora, secretary, Tuhoe Maori Trust Board, to Minister of Maori Affairs, 15 August 1973, and M Rata, Minister of Lands, to secretary, Tuhoe Maori Trust Board, 29 August 1973 (Parker, 'List of Documents' (doc M27(a)), pp 112–113, 132–133)

681. C Moyle, Minister of Forests, to Minister of Maori Affairs, 25 June 1974; compare M J Conway to A P Thomson, Director-General of Forests, to secretary for Maori Affairs, 27 January 1972, and A Macready for Minister of Maori Affairs to Minister of Forests, [12 June 1972] (Parker, 'List of Documents' (doc M27(b)), pp 830, 1009, 1015)

682. J Cater, district officer, Maori Affairs, [to secretary for Maori Affairs], 18 April 1974, and minutes of meetings of committee set up by Minister of Lands to investigate possible exchanges of Tuhoe lands, 26 August 1974 and 30 January 1975 (Parker, 'List of Documents' (doc M27(a), doc M27(b)), pp 425–426, 833, 887–888)

683. Minutes of meeting of committee set up by Minister of Lands to investigate possible exchanges of Tuhoe lands, 26 August 1974 (Parker, 'List of Documents' (doc M27(b)), pp 888–889); Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 203

684. Campbell, 'Te Urewera National Park' (doc A60), p 119; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 833–834; A E Turley, commissioner of Crown lands, to Conservator of Forests, 9 September 1975 (Parker, 'List of Documents' (doc M27(a)), p 442)

685. Bassett and Kay, 'Ruatahuna' (doc A20), p 205; Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p 457

686. 'Minutes of meeting of Committee set up by Minister of Lands to Investigate Possible Exchanges of Tuhoe Lands', 19 November 1975, and HK Hingston to Conservator of Forests, 25 November 1975 (Parker, 'List of Documents' (doc M27(a)), pp 417, 419–420)

was a smaller afforestation area than the trust board had hoped to achieve,⁶⁸⁷ and so it requested at the same time that the Crown reopen negotiations for the exchange agreed to in 1973. Going ahead with the exchange would give the trust board a second area for afforestation, and it could use the lease rental to pay for the second forest's establishment.⁶⁸⁸ By September 1976, the two parties had agreed to exchange 1,793 hectares of land in Te Manawa o Tuhoe for 430 hectares of the Waiohau B9B block,⁶⁸⁹ which was the same as the October 1973 deal. As noted above, Cabinet had approved the exchange in May 1977, after which updated valuations were made, which resulted in the exchange areas being adjusted upwards to 1,803 hectares and 469 hectares respectively in the final agreement on 20 December 1977. The new valuations showed the total worth of land and timber to be just over \$170,000.⁶⁹⁰

This deal was unable to be confirmed though, as the Maori Land Court ruled that the trust board did not have the required trustee powers at the time the agreement was made. When the trust board had applied for the 'terms of trust' (which set out the powers held by the trustee) to the Maori Land Court on 30 November 1978, it received authorisation to lease lands vested in it on the owners' behalf, but when it came to either a sale or exchange of the freehold, it was authorised 'to treat but no more'. In short, this meant that the trust board could negotiate on behalf of the owners, but any agreement it reached would have to be approved by the owners before it could be put into effect.⁶⁹¹ Although there were hardly any objectors when the trust board had earlier submitted an application for the Te Manawa o Tuhoe exchange under section 261 of the Maori Affairs Act 1953, the fact that one objector had declared an intention to appeal any exchange order to the then Supreme Court (now the High Court) evidently convinced the trust board that it would need a favourable resolution from a meeting of assembled owners in order to demonstrate to the court that this was what the owners wanted.⁶⁹² The then legal

687. In contrast, less than a year earlier the New Zealand Forest Service had assessed the area suitable for afforestation as 9,418 acres: J Ure, Conservator of Forests, to B Briffault, 16 January 1975, and 'Minutes of Meeting of Committee Set Up by Minister of Lands to Investigate Possible Exchanges of Tuhoe Lands', 19 November 1975 (Parker, 'List of Documents' (doc M27(a)), pp 10, 420).

688. 'Minutes of Meeting of Committee Set Up by Minister of Lands to Investigate Possible Exchanges of Tuhoe Lands', 19 November 1975, and draft memorandum to Cabinet, circa April 1977 (Parker, 'List of Documents' (doc M27(a)), pp 349, 420)

689. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 830; RM Velvin, commissioner of Crown lands, to Director-General of Lands, 6 October 1976 (Parker, 'List of Documents' (doc M27(a)), p 377)

690. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 831

691. Extract from Rotorua Maori Land Court, minute book 191, 30 November 1978 (Parker, 'List of Documents' (doc M27(a)), pp 616–617); Campbell, 'Te Urewera National Park' (doc A60), pp 117–118; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 831–832

692. 'Minutes of Meeting of Tuhoe Lands Combined Committee – Working Party Committee, Held at Rotorua on 11 October 1978'; *Whakatane Beacon*, 28 December 1978 (Parker, 'List of Documents' (doc M27(a), doc M27(b)), pp 187–188, 600)

quorum for a meeting of owners was 75 per cent of shares represented,⁶⁹³ which was a serious hurdle for the trust board, for Te Manawa o Tuhoe had several hundred owners, many of whom were either dead or difficult to locate, and there was no guarantee that all those owners who could be notified of the meeting would participate (given that some individual interests had little monetary value).⁶⁹⁴ In view of the inevitable delay in getting the exchange approved, it was also likely that new updated valuations of the land and timber would be also be required before a new application could be submitted.⁶⁹⁵

The Te Manawa o Tuhoe exchange application was to remain on the court's books for another 10 years. No more progress had been made on it by July 1980, when the court signalled an intention to dismiss it unless advised otherwise, while in December 1980 a Government directive to encourage employment meant that planting of Waiohau B9B by the Crown started the following year.⁶⁹⁶ The possibility of resurrecting the exchange idea was then raised in April 1983 by the trust board solicitor, but it received a lukewarm reception from officials who recalled that their recent predecessors had lost their enthusiasm for it.⁶⁹⁷ In addition, negotiations would have had to start largely from scratch, since the planting of the Crown land had thrown out the matching valuations, and the Te Manawa o Tuhoe survey was still to be completed. Finally, in June 1988, by which time the New Zealand Forest Service no longer existed, and the Waiohau B9B forest had been transferred to the Forestry Corporation, the application was dismissed without objection on application by the court registrar.⁶⁹⁸

On the advice of the court, the Crown and the trust board agreed in the meantime to progress the afforestation lease. The lease agreement, which saw the trust board lease 2,117 hectares to the New Zealand Forest Service for 32 years, in return for a rental which rose in steps over five years from \$5,600 to \$28,000 per year, and then was adjusted in line with the change in land value, was duly signed on 9 February 1979.⁶⁹⁹ However, registration of the lease was not straightforward, which had ramifications for the Te Manawa o Tuhoe exchange because the court's position was that the registration must be completed in the land transfer register

693. Maori Affairs Amendment Act 1974, s36(1)

694. *Whakatane Beacon*, 28 December 1978 (Parker, 'List of Documents' (doc m27(b)), p 600)

695. R M Velvin, commissioner of Crown lands, file note, 4 January 1979, and R M Velvin, commissioner of Crown lands, to Director-General of Lands, 7 February 1979 (Parker, 'List of Documents' (doc m27(b)), pp 599, 601)

696. Extract from Rotorua Maori Land Court, minute book 197, 23 July 1980, and R F Schwass, Maori Division, Lands and Survey, 'Maori Land/Crown Land Exchanges Urewera', 17 September 1981 (Parker, 'List of Documents' (doc m27(b)), pp 645–646, 669)

697. Department of Lands and Survey, Hamilton, file note, 27 April 1983 (Parker, 'List of Documents' (doc m27(b)), p 665)

698. DB Prentice for chief surveyor, to the registrar, Maori Land Court, 23 May 1988, and extract from Rotorua Maori Land Court, minute book 222, 28 July 1988, fol 210 (Parker, 'List of Documents' (doc m27(b)), pp 636, 642)

699. T R Nikora and K R Locke, 'Report on Legal Access to Te Manawa-o-Tuhoe A Block across Waiohau 2 Block' (Tama Nikora, 'Urewera Consolidation Scheme (1921–1926): An Analysis' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc e7), app c3, p 5); Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 849

before the exchange was considered; for the Crown, the security of its investment in the lease while it was unregistered was also an issue.⁷⁰⁰ The obstacle to registration was the incomplete state of the underlying Te Manawa o Tuhoe surveys; Nikora has documented that as of 1969 almost all of the Ruatoki and Waiohau blocks which had been amalgamated in Te Manawa o Tuhoe were unsurveyed.⁷⁰¹ Due to the amount of survey work required, and delays from interference by forestry operations and other causes, a set of plans for Te Manawa o Tuhoe was not in fact completed until 1992, and even then there were still unresolved problems with access roadways.⁷⁰²

While the Te Manawa o Tuhoe exchange did not fall through because of any loss of commitment by the trust board or Crown, the same could not be said of the arrangements for the Crown's lease of the Tuhoe bushlands. At first, the Crown's suggestion at the working committee meeting in May 1977 that it afforest Crown lands at Matahina and Ashdown for lease by the board, in order to make up the difference in value, seemed like a breakthrough in the problem of finding suitable Crown lands for exchange; the trust board's immediate response was that it looked 'quite a good proposition'.⁷⁰³ Already the trust board had identified which areas of Tuhoe Tuawhenua could be included in the reciprocal lease – in essence, the forested lands of Tuhoe Tuawhenua were generally earmarked for inclusion in any lease, whereas the lands which had been developed for farming (or which had farming potential) were intended to be managed in the future as part of the Ruatahuna farm.⁷⁰⁴ As valuations were already at hand, within days of the May meeting the Hamilton commissioner of Crown lands, RM Velvin, had drawn up a draft heads of agreement.⁷⁰⁵ Subsequent correspondence shows that the Crown offer amounted to the lease by the trust board of 2,123 hectares at Matahina and 536 hectares at Ashdown, with a combined unimproved value of \$680,000,⁷⁰⁶ while the Crown would lease the yet to be defined area of the Tuhoe bushlands (potentially as much as 26,700 hectares, hence the later complaint of the 10:1 imbalance in areas).⁷⁰⁷

However, the common purpose of the Crown and trust board to implement the

700. B Briffault, Maori Land Division, file note, 10 April 1979, and K W Walsh, chief surveyor, to Conservator of Forests, 3 April 1979 (Parker, 'List of Documents' (doc M27(b)), pp 591, 593)

701. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 850; Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), app A, pp 74–75

702. MP Flaherty, 'Survey Report: Te Manawa o Tuhoe A Block', 9 August 1991, J Neal, survey land information officer, to J Canning, 17 June 1992, and J Canning to the registrar, Waiariki Maori Land Court, 29 June 1998 (Parker, 'List of Documents' (doc M27(b)), pp 678, 682, 688–689)

703. 'Minutes of meeting of Tuhoe Lands Combined Committee – Working Party Committee', 26 May 1977 (Parker, 'List of Documents' (doc M27(a)), p 323)

704. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p 459

705. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 834–835

706. RM Velvin, commissioner of Crown lands, to Director-General of Lands, 21 October 1977 (Parker, 'List of Documents' (doc M27(b)), p 741). Maps of these two areas, drawn up in early June 1977, are reproduced in TR Nikora, 'Matahina c & c No 1 Blocks' (commissioned research report, Taneatua: Tuhoe-Waikaremoana Maori Trust Board, 1995) (doc A39), pp 64, 66.

707. RM Velvin, commissioner of Crown lands, to Director-General of Lands, 21 October 1977 (Parker, 'List of Documents' (doc M27(b)), p 742)

reciprocal lease arrangement soon began to break down. The first major sticking point was Velvin's unilateral decision to value, for the purposes of the agreement, the non-merchantable timber at half the minimum stumpage. This had been done on the basis that the Crown was not going to exploit the timber commercially.⁷⁰⁸ Unsurprisingly, the trust board had not accepted the idea that they should take a reduced payout for the timber, with their solicitor HK Hingston observing at the May meeting that the trend in similar cases was for a high value to be put on forest stands which were being preserved for their aesthetic worth.⁷⁰⁹ Similarly, officials were also steadfastly opposed to the trust board being given a forestry encouragement grant (a subsidy available to private parties for the development of new exotic forests) towards the planting of Matahina and Ashdown, which could have boosted the necessary outlay by the Crown by \$885,000;⁷¹⁰ this was despite the fact that a similar grant had been approved, subject to the normal application process, as part of the Te Manawa o Tuhoe exchange.⁷¹¹ This opposition reflected a general effort to depress the cost of the transaction, lest it become difficult to get it approved by Treasury and the Cabinet. In this context, officials related to the trust board that the benefits that the Crown gained from enlarging the managed area of the national park did not really justify the expenditure that it was asking for.⁷¹² Officials could do nothing, however, about an unwelcome discovery by J Ure, the Rotorua Conservator of Forests, in late 1977 that the wrong rates had been used in valuing the timber on the Tuhoe bushlands blocks. The correct value for the timber (based on full value for the minimum stumpage) was not near the \$725,000 which Velvin had used in calculations in June 1977, but some \$1,315,412. As the land value of the Tuhoe bushlands was \$1,172,000, the total worth, if all lands were included, now came to some \$2,487,412, meaning that the Crown had a potential deficit to make up through investment in forestry operations of \$1,807,412.⁷¹³

708. Bassett and Kay, 'Ruatahuna' (doc A20), p 206; RM Velvin, commissioner of Crown lands, to secretary, Tuhoe-Waikaremoana Maori Trust Board, 31 May 1977 (Parker, 'List of Documents' (doc M27(a)), pp 335–336). By way of comparison, when purchasing Manuoha and Paharakeke in 1961 (see chapter 16) the Crown had eventually paid three-quarters of the minimum stumpage, and this was only reduced from the full stumpage to offset the difference between market and Forest Service rates for the millable timber.

709. Bassett and Kay, 'Ruatahuna' (doc A20), p 206

710. GW Boggs to Director-General of Lands, draft memorandum [circa September 1977], NS Coad, Director-General of Lands, to commissioner of Crown lands, 7 October 1977, and RM Velvin, commissioner of Crown lands, to Director-General of Lands, 15 December 1977, 7 February 1979 (Parker, 'List of Documents' (doc M27(b)), pp 599, 720–721, 744, 746–747)

711. V Young, Minister of Lands and Forests, to secretary, Tuhoe-Waikaremoana Maori Trust Board, 27 June 1977 (Parker, 'List of Documents' (doc M27(a)), p 277)

712. See 'Minutes of meetings of Tuhoe Lands Combined Committee – Working Party Committee, held at Rotorua on 2 September 1977, 20 October 1977, and 11 October 1978, and RM Velvin, commissioner of Crown lands, file note, 4 January 1979 (Parker, 'List of Documents' (doc M27(a), doc M27(b)), pp 189, 601–602, 729, 751)

713. RM Velvin, commissioner of Crown lands, to Director-General of Lands, 1 June 1977, 22 September 1977, and 21 October 1977 (Parker, 'List of Documents' (doc M27(b)), pp 742, 749, 779). The Tuawhenua claimants have noted that the value of Ruatahuna's timber had risen from \$433,772 to \$618,867: see Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p 459.

Subsequently, Tuhoe owners and even the trust board also began having second thoughts about proceeding with the leases. Indeed, as early as June 1978 the arrangement was put in jeopardy when the owners of Matahina E (which was vested in the trust board) appealed for a reversal of the 1907 taking by the Crown of parts of Matahina C and C1 to satisfy survey liens. The areas taken had been included in the Ashdown farm settlement block, and so the reciprocal lease could not have gone ahead if the Crown had agreed to return this land upon payment of the original liens plus interest.⁷¹⁴ However, in September 1978 this bid was rebuffed by the Minister of Lands, who observed that the land had been acquired by the Crown legally.⁷¹⁵ When, at the start of October, a meeting was then held at Ruatahuna to consider the reciprocal leases, the trust board backed away from pushing the deal, after finding that a number of owners expressed misgivings about it. While some thought the small area of Crown land on offer an unfair swap, others expressed the view that the deer and possum fur industries were now bringing in sufficient income so that it was better to drop the deal altogether.⁷¹⁶ To assuage the first group's concerns, the trust board asked the Crown at the October 1978 committee meeting if it could find more land for the deal, but the Crown negotiators had previously been requested by the Director-General of Lands to explore the option of using more cash and less land, and thus they opted for the status quo.⁷¹⁷ Owner support had shown no sign of increasing by the time the next working committee meeting was held in July 1979,⁷¹⁸ and indeed in April 1979, RM Velvin, who was not only commissioner of Crown lands but also chairman of Te Urewera National Park Board, instructed the park's planning officer not to take further action relative to the inclusion of Whakatane and Waimana Valley blocks – in effect Te Pae o Tuhoe and Tuhoe Kaaku – in the park.⁷¹⁹

The most serious setback to the reciprocal lease plan, however, came when a group of owners exposed errors in the amalgamation process for Tuhoe Tuawhenua over the course of 1979, as a consequence of which they launched a legal challenge to the amalgamation in November of that year.⁷²⁰ As has been noted above, this challenge was ultimately successful, with the High Court quashing the Tuhoe Tuawhenua amalgamation orders in 1984. In Professor Murton's view, this was the 'final factor involved' in the whole compensation negotiations

714. Nikora, 'Matahina C & C No 1 Blocks' (doc A39), p 16; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 836

715. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 836

716. 'Minutes of meeting of Tuhoe Lands Combined Committee – Working Party Committee, held at Rotorua on 11 October 1978' (Parker, 'List of Documents' (doc M27(a)), p188)

717. NS Coad, Director-General of Lands, to commissioner of Crown lands, 7 October 1977, and Tuhoe Lands Working Party Committee, minutes of meeting held at Rotorua on 11 October 1978 (Parker, 'List of Documents' (doc M27(a), doc M27(b)), pp189, 744)

718. 'Minutes of meeting of Tuhoe Lands Combined Committee – Working Party Committee', 2 July 1979 (Parker, 'List of Documents' (doc M27(b)), p 571)

719. Campbell, 'Te Urewera National Park' (doc A60), pp124–125

720. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), pp 521–523; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 836–837

falling over;⁷²¹ put simply, from 1979 onwards there was no certainty that the trust board's position as negotiating trustee, or even the Tuhoe Tuawhenua block title, had any legal standing.

Mention should also be made of the actions of the Bay of Plenty Electric Power Board which by themselves did not sink either the Te Manawa o Tuhoe exchange or the Tuhoe bushlands lease, but were certainly unhelpful to them. In mid-1977, both the Crown and trust board became aware that the power board was planning to run electricity transmission lines through Matahina as part of its Aniwhenua hydroelectric power scheme. As a result of the setback of trees alongside the lines, part of the block would no longer be available for exotic forestry, which was, as described above, the means by which the Crown was going to work off the deficit in land values.⁷²² In order to compensate for this potential loss, an arrangement was made with the power board in 1978 that it would, in the event of both the reciprocal leases and the hydroelectric scheme going ahead as planned, indemnify the Crown for the cost of purchasing a forest block of 37 hectares in the vicinity of Matahina and Ashdown, which would serve as a replacement for the forest that could not be established because of the lines.⁷²³ In a similar vein, the emergence of plans in 1978–79 for a second hydroelectric project (Mangamako) also meant that part of the Waiohau B9B block would be flooded if the dam went ahead. To this end provision had to be made in the Te Manawa o Tuhoe exchange agreement that the Crown could give a greater area of Waiohau B9B if because of flooding some of the original exchange area was lost.⁷²⁴

Tuhoe were thus left, after almost a decade of negotiations with the Crown over the fate of the Tuhoe bushlands, with no compensation having been paid for the milling restrictions which had been imposed on them in order to meet the wider public interest. As a result they have gained almost no return from an asset which even in the mid-1970s was worth almost \$2.5 million. This remains a major grievance for Tuhoe today. The parallel failure of the Te Manawa o Tuhoe exchange further disadvantaged Tuhoe when it came to the income-earning potential of their lands. Too often, compensation for milling restrictions was a bargaining chip for Crown officials intent on enlarging the effective area of the national park, whereas it should have remained front and centre in all of the negotiations.

721. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 837

722. 'Minutes of meeting of Tuhoe Lands Combined Committee – Working Party Committee', 26 May 1977, and RM Velvin, commissioner of Crown lands, to Director-General of Lands, 22 September 1977 (Parker, 'List of Documents' (doc M27(a), doc M27(b)), pp 323, 748)

723. RM Velvin, commissioner of Crown lands, to Director-General of Lands, 19 April 1978 (Parker, 'List of Documents' (doc M27(b)), p 705)

724. 'Minutes of meetings of Tuhoe Lands Combined Committee – Working Party Committee', 11 October 1978, and 2 July 1979, and P Walmsley, Secretary and Treasurer, Bay of Plenty Electric Power Board, to commissioner of Crown lands, [circa September 1979] (Parker, 'List of Documents' (doc M27(a), doc M27(b)), pp 188, 528–529, 571)

18.8.4.2 Te Whaiti

The first areas at Te Whaiti (and within Te Urewera) where timber milling was allowed by the Crown were the Kaitangikaka and Tahupango blocks, which had a combined area of 1,687 acres. Walter Smith and Wharepapa Whatanui were given a timber-cutting grant for these blocks in 1928. These cutting rights were then onsold to Wilson Timber in 1930. The licence only provided for a royalty payment of 1s 6d per 100 superficial feet.⁷²⁵ The Crown's failure to disallow the terms of the agreement is a grievance for the Ngati Whare claimants.

It will be recalled that the Crown did not become concerned about the environmental effects of milling on Maori land until the mid-1930s. Restrictions before then were aimed at protecting the interests of the Maori owners through the scrutinising and approval powers of the Maori Land Boards. According to the Ngati Whare claimants, the additional requirement under section 35(2) of the Forests Act 1921–22 – that the Commissioner of State Forests' consent be given to the sale of cutting rights on the Kaitangikaka and Tahupango blocks in 1928 – was not complied with even though the sale conditions were injurious to the block owners.⁷²⁶ These conditions included:

- ▶ a royalty of one shilling per 100 feet by log measure for all species (which equated to about 1s 6d per 100 board feet, whereas the minimum State royalty rate by this time was five shillings and four shillings per 100 board feet for totara and matai respectively);
- ▶ an obligation to extract only the trees with a diameter greater than 18 inches (as opposed to a 12-inch limit used by the Forest Service);
- ▶ no payment for any timber used in construction;
- ▶ no payment for any timber which was not milled; and
- ▶ no provision for reviewing the royalty rate.⁷²⁷

In 1931, the block owners alerted the Rotorua Conservator of Forests to the negative consequences of this agreement, who in turn notified the Commissioner of State Forests, E A Ransom, who advised that his consent had not been sought to the original agreement. He also expressed doubt that the Maori Land Board was aware of the onsale. At last the Native Minister, Sir Apirana Ngata, was informed of the situation, but it appears that the only action taken by him was to criticise the Waiariki District Maori Land Board.⁷²⁸

725. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 308–311; Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), pp 61–64; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 765–766

726. Counsel for Ngati Whare, closing submissions (doc N16), p 87. It appears that Wharepapa Whatanui's role in the partnership was nominal only: Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 310.

727. Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), p 64. The significance of the non-payment for timber that was not milled was that Smith was able to sell fence posts to farmers involved in the nearby closer settlement scheme at Galatea.

728. Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), pp 63–65

As the Crown observed in its statement of response, while it did take some action over the matter,⁷²⁹ its response proved, in terms of the welfare of the owners, completely ineffective. Since the original agreement had not been approved as required by law,⁷³⁰ it is doubtful that its terms were binding on the owners. The employment situation at this time may well have dissuaded Crown officials from taking firmer action. As Hampson and Davys, the Rotorua solicitors acting for the millers, pointed out when they wrote to Ngata, it was the only sawmilling operation in an area with few alternative employment opportunities.⁷³¹ Moreover, as was demonstrated by Forest Service inquiries, in response to requests from the peoples of Te Urewera in 1932 for timber-cutting opportunities on Crown-owned forest at Te Whaiti, the Wilson Timber operation was only able to keep going because it had secured a kahikatea supply contract at pre-Depression prices.⁷³²

In the wake of Wilson Timber's milling, Septimus and Gordon Wright were given a licence to split totara and matai posts in 1934, but only after they raised their offer to 30 shillings per 100 first class posts to satisfy the Director of Forestry.⁷³³ The bid by Trevor Taylor for cutting rights on Waireporepo 2 block, meanwhile, was turned down, despite its being doubled to 2 shillings per 100 board feet, as the output-only basis of the royalty, and the proposed length of licence term, together with suspicions that Taylor was merely acting as a front man for another sawmiller, caused Forest Service officials to conclude it should be rejected.⁷³⁴ Since the rejection was regarded as being in the owners' interests, no compensation was offered to the owners. Further applications from Wilson Timber in 1934 and 1937 were also rejected, including one to mill 1,100 acres on the western bank of the Whirinaki River (which was estimated to contain 10 million superficial feet). As this bid for the 1,100 acres was declined because of the fear it would increase flooding of downstream farmland, rather than being injurious to the Maori owners, the suggestion that Maori ought to receive compensation for a declined licence application was made for the first time.⁷³⁵

By about this time, two small mills on Maori land at Minginui (Ray Winger's and A W MacLarn's), plus two post splitters (L Rogantini, and D Iles), were also

729. Crown counsel, final statement of response, 5 March 2003 (statement of response 1.3.2), sec B, pp 110–B110)

730. Section 35(2) of the Forests Act 1921–22 stipulated that 'After the commencement of this Act neither the Native Land Court nor a Maori Land Board shall grant any right to cut timber or confirm any instrument of grant of such right without the previous consent in writing of the Commissioner of State Forests.' Neumann refers to the commissioner of forests in 1928, OJ Hawken, giving provisional approval to the original agreement in accordance with regulations made under section 34(6) of the War Legislation and Statute Amendment Act 1918, subject to an appraisal of the timber being made, and notes there is no evidence that the appraisal was made: Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), p 65.

731. Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), p 65

732. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 340–341

733. *Ibid*, p 317

734. *Ibid*, pp 317–318

735. *Ibid*, pp 318–320

operating in the Whirinaki Valley, seemingly without a licence.⁷³⁶ The Crown failed in attempting to prosecute MacLarn, since he was found to be milling the land as an agent of the owners, although it did decline Winger's bid to mill 2,800 acres on the west side of the Whirinaki Valley.⁷³⁷ Following the rejection of Winger's bid and the Wilson bid, Cabinet voted between £7,500 and £10,000 to purchase 6,000 acres of Maori land on the west side of the Whirinaki River.⁷³⁸

In 1937, Wilson Timber put in another milling bid, this time for cutting rights for the 3,979-acre Te Whaiti Residue B block. Crown officials did not oppose this bid, but convinced the owners not to accept it by promising to exchange the block for Crown-owned farmland elsewhere in the Whirinaki Valley. Subsequently, the proposal was expanded to include the neighbouring Ponaua, Matera, and Tawa-a-Tionga blocks, with the timber involved adding up to 1,678,423 board feet. However, this deal was not completed before the outbreak of the Second World War.⁷³⁹

Although the Crown allowed a post splitting licence for the Minginui 1A block in 1934, when Tunncliffe Timber applied for timber-cutting rights on the 325-acre Te Whaiti Residue A block in 1948, the Forest Service recommended that it be declined on the grounds of scenic preservation, and water and soil conservation. In keeping with the Crown policy of offering compensation to the owners via purchase, Cabinet proceeded to make available £1,580 to buy it.⁷⁴⁰ Then, after the Director of Forestry, A R Entrican, reiterated the Crown's position that 'milling should not be allowed' on either this block or the Te Whaiti Residue B, Ponaua, Matera, and Tawa-a-Tionga blocks, they were included in the £24,725 purchasing package for 11 Te Urewera blocks which the Labour Government put forward in 1949.⁷⁴¹ As discussed above, the subsequent shelving of this proposal by the National Government meant that Te Whaiti block owners still had nothing to show in compensation for the milling restrictions imposed on them.

The Crown was not done with its restrictions on milling. In 1952, a bid for Penrose Sawmilling to obtain cutting rights on the Waireporepo 2F block was declined. Perhaps not surprisingly, block owners now began to bypass the licence system, with the small areas of timber on the Ponaua and Tauwharekopua blocks being milled, and the Te Whaiti Residue A cutting rights being sold to Manakau

736. MJ Orchard, DA Field, and J Ure, *Whirinaki State Forest Management Plan* (Wellington: New Zealand Forest Service, 1981), pp 82–84

737. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 325–330; MJ Galvin and DD Dun to Conservator of Forests, 'Report by Officers of the Lands and Survey Department and the State Forest Service on the Urewera Forest', 29 April 1935 (Campbell, supporting papers to 'Te Urewera National Park' (doc A60(a)), pp 36–37)

738. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 322

739. Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), pp 81–83

740. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 330; Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), pp 108–109

741. Under-Secretary for Lands and Director of Forestry to Minister of Lands and Commissioner of State Forests, 23 December 1948 (Neumann, "... That No Timber Whatsoever Be Removed" (doc A10), p 109)

Timber; in this case, there were fewer than 10 owners, so the requirement for Maori Land Court sanction of the timber sale did not apply.⁷⁴² In light of these events (and developments in the Ruatahuna district), the Crown began to soften its approach to restrictions, and when Ngapuna Timber applied for cutting rights on the Te Whaiti Residue B block in 1954, an interdepartmental committee of officials concluded that only 230 out of its 3,979 acres were unsuitable for milling. Although there were sporadic complaints from Crown officials about the risk of erosion on the block, none of these translated into restrictions.⁷⁴³ By the early 1970s milling had been completed on the Te Whaiti Residue B block. Evidently, it had been completed on many of the other Te Whaiti blocks as well by this time, as many of these blocks (including Tawa-a-Tionga, Kaitangikaka, Okui, Part Umurakau, Tahupango, Te Apu, Tauwharekopua, Te Rautahi, and Huirangi) were to be included in the Te Whaiti Nui-a-Toi exotic afforestation scheme.⁷⁴⁴

18.8.4.3 *Whirinaki and Heruiwi*

The first sawmilling application for Heruiwi was one by Iles and Prentice for cutting rights on Heruiwi 4F2 in 1952. The Crown considered opposing this on the basis that it might interfere with Whirinaki State Forest operations, but chose not to after deciding against purchasing this block. The grant was confirmed in 1956.⁷⁴⁵ Over the years 1960 through 1963, seven separate applications were also put in by Kauri Sawmills, Minginui Transport, and Fletcher Timber for rights on the Whirinaki 1 4B2A–G blocks. Again these seem to have been confirmed without the Crown imposing restrictions. Three of the seven Whirinaki 1 4B2 blocks had so few owners, however, that they could have been milled without a licence in any case.⁷⁴⁶

Milling applications for two other blocks – Heruiwi 4A2B and Whirinaki 1 4B1B – had a more complex outcome. The Crown sought a partitioning of its shareholding interest in Heruiwi 4A2B in 1943, but the Maori Land Court blocked this on finding that the Crown had left the timber (which at minimum Forest Service royalty rates was worth at least £10,000) out of the valuation.⁷⁴⁷ Then, when a milling bid was made for this block by Kauri Sawmills in 1961, the Crown used its 54 per cent interest to block the bid, in the expectation that this would force the minority Maori owners to sell out. Indeed, the Director-General of Lands commented: ‘I agree that the Crown should oppose the sale of the timber . . . and this

742. Neumann, “... That No Timber Whatsoever Be Removed” (doc A10), pp 110–111

743. Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), pp 527–528, 531–534

744. For the area included in the Te Whaiti Nui-a-Toi forest, see ‘Forest Map: Te Whaiti Nui a Toi’, MAF, 1999, in Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 618. See also Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), pp 535, 577; Boast, ‘Ngati Whare and Te Whaiti-Nui-a-Toi’ (doc A27), p 241.

745. Tracy Tulloch, ‘Heruiwi 1–4’ (commissioned research report, Wellington: Waitangi Tribunal, 2000) (doc A1), pp 127–130

746. Tracy Tulloch, ‘Whirinaki’ (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A9), p 64. One block had one owner and two had three owners, putting them well below the ‘more than ten’ qualification needed for the provisions in the Maori land legislation to apply.

747. Tulloch, ‘Heruiwi 1–4’ (doc A1), pp 106–109

will no doubt precipitate an application from the Maori owners for partition of their interests. . . . the Crown could then possibly buy or exchange the land.⁷⁴⁸ The Crown thus welcomed a bid in 1962 from Bayten Timber for the timber on the Heruiwi 4A2B and Whirinaki 1 4B1B blocks, which proceeded on the basis that the owners would sell the land to the Crown. This agreement was confirmed in 1963, although in 1964 the Whirinaki 1 4B1B owners opted to exchange their land for part of Waiohau B9 and Paeroa East 4B1B1, rather than just selling it.⁷⁴⁹

18.8.4.4 *Tuararangaia*

Sales of cutting rights on Tuararangaia are outside the scope of this chapter. The 1952 sale of timber on Tuararangaia 3B2, then the only Maori-owned land left in the block, is outside our jurisdiction to consider. As we explained in chapter 10, the Tuararangaia 3 lands were awarded to hapu affiliated with Ngati Awa, and are thus covered by the Ngati Awa Claims Settlement Act 2005. The second milling agreement relevant to Tuararangaia involved the land gifted by Tuhoe to the Crown (see chapter 10), which was milled by Tunncliffe Timber for a total payment of £10,200 in the 1950s.⁷⁵⁰ We address the Tuhoe claim about this timber later in the report.

18.8.4.5 *Tahora 2*

Between 1948 and 1973, several forested areas within Tahora 2 were subject either to milling proposals or to Crown purchase proposals designed to prevent milling from taking place. Unusually for Te Urewera, the latter were followed through to their conclusion, with two land exchanges being the result.

The earliest Tahora applications related to Tahora 2B2B1. We do not, however, cover the applications for the milling of Tahora 2B2B1 block,⁷⁵¹ which was awarded to people of Whakatohea descent, who are not claimants in our inquiry. The next applications, from Whakatane Sawmilling for cutting rights for five 2A3B blocks in 1958, seem to have gone ahead without any restrictions being imposed by the Crown. In contrast, a 1963 bid by RH Twisleton for rights to cut 23,116 acres of the 2C1(3) block had conditions placed upon it to mitigate soil erosion, such as not destroying vegetation on the steepest slopes. These conditions were put forward by the Hawke's Bay Catchment Board. It is not evident how much, if it all, this restriction affected the royalty paid to the owners (which amounted to a minimum of £5,000 per year for 20 years).⁷⁵² A 1966 inquiry from the National Conservation Council, which had been advised that milling this land was an erosion risk, was met with the response that the Forest Service was monitoring matters and the

748. Director-General of Lands to chief surveyor, 17 August (Tulloch, 'Heruiwi 1-4' (doc A1), pp111, 113-114)

749. Tulloch, 'Heruiwi 1-4' (doc A1), pp 114-118; Tulloch, 'Whirinaki' (doc A9), pp 65, 69

750. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), pp116-118; counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 41

751. Boston and Oliver, 'Tahora' (doc A22), pp 233-235

752. Ibid, pp185-186, 266-268

catchment board had taken the opportunity to insert the necessary conditions to prevent erosion.⁷⁵³

The two forested blocks which the Crown gained via exchanges were Tahora 2G2 and part of Tahora 2F2 (Te Papuni). We have already discussed Tahora 2G2 in chapter 12. There, we noted the Crown's attempts to purchase it in the late 1950s to convert it into conservation forest. Differences of opinion within Government convinced us that the Crown may not have been acting in good faith, since as late as 1971 the Forest Service was interested in possibly milling 2G2 after acquiring it from its Maori owners. Eventually, after the owners' ability to mill the land was prevented for a decade by a section 34 notice under the 1959 Act, the owners agreed to exchange 2G2 in 1973 for two areas of State Forest 101 (Waiohau State Forest) plus \$8,320 (see chapter 12).

The exchange of part of 2F2, on the other hand, was prompted by the opposition of the Crown (in the form of the Hawke's Bay Catchment Board) to a specific milling application from C and A Odlin Ltd in 1967. The board's concern was the risk of increased erosion and flooding in the Ruakituri River catchment. The exchange, which saw 296 acres of Tahora 2F2 plus \$800 being swapped for 248 acres of State Forest 91 (Ruakituri State Forest), was for the Crown a means of compensating the owners for the Odlin's licence not being granted.⁷⁵⁴

18.8.4.6 *Manuoha and Paharakeke*

We have discussed the Crown's purchase of the Manuoha and Paharakeke blocks from their Maori owners in chapter 16. All that we need note here is that the purchase was triggered by an application to mill the Manuoha block. This application was left in limbo for over a year while officials and Ministers tried to decide whether to purchase these lands or approve controlled milling. The application was not officially rejected until the owners had agreed to the Crown's purchase offer in 1961. As we discussed in chapter 16, allaying public fears about erosion and flooding was an important motive for this purchase. There was some disagreement within Government as to whether there was a genuine risk of soil erosion from controlled milling on the Manuoha block. Some Forest Service officials thought the risks were minimal, and that milling was unlikely to actually happen in any case because of the difficulties of terrain and access. But the view won out that it was not safe to allow any milling on these blocks.

Since the Crown's motive for purchase was to prevent milling, this case was the only successful example of the Crown's long-standing policy of compensating by way of acquiring the land and trees. At first, it intended to pay the full value of non-merchantable timber, although (as we saw in chapter 16) its eventual offer to the Maori owners was only for three-quarters of the Forest Service minimum stumpage. This was more than the Crown was willing to offer Tuhoe in the 1970s. But the primary difference between this and other negotiations, and the reason

753. Boston and Oliver, 'Tahora' (doc A22), pp 267–268

754. Ibid, pp 293–297

why it succeeded where others failed, is that the incorporated Maori owners of Manuoha and Paharakeke were willing sellers.

18.8.4.7 Impacts of milling on Maori values and customary resource-use: the essential dilemma

Finally, we consider a point that is lost sight of if we concentrate on the written records of the Crown. From Galvin and Dun in the 1930s to Corbett in the 1950s and beyond, governments were concerned to prevent flooding of settler farms in the Bay of Plenty, to prevent river degradation and erosion, and to preserve scenery. The historians who gave evidence in our inquiry, however, did not find evidence from that time of Government concern about the impacts of logging on Maori values and customary resource use in Te Urewera. For the claimants who gave evidence in our inquiry, these issues were of great importance. This was particularly so for the Ngati Whare witnesses.

In her evidence for Ngati Whare, Meriana Taputu described the dilemma for her people in the twentieth century: should the remaining pieces of forest in Maori ownership be milled for a desperately needed income or preserved for their traditional values and uses? We quote from her evidence at length, as she captured the essence of the dilemma facing the claimants:

The Whirinaki, all 60,000 hectares, is actually a temperate rainforest and one of the greatest forests in the world. It has a virtual uniqueness where it hosts the great five of New Zealand's remaining giant podocarp together (totara, miro, rimu, kahikatea and tawa) and has the greatest volume of multi species indigenous trees per hectare than any other forest. In 1984 this forest became one of the most important of New Zealand's environmental crusades.

One cannot distinguish the Whirinaki Forest Park from its people. My Ngati Whare people are essentially a forest people and generically our story unfolds as one of many core stories about Ranginui (Sky Father), Papatuanuku (Earth Mother), their separation by Tane Mahuta (the god of forests) and his many children within his realm – Te Wao nui a Tane. It is not my place here to retell the story of the many territorial, inter-tribal wars within the Whirinaki, but I know that as I grew up along the fringes and within the Whirinaki, my mother recounted to me the various uses of leaves, bark, berries and roots for both rongoa (medicines) and kai (food) – the Whirinaki was and is still our supermarket and pharmacy.

Mum would also recount stories of various mahinga kai (cultivation sites), waahi noho (habitation sites) and waahi tapu (sacred sites). There was always a sense of reverence when we walked in the forest and that is what I share with my guests when I guide them through the forest. What was taught to me is that you only take what you need and always be respectful of what the forest has to offer – we are the kaitiaki (guardians).

There have been guests that ask me, 'Why then, Meriana did your people help cut the very trees that your mother of ancestors cherished so much?' 'Easy', I reply, 'It's called the dollar note!' Times were evolving and changing economic circumstances were impacting on my people, so it was easier to buy basic and luxury items with

money you earned than from a few leaves or bark that was being gathered to supplement the daily meal. In hindsight, I am glad that Whirinaki is protected, but what of the future of my people?⁷⁵⁵

Ms Taputu's ambivalence was shared by other claimants who appeared before us. Not only did logging remove the forest itself, a taonga and a resource of great importance, but it damaged or even destroyed other taonga as well. In this sense, it was not only the rich farmland of the Bay of Plenty that was endangered by milling, whether the milling was on Maori or Crown land. Jack Tapuhi Ohlson told us that

The Whirinaki river was well-known for its eels. My father used to make a special hinaki to eel in the Okahu stream. There used to be a swamp there which would go right up to Tarapounamu. I'm sorry to say that I was one of those who logged up there because the effect of it was that the swamp dried up and so the eels disappeared. We logged up there because it was our job. That was the effect of forestry, it damaged the swamps and natural habitats of the eels, which were one of our main sources of food. Now the area up at Tarapounamu is all desert.⁷⁵⁶

As we see it, this and similar evidence shows the degree to which the loss of land and resources in Te Urewera had left its peoples with few choices in the post-UCS era. A more extensive resource base would have enabled strategic choices between commercial use and preservation. The essential point for this chapter is that milling of native forests had impacts on the Maori communities of Te Urewera, as well as posing a risk of environmental catastrophe for others.

In the evidence of Sarah Harris, however, selective logging and the preservation of forests highly valued by the claimants, such as Minginui E, meant that the risks to the environment and to tangata whenua values had been minimised by the third quarter of the twentieth century.⁷⁵⁷ Ngati Whare were strong supporters of selective logging in the Whirinaki forest, sustainable indigenous forestry, and the replanting of native trees.⁷⁵⁸ Mrs Harris described the 'Battle with the Greenies' in the 1970s and 1980s, in which the local Maori communities, supported by the Forest Service, 'felt they were battling for their very livelihood and existence.'⁷⁵⁹ But, as we discussed above, the claimant communities only won a reprieve, not the war. The Government approved the continuation of selective logging but this only lasted until the mid-1980s:

Despite the go ahead for selective indigenous forestry, we had in fact only won a battle, not the war. The new Labour Government, acting on its election promises,

755. Meriana Taputu, brief of evidence, September 2004 (doc G28), pp 3–4

756. Jack Tapuhi Ohlson, brief of evidence, September 2004 (doc G36), para 24

757. Sarah Harris, brief of evidence, September 2004 (doc G39), pp 6–8

758. Wakely Matakuare, brief of evidence, September 2004 (doc G40), p 4

759. Harris, brief of evidence (doc G39), p 7

announced in 1984 that all native forestry would cease. This was an enormous blow for the local community, although it was not felt that all was lost as there were by that time major exotic forests established in the area and work should have continued.⁷⁶⁰

We will return to the question of exotic forestry in a later chapter that deals with wider social and economic opportunities. Here, we note that the conservation of remaining native forests (still without compensation in Te Urewera) remains a grievance for the claimants – but it is a grievance that contains much ambivalence. Many claimants pointed out their dependence on forestry as one of the few viable economic opportunities still available to them with their limited land base, but they also – like Meriana Taputu and Jack Ohlson – value the domain of Tane Mahuta and are grateful that much of it has been preserved. As a result, the claim focuses to a large extent on questions of authority – who should have decided what trees could be milled – and on the question of compensation for what the Crown admitted (then and now) was a denial of an economic opportunity to the peoples of Te Urewera. We turn to these questions next in our analysis of how the Treaty applies to the claims before us.

18.9 TREATY ANALYSIS AND FINDINGS: TIMBER RESTRICTIONS

In essence, the parties in our inquiry agreed that the prevention of erosion and flooding was necessary in the best interests of the public. But the claimants challenged the Crown's right to impose blanket restrictions on their authority to manage their forests and develop their lands as they chose. The historical evidence clearly shows that significant milling was possible on Maori land in Te Urewera without threat of erosion. Also, relying on the evidence of Dr Neumann, Tuhoe pointed to historical evidence that browsing by pests posed a much greater threat of erosion and flooding, but that tackling this problem was set aside in favour of the easier route of restricting the claimants from milling timber. The evidence was insufficient for us to determine the latter point, but we accept that selective restrictions were appropriate if the goal was simply to protect the environment from erosion and flooding, rather than to preserve scenery or create and supplement the national park. As we found in chapter 16, however, there was a major overlap in motivations; the Crown used timber restrictions and the prevention of milling as one justification for extending the park, although – as we have seen – it only really succeeded in adding Manuoha and Paharakeke. The many other purchase, lease, and exchange suggestions recited in this chapter, almost all of them arising from Maori responses to timber restrictions, fell through. Only in the former East Coast trust lands of Tahora 2 and in the case of Whirinaki 1 4B1B were any exchanges finally brought to fruition.

Underlying this history is a fundamental question, put to us by counsel for Wai 36 Tuhoe. Did the Treaty give the Crown the responsibility of protecting the environment as part of its kawanatanga responsibilities? And did these responsibilities

760. Ibid, p8

justify preventing timber use in Te Urewera for scenery preservation as well as preventing the environmental catastrophe that could well have followed the removal of all its forest cover? As we see it, the historical evidence shows that timber restrictions in Te Urewera from the 1930s onwards were motivated much more by the prevention of catastrophe than by the preservation of scenery. Even so, as we said in chapter 16, the scope of the restrictions, and of the area concerned, and its importance to the Maori peoples of Te Urewera, ought to have resulted in a general agreement as to how such matters were to be managed and implemented. Had such a perspective informed the negotiations of the 1950s, as it could easily have done, then the outcome might not have been a national park, or at least not in the usual format of such a park. But, we are sure, the outcome would have involved some milling restrictions so as to prevent an environmental catastrophe. From the content of discussion at hui, as we saw in chapter 16 and in this chapter, Maori leaders of Te Urewera recognised and accepted that some restrictions were required to that end. Tuhoe acknowledged as much in their petition to Matiu Rata in 1973. We note, too, that public opinion had become a significant factor by at least the 1960s – from that point on, timber restrictions in Te Urewera were as much about allaying public fears of a catastrophe as about actually preventing one (see chapter 16). As a result, controlled milling was permitted with some flexibility on the ground, even after 1961.

As we see it, the issue then is whether the Crown was justified in imposing the kind and extent of restrictions that it did, and whether it ought to have compensated Tuhoe and the other peoples of Te Urewera when it prevented them from raising capital by selling timber rights and then developing cleared land for forestry or farming.

In our inquiry, the Crown accepted that it failed to provide compensation for the denial of milling applications before 1961, in circumstances where it was prohibiting logging so as to preserve scenery or prevent river degradation, erosion, and flooding. In its defence, counsel submitted that it was not legally required to pay compensation, although arguably it was morally obliged to do so. Also, the Crown accepted that it failed to provide compensation for preventing the peoples of Te Urewera from milling their lands from 1961 to 1993, when it was legally obliged to do so under the terms of the Soil Conservation and Rivers Control Amendment Act 1959. Again, in its defence, the Crown argued that it had applied this supposedly blanket restriction in a flexible manner that allowed milling to continue where appropriate on various blocks. Also, counsel submitted that the owners never filed a formal application under section 37 of the Act, so it never actually had to pay them a cent. The Crown has not conceded a Treaty breach in its admitted failure to compensate the peoples of Te Urewera for ‘injurious affection’. According to the Crown, the only safe way to ensure that milling was permanently prevented, and compensation was therefore both justified and effective, was to acquire the land and trees. This is not, however, what the 1959 Act required, which was compensation for ‘injurious affection’ where notices under the Act prevented people from profiting by the use of their property.

We accept that the Crown did permit milling on many blocks, especially from

the mid-1950s, and that the effect of its restrictions was therefore not as great as the claimants have suggested. We have shown, block by block, the negotiation of exceptions to milling, and also the broader failure to negotiate compensation for the value of timber that could not be milled. Despite the exceptions that were allowed, the historical evidence shows that a large and valuable timber resource still existed from the 1970s onwards. Since licences ran out in the 1970s, the peoples of Te Urewera have been prevented – permanently, for all intents and purposes – from using their timber as a source of income and development capital. Although we have not recited the evidence in this chapter, many witnesses painted a grim picture of poverty in Te Urewera, even in the final quarter of the twentieth century when exotic forestry boosted employment. It was no small matter, therefore, to deny them this opportunity.

In the mid-1930s, officials accepted that Maori were entitled to a quid pro quo if they were denied the opportunity to log and develop their lands. This thinking persisted and was often in the foreground of discussions between the Crown and Maori from the 1950s onwards. The historical evidence recited in this chapter shows many examples of it. Yet the many attempts to arrange suitable compensation between the late 1940s and the 1980s all failed, with the exception of the exchanges for Tahora 2G2 and 2F2 lands and Whirinaki 1 4B1B. Why was this? The Crown accepts that it had a moral obligation to provide compensation, which was also a legal obligation between 1961 and 1993. Although no formal applications for compensation were filed, both the Crown and the peoples of Te Urewera accepted at the time that this was an issue which had to be settled by large-scale negotiations rather than piecemeal block by block. The Crown cannot, therefore, defend itself by relying on the fact that no applications were lodged.

It almost goes without saying that the Crown had a Treaty obligation to compensate the peoples of Te Urewera for their lost income and development rights. The Crown's duty actively to protect Maori in their use of their lands and resources to the fullest extent practicable, as well as the Crown's obligation to deal fairly and justly with its Treaty partner, required compensation for 'injurious affection' such as that suffered by the peoples of Te Urewera when denied the full use of their timber and the development of the underlying land. This is also a principle of the law. We cannot put it better than Tuhoe did in 1973, when they told the Crown that 'It is, we believe, one of the principles of a democratic Government that in general what the community acquires from the individual it should pay for.'⁷⁶¹ What was being acquired in this case was the permanent locking up of much of the valuable timber resource on Maori land, free of cost to the wider community, ostensibly to protect that community from the effects of erosion and flooding.

The Crown is not necessarily to blame for the failure of particular compensation initiatives from the 1950s through to the 1980s. As we have seen, many initiatives were ultimately unacceptable to the peoples of Te Urewera because they

761. Tuhoe submission to Matiu Rata, ratified at 'Tuhoe General Meeting held at Tauarau marae, Ruatoki, on 17 February 1973' (Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc 619), p30)

would have entailed yet more land loss. Even exchanges on leasehold failed to command general support in the 1970s. Nonetheless, the Crown is responsible for its ultimate failure to ensure that owners were compensated for the effects of the milling restrictions.

We find the Crown in breach of the principles of partnership and active protection for this failure. The prejudice to the peoples of Te Urewera was their loss of a source of income, their loss of a source of capital for development, and their loss of the opportunity to develop cleared land for either forestry or farming. We accept that the Crown did allow some milling of parts of some blocks, as we have described in detail. Corbett's advice to Cabinet in 1953, that Tuhoe would not sell their land and could not, in fairness, continue to be denied the right to use it, was a turning point in that respect. The exceptions which were made do mitigate the Crown's Treaty breach to a considerable extent. But there was nonetheless a clear and significant loss over and above the milling that was allowed, estimated in terms of millions of dollars back in the 1970s. That can only be much greater today. As is the way with deprivation of opportunities, the loss accumulates from generation to generation.

CHAPTER 19

NGA TONO WHENUA – SPECIFIC CLAIMS (LAND TITLE ISSUES)

19.1 INTRODUCTION

This chapter deals with some of the burning grievances of the peoples of Te Urewera, which – while very important to the claimants presenting them – did not require lengthy treatment or full chapters in their own right. Although we did not receive a comprehensive or general claim about twentieth-century title matters, there were a number of specific allegations from various claimant groups which are the subject of this chapter. Not all of the grievances were the result of Crown actions, as we will explain. The twentieth-century land titles system has given roles to the Maori Land Court, the Maori Trustee, and tribal trust boards, which are not ‘the Crown’. We have tried to show how matters of distress to the claimants have arisen, whether or how far the Crown was responsible, and what role claimant communities themselves played in the decisions about their lands. We hope that with better understanding may come solutions to problems which still face many owners of Maori land in Te Urewera.

The claims discussed in this chapter raise specific issues or complaints about:

- ▶ the Ruatoki–Waiohau consolidation scheme;
- ▶ the failure to implement a consolidation scheme for Ngati Manawa;
- ▶ the ownership of the Ruatoki water scheme;
- ▶ the terms of the 1976 Te Whaiti Nui-a-Toi forestry lease; and
- ▶ the 1972 amalgamation of land titles into the Te Manawa o Tuhoe, Te Pae o Tuhoe, Tuhoe Tuawhenua, and Tuhoe Kaaku blocks.

19.2 THE RUATOKI–WAIIOHAU CONSOLIDATION SCHEME

19.2.1 Introduction

We received specific claims about the Ruatoki–Waiohau consolidation scheme from the Wai 36 Tuhoe claimants, the Wai 1036 Ruatoki claimants, and the Ngati Haka Patuheuheu claimants. One aspect of those claims – that the schemes resulted in sections that were too small and soon became uneconomical – has been dealt with in chapter 18. As will be recalled from chapter 14, Ruatoki was excluded from the Urewera Consolidation Scheme (UCS) partly because of the Tuhoe wish to reserve it and partly because some of its dairying land was so valuable (by comparison with other lands) that it would have skewed the outcome of the whole scheme. As a result, the Ruatoki owners sought a separate scheme in 1924 after discussions with Sir Apirana Ngata, which the Government agreed to later that year. The Waiohau owners, prompted by their Ruatoki relations and the

consolidation officers, joined the scheme in 1930. The combined scheme was completed in 1936.

The Ruatoki–Waiohau consolidation scheme was entirely different in nature from the UCS, based on similar principles but carried out to different ends. As we explained in chapter 14, consolidation schemes were developed in the 1910s and 1920s as an attempt to fix the problem of scattered, fragmented individual interests created by the Crown's native title system, and by purchase of some of those interests. They did not normally involve consolidation of large numbers of Crown interests. Although Ngati Manawa also wanted a consolidation scheme, the Ruatoki–Waiohau scheme was in fact the only one of its kind carried out in our inquiry district. As a result, the claimants' grievances are limited to this one scheme and justify discrete treatment in this chapter, although they are, of course, part of the larger stories of Tuhoe and Ngati Haka Patuheuheu.

19.2.2 Context

In essence, a typical consolidation scheme involved the swapping of small, fragmented owner interests awarded by the land court in a number of blocks so as to consolidate individual or whanau holdings in a single place, sufficient (it was hoped) for farming or some other economic use. Consolidation grew out of a late nineteenth-century mechanism for exchange of interests at the time of successions. Beginning in 1909, Governments developed the idea that surveyed titles and partitions could be set aside by the Native Land Court so as to concentrate scattered individual interests into usable holdings. Interests would be exchanged on the basis of value rather than area, so that all owners would emerge with an area equivalent in value to the interests they had started with, but in one place.

Government consolidation officers were appointed to arrange the swapping of interests until those interests were sufficiently consolidated to allow a complete 'scheme' to be presented to the Native Land Court and then the Native Minister for approval. While Crown-driven, the process could not happen without the cooperation of Maori owners, who sometimes appointed committees to help rearrange the many scattered interests. Stretching over multiple blocks and large areas of land, with sometimes hundreds of owners (many absent) and out-of-date titles, consolidation schemes were immensely complex and could take years, even decades, to complete. Tragically, since the title system itself was not reformed, the work of these mammoth enterprises could soon be undone after a further generation of successions and out-migration. An unavoidable price to be paid for securing a usable block of land in place of many scattered interests was that owners sometimes had to give up their last interests in a cherished piece of ancestral land; their informed consent to the exchanges was, therefore, a vital pre-requisite. But, it should be noted, the Ruatoki–Waiohau consolidation scheme was on a much smaller scale than the UCS and so its effects were less extreme. As we saw in chapter 15, interests in the UCS were being exchanged between blocks many miles apart and large numbers of 'outsiders' could be introduced to favoured areas for consolidation. This was not the case in more localised schemes such as that at Ruatoki and Waiohau.

The Crown did not adopt consolidation schemes purely for the benefit of Maori farmers. The native title system had also created problems of unpaid rates, unpaid survey liens, and scattered Crown interests (as a result of piecemeal purchasing), all of which could be tidied up and resolved through consolidation. An underlying principle, therefore, was that the Crown would use consolidation schemes to sort out its own scattered interests (if any) and obtain a share of the land to pay off rate arrears and survey liens. By the late 1920s, the Crown had agreed to suggestions from Ngata and others that the schemes would only work if these costs were negotiated down. The Native Land Court was supposed to ensure that a rates compromise was arranged between owners and local authorities, which were anxious to secure unpaid rates. By the time of the Ruatoki–Waiohau scheme, the Crown had also agreed that survey liens were so burdensome that a significant proportion would have to be remitted. The new consolidated titles would then, it was hoped, be economically viable and so able to pay any future rates or survey costs. Thus, a strategy of full cost recovery was abandoned by the time of the Ruatoki–Waiohau scheme, although the Crown still expected to obtain some land in satisfaction of unpaid rates and survey liens. It would then pay outstanding rates to local bodies.

At the same time, the Crown was sometimes willing to buy the interests of Maori who, for whatever reason, wanted to sell their shares instead of attempting to consolidate and relocate them. The Native Land Amendment and Native Land Claims Adjustment Act 1927, which is the most relevant Act in this respect for Ruatoki, provided for two kinds of Crown purchase during a consolidation scheme: the Crown could purchase land, whether Maori or European, and make it available for the scheme; or the Crown could buy Maori land and keep it. The Act, while authorising the Crown to buy interests for the purpose of assisting consolidation, did not require the Crown to seek reimbursement. Broadly speaking, Ngata's intention was that the Crown would not use consolidation as a way to get Maori lands into its own hands, but instead would make such lands as it did acquire available to help consolidate the titles of Maori owners participating in a scheme. Ngata was a major architect and proponent of consolidation in the 1920s and 1930s, first as an advisor to Prime Minister Coates and to Maori, and then as Native Minister.¹

The origins of the Ruatoki consolidation scheme lie in a visit by Apirana Ngata to Ruatoki in 1924.² He passed on a request from at least some Ruatoki owners to the Government that their titles be rationalised and consolidated. It will be recalled that the titles in this block had had a particularly fraught and unsettled history, having been determined by the Native Land Court, the Native Appellate

1. The above account of consolidation has been drawn from SKL Campbell, *National Overview on Land Consolidation Schemes, 1909–1931* (commissioned research report, Wellington: Crown Forestry Rental Trust, 1998) (Wai 1200 RO1, doc A62); Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, pp 720–740.

2. See Ngata to Coates, 17 April 1924 (SKL Campbell, comp, supporting papers to 'Land Alienation, Consolidation and Development in the Urewera, 1912–1950', 3 vols, various dates (doc A55(c)), vol 3, pp 349–350)

Court, the Urewera commissions, and then the Native Appellate Court again, only reaching finality a decade or so before the request for consolidation. David Alexander commented that the ‘Court’s emphasis on maintaining the equity of individual shareholdings’ was partly to blame for the need for rationalisation so soon after the titles were finalised.³ On Ngata’s analysis of the situation at Ruatoki, individualisation created the problem even before successions and partitioning began:

The determinations of the Court were governed by tribal custom, which allocated specific areas to long-departed ancestors, and compelled their living descendants to accept mathematically calculated proportionate interests at such places and in such areas as their genealogical descent might decree. It resulted that a man descended from a number of successful ancestors might find himself entitled to many valuable but scattered and too often undefined areas of land. If in addition to the implications of ancestral right, some arrangement were made to equalise interests between high country and low, or between lands on one side of a river and those on the other side, or between what may be termed village lands and farm lands, it is easy to conceive the dilemma of the hapless individual.⁴

As Ngata observed, the titles were already hampering the Ruatoki community’s ability to farm their land or raise development finance.⁵ As we noted in chapter 15, Fred Biddle had raised these problems with visiting members of Parliament as early as 1921. His comments were reported in the *Whakatane Press*.⁶ Prime Minister (and Native Minister) Gordon Coates applied to the court in 1924 to carry out a consolidation scheme for Ruatoki, and – as a normal first step – a proclamation was later issued to prevent the owners from selling interests in the meantime (except to the Crown).⁷

The first stage of consolidation involved updating titles by arranging successions so that all owners were ‘live’ owners. This took four years (1925 to 1929). David Alexander suggested that ‘slow progress’ was made until Sir Apirana Ngata took a personal interest in 1929.⁸ Field work had included an early attempt to arrange exchanges, but this first attempt was abandoned in 1928 when a court sitting revealed ‘friction amongst a large section of the owners respecting their rights.’⁹ In any case, by 1929 there were living owners with 294 separate Ruatoki

3. David Alexander, ‘The Land Development Schemes of the Urewera Inquiry District’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A74), p 16

4. AJHR, 1932–33, G-10, pp 35–36 (Alexander, ‘Land Development Schemes’ (doc A74), p 14)

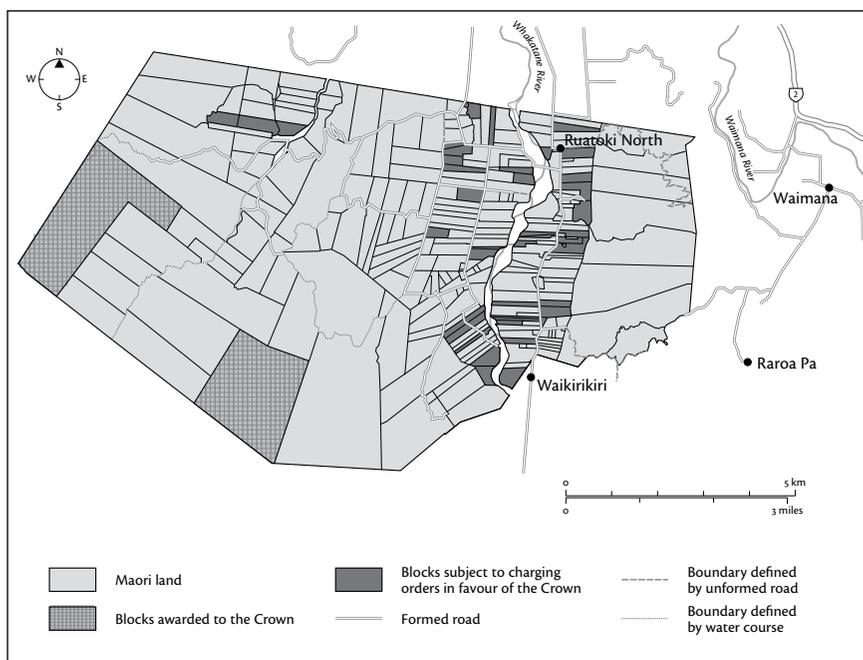
5. Alexander, ‘Land Development Schemes’ (doc A74), pp 14–18

6. SKL Campbell, ‘Land Alienation, Consolidation and Development in the Urewera, 1912–1950’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 1997) (doc A55), p 35

7. Alexander, ‘Land Development Schemes’ (doc A74), pp 17–19

8. David Alexander, summary of ‘The Land Development Schemes of the Urewera Inquiry District’, 26 April 2004 (doc D10), p 24; David Alexander, answers to questions of clarification from the Crown, 12 May 2004 (doc E5), pp 29–30

9. Campbell, ‘Land Alienation, Consolidation, and Development’ (doc A55), p 113



Map 19.1: Consolidation blocks created at Ruatoki, 1930–31. The pattern of the blocks reflected the existing intensive use of lands along both sides of the Whakatake River.

titles covering an area of just over 21,000 acres.¹⁰ Although the resident Ruatoki population was about 500 to 550 at this time,¹¹ there were 10,755 individual interests.¹² Most titles had several owners each (some of whom were absentee owners), and equally, many owners had a shareholding in several titles.¹³ Brian Murton noted that Sir Hugh Kawharu's study of Maori land tenure in 1977 used Ruatoki as a case study, observing that as many as eight levels of partitioning had taken place in some Ruatoki blocks before consolidation.¹⁴

The next step was to determine the value of the interests and then exchange and locate them so as to create consolidated whanau titles. As we discussed in chapter 18, this was done in 1929–30 with dairying and a land development scheme in mind for the usable blocks that would be created. The Crown agreed to remit the

10. Alexander, 'Land Development Schemes' (doc A74), pp 17–18

11. *Ibid*, p 56

12. Steven Oliver, 'Ruatoki Block Report' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A6), p 124

13. Alexander, 'Land Development Schemes' (doc A74), p 23

14. Brian Murton, 'The Crown and the Peoples of Te Urewera, 1860–2000: The Economic and Social Experience of a People' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc H12), pp 403–404

whole of the survey liens for Ruatoki, and rating issues were deferred.¹⁵ To assist consolidation, the Crown also purchased interests amounting to about 10 per cent of the Ruatoki block (by value).¹⁶ Some 61 per cent of its interests were made available to the owners of 48 blocks for repurchase, by means of charging orders on their new titles. Repaying the Crown for this land was loaded onto the development scheme units' debts, plus a 10 per cent surcharge to recoup the Crown's purchase expenses. The remainder was kept by the Crown. Almost all of the area retained by the Crown (2,091 acres) was selected in two poorer, hilly blocks, not the good farmland needed for dairying and the development scheme. One of these blocks became State forest land, the other ended up in the national park.¹⁷

In the meantime, as Steven Oliver explained, hapu leaders and representatives had worked with the consolidation officers to relocate and consolidate owners' interests in 243 new titles. The new titles created larger blocks with fewer owners.¹⁸ As part of this work, the number of Ruatoki owners with interests at Waiohau (and vice versa) emerged as an issue which, if the scheme could be widened to include Waiohau, would enable a better concentration of interests into usable blocks. In fact, officials found that they could not rearrange the Ruatoki block titles without involving both communities.¹⁹ As a result, they began preliminary work to add Waiohau to the scheme in 1929, at some point approaching the Waiohau owners although it is not clear when (or if) they obtained consent from the Waiohau community. We will return to this point below. Here, we note that private alienations were prohibited at Waiohau from January 1930, and the Waiohau owners did eventually make a formal request to be included in the scheme in February 1930.²⁰

It will be recalled from chapter 11 that, because of the Waiohau fraud, the Waiohau community had been evicted from the 1B block and had had to relocate to the less fertile part of their lands (1A) in 1907. A 310-acre piece of land, Te Teko, was awarded to them in compensation, although they did not get title to it until 1920. By 1933, as we saw in chapter 18, a development scheme was being set up to assist Ngati Haka Patuheuheu to farm their surviving lands. The Waiohau part of the consolidation scheme was carried out after this, in cooperation with the owners through hapu leaders and an advisory committee. It was completed in 1935 and 1936. Although the Crown did not purchase any of the Waiohau owners' interests, it did relocate some of its share of Ruatoki interests to Waiohau, taking almost 30 per cent of the surviving Waiohau 1A block. This took the form of

15. Oliver, 'Ruatoki' (doc A6), p 124; Judge Harold Carr, Native Land Court, 31 March 1928 (Steven Oliver, comp, supporting papers to 'Ruatoki Block Report', various dates (doc A6(a)), doc 11)

16. Alexander, summary of 'Land Development Schemes' (doc D10), p 25

17. Alexander, 'Land Development Schemes' (doc A74), pp 22–25, 28–33, 43–52; Oliver, 'Ruatoki' (doc A6), pp 131–132

18. Oliver, 'Ruatoki' (doc A6), p 128

19. Ibid; Alexander, 'Land Development Schemes' (doc A74), pp 178–179; Bernadette Arapere, 'A History of the Waiohau Blocks' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A26), pp 66–67

20. Alexander, 'Land Development Schemes' (doc A74), pp 179–180

44 acres of land intended for dairying, and almost half (2,073 acres) of the land intended for a cattle run. Part of Te Teko (25 acres) was also taken. Approximately one-third of the value of the Crown's award at Waiohau was taken in satisfaction of rates and survey liens, which were not written off as they were for Ruatoki. In part, the Crown took so much of its share of the scheme lands at Waiohau because, when the consolidation officers began exchanging interests held by the people of Waiohau in Ruatoki blocks, with those held by the people of Ruatoki in the Waiohau blocks, there was a surplus of Ruatoki people with Waiohau interests. The Crown swapped its own interests at Ruatoki for these excess Waiohau interests, to enable more economic blocks at Ruatoki.²¹

In sum, the Crown had purchased Ruatoki lands worth £4,354 during the course of the consolidation scheme. It converted £2,675 of that value into charging orders against Ruatoki blocks (plus a 10 per cent surcharge), thereby returning that land to the owners. It recouped £1,088 in the form of Ruatoki lands, and transferred £596 worth of its shares to Waiohau and Te Teko, which it took in the form of land.²² In addition, it took a further £314 worth of Waiohau and Te Teko lands in satisfaction of survey liens and rates arrears. In terms of area, the Crown kept around 11 per cent of the Ruatoki lands and 29 per cent of the Waiohau lands.

Having briefly explained the context of the Ruatoki–Waiohau consolidation scheme and its outcomes, we next describe the specific claims about the scheme and the Crown's response to them.

19.2.3 The claims

While a number of issues with regard to the Ruatoki–Waiohau consolidation scheme were canvassed during our hearings, the Wai 36 Tuhoe claim was refined as follows:

The primary complaint is that the RWCS was specifically entered into by Tuhoe on the basis (as recorded) that all of the Crown's consolidated interests would be offered back to the Tuhoe owners at Ruatoki and Waiohau. That never took place and the Crown retained substantial areas of land at Waiohau. These should have been offered to the Ruatoki and Waiohau owners.²³

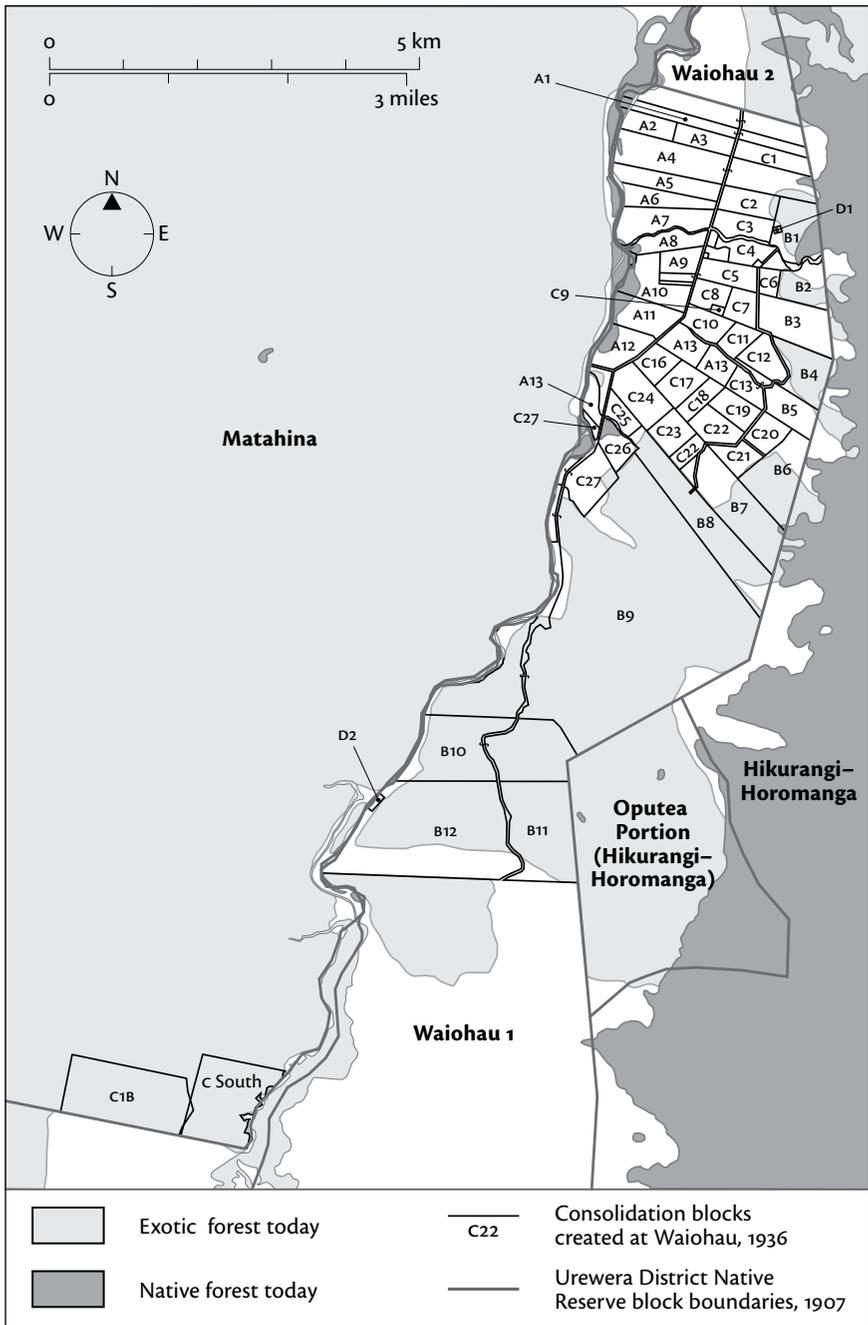
The Wai 36 Tuhoe claimants sought a specific finding that the Crown had failed to return its interests 'in accordance with the requirement of the Tuhoe owners prior to entering into the RWCS', and a recommendation that the Crown negotiate a settlement with Tuhoe and the Te Manawa o Tuhoe Trust.²⁴ As subsidiary matters, the Wai 36 Tuhoe claimants complained that the consolidated titles

21. Ibid, pp 192–196

22. Native Land Court, 'Ruatoki Consolidation Scheme: Reconciliation of Crown Interest', no date (Oliver, supporting papers to 'Ruatoki' (doc A6(a)), doc 15)

23. Counsel for Wai 36 Tuhoe, closing submissions, pt A, overview, 31 May 2005 (doc N8), p 61

24. Counsel for Wai 36 Tuhoe, closing submissions, pt C, schedule of primary findings and recommendations sought, 1 June 2005 (doc N8(b)), pp 10–11



Map 19.3: Waiohau, post-consolidation

for farming on their own. Note that B9, by far the largest post-consolidation block, formed the bulk of the award made to the Crown.

were themselves too small and soon became uneconomic, and that they were not surveyed.²⁵

Ngati Haka Patuheuheu's main grievances with the scheme were that it concentrated individuals in one block or the other, thus severing their links with part of their turangawaewae, and that it was established without 'adequate formal consultation' or 'proper authority'. Also, Ngati Haka Patuheuheu took issue with the Crown's concentration of its interests at Waiohau, obtaining nearly 30 per cent of the remaining lands of Waiohau 1A, which they say was unjust and had a disproportionate effect on the Waiohau community, leaving it with too little land for the development scheme. The owners expected the Crown to return its interests to them, not take interests purchased at Ruatoki out of Waiohau and then keep the land.²⁶

The Wai 1036 Ruatoki claimants (part of Nga Rauru o Nga Potiki) claimed that the Crown acted in bad faith, taking advantage of the consolidation scheme to obtain about 2,000 acres of Ruatoki land that should have been sold back to the owners so as to create suitable farm blocks. Instead, the Crown kept this land, and the consolidation scheme – which was only necessary because Crown policies had resulted in individualisation and fragmentation of titles – created titles that were too small and uneconomic.²⁷

19.2.4 The Crown's response to the claims

In the Crown's view, consolidation was a well-meant and positive scheme to 'facilitate security of title and the economic use of land through a fair and affordable process'.²⁸ The Crown agreed that the Ruatoki owners had sought to impose, as a condition of the consolidation scheme, a requirement that all Crown interests should be returned to them. But, relying on the evidence of historian David Alexander, the Crown maintained that there was no record of the Crown ever having agreed to this condition. Indeed, the Crown clearly did not agree, although it did apply a 'general concept' of allowing Ruatoki owners to buy back part of its interest. In terms of Waiohau, the Crown also agreed with Mr Alexander that there was no evidence of the Waiohau owners expecting to be able to 're-purchase or re-claim' land awarded to the Crown, although the smaller 44-acre block was in fact made available for use in the development scheme. In the Crown's view, the Waiohau owners were not treated any differently from those at Ruatoki, because their interests (in common with all) were relocated in a manner that suited them best. There was, counsel pointed out, no evidence of protest about the Crown's award of land at Waiohau.²⁹

25. Counsel for Wai 36 Tuhoe, closing submissions, pt B, response to statement of issues, 30 May 2005 (doc N8(a)), pp 128–130

26. Counsel for Ngati Haka Patuheuheu, closing submissions, 31 May 2005 (doc N7), pp 121–125

27. Ruatoki cluster of Nga Rauru o Nga Potiki, statement of claim, 3 March 2003 (claim 1.2.8, SOC 8), pp 79–82; counsel for Nga Rauru o Nga Potiki, opening submission, 17 January 2005 (doc J44), paras 7.9–7.12

28. Crown counsel, closing submissions, June 2005 (doc N20), topics 18–26, p 81

29. *Ibid.*, pp 81–85

In respect of surveys, the Crown suggested that their absence was no impediment to the development scheme, that surveys were arranged in the 1980s at the Crown's expense, and that no prejudice has been shown. The Crown did not deny that the titles emerging from this scheme resulted in small, uneconomic blocks, but suggested that this was a result of unforeseeable economic changes affecting everyone and outside of the Crown's control (see also chapter 18).³⁰

19.2.5 Was there an arrangement between the Crown and Maori owners that any interests obtained by the Crown would be offered back to the owners?

The main grievance shared by all claimants is that the Crown, in violation of the wishes of the owners, kept a significant amount of land for itself as a result of the consolidation scheme. In Ngati Haka Patuheuheu's view, the impact fell disproportionately on them – this claim will be addressed in the next section. Here, we focus on the key question of whether there was in fact an agreement, or a reasonable expectation on the part of the claimants, that the Crown would abide by their express wishes and return any land that it obtained as part of the scheme.

The basis on which the Ruatoki hapu decided to seek a consolidation scheme, or on which the Crown agreed to it, is not known. Ngata (who was not a Crown official or Minister at the time) supplied no details of his 1924 meeting at Ruatoki. The Government does not appear to have held any further discussions with the Ruatoki community before acting on Ngata's request and applying to the court for a consolidation scheme.³¹ As a result, the main written record of how the Ruatoki communities understood the scheme is the consolidation minute books. Owners cooperated with the scheme until 'a large section' became hostile to it in 1928, forcing work to be postponed. Within six months of work resuming in 1929, it was reported that 'the whole tribe had entered into Consolidation'. At meetings at Ruatoki in 1930, moreover, several owners who had complaints about the specific execution of the scheme nevertheless affirmed that they supported 'the kaupapa of Consolidation'.³² As David Alexander noted, there are also no letters of protest in the head office development scheme files from the years 1926 to 1929.³³ In summary, there is no evidence to suggest that the request Ngata received in 1924 for a consolidation scheme to be established was unrepresentative of the views of the Ruatoki owners. At the same time, there was no reason at that date to suppose that this kind of consolidation scheme would involve the Crown purchase of any interests.

Before the scheme reached the stage of grouping the owners and exchanging their interests, the question of survey liens and rates had been decided in the claimants' favour. In March 1928, Judge Carr recommended that £2,237 owing for surveys be entirely remitted. The court had registered charging orders for these

30. Ibid, pp 81–82, 84

31. Oliver, 'Ruatoki' (doc A6), pp122–123; Alexander, 'Land Development Schemes' (doc A74), pp17–18

32. Campbell, 'Land Alienation, Consolidation, and Development' (doc A55), pp113–115

33. Alexander, 'Land Development Schemes' (doc A74), p20

liens between 1918 and 1925. The Minister of Lands agreed to the recommendation in June 1928.³⁴ Among his reasons for recommending remission, Judge Carr stated:

The Ruatoki Natives are to a very great extent indigent and their activities as farmers are, and have been, hampered by the unsatisfactory nature of their titles.

The attempts heretofore made by the owners to carry into effect Land-Settlement by individualising their titles has led them nowhere; owing to the consequent smallness of their holdings and cumulative survey and title fees they are unable to obtain financial assistance necessary to develop their lands.

The Local Bodies recognise the difficulties these people labour under and have decided not to strike a rate until such time as their titles are consolidated.³⁵

This was a stinging indictment of the Crown's native title system and its impacts on the Ruatoki community, made at the time by a judicial officer charged with implementing that system, and we have borne this in mind in reaching our conclusions below.

The question of Crown purchase of interests at Ruatoki did not arise until 1929. The earliest reference that we have located of the Crown's communication of its intentions comes in June 1929, when it was recorded in the consolidation minute book:

The Consolidation Officers have been repeatedly asked when the purchase of Ruatoki Blocks will proceed? It is desired to be made clear that no purchase has yet been authorised and as soon as the Land Purchase Department decides to do so they [the owners] will be notified. The purchase if authorised will only be for the purpose of creating vacancies in sections so that the resident owners could fill up with their outside interests. If vacancies could be created by way of exchange, no sales will be permitted.³⁶

The Ruatoki owners were thus assured that purchases would only be authorised if there was no other way of consolidating the interests of the residents, and that purchases – if authorised – would be for that purpose and no other. In our view, the owners could not have thought that the Crown intended to keep any interests thus purchased.

Then, in July 1929, the consolidation officer advised Ngata that the scheme could not be made to work unless the Crown purchased interests to 'create the necessary vacancies'.³⁷ Ngata, recalling this matter in 1932, wrote:

34. Oliver, 'Ruatoki' (doc A6), p124

35. Judge Harold Carr, Native Land Court, 31 March 1928 (Oliver, supporting papers to 'Ruatoki' (doc A6(a)), doc 11)

36. Ruatoki consolidation minute book 1A, 4 June 1929, fol178 (Oliver, supporting papers to 'Ruatoki' (doc A6(a)), doc 17)

37. Consolidation officer, Rotorua, to Native Minister, 20 July 1929 (Alexander, 'Land Development Schemes' (doc A74), p 22)

The scheme progressed so far that, at the end of July 1929, the consolidation officers reported all necessary data completed. It was submitted, however, that numerous owners, who did not wish to retain locations in the Ruatoki Valley, were pressing to sell their interests to the Crown, and it was recommended that the Crown should buy them out, being for the most part absentee owners, and so enable those owners who were farming at Ruatoki to adjust or enlarge their holdings.³⁸

On this basis, Ngata gave his approval and the consolidation officers collected signatures over a four-month period between November 1929 and March 1930.³⁹

In February 1930, the consolidation officers convened a hui at Ruatoki to advise the owners that all successions had been completed and they were ready to start the task of grouping whanau and arranging the exchange of interests. This, so far as the owners were concerned, was the point at which the Crown's recent purchase of interests could be discussed and its purpose and ramifications defined. Disappointment was expressed because Ngata was not present, he being the one who had told Tuhoe that Crown purchases had to take place 'so as to facilitate consolidation.'⁴⁰ Tuhoe feared the result: 'The Crown, having purchased a considerable area, leaves little for us to farm, and we ask that the Crown area when consolidated be made available for allotment by us, or rather by those who are living in Ruatoki.'⁴¹

Several issues were raised but the key point for our purposes was that Tuhoe had held their own hui earlier in February, at which it had been agreed that they wanted the Crown's interest made available free of charge 'for settlement by the Ruatoki residents', that non-residents should be allowed to buy back Crown interests, and that the Crown should bear the loss caused by erosion in any waterfront sections in which it had purchased undivided shares.⁴² According to the minutes, the consolidation officers made no response to these Tuhoe conditions.⁴³

Fred Biddle, who acted as tribal representative in dealings with the consolidation officers, had presented these resolutions. We have no information as to what further discussions might have been held, but in March 1930 Biddle presented a different proposal to the Native Land Court as part of the first (Te Mahurehure) stage of the consolidation scheme. He asked the court that the Crown's shares be used for access roads and that the Crown not be included in any titles, taking instead a mortgage until it had been repaid for its share of the newly created

38. Sir Apirana T Ngata, 'Report on Native-Land Development Schemes', [1932], AJHR 1932-33, G-10, p 36 (Alexander, 'Land Development Schemes' (doc A74), pp 22-23)

39. Alexander, 'Land Development Schemes' (doc A74), p 23

40. Ruatoki consolidation minute book 1A, 19 February 1930, fol 262 (Alexander, 'Land Development Schemes' (doc A74), p 26)

41. Ruatoki consolidation minute book 1A, 19 February 1930, fol 261 (Alexander, 'Land Development Schemes' (doc A74), p 28)

42. Ibid

43. Ruatoki consolidation minute book 1, 19-22 February 1930, fols 261-264, 294-298 (David Alexander, comp, supporting papers to 'The Land Development Schemes of the Urewera Inquiry District', 7 vols, various dates (doc A74(f)), vol 6, pp 1708-1716; see also pages 1717 to 1718)

blocks.⁴⁴ This represented a compromise on the part of Tuhoe: they no longer sought the donation of land to residents, but nor would the Crown keep any land. Biddle assured the court that the lands were fertile and the owners would be able to pay off the debt, but the court called for a report on this point from the owners' advisory committee (set up for the development scheme), before agreeing to recommend it to the Native Minister.⁴⁵ This report was presumably favourable because, in May 1930, Judge Holland recommended to the Minister that it was better for the Crown to recover the value of its purchased interests by placing a charging order over Ruatoki blocks than converting it into Crown land.⁴⁶

We have not been presented with evidence as to exactly how the Crown made the decision in 1931 to keep 39 per cent of its interests as land.⁴⁷ As far as we are aware, there were no objections when this part of the consolidation arrangements was proposed in court in 1931, and no written objections to the Native Minister have been recorded. The decision to take a substantial amount of Waiohau land in satisfaction of the Crown's interests seems to have been forced on everyone – Crown, court, and owners – by the sheer number of Ruatoki owners whose shares had been swapped out of Waiohau to Ruatoki. As we understand it, this left an imbalance in the scheme that could only be rectified by the transfer of Crown interests from Ruatoki to Waiohau (and Te Teko), even though the Crown never purchased an inch of ground at Waiohau. If the Ruatoki and Waiohau schemes had been done separately, the result would therefore have been that both groups of owners would have retained individual interests in both blocks, preventing the creation of larger, more rational blocks in just one place or the other.

The Crown had always intended to use its interests to assist the consolidation process, but it had started to buy interests before the process of grouping and exchange began, rather than waiting for that process as a means of facilitating it. Honourably, the Crown then exchanged its interests so as to increase the size of the owners' blocks on the better quality dairy land, and concentrated its own left-over interests in the poorer bush blocks. David Alexander, however, suggested that the same object might have been attained without needing to reduce the overall Maori land holdings, because non-residents were often willing to take their shares on the poorer, less farmable lands so as to help their relatives.⁴⁸ Such an outcome, however, would have been of no real benefit to those who wished to sell and there is no compelling evidence that they (as opposed to the non-residents who kept their interests) would have agreed to it.

The Crown has pointed out that there is no evidence of any separate agreement with the Waiohau owners that interests purchased by the Crown would be returned

44. Alexander, 'Land Development Schemes' (doc A74), pp 28–29

45. Ruatoki consolidation minute book 1, 28 March 1930, fol 17 (Alexander, supporting papers to 'Land Development Schemes' (doc A74(f)), p 1719)

46. Alexander, 'Land Development Schemes' (doc A74), p 28

47. See Oliver, 'Ruatoki' (doc A6), p 132.

48. Alexander, 'Land Development Schemes' (doc A74), pp 23–24

to them.⁴⁹ This is hardly surprising, since the Crown never intended to purchase any interests from them, and never in fact did so. But the Waiohau community entered the scheme in February 1930, when this issue was first being clarified with the Ruatoki owners. As Bernadette Arapere has pointed out, Waiohau leaders were present at the February 1930 hui and supported the Tuhoe stance at that hui as to the return of all interests purchased by the Crown. It was on the basis of that formal request (unanswered at the time by officials) that Ngati Haka Patuheuheu brought their Waiohau and Te Teko lands into the consolidation scheme, so that the exchange of Ruatoki owners' interests could begin at that time.⁵⁰

Issues arise about the nature of the Crown's charging orders, and who actually paid them. First, as noted above, the Crown added a 10 per cent surcharge to recoup its expenses during the purchasing process. David Alexander commented that

the imposition of a compulsory 10% surcharge, to cover supposed purchase costs, never seems to have been negotiated with the owners, or received their consent. If they had agreed, it is almost certain that there would be documentation in the Crown's records to that effect. But no such documentation has been discovered during the research for this evidence. Instead the 10% surcharge seems to have been an arbitrary decision of the Crown, made after the event.⁵¹

The Crown has not challenged this evidence in cross-examination or submissions.

Secondly, the surcharge was paid immediately in 1932 by adding it to the development scheme debts. A complicated history followed, in terms of whether the unit occupiers or the owners paid the debt and whether ownership of the Crown's interest therefore vested in the occupier alone or the owners of the section.⁵² The claimants have raised no concerns about this aspect of the surcharge, however, so we take these issues no further.

19.2.5.1 Conclusion

From the evidence we have described, the Crown's stated intention in June 1929 was to purchase interests for the sole purpose of 'creating vacancies in sections so that the resident owners could fill [them] up with their outside interests. If vacancies could be created by way of exchange, no sales will be permitted.'⁵³ The Ruatoki owners did not object to purchasing on that basis. The point was to create vacancies on the best land that could then be filled by resident whanau, and this was certainly achieved. There is no doubt that the Crown acted in good faith, and that

49. Crown counsel, closing submissions (doc N20), topics 18–26, p 83

50. Arapere, 'Waiohau' (doc A26), pp 66–68

51. Alexander, 'Land Development Schemes' (doc A74), p 51

52. *Ibid*, pp 44–51

53. Ruatoki consolidation minute book 1A, 4 June 1929, fol178 (Oliver, supporting papers to 'Ruatoki' (doc A6(a)), doc 17)

its actions assisted the integrity of both consolidation and development, since the land it kept at Ruatoki consisted of bush land not suitable for farming. It was purchasing the interests of those who did not wish to stay (or had already left). But consolidation had only proceeded as far as arranging successions when the Crown began purchasing. Its purchases were not targeted to creating specific vacancies, as had been proposed, but to acquiring the interests of willing sellers.

When the time came to begin arranging groupings and exchanges in 1930, Tuhoe held a hui and put terms to the Government: Crown interests should be used to top up the land holdings of residents (free of charge), while non-residents should be given the option of supplementing their sections by buying back Crown interests. While these terms were not explicitly rejected by the Government, Fred Biddle presented a revised proposal the following month: all Crown interests would become mortgages against blocks that the Crown had 'filled' up with its shares, or else would be used for roads. This proposal was agreed to by the court and the Minister when this part of the consolidation scheme was put up for approval. But in later stages of the scheme, the court and the Minister also agreed to the Crown taking some of its interests in land, and the transfer of some of those interests to Waiohau.

By then, it seems that the owners had little choice. Given that the scheme was in its final stages at the point when the Crown converted its interests into land, it would have been impossible to prevent it. As we noted, the court only agreed to Tuhoe's March 1930 proposal on the basis that the land concerned could sustain the cost of repayment. The owners of the bush sections (where the Crown's share was placed) could not have managed it. Nor could the Crown have reasonably added the repayment of all of its purchases to the development scheme's debts, which were already considerable (see chapter 18). At the same time, the Crown was careful not to take land that would reduce the effectiveness of the Ruatoki development scheme. As Alexander acknowledged, this willingness of the Crown to accommodate the wishes of the Ruatoki owners when implementing the scheme helped keep their complaints to a minimum.⁵⁴ Also, the Crown agreed to the complete remission of all survey liens, which stands to its credit. Had it not done so, the value of the Crown's award would have increased by 51 per cent (from £4,359 to £6,596).

19.2.5.2 Treaty analysis and findings

It seems to us that the Crown and Tuhoe both wanted a consolidation scheme at Ruatoki for the purpose of solving title problems, which were preventing economic use of the land. Later, by 1929, Ngata and the owners also had in mind a development scheme to provide state assistance for farming. The Crown acted in good faith when it purchased interests for the purpose of facilitating consolidation, but it appears to us that – having commenced purchasing before it knew the extent of what it would need – the Crown broke its own stated intention of only purchasing the sections needed to 'create vacancies' and no more. As a result, the

54. Alexander, 'Land Development Schemes' (doc A74), p33

Crown was left with a residue of interests, the majority (in value) of which it sold back to the Ruatoki owners, but a significant part of which it retained as land.

Tuhoe's February 1930 request that land should be returned to residents without having to pay the Crown is a primary factor in our assessment of what was to follow. As we see it, this request should have been honoured. Given that the overcrowded and fragmented titles at Ruatoki were the combined result of the confiscation of much of Tuhoe's best land in the nineteenth century, and then of the Crown's own native title system, we think that a Crown mindful of the need to redress past Treaty breaches would have agreed to Tuhoe's request. While recouping the Crown's financial outlay was, of course, a factor to be considered, we observe that the Crown had already incurred a loss since it did not make economic use of the land that it kept (except for the piece added to a State forest). So the Crown was prepared to keep land of little or no use to it, which seems pointless by any standards: the question was whether it would keep its Treaty obligation to redress past breaches.

We think, however, that the second, compromise proposal in March 1930 – that all land be returned on the basis of mortgage charges against the sections which benefitted – might have been unfairly burdensome to Tuhoe in terms of debt repayment if the Crown had returned all its interests on that basis. Mr Alexander suggested that the development scheme could have absorbed this extra debt, but such a solution would have required locating all of the Crown's interests in the dairying lands. We have no information as to whether that was possible in the scheme of relocations, but we seriously doubt it. We also accept that the Crown's return of 61 per cent of its interests, requiring owners' repayment by means of charging orders, was in accord with Tuhoe's wishes by March 1930 and was not in itself a Treaty breach. No justification for the surcharge, however, was offered in our inquiry, nor do we think it could have been. That additional burden for the Tuhoe owners was, in the circumstances, inconsistent with Treaty principles. We note that the Crown's remission of all survey liens was in keeping with its duty of active protection.

Finally, we conclude that the Crown could have returned the full extent of its purchases to the Ruatoki community gratis without great cost to itself. The legislation authorising such purchases did not require repayment, nor would it have been a breach of the spirit of consolidation, as promoted by Ngata, for the Crown to have excused Tuhoe from repayment. Its failure to do so was a breach of the Treaty principle of redress, which had grown ever more pressing since the confiscation in the 1860s.

We turn next to Ngati Haka Patuheuheu's claim that the burden of land loss fell unfairly on their community at Waiohau, to their lasting detriment.

19.2.6 Was it fair for the Crown to take nearly one-third of the Waiohau lands?

In comparison with Ruatoki, the Waiohau community appeared to fare much worse from consolidation. Not only did the Crown convert £292 into land out of the existing £314 worth of interests it had held in Waiohau, which comprised outstanding rates and survey liens, but it also converted into land all of the £596

worth of interests it transferred from Ruatoki to Waiohau as well.⁵⁵ This was despite the fact that the purchasing at Ruatoki had not extended to Waiohau, and all of the Ruatoki survey liens had been remitted. On the other hand, some of the Ruatoki interests purchased by the Crown belonged to Waiohau residents, so they had received a monetary payment, but we have no information beyond this general point.⁵⁶

As noted above, Bernadette Arapere pointed out that Waiohau community leaders were present at the February 1930 hui and supported the Tuhoe kaupapa that the Crown should return all land purchased for the consolidation scheme, free of charge to residents and with an option for absentees to buy back interests. In Arapere's evidence, this was the shared view of the communities of Ruatoki and Waiohau, and it serves as the vital context for our evaluation of the outcome at Waiohau.⁵⁷ The Crown, in its submissions, notes that it never officially agreed to this, although its return of about 61 per cent of its interests showed that a 'general concept of allowing re-purchase of the Crown interest was applied'.⁵⁸ The Wai 36 Tuhoe claimants, however, have queried whether the taking of land at Waiohau was really a cost to that community alone.⁵⁹ In their view, the scheme needs to be seen as a whole: no owners, we were told, emerged from the scheme with a smaller share of land in terms of value than what they took into it.⁶⁰ The size of the Crown's award at Waiohau reflects the low value of that land and the larger number of shares that were consolidated at Ruatoki instead of Waiohau.⁶¹

We accept all of these points. In terms of Crown actions in 1935 and 1936, we note that one clear difference between Ruatoki and Waiohau was that the Crown insisted on taking some Waiohau land in satisfaction for rates and survey liens. Ruatoki escaped these charges entirely, which shows that the Crown could have remitted them at Waiohau had it been minded to do so. Indeed, the consolidation officer had applied for a remission of all Waiohau survey charges back in 1929 but this was opposed in court by the Crown, which argued that the consolidation scheme should proceed until it was determined 'whether or not productive use of the land would be held back by the existence of the liens'.⁶² Ultimately, a compromise was negotiated so that the interest would be written off and the Waiohau owners would bear roughly one-third of the original costs. This was in line with

55. Alexander, 'Land Development Schemes' (doc A74), p 195. Alexander gave the size of the Crown award as £689 plus 305 acres. The 305-acre area had a value of £221: see Rotorua Maori Land Court, minute book 86, 1 November 1935, fol143 (Alexander, supporting papers to 'Land Development Schemes' (doc A74(f)), p 1767).

56. Kathryn Rose, 'A People Dispossessed: Ngati Haka Patuheuheu and the Crown, 1864–1960' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A119), p 194

57. Arapere, 'Waiohau' (doc A26), pp 66–68

58. Crown counsel, closing submissions (doc N20), topics 18–26, p 83

59. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 129–130

60. Ibid; Tamaroa Raymond Nikora, brief of evidence, 12 January 2005 (doc J40), pp 5–6; see also Arapere, 'Waiohau' (doc A26), p 73.

61. Alexander, 'Land Development Schemes' (doc A74), pp 179–180

62. Ibid, p 180

consolidation schemes in general, although Ruatoki was treated more generously. The situation was also worse at Waiohau because an outstanding award of land to the Crown for survey costs, dating back to 1915, was not included in the compromise. In 1935, the court finally completed this award of 305 acres to the Crown. In sum, as a result of survey costs and the rating compromise, the Crown acquired £314 worth of land at Te Teko (the compensation lands) and Waiohau (including the 305-acre award from 1915).⁶³

This loss fell on the Waiohau owners alone and was not shared with the Ruatoki owners, whose interests had all been relocated years earlier. Also, the rates arrears seem particularly unfair, given that the lion's share (£190) of the original sum before the compromise was owed on the compensation lands, which Ngati Haka Patuheuheu had not yet been able to make use of, while only £2 was owed on Waiohau.⁶⁴

From 1931, when the Ruatoki part of the scheme was completed without awarding all of the Crown's interests, and the Crown had taken some of its interests there as land, the Waiohau owners must have known that they were likely to lose some land. A proposal was made in 1931 that any such land should be taken at Te Teko. These were the compensation lands for which title had only recently been gained, and which the Waiohau community had never really wanted and had not been able to farm (see chapter 11).⁶⁵ Some Ngati Haka Patuheuheu people, however, wrote to Ngata in 1933 that they wanted to develop land at Te Teko.⁶⁶ There was also a desire to lease it and get an income from settler farmers.⁶⁷ Land loss of any kind was problematic for Ngati Haka Patuheuheu, who had very little left. At the same time, we note that earnings per unit farm in the Waiohau development scheme seem to have been similar to those at Ruatoki, so the Crown could probably have converted at least some of its Waiohau award to charging orders – perhaps £200 of its £596 (transferred from Ruatoki) could have been converted without causing undue hardship. We have no information as to why the Crown decided not to follow the model it had agreed to at Ruatoki and offer this repayment option to the Waiohau owners. Two small charging orders were in fact made for the purpose of saving some pre-existing, surveyed boundaries. Clearly, charging orders were still possible in principle.

In the Crown's defence, it should be noted that, as at Ruatoki, it chose to take land that would not interfere greatly with the Waiohau development scheme. Only

63. Alexander, 'Land Development Schemes' (doc A74), pp 181–182, 192–194; consolidation minute book 1A, 5 April 1935, fols 88–91 (Alexander, supporting papers to 'Land Development Schemes' (doc A74(f)), pp 1727–1730); Rotorua Native Land Court, minute book 86, 1 November 1935, fol 143 (Alexander, supporting papers to 'Land Development Schemes' (doc A74(f)), p 1767)

64. Alexander, 'Land Development Schemes' (doc A74), p 182

65. Arapere, 'Waiohau' (doc A26), pp 68–69. The consolidation officer, Kepa Ehau, said that this had been the wish of Ngati Haka Patuheuheu, Ngati Whare, and Ngati Manawa for two years, which suggests that the Waiohau owners had been contemplating the possible loss of land to the Crown since 1929, although there is no evidence in corroboration of this statement.

66. Arapere, 'Waiohau' (doc A26), p 70

67. *Ibid.*, p 71

one block thought suitable for dairying (Waiohau c25, of 44 acres) was included in the Crown award, and in 1940 it was made available for lease by a development scheme unit occupier.⁶⁸ This may explain Alexander's observation, cited by Crown counsel, that there is no evidence of contemporary opposition to the size of the Crown award.⁶⁹

Whatever the case, the establishment of forestry on lesser quality Waiohau lands in recent times has undoubtedly made the large wedge of Crown land in the middle of the block much more conspicuous. Whereas this land (Waiohau B9) could not have produced much dairy income, it is now a Crown forest and could clearly have generated an income for the local community instead of the Crown.⁷⁰ The Tuhoe-Waikaremoana Maori Trust Board tried to buy this land back in 1994 on behalf of Te Manawa o Tuhoe trust, but the Crown did not respond to their offer.⁷¹ According to the evidence of Tama Nikora, the Waiohau B9 lands are the 'only commercial lands in Crown ownership which were derived from the Ruatoki-Waiohau Consolidation Schemes'.⁷²

19.2.6.1 Conclusion

We cannot accept the claim that the relocation of part of the Crown's award from Ruatoki to Waiohau had, of itself, an unfairly disproportionate effect on Ngati Haka Patuheuheu, leaving them with too little land for their development scheme. We accept the Wai 36 Tuhoe claimants' submission that all owners in the consolidation scheme were affected equally in that sense, retaining the value of the land with which they entered the scheme. Nonetheless, the Crown did treat the Waiohau owners differently from the Ruatoki owners in some crucial ways. First, survey liens and rates arrears were only partly remitted for Waiohau and Te Teko. Secondly, the 1915 award of land for survey costs was finalised in 1935 without being reduced in the same way as the other survey costs. We note, however, that the court stuck to the 1915 valuation, which gave the Crown much less land than the 1935 values would have done.⁷³ Thirdly, the Waiohau owners were denied the opportunity to convert Crown interests into charging orders against land in the development scheme, which would have significantly reduced the amount of land kept by the Crown. We have no information as to why this option was not transferred from Ruatoki to Waiohau along with the Crown's interests.

68. Alexander, 'Land Development Schemes' (doc A74), pp194, 206

69. Crown counsel, closing submissions (doc N20), topics 18–26, p 83

70. Arapere, 'Waiohau' (doc A26), p 79; Evelyn Stokes, J Wharehuia Milroy, and Hirini Melbourne, *Te Urewera Nga Iwi Te Whenua Te Ngahere: People, Lands and Forests of Te Urewera* (Hamilton: University of Waikato, 1986) (doc A111), p 266, fig 52; Nikora, brief of evidence (doc J40), p 9

71. Nikora, brief of evidence (doc J40), p 9

72. Ibid

73. Consolidation minute book 1A, 5 April 1935, fols 88–91 (Alexander, supporting papers to 'Land Development Schemes' (doc A74(f)), pp 1727–1730); Rotorua Native Land Court, minute book 86, 1 November 1935, fol 143 (Alexander, supporting papers to 'Land Development Schemes' (doc A74(f)), p1767)

In terms of outcomes, the development scheme was not damaged by the location of the Crown's award since the 44 acres of dairying land taken by the Crown was eventually made available to the development scheme on lease, while the remainder of the Crown's award at Waiohau was suitable for forestry, not farm development. We have no information as to the nature of the 25 acres of land taken by the Crown at Te Teko, or the effect of that taking on the Ngati Haka Patuheuhe owners.

19.2.6.2 Treaty analysis and findings

In our view, the Crown's taking of almost 30 per cent of Waiohau 1A in this manner was yet another blot on the record of the Crown's shameful treatment of Ngati Haka Patuheuhe. If for no other reason, the Crown – being aware of the harm done to this community by the Waiohau fraud and the extent of land already lost by that means – should never have insisted on taking so much more land from it. That it also took almost one-tenth of their compensation lands was adding insult to injury. The Crown could have remitted all survey costs, as it did for Ruatoki. It could have remitted all rates arrears (or paid those arrears itself), given the lack of use that the Waiohau community had been able to make of the compensation lands, on which the rates were owing. It could, at the very least, have arranged for charging orders so as to allow the owners to buy back some of the interests that it had obtained. As we have already observed, the Crown's purpose in purchasing interests was solely to create vacancies where land was needed for consolidation and then development. For this objective to have resulted in the Crown obtaining such a large share of a block where it had never purchased any interests was surely unjust. In our view, the Crown's treatment of the Waiohau community was not in keeping with either the spirit of consolidation, as promoted by Ngata, or the principles of the Treaty. The prejudice to this community was the loss of further land when they could not afford to lose any.

19.2.7 Other issues

Other issues raised by the claimants can be addressed briefly.

First, Ngati Haka Patuheuhe and the Wai 1036 Ruatoki claimants argued that the consolidation scheme had severed their ties with valued areas of ancestral land. We have no doubt that that occurred. David Alexander commented, in response to a question from the Crown,

The Native Land Court process of fragmentation of a hapu's lands was a substantial departure from more traditional ways of thinking about land. But it would be wrong to think of consolidation as just a different type of fragmentation. Under consolidation people could end up with land they had no particular traditional connection to, they could lose areas they had been connected to, they were obliged to take on board the minutiae of share numbers, and they also had to grapple with the concept of their shares having a monetary value, which was the currency of exchanging under the scheme. Many of these were alien or difficult concepts for the people involved, and

they had to grapple with them under the close eye of outsider Crown and Court officials. I stand by my belief that consolidation was a major upheaval.⁷⁴

But, also from the evidence of David Alexander, which the claimants have not challenged on this point, it is clear that hapu leaders and whanau were intimately involved in the decisions that were made, as to relocating whanau interests and constructing usable blocks on the ground.⁷⁵ There were very few objections when the schemes passed through the court, and almost no recorded complaint after that, because the people had in effect designed their own grouping of interests and consolidation of those interests in particular places.⁷⁶

In a broader sense, the necessity of having to carry out such an exercise rested squarely on the shoulders of the Crown. Having considered Judge Carr's 1928 assessment of the situation at Ruatoki, which is echoed by Ngata's comments in 1932, there seems no doubt that the Crown's native title system had failed the people badly. The hapu were intimately involved, however, in the application of this particular solution to the problem. The tragedy, as Leah Campbell pointed out in her study of consolidation, is that the improvements could only last for a generation or so unless there was a more fundamental redesign of the system.⁷⁷ We discussed this point in chapter 15, where we noted that by 1960 Jack Hunn, secretary for Maori Affairs, had come to this conclusion.⁷⁸ He described consolidation as 'futile'. The effects at Ruatoki and Waiohau, however, were masked by the development schemes, which for many years operated as an overlay, ignoring the fractionating titles underneath (see chapter 18).

We conclude that the loss of links to particular ancestral lands was a prejudicial effect of the Crown's Treaty breach in establishing and maintaining its native title system. We do not attribute fault to the consolidation scheme, which was a well-intentioned if temporary fix to the circumstances in which owners found themselves, requested by the people and largely carried out according to their wishes.

A related issue raised by all the claimants is that the consolidated sections were too small and soon became uneconomic. The evidence about this issue has already been covered in chapter 18. Here, we note that the grouping of individual interests, and the size of blocks that resulted, was shaped equally by the Crown and the owners. Ngata's imperative was small family dairy farms; this was, as Mr Alexander put it, the only choice on offer and therefore the only choice that was made.⁷⁹ But the owners were instrumental in the grouping of interests and the size of blocks, and it seems to us that they were in wholehearted support of

74. Alexander, answers to questions of clarification (doc E5), p 33

75. Alexander, 'Land Development Schemes' (doc A74), p 35

76. Ibid, pp 27–41; Alexander, summary of 'Land Development Schemes' (doc D10), pp 41–42; see also Arapere, 'Waiohau' (doc A26), pp 71–73.

77. Campbell, *National Overview on Land Consolidation Schemes* (Wai 1200 ROI, doc A62), pp 150–152

78. See JK Hunn, *Report on the Department of Maori Affairs, with Statistical Supplement* (Wellington: Government Printer, 1961), pp 54–55.

79. Alexander, summary of 'Land Development Schemes' (doc D10), p 28

Consolidation Was 'Futile': The Hunn Report, 1960

In 1960, Jack Hunn was appointed acting secretary for Maori Affairs to carry out a review of the Maori Affairs Department. The review was driven by Government concerns about the present and future effects of Maori population growth, urbanisation, multiple ownership, and unused or under-used Maori land. Hunn completed his report to the Minister in 1960 and it was published in 1961. While best known for its controversial findings about what it called 'Maori integration', it made the following assessment of consolidation schemes:

Consolidation is the process of amalgamating all the separate interests that any one person may own in various blocks. His dispersed land interests are added up (in value) and relocated as a combined interest in one block. It is a long laborious and futile process that has finally been abandoned, except on a small scale. It has been going on for 50 years (since 1911) with results, as follows, which can hardly be said to have justified all the time and money involved . . . Consolidation may look impressive on these figures but unhappily it is a treadmill effort, endless and hopeless. As soon as consolidation is completed, the ownership starts to proliferate again by death and succession, so consolidation is never really completed at all.¹

1. JK Hunn, 'Department of Maori Affairs – Report on, with Statistical Supplement', 24 August 1960, AJHR, 1961, G-10, pp 54–55

Ngata's plan. Both cause and effect, however, were dominated by the development schemes at Ruatoki and Waiohau, rather than the consolidation schemes. As we noted above, all consolidation schemes were ultimately futile given an unreformed title system. It was already evident by 1937 that some sections were too small and uneconomic, which was only a year after the completion of the Waiohau scheme.⁸⁰ We accept that the claimants have a point, which we explored in relation to our assessment of the development schemes in chapter 18.

A third issue raised by the Wai 36 Tuhoe claimants is the Crown's failure to carry out timely surveys of the new consolidated titles. The Ruatoki land use survey found in the late 1970s that only 90 titles were surveyed out of 390, which meant that 300 could not be registered. Some surveying was carried out by Lands and Survey staff during the 1980s, the cost of which was paid by the Crown.⁸¹ But claimant witness Tama Nikora observed that this work was never finished. In his expert opinion as a surveyor, the lack of surveyed titles is a problem for Ruatoki

80. Alexander, summary of 'Land Development Schemes' (doc D10), p 35

81. Oliver, 'Ruatoki' (doc A6), pp 213–214

owners today.⁸² David Alexander suggested that ‘the great mass of the blocks ordered by the court in 1933’ have still not been surveyed. He did not provide a definite statistic.⁸³

The Crown has acknowledged the lack of surveys, although it does not believe that there was any consequential prejudice suffered by the Ruatoki owners, given that the Ruatoki development scheme operated successfully without them.⁸⁴ In the Crown’s defence it should also be said that the Crown deferred the surveys at the apparent request of the Ruatoki owners, who did not want to incur yet more debt through the expense of surveying their land in the 1930s.⁸⁵ The registrar reported in court in 1935 that

no request has ever been made to the Court to requisition a survey of the new titles; apparently the Native owners are reluctant just now to incur any further costs which would be loaded upon their lands. They have been working according to the new boundaries for the past four years, and have not yet asked for a survey.⁸⁶

As Tama Nikora told us: ‘The new titles produced by the Ruatoki–Waiohau Consolidation Scheme were never surveyed. This was in one sense fortunate as Tuhoe did not lose any more land to the Crown.’⁸⁷

As a result, the only survey cost which the owners had to meet, arising from the consolidation scheme, was for a topographic survey. In 1951, the amount owing for this was set at £160 by the Maori Land Court, after the Crown remitted £148 interest.⁸⁸ In 1959, officials obtained approval from the Department of Maori Affairs to carry out surveys for all the consolidation titles, as it prepared to hand over control of roads to the Whakatane County Council in 1960; the cost of this was to be met from Vote: Maori Affairs, as officials did not think it would be practical to recover the cost from the owners. However, only eight blocks were subsequently surveyed.⁸⁹ We have no information as to why – the Government having authorised the survey of all Ruatoki titles – this work was not carried out. Steven Oliver suggested, ‘The main purpose of the surveying carried out at this time by the Department appears to have been to map the position of the roads and the water system in preparation for these systems being handed over to the Whakatane County Council.’⁹⁰

82. Nikora, brief of evidence (doc J40), pp 4–5

83. Alexander, ‘Land Development Schemes’ (doc A74), p 43

84. Crown counsel, closing submissions (doc N20), topics 18–26, p 84

85. Alexander, ‘Land Development Schemes’ (doc A74), p 43

86. Registrar, Native Land Court, Rotorua, to Under-Secretary, Native Department, 18 June 1935 (Alexander, ‘Land Development Schemes’ (doc A74), p 43)

87. Nikora, brief of evidence (doc J40), p 4

88. Oliver, ‘Ruatoki’ (doc A6), pp 136–137

89. Ibid, p 137; Alexander, ‘Land Development Schemes’ (doc A74), p 155; correspondence between Department of Maori Affairs head office and Rotorua office between 5 June 1959 and 23 October 1964 (David Alexander, comp, supporting papers to ‘The Land Development Schemes of the Urewera Inquiry District’, 7 vols, various dates (doc A74(c)), vol 3, pp 851–857)

90. Oliver, ‘Ruatoki’ (doc A6), p 137

Mr Oliver noted in his evidence that between 1933 and 1959, and 1967 and 1975, some 38 land titles were surveyed by the owners at their own expense, although in those cases where new partitions were being added – for house sites, for example – the owners would have had some costs to meet whether or not title surveys already existed.⁹¹

The Crown's submission is that surveys were not really necessary in the development scheme era, that some surveys were carried out in the 1980s, and that 'no prejudice is apparent'.⁹² But the evidence of Steven Oliver and of Tama Nikora outlined the very real prejudice identified by the Ruatoki Land Use Survey in the 1970s. Boundaries were uncertain, land was mistakenly left out of amalgamations, a house turned out to be on someone else's land, and so forth. Mr Nikora, who was involved in these events, told us

In about the 1970's I recall that Murray Linton, the Land Utilisation Officer of the Department of Maori Affairs, considered that Ruatoki was in such a mess as a result of the Consolidation Scheme, and court orders on top of court orders down the years, that it was in the public interest that the whole of Ruatoki should be surveyed. As a result, the Chief Surveyor issued an authority to him to survey the Ruatoki lands. That task was never completed. I believe a full assessment of the Ruatoki titles is now required. The title situation at Ruatoki (no surveys, small blocks and large numbers of owners) is a major hurdle to the economic development of land at Ruatoki.⁹³

Mr Nikora's evidence was reinforced by the evidence of Frank Vercoe, who was one of the four Owhakatoro unit farmers in the 1950s. Mr Vercoe explained that his own boundary was found to have gone through the middle of his uncle's kitchen, and that many boundaries were significantly incorrect. Surveys revealed that fences had been built as much as 12 metres away from correct boundaries, and some blocks turned out to be significantly smaller than thought, and all of it required either expensive refencing or swapping of land between titles. Attempts by trusts to farm or lease land were hampered by the lack of surveys, and it was impossible for them to raise finance on unsurveyed lands.⁹⁴ No evidence was filed, however, to show the exact extent to which the surveying of Ruatoki titles was left incomplete.

In conclusion, the lack of title surveys between the 1930s and 1970s would have imposed extra costs on those owners who paid for their own surveys, since it would have been cheaper for each owner if all the blocks had been surveyed at once, but equally the fact that the Crown ultimately carried out some title surveys in the 1980s at its own cost would have benefited those owners who had not paid for surveys. We accept the Crown's submission that the deferral of surveys in the 1930s was not a problem during the early development scheme era. We also accept

91. Ibid, pp137–138

92. Crown counsel, closing submissions (doc N20), topics 18–26, p 84

93. Nikora, brief of evidence (doc J40), pp 4–5

94. Frank Rongoiti Vercoe, brief of evidence, 2005 (doc J37), pp 3–6

Solving the Problem of the Rutoki Surveys

Tama Nikora, in his evidence for the claimants, described some of the problems that he discovered in the 1970s as a result of the lack of Ruatoki surveys:

The Report of the Royal Commission of Inquiry into the Maori Land Court, 1980, pp 43–44 paragraph 27, refers to a report by me at that time that there were at Ruatoki 390 titles where 300 titles were unsurveyed. 814 searches had been carried out where some matters noted for attention were – Court orders which require referral back to the Court; land with no current title; need for field work to clarify Court orders; no legal road or roadway to provide for the only bridge to cross the Whakatane river; unformed non legal roads not treated with; land unwittingly left out of an amalgamation; 10 acres provided for a roadway but ignored by later court orders; and a house on someone else's land due to an impossible partition.¹

The assistant district officer of the Maori Affairs Department had proposed the survey of all Ruatoki titles in 1959 at the Crown's expense, although 'not from any feeling of tender heartedness towards the owners' but in the public interest:

1. Tamaroa Raymond Nikora, brief of evidence, 12 January 2005 (doc J40), p 4

Mr Nikora's evidence that it has become a problem since then. It was certainly identified as a problem by officials in the 1950s and again in the 1970s.

The information before us is that the Crown twice ordered a survey of Ruatoki titles at its own expense, and twice this has not happened. We have no precise information as to how many titles have not been surveyed, but the evidence of Mr Alexander and Mr Nikora suggests that it is the majority.⁹⁵ Again, we have no information as to why the decision to survey all titles was not carried out in the 1980s. In the absence of this information, we cannot say that there has been a Treaty breach. We cannot, however, agree with the Crown that no prejudice has been shown. The Ruatoki Land Use Survey indicated significant prejudice, as had an earlier officials' reports in the 1950s. We think that the Crown and claimants, with the assistance of the Maori Land Court, should investigate the question of why the surveying was left incomplete, and whether current circumstances still require it to be finished. If so, then we also think that the Crown should honour its earlier commitment to survey those titles at its own expense. But these are not formal recommendations, as we are not in a position to say that a Treaty breach

95. Alexander, 'Land Development Schemes' (doc A74), p 43; Nikora, brief of evidence (doc J40), pp 4–5

It seems to me that this is a case where we should make up our minds to do the survey of all these lands without regard to the selection of fees. The work is vitally necessary. I can see no prospect of recovering the cost by any system of levy, and we will only be creating endless work and trouble for ourselves if we try to do so. Certainly the longer we go on without proper surveys, the more trouble we are likely to be in, in one way or another.

The suggestion is made not from any feeling of tender heartedness towards the owners of the land, but with a desire to save ourselves much time and trouble, and to promote the public interest generally. If it is not done now, it will have to be done before many years go by, so let us take advantage of the availability of survey staff, and the knowledge and data which they now have, to get this problem cleared once and for all.²

While approval of this proposal was granted by head office in 1959, a beginning was made but the surveying project did not get very far and was never completed, for reasons unknown.

2. David Alexander, 'The Land Development Schemes of the Urewera Inquiry District' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A74), p 155

has occurred. We hope that, in the improved Treaty relationship established by a negotiated settlement, this course of action will seem obvious to the Crown.

19.3 THE NGATI MANAWA CONSOLIDATION SCHEME CLAIM

19.3.1 Introduction

Ngati Manawa also have a claim about a consolidation scheme, but it is unique among the various claims that we received about consolidation because it relates to a scheme that was wanted but did not happen. As we noted above, the Ruatoki–Waiohau scheme was the only one of its kind in our inquiry district. Essentially, the claim here is that Ngati Manawa's repeated efforts to arrange a consolidation scheme were ultimately frustrated because completing the scheme ran counter to the Crown's forestry interests. As a result, Ngati Manawa were denied a consolidation scheme.

19.3.2 Context

Much of the general context of consolidation schemes has been explained above, as has the view that – due to a failure to reform the underlying title system – consolidation schemes were ultimately futile unless land was vested in an

incorporation, a trust, or some other corporate management entity. We turn, then, to a brief account of the chequered history of Ngati Manawa's attempts from the 1930s to the 1950s to obtain a consolidation of their land titles.

In 1929, Ngati Manawa leader William Bird proposed a multi-tribal consolidation scheme, covering Ngati Manawa, Ngati Haka Patuheuheu, and Ngati Whare interests in what remained to them of the Matahina, Whirinaki, Pokohu, Opoutea, Heruiwi, and Karatia blocks. This ambitious proposal included the interests of 1,831 owners across some 25,000 acres. The end result, it was hoped, would be small family farms for the communities concerned – but not necessarily on these lands. Bird hoped to exchange poorer quality land for better Crown land at Murupara, which would then be developed for dairy farming.⁹⁶

Officials rejected the proposed exchange because, in the view of the Lands Department, the 'proposed arrangement offers no advantage whatever to this Department'.⁹⁷ They do appear, however, to have agreed to a consolidation scheme. By 1932, the ownership lists for the Ngati Manawa lands had been updated in preparation for it. During the mid-1930s, however, most of the Native Department staff who had worked on consolidation schemes were redeployed to development schemes. Consequently, no more progress was made on the Ngati Manawa consolidation for the meantime.⁹⁸

Ngati Manawa enthusiastically embraced the chance for development assistance.⁹⁹ Nonetheless, William Bird thought that consolidation should precede development, so that sensible unit farms could be arranged without vested interests being created, which would happen as soon as some pieces of land had been developed but not others.¹⁰⁰ He continued to make what the Rotorua registrar called 'persistent demands' for consolidation to proceed.¹⁰¹ While the consolidation officer noted that the department had become 'lukewarm' towards consolidation, he advocated for it because it was the only scheme in the region which he thought could be completed within 12 months. In Bird's opinion, which the consolidation officer agreed with, the case for consolidation had become more pressing in 1937 once development work had actually started.¹⁰²

96. Heather Bassett and Richard Kay, 'Ngati Manawa and the Crown, c1927–2003' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc C13), p 25

97. M Galvin, field inspector, to commissioner of Crown lands, Auckland, 30 September 1930 (Heather Bassett and Richard Kay, comp, supporting documents to 'Ngati Manawa and the Crown, c 1927–2003', various dates (doc C13(a)), p 143): see also Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), p 25.

98. Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), pp 25–26, 29–31

99. Alexander, 'Land Development Schemes' (doc A74), pp 333–337

100. Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), p 30

101. Klaus Neumann, 'Maori and Forestry in the Twentieth Century: A Preliminary Report' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2000) (doc 110), p 184 (counsel for Ngati Manawa, closing submissions, 2 June 2005 (doc N12), p 69). At the request of the Crown Forestry Rental Trust, this incomplete draft report was made confidential to the Tribunal and parties: see presiding officer, memorandum, 11 November 2004 (paper 2.691).

102. Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), p 30

The contrary view of the Native Land Court registrar, which was supported by the Native Minister, was that if the lands concerned were cut into unit farms, and leases were provided to the unit occupiers, then consolidation could wait. Thus, the Minister advised Bird that there were no consolidation officers to do the work, and that in the meantime the owners should nominate occupiers.¹⁰³ At that point, the owners and the department still coincided in the view that the ultimate outcome should be small family farms.¹⁰⁴

As far as we are aware, no further requests for consolidation to proceed were made until after the Second World War, when it was sought by William Bird (junior), Henry Bird, and Mate Wharehuia. Henry Bird noted that Rangi Royal, a former consolidation officer, had offered to assist the current consolidation officer since a shortage of staff was again cited as causing the hold-up. According to Wharehuia, Ngata was making the lack of progress an issue in the forthcoming election. In response to these 1946 requests, the Native Minister, Peter Fraser, instructed the Native Land Court to proceed with the scheme. A preliminary hearing was held in May 1947 for the consolidation of the Ngati Manawa lands, together with the Ngati Haka Patuheuheu lands left out of the Waiohau scheme and some Ngati Whare lands. Although progress was slow due to staff shortages, by 1948 ownership lists had been updated, and work had begun on valuations, and determining where land exchanges might occur.¹⁰⁵

Resolution of these issues, however, was not going to be straightforward. As Judge Harvey pointed out, consolidation depended on owners being able to vacate the '[over]crowded Murupara end', and this in turn depended on the use of at least some Crown land in the Whirinaki and Heruiwi blocks. The Forest Service and the Lands and Survey Department, however, were still trying to buy interests (see chapter 10), and were reluctant to give up Crown land or abandon their own ambitions for these lands. So Crown cooperation in this aspect of the scheme, essential to the success of consolidation, was by no means certain at this time.¹⁰⁶

Nonetheless, Ngati Manawa's hopes that the consolidation scheme would be completed were frustrated from another quarter in 1949, when the Crown proposed to obtain 1,625 acres (later 1,100) of the Karatia blocks to establish a pulp and paper mill complex at Murupara.¹⁰⁷ Prime Minister Fraser opened negotiations with Ngati Manawa in 1949, but discussions stalled after the fall of his government at the end of that year. Judge Harvey explained in March 1950 that the Ngati Manawa consolidation was 'an urgent and important scheme of consolidation', but

103. *Ibid*, pp 30–31

104. For the owners' views, see Alexander, 'Land Development Schemes' (doc A74), p 333. The department's plan was for 4,000 acres to be developed into farms of 80 to 100 acres each, thus creating at least 40 farms. Forty-two unit occupiers had been selected by 1939: see Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), pp 29, 32.

105. Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), pp 50–55

106. *Ibid*, pp 55–58

107. *Ibid*, p 63

Ngati Manawa Censure the Crown, 21 November 1950

Moved: Henry Bird

Seconded: Mate Wharehuia

That the Ngati-Manawa people assembled here in meeting expressed their extreme concern at the lack of progress in the Consolidation of their lands and are of the opinion that the main cause of such lack of progress is the delay in any announcement regarding the future of the Murupara pulp project. Further, that a letter be sent to the Hon the Minister of Maori Affairs drawing his attention to the fact that Ngati-Manawa are being retarded in their progress towards economic establishment as citizens of New Zealand.

The above resolution was put to the meeting and *carried*.¹

1. 'Meeting of Tribal Committee and Owners of Ngatimanawa Development Scheme held at Murupara on 24/11/50 - 10.30 pm' (David Alexander, comp, supporting papers to 'The Land Development Schemes of the Urewera Inquiry District', 7 vols, various dates (doc A74(a)), vol 1, p293)

was unable to proceed further '[u]ntil the various State Departments interested in the industrial development make known their plans and proposals to the Court'.¹⁰⁸

After being told by the consolidation officer that only the Minister of Maori Affairs had the power to order consolidation to resume, Ngati Manawa owners met in November 1950, when they expressed 'their extreme concern at the lack of progress' and decided to write to the Minister, 'drawing his attention to the fact that Ngati Manawa' were being 'retarded in their progress towards economic establishment as citizens of New Zealand'.¹⁰⁹ The proposed Murupara mill remained an insuperable stumbling block until 1952, by which time Crown officials were not sure they wanted to persevere with the existing development scheme either (see chapter 18).¹¹⁰

In 1956, the prospect of consolidation was revived again by the Maori Land Court, albeit with a smaller scheme involving only those Whirinaki and Karatia blocks which were still needed for the Ngati Manawa development scheme. In September of that year, Henry Bird was told that 'a plan of utilisation was being made' and that there would soon be a meeting to 'push ahead with consolidation

108. Judge Harvey to Under-Secretary for Maori Affairs, 14 March 1950 (Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), p73)

109. Consolidation officer to Department of Maori Affairs, [circa November 1950] (Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), pp 73-74)

110. Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), p75

into family groups.¹¹¹ No consolidation ever occurred though, as Maori Affairs Department staff decided, following a review of the development scheme's performance, that the only worthwhile options for the Ngati Manawa lands were to either lease them out, or to have them amalgamated.¹¹² As we explained in chapter 18, the result was an amalgamation of the development scheme lands into two titles. This marked the end of attempts to swap existing interests and consolidate them into family-sized farms.

We turn next to outline Ngati Manawa's claim arising from these unsuccessful attempts to consolidate land titles.

19.3.3 The claim

In essence, Ngati Manawa's claim is that they were denied a consolidation scheme because such a scheme did not fit with the Crown's wish to use parts of their land for forestry purposes; in other words, the Crown at first agreed to consolidation (which was in the owners' interests) but later prevented it to suit its own interests. This was at the expense of the Crown's Treaty partner. In the claimants' view, the scheme was ultimately prevented not by 'simple mismanagement and delay' but by deliberate policy.¹¹³ This was because in the late 1940s, when the Minister had finally instructed that the consolidation scheme should proceed, it was then 'put on hold' to facilitate the Crown's Murupara forestry acquisitions.¹¹⁴ This interpretation, the claimants contended, was reached as a result of two independent historical research projects. By the time that Murupara had been sorted out in the mid-1950s, the department had lost faith in the concept of settling Ngati Manawa whanau on unit farms. No such farms were ever established, which was totally counter to Ngati Manawa's wishes. This outcome was facilitated because consolidation had not preceded development.¹¹⁵

19.3.4 The Crown's response to the claim

The Crown did not address this issue in its closing submissions. In its statement of response to the claims at the beginning of our hearings, Crown counsel suggested that consolidation was not in fact a necessary prerequisite for development schemes, which were designed to sidestep title problems. Nonetheless, the Crown accepted that its Murupara forestry plans 'ended any further work on consolidation of interests of Ngati Manawa lands', but again suggested that this made no practical difference to the use and development of those lands.¹¹⁶

111. *Ibid*, p 112

112. *Ibid*, pp 113–118

113. Counsel for Ngati Manawa, closing submissions (doc N12), p 70

114. Neumann, 'Maori and Forestry in the Twentieth Century' (doc I10), p 185 (counsel for Ngati Manawa, closing submissions (doc N12), p 70)

115. Counsel for Ngati Manawa, closing submissions (doc N12), pp 68–70

116. Crown counsel, final Crown statement of response, no date (statement of response 1.3.5, sec E), p 16, in response to Ngati Manawa, third amended statement of claim, 16 April 2004 (claim 1.2.23(a), SOC v1), pp 38–39

19.3.5 Did the Crown unduly delay and then prevent the completion of the consolidation scheme?

From the claimants' historical evidence, it is apparent that Ngati Manawa had been seeking farming development assistance just as intently (if not more so) as they had been requesting a consolidation scheme.¹¹⁷ The community's need was urgent and we think that the Crown rightly prioritised development over consolidation. As we saw in chapter 18, Ngata's development policy was designed to sidestep title problems. A consolidation scheme was not strictly necessary for a development scheme to proceed. Claimant counsel submitted that the failure to arrange small-farm titles at the beginning had an impact on how development was carried out,¹¹⁸ but the evidence suggests that the sensible course for bringing the land into production was to farm it as a single enterprise at first, before creating the unit farms. Even then, unit farms could still have been created, and unit occupiers selected by the owners from among their own number, without the benefit of a consolidation scheme. William Bird was concerned, on behalf of his people, that any eventual consolidation would be made more difficult if it was delayed until after certain lands were developed (while others were not). That seems a valid point but it was not ultimately a problem for Ngati Manawa in practice, since no consolidation scheme was carried out and owners retained their existing interests in the shape of two new, amalgamated titles.¹¹⁹ Our first point, therefore, is that consolidation was not a necessary prerequisite to a development scheme, although it might have made a significant difference if the land had ended up – as expected – in the form of small family farms.

Our second point is that the initial delay in the 1930s was caused by a shortage of departmental staff to carry it out. This appears to have been a general problem, as many consolidation officers were reassigned to the more urgent work of development schemes. On the other hand, it was believed that the Ngati Manawa scheme would only take a year to complete, making it quick and easy compared to other such schemes. Nonetheless, the Minister decided that development was more urgent and that consolidation would have to wait. Given the social and economic circumstances of the time, and Ngati Manawa's struggle to obtain a development scheme, we cannot quarrel with this decision.

Our third point is that the Government finally agreed to carry out the consolidation scheme in the post-war years and then pulled the plug on it at the last minute. Native Minister Peter Fraser accepted the earnest requests of Ngati Manawa and ordered the preparation and completion of a full consolidation scheme in the late 1940s. In the meantime, the Native Department had realised that the original farms were too small to be viable. It revised its expectations from

117. Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), pp 24–27

118. Counsel for Ngati Manawa, closing submissions (doc N12), pp 68–70

119. There was one amalgamated title for house sites and a second amalgamated title covering the rest of the development scheme: see Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), pp 130–131.

being able to create 42 family farms (1939) to only 12 farms (1945).¹²⁰ While the consolidation scheme was before the Maori Land Court in 1947 to 1948, however, it was 'put on hold to allow the crown to proceed with the acquisition of the heart of the remaining Ngati Manawa lands, namely the Karatia blocks, which the Forest Service required for its Murupara Scheme'.¹²¹ This was the conclusion of historian Klaus Neumann, and also of historians Heather Bassett and Richard Kay.¹²² As we noted above, the Crown did not dispute this conclusion.

This intervention in the consolidation scheme was literally at the eleventh hour. All the information was ready and had been checked by Maori Land Court staff, and *Gazette* notices were being prepared and sent to Wellington. The hiatus imposed by the Government lasted until 1952, when the decision was made to locate the pulp mill at Kawerau instead of Murupara. Ngati Manawa protested to the Minister of Maori Affairs in the meantime but to no avail. As they saw it, they were being unfairly 'retarded in their progress towards economic establishment as citizens of New Zealand'.¹²³ In part, this was because the development scheme had virtually been put on hold as well (see chapter 18).

Was there a reasonable justification for delaying the consolidation scheme? We note the evidence of Bassett and Kay that the Government planned to obtain 1,100 acres of Ngati Manawa land at Murupara – this was a substantial amount – and to exchange it for Crown land at Whirinaki and Heruiwi. Land from the Galatea Estate was also on the table for possible exchange. Clearly, no consolidation scheme could be completed until negotiations between Ngati Manawa and the Crown established which lands were being taken in the Karatia blocks, and which lands were being received in exchange. Cabinet approved the siting of the mill at Murupara in 1949 and negotiations had begun, led by Prime Minister Peter Fraser and conducted with seriousness of purpose and generous intentions. In particular, Fraser emphasised the employment and other benefits that would flow from centering the forestry industry at Murupara.¹²⁴

The fall of the Labour Government in late 1949, however, caused a new delay. Ngati Manawa, while clearly reluctant to give up their ancestral land, asked for 20 acres for every acre taken, citing the grievous extent of their past land loss in justification. The Government was reluctant to agree to that, and there were desultory discussions in 1950 and 1951, until the new Government decided to enter into a joint venture with private enterprise in mid-1951. Ngati Manawa were advised that this might result in a change of location for the mill. The iwi protested this in late

120. Bassett and Kay, 'Ngati Manawa and the Crown' (doc c13), p 32; Alexander, 'Land Development Schemes' (doc A74), p 354

121. Neumann, 'Maori and Forestry in the Twentieth Century' (doc 110), p 185 (counsel for Ngati Manawa, closing submissions (doc N12), p 70)

122. Counsel for Ngati Manawa, closing submissions (doc N12), p 70

123. 'Meeting of Tribal Committee and Owners of Ngatimanawa Development Scheme held at Murupara on 24/11/50 – 10.30 pm' (Alexander, supporting papers to 'Land Development Schemes' (doc A74(a)), p 293)

124. Bassett and Kay, 'Ngati Manawa and the Crown' (doc c13), pp 60–67

1951, asking the Government to continue with Murupara and a generous exchange of land. The decision was finally made to locate the mill at Kawerau in late 1952.¹²⁵ Both sides, it seems, would have benefited from holding up the consolidation scheme if in fact there had been an exchange of land, resulting in a substantial taking of Maori land for the mill and an even more substantial injection of former Maori lands (currently Crown lands) into the scheme.

Our fourth point is that the Government's intervention in the late 1940s effectively 'ended any further work on consolidation of interests of Ngati Manawa lands', a point accepted by the Crown in our inquiry.¹²⁶ When it became possible to resume work on consolidation in 1953, the department had decided that only eight farms could be created (1951) on the development scheme lands, and this was revised downwards yet again to four in 1952.¹²⁷ By this time, however, the development scheme was too run down and needed further work before unit farms could be established. As we discussed above, the end result was that the Ngati Manawa community was faced with an awful dilemma in the mid-1950s. A smaller-scale consolidation scheme was planned in 1956, just involving the blocks still in the development scheme, but by then the department had come to the conclusion that family farms were not a viable option at all. Ngati Manawa were asked to choose instead between leasing their land or authorising the department to farm it as a single, amalgamated block.¹²⁸ As we discussed in chapter 18, the owners had to give up their dream of family farms and opted for amalgamation, although they never really forgave the Maori Affairs Department for the position in which they found themselves.

19.3.6 What were the consequences of the failure to carry out a consolidation scheme?

On balance, we cannot accept that Ngati Manawa were prejudiced by the failure to carry out a consolidation scheme on their Whirinaki and Karatia development scheme lands. As we see it, consolidation was too often an expensive waste of time, since title improvements only lasted for a generation (possibly two). Also, it seems that the owners' and department's vision in the 1930s was, with hindsight, unrealistic. Numerous small family farms could not in fact be created on these lands. Again, a consolidation scheme would have been an expensive waste of time, and, had one been carried out, could only have enhanced Ngati Manawa's bitter disappointment in the 1950s when the choice had to be made to amalgamate the titles. It is certainly the case that farming – and, later, forestry – could have been carried out by continuing to ignore the underlying titles, and this is in effect what happened when all owners had their interests included in an amalgamated title, eventually controlled by an incorporation. In the evidence of Rangiuiira Briggs, the iwi

125. Bassett and Kay, 'Ngati Manawa and the Crown' (doc C13), pp 66–71

126. Crown counsel, final Crown statement of response (statement of response 1.3.5, sec E), p 16, in response to Ngati Manawa, third amended statement of claim (claim 1.2.23(a), SO C VI), p 39

127. Alexander, 'Land Development Schemes' (doc A74), pp 359–364

128. *Ibid*, pp 361, 367, 378–383

supports the incorporation: 'Ngati Manawa Incorporation continues to *mori mori* and *tiaki* our whenua, and we, the Iwi, support and wish them well.'¹²⁹

We have no firm evidence, however, as to whether consolidation would have had any beneficial effects in terms of the claimants' ability to use their lands that were outside the development scheme. It is certainly the case that, by the late 1940s, any new development scheme for Ngati Manawa and others on Whirinaki and Heruiwi lands was dependent on a consolidation of their interests into viable farms, as part of which the Crown had to make available at least some of its land in those blocks. The Maori Land Court, Ministers, and Government departments were fully apprised of this fact. To prevent consolidation was – in this instance, at least – to preclude Maori farm development.¹³⁰ A consolidation scheme at that time would have enabled the owners to take advantage of a new initiative to bring an additional 200,000 acres of Maori land under development.¹³¹ Without a consolidation scheme, there was no new development scheme for Ngati Manawa and other owners – their development gap persisted. On the other hand, the evidence of Bassett and Kay suggested obtaining suitable Crown land for the scheme would have encountered significant resistance from the Forest Service and Lands and Survey (see above). In the end, we cannot know whether the consolidation scheme would have succeeded, or whether an extra development scheme would have fared better than the indifferent success enjoyed by the Murupara scheme.

19.3.7 Treaty analysis and findings

The Crown accepts that it killed the Ngati Manawa consolidation scheme by putting it on hold while a decision was made as to whether it would take Ngati Manawa lands at Murupara for forestry purposes. The pre-war delay in carrying out a scheme was also attributable to the Crown, which had decided to prioritise development over consolidation and reassigned many of its staff accordingly. There seems no doubt that a shortage of consolidation officers delayed consolidation until Ngati Manawa representations convinced Peter Fraser to order the scheme completed in the late 1940s. We agree that, in the circumstances of the time, development was the higher priority if a choice had to be made.

Ngati Manawa's claim is essentially that the Crown deliberately sacrificed their interests in furtherance of its own when it prevented the completion of the consolidation scheme between 1948 and 1952. Certainly, that is how Ngati Manawa at the time saw it, hence their appeals to the Minister in 1950. They put it to the Crown that they were being denied rights accorded other New Zealand citizens,

129. Rangiuiira Briggs, brief of evidence, 9 August 2004 (doc F17), p 6

130. See Judge Harvey, 'Ngati Manawa Consolidation Scheme', 16 May 1947; minutes of meeting held at Wellington on 13 June 1947 on Ngati Manawa consolidation; Under-Secretary for Lands to Native Under-Secretary, 5 September 1947; registrar, Rotorua Maori Land Court, to Native Under-Secretary, 20 November 1947; Under-Secretary for Lands to Native Under-Secretary, 12 July 1948; Under-Secretary for Maori Affairs to Secretary to Director of Forestry, 8 February 1951 (Bassett and Kay, supporting papers to 'Ngati Manawa and the Crown' (doc C13(a)), pp 841–847, 849)

131. Ashley Gould, 'Maori Land Development Schemes: Generic Overview, c 1920–1993' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc M7), p 18

and that their economic prospects were ‘retarded’ as a result. Judge Harvey, too, thought the consolidation scheme ‘urgent and important’ in 1950. The owners of the many scattered interests involved could not create a viable base for additional development assistance without it.

The Crown’s view appears to be that its lengthy decision-making about the mill did in fact end consolidation work for the Ngati Manawa lands, but that this had no practical effect on the existing land development scheme. We have to agree. Between 1939 and 1945, the department changed its prediction of family farms from 42 to 12. Between 1945 and 1958, this number was gradually whittled away to zero. Whether or not a consolidation scheme before or during development would have resulted in a fairer distribution of Ngati Manawa interests, we can never know. What seems certain, however, is that it would ultimately have been futile as a title-rationalisation exercise. Nonetheless, this was not why the Crown failed to proceed with consolidation. Nor did Ngati Manawa know at the time when they pressed for the scheme that small family farms were not viable – to the contrary, that was exactly what everyone had expected would be the outcome.

We agree with the claimants that the Crown prioritised its own interests above theirs when it shut down a previously approved and well-advanced consolidation scheme while it made up its mind (over a number of years) whether or not to take some of their land. But we cannot agree that the Government showed little or no regard for their interests at first. Good-faith negotiations were commenced, and Ngati Manawa – while reluctant to give up ancestral land – stood to benefit considerably from a generous exchange of Crown land. The likelihood of a good result declined steadily after 1949 with the new Government’s reluctance to exchange land at the rate requested by Ngati Manawa, and its preference for a joint venture. Ultimately, it was decided to use Kawerau instead of Murupara. On the wider question of the negotiations between the Crown and Ngati Manawa, and the eventual choice of Kawerau instead of Murupara, we make no findings. That issue falls outside of our inquiry district.

In the context of this particular claim, the principle of partnership required the Crown to keep its commitment to Ngati Manawa unless:

- ▶ circumstances had changed, making it manifestly unreasonable for the Crown to have kept its commitment;
- ▶ Ngati Manawa’s agreement to alter the commitment had been sought and obtained; or
- ▶ the commitment concerned a matter that both parties saw as minor or relatively unimportant.

We consider the honour of the Crown to have been pledged when the Native Minister agreed to Ngati Manawa requests for consolidation in 1946 and ordered that a consolidation scheme be prepared and carried out. Not only did the Crown fail to carry out this consolidation scheme, it actively stopped it from proceeding. Ngati Manawa complained that they were being discriminated against, and denied opportunities available to other New Zealanders. From the evidence available to us, the four-year delay while the Crown decided whether or not it would take land from the prospective scheme (for a pulp and paper mill complex) effectively

ended the scheme. Also, this ambitious scheme – which was aimed at a second farm development scheme – required the Crown to supply land. The departments involved were clearly reluctant to do so. Then, even the smaller-scale scheme that was started in the mid-1950s was not completed, although this scheme was specific to the development scheme lands and was clearly inadvisable by that time. Any consolidation scheme in 1956 would have been an expensive waste of time, needing to be undone only a few years later when amalgamation and incorporation became necessary for these development scheme lands.

The Crown does not deny that its actions prevented the original, large-scale consolidation scheme from being carried out. As noted, we make no finding of breach in respect of the pulp and paper mill negotiation, because the particular land concerned is outside our inquiry district. But we do find that the Crown breached its partnership obligations when it stopped a consolidation scheme to which it had agreed, and did so without obtaining the agreement of Ngati Manawa – indeed, against their strenuous opposition. As Ngati Manawa saw it, their future depended on a successful consolidation scheme that would rationalise their interests and enable a second farm development scheme to be established. In other words, abandoning this particular scheme was of great moment to Ngati Manawa. While consolidation schemes were ultimately futile as a remedy for fractionating titles and fragmenting land, this particular scheme could have delivered tangible results in the form of farm development. Without it, a farm development scheme was simply impossible. We accept that it was reasonable for the Crown to stop the scheme while the issue of an exchange for a pulp and paper mill was a live issue under discussion with Ngati Manawa, but not beyond that.

But prejudice is a difficult matter to evaluate in this case. As we have seen, the Crown was reluctant to contribute any of its own land, without which the large-scale scheme could not have succeeded in any event. And we cannot be sure that a second development scheme would have been established, or that it would have done better than the rather indifferent success of the other Te Urewera schemes (see chapter 18). What we can say is that Ngati Manawa were denied a significant opportunity, which they felt at the time – and still at our hearings – was an act of discrimination against them. We note the relevance of Professor Brian Murton's observation about the impact on Tuhoe of losing their confiscated lands: 'Whether or not they would have used this land to its full potential is not the issue here: they were never given the chance to either succeed or fail.'¹³² As we discussed in chapter 4 and chapter 10, the foreclosing of economic opportunities in this way, as a direct result of a Crown action or actions, constituted a prejudicial effect of those actions. The Crown knew that denying Ngati Manawa their consolidation scheme would prevent any chance of a second farm development scheme. We find that Ngati Manawa suffered prejudice accordingly. When the forestry industry declined later in the century, Ngati Manawa had few options to fall back upon.

132. Brian Murton, summary of evidence Stage Three: Socio-Economic Impact Issues, 10 January 2005 (doc J10), p 9

19.4 THE RUATOKI WATER SCHEME CLAIM

19.4.1 Introduction

The Wai 761 claim, filed by Pita Keepa on behalf of Tuhoe hapu Te Mahurehure, makes specific allegations about the transfer of ownership of the Ruatoki water scheme from the Ruatoki landowners to the local council in the 1960s.¹³³ Mr Keepa, in his evidence at the Ruatoki hearing in 2005, concentrated on matters that had arisen since the council sought agreement to build a new water scheme in the late 1980s. That part of the Wai 761 claim was closely connected to issues of rating and community self-management, which were close to the heart of the Ruatoki claimants.¹³⁴ Evidence about the historical transfer of ownership and control of the old water scheme in the 1960s was presented at our hearings by historians David Alexander and Steven Oliver.¹³⁵ Relying on this evidence, the Wai 761 claimants argue that they lost ownership and control of the original scheme in breach of the Treaty.

19.4.2 Context

A good water supply was essential for dairy farming. As a result, farm development schemes usually gave early attention to creating such a supply if none already existed. At Ruatoki, three gravitational dams were built in the 1930s on the rougher, hilly parts of the block, as well as some smaller, individual dams. Pipe was laid (without legal easements) to connect unit farms to the supply. The Minister had the power to carry out such works under the development scheme legislation, and they remained the property of the owners, so long as the unit occupiers paid the debts arising from the costs of the works. The Ruatoki water scheme was not without its problems; the dams were difficult to access and they tended to silt up, requiring periodic clearing. The debt arising from the Ruatoki water scheme was still being paid off when it broke down in 1960.¹³⁶

By that time, the department was in the midst of trying to withdraw from further involvement in the Ruatoki development scheme (see chapter 18). As part of its intended withdrawal, it informed the owners in 1959 that it no longer wished to maintain or run the water scheme, or to continue its bulk funding arrangement (in lieu of rates) with the Whakatane County Council. In part, this was because the release of some lands from the development scheme had left the legality of the department's charges uncertain. In addition to the original debt and interest, the department was charging a water rate of £1 per annum per household, and £2 for households with flush toilets. The 'community generally has concurred' in its running of the water scheme, and so there was no resistance to paying, but the 'whole basis of our collection of water charges is pretty shaky . . . we really have little, if

133. Counsel for Te Mahurehure, statement of claim, 3 March 2003 (claim 1.2.9, s o c 9), pp 35–38

134. Pita Keepa, brief of evidence, 10 January 2005 (doc J25), pp 8–13

135. Alexander, 'Land Development Schemes' (doc A74), pp 154–156; Oliver, 'Ruatoki' (doc A6), pp 185–187

136. Alexander, 'Land Development Schemes' (doc A74), p 154; Oliver, 'Ruatoki' (doc A6), p 185

An Undertaking is Given about the Ruatoki Water Supply, 1959

Tui Tawera: Mr Alley (a previous District Accountant) said in 1950 that the Department would not transfer the water supply scheme to the Whakatane County Council. What is the attitude of the Board now?

Chairman: . . . The Department is not set up for running water schemes, roads, bridges or drainage but for development and housing. The only reason the Department became involved with the water supply was because it was necessary for the development of farms in Ruatoki. It will take about 7 years to repay the debt. The attitude then will depend on the number of farmers who wish to hand over to the Local Body, or a Committee of Owners.¹

1. 'General Meeting of Units Held at Ngahina Pa, Ruatoki, 8 April 1959' (David Alexander, comp, supporting papers to 'The Land Development Schemes of the Urewera Inquiry District', 7 vols, various dates (doc A74(d)), vol 4, p 1155)

any, legal authority to collect the charges.¹³⁷ At a meeting of unit occupiers in April 1959, officials told those present that it would take another seven years to pay off the water scheme's debt, after which 'farmers' could decide whether to transfer it to a committee of owners or to the council. This was in response to a reminder from Tui Tawera that they had been promised in 1950 that the Government would not hand over their water supply to the council.¹³⁸ Dr Gould pointed out that section 8 of the Maori Purposes Act 1943 enabled such assets to be put into a trust for community management.¹³⁹

At the same time, officials started work to enable the severance of the water scheme from the development scheme. They called for a survey of Ruatoki titles so that the water scheme and its pipes could be surveyed (see above). This was the situation when the scheme broke down in 1960, requiring £2,000 worth of repairs. The Maori Affairs Act 1953 was amended in 1960¹⁴⁰ to enable the Board of Maori Affairs to separate water schemes from the rest of the development schemes' accounts, and to declare a water supply area in which it could levy owners for

137. EW Williams, assistant district officer, 'Ruatoki water supply', 16 November 1960 (Brian Murton, comp, supporting papers to 'The Crown and the Peoples of Te Urewera, 1860–2000: The Economic and Social Experience of a People', various dates (doc H12(a)(JJ)), p 18); see also Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 1897.

138. 'Minutes of a General Meeting of Units Held at Ngahina Pa, Ruatoki, 8 April 1959' (David Alexander, comp, supporting papers to 'The Land Development Schemes of the Urewera Inquiry District', 7 vols, various dates (doc A74(d)), vol 4, pp 1153–1155)

139. Ashley Gould, 'Topic 32: Development Schemes' (commissioned research report, Wellington: Crown Law Office, 2005) (doc M6), p 23

140. Maori Purposes Act 1960, s 10 (which inserted section 371A in the Maori Affairs Act 1953)

contributions. Ruatoki was declared such an area in 1962, the scheme and its pipes were surveyed, and a separate account established.¹⁴¹ This solved the issue of whether the Crown's water charges were legal.¹⁴² The Ruatoki community, however, objected to what appeared to be new, high levies, asking the Crown to write off any remaining debt against the water scheme. The Government refused to do so.¹⁴³ Then, in 1963, the Local Government Commission, charged with examining the wider issue of rates in Te Urewera, recommended that the Maori Affairs Department should stop providing local authority-type services to development schemes, and that (among other things) the Ruatoki water supply be transferred to the district council.¹⁴⁴

At this time, however, the council did not want to take over a scheme on which it would have to pay a large debt. Negotiations ensued between the Crown and the council, and were nearing completion when the scheme broke down again in 1964, requiring smaller-scale repairs than in 1960. The council agreed to take over the scheme so long as it was first repaired by the Crown, and this arrangement was formalised in 1965. The council took over a debt of £2,312, which – because the Government refused to write it off – the council had repaid with interest by 1975. This was no sooner done than serious concerns about water quality emerged, resulting in a lengthy battle over whether an entirely new water scheme was needed.¹⁴⁵

19.4.3 The claim

According to the Wai 761 claimants: 'In breach of Te Tiriti, the Crown failed to actively protect the Claimants' ownership interest in the Ruatoki water scheme by allowing the local Council to administer the Ruatoki water supply scheme as a de facto owner.'¹⁴⁶ Individual owners and occupiers supplied the land on which the scheme was built, and were paying for the cost of its construction and maintenance. In 1959, officials assured them that they would have the choice of retaining control of the scheme in their own hands or transferring it to the council, once it was paid off. Despite that assurance, however, the scheme was then handed over to the council without their consent.¹⁴⁷

19.4.4 The Crown's response to the claim

The Crown accepted the facts as outlined in the evidence of David Alexander. It also accepted the claimants' contention that the owners had received an assurance

141. Alexander, 'Land Development Schemes' (doc A74), pp152–162; Oliver, 'Ruatoki' (doc A6), pp185–186

142. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p1898

143. *Ibid*, p1899

144. Tom Bennion, 'The History of Rating in Te Urewera' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A130), pp 85–91

145. Alexander, 'Land Development Schemes' (doc A74), p156; Oliver, 'Ruatoki' (doc A6), pp186–187

146. Counsel for Te Mahurehure, statement of claim (claim 1.2.9, soc 9), p35

147. *Ibid*, pp 35–38

that they would decide the ultimate fate of the scheme.¹⁴⁸ In the Crown's submission: 'The evidence is unclear as to why this did not happen.'¹⁴⁹ The likely explanation, we were told, is that the Government perceived that maintaining the problematic scheme was simply beyond the means of the owners and therefore had to be assumed by another authority – in this case, the local council.¹⁵⁰

19.4.5 Did the claimants lose ownership or control of the scheme and if so why?

The Crown has accepted the facts as set out in the claimants' historical evidence, and has also accepted the claimants' allegation that they were not allowed to make the decision, even though this had been promised by officials. It must be remembered that, before 1960, it appeared that the scheme belonged to the owners; they had paid off most of it and were repaying the remainder. All scheme improvements were supposed to belong to either the owners or the unit occupiers, not to the Crown. By 1959, the evidence shows that the Crown was looking to divest itself of all its responsibilities in the Ruatoki development scheme (see chapter 18). This clearly included the water scheme. Also, it is evident that officials thought it possible that control of the scheme could be returned to the owners if they wanted it, once the debt was paid off. Over a 20-year period, they had repaid about two-thirds of the Crown's capital investment in the scheme, with interest.¹⁵¹

Nonetheless, for unknown reasons (presumably because the owners would not have agreed), the decision was taken out of their hands when the Government became determined to transfer the scheme to the local council. Why did it make that decision? We have no explicit evidence, other than its clear desire to disengage from work that was increasingly seen as the responsibility of local authorities, and as peripheral to its core development work. Crown counsel speculated that the explanation lay in the prospect of it being obviously beyond the ability of the community to pay for the upkeep of a scheme which was admittedly difficult to maintain.¹⁵² Counsel relied on Dr Gould's surmise: 'It would appear that the Department was in this case considering the capacity of the local community to pay for the major up-grading of the scheme which was anticipated in the short term, and meeting the ongoing costs of maintenance.'¹⁵³ That may be so. In our view, however, and in the view of both owners and officials in 1959, that was not the Crown's decision to make. In any case, councils – no less than the Crown – expected to recover their costs from users through rates and special charges.

The question of whether the Crown *owned* the scheme, such that it could lawfully transfer ownership unilaterally to another, is harder to establish. According to the claimants, 'de facto' ownership was passed to the council in the 1960s.¹⁵⁴ While

148. Crown counsel, closing submissions (doc N20), topic 32, pp 16–17

149. Ibid, p 17

150. Ibid

151. The Crown's investment in the scheme in 1939–40 amounted to £9,300. By 1960, roughly £2,809 remained to be paid: see Oliver, 'Ruatoki' (doc A6), p 185.

152. Crown counsel, closing submissions (doc N20), topic 32, p 17

153. Gould, 'Development Schemes' (doc M6), p 23

154. Counsel for Te Mahurehure, statement of claim (SOC 9, claim 1.2.9), p 35

Mr Oliver had located the formal agreement reached between the Crown and the council, signed on 23 May 1965, and which Mr Alexander had not found, we were not supplied with a copy.¹⁵⁵ The transfer of water schemes to local authorities was authorised under section 371A of the Maori Affairs Act 1953 (as inserted in 1960). While that Act regularised Government charges in a ‘water area’, it also provided that the Board of Maori Affairs ‘may’ construct or purchase a waterworks for any land subject to the development schemes part of the 1953 Act.¹⁵⁶ Under the Act, the board could then ‘dispose’ of such waterworks to local authorities or Government departments. It was specified that

[n]otwithstanding anything to the contrary in any Act or rule of law, any waterworks constructed or purchased by the Board under this section shall remain the property of the Board or, as the case may be, of the local authority or Department of State for the time being entitled thereto under any disposal thereof under this section or under any subsequent disposal, and may be at any time removed by the Board or any other owner without liability for payment of compensation to the owner of the land on which the waterworks are erected or to any other person, notwithstanding that the waterworks may have been so attached to the land as to form part thereof.¹⁵⁷

The Ruatoki waterworks were built long before the passage of the 1953 Act, let alone the 1960 amendment, and the debt to the Crown was mostly paid off by 1962 when Ruatoki was declared a water area. The board had neither constructed the waterworks under this Act, nor purchased them from owners, although it had made the initial outlay and paid for repairs since the late 1930s (the cost of which it was recovering). So, who owned the waterworks before the 1960 amendment, and did that amendment of itself change the ownership or apply in such a way that the ownership was vested in the board? Dr Gould suggested:

My own view is that there is room for considering the perspective of the owners of the [development] scheme who may reasonably have thought that by paying an annual maintenance and capital recovery fee for the water scheme and having seen it listed in the scheme accounts as an asset, that it was an asset of the scheme. Perhaps it was?¹⁵⁸

We did not receive legal submissions about the ownership status of the Ruatoki water scheme. The Wai 761 claimants, in their statement of claim, suggested that the council had become the ‘de facto owner’.¹⁵⁹ As we see it, legal ownership was also thought to have been transferred in 1965, but it does not appear to us that the 1953 Act had retrospectively made the board the owner of the waterworks.

155. See Oliver, ‘Ruatoki’ (doc A6), p186; Oliver, supporting papers to ‘Ruatoki’ (doc A6(a)).

156. Maori Affairs Act 1953, s 371A

157. Ibid, s 371A(10); Maori Purposes Act 1960, s10

158. Gould, ‘Development Schemes’ (doc M6), p 23

159. Counsel for Te Mahurehure, statement of claim (claim 1.2.9, sOC 9), p35

In effect, the board had made loans that the owners were repaying; the board could hardly claim ownership (or sole ownership) on the basis of construction many years earlier, when it had already been repaid two-thirds of the costs (with interest). As for purchasing, if anyone had purchased the waterworks it was the Ruatoki farmers, who had by then paid for the majority of it. Before the 1960 amendment, all improvements were supposed to end up the property of either the owners or the unit occupiers. As we see it, the board may not have acted lawfully when it purported to transfer ownership to the council unilaterally. But what is more crucial to the mana and tino rangatiratanga of the claimants is that, irrespective of ownership, absolute control was also transferred to the council in 1965. We turn next to consider these matters in Treaty terms and make our findings.

19.4.6 Treaty analysis and findings

The Crown's view is that the scheme was probably transferred to the council because it was beyond the ability of the owners to afford its maintenance. That may well be the case, but we do not consider – in the circumstances of the history of Ruatoki and of its development scheme – that this was the Crown's decision to make. Nor do we consider that there was any justification for breaching the undertaking made in 1959 that the owners would decide the fate of the scheme, whether to manage it themselves or transfer control to the council. Circumstances may have changed with the major breakdown of the scheme in 1960, but not in such a way as to change whose decision it was, or to empower the Crown to make that decision unilaterally. The Crown has accepted that it broke this undertaking, and is unable to explain why it did so. In our view, this is tantamount to an admission that it failed actively to protect the owners' rights and the tino rangatiratanga of the Ruatoki community, when it transferred control unilaterally in 1965. We agree. The Treaty has thus been breached, regardless of whether the Crown acted lawfully when it transferred the scheme to the council in 1965. We therefore put the question of legality to one side, since it was not argued before us and we do not need to determine that question in order to determine whether a Treaty breach has taken place.

The prejudice is clear: once the decision was taken out of the hands of the owners, and the Crown unilaterally transferred the scheme to the council, the claimants were not in a position to control the water scheme. Lengthy battles ensued over water quality, the management and maintenance of the scheme, and – ultimately – the building of a new scheme.¹⁶⁰ Steven Oliver noted that concerns about water quality were raised in the 1970s and the 1980s.¹⁶¹ Since 1970, the water supply has been officially classified as only fit for stock.¹⁶² By the late 1980s, Ruatoki

160. Oliver, 'Ruatoki' (doc A6), pp 186–187; Keepa, brief of evidence (doc J25), pp 8–13; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1901–1913

161. Oliver, 'Ruatoki' (doc A6), pp 186–187

162. Housing Corporation of New Zealand, 'Ruatoki Housing', October 2000 (Awhina Rangiaho, comp, appendices to brief of evidence, various dates (doc J15(b)), p 5)

residents were complaining about water pollution, and new home owners ‘were no longer being connected to the water supply but were installing water bores.’¹⁶³

In his evidence for the claimants, Pita Keepa explained what happened next. The council proposed to establish a new water supply ‘because they said the old one was broken down and a health risk.’¹⁶⁴ The Ruatoki community formed a committee to represent them in the consultation that followed, which involved ‘meetings all over Ruatoki.’¹⁶⁵ Some supported and others opposed the council’s proposals, but ultimately the community agreed.¹⁶⁶ According to Mr Keepa, one unforeseen result was a \$2,500 connection fee charged to every household, which had to be paid upfront.¹⁶⁷ Although the Ministry of Health subsidised 40 per cent of the scheme, and the council a further 10 per cent, Ruatoki households were expected to pay half of its costs, through rates, water fees, and the connection fee.¹⁶⁸ Professor Murton commented: ‘There was discussion about these costs at a number of meetings, but for many in the community it was a shock when they found out in 1990 how costly it would be to be connected to the new system.’¹⁶⁹ The result was that some Ruatoki residents, who could not afford to pay this charge, tried to resurrect the old water supply. When this was unsuccessful (Mr Keepa suspected sabotage, and the council did in fact try to ‘dismantle’ it), some had to resort to using the river for both household and farming needs.¹⁷⁰ For a detailed account of these events, and the ombudsman’s inquiry into the complaints of Ruatoki owners, we refer readers to the evidence of Professor Brian Murton.¹⁷¹

A Housing Corporation of New Zealand report in 2000 noted that the majority of Ruatoki homes were still not connected to the new supply after a decade, because it was simply unaffordable. These households depended on shallow bore holes, rain water tanks, backyard wells, or pipes from springs or reservoirs in the hills (the old water system). Failed sewage pipes, septic tanks, and run-off meant that all such households were using contaminated water.¹⁷² The council was unwilling to abandon its user-pays-upfront policy, some of which was being used to fund connection costs and the building of a new reservoir tank.¹⁷³ The Housing Corporation report suggested that Government intervention of some kind was

163. Oliver, ‘Ruatoki’ (doc A6), p 187; see also Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), pp 1901–1903

164. Keepa, brief of evidence (doc J25), p 8

165. *Ibid*

166. *Ibid*, pp 8–9

167. *Ibid*, p 9

168. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), p 1913

169. *Ibid*

170. Keepa, brief of evidence (doc J25), pp 9–11; Housing Corporation of New Zealand, ‘Ruatoki Housing’, October 2000 (Rangiaho, appendices to brief of evidence (doc J15(b)), p 5)

171. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), pp 1894–1913; for the chief ombudsman’s report, see Murton, supporting papers to ‘The Crown and the Peoples of Te Urewera’ (doc H12(a)(JJ)), pp 38–71.

172. Housing Corporation of New Zealand, ‘Ruatoki Housing’, October 2000 (Rangiaho, appendices to brief of evidence (doc J15(b)), pp 5–6)

173. *Ibid*, p 6

necessary to assist Ruatoki residents to obtain access to clean water. It also suggested that a means be found for the community to buy back and manage its water supply, 'a source of major irritation with the Ruatoki residents', otherwise disputes with the council would be ongoing.¹⁷⁴ The chief ombudsman, too, had recommended that perhaps the Tuhoe trust board could buy and run the scheme for the local community. In his view, this could 'provide a culturally sensitive control authority with greater flexibility than the Council had under the law', as well as an authority more willing to help those who could not afford to pay.¹⁷⁵ In Mr Keepa's evidence, the trust board was approached by the claimants but was unable to meet their request.¹⁷⁶

The very fact that the owners and the council were in this difficult and fraught position, of course, is a prejudicial effect of the Crown's transfer of the water supply to the council without the owners' agreement in 1965, and is in breach of the Treaty. This painful situation, in which the majority of Ruatoki residents had no access to clean water for many years, could have been avoided – although, we accept, Government assistance would still have been required in the maintenance or upgrading of the water supply, if it had been controlled and managed by the community of owners.

According to Pita Keepa's evidence, as the dispute with the council dragged on past 2000, the Government did intervene and agree to pay the owners' connection fees so that they could start using the new water supply. Keepa admits that this was a generally acceptable solution, although there was still interest in establishing a community-controlled alternative water supply.¹⁷⁷ We have no technical evidence on this point, and Mr Keepa was uncertain whether payment of connection fees was a free grant or to be recovered in some way.¹⁷⁸

While we do not have evidence from the council or legal submissions about these events, failure to secure control of the water supply in the 1960s has clearly had long-term prejudicial consequences for the Ruatoki claimant community.

19.5 TE WHAITI NUI-A-TOI FORESTRY LEASE

19.5.1 Introduction

Ngati Whare have a specific grievance about the terms of the lease under which much of their land was made available to the Crown for exotic forestry in the 1970s. In common with other groups who retained marginal land in multiple (individual) titles, Ngati Whare had found it almost impossible to develop Te Whaiti lands without assistance from the Crown. After much debate over many years, the Government and the owners finally agreed that the land was more suited to development for forestry than farming. Titles were therefore amalgamated

174. *Ibid*, p 10

175. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1912–1913

176. Keepa, brief of evidence (doc J25), p 11

177. *Ibid*, pp 11–13

178. *Ibid*, p 11

and the new Te Whaiti-nui-a-Toi block was vested in the Maori Trustee in 1974, assisted by six advisory trustees drawn from among the community of owners. The Maori Trustee then negotiated a very unusual lease with the Forest Service. Instead of paying rent based on the capital value of the land (with regular reviews) or stumpage from the milling of trees, or some combination of the two, the lease provided for the Crown to pay rent tied to rises in the Consumer Price Index. It did not allow for any review of the base amount of the rent.

According to the claimants, this deal was disastrous for them and, from 1994, resulted in much lower rents than they should have received. The Crown, while agreeing that the results were unfavourable to the claimants, suggested that the lease was a purely commercial venture and one that it was willing to renegotiate on that basis so long as other changes sought by the Crown were also incorporated. While the renegotiation of the lease was finally completed in 2007, after the end of our hearings, the parties agreed that the Tribunal should still report on the claim and requested us to do so, but that we should not make any recommendations. Accordingly, we set out the evidence and issues in this section of the Specific Claims chapter and make our findings at the end of it.

19.5.2 Context

19.5.2.1 A dramatic change in forestry policy in the 1960s

There are two major contexts for the Te Whaiti Nui-a-Toi lease claim. The first is a fairly dramatic change in Government policy relating to exotic forestry in the 1960s. Towards the end of the 1950s, an export market was established for exotic timber, which revived the Crown's flagging interest in promoting this industry. Also, the Government understood that there could be an internal timber deficit by the mid-1970s. As a result, there was a second 'planting boom' in the 1960s, which involved afforesting marginal Crown land and encouraging similar development of private land. The Forest Service became keen to lease private land for forestry. From 1965, there was a major Government initiative to persuade Maori to lease their land to the Crown for that purpose.¹⁷⁹

This interest in developing marginal or recently cleared land for forestry coincided with a new push for the social and economic development of rural Maori communities. As we saw in chapter 18, the 1960 Hunn report recommended bringing large areas of marginal Maori land into new farm development schemes each year. From 1962 onwards, however, there was a reorientation in the Maori Affairs Department towards forestry instead of farming on the really marginal lands, with the aim of increasing employment for rural Maori, generating revenue for owners and the State, and allaying the pressure to alienate this 'idle' land. This tendency was encouraged by the Prichard-Waetford report in 1965, which recommended some 400,000 acres of Maori land in the North Island be developed for forestry.¹⁸⁰

179. Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003), pp 44–48

180. *Ibid*, pp 33–48

These developments dovetailed with the second major context for the Te Whaiti Nui-a-Toi claim: from the 1930s, the Ngati Whare owners had been trying to get Government assistance for a Maori land development scheme on their Te Whaiti lands. We set out their efforts and the Crown's responses in some detail here, and show how the idea eventually arose that development assistance should take the form of a forestry lease instead of a farm development scheme, because it is vital context to the issue of whether or not the lease was, as the Crown argued, a purely commercial arrangement between the Maori owners and the Crown.

19.5.2.2 *The long history of Ngati Whare and Crown efforts to secure land development at Te Whaiti*

In 1928, Te Whaiti was suggested as a suitable spot for a dairy factory by the Ruatahuna rangatira Te Whenuanui III. At the time, the farm economy at Te Whaiti was, according to the evidence collected by John Hutton and Klaus Neumann, a largely subsistence one.¹⁸¹ During the 1930s, it was the Crown which took the lead in proposing development, as the UCS had given it a large area of cleared but otherwise undeveloped land in the Whirinaki Valley, between Te Whaiti and Minginui. Officials recommended exchanging Crown farmland for Maori-owned forest along the roadside between Te Whaiti and Waikaremoana, and developing the extensive flat, fertile areas that the Government had acquired, along with neighbouring Maori land at Te Whaiti at the same time.¹⁸²

The people of Te Whaiti, who would have been shielded from the worst effects of the Depression by employment in the timber mills and on road construction, did not have the same immediate need for Crown assistance as other Te Urewera communities, and thus they do not appear to have expressed any interest in land development until 1938.¹⁸³ At this time, the Crown was offering some of its open Whirinaki Valley land in exchange for the forest-covered Te Whaiti Residue B block, in order to prevent the owners of the latter agreeing to its being logged by Wilson Timber. In light of this offer, the owners narrowly voted against Wilson Timber's bid for cutting rights in March 1938. Shortly after the vote, William Bird Junior related to MJ Galvin of Lands and Survey that the owners 'were prepared to consider a suggestion to exchange the bush for land that could be developed in the Native Land Development Scheme'. In reply, Galvin observed that 'the Whirinaki land is very suitable for development. It is infested with ragwort but this can be overcome by proper farming methods.'¹⁸⁴ Although both the Crown and the block

181. See John Hutton and Klaus Neumann, 'Ngati Whare and the Crown, 1880-1999' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2001) (doc A28), pp 410-415.

182. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 418-420; Klaus Neumann, "'... That No Timber Whatsoever Be Removed': The Crown and the Reservation of Maori-Owned Indigenous Forests in the Urewera, 1889-2000" (commissioned research report, Wellington: Waitangi Tribunal, 2001) (doc A10), p 80

183. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 338, 343

184. Under-Secretary for Lands to Native Under-Secretary, 27 April 1938 (Neumann, "'... That No Timber Whatsoever Be Removed'" (doc A10), pp 81-82); Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 321-322

owners supported the proposed exchange of forested Maori land for open Crown land, the sequence of events leading up to an exchange was interrupted by the Second World War, and it never took place.¹⁸⁵

In the wake of the Second World War, the Native Department allowed the Forest Service to take the lead in terms of job creation and housing development in the Whirinaki Valley, through the establishment of the model Forest Service village on Crown land at Minginui.¹⁸⁶ However, during a meeting and subsequent hui in August 1949, the people of Te Whaiti asked Maori Affairs staff to revive the pre-war proposed land exchange, in order that they might develop land for farming. As Tame Taylor put it, ‘the Maori people of Te Whaiti had watched the people of Ruatahuna, Murupara and the surrounding districts being assisted by the Government in the development of their lands whereas the Ngatiwhare tribe and their lands were left “out in the manuka – a forgotten tribe”’.¹⁸⁷

In response, Maori Affairs staff investigated the possibilities of agricultural development at Te Whaiti in 1950 and 1951. Initially, they were fairly optimistic that good farms could be created if the area was ‘carefully developed, stocked and managed’,¹⁸⁸ but subsequent reports concluded that development at Te Whaiti was an uneconomic proposition. To a large extent, this conclusion was based on the relative isolation of Te Whaiti at the time, both from other schemes and from markets. The railhead had not yet reached Murupara, the cost of cartage was too high, and, as discussed in chapter 18, Crown involvement in other Te Urewera land development schemes was actually being wound down. Rotorua lands were seen as a better bet. Moreover, it was noted that the mills provided plenty of employment in the district, and there was scope for more jobs to be created once other ‘state enterprise work’ at Murupara had begun. Consequently, Maori Affairs decided that more accessible schemes involving larger areas in the vicinity of Rotorua had greater priority, and the development and land exchange proposals for Te Whaiti were again shelved.¹⁸⁹

Following the 1951 decision, there was a hiatus in development scheme proposals until 1963, when the land utilisation officer, RG Lockie, reported that he ‘would not hesitate to recommend development’ of an area of 1,528 acres at Te Whaiti.¹⁹⁰ This may have been prompted by the rejuvenation of the neighbouring Ruatahuna development scheme in 1962, or perhaps by the Whakatane County Council’s pressure on the Crown to lift rates exemptions for ‘idle’ Maori land.¹⁹¹ Whatever the case, nothing came of Lockie’s report, and it was not until May 1968

185. Neumann, “... That No Timber Whatsoever Be Removed” (doc A10), pp 82–83

186. See Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), pp 481–484, 496–498.

187. ‘Meeting of Members of Ngati Whare Tribe and Members of Previous Deputation at Waikotikoti Marae, Te Whaiti’, 31 August 1949 (Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), pp 421–422)

188. Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 425

189. *Ibid*, pp 424–427

190. *Ibid*, p 571

191. ‘Notes of a Deputation Held in Hon Mr Hanan’s Rooms’, 18 September 1962 (Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 569)

that the Crown again considered development options for Te Whaiti. At the time, the Maori Affairs Department was actively seeking more land to develop. The district officer, JH Barber, concluded that 'we might well be able to start with a substantial area of grassing if we could work up a project at Te Whaiti in a reasonable time'.¹⁹² It is not certain whether Ngati Whare owners would have supported a standard start-up for development schemes (see chapter 18). Several owners, for example, had approached Maori Affairs about assistance with establishing a farm on the Te Apu and Te Tuturi blocks. When told that it would be difficult to use development funds to establish a one-farm operation, they reportedly responded that they were 'not concerned with large-scale development and thought they would oppose any such move'.¹⁹³

In any case, there was a marked change in 1969 in the Department of Maori Affairs' view of future land use at Te Whaiti. Although Barber had still been convinced in April of that year that there was a golden opportunity to get grassing under way, only five months later he was declaring that '[t]he lands suitable for grass land development were so small in area as to be uneconomic to touch as a grass land development scheme'.¹⁹⁴ This change of heart followed his receipt of field reports, presumably echoing the findings of a National Resources Survey inspection, which found that four of the Maori blocks at Te Whaiti were too infertile or too readily eroded to maintain pastures.¹⁹⁵ From this time, therefore, Maori Affairs officials became advocates not of pastoral farming for Te Whaiti, but of exotic forestry. In this connection it should be noted that the Maori Affairs Amendment Act 1962 allowed Maori land to be utilised for forestry schemes, and by the late 1960s the Maori Affairs Department had already initiated several afforestation leases.¹⁹⁶ As we noted earlier, this was a major new development in the 1960s for marginal Maori land.

19.5.2.3 *Negotiation of a forestry deal and lease*

Maori Affairs officials approached the New Zealand Forest Service, asking it to put forward an afforestation proposal. A proposal was duly completed by the Forest Service in January 1971, which envisaged the lease of 10,726 acres for a period of 99 years. This included practically all of the Ngati Whare land not already occupied by existing farms, and some of the Ngati Manawa lands bordering Te Whaiti as well. In order to make the area under Forest Service control more compact,

192. Barber to J A Dye, special titles officer, Department of Maori Affairs, 28 May 1968 (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 571–572)

193. Note by J A Dye, 3 October 1968, appended to correspondence from P Reweti to A F Sutton, 26 September 1968 (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 573)

194. JH Barber, memorandum, 'Maori Lands, Presumably Idle: Te Whaiti Area', 19 September 1969 (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 575)

195. See Barber to Dr Allan North, 16 September 1969, 'Land Development in Te Whaiti Area', special file 45-153, Waiariki District Maori Land Court, Rotorua; ED Revington to registrar, Maori Land Court, 7 October 1971, 'Land Development in Te Whaiti Area', special file 45-153, Waiariki District Maori Land Court, Rotorua.

196. See Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 569–570.

an exchange of Crown land with part of the Te Whaiti Residue block was also envisaged.¹⁹⁷

The Ngati Whare landowners remained unaware of these developments. In mid-1971, the Maori Land Court received several applications for land to be leased or sold to pastoral farmers. The court ‘stood these applications down’. Its deputy registrar, HP Martin, anticipated that there would be an informal meeting of owners to consider some degree of title amalgamation.¹⁹⁸ When, however, ‘a number of owners spoke in favour of developing the land or part of it for sheep and cattle farming’ at this meeting in August 1971, Maori Land Court staff told them ‘quite clearly that there is no prospect of the Department of Maori Affairs providing the money for a development scheme in the area.’¹⁹⁹ Having ruled out farm development, which was the preference, the court staff found many of the owners ‘now favourably disposed towards the proposed amalgamation and afforestation lease’ when this option was put to them.²⁰⁰ Lockie’s suggestion that higher quality land could still be developed for farming in conjunction with partial afforestation was killed within the department, and not put to the owners.²⁰¹

Before the afforestation plan could proceed further, it needed approval from the Ministers of Forests and Finance, since the Crown would be committing Forest Service resources to the project. Also, the Ngati Whare owners had to formally authorise the use of their land for forestry purposes. The ministerial approvals came in early 1972.²⁰² In April 1972, Martin, on the court’s initiative, submitted an application for the title amalgamation of all the Ngati Whare unutilised lands; these were to be vested in a trust which was charged with using the lands to their best advantage. According to Hutton and Neumann, ‘Ngati Whare turned up in force’ at the hearing in late August 1972, with 100 people present. Over the course of the hearing, ‘a consensus among the land owners appears to have been built that afforestation was the most feasible and beneficial option.’²⁰³ This reflected the advice given to the owners that the prospects for farming were poor – it being observed that the Ngati Manawa Development Scheme was now floundering in debt – and the assurances of forestry job creation provided to the court by the

197. Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), pp 576–577; J Ure to registrar, Maori Land Court, 28 January 1971, ‘Land Development in Te Whaiti Area’, special file 45-153, Waiariki District Maori Land Court, Rotorua. For a full list of the areas that were to make up the 10,726 acres, see ‘Land Classification – Te Whaiti’ in ‘Land Development in Te Whaiti Area’, special file 45-153, Waiariki District Maori Land Court, Rotorua.

198. HP Martin to TT Puriri, Rotorua City Council, 14 May 1971 (Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), pp 578–579)

199. HP Martin to secretary, Bay of Plenty Catchment Commission, 30 September 1971 (Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 579)

200. HP Martin ‘Note for File’, 24 September 1971, ‘Land Development in Te Whaiti Area’, special file 45-153, Waiariki District Maori Land Court, Rotorua

201. Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), pp 579–580

202. See MA Craig, for Conservator of Forests, to registrar, Maori Land Court, 15 March 1972, ‘Land Development in Te Whaiti Area’, special file 45-153, Waiariki District Maori Land Court, Rotorua; secretary to Treasury to Minister of Finance, 14 February 1972, ‘Land Development in Te Whaiti Area’, special file 45-153, Waiariki District Maori Land Court, Rotorua

203. Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), pp 582–584

Forest Service's principal forester, Allan Leslie Rockell.²⁰⁴ Interestingly, given the different views of the Crown and the claimants as to the essential nature of the afforestation lease, Rockell's and Martin's description of the forestry plans as a 'scheme', and Rockell's commitment to the preferential employment of local people, suggests that the Crown was presenting the afforestation lease to Ngati Whare as something more akin to a development scheme.²⁰⁵ To this end, it is also worth noting Cecil Hood's evidence that additional plantings in the eastern Bay of Plenty were a low priority for the Forest Service at the time. In other words, there was no particular commercial imperative for the Forest Service to enter into this lease. Further, there was Martin's advice to the owners that they did not need independent legal representation at the hearing; the latter would be particularly surprising if Martin had believed that the Forest Service officials present were acting solely for the Crown's commercial interest.²⁰⁶

Further valuation work and surveying was required before the court's order could be carried out. The Ngati Whare owners present had resolved that marae and urupa should be left out of the amalgamated title, which then required surveyed partitions.²⁰⁷ While these preparations were going on, the Forest Service came up with a new forestry plan which involved leasing 5,686 acres, all of it Ngati Whare land, for 99 years. Subsequently, the owners also approached Caxton Paper Mills, who were looking for land on which to plant exotic forest. Accordingly, Caxton put in a counter-offer, which also proposed a 99-year lease, but with a higher annual rental, and a lower harvest royalty, than was offered by the Forest Service.²⁰⁸ The owners, therefore, were willing to consider a private deal rather than a long-term development relationship with the Crown and the Forest Service. Also, as Hutton and Neumann pointed out, some owners still preferred farm development if that had been on offer. The historians concluded that 'for Ngati Whare, afforestation was something of a Hobson's choice – the choice to take what was offered or nothing at all.'²⁰⁹

The amalgamation order was eventually granted by the Maori Land Court in January 1974, with the new 7,777-acre Te Whaiti Nui-a-Toi block being vested in the Maori Trustee in accordance with section 438 of the Maori Affairs Act 1953. Despite the interest from Caxton, the order also contained the supplementary instruction that 4,983 acres should be leased for afforestation purposes to the New Zealand Forest Service, if a suitable leasing offer was made. Further stipulations in

204. Rotorua Maori Land Court, minute book 164, 22 August 1972, fol 309; Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 584

205. Rotorua Maori Land Court, minute book 164, 23 August 1972, fol 319 (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 584). The term 'scheme' was also used by Martin in a letter to the Whakatane County Council (HP Martin to county clerk, Whakatane County Council, 25 August 1972, 'Land Development in Te Whaiti Area', special file 45-153, Waiariki District Maori Land Court, Rotorua).

206. John Cecil Murray Hood, brief of evidence, 23 June 2006 (doc M32(c)), pp 4-5; Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 582-583

207. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 584, 591

208. *Ibid.*, pp 586, 589-590

209. *Ibid.*, pp 584-585

regard to the anticipated afforestation lease included a maximum lease duration of 100 years, various conditions on the time frame, type and density of forest plantings, and a requirement that beneficial owners of the land residing within 17 miles of Te Whaiti be given priority in terms of employment. Six local advisory trustees were also appointed to assist the Maori Trustee in future afforestation lease negotiations.²¹⁰ We note that it was common at this time to use either a commercial body or the Maori Trustee as the responsible trustee, but with owners' input secured through the appointment of advisory trustees. Much then depended on the degree to which advisory trustees were consulted or heeded.

With the area intended to be afforested (that is, approximately 4,983 acres) already stipulated in the amalgamation order of 16 January 1974, this left two key elements in the Te Whaiti Nui-a-Toi afforestation lease to negotiate – the term of the lease, and the method for sharing any profit between the landowners and the Crown. The first was somewhat circumscribed by the need to synchronise the termination of the lease with the harvest rotation (one rotation for a *Pinus radiata* forest lasting about 30 to 35 years), and the requirement that the lease be no longer than 100 years. This meant it could only fit within one of three time brackets: 30 to 35 years, 60 to 70 years, or 90 to 100 years.²¹¹ How the income from the forest might be shared between the lessor (the Maori Trustee, acting on behalf of the beneficial owners) and the lessee (the New Zealand Forest Service) was almost entirely open to question. It could involve either the payment of an annual rental, a share of the profit from the final crop (referred to as a royalty or stumpage), or any combination between the two methods of payment.

In all of the Forest Service's proposals before 1974, the owners' share of the income was going to be paid almost entirely through stumpage. The method for calculating the stumpage was based on the so-called Grainger formula, which had been devised in 1965 in light of Forest Service concerns that predicting returns in 30 years time, when both harvest yields and future timber prices could only be guessed at, was too risky. The Grainger formula was intended to divide up the return on the basis of the lessor's and lessee's investment, with the lessor contributing the land, and the lessee the labour and capital to plant, maintain, and ultimately harvest the forest. Since the operational costs rose as the terrain became more difficult, the percentage going to the lessor was highest when the land was easiest to work, and vice versa. In general, Grainger predicted that the split should be around 20 per cent for the lessor and 80 per cent for the lessee.²¹²

210. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 591–592

211. The trees are ready for harvesting after about 25 years, but planting is staggered (over a 10-year period in the case of Te Whaiti Nui-a-Toi), so as to even out the labour requirement needed for forestry operations: see P W Herrick, file note: 'Te Whaiti Nui-a-Toi Leasing Proposal – costs, revenue and yields', 5 September 1974, BAHT 1466/490/b, Land Acquisition – Atlas Sheet 95, 9/2/95, Archives New Zealand, Auckland.

212. Peter John Gorman, brief of evidence on behalf of the Ministry of Agriculture and Forestry, 4 April 2005 (doc M16), pp 5–6

On this basis, when the Forest Service put forward the original plan encompassing both Ngati Manawa and Ngati Whare land in 1971, the rate of stumpage offered was 15 per cent, while the annual rental was a token five cents an acre. The proposed term of the lease, as noted above, was 99 years. When, in April 1973, the area was cut back to just Ngati Whare land, thereby reducing it to 5,686 acres, the annual rental offer stayed the same but the proposed share of stumpage was raised to 17.5 per cent.²¹³ The increase reflected a Forest Service assessment that this smaller area was more suitable for forestry.²¹⁴

The problem for the Ngati Whare owners, however, was that they were looking to obtain some income immediately (for marae repairs in particular), so they did not want to make do with the peppercorn rental of five cents an acre for the next 20 years. For this reason, the owners approached Caxton, who made a counter-offer of \$2,410 rental per annum initially, and then 13.3 per cent of the stumpage value from year 21 onwards.²¹⁵ As Arthur Meihana, later one of the advisory trustees, recalled, the Caxton offer was also unacceptable to the owners. They did not want to give away control of their land for the 99-year term that Caxton was proposing; presumably, the similarly long Forest Service offer would have been rejected on the same grounds. The Caxton offer was also rejected because the company would not guarantee employment of the owners, which the Forest Service was willing to do.²¹⁶

The Caxton counter-offer was the last proposal put before the owners before the court made its amalgamation order in 1974. After that, all new proposals were negotiated between the Forest Service and the Maori Trustee, assisted by the six advisory trustees.²¹⁷ For the staff of the Forest Service, an area-based rental or a share of stumpage were both seen as equally valid methods of payment.²¹⁸ Their offers in mid-1974 encompassed both options. One was essentially a modified version of previous offers, combining the pre-harvest peppercorn rental with a stumpage share of 14.8 per cent when harvesting began. In order to meet the shorter-term income requirements of the owners, they would be allowed to borrow up to \$500 a year, but subject to 6 per cent interest, to be repaid eventually

213. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 577, 586

214. This is evident if one compares the list of stumpage share values ascribed to the various blocks in 1971 ('Land Classification – Te Whaiti' in 'Land Development in Te Whaiti Area', special file 45-153, Waiariki District Maori Land Court, Rotorua) with the 1973 list ('Land Classification – Te Whaiti', attachment to rural district valuer to Conservator of Forests, Rotorua, 28 February 1973, BAHT 1466/490/b, Land Acquisition – Atlas Sheet 95, 9/2/95, Archives New Zealand, Auckland). By way of example, the entire Kaitangikaka block (1,365 acres) was included in the 1971 proposal, with the stumpage share for the lessor being calculated as 10.4 per cent but when in 1973 only 660 out of 1,365 acres were selected for afforestation, the calculated stumpage share rose to 17.3 per cent.

215. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 589–590, 593

216. *Ibid*, p 602

217. The six advisory trustees were James Anderson, Arthur Meihana, Akutina Waitohi, Te Au Nikora, Keruru Hune, and Te Kura Mihirangi Sampson: see Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 592.

218. See Gorman, brief of evidence (doc M16), pp 7–8.

from their share of the stumpage.²¹⁹ It should be noted that the 4,983 acres now set aside for afforestation included more hilly land than the previous Crown proposal, hence the reduced offer for stumpage.²²⁰

The Forest Service's other option was markedly different, as it included no stumpage. Instead, it entailed an annual rental equivalent to 6 per cent of the unimproved land value, which would be reviewed every five years. The percentage offered as rental was also to be subject to review as time went on. At the then current valuation, 6 per cent equated to a starting rental of \$9,792. From a comparative perspective, the first option was projected to earn the owners about 15 per cent more than the second over the first 40 years, but only if they did not borrow any money from the Crown.²²¹

By the time the Forest Service held a meeting with the advisory trustees at the end of August 1974, it is evident that a third option was also on the table. This retained the annual rental based on 6 per cent of land value, but provided for income sharing too; if the owners chose not to collect the rental, this would be considered as a contribution to the venture, which in turn would give the owners a share of the stumpage. Evidently, the Forest Service was also considering setting aside 2 per cent of its investment in the operation for the benefit of the owners.²²² As Hutton and Neumann have observed, however, the Crown's decision to compound the respective contributions at an interest rate of 10 per cent per year potentially put the owners at a significant disadvantage. Operations such as land clearing and planting for the first rotation would mean that the Forest Service's contribution would quickly build up at the start of the lease term, giving them the maximum benefit of the compounding interest; if in the meantime the cash-strapped owners drew on the rental, they would have no net contribution to compound.²²³

In November 1974, a formal proposal, along similar lines, was put to the Maori Trustee, although this had a reduced annual rental (only 5 per cent of land value,

219. IA Black to WJ Wendelken, 7 June 1974, BAHT 1466/490/b, Land Acquisition – Atlas Sheet 95, 9/2/95, Archives New Zealand, Auckland

220. Among the 4,983 acres were all 1,365 acres of the steep Kaitangikaka block, whereas the previous 5,686-acre forestry proposal only incorporated 660 acres of this block: see 'Schedule – Te Whaiti', 13 July 1973, BAHT 1466/490/b, Land Acquisition – Atlas Sheet 95, 9/2/95, Archives New Zealand, Auckland; 'Land Classification – Te Whaiti', attachment to rural district valuer to Conservator of Forests, Rotorua, 28 February 1973, BAHT 1466/490/b, Land Acquisition – Atlas Sheet 95, 9/2/95, Archives New Zealand, Auckland.

221. Black to Wendelken, 7 June 1974, BAHT 1466/490/b, Land Acquisition – Atlas Sheet 95, 9/2/95, Archives New Zealand, Auckland

222. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 595–596; John Hutton, second summary of 'Ngati Whare and the Crown, 1880–1999', August 2004 (doc G4), para 48. Hutton and Neumann gave a meeting date of 30 September, but it was actually on 30 August (see handwritten note by Black, appended to JJ Gartner to IA Black, 26 August 1974, BAHT 1466/490/b, Land Acquisition – Atlas Sheet 95, 9/2/95, Archives New Zealand, Auckland).

223. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 593–594. The 10 per cent interest rate was based on the assumed opportunity cost for Crown spending: RWM Williams for Director-General of Forests to IA Black, 3 July 1974, BAHT 1466/490/b, Land Acquisition – Atlas Sheet 95, 9/2/95, Archives New Zealand, Auckland.

or \$8,100 per annum), and the potential share of stumpage available to the owners had also shrunk to 12 per cent. There was also no mention of the 2 per cent investment in favour of the owners.²²⁴ We have no information as to why the Forest Service put forward a significantly less generous offer than initially contemplated. The proposed lease term, meanwhile, was 68 years (that is, two rotations). While the Forest Service representative had noted in the August meeting that there were single rotation leases elsewhere, he had stressed to the advisory trustees that these were not viable for Te Whaiti Nui-a-Toi due to the high costs of establishing operations in the area.²²⁵

At this stage of the negotiating process, the advisory trustees attended an annual general meeting of Ngati Whare owners in January 1975. Amongst other matters, the 80 or so owners present voted in favour of leasing their land to the Forest Service, subject to the advisory trustees having 'further discussion on the individual clauses before the lease [was] signed'. The result of this vote was then passed on to the Forest Service by the Maori Trustee. It was not until July 1975, however, that the Forest Service was ready to discuss its 'second draft' of the lease with the Maori Trustee. As a result of a meeting between JC (Cecil) Hood of the Forest Service and JE Cater, the Maori Trustee's district officer, in Rotorua, further changes were made to a final draft, which was ready by August 1975.²²⁶

This August 1975 version of the proposed afforestation lease differed from the November 1974 agreement in two key aspects. The first of these was the manner in which the lessor would be paid. In the new version, the option of profit-sharing through royalties had been removed, as had the concept of a rental payment based on the unimproved value of the land. Instead, the proposed rental, using the same initial sum as before (\$8,100), was to increase each year in line with the Consumer Price Index (CPI). The only exception to this was if the CPI fell, in which case the rent would stay at the previous level.²²⁷ This shift from a land value-based rental to CPI-based rental meant that the rental was tied, for the length of the lease, to a measure that reflected what was happening in the national economy, but did not necessarily reflect the changing value of the Te Whaiti Nui-a-Toi forest asset.

The second key change was in the duration of the lease. Rather than staying at two rotations (68 years), it was increased to three rotations (90 years). There was an allowance for the lessor and lessee to agree on changes to the management of the forest after the sixty-fifth year, since trees planted after this time would not

224. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 596–597. Also see MJ Hargreaves to J Ure and IA Black, 2 August 1974, BAHT 1466/490/b, Land Acquisition – Atlas Sheet 95, 9/2/95, Archives New Zealand, Auckland.

225. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 595, 597

226. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 600–603; 'Minutes of Meeting of Owners of Te Whaiti-Nui-A-Toi held at Murumurunga Marae, Te Whaiti, on Saturday 11 January 1975', 15 January 1975 (John Hutton and Klaus Neumann, comps, supporting papers to 'Ngati Whare and the Crown, 1880–1999', 2 vols, various dates (doc A28(b)), vol 2, p124); Hutton, second summary of 'Ngati Whare and the Crown' (doc G4), para 58

227. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 603–604; Gorman, brief of evidence (doc M16), p13

be ready for harvest (as mature trees) before the term of the lease expired.²²⁸ The claimants have not raised issues about this second change.

It should also be noted that a third key change was envisaged for a time, namely the removal of the provision allowing for preferential employment of Ngati Whare owners. The original version was taken out by the Forest Service, apparently owing to fears that it contravened the Race Relations Act, but after legal advice was sought, an alternative wording was composed which restored the intent of the original provision.²²⁹

The final draft was forwarded by the Maori Trustee to the advisory trustees for discussion at a meeting in October 1975. Only one of the six advisory trustees was able to attend, but the Maori Trustee in Rotorua assumed that as they did not respond negatively to the lease, they were happy for it to proceed.²³⁰ After some more minor amendments to provisions affecting other issues, such as the protections to be afforded to archaeological sites, and how to deal with uncut native timber on the forest blocks, final approval for the afforestation lease was obtained from a meeting of two of the advisory trustees with the Maori Trustee in Rotorua in March 1976. Three months later, on 28 July 1976, the Maori Trustee (acting on behalf of the Ngati Whare owners) signed the afforestation lease agreement with the New Zealand Forest Service.²³¹

19.5.3 The claim

The Te Whaiti Nui-a-Toi lease claim (Wai 1038) was filed in 2003 by the trustees of the block on behalf of its beneficial owners. The claimants argued that they represent a large sub-section of an iwi and exercise authority over Maori land on behalf of its owners, and thus have rights and protections under article 2 of the Treaty. The claim was supported by the Ngati Whare iwi, which characterised it as ‘ancillary’ to their main historical grievances. In essence, the Wai 1038 claimants’ position is that, in dealing with the owners of Te Whaiti-nui-a-Toi,²³² the Crown was in fact dealing with the Ngati Whare iwi (or a substantial part of the iwi) and its full Treaty obligations applied to its dealings with them.²³³

228. Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 603. The provisions for the review after 65 years were clauses E20 (a) and (b): see memorandum of lease of Te Whaiti-nui-a-Toi, 28 July 1976, pp11–12 (Guinness Gallagher Consultants, ‘Te Whaiti Nui a Toi Lease Rental Negotiation: Proposed Revised Rental’, prepared by Guinness Gallagher Consultants Ltd, November 1996 (doc A115), app 6.1).

229. JCM Hood to Maori Trustee, attention JE Cater, 15 July 1975, BAHT 1466/490/b, Land Acquisition – Atlas Sheet 95, 9/2/95, Archives New Zealand, Auckland; JCM Hood for Director-General of Forests to Maori Trustee, 23 July 1975, BAHT 1466/490/b, Land Acquisition – Atlas Sheet 95, 9/2/95, Archives New Zealand, Auckland

230. Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 606

231. *Ibid*, pp 608–611, 613

232. We have adopted the convention of using the official spelling of the block name, which we understand to be Te Whaiti-nui-a-Toi, when referring to the block. Otherwise, we have used the spelling preferred by the claimants: Te Whaiti Nui-a-Toi.

233. Counsel for Wai 1038 Te Whaiti-Nui-a-Toi claimants, closing submissions, 2 June 2005 (doc N11), pp 2–4, 10–11, 17–18, 23–25



Kaumātua Jack Ohlson (left) and anthropologist John Hutton, January 2001. Mr Ohlson was one of several trustees of the Te Whaiti Nui-a-Toi Trust who brought the claim on behalf of the owners of the block, and Mr Hutton provided historical evidence for Ngati Whare claims. The Te Whaiti Nui-a-Toi claimants contended that the lease negotiated by the Maori Trustee with the Forest Service led to much lower rents for the block than should have been the case.

The Crown's acquisition of most of Ngati Whare's land, its lengthy failure to give any kind of development assistance for their surviving Maori lands, and its reduction of Ngati Whare's options by 1970 to exotic forestry or nothing, are all seen as essential contributors to the claimants' principal grievance. The principal grievance is the negotiation of unfavourable terms in the forestry lease of 1976, without allowing the owners or their advisory trustees to have adequate input to the negotiations or the final decision. In the claimants' view, the arrangements between the New Zealand Forest Service and the Maori Trustee (on behalf of the collective owners of the Te Whaiti-nui-a-Toi block) could never have been a purely commercial matter. The Crown's Treaty duties required it actively to protect the owners' best interests in the use and development of their lands. At the time, the owners understood themselves to be entering into a long-term and beneficial relationship with the Crown. Although the Maori Trustee and the Maori Land Court were key players in these events, the lease was ultimately between the Treaty partners.²³⁴

234. Ibid, pp2-25

The key Treaty breach, in the claimants' view, was the Crown's failure to rectify the lease as soon as it became apparent – in 1996 at the latest – that the linking of rent to the CPI was no longer giving the owners a fair return. It was also from this point that the failure to include any kind of profit-sharing arrangements hit home. The Crown's ongoing failure to renegotiate this aspect of the lease, combined with its refusal to contemplate the lease as anything other than a commercial venture (and therefore not requiring compensation for past shortfalls in the rent), has resulted in significant social and economic prejudice. Although the Crown's witness, Mr Gorman, refused to accept the full amount that the claimants say they have lost, he nonetheless conceded that the loss has been significant and was ongoing.²³⁵

19.5.4 The Crown's response to the claim

Fundamentally, the Crown did not accept that the owners of Te Whaiti-nui-a-Toi were or are its Treaty partner, or that it has any obligations to them over and above the purely commercial obligations of a lessee: 'The Crown is entering into the [renegotiation of the] lease on the basis of good faith commercial negotiations. The duty the Crown owes to the Trustees in the negotiation of this lease is the same as it owes to any other citizens.'²³⁶

In the Crown's submission, therefore, anything in the original lease which appeared to be outside the realm of a normal commercial arrangement was included at the request of the owners, not at the initiative of the Crown.²³⁷

Nor did the Crown accept that any of its actions had breached the Treaty. In its view, the interests of the Maori owners were rightly looked after and protected by the Maori Trustee, whose actions were not Crown actions in terms of the Tribunal's jurisdiction. On the other side of the negotiations, the Forest Service entered into a purely commercial venture and was not responsible for protecting the owners' interests; that was the Maori Trustee's job. Both sets of negotiators were ultimately responsible to the 'supervisory jurisdiction' of the Maori Land Court, which had the task of approving the final lease.²³⁸ Nonetheless – even though it was not legally obliged to do so – the Crown did agree to renegotiate the rent in the 1990s when it became apparent that the CPI-indexed rental was 'out of step' with other forest land rents, which had been based on land values. Counsel conceded that the Crown had a number of reasons for renegotiating the lease, including its own desire to obtain concessions from the owners (a contraction of the period of the lease, and the introduction of a third party to manage the timber after the demise of the Forest Service).²³⁹

235. Counsel for Wai 1038 Te Whaiti-Nui-a-Toi claimants, closing submissions (doc N11), pp 29–34

236. Crown counsel, closing submissions (doc N20), topic 34, p 2

237. Ibid

238. Ibid, pp 2–7

239. Ibid, pp 2, 7, 11–12

Negotiations from 1996 to 2000 ‘stalled’. According to Crown counsel, the valuations relied on by the claimants were too exaggerated to be a proper basis for renegotiation of the rental.²⁴⁰

19.5.5 Was the lease seen as a purely commercial arrangement when it was negotiated?

According to the Crown, the Te Whaiti-nui-a-Toi forestry lease was always seen as a purely commercial arrangement between the Forest Service and a trustee for a set of landowners. As we have noted, counsel suggested that the Crown had no duty towards those landowners over and above the duties it owes to every citizen, to negotiate a good-faith deal and carry it out according to the agreed terms. That is the essential context for the Crown’s argument that the same situation persists today. It was not obliged to renegotiate the lease simply because the lessor was getting a worse deal than originally expected, any more than if the lease had been with – say – the Pakeha owners of a piece of land with whom it had a commercial arrangement. The claimants’ position, however, was that the lease must be seen in the context of the Ngati Whare iwi’s Treaty relationship with the Crown, and that all Maori owners of land have Treaty rights which require the Crown actively to protect their interests.

At the time of the negotiation of the lease, there had been a long history in which both the Crown and Maori had sought to develop ‘idle’ land for economic growth and the support and development of rural communities, including for Ngati Whare at Te Whaiti. We have already set out this history above as an essential context to the claim. The Maori Affairs Department, in particular, was concerned to see Maori land developed and rural Maori communities supplied with local employment. In essence, the Crown has suggested that the Forest Service did not share such an outlook. The protection of the owners’ interests, including opportunities for their social and economic development, was not the Forest Service’s job.

We disagree. In 1972, the Minister of Forests approved the afforestation proposal because it was designed to provide income and ‘employment opportunities’ for local Maori as well as because it was intended to bring ‘idle’ land into forestry production.²⁴¹ He noted:

The Forest Service has indicated that, *in the interests of the Maori owners as well as in its own interests*, it plans to follow a profit maximisation policy and that it will sell the wood from the forests under discussion on the best markets. The proposed division of the stumpage return is considered to be reasonable. [Emphasis added.]²⁴²

240. Ibid, pp 2, 8–11

241. Minister of Forests to Minister of Finance, 15 February 1972 (Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 581)

242. Ibid, pp 581–582

The Forest Service was committed to making arrangements that would ‘work out a fair and reasonable relationship’ between the respective investment of land (by its owners) and development resources (by the lessee).²⁴³ In doing so, the service explicitly accepted that Maori owners should not be separated from their land in the manner commonly required for ‘conventional’ leases, and that profit-sharing and the involvement of the owners in both management and preferential employment was a goal for such leases.²⁴⁴ The principal forester assured the owners personally that employees would be ‘drawn from those as close to [the] land as possible’, possibly 10 to 20 people from 1975.²⁴⁵ When this is placed in the context of the long negotiations over how to provide development assistance for the Te Whaiti community and lands, with the Government being the one to propose switching from farm development to forestry, and then actively persuading the Maori owners that this was their best course, we cannot accept that the Crown (including the Forest Service) saw the forestry deal as a purely commercial arrangement between just any lessee and lessor in 1976. While the Maori owners themselves were prepared to entertain the idea of a private arrangement with Caxton instead of the Crown (see above), this choice was taken away from them by order of the Maori Land Court, which required the Maori Trustee to enter into a lease with the Forest Service if suitable terms could be arranged.

In evidence filed by the Crown after the close of our hearings, J C Hood, who was in charge of such leases for the Forest Service at the time, confirmed that the Te Whaiti-nui-a-Toi lease was not seen as a purely or even primarily commercial venture for the Forest Service. In fact, it was quite the reverse. The Forest Service had ‘ample land within the Rotorua Conservancy for new planting and did not need to either purchase or lease land in the Te Whaiti area for further forest plantation.’²⁴⁶ The service, however, was encouraged by successive Governments to acquire land ‘which was at best marginally economic for forestry purposes alone, but provided significant employment opportunities for local people.’²⁴⁷ This was the motivation for forestry projects on much Maori land, including Te Whaiti: ‘Acquiring a lease of land in the Te Whaiti area was not a priority for the NZFS and was undertaken more as a means of helping the owners of the Maori land to get their land developed into a productive and revenue earning state.’²⁴⁸ Mr Hood’s evidence confirms that of other witnesses, who had described the long history of attempts to set up a land development scheme at Te Whaiti, and the reinvention of those efforts as a forestry scheme at the beginning of the 1970s.

243. New Zealand Forest Service, ‘Long Term Leases for Afforestation of Permanent State Forest Land’, March 1971 (Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 587)

244. Director, Forest Economics Division, ‘Draft Proposal for Leasing of Maori-Owned Land for Forestry’, 22 May 1975 (Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 593)

245. Rotorua Maori Land Court, minute book 164, 23 August 1972, fol 319 (Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 584)

246. Hood, brief of evidence (doc M32(c)), p 4

247. *Ibid*, p 5

248. *Ibid*

In light of this historical evidence, the Crown cannot legitimately claim that the lease was a purely commercial venture on its part in 1976. Officials and Ministers rightly considered the best interests of the Maori owners, for whose benefit the afforestation project was mostly intended, and sought to protect those interests at the same time as ensuring an economically viable project and a fair return for the Crown. Whether or not they succeeded is the next question.

19.5.6 Why was the rental linked to the CPI, and was this obviously disadvantageous to the claimants at the time? Did the owners agree to it?

19.5.6.1 Who was responsible for the CPI clause?

As we outlined above in describing the context of the claim, the rental was set on the basis of 5 per cent of the land value at the time (\$8,100), and then linked to rises in the Consumer Price Index instead of rises in the value of the land. There was no provision for a review of the base rental. These arrangements were unique to the Te Whaiti-nui-a-Toi lease. Claimant counsel submitted:

The CPI indexing, which is the fundamental flaw in the lease, was a novel concept at the time the lease was negotiated and it has proved to be an extremely damning one in terms of the financial benefit to be derived from the Ngati Whare landowners under the lease. Notwithstanding that there are later leases elsewhere that have included a CPI linking, the Te Whaiti Nui-a-Toi remains unique as the only known lease that has a CPI link but does not also include the essential safeguard of a regular review of the annual ground rental that is linked to the CPI or the balancing effect of a royalty or stumpage share payment to the lessor.²⁴⁹

At the time of our hearings, neither the claimants nor the Crown could explain the origins of this late-stage amendment to the proposed lease. John Hutton and Klaus Neumann theorised that it was inserted at the behest of the Forest Service.²⁵⁰ In evidence for the Crown, filed after the close of our hearings (and so not discussed above in our outline of the claimants' and Crown's positions), it was revealed that the idea came from Maori Land Court Judge Gillanders Scott.²⁵¹

JC Hood, who was in charge of land transactions at the Forest Service, recalled that Judge Gillanders Scott urged him to make the payment mechanism a CPI-based rental as early as 1973, during a visit to Rotorua.²⁵² On meeting again in mid-1975, the chief judge (as he had become)

emphatically stated that the lease that was being negotiated with the NZFS must be founded on an annual rental that must be revised annually on the basis of each year's CPI. He also stated that he would remind the Maori Trustee of this and would be

249. Counsel for Wai 1038 Te Whaiti-Nui-a-Toi claimants, closing submissions (doc N11), p 26

250. Ibid, p 20

251. Kenneth Gillanders Scott was a judge at the time he first suggested the CPI arrangement (1973) and became chief judge of the Maori Land Court in 1974.

252. Hood, brief of evidence (doc M32(c)), pp 7-8

keeping an eye on the lease negotiations and the lease that eventually was agreed between the Maori Trustee and the NZFS.²⁵³

Hood recalled that he was subsequently contacted by the Maori Trustee's district officer in Rotorua, J Cater, with the proposition that 'the rent for the lease of Te Whaiti Nui-a-Toi must be an annual rent revised each year on the basis of the movement in the CPI'.²⁵⁴ This accords with the comment in a letter by DM McPhail, the office solicitor, dated 28 August 1975, that 'the option for the trustees to convert the lease to a revenue sharing basis has been deleted . . . at the request of Mr Cater'.²⁵⁵ According to an earlier letter by McPhail, the CPI basis for the rental was 'a novelty proposal'.²⁵⁶ Indeed, its unfamiliarity caused some anxiety for the Maori Affairs Department, which sent a memorandum to the Forest Service stating that its use 'was a matter for some concern', and asking for provision for the adoption of alternative measures to be included in the lease.²⁵⁷ Similarly, Mr Hood notes that the Forest Service asked Treasury to advise it on what the future might hold for inflation, but was unable to get any firm predictions from it. Nonetheless, the service anticipated at the time that the Government might move to bring inflation 'under control',²⁵⁸ which – while good for the country – would be bad for the Maori owners of Te Whaiti-nui-a-Toi.

The judge seemed to have the whip hand over officials and the Maori Trustee because, as he implied to Mr Hood, the lease would eventually come before the court for final approval. The Forest Service and the Maori Trustee both acted on Gillanders Scott's advice, which technically he had no right to have given. Responsibility for the choice of the CPI-based rental must therefore be borne by the Maori Trustee and the Forest Service, even if they were acting on the advice of Chief Judge Gillanders Scott and, by extension, the Maori Land Court.

19.5.6.2 Did the owners or their advisory trustees agree to the CPI proposal?

As we outlined earlier, the Forest Service's formal proposal of November 1974 included a lease period of 68 years; an annual rental of \$8,100 (5 per cent of land value, to be reviewed every five years); and a potential share of stumpage if the owners chose to forego their rent.²⁵⁹

This proposal was put by the advisory trustees to an annual general meeting of owners in January 1975. According to Hutton and Neumann, the owners 'felt

253. Hood, brief of evidence (doc M32(c)), pp 11–12

254. *Ibid*, p 12

255. D McPhail to Maori Trustee, Rotorua, 28 August 1975 (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 605)

256. D McPhail to Maori Trustee, Rotorua, 18 July 1975 (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 603–604)

257. Department of Maori Affairs to director-general, New Zealand Forest Service, 11 August 1975 (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 605)

258. Hood, brief of evidence (doc M32(c)), p 12

259. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 595, 597

excluded from negotiations, but . . . they were not necessarily against them.²⁶⁰ The owners present at the meeting agreed to the lease, subject to the advisory trustees having ‘further discussion on the individual clauses before the lease [was] signed.’²⁶¹

The result of this vote was then passed on to the Forest Service by the Maori Trustee. In July 1975, the Forest Service put a ‘second draft’ of the lease to the Maori Trustee. As a result of a meeting between JC Hood of the New Zealand Forest Service and JE Cater, the Maori Trustee’s district officer, in Rotorua, further changes were made to a final draft, which was ready by August 1975.²⁶² From the evidence of Hutton and Neumann, it is unclear whether the advisory trustees attended the meeting between Hood and Cater in July 1975. If they did not, then they were only given a week between their receipt of draft copies and their scheduled meeting with Cater in October 1975. In our view, it was not reasonable to expect them to properly review the final draft of the lease in such a short period of time, since it contained key changes to the term (90 years) and payment mechanism (a CPI-linked rental with no profit sharing). As Hutton and Neumann noted, one of the advisory trustees (Akutina Waitohi) died in hospital only a few days after the meeting, so quite possibly the afforestation lease was not uppermost in the minds of some of the advisory trustees in the week that preceded the meeting. Only one of the trustees was able to attend this meeting.²⁶³

Having said this, Cater’s assumption that the advisory trustees were happy with the proposed lease arrangements was presumably correct. If they had not been, they would have been able to raise it with him between October 1975 and the meeting where final approval was given in March 1976. At that meeting, two advisory trustees were present and they agreed to the revised lease. Mr Hutton, however, noted that ‘Minutes of that meeting give no indication that the profit sharing or rental mechanisms of the lease were discussed.’²⁶⁴

We conclude that there was ample time for the advisory trustees to have informed and consulted the owners, or to have raised any objections themselves. Clearly, the annual general meeting had approved an arrangement for an immediate stream of rental income. What had changed (other than the term of the lease) was the basis on which the rent would be revised, and the exclusion of an option for profit sharing if the owners chose to forego their rent. From the historical evidence supplied by the claimants, it does not appear likely that the voluntary

260. *Ibid*, p 601

261. ‘Minutes of Meeting of Owners of Te Whaiti-Nui-A-Toi held at Murumurunga Marae, Te Whaiti, on Saturday 11 January 1975’, 15 January 1975 (Hutton and Neumann, supporting papers to ‘Ngati Whare and the Crown’ (doc A28(b)), p124); Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 601

262. ‘Minutes of meeting held with Mr JC Hood, NZFS, and Advisory Trustees in DO’s Office’, 2 July 1975 (Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), pp 600–603); Hutton, second summary of ‘Ngati Whare and the Crown’ (doc G4), para 58

263. Hutton, second summary of ‘Ngati Whare and the Crown’ (doc G4), paras 54, 63–64

264. *Ibid*, para 66

suspension of rent was a realistic option anyway in the economic circumstances of the Ngati Whare owners. Nor was it clear what would happen to land values, whereas inflation looked set to keep rising. No one, including the Crown, knew with certainty whether the CPI-based rental would be more or less favourable to the owners than the mixed rental–royalty agreement that they had considered in January 1975.

When the Minister of Forests visited Te Whaiti in 1977, a year after the lease was signed, some concerns were expressed by the owners, including a view that the rent was too low and that the lion's share of profit would go to the Crown.²⁶⁵ As we noted above, more generous arrangements had been suggested within Government at first, including a 6 per cent rental instead of 5 per cent, and also a reservation of 2 per cent of all profits for the owners. Officials decided to drop both of these more favourable suggestions.

Ultimately, the question here is whether the Maori Trustee should have had the power to sign the lease without giving the owners the opportunity to approve or decline it, rather than simply relying on the expressed consent of only two of the advisory trustees. While the Maori Trustee's decision is not directly subject to our review, we note here that legislation conferred upon him the power to make such decisions without recourse to the owners of the land. The Maori Trustee acted within the letter of the law – and, indeed, did not need the consent of the advisory trustees either. In response to questions from the Crown, Mr Gorman pointed out that the terms of the lease were reviewed and confirmed by the Maori Land Court.²⁶⁶ We were not supplied with evidence about the court's hearing, or whether the owners had an opportunity to object at that point.

19.5.6.3 Was the CPI clause obviously disadvantageous to the claimants at the time?

The claimants argued that the Maori Trustee failed to ensure that the lease was 'to the best advantage of Ngati Whare.'²⁶⁷ In their view, however, the main responsibility rested with the New Zealand Forest Service and the Government. In light of the Crown's Treaty obligations to Ngati Whare, the Te Whaiti Nui-a-Toi lease was not the occasion to experiment with an untried method of calculating rental payments. Counsel for the Wai 1038 claimants submitted:

this was an entirely inappropriate situation in which to impose the admittedly novel concept of a forestry lease based on unimproved ground rental linked solely to the CPI for a period of 90 years without provision for either review or some form of royalty payment.²⁶⁸

265. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 615–617

266. Peter Gorman, answers to questions in writing from the Crown, 6 May 2005 (doc M32), p 3

267. Counsel for Wai 1038 Te Whaiti-Nui-a-Toi claimants, closing submissions (doc N11), p 9

268. Ibid, p 18

As we have noted, the Crown conceded that there should have been provision for regular reviews of the baseline. As we have also described, there were doubts within the Forest Service and the Maori Affairs Department as to whether the CPI proposal was in the best interests of the Maori owners. Officials' uncertainty, however, did not outweigh the firm directive from Chief Judge Gillanders Scott, and the knowledge that the lease would ultimately come before the court for his approval.

As we see it, the CPI proposal was not so obviously faulty at the time that it was unreasonable for the Forest Service, the Maori Affairs Department, or the Maori Trustee to have put aside their doubts and accepted it. Our main reason for this conclusion is the consensus between claimants and the Crown that the rents did not fall behind comparable leases until the 1990s. Inflation rates were very high in the mid-1970s (between 15 and 20 per cent in 1975 and 1976), and as such it made sense to ensure that any payment method was inflation-protected. In the first decade of the lease, as Gorman has observed, the fixed basis of the rental did not greatly favour either party, as relatively high inflation rates during those years more or less matched the rising price of rural land. It is only since the early 1990s that the rental terms have worked out strongly in the Crown's favour.²⁶⁹ Also, it was clear in the 1970s that the owners needed a regular income stream from the start of the lease period, rather than waiting decades for their first royalty cheques. Further, the CPI-based rental removed any risk for the owners of the timber harvest being poor, through disease, fire, or some other disaster, and from a drop in export or domestic timber prices.

For all these reasons, the use of the CPI for annual adjustments of the rent was not to the disadvantage of the claimants at the time the lease was negotiated. More critical was the failure to provide for regular reviews of the baseline. The Crown has conceded this point: 'The Crown accepts that the failure to include a review clause was an omission.'²⁷⁰ In its defence, the Crown blamed the Maori Trustee for this omission, and pointed out that it was prepared to renegotiate the lease when the problem became apparent, even though not legally required to do so.²⁷¹ We turn to that issue next.

19.5.7 When the rentals fell 'out of step' with other forestry leases, was the Crown obliged to take action to correct the matter, and, if so, did it do so?

According to Mr Hood, the Minister of Forests expressed doubt about whether the Crown should proceed with the lease, just three months before it was signed in 1976. The Minister was reportedly concerned that the proposal might not be economic in terms of what it would cost the Forest Service, that the owners were not unanimous in their support of afforestation, that the Maori Trustee was not acting

269. See Gorman, brief of evidence (doc M16), pp 9–10, and the accompanying graph, fig 1.

270. Crown counsel, closing submissions (doc N20), topic 34, p 7

271. Ibid

with sufficiently independent advice, and whether there were ‘submerged issues relating to the lease negotiations that could later become an embarrassment to the Government.’²⁷² Officials assured the Minister that all his doubts were unfounded, and the deal proceeded.²⁷³ The CPI clause, however, did return to haunt those who had approved it in 1976.

At the end of the 1980s, the Crown moved to control inflation rates. Since the passage of the Reserve Bank of New Zealand Act in 1989, Parliament has set inflation targets for the Reserve Bank. In the same period, there was a rapid increase in land values. Such was the divergence between rural land prices and the inflation rate after 1994 that, in Mr Gorman’s evidence, the Consumer Price Index ceased to be a sensible measure on which to base the annual rental.²⁷⁴ There was nevertheless the potential for this problem with the lease mechanism to be quickly rectified, as the Crown also wanted to renegotiate the Te Whaiti Nui-a-Toi lease in the mid-1990s, so as to shorten its duration by one rotation (that is, about 30 years), and make the cutting rights transferable to a third party.²⁷⁵

It cannot be argued that the Crown should not have taken steps to combat inflation, so as to preserve the rental owing to the owners of Te Whaiti-nui-a-Toi. Nor did the claimants make such an argument. Instead, they argued that the Crown was obliged to fix the lease as soon as the problem became apparent. Counsel submitted:

the Crown was obliged to enter into good faith negotiations, unconstrained by strict commercial imperatives, to amend the offending aspects of the lease as soon as it became reasonably apparent that the continuation of the lease under its original terms was inequitable and was operating to the significant financial disadvantage of the Maori owners.²⁷⁶

In the claimants’ view, this obligation had arisen by 1996 ‘at the latest.’²⁷⁷

We cannot accept the claimants’ argument in its entirety. While the 1976 lease was never a purely (or even primarily) commercial deal, the Crown was still obliged to take ‘commercial imperatives’ into account. In any case, as the Crown submitted, it was in fact ‘prepared to renegotiate the terms of the lease with the Trustees when their concerns at the increase of land values were raised.’²⁷⁸ In effect, the Crown has accepted an obligation, even if it disputed the claimants’ argument as to the Treaty basis for that obligation. In our inquiry, the Crown tried to deny the existence of an obligation while yet explaining its willingness to renegotiate. Crown counsel submitted that Ngati Whare were ‘not entitled to compensation

272. Hood, brief of evidence (doc M32(c)), p 14

273. *Ibid*, pp 14–15

274. Gorman, brief of evidence (doc M16), p 10

275. Gorman, brief of evidence (doc M16), pp 18–19; Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 621

276. Counsel for Wai 1038 Te Whaiti-Nui-a-Toi claimants, closing submissions (doc N11), p 18

277. *Ibid*

278. Crown counsel, closing submissions (doc N20), topic 34, p 7

for accumulated financial loss' but that such compensation might eventuate from a negotiated adjustment of the lease.²⁷⁹ Also, while there was no 'requirement' for the lease to be modified, the Crown had 'accepted in 1996 that it was appropriate to seek to renegotiate the terms of the lease'.²⁸⁰ We see in this a determination to avoid formal liability while nonetheless settling the claim. We comment below on whether this is appropriate behaviour in a Treaty partner.

Here, we note that a renegotiation of the lease commenced in 1996 but had stalled by 2000. According to Mr Gorman, the negotiations began when the claimants approached the Crown in 1996 with valuations and a report from Guinness-Gallagher, requesting a revision of the rental.²⁸¹ But in the evidence of Anaru Te Amo, the chairperson of the trust, the question of renegotiating the lease was raised earlier by the Crown, because it wanted to get out of State forestry and to at least cut the duration of the lease.²⁸² Hutton and Neumann also thought that the initiative came from the Crown.²⁸³

In any case, the Crown commissioned its own valuations, followed by negotiations in 1998 and 1999. According to Mr Gorman:

Crown officials agreed to setting rent at a market level, provided that the term of the lease was shortened to one rotation and included a right of assignability to a competent and credit-worthy third party. The Trustees were generally agreeable with this proposal, but had reservations about the lack of compensation for past CPI based rent, and were reluctant to accept changing the lease term to one rotation and becoming a forest owner rather than a landlord. Negotiations then lapsed between 2000 and 2004.²⁸⁴

In other words, the negotiations foundered over the Crown's refusal to pay compensation for past low rents, and some reluctance on the part of the Maori owners to completely revise what they saw as their forestry partnership. As Mr Te Amo noted, the claimants were concerned about ending their partnership with the Crown in the afforestation project, but were also unsure as to whether – after the demise of the Forest Service – the partnership could continue in any case.²⁸⁵

In 2004, with our hearings under way, officials resumed negotiations with the trustees but these negotiations proved no more successful in the short term. At the time of making closing submissions in 2005, the claimants and Crown were still locked in a contest over estimates as to the market level of the rent and the relative extent of the owners' loss. We do not need to describe or comment on their evidence and submissions on this point, because the lease was in fact successfully

279. Ibid, p 11

280. Ibid

281. Gorman, brief of evidence (doc M16), pp 14–15; see also Anaru Te Amo, second brief of evidence, September 2004 (doc G38), p 7

282. Te Amo, second brief of evidence (doc G38), pp 6–7

283. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 621

284. Gorman, brief of evidence (doc M16), p 19

285. Te Amo, second brief of evidence (doc G38), pp 6–8

renegotiated in 2007. The claimants acknowledge that the 'terms of the revised lease represent a fair, commercially negotiated forestry lease for the Block and, as such, no further prejudice has accrued since the revised lease took effect'.²⁸⁶ As part of the revised terms, the rent was set at the figure of \$120,000 a year (plus GST), still linked to rises or falls in the CPI, but now to be reviewed every five years on the initiative of one or other of the parties.²⁸⁷

We were not provided with information as to how this level of rent was calculated, although we note that it was \$10,500 lower than the Crown's calculation of a fair annual rent back in 1995.²⁸⁸ The Crown paid the trustees a total of \$864,872 plus GST, which included one year's rent (backdated) and a payment for the first quarter of the current year. The remainder was a 'cash payment', which was presumably in compensation for past losses but could also be interpreted as an inducement for the trustees to agree to changes sought by the lessee, including a reduction of the term of the lease.²⁸⁹ In their brief submissions on the matter, neither party explained to us the purpose of the cash payment.

The Crown and claimants both acknowledge that the Wai 1038 claim will be settled by the deed of settlement, as enacted in settlement legislation for all Ngati Whare's historical claims. In the Crown's submission, there is 'no prejudice remaining'.²⁹⁰ Any matters to do with the 1976 lease were resolved by its renegotiation, including matters of 'prejudice and remedy'. The Crown added that all matters were now resolved 'by the 2009 lease revision and/or the settlement legislation'.²⁹¹ The claimants, on the other hand, deny that the prejudice suffered from unfair rentals from 1994 to 2006 has in fact been removed by the renegotiation of the lease. They are also concerned that the Crown continues to deny that its actions have breached the Treaty, or that the Treaty is in fact relevant to a purely commercial lease.²⁹²

The Ngati Whare Claims Settlement Act received the royal assent on 5 April 2012. We make no comment on it. We confine our attention to the renegotiation of the lease, which the Crown submits is not a Treaty settlement, and to the broader question of whether this lease is rightly to be considered as a purely commercial arrangement in which the Crown, according to its submissions, has no Treaty duties. We will return to this question in the following section. Here, we note that the claimants have not provided us with any information or arguments as to why the Crown's 2007 cash payment was insufficient to compensate them for pre-2006 inequities in the rent. We are not, therefore, in a position to comment on whether

286. Counsel for the Wai 1038 Ngati Whare claimants, memorandum, 30 November 2011 (paper 2.900), p 4

287. Deed of variation of lease, 17 July 2007 (attached to Crown counsel, memorandum, 10 July 2009 (paper 2.879))

288. Gorman, brief of evidence (doc M16), p18

289. Crown counsel, memorandum, 10 July 2009 (paper 2.879), pp1-2

290. Crown counsel, memorandum, 23 September 2011 (paper 2.897), p 1

291. *Ibid*

292. Counsel for the Wai 1038 Ngati Whare claimants (paper 2.900), pp 4-5

the claimants have in fact received adequate compensation. We note too that the parties are in agreement as to the effect of the lease: it is now a fair arrangement which will not cause any fresh prejudice.

19.5.8 Treaty analysis and findings

From the foregoing discussion, it will be clear that the afforestation project at Te Whaiti, and the lease which gave it legal form, was never a purely commercial venture on the part of the Crown. It was primarily an act of social policy aimed at developing the local Maori community both socially and economically, by providing them with an income and also with additional opportunities for forestry employment. It was the culmination of a long period (since the late 1930s) in which both Ngati Whare and the Crown had explored options for development assistance, especially a farm development scheme. The eventual 1976 lease had thus been a long time coming. In other words, this social policy initiative was both negotiated and agreed with the local Maori community; it began a development partnership focused on forestry, employment, and improvement of social and economic circumstances. While some still preferred the possibility of farming, the owners of Te Whaiti Nui-a-Toi as a collective had approved the afforestation project.

The Crown's evidence was quite clear that it neither needed nor wanted to develop Te Whaiti if forestry had been its concern. That did not mean, of course, that the Forest Service would enter into an uneconomic project that might result in losses for the Crown, but it did mean that profit (and even timber) was a secondary consideration for the Crown in 1976. What it wanted to do was assist Ngati Whare with the means of obtaining an income and employment. The historical evidence is also clear that the officials and Ministers involved, whether associated with the Maori Trustee, Maori Affairs, the Maori Land Court, or the Forest Service, wanted to protect and act in the best interests of the Maori owners. We cannot accept the Crown's argument that the owners' interests were left to the Maori Trustee, while the Forest Service represented the commercial interests of the Crown. That simply does not fit with the historical evidence.

While we accept the claimants' and Crown's evidence for the context of the lease (both of which disproved the suggestion that it was a purely commercial arrangement), we cannot accept the claimants' position that the terms of the lease were obviously to their disadvantage at the time they were negotiated. While officials had doubts about the wisdom of the CPI provision, it was not disadvantageous to the claimants until the early 1990s. The parties agree on that point. We do not consider, therefore, that there was any Crown failure or Treaty breach arising from the Forest Service and the Minister's acceptance of this clause in the lease. From our perspective, therefore, it makes no difference that the idea originated with Chief Judge Gillanders Scott, or that a Maori Land Court judge might be more responsible than any other for the inclusion of the CPI proposal in the lease. We are less convinced that the failure to include a review clause is excusable. The Crown conceded that this was an omission, and we do not accept that the Maori Trustee

(negotiating for the owners) was solely to blame for it. Indeed, this omission was so unusual that the valuers employed by the Crown in 1997 could not credit it and assumed that the deed must have included a review clause.²⁹³ We think that the Maori Affairs Department and the Forest Service ought to have ensured that such a standard arrangement was included in the lease, even if the Maori Trustee did not.

Was this omission a breach of the Treaty? We think not, although not for the reasons put forward by the Crown. Rather, this omission did not become a problem until the early 1990s. When the problem was pointed out by the claimants, the Crown agreed to renegotiate the lease. This was entirely reasonable behaviour by both parties to the afforestation agreement which, as we have said, was part of a wider Treaty relationship between Ngati Whare, intent on the development of their community and their lands, and the Crown. The renegotiation of the lease took a decade, with a long interruption of negotiations between 2000 and 2004. Here, we do attribute fault to the Crown. It took the view that this was a commercial negotiation, in which it owed no duty to the owners of Te Whaiti Nui-a-Toi other than to negotiate in good faith, as it would with any other citizens. The Crown could thus play hardball and saw no problem in Treaty terms if it refused compensation and if the owners continued to receive a very unfair rental in the meantime.

The Crown's actions in this respect were not consistent with Treaty principles. We accept the claimants' submission that in embarking on the afforestation project, executed by the lease, the Crown and Ngati Whare were acting as Treaty partners both in the social and economic development of the Ngati Whare community at Te Whaiti, and in protecting the interests of Ngati Whare in the use and enjoyment of their land. Thus, owners' access was preserved and wahi tapu were protected, while the land was developed for exotic forestry. It makes no difference in this respect that the owners did not comprise the entirety of the Ngati Whare iwi, or that the trust did not represent the whole iwi. The Crown cannot rely on its imposition of the native land laws to deny the Treaty rights of the Ngati Whare owners. Nor can it argue that an arrangement between the Crown and such a group of owners was somehow separate from or immune to the long history of the Treaty relationship between the Crown and Ngati Whare, and their Treaty obligations to one another.

We are disappointed that the Crown maintains this view of the lease today, despite renegotiating its terms, making a 'cash payment' to the trust, and negotiating a Treaty settlement with the Ngati Whare iwi. So long as the Crown continues to view this arrangement as a purely commercial one, and to act accordingly, the Crown will remain in breach of Treaty principles. Our finding in this respect should not be taken to apply to any and all deals or arrangements between groups of Maori owners and the Crown. We are concerned here with a very particular arrangement with its own long history. We encourage the Crown to examine the history of its arrangements with groups of Maori owners in the future, so that

293. Counsel for the Wai 1038 Te Whaiti Nui a Toi claimants, closing submissions (doc N11), p 20

it can ensure mistakes such as this one are not repeated for Ngati Whare or for others. The Crown cannot escape history and its consequences, any more than the claimants can. It may be that the idea of a forestry partnership is no longer appropriate after the withdrawal of the State from forestry, but the wider Treaty partnership must not be lost sight of in the relationship between the Crown and the Ngati Whare owners of Te Whaiti Nui-a-Toi.

Two further criticisms have been made of the 1976 lease. One concerns the quality of the owners' consent to its terms. As the claimants pointed out, only two of the advisory trustees approved the revised terms, while the wider community of owners had approved a lease at an annual general meeting, but not the actual terms as finalised in 1976. As we see it, the final terms of the lease should either have required the approval of a full meeting of the advisory trustees or the endorsement of a meeting of owners. The Maori Affairs Act 1953 and its amendments, which allowed the Maori Trustee to go ahead without either of these things happening, was in breach of the principles of the Treaty of Waitangi. On the other hand, we do not think that the owners suffered prejudice in this particular instance. There is no evidence to suggest that the majority of owners would have thought any differently to the two advisory trustees who had accepted the revised terms. The owners had already approved a forestry lease to the New Zealand Forest Service and very clearly wanted an immediate rental income, and no one – as we explained earlier – could have been sure whether the proposed CPI basis for adjusting that rental would prove fair in the long term. The lack of a revision clause, as we noted, was the key flaw. Also, the owners may have had an opportunity to voice concerns at the Maori Land Court hearing which approved the lease – we have no information on that point.

The second remaining criticism is that the terms of the lease could have been more generous in respect of profit sharing. The claimants noted that the base rental was originally to be calculated at 6 per cent but was reduced to 5 per cent, and that the proposal to share 2 per cent of the profits with the owners, regardless of whether any stumpage was due them, was also deleted. We agree that, in the circumstances of the time, the Crown chose to make a less generous offer than it had originally proposed. We also agree that some form of profit sharing would have been in keeping with the wider Treaty relationship and the Crown's social and economic objectives at the time. But, as noted, this was not a commercial deal for the Crown, and there was a question as to how profitable it would end up being for the Crown as lessee, so we do not think that this less generous offer was inconsistent with the Crown's Treaty duties to the Maori owners. The other means for profit sharing, if the owners chose to forego their rent and wait for stumpage payments, we think was impractical. In their particular economic circumstances, the owners could not afford to waive the rental payments. That is why the Maori Trustee, Chief Judge Gillanders Scott, and the advisory trustees all preferred a rental arrangement in the first place.

Ultimately, the forestry lease would have been a fair deal for Ngati Whare if a fair rent had been paid, and if the Crown had been mindful of its ongoing Treaty obligations to the claimants when the rental became obviously unfair in the 1990s.

19.6 CLAIMS ABOUT THE AMALGAMATION OF LAND TITLES IN 1972

19.6.1 Introduction

We have not received a comprehensive claim about post-UCS land title issues. In part, this is because many of the claimants in our inquiry, including the Wai 36 Tuhoe claimants and Ngati Whare, accepted that the mid- to late twentieth century policy of amalgamating titles and creating trusts was an acceptable solution to some of the problems created by earlier Crown actions. Ngati Whare, for example, did not take issue with the amalgamation of Te Whaiti titles into the Te Whaiti-nui-a-Toi block in 1974. Their complaint was about the UCS, and that amalgamation had been necessary despite or even because of consolidation (which rendered payment for the consolidation scheme in land even more egregious).²⁹⁴ Ngati Whare's historian, John Hutton, commented that this 1974 'amalgamation of titles was attractive to most Ngati Whare landowners' because 'it meant a re-unification of fractionated land interests in a kind of iwi Trust, an improvement on their situation at the time'.²⁹⁵

This was also how Tama Nikora saw matters in respect of the 1972 amalgamation of Te Urewera blocks in his evidence for the Wai 36 Tuhoe claimants.²⁹⁶ In that year, most of the surviving Maori land in Te Urewera (outside of the farm development schemes) was amalgamated into four titles: Te Manawa o Tuhoe; Te Pae o Tuhoe; Tuhoe Kaaku; and Tuhoe Tuawhenua. The Wai 36 Tuhoe claimants' grievance was not that this amalgamation was a bad solution to the many land and title problems facing them at the time, but that they should not have had to pay the expenses of fixing problems created by the UCS and the native title system.²⁹⁷

Other grievances about the amalgamation of Te Urewera titles in 1972, and the subsequent history of the Tuhoe Tuawhenua block, were raised with us by the Tuawhenua claimants. We also received claims from the Nga Rauru o Nga Potiki collective of Tuhoe claimants, but their concern was about the use of the Tuhoe-Waikaremoana Maori Trust Board as trustee for the amalgamated lands, rather than about the process of title amalgamation itself. Ngati Haka Patuheuheu, too, took exception to how their lands were vested in a body which they considered inappropriate because it was not a hapu body solely representative of them.

We begin by setting out the policy context and the historical background to the claims.

19.6.2 Context

19.6.2.1 Policy and law

In the Maori Affairs Act 1953, the National Government attempted to provide solutions for the many title problems afflicting Maori and their lands as a result of decades of Crown policies. With a growing population, equal succession of all

294. Counsel for Ngati Whare, closing submissions, 9 June 2005 (doc N16), p 84

295. Hutton, second summary of 'Ngati Whare and the Crown' (doc G4), para 40

296. See Tama Nikora, 'Te Urewera Lands and Title Improvement Schemes' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc G19), pp 64-65; Tamaroa Nikora, brief of evidence for 7th hearing week, 3 September 2004 (doc G8), pp 14-15.

297. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 66

children to each parent's interests, and a large-scale migration to the cities, the problems of absentee owners, fractionating titles, and fragmenting blocks grew worse. With each generation, more owners were entitled to ever-smaller fractions of a block, and some blocks – many of which were too small to begin with – were partitioned into ever-smaller fragments. By this time, it was clear that consolidation schemes were not the answer (or, at least, not the only answer).

From 1953 onwards, there was a strong official emphasis on encouraging the vesting of Maori land in trusts or incorporations, to provide a form of collective management. Also, where blocks were too small or fragmented to be of practical use to their ever-growing lists of owners, Maori could opt for amalgamation of titles as a solution. This involved abolishing the former titles and amalgamating blocks into larger entities, and then vesting them in trustees for more effective management and use. Individual owners retained a share relative to their original interest, which could be partitioned out if the Maori Land Court was convinced of the necessity to do so. Each share was based on the value of the original interest, with the court having discretion to use capital or unimproved values.²⁹⁸ This solution made Maori land administration larger-scale and less personal to resident owners. The Tuawhenua claim before this Tribunal reveals the degree to which resident communities could resent and oppose the interpolation of a distant management structure between them and their (former) entitlements (see below).

It is well known to this Tribunal that in the 1960s the Government took a more coercive approach to solving some of the problems of fractionation of titles and fragmentation of Maori land blocks. The Hunn report of 1960 identified how Maori clung to small shares in land, regardless of whether they were of any economic use, because they provided for the Maori relationship with their ancestral land and for each owner's sense of *turangawaewae*. It became Government policy that all Maori land must be retained in Maori ownership if possible (though not necessarily by its present owners), and that all Maori owners must be put in a position where they could use and benefit from their lands. Underlying this policy was a deeply held belief that all Maori land must be made productive in some way, so as to assist the growth of the New Zealand economy.²⁹⁹ Criticisms that much general land was also not being used effectively were ignored, and coercive solutions were confined to Maori.³⁰⁰

A second inquiry in the wake of the Hunn report, the Prichard–Waetford inquiry of 1965, found that Maori must be made to use their lands more effectively; they must be given the legal and administrative tools to do so, and they must be made to use them. The resultant Maori Affairs Amendment Act 1967 aroused large-scale Maori opposition, because it took away the choices of Maori

298. For an overview of laws and policies relevant to this section of chapter 19, see Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 740–795; see also Clementine Fraser, 'Amalgamation of Urewera Lands 1960–1980s' (commissioned research report, Wellington: Waitangi Tribunal, 2004) (doc F3), pp 7–14; Heather Bassett and Richard Kay, 'Ruatahuna: Land Ownership and Administration c 1896–1990' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A20), pp 271–276.

299. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 749–751, 752–762

300. Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), pp 15–18

owners in many circumstances. Most notoriously, Maori shares worth \$50 or less were deemed uneconomic, and were to be identified at the time of succession or other title changes and then vested compulsorily in the Maori Trustee. This was symptomatic of much of the Government's approach to Maori land and title issues in the late 1960s.³⁰¹ At issue in this inquiry, however, are this Act's provisions for the amalgamation of titles and the vesting of amalgamated lands in trustees. As will be apparent from the previous section, in which we discussed the vesting of Te Whaiti-nui-a-Toi in the Maori Trustee in 1974, the system of trustees continued much the same after 1967. The court could appoint advisory trustees (usually selected by the owners) but the responsible trustee was normally either the Maori Trustee or a commercial entity such as the New Zealand Insurance Company. Owners had little choice in this regard.

In terms of amalgamation, the 1967 Act provided for title improvement officers who would proactively investigate whether Maori land was too fragmented or its titles too fractionated for efficient use. In such cases, the improvement officers were required to consult the owners (as far as was 'conveniently practicable') and then the registrar could apply to the court for amalgamation of the titles into more usable blocks. The court was required to satisfy itself that the land could be used more effectively in an amalgamated form, and was then empowered to order the amalgamation regardless of the wishes of the owners.³⁰² Indeed, the court was empowered to amalgamate the titles even if the owners actively disagreed, so long as the court was satisfied that any objector would not 'suffer an immediate diminution of the value of his interests in the land' or (if in occupation) 'suffer substantial hardship.'³⁰³ At the same time, however, owners themselves could still apply for amalgamation of titles under the original 1953 provisions, as amended by the 1967 Act.³⁰⁴ But the law was very specific that owners had no rights of veto; it was only if the land had been dealt with by way of a lease or mortgage or some other form of alienation that consent was required – from the lessee or mortgagee.³⁰⁵

19.6.2.2 *Te Urewera context*

As outlined in earlier chapters, the native land title system turned communally owned and governed land into individually owned shares in land, often with many individual owners in a block. It did so without providing any legal tools or structures to replace customary collective use and management. The Urewera District Native Reserve Act 1896 (UDNR Act) was supposed to have created a two-tier system of committees, local and central (or tribal), to govern the management and alienation of hapu blocks. As we explained in chapter 13, this system was never properly established and the Crown came to treat the multiple individual interests as alienable by individuals, but not governable by collectives. This was the

301. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 747–751, 752–755, 759–762

302. Maori Affairs Amendment Act 1967, ss 4, 15–19

303. *Ibid*, s 19

304. *Ibid*, s 141. This section repealed section 435 of the 1953 Act and substituted a new section 435 into the principal Act.

305. Maori Affairs Amendment Act 1967, ss 19, 141

case also for interests created under the native land laws outside the UDNR, even after incorporations first became possible in 1894. As we discussed in chapter 10, incorporations were not allowed in the ‘rim’ blocks during the period in which the Crown was purchasing individual interests in those blocks. The Native Land Act 1909 system of meetings of assembled owners was notable for its extremely low quorum (see chapter 10). Such one-off meetings, usually called only to vote on a sale or lease, could not substitute for customary collective management and decision-making for land.

In the meantime, once the UDNR Act had been repealed and the native land titles system was imposed across the whole of Te Urewera, the Urewera Consolidation Scheme left Maori owners with individual interests in small blocks. Some had unsuitable shapes or lacked legal access, and most were unsuitable for small-scale farming by individuals. Farm development schemes helped to overcome title problems in some areas (see chapter 18), but by the 1950s it would be fair to say that all Maori owners in Te Urewera faced the same problems of fractionating interests, fragmenting blocks, and absentee ownership as other owners in the North Island.

The problems were clear to both sides in the Treaty partnership. In addition, the owners of land near (or inside) Te Urewera National Park faced the pressure of initiatives to expand the park or to prevent the milling of their indigenous timber (see chapters 16 and 18). As noted by Tama Nikora, the earliest impulse towards amalgamating titles in Te Urewera came in the early 1960s, with a view to combined negotiations for land exchanges with the Crown. Tuhoe wanted compensation for milling restrictions and they wanted farmland, which they felt the Crown had acquired from them unfairly, to be returned in place of the use – or even the ownership – of land suitable for the national park or forestry. But there was also, as the 1960s wore on, a growing determination among Maori landowners in Te Urewera that their remaining lands should not be taken from them, and that means should be found for their lands to be used effectively for an economic return, and managed centrally by the tribe.³⁰⁶

In this decade, as in others, there was a tension within the tribe as to the appropriate level at which land should be managed and governed. In the 1960s, the tendency was towards some form of central, tribal organisation, for which a vehicle seemed ready-made in the Tuhoe Maori Trust Board. In 1958, the board was established to receive and administer the compensation money for the Crown’s failure to build the promised roads in Te Urewera (see chapter 14). In the 1960s, the trust board took the lead in developing Tuhoe policies for land management and development, representing the tribe to the Government on a number of issues (see chapter 16). The board held hui with its own people and experts such as Hugh Kawharu, and came to the view that the many small or fragmented land interests should be amalgamated using the tools available under the Maori Affairs Acts. In 1969, the first attempt was made to amalgamate some of the blocks that would

306. Nikora, ‘Te Urewera Lands and Title Improvement Schemes’ (doc G19), pp 6–28; Nikora, brief of evidence for seventh hearing week (doc G8), pp 4–12

later become part of Te Pae o Tuhoe. This initiative stalled but in 1970 a second application to amalgamate some of the titles (that would eventually become part of Te Manawa o Tuhoe) was successful. The court vested these blocks in the New Zealand Insurance Company as the responsible trustee.³⁰⁷

In 1971, at a hui mentioned often in this report, the Minister of Maori Affairs, Duncan MacIntyre, met with Tuhoe on the anniversary of their 1871 declaration of loyalty to the Crown (see chapter 8). At this hui, following an earlier hui in which a position was developed and agreed, the Minister was asked to assist the tribe to amalgamate their lands for vesting in a central authority of their own (instead of outside trustees). Tuhoe asked MacIntyre to provide them with the services of a Maori title improvement officer, to work closely with them in bringing about this objective. The goal was still negotiations with the Crown from a position of unity and strength, for exchanging land or obtaining compensation for the legal restrictions on their ability to use their standing timber. But other economic imperatives also came into play, including a belief that exotic forestry might be possible if only finance could be obtained, requiring a 'critical mass' of land for attracting investment and for use in large-scale forestry ventures.³⁰⁸

As we shall see below – and this is a crucial point – there was no need for the Crown to use the coercive powers accorded the title improvement officers and the court under the 1967 legislation. Tuhoe wished to amalgamate their lands and vest them in a collective management structure of their own choice, and which, they believed, would be accountable to them in a way that the Maori Trustee or the New Zealand Insurance Company could never be. The court assisted by providing JV (Joe) Devcich as title improvement officer, although his role was restricted to assisting the trust board and owners rather than using his official powers under the 1967 Act.³⁰⁹ Also, MacIntyre inserted a clause in the Maori Purposes Act 1971 to enable Maori trust boards to accept lands in trust.³¹⁰ In the same year, the Tuhoe Maori Trust Board became the Tuhoe-Waikaremoana Maori Trust Board, when the Lake Waikaremoana Act vested the lake bed in it (and also in the Wairoa-Waikaremoana Maori Trust Board).

19.6.2.3 *The 1972 amalgamation and its sequels*

The stage was set for a significant expansion of the role of the trust board in the collective management of Maori lands in Te Urewera. Taking advantage of MacIntyre's law change, John Rangihau and Piki McGarvey, acting on behalf of the trust board and (they believed) the owners, filed a fresh amalgamation application with the Maori Land Court in February 1972. On the same day that the application was lodged, Judge Gillanders Scott heard it and cancelled the 1970 amalgamation.

307. Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), pp 10–14, 18, 41–43, 49–50; Fraser, 'Amalgamation of Urewera Lands' (doc F3), pp 14–20, 28–29, 33–35

308. Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), pp 24–28, 41–48; Fraser, 'Amalgamation of Urewera Lands' (doc F3), pp 20–23

309. Fraser, 'Amalgamation of Urewera Lands' (doc F3), pp 21, 23–24, 54–55

310. Maori Purposes Act 1971, s8

A total of 160 blocks were amalgamated into four new titles: Te Manawa o Tuhoe (63 blocks), Te Pae o Tuhoe (33), Tuhoe Kaaku (21), and Tuhoe Tuawhenua (43).³¹¹ The blocks were vested in the Tuhoe-Waikaremoana Maori Trust Board as the responsible trustee under section 438(2), with the terms of trust to be arranged at a future hearing. The judge believed, on the basis of the application and the hui that had preceded it, that it represented the general wishes of the owners. Gillanders Scott had himself been present at the 1971 hui with Duncan MacIntyre, and had been advised of other hui which called for or agreed to the vesting of amalgamated lands in the trust board.³¹²

In March 1972, less than a month after the court ordered the amalgamation, the registrar applied for a rehearing on the grounds that calculating the values of the original shares was not a straightforward matter, and the court needed to sit again to determine valuation issues. Also, it soon emerged from the work of the title improvement officer with the board, and from various inquiries by owners, that some blocks included in the amalgamations were either leased or being farmed by resident owners and should not have been included.³¹³ On 8 March 1972, the judge adjourned the application for rehearing *sine die*, recording a minute that the values might be resolved without the need for a further hearing.³¹⁴ For Te Manawa o Tuhoe and Te Pae o Tuhoe, a 'special sitting' was then held at Ruatoki in November 1973, following a number of hui throughout the year and a special meeting of owners the day before, attended by 170 owners. As a result of this (well-advertised) hearing, several blocks were removed from the amalgamation or partitioned so that parts of them could be excluded, with the final orders made at Rotorua on 4 December 1973. The court staff then treated these amalgamations as completed, although discussions did continue as to whether more land should be excluded. When the Maori Land Court sat again to consider these blocks in 1974, the judge declined to make trust orders until definite arrangements had been made with the Crown as to leases, exchanges, and afforestation.³¹⁵ For the other two blocks, Tuhoe Kaaku and Tuhoe Tuawhenua, the rehearing application remained adjourned and the Maori Land Court staff mistakenly left the original

311. Fraser, 'Amalgamation of Urewera Lands' (doc F3), pp 28–31, 35; Bassett and Kay, 'Ruatahuna' (doc A20), pp 276–280

312. Fraser, 'Amalgamation of Urewera Lands' (doc F3), pp 17–20, 28, 33–34, 97; Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), p 25; 'Memorandum of Retired Chief Judge K Gillanders Scott', no date (1984) (Heather Bassett and Richard Kay, comps, supporting papers to 'Ruatahuna: Land Ownership and Administration, c 1895–1990', 3 vols, various dates (doc A20(a)), vol 1, pp 152, 160, 162)

313. Bassett and Kay, 'Ruatahuna' (doc A20), pp 282–283; *Jennings v Scott* unreported, 13 November 1984, Savage J, High Court, Rotorua, A183/79, p 2 (Bassett and Kay, supporting papers to 'Ruatahuna' (doc A20(a)), p 164)

314. *Jennings v Scott*, p 2 (p 164)

315. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 826–827; Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), pp 44–47; Brian Murton, comp, supporting papers to 'The Crown and the Peoples of Te Urewera, 1860–2000: The Economic and Social Experience of a People', various dates (doc H12(a)(H)), pp 113–117

titles for these blocks in place, being under the impression that they had not been amalgamated. Successions, partitions, and other title-changes proceeded on this false basis until the mistake was finally uncovered in 1979.³¹⁶

In the late 1970s, as we discussed in chapter 18, the negotiations for land exchanges and timber restrictions' compensation failed to result in an agreement. In the meantime, the trust board had been able to arrange exotic forestry for part of Te Manawa o Tuhoe but not for any of the other amalgamated blocks. When applications for deer stalking and the prevention of poaching in Tuhoe Tuawhenua came to the board, it found itself helpless to deal with them because terms of trust had still not been defined. In particular, Ruatahuna rangatira Hikawera Te Kurapa supported a local helicopter operation for deer hunting and live capture, which was to be led by his nephew, the Tuawhenua claimant Wharekiri Biddle. The trust board did not have the authority to authorise this or any other specific operation for Tuhoe Tuawhenua lands. In 1979, therefore, the board applied to the court to establish the terms of trust. It was at this point that the court discovered that the amalgamation had not been properly carried out and all involved were, as Chief Judge Gillanders Scott put it, 'sitting ducks'³¹⁷ if the situation were to be challenged in the High Court.³¹⁸

Some of the leading owners in the block, represented in our inquiry today by the Tuawhenua claimants, took legal action in 1981 to challenge the legality of the 1972 amalgamation of Tuhoe Tuawhenua. As will be discussed in more detail below, this litigation was successful. The High Court found in 1984 that the court, in hearing the application the same day that it was lodged, had breached the rules of natural justice and had not provided the owners an opportunity to appear or be heard on the fate of their own lands.³¹⁹

By this time, a new legal tool was available for the use of Maori owners: aggregation, introduced in the Maori Affairs Amendment Act 1974. Aggregation allowed the original titles to remain (preserving that link with ancestral land) but creating a common ownership, with the owners having a relative share commensurate with their original entitlements. As Heather Bassett and Richard Kay explained:

aggregation retained the existing block identities. However, it also meant that the owners became an 'aggregate', meaning their relative shares were combined into one

316. Bassett and Kay, 'Ruatahuna' (doc A20), pp 283, 290–294; Whakatane Maori Land Court, minute book 77, 16 April 1985 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(H)), p 125)

317. Chief judge to registrar, Rotorua Maori Land Court, 1 November 1979 (Bassett and Kay, supporting papers to 'Ruatahuna' (doc A20(a)), p 130)

318. Bassett and Kay, 'Ruatahuna' (doc A20), pp 291–294; Fraser, 'Amalgamation of Urewera Lands' (doc F3), pp 45–46, 66–67; Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two: A History of the Mana of Ruatahuna from the Urewera District Native Reserve Act 1896 to the 1980s' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc D2), pp 520–523; Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), pp 55–56

319. Bassett and Kay, 'Ruatahuna' (doc A20), pp 294–301

ownership unit, and each owner held a share in the total area of the combined blocks. So while an aggregation retained the individual blocks identities, all of the owners shared in the ownership of all of the aggregated blocks.³²⁰

At first, the Tuawhenua claimants decided to aggregate their lands but later changed their minds, taking the view that even aggregation interfered too much with the links between owners and their blocks. Instead, they sought to have all 48 blocks retain their original titles in separate ownership but administered jointly as a ‘composite trust’, with owner-trustees representing each of the blocks.³²¹

Ultimately, after many hui among owners and the completion of research as to potential land uses, their application to create a ‘composite trust’ for all the blocks of Tuhoe Tuawhenua was heard by the Maori Land Court in 1987. In the event, Judge Hingston took the view that he could not – as Judge Gillanders Scott had done – rely on evidence of earlier hui and out-of-court agreements, which had apparently resulted in the invalid decision of 1972. Instead, he insisted that owners of each block confirm or deny in court their support for the application. As a result, 22 blocks were vested in new trustees but eight blocks were vested in the trust board. Fifteen blocks remained in their pre-1972 titles because there were either no owners present in court or the owners could not agree among themselves. Also, the judge decided that the 20 trustees favoured by the Tuawhenua applicants should be reduced to seven, and some alternative individuals should be included to ensure commercial and practical experience for the new trust.³²² Only three of the original proposed trustees were appointed. As we shall see, all of these developments angered the Tuawhenua claimants and led in part to the filing of their present claim with this Tribunal.³²³ We have no information as to what has since happened to these blocks.³²⁴ Tama Nikora suggested: ‘Unfortunately the title and governance situation of the Tuawhenua blocks has not advanced since the UCS and the lands will continue to make little or no progress until that situation is rectified.’³²⁵

In the wake of the High Court decision about Tuhoe Tuawhenua, Judge Norman Smith agreed in 1985 to revive the adjourned rehearing application for the fourth outstanding block, Tuhoe Kaaku. As explained in the evidence of Tama Nikora and of Clementine Fraser, this resulted in a protracted court process (it took a decade) and adjustment of the arrangements for Tuhoe Kaaku in the 1990s. In 1995, the 21 original titles were restored and aggregated into three groups of owners, with the trust board becoming custodial trustee and owner representatives becoming

320. Ibid, p 305

321. Ibid, pp 301–311

322. Ibid, pp 301–316

323. Tuawhenua Research Team, ‘Te Manawa o te Ika, Part Two’ (doc D2), pp 535, 571–572

324. The narratives of the Tuawhenua Research Team, Bassett and Kay, Fraser, and Nikora, all stop at that point.

325. Nikora, ‘Te Urewera Lands and Title Improvement Schemes’ (doc G19), p 59

responsible trustees.³²⁶ We received no claims about Tuhoe Kaaku so we take that matter no further.

Having briefly described the political and legislative context in the 1960s, the events leading up to the hui with Duncan MacIntyre in 1971, the law-change of 1971, the amalgamation of titles in 1972, the ‘special sitting’ of 1973, the High Court litigation about Tuhoe Tuawhenua in the 1980s, and the arrangement of new trustees for some of the Tuhoe Tuawhenua titles in 1987, we now proceed to describe the Treaty claims made to the Tribunal as a result of these events.

19.6.3 The claims

The 1972 amalgamation of titles was the subject of claims from Wai 36 Tuhoe, Nga Rauru o Nga Potiki, the Tuawhenua claimants, and Ngati Haka Patuheuheu. We discuss their main arguments and submissions in turn.

19.6.3.1 The Wai 36 Tuhoe claim

The Wai 36 Tuhoe claimants accepted that amalgamation of titles was an appropriate solution to some of the land and title problems that plagued Tuhoe in the 1960s. In particular, it offered an opportunity to ‘return land to a form of tribal corporate governance’.³²⁷ According to the evidence of Tama Nikora, the outcomes have not been ideal in economic terms, at least for Tuhoe Kaaku, Tuhoe Tuawhenua, and Te Pae o Tuhoe. For Te Manawa o Tuhoe, however, the trust board was able to negotiate the establishment of exotic forestry. In part, this situation reflected the quality of lands left to Tuhoe after Crown purchasing and the UCS.³²⁸

Here, we are concerned with the process of title amalgamation and the vesting of amalgamated lands in trusts, established by the Crown in 1953 as a tool for helping Maori overcome the problematic legacy of its native title system. The Wai 36 Tuhoe claim is essentially that the process was a drawn-out and expensive one. Because amalgamation was a remedy for past Crown actions (which had breached the Treaty), the claimants argue that ‘Tuhoe should not have had to meet the cost of tidying up yet another mess left by the Crown’.³²⁹ Having to pay for their own remedy was, they suggest, a further breach of the Treaty. Also, the process was not merely costly but divisive. The Crown had failed to provide for tribal management of land, and now the process of restoring such management generated ‘internal disharmony’.³³⁰ Nonetheless, it is the Wai 36 Tuhoe claimants’ view that the ‘process of amalgamation for Tuhoe (and for other iwi) has led to the return of land to a state of ownership and control which is akin to the rangatiratanga exercised by hapu and iwi before the Crown intervened’.³³¹

326. Nikora, ‘Te Urewera Lands and Title Improvement Schemes’ (doc G19), pp 60–61; Fraser, ‘Amalgamation of Urewera Lands’ (doc F3), pp 81–92

327. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 208

328. Nikora, ‘Te Urewera Lands and Title Improvement Schemes’ (doc G19), pp 48, 51–52, 59

329. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 66

330. Counsel for Wai 36 Tuhoe, closing submissions, pt C (doc N8(b)), p 12

331. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 210

19.6.3.2 *The Tuawhenua claim*

The ‘internal disharmony’ pointed to by the Wai 36 Tuhoe claimants is nowhere more evident than in the Tuawhenua claim. Filed on behalf of the hapu of Ruatahuna, this part of their claim was generated by grievances arising from the long and tangled history of the Tuhoe Tuawhenua amalgamation. In essence, the Tuawhenua claimants put what they understood to be the home people’s view of the amalgamation.³³²

These claimants argued that amalgamation of titles, and the assistance of Duncan MacIntyre, was sought by the trust board (not the owners) in 1971. The result was an application by John Rangihau and Piki McGarvey acting as officers of the Maori Affairs Department (although they ‘also had interests in land of the Tuawhenua blocks’).³³³ The court’s understanding was that the applications were ‘prepared and typed by the Department’.³³⁴ The application for amalgamation was not advertised. Owners were neither notified nor had any opportunity to appear, which meant that they had no input into either the decision to amalgamate or the choice of trustee. This was all part of the Crown’s 1967 title improvement policies, which ‘gave greater emphasis to general considerations regarding profitable land use and effective land management rather than the wishes of owners’.³³⁵ In the claimants’ view, all of these matters were actions of the Crown and in breach of the Treaty.³³⁶

When owners found out in 1974 that the amalgamation had actually occurred, it was discovered that land being used for housing and cropping, some of it with substantial improvements, had been included in the amalgamation. According to the Tuawhenua claimants, this marked the beginning of a long process of owners’ objecting to the amalgamation and seeking the return of their lands. At the same time, they tried to establish their own economic ventures, including deer recovery. It was just such a venture, arranged by the Tuawhenua claimant Wharekiri Biddle and others in the late 1970s, which led to the successful legal challenge to the amalgamation. When the trust board stopped their deer recovery operation in Tuhoe Tuawhenua, the result was a special sitting of the Maori Land Court at Ruatahuna in 1979 to define the terms of trust and the powers of the trustee. The Tuawhenua claimants sought to have their land withdrawn from the amalgamation and from control of the trust board. When this initiative failed, they went to the High Court in 1980 and, in 1984, succeeded in having the 1972 amalgamation order quashed. In their view, the court’s ruling upholds their claim that the order was made in breach of their Treaty rights.³³⁷

332. Tuawhenua Research Team, ‘Te Manawa o te Ika, Part Two’ (doc D2), pp 521–524. The Tuawhenua Research Team used the term ‘ahi ka’ (see page 524).

333. Counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), p 259

334. *Ibid*, p 260

335. *Ibid*, pp 260–261

336. Counsel for Tuawhenua, second amended statement of claim, 20 September 2004 (claim 1.2.12(b), SOC AA), pp 222–223

337. Counsel for Tuawhenua, closing submissions (doc N9), pp 261–262, 270–271; counsel for Tuawhenua, second amended statement of claim (claim 1.2.12(b), SOC AA), pp 237–238

The sequel, however, was less fortunate. The Tuawhenua claimants say that, despite forming a properly representative committee of owners and carefully researching potential economic development options, the owners' tino rangatiranga was again defeated in the Maori Land Court in the late 1980s. Judge Hingston, who had previously been the lawyer for the trust board and who had 'fought against the owners' case' in the High Court, was made the presiding judge. The Tuawhenua Steering Committee requested that another judge hear the case but this was 'rejected by the Maori Land Court'.³³⁸ As a result, they say, and also as a result of strong opposition to their proposals from 'Government officers who had interests in the Tuawhenua blocks or in the TWMTB [Tuhoe-Waikaremoana Maori Trust Board]', the court only vested 22 blocks in their proposed trust, granting eight blocks to the trust board and making no orders in respect of a further 15. Also, the judge rejected their proposed trustees, instead putting in place 'members of the TWMTB and others'.³³⁹ After a long and expensive process of obtaining a consensus among the owners, their tino rangatiranga was thus defeated.³⁴⁰ In the claimants' view, everything that took place in the Maori Land Court in 1987 consisted of actions of 'the Crown', including the decision that Judge Hingston should hear the case, the court's request for a land-use report from Lands and Survey, and the court's decisions about which blocks would be aggregated in trust and about the proposed trustees.³⁴¹

In 1985, the Crown refused the claimants' request for compensation for the long period in which their lands had been tied up outside their control, with no development or returns. The claimants hold the Crown responsible for their lack of economic development since the 1970s, and for its failure to compensate them in 1985 or assist them since.³⁴²

Finally, the claimants argued that the actions of the Tuhoe-Waikaremoana Maori Trust Board in these events were the actions of an agent of the Crown and therefore in breach of the Treaty. In their submission, the process of appointing and removing trustees is Crown-controlled, and 'the boards required approval from the Minister of Maori Affairs on most financial and operational matters'.³⁴³ In oral submissions, counsel for the Tuawhenua claimants argued that this Tribunal should not adopt the approach to the test for Crown agency that was adopted by the Wellington Tenth's Tribunal in its report *Te Whanganui a Tara me ona Takiwa*.³⁴⁴

338. Counsel for Tuawhenua, closing submissions (doc N9), pp 272–273

339. *Ibid*, pp 273–274

340. Counsel for Tuawhenua, second amended statement of claim (claim 1.2.12(b), SOC AA), pp 239–243

341. *Ibid*, pp 239–240, 243

342. *Ibid*, pp 236, 238, 239, 243; counsel for Tuawhenua, closing submissions (doc N9), pp 271–272

343. Counsel for Tuawhenua, closing submissions (doc N9), pp 265–266

344. Counsel for Tuawhenua, oral submissions, 14th hearing week, Ruatoki, 10 June 2005

19.6.3.3 *The Nga Rauru o Nga Potiki claim*

In essence, the Nga Rauru o Nga Potiki claim is that the Tuhoe-Waikaremoana Maori Trust Board was an agent of the Crown, and that Tuhoe lands should never have been vested in such an agent in 1972. The claimants emphasised that their challenge was to an inappropriate structure established by the Crown, and involved no ‘disrespect for the many tribal leaders’ who had sat on the trust board as decision makers.³⁴⁵ In closing their case, counsel focused on the establishment of the trust board by statute in 1958, arguing that legislation made the board primarily accountable to ‘the source of its mandate’, which is the Crown, not the people. The board’s ‘function, structure, and the scope of its power are all defined by the Crown.’³⁴⁶ While accepting that certain legislative restrictions on trust boards were not necessarily adhered to in the strictest sense, ‘such as the restrictions on expenditure over \$200’,³⁴⁷ the Nga Rauru o Nga Potiki claimants believe that the board has to carry out Crown aspirations, not Tuhoe aspirations, and is controlled by the Crown.³⁴⁸

Although arguing that the board structure was imposed on the people in 1958, the claimants accepted that a Tuhoe hui unanimously agreed to its creation and its overriding function to better ‘the Tuhoe people as a whole.’³⁴⁹ This acceptance related to a body for administering compensation funds, and the claimants argued that an ‘organ of the state’ should not have been empowered to become ‘the legal owner of hapu lands’ in 1971.³⁵⁰ The amalgamation of 1972, by vesting the lands in the trust board, severed the owners’ ‘direct relationship with Papatuanuku’, resulting in a loss of connection and identity for the claimants. It appears, however, that the claimants’ view is also that the ‘accumulation of lands’ in any ‘single administrative functionary’ would have had this effect. They pointed to long-standing tension among Tuhoe leaders over this issue.³⁵¹

19.6.3.4 *The Ngati Haka Patuheuheu claim*

Ngati Haka Patuheuheu supported the Nga Rauru o Nga Potiki claim, and also presented their own grievance about the amalgamation of lands in Te Manawa o Tuhoe. Relying on the evidence of Robert Pouwhare, counsel stressed that their claim was against the Crown and not the trust board. The Tribunal, we were told, should not examine ‘internal problems arising between the hapu and the Trust Board.’³⁵² Counsel added:

345. Counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), p 68

346. *Ibid*, p 69

347. *Ibid*, p 73

348. *Ibid*, pp 73–74

349. *Ibid*, p 71

350. *Ibid*, p 75

351. *Ibid*

352. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 139

At the heart of the Ngati Haka Patuheuheu claims is the allegation that the Crown has breached the Treaty by imposing a governance structure on Ngati Haka Patuheuheu without the consent of the hapu and that the Crown has allowed the vesting in an entity, other than Ngati Haka Patuheuheu, [of] nearly all of the remaining Ngati Haka Patuheuheu lands . . .

A major grievance for Ngati Haka Patuheuheu is that the bulk of the remaining lands of Ngati Haka Patuheuheu have been amalgamated into Te Manawa o Tuhoe block and vested in the Trust Board in 1972.³⁵³

Relying on the evidence of Wharehuia Milroy and Hirini Melbourne, the claimants argued that the Crown imposed the trust board on Tuhoe.³⁵⁴ This was the beginning of the Crown's failure to provide properly for each hapu to control its own resources. The claimants accepted that the amalgamation of titles and the vesting of lands in trust in 1972 was 'effectively returning the shares to a communal title (at least in terms of the management of the land)', but the Crown's Treaty breach consisted of allowing this vesting and management to be 'carried out at a wider level than the hapu', and by a body created by the Crown, not by Ngati Haka Patuheuheu.³⁵⁵ Article 2 of the Treaty requires the Crown to protect the tino rangatiranga of hapu over their whenua. The 'Treaty refers to "hapu", not to any other entities': 'Accordingly, it is submitted that the Crown should have ensured that the remaining Ngati Haka Patuheuheu lands were vested in an entity or body which is subject to the management by Ngati Haka Patuheuheu as a hapu.'³⁵⁶

The claimants sought a recommendation that 'the Crown return lands and assets held in statutory control through Maori Trust Boards to Ngati Haka Patuheuheu.'³⁵⁷

19.6.4 The Crown's response to the claims

In the Crown's view, almost everything at issue in these claims was the responsibility of either the Tuhoe-Waikaremoana Maori Trust Board or the Maori Land Court. The Crown itself played little or no role. Counsel denied that the trust board and the court can be considered agents of the Crown for the purposes of the Tribunal's jurisdiction under the Treaty of Waitangi Act: 'The Trust Board is not the Crown. Not every entity established by statute is the Crown, nor is every person who acts under statute a Crown agent. The Trust Board is not listed as a Crown entity under the schedule to the Public Finance Act.'³⁵⁸

Further, the claims reflect 'differing desires within the community of owners and only tangentially involve the Crown'. In particular, the 'substance of the issue

353. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 139–140

354. *Ibid*, p 139

355. *Ibid*, p 140

356. *Ibid*, pp 140–141

357. Counsel for Ngati Haka Patuheuheu, submissions by way of reply, 8 July 2005 (doc N25), p 60

358. Crown counsel, closing submissions (doc N20), topic 36, p 7

brought by Tuawhenua claimants concerns a division amongst the community of owners, not any wrongdoing by the Crown.³⁵⁹

This was the Crown's principal submission, covering almost every issue complained of in respect of the 1972 amalgamation and its sequels.

In addition, counsel argued that there was evidence of extensive consultation with owners at hui and wananga in the 1960s and 1970s before the decision was made to apply for amalgamation of titles. Strong support was evident at these hui.³⁶⁰ John Rangihau and Piki McGarvey justifiably thought that they were acting on the wishes of the owners when they filed the amalgamation application, 'carrying through with the work that their community had asked of them since 1964'.³⁶¹ They were not acting as officials of the Maori Affairs Department, and it would be 'absurd' to ban such professionals from acting for their people 'simply because they also worked for the Crown'.³⁶² The Crown accepted, however, that there have been strong expressions of dissent by the Tuawhenua owners since the 1970s, and noted that Ministers had agreed to meet a 'moral obligation' and pay for the lion's share of plaintiffs' costs in the High Court litigation (\$12,000 of \$16,537).³⁶³

Nonetheless, it was the Crown's view that although the Maori Land Court hearing in 1972 had not been properly notified, there had been a sound pre-hearing process of determining the owners' support for amalgamation, conducted by Tuhoe leaders themselves. For that reason, the failure was a 'technical' one only, and 'no substantive prejudice arose'.³⁶⁴ The 'Urewera community' had 'considered land utilisation and economic development, as well as social and cultural concerns in depth, and made the strategic decision to amalgamate lands and place those lands in trust. This was not a decision of the Crown'.³⁶⁵

In the Crown's view, its policies at the time did take the owners' wishes into account.³⁶⁶ Also, although the Crown did not respond directly to the Ngati Haka Patuheuheu claim on this point, it made its view clear that the legislation of the time 'provided vehicles to implement landowners' aspirations'.³⁶⁷

In terms of the issue raised by the Wai 36 Tuhoe claimants, we note the Crown's acceptance that, from 1953, it had to find 'solutions acceptable to Maori to address the problems associated with partitions, multiple succession orders, and uneconomic blocks of land that left Maori with small and scattered land interests, which could not be utilised effectively'.³⁶⁸ Counsel accepted that title improvement was a 'costly and time-consuming process', submitting that the Department of Maori

359. *Ibid*, p 2

360. *Ibid*, p 4

361. *Ibid*, p 2

362. *Ibid*, p 10

363. *Ibid*, pp 8, 13

364. *Ibid*, p 7

365. *Ibid*, p 8

366. *Ibid*

367. *Ibid*, p 9

368. *Ibid*, p 3

Affairs provided administrative support and funding for meetings of assembled owners, which ‘assisted in meeting the costs of these exercises.’³⁶⁹ Otherwise, the Crown’s position was that it had no responsibility to contribute towards ‘costs associated with land management.’³⁷⁰

In submissions on UCS matters, however, the Crown took a rather different approach, arguing that there were few or no costs associated with amalgamation unless surveys were required.³⁷¹ Crown counsel also maintained that ‘It is impossible for the Crown to respond to this issue unless some evidence has been led to show that there was unnecessary cost incurred in amalgamation due to some omission or lack of quality in the Urewera consolidation scheme surveys.’³⁷²

We find it difficult to reconcile these two sets of submissions.

19.6.5 The Tuawhenua claimants’ response to the Crown

The Tuawhenua claimants rejected utterly the Crown’s position that all of their complaints involved the actions of bodies which were not the Crown or agents of the Crown. We will discuss their arguments in more detail below, but they may be summarised briefly here as:

- ▶ previous Tribunal reports have been inconsistent as to whether the Maori Land Court is an agent of the Crown;
- ▶ the functions and control test is not the appropriate test to apply;
- ▶ the separation of powers is not a relevant consideration, because the powers that were separated were those of the Crown – the ‘Sovereign embodies all three branches’;
- ▶ although the Maori Land Court is not part of the executive arm of Government, the Treaty of Waitangi was made with the Queen and not the executive Government;
- ▶ the Treaty undertakings of the Sovereign include responsibility and Treaty obligations for ‘each and every branch of the Crown’, which includes the Maori Land Court for the purposes of section 6 of the Treaty of Waitangi.³⁷³

In addition, counsel stressed two ‘non-court crown actions’ to which she thought the Tribunal must accord weight: the Minister’s action in 1971 that obtained a law-change enabling the trust board to become trustee for the amalgamated lands; and the pressure put on Tuhoe by efforts to expand the national park, meaning that the amalgamations were a defensive act on the part of Tuhoe rather than a free choice.³⁷⁴

369. Crown counsel, closing submissions (doc N20), topic 36, p13

370. Ibid

371. Ibid, topics 18–26, pp 66–67

372. Ibid, p 67

373. Counsel for Tuawhenua, submissions by way of reply, 8 July 2005 (doc N34), pp 34–38

374. Ibid, p38

19.6.6 The Wai 36 Tuhoe claimants' response to allegations concerning the Tuhoe-Waikaremoana Maori Trust Board

In his reply submissions, counsel for Wai 36 Tuhoe took the opportunity to reply to the many arguments made relative to the trust board and the question of whether it should legally be considered an agent of the Crown. In response to Ngati Haka Patuheuheu, counsel submitted that the amalgamation of Te Manawa o Tuhoe lands had been well canvassed, and that there is no evidence of Ngati Haka Patuheuheu owners objecting at the time (or later) to the inclusion of their individual interests in this trust. The Crown had no role in the decision to amalgamate the lands or the decision to vest them in the trust board as trustee. Since the Crown had no role, the Tribunal has no jurisdiction to consider the trusteeship of this land, which is a matter for the owners and the Maori Land Court.³⁷⁵

In response to the various submissions that the trust board was and is an agent of the Crown, counsel observed that the Wai 36 Tuhoe claimants had deliberately not presented evidence about the formation and operation of the board, which were not legitimate matters for the Tribunal's inquiry. Nonetheless, counsel felt that the evidence available to the Tribunal showed that, in practical terms, the trust board was not controlled by the Crown and instead had been a vehicle for Tuhoe tribal leadership. The main complaints about the board – the 1972 amalgamations and the vesting of Lake Waikaremoana – were plainly initiatives of the Tuhoe leadership and people, not the Crown. The Maori Trust Boards Act 1955 does not usurp Tuhoe authority or create a monopoly of representation for Tuhoe views to the Crown. Rather, Tuhoe themselves have chosen to use the board to 'achieve certain Tuhoe aspirations.' The claims about amalgamation and the trust board are evidence of 'internal debates within Tuhoe about leadership, governance and management issues.'³⁷⁶

Not only is the trust board not an agent of the Crown 'in fact', nor is it a Crown agent 'in law'. In counsel's view, the Tuawhenua claimants' submission boils down to an assertion that the board is accountable to the Crown, not its beneficiaries, on financial matters, and performs services that 'read like functions of Government'. According to the Wai 36 Tuhoe claimants, this is a misreading of the legislation and a misapplication of the functions and control test.³⁷⁷ We will return to these arguments in more detail below.

19.6.7 Jurisdictional matters: can the Tribunal proceed?

It will be clear from the discussion so far that serious questions have been raised about the Tribunal's jurisdiction to report on claims about the 1972 amalgamation and its sequels. The Crown and the Wai 36 Tuhoe claimants agree that there were no Crown actions involved in either the 1972 amalgamation of titles and vesting of

375. Counsel for Wai 36 Tuhoe, submissions by way of reply, 9 July 2005 (doc N31), pp 69–70

376. *Ibid*, pp 79–80

377. *Ibid*, pp 72–75

land in the trust board, or the later Tuhoe Tuawhenua proceedings in the Maori Land Court. Rather, their view is that all matters involved were the actions of individuals and entities which were not the Crown or Crown agents, including the trust board and the Maori Land Court. Also, counsel for Wai 36 Tuhoe have submitted that these are matters for the Maori Land Court, not the Tribunal, and that the owners have legal options available to them should they wish to pursue them. Ngati Haka Patuheuheu, the Nga Rauru o Nga Potiki claimants, and the Tuawhenua claimants argue that the trust board was an agent of the Crown. Also, for the purposes of this claim, the Tuawhenua claimants argue that the Maori Land Court should also be considered an agent of the Crown. Finally, these claimants argue that there were indeed Crown actions at the centre of the amalgamation process, including the 1967 legislation and the actions of Ministers and officials.

In order to resolve these issues, we have structured our analysis around the following questions:

- ▶ Was the Tuhoe-Waikaremoana Maori Trust Board an agent of the Crown?
- ▶ Is the separation of powers relevant to the Tuawhenua claim in respect of the actions of the Maori Land Court?
- ▶ Do the claimants still have a legal remedy?
- ▶ Are any remaining matters actions of the Crown which may legitimately be the subject of inquiry by this Tribunal?

Under the fourth question, we have posed the following issues for determination:

- ▶ Should the Crown have paid the expenses of amalgamation or did such expenses fall in the category of ordinary land administration?
- ▶ Was the Minister at fault in securing legislative provision for Maori trust boards to accept land in trust?
- ▶ Was the 1972 amalgamation of titles an action of the Crown or an action of Tuhoe?
- ▶ Did the Crown's legislative regime provide adequate and appropriate tools for title improvement and the collective management of Maori land?

19.6.8 The first jurisdictional matter: was or is the Tuhoe-Waikaremoana Maori Trust Board an agent of the Crown?

19.6.8.1 Discussion

The question of whether a body is 'the Crown' or an agent of the Crown is a legal question. In the courts, the determination is made according to the degree of independent discretion accorded the body. In the nineteenth century, the primary question was whether or not the functions performed by the body would normally be considered functions of the executive government. This test has now been superseded, although it is still 'good law' and a matter for secondary consideration.³⁷⁸ But the primary test is the degree of discretion accorded by legislation to the statutory body concerned. If ministerial or official control is such that the body does not have a significant degree of independent discretion, then the body

³⁷⁸ See the discussion by the Tribunal in *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 2, pp 879–881.

is considered to be an agent of the Crown. It is by now well established that this is a *de jure* test, not a *de facto* one. Regardless of the extent to which the Crown does (or does not) control the body in practice, the test of agency is limited to the amount of control formally accorded the Crown by statute.

Case law regarding the functions test and the evolution and primacy of the control test has been discussed in previous Tribunal reports, most extensively in *Te Whanganui a Tara me ona Takiwa* and *Te Tau Ihu o te Waka a Maui*. We refer readers to those reports for the details. In both reports, the Tribunal concluded that the Public and Maori Trustees were not agents of the Crown in their administration of Maori reserved land, because of the extent of independent discretion accorded them by law when carrying out that function. The Tribunal also concluded that the same body could be an agent of the Crown when carrying out other functions, such as running Maori farm development schemes. The control test is properly applied only to the particular responsibility under consideration, and not to other capacities in which a body functions.

The task for this Tribunal is to determine whether the Tuhoe-Waikaremoana Maori Trust Board, when acting in connection with the lands that were amalgamated and vested in it in 1972, was controlled by the Crown in such a way as to make it a Crown agent at law.

Counsel for the Tuawhenua claimants has submitted that the proper test is not a legal test but a Treaty test. In oral submissions at Ruatoki in 2005, she suggested that the question is whether or not a body is performing the Crown's Treaty obligations in respect of Maori land. If so, then it has a 'Treaty function' and its actions should be considered as Crown breaches if they fall short of Treaty standards, regardless of whether it has an independent discretion. In her submission, the control test was developed in the United Kingdom in order to limit the number of bodies that could claim the Crown's tax exemptions, and so was developed for a different purpose and with a view to narrowing the definition of the Crown. This was not, she said, appropriate in a Treaty context in New Zealand, and a revamped 'Treaty function' test should be applied instead.³⁷⁹

Counsel for the Wai 36 Tuhoe claimants, relying on the *Te Whanganui a Tara* report, argued that submissions that the law should be interpreted differently from current case law are matters for the courts to decide. The Tribunal must apply the law as it is, which means the use of the control test, informed by the functions test. Counsel noted that the argument that the control test was devised for a purpose that is inappropriate in a Treaty context had already been made to, and rejected by, the *Te Whanganui a Tara* Tribunal.³⁸⁰

We accept that the control test is established law and that we must apply it when determining, for the sake of an inquiry under the Treaty of Waitangi Act 1975, whether a body is an agent of the Crown. Even if we were not of that view, however,

379. Counsel for Tuawhenua, oral submissions, 14th hearing week, Ruatoki, 10 June 2005

380. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), pp 347–378 (counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 73)

we think that the trusteeship of private Maori land is an article 2 responsibility of the Maori Treaty partner, acting where appropriate with the active protection of the Crown Treaty partner. We do not think that trusteeship of the four amalgamated blocks in 1972 was properly a function of the Crown under the Treaty. Thus, counsel for Tuawhenua's argument would fail in any case.

In addition to the question of Crown control, counsel for the Tuawhenua claimants and for Nga Rauru o Nga Potiki submitted that we should take into account two matters: first, the power of the Governor-General to appoint and remove the members of the trust board; and, secondly, that the functions performed by the trust board are the expenditure of 'public money' for health, education, and welfare, which are akin to Government services (and are therefore functions of Government). Counsel for the Tuawhenua claimants summarised the argument as follows:

The core asset of the Board was public money and as such they became administrators of Crown services. For example government functions such as the provision of water supplies, housing and relief from indigence or distress, were by enactment made the function of Maori Trust Boards.³⁸¹

Also, in Nga Rauru o Nga Potiki's submission, the trust board has more recently become a conduit for Government funding for job skills development, business development programmes 'and the like'. It is clear, in our submission, they argued, 'that the source of Trust Board authority and accountability and possible access to resources to a large extent is to and from the Crown.'³⁸²

After consideration of all the factors involved, we do not accept these submissions, insofar as they apply to the trust board's role as a trustee of the amalgamated lands. First, it is well established that Crown appointment of members does not make a body an agent of the Crown. Also, we received uncontested evidence that trust board members are chosen by a 'Tuhoe' process that negates the need for elections but complies with the Maori Trust Boards Act.³⁸³ That evidence confirms that the Governor-General's role in appointing members (for three-year terms) is a formality.³⁸⁴ Further, the Governor-General's statutory power to remove a board member is exercisable only in limited circumstances, where the reason for removal is the member's non-performance of their duties or their disreputable or criminal behaviour.³⁸⁵ In other words, board members can be removed by the Crown only for reasons that call into question their ability to discharge their duties as trustees.

Secondly, we do not accept that the roading compensation money paid to the trust board was 'public money'. It was the board's own money – theirs in

381. Counsel for Tuawhenua, synopsis of closing submissions, 10 June 2005 (doc N9(b)), p 36

382. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 75

383. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), pp 76–77

384. Section 14(2), together with part 3 (especially section 48), of the Maori Trust Boards Act 1955 provide for trust board members to be elected (or chosen without an election) by the beneficiaries of the board and then appointed by the Governor-General for a term of three years.

385. Maori Trust Boards Act 1955, s 16(1)

its entirety', as the Minister said when explaining the Maori Trust Boards Bill to Parliament.³⁸⁶ And while the trust board has used that money for various social purposes authorised by section 24 of the 1955 Act, it is not required to do so by the Act; it has a discretion to do so, as counsel for the Wai 36 Tuhoe claimants observed.³⁸⁷ Section 24 does not, therefore, delegate to trust boards the delivery of social services that would otherwise be provided by the Government. The role assumed by the trust board when it is contracted by the Crown to deliver social services (in which role it may well be a Crown agent) is quite different but is equally removed from the board's role in connection with the administration of the amalgamated lands.

None of these things, however, is germane to the question of whether the trust board was an agent of the Crown in its dealings with the lands that were amalgamated under its trusteeship in 1972. The key question here is whether the law accorded the board an independent discretion or provided the Crown with substantial control of its actions. A helpful explanation of the 'control test' was given by the Te Tau Ihu Tribunal, citing the 'standard authoritative reference work on Crown agency' by Peter Hogg and Patrick Monahan.³⁸⁸ There, the test is formulated as:

whether the corporation is 'largely free of ministerial control' or whether it is 'fairly closely controlled by the executive'. [Hogg] contends that 'any substantial measure of independent discretion will suffice to deny the status of Crown agent to a public body that is subject to some degree of direct control'.³⁸⁹

And the authors' analysis of the courts' overall approach is as follows:

the tendency of decisions is to require a high degree of control; in other words, the tendency of the decisions is against the finding of Crown agency status. The reason, without doubt, is a justified reluctance on the part of the courts to extend the special privileges of the Crown any further than necessary.³⁹⁰

We received only brief and general submissions on this matter; counsel did not review the Maori Trust Boards Act in any detail. If we rule out the board's formal appointment by the Crown, the Crown's power to remove members for cause, the fact that the board is a statutory body, and its discretionary expenditure on various social purposes, as we must, then the claimants' submissions focus largely on whether the trust board is accountable to the Minister or its beneficiaries. According to counsel for the Tuawhenua claimants, 'The Trust Board is

386. Corbett, 6 October 1955, NZPD, vol 307, p 2879

387. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), pp 74–75

388. Peter W Hogg and Patrick J Monahan, *Liability of the Crown*, 3rd ed (Ontario: Thomson Canada Ltd, 2000), pp 334–336; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, vol 2, pp 882, 884

389. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, vol 2, p 882

390. Hogg and Monahan, *Liability of the Crown*, p 335; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, vol 2, p 884

accountable to the Crown, the audited financial accounts are presented to the Minister of Maori Affairs, and there is no provision for accountability to the beneficiaries of the board.³⁹¹

As has been noted, counsel for Nga Rauru o Nga Potiki also referred to legislative restrictions on board expenditure ‘over \$200’ without ministerial approval, although acknowledged that these were not adhered to in practice.³⁹²

In reply, counsel for the Wai 36 Tuhoe claimants argued that the board is required to administer its assets for the general benefit of its beneficiaries, which establishes a duty to those beneficiaries. This duty, it was submitted, can be enforced through the court (arguably), and board members are otherwise accountable to the beneficiaries through the three-yearly ‘Tuhoe’ appointment process, or by beneficiaries’ appealing to the Minister to exercise the ‘extraordinary’ power to order an investigation of the board’s affairs.³⁹³

On our analysis, there are three distinct periods during which the trust board had dealings in connection with the amalgamated lands: before the lands were amalgamated; after the lands were amalgamated and vested in the trust board as a responsible trustee but before terms of trust were ordered; and after the terms of trust were ordered. The last period differs from the earlier two in that it was the terms of the trust, rather than the general provisions of the Maori Trust Boards Act, that governed the board’s dealings with the land. However, we consider that the result of applying the control test to the board in each of the three periods is the same: it was not an agent of the Crown.

We deal first with what may be a popular misconception that, by law, a trust board needs (or needed – because the relevant provision was repealed in 1996)³⁹⁴ the Minister of Maori Affairs’ approval to spend any amount at all over \$200. This notion could derive from reading section 32(3) of the original Act in isolation. But the meaning of that subsection, when subsections (1) and (2) are taken into account, is that ministerial approval was needed only for a payment that was more than \$200 in excess of a payment for which the board had budgeted in its approved annual financial statements. In other words, a trust board could always make a payment of any amount at all (plus \$199.99) as long as it had made provision for it in its ministerially approved budget for the year. The result is that section 32(3) in its original form did not restrict trust board spending in the very substantial way that some claimants have supposed (although the need for prior ministerial approval of a detailed annual budget does raise other questions about Crown control of trust boards, to which we return shortly). The ‘\$200 limit’ on trust board spending was not a general restriction imposed by the law: it was a limit on expenditure that had not been forecast in the board’s approved financial statements. The law on that matter does not, therefore, support the claimants’

391. Counsel for Tuawhenua, synopsis of closing submissions (doc N9(b)), p 36

392. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 73

393. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 74

394. Maori Trust Boards Amendment Act 1996, s 7

suggestion that the Crown could intervene in every financial decision of a trust board involving more than \$200, including decisions about land administration.

Before turning to other relevant provisions of the Maori Trust Boards Act, we note that we have assessed the Act as it stood in the period spanning the 1970s to about 2005, when our hearings in the Te Urewera inquiry concluded. (Since that time, important amendments have been made to the Act, strengthening trust boards' financial accountability to beneficiaries and removing the Minister's power to approve board financial statements.) The provisions of most relevance to the issue of Crown control over Maori trust boards in the relevant period relate to boards' financial accountability, and are as follows:

- ▶ Section 24(1), which provides that the functions of a board 'shall be to administer its assets in accordance with the provisions of this Act for the general benefit of its beneficiaries', lists a number of specific purposes that a board may, in its discretion, apply money towards, and concludes by stating that a board may apply money to 'such other or additional purposes as [it] from time to time determines'.
- ▶ Section 27(a), which, before 1996, provided that a board needed the Minister's prior consent to borrow money on the security of a mortgage or charge on any lands vested in the board, or on the security of a charge on any money payable to the board. (Since 1996, a trust board no longer needs the Minister's consent to do any of those things.)
- ▶ Section 27(b), which, before 1996, provided that a board needed the Minister's prior consent to be a guarantor for the repayment of any money by any person. (Since 1996, a board no longer needs the Minister's consent to do this.)
- ▶ Section 29, which, before 1996, empowered the Minister to appoint a public servant as a countersignatory for trust board cheques. (The section was repealed in 1996, thereby cancelling that Ministerial power.)
- ▶ Section 30, which requires a board to keep full and accurate accounts of all money received and paid by it and provides that the board's books may be inspected at all reasonable times, and copied, by any board member, board-authorized officer, any person authorised by the Minister, and any beneficiary of the board.
- ▶ Section 30A (inserted in the Act in 2001), which provides that every trust board is a 'public entity' as defined in section 4 of the Public Audit Act 2001 and that the Auditor-General is its auditor.
- ▶ Section 31(1), which requires a board, at the end of each financial year, to send to the Audit Office a balance sheet showing the board's assets and liabilities, an account of its income and expenditure, a statement of receipts and payments, and such other statements of account as may be necessary to show fully the financial position of the board and its financial operations during the year.
- ▶ Section 31(2) and (3), which provides (since 2001) that the Auditor-General (previously the Audit Office) must audit the board's financial statements and then transmit the certified statements to the Minister who shall forward them, with such comments as he or she thinks necessary, to the board.

- ▶ Section 32(1), which requires the trust board to furnish to the Minister, as soon as practicable after the end of a financial year, a statement of the estimated receipts and proposed payments of the board for the next year, together with the balance sheet, accounts, and statements prepared under section 31.
- ▶ Section 32(2), which provides that the Minister may approve the statement of estimated receipts and payments or defer approving it pending an explanation of an item or items in any of the statements provided by the board. However, the Minister can only defer approval for up to three months, after which time he or she must either approve the trust's estimated receipts and payments or direct an investigation of the board's affairs under section 33 of the Act.
- ▶ Section 32(3), which provides that no board shall in any year, without the prior approval of the Minister, make aggregate payments exceeding by more than 10 per cent the aggregate of payments provided for in the approved financial statements for that year.
- ▶ Section 33, which provides that the Minister can at any time direct an investigation of the affairs of a trust board and may, while the investigation is ongoing, suspend payments from the public account to the board and may, on receiving the report of the person conducting the investigation, recommend (to the Governor General) the removal of any board member, require the board to terminate the employment of any person or to exercise any power or do any act that it may lawfully do, and if the board fails or neglects to do as the Minister requires, the Minister may authorise a public servant to take action in the name of the board.

The first point in our assessment of the effect of these provisions is that, as counsel for Wai 36 Tuhoe submitted, the section 24 requirement that a trust board administer its assets for the general benefit of its beneficiaries establishes a duty to those beneficiaries. Until recently, that duty was not supported by a statutory requirement that the board report on its financial performance to its beneficiaries. Instead, financial reports were required to be made only to the Minister (who also had a number of powers relating to a board's financial operations, which we will discuss shortly). While the absence of a direct line of financial reporting to beneficiaries detracted from a board's accountability to them, it did not, in our view, establish that the board was legally accountable only to the Minister and not to its beneficiaries. We consider that a board's accountability to its beneficiaries was achieved primarily through the three-yearly statutory process of board members' selection or election. As well, as counsel for the Wai 36 Tuhoe claimants noted, beneficiaries could appeal to the Minister to order an investigation of the board's affairs and, in certain circumstances, could take High Court action to enforce the board's duties.³⁹⁵

Secondly, we note that the Act did impose some significant financial constraints

395. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 74

upon trust boards. We refer, in particular, to the section 32 ministerial power to approve detailed financial statements for the current year's operations of a board. The question is whether those undoubted fetters on a trust board's ability to act independently meant that the Crown controlled it so closely as to render the board a Crown agent in its administration of amalgamated lands. We think they did not.

One factor in our reasoning is that the primary purpose of the fetters – as explained to Parliament by the Minister of Maori Affairs and members of the Maori Affairs Select Committee when speaking to the Maori Trust Boards Bill in 1955 – was not to further Crown aspirations but to protect beneficiaries' interests in the prudent management of trust assets by promoting boards' performance of their duties to their beneficiaries.³⁹⁶ A more specific, but lesser, purpose of the requirement for boards to submit detailed budgets for ministerial approval was related to the fact that some boards were due to receive compensation money over a period of years from the Government. The Minister explained in Parliament that while compensation money belonged to the trust boards (it 'is theirs in its entirety'), the fact of its payment being 'spread over a number of years' meant that all taxpayers had an interest in trust board operations being prudently managed. That gave rise to a duty on the part of Government 'as trustees for the taxpayers, while giving a great degree of freedom to the [Maori Trust Board] trustees of the compensation money, to accept considerable responsibility to ensure that the beneficiaries as a whole are given protection.'³⁹⁷

Further support for our conclusion that the trust board was and is not a Crown agent in its activities in respect of the amalgamated lands derives from section 32(2), which empowered the Minister to approve a board's financial statements within three months or direct an investigation into part or all of its affairs. At the time the 1955 Act was passed there were already 10 trust boards in operation; more were created later. Therefore, section 32(2) envisaged that a minimum of 10 sets of financial statements would be presented to the Minister at the start of each financial year and the Minister would have three months (from the time all the required information was submitted) to approve them or initiate investigations into those that were not approved. The Minister's choices were stark – approve or investigate – and the later subsections of section 33 indicate that an investigation would be concerned with possible irregularities or improprieties in board expenditure. These matters suggest to us that the Minister's power to approve a board's financial statements was essentially a prudential measure, not a power to review in detail a board's financial plans and decisions.

Finally, we note in respect of the amalgamated lands that the Tuhoe-Waikaremoana Maori Trust Board was a 'responsible trustee' under section 438 of the Maori Affairs Act 1953. As we have discussed, in 1971 Tuhoe sought the assistance of the Minister, Duncan MacIntyre, who obtained an amendment to the Maori Trust Boards Act later the same year, which stated:

396. 'Maori Trust Boards Bill', 6 October 1955, NZPD, vol 307, pp 2843, 2850, 2868, 2879

397. *Ibid*, p 2879

Notwithstanding anything in any other provision of this Act, a Board may accept and hold or otherwise deal with any property upon trust for the benefit of the Board's beneficiaries or any of them or for the benefit of any group of persons which includes any such beneficiaries. *Any property held by a Board pursuant to this section shall be dealt with in accordance with the terms of the trust and shall not constitute an asset of the Board for the general purposes of this Act.* [Emphasis added.]³⁹⁸

Thus, most of the provisions of the Maori Trust Boards Act did not actually apply to the board in its role as trustee of the four amalgamated blocks. From the late 1960s through to the 1980s, the board did undertake a great deal of work in attempting first to consult owners and arrange the amalgamations, and then as trustee in attempting to administer the lands and negotiate afforestation or other arrangements with the Crown – all with little or no income coming to it from these blocks. Thus, the board used its general beneficiaries' money to pay for this work and the financial constraints of the Maori Trust Boards Act did apply (such as they were). Otherwise, the boards were acting as section 438 trustees rather than under the general provisions of the Maori Trust Boards Act.

Although these amalgamated lands were vested in the board as section 438 trusts in 1972, trust orders (setting out terms of the trusts) were not made at that time. The court, aware of ongoing negotiations with the Crown for the possible lease or exchange of lands (see chapter 16), decided not to define the trusts until the negotiations were advanced enough for definite proposals to be placed before it, and for specific powers or dispositions to be sought. Indeed, it was not until 1978 that the court approved terms of trust for Te Manawa o Tuhoe.³⁹⁹ The following year, the trust board was also successful in obtaining trust orders for Te Pae o Tuhoe and Tuhoe Kaaku.⁴⁰⁰ An attempt to define the trust for Tuhoe Tuawhenua was only temporarily successful, resulting ultimately in the litigation that quashed the 1972 amalgamation of lands under that title.⁴⁰¹

Here, we are concerned with whether the terms of a section 438 trust, as provided for under section 24c of the Maori Trust Boards Act 1955, gave the Crown such powers that the trust board should be considered a Crown agent when carrying out its role as a responsible trustee. The legislation in force at the time of the creation of the trusts in 1972 was the Maori Affairs Amendment Act 1967, which gave the Maori Land Court significant powers to decide the constitution of a trust and its trustees, as well as to supervise trusts after their creation. But no such powers were given to the Government under the Act.⁴⁰² Originally, section 438 of the 1953 Act had given significant powers to the Minister of Maori Affairs: no order vesting land in trustees could take effect 'until it has been approved by the Minister'; and no section 438 order could be varied or cancelled without the

398. Maori Trust Boards Act 1955, s 24c (inserted by Maori Purposes Act 1971, s 8)

399. Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), pp 47–48

400. Ibid, p 52; Fraser, 'Amalgamation of Urewera Lands' (doc F3), p 85

401. Bassett and Kay, 'Ruatahuna' (doc A20), pp 290–294

402. Maori Affairs Amendment Act 1967, s 142 (substituting a new section 438 in the Maori Affairs Act 1953)

Minister's approval.⁴⁰³ These powers were repealed in 1967. Similarly, the Maori Affairs Amendment Act 1974, which was in force at the time the trust orders were made, gave the Government neither relevant powers nor a supervisory role.⁴⁰⁴

From the terms of the trust order made for Te Manawa o Tuhoe in 1978, we note that the trustees had to submit their accounts to an annual general meeting of the beneficial owners as well as to the court. In accordance with the Act, the trust order gave the Maori Land Court a substantial role in supervising the trust's affairs and, indeed, prescribing some of its actions.⁴⁰⁵ We note the Central North Island Tribunal's view that the extent of the court's role and powers 'does raise issues about whether the [trusts] model is Treaty compliant'.⁴⁰⁶ But, for our purposes here, it means that the trust board as a responsible trustee for section 438 trusts could only be considered a Crown agent if the Maori Land Court itself was 'the Crown' or part of the Crown. This very argument was made by counsel for the Tuawhenua claimants, and we consider it in the next section.

19.6.8.2 The outcome of the first jurisdictional finding for the Tuawhenua, Nga Rauru o Nga Potiki, and Ngati Haka Patuheuheu claims

The combined effect of the various factors outlined above satisfies us that, in Hogg and Monahan's language, a Maori trust board operating under the 1955 Act had a 'substantial measure of independent discretion' such that it was not a Crown agent, despite the fact that it was subject to 'some degree of direct control'. Further, a Maori trust board operating as responsible trustee for a section 438 trust appears to have been subject to no Crown oversight or control.

We conclude that the Tuhoe-Waikaremoana Maori Trust Board was not an agent of the Crown in its various roles of:

- ▶ developing proposals and leading tribal discussions about amalgamation (up to 1972 and beyond);
- ▶ acting on behalf of the tribe and of what it believed to be a consensus of owners in applying to the court for amalgamation of titles in 1972;
- ▶ negotiating with the Crown about the future fate of these lands before trust orders defined the terms of the trust; and
- ▶ as responsible trustee for the amalgamated lands after the terms of trust had been set.

19.6.9 The second jurisdictional matter: is the separation of powers relevant to the Tuawhenua claim in respect of the actions of the Maori Land Court?

19.6.9.1 Discussion

As discussed earlier, counsel for Tuawhenua claimants argued that the Treaty of Waitangi was entered into by the Queen and not the executive Government. As

403. Maori Affairs Act 1953, ss 438(4), 438(8)

404. See Maori Affairs Amendment Act 1974.

405. 'Extract from Rotorua Minute Book Volume 191 Folios 204–242', 30 November 1978 (Brent Parker, comp, 'List of Documents – Compensation for Restrictions placed on Milling of Native Timber in the Urewera', various dates (doc M27(b)), pp 615–626)

406. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 793

a result, it follows that the separation of powers is not relevant, in the context of the Treaty of Waitangi Act, to the definition of ‘the Crown’ in a Tribunal inquiry. All three branches of Government, we were told, exercise the powers and responsibilities of the Sovereign. The independence of the courts from the executive Government is not a relevant consideration in Treaty terms. For the purposes of our inquiry, the actions of the Maori Land Court in amalgamating Te Urewera blocks in 1972, vesting those blocks in (inappropriate) trustees, and then failing to vest the Tuhoe Tuawhenua blocks in the Tuawhenua Steering Committee’s trustees in the late 1980s, are all to be considered actions of the Crown which may be found to have been in breach of Treaty principles.⁴⁰⁷

Because this submission was made in reply to the Crown’s closings, we did not hear from the Crown or other parties on this question.

In chapter 10, we noted our agreement with the Rekohu Tribunal’s conclusion that, as a matter of law, the Native/Maori Land Court is not the Crown nor an agent of the Crown. We did not elaborate in chapter 10 on the Rekohu Tribunal’s reasons for that conclusion but moved directly to the issue before us (and also before the Rekohu Tribunal): whether the Tribunal can investigate decisions of the Native/Maori Land Court for their consistency with Treaty principles, for the purpose of holding the Crown accountable in Treaty terms if it failed to redress injustices arising from the actions or decisions of the court. In the present context, however, concerning the amalgamation of lands into the Tuhoe-Tuawhenua block, counsel for Tuawhenua has raised an argument that was rejected by the Rekohu Tribunal. The argument is that ‘the Crown’ in section 6(1)(c) and (d) of the Treaty of Waitangi Act 1975 includes the courts because the doctrine of separation of powers is not relevant to the Tribunal’s jurisdiction, especially as the Treaty was made between the Sovereign – the Queen – and Maori; the courts, no less than the executive and the legislature, exercise governmental power on behalf of the Queen.

We agree with the Rekohu Tribunal’s reasons for rejecting that argument, a number of which derive from principles of statutory interpretation as applied to section 6 of the Treaty of Waitangi Act 1975. We reproduce here the Rekohu Tribunal’s own summary of its reasoning:

we are not satisfied that the term ‘the Crown’ where it appears in s 6(1)(c) and (d) of the Treaty of Waitangi Act 1975 includes the Native Land Court or any other court. . . . Our reasons for reaching this conclusion have been stated in the course of our consideration of the submissions addressed to us. Included among them are:

- ▶ the constitutional evolution of the independence of the judiciary;
- ▶ the identification of ‘the Crown’ as referring, unless clearly indicated otherwise, to the executive or the government;

407. Counsel for Tuawhenua, submissions by way of reply (doc N34), pp 37–38; counsel for Tuawhenua, second amended statement of claim (claim 1.2.12(b), SO C AA), pp 238, 243

- ▶ the expectation that had the legislature intended the Crown in s6(1)(c) or (d) to include the courts or judiciary that it would have said so bearing in mind that the 'the courts' necessarily includes all New Zealand courts and the Judicial Committee of the Privy Council;
- ▶ the context of s6 in which 'the Crown' unequivocally refers to the executive or government in subsections (3), (4) and (5) and express provision is made to include Acts of Parliament in subsection (1)(d);
- ▶ the absence of anything in the Treaty context to require the construction sought by the claimants;
- ▶ the absence of any provision in the Bill of Rights or the Universal Declaration of Human Rights which materially assists in the interpretation of s6(1)(c) or (d); and
- ▶ the intimation (albeit provisional) of Heron J in the *Te Runanga o Wharekauri Rekohu Inc* case that there would seem to be a strongly arguable case that the Native Land Court's decision could not be regarded as the actions of the Crown.⁴⁰⁸

19.6.9.2 The outcome of the second jurisdictional finding for the Tuawhenua claim

The result of our agreement with the Rekohu Tribunal's reasoning is that we do not accept the Tuawhenua claimants' argument that the Maori Land Court should be regarded as the Crown. In particular, this means that we will not consider further the claims relating to the Maori Land Court's treatment of the Tuawhenua application in 1987. We accept that the claimants feel aggrieved, but none of the actions involved were actions of the Crown. The claimants had a right of appeal, which they did not exercise. In section 19.6.10 we consider whether they still have a legal remedy in the court.

19.6.9.3 A qualifying point: more an administrative than a judicial body?

Although counsel did not raise this point with us, witnesses stressed the relevance of findings made by the 1980 commission of inquiry into the Maori Land Court. In the report of Heather Bassett and Richard Kay and the report of Clementine Fraser, the discussions of amalgamation were framed by the findings of this royal commission.⁴⁰⁹ While generally approving of the formation of trusts and incorporations, the commission noted that the court had been largely responsible for promoting this development. In its view:

The Court is thus in a powerful position in being able to influence the form and extent of corporate land management. Some judges who use this power see the Court as an agent in advising owners of land held in multiple ownership about ways of

408. Waitangi Tribunal, memorandum, 5 October 1994 (Wai 64 RO1, paper 2.67), pp 21–22

409. Bassett and Kay, 'Ruatahuna' (doc A20), pp 275–276, 286–289; Fraser, 'Amalgamation of Urewera Lands' (doc F3), pp 25, 26–28

achieving optimum management of their land. At the other extreme would be judges who see the Court's role as that of exercising its jurisdiction on the applications which come before it without any general underlying philosophy on land management.⁴¹⁰

In their submissions to the commission, Chief Judge Gillanders Scott and Judge Durie favoured the court taking an 'overriding social and therapeutic approach, even if it could be criticised as implying a substantial element of paternalism.'⁴¹¹ Although the commission felt that the court 'is not given any special legislative guidance on the aims or philosophies which are to direct it', Gillanders Scott saw the court and the Maori Affairs Department as having the same goal: 'preserving Maori ownership by making better use of Maori land'.⁴¹² He conceded:

this role had led the Court to involve itself in steps which might be thought to be basically more administrative than judicial, such as helping Maori owners (by advice, encouragement, and sometimes promotion outside the precincts of the Court) to improve the use of their lands.⁴¹³

Gillanders Scott 'would not accept that the Court should confine itself to the "hear and determine" approach'.⁴¹⁴ The commission noted that 'many Maoris (especially those from country areas) expect this kind of help from the Court and are grateful for it', while others 'see it as offensively paternalistic and unjustifiably interfering'.⁴¹⁵ Gillanders Scott believed that there was 'grass roots' support in Maoridom for the court's protective functions.⁴¹⁶

Judge Durie (as he then was) told the commission that the core of the court's 'social purpose' was to 'assist the retention of Maori land in Maori ownership by facilitating its better use and management'. He set out the court's duties as:

- ▶ to provide a means for owners to know what is happening to their lands, and a forum in which they might discuss it;
- ▶ to determine or settle disputes within the body of owners;
- ▶ to protect minorities from oppressive majorities, and to protect majorities from 'vociferous' minorities;
- ▶ to 'ensure fair play' when the Crown or non-owners treat with Maori about lands in multiple ownership;
- ▶ to 'see practical results, and promote better use and management of lands';

410. 'The Maori Land Courts: Report of the Royal Commission of Inquiry', 1980, AJHR, 1980, H-3, pp 27-28 (Bassett and Kay, 'Ruatahuna' (doc A20), p 276)

411. 'The Maori Land Courts: Report of the Royal Commission of Inquiry', 1980, AJHR, 1980, H-3, p 80

412. Ibid

413. 'The Maori Land Courts: Report of the Royal Commission of Inquiry', 1980, AJHR, 1980, H-3, p 80

414. Ibid

415. Ibid, p 81

416. Ibid, pp 80-81

- ▶ to protect individuals and groups when their assets were being administered by incorporations, trusts, or the Maori Affairs Department, and to protect the incorporations, trusts, and Department 'in the administration of those assets'; and
- ▶ to keep proper records so as to provide certainty in Maori land administration.⁴¹⁷

The commission concluded:

The Maori Land Court should be a *court of justice* with traditional judicial standing and independence. But if it is to be that, it must strive to be predominantly a judicial and less of an administrative body. Once a court involves itself substantially in administrative action, especially in areas which are traditionally the fields of State administration, it places in jeopardy its claim to independence and sows the seeds of conflict between itself and the machinery of State. Furthermore, it runs a real and substantial risk of being not only interfering, but of being partisan in its rulings, not consciously but by allowing itself to become a promoter of its own opinions about the use of land to the exclusion of those of the litigants before it.⁴¹⁸

The commission noted evidence that this risk had already come to pass, quoting an experienced lawyer who told the commission:

I have found in the past that the natural and proper concern of some Judges of the Maori Land Court to achieve some utilization of Maori lands which they have concluded is in the best interest of the owners, has led them to ignore the fundamental right of those owners to have some voice in the disposal of their property . . . Judges sometimes seem to become advocates for a cause they have espoused.⁴¹⁹

The commission did not really doubt the independence of the court from the Crown – and, indeed, noted that the Maori Affairs Department sometimes came into conflict with the court because both were trying to do the same job. But we do take account of its findings. This is where, in our view, counsel for Tuawhenua's submission about a 'Treaty function' has some force. In the period under review, from the late 1960s to the early 1990s, Maori Land Court judges such as Gillanders Scott saw themselves as protecting Maori interests and carrying out a policy that Maori land was best preserved in Maori ownership by ensuring its effective management and use. This will be apparent not just from this section of the chapter but also from the preceding section in which we discussed the Te Whaiti-nui-a-Toi lease. From the evidence available to us, it appears that the court and the Maori Affairs Department had similar objectives but sometimes clashed in their execution. But it is beyond doubt that the legislation in force from 1967 to 1993 gave the

417. Ibid, p 80

418. Ibid, p 81

419. Ibid, pp 81–82

court enormous power over what Maori could do with their land, and who among them could do it.

We accept that, from the mid- to the late twentieth century, the Maori Land Court was to some extent exercising the Crown's Treaty duty of actively protecting Maori and their lands – sometimes in conjunction with the Department of Maori Affairs or the Forest Service and other departments, sometimes in supervision of them, and occasionally at odds with them. This was so, even though the Maori Land Court was not the Crown or an agent of the Crown at law. The latter point is still crucial, in our view; the legislation provided Maori with protection by a court independent of Crown control, although responsive (as it had to be) to the policy imperatives enshrined in successive Acts. And the court's process gave Maori a right to appear and be heard on how their interests should best be managed and protected (that process failed in 1972, as we explain in section 19.6.11(3)). This was important in mitigating against protection becoming paternalism. As the Te Tau Ihu Tribunal has found, 'Active protection requires honourable conduct by, and fair processes from, the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected.'⁴²⁰ But, as we mentioned earlier, the Central North Island Tribunal did note a concern about whether the extent of the court's powers over Maori and their lands was Treaty compliant.

Nonetheless, there were safeguards in the court's exercise of its powers: judicial independence; due process; a right of appeal to the Maori Appellate Court; and (as exercised by the Tuawhenua claimants in the 1980s) the right to seek a judicial review in the ordinary courts. In their research reports, however, Bassett and Kay and Fraser stated that the 1967 Act had taken away the right of Maori owners to appeal section 438 vesting orders.⁴²¹ If this were correct, it would have been a serious matter – but it was not correct. What the 1953 Act had provided for was the Maori Appellate Court to hear an appeal regardless of whether the Minister had approved the vesting order, and for the Appellate Court's decision likewise to be subject to ministerial approval.⁴²² In repealing this provision, the 1967 Act removed the Minister's powers, not the Maori owners' right of appeal.

In this section of our chapter, there are three issues arising from the legislation and the roles that it gave the court and the title improvement officers:

- ▶ the first is whether the 'real and substantial risk' of the court promoting 'its own opinions about the use of land to the exclusion of those of the litigants before it' came to pass when the court ordered the amalgamation of 160 blocks in Te Urewera in 1972;
- ▶ the second is whether the legislative powers of the title improvement officer were exercised in conjunction with the court to take away the Maori owners'

420. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, vol 1, p 4

421. Bassett and Kay, 'Ruatahuna' (doc A20), p 274; Fraser, 'Amalgamation of Urewera Lands' (doc F3), p 12

422. Maori Affairs Act 1953, s438(5)

Treaty rights to determine how their lands were to be held, used, and administered; and

- ▶ the third is whether the 1967 and 1974 Maori Affairs Amendment Acts set policy goals for both court and department, such that the legislation under which the court and officials acted was culpable in Treaty terms.

Before addressing these issues, however, we need first to consider counsel for Wai 36 Tuhoe's argument that the objectors to amalgamation still have legal remedies available to them.

19.6.10 The third jurisdictional matter: do the claimants still have a legal remedy?

In the submission of counsel for Wai 36 Tuhoe, trusteeship of land 'is a matter for the owners and for the Maori Land Court', not the Waitangi Tribunal.⁴²³ Fundamentally, that submission is correct. As noted at our hearing of closing submissions in Ruatoki in 2005, it may be possible to establish a whenua topu trust if Ngati Haka Patuheuheu want to establish an entity or body for the hapu to manage land. We note the following exchange at the hearing:

Waitangi Tribunal: Can we go please to page 141 [of closing submissions (doc N7)], talks about vesting in an entity or body, subject to management by your client. Can you be more specific? What do you mean in modern day terms?

Counsel for Ngati Haka Patuheuheu: Well, in modern day terms, for example, the Ngati Haka Patuheuheu have a trust which they have created. It's registered with the registrar of incorporated societies. It's that entity which has been created to manage the affairs of Ngati Haka Pautheuheu that, I submit, it should have been a body such as that.

Tribunal: Yes. When I read that I looked at it and thought: 'He means a Whenua Topu trust'.

Counsel: Not necessarily, Sir.

Tribunal: Not necessarily, so you're keeping your options open?

Counsel: Absolutely.⁴²⁴

Although he did not state it outright, counsel for Wai 36 Tuhoe implied that the Tribunal should exercise its jurisdiction under section 7(1)(c) of the Treaty of Waitangi Act, where it has discretion not to inquire into a claim if there is 'in all the circumstances an adequate remedy or right of appeal . . . which it would be reasonable for the person alleged to be aggrieved to exercise'. The question here is: what options are available to the claimants in the Maori Land Court, and do any such options for 'remedy' preclude the necessity of the Tribunal making findings on their Treaty grievances?

423. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 70

424. Counsel for Ngati Haka Patuheuheu, responses to questions from the Tribunal, 14th hearing week, Ruatoki, 8 June 2005

First, we note that the grounds on which the High Court quashed the 1972 amalgamation of Tuhoe Tuawhenua only applied additionally to Tuhoe Kaaku. For Te Manawa o Tuhoe and Te Pae o Tuhoe, the 1973 hearing which finalised those amalgamations was advertised, preceded by a well attended meeting of owners the day before. And for Tuhoe Kaaku, there has since been a rehearing in 1995 and a full Maori Land Court reconsideration of that amalgamation. Thus, further High Court action is no longer possible, at least on the grounds advanced for Tuhoe Tuawhenua.

Secondly, we note that further action may be taken by the owners in the Maori Land Court under Te Ture Whenua Maori 1993. It is not possible to say whether court actions of this kind will be successful.

19.6.11 The fourth jurisdictional matter: are any remaining matters actions of the Crown which may legitimately be the subject of a Treaty inquiry by this Tribunal?

We are still required to carry out our function under section 6A of the Treaty of Waitangi Act, to determine whether the Treaty claims are well founded and if the claimants have suffered prejudice. But, as counsel for Wai 36 Tuhoe has submitted, we cannot make findings about actions of bodies that are not the Crown or agents of the Crown. With that proviso in mind, we now consider the following issues:

- ▶ Should the Crown have paid the expenses of amalgamation or did such expenses fall in the category of ordinary land administration?
- ▶ Was the Minister at fault in securing legislative provision for Maori trust boards to accept land in trust?
- ▶ Was the 1972 amalgamation of titles an action of the Crown or an action of Tuhoe?
- ▶ Did the Crown's legislative regime provide adequate and appropriate tools for title improvement and the collective management of Maori land?

19.6.11.1 *Should the Crown have paid the expenses of amalgamation or did such expenses fall in the category of ordinary land administration?*

In the submission of counsel for Wai 36 Tuhoe:

Amalgamation has been a necessary remedial step to reverse the adverse impacts of the UDNR, the UCS, the RWCS [Ruatoki–Waiohau consolidation scheme] and the general fragmentation and over-subdivision of land within Te Urewera. The prejudice of these earlier schemes was that land was over-subdivided, over-surveyed (yet without giving rise to proper titles) and most significantly without any form of tribal/corporate management. The UDNR had purported to establish a system of self government but the local committees and general committee were never allowed to work.

The Crown should have met the cost of amalgamation: Tuhoe should not have had to meet the cost of tidying up yet another mess left by the Crown. The Tuawhenua lands still suffer the problems of not being amalgamated.⁴²⁵

425. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 66

As we noted earlier (section 19.6.4), the Crown made two rather contradictory submissions on this issue. In essence, we understand its position to be:

- ▶ that the division and amalgamation of lands over time is a ‘rational response to changing conditions as land finds its “best use”’;
- ▶ that legislation has provided tools for this to occur;
- ▶ that amalgamations are not necessarily costly and there is no evidence to show the actual costs of these particular amalgamations; and
- ▶ that the Department of Maori Affairs provided administrative support and funded meetings of assembled owners, which went some way towards assisting with costs.⁴²⁶

We cannot accept the Crown’s submission that the 1972 amalgamations were part of a natural process over time in which the best use of land was gradually worked out and agreed upon. Clearly, the creation and empowerment of individual interests by the Crown – first, through the UDNR Act, secondly by the Urewera commissions, thirdly by the Crown’s purchase from individuals of undivided shares, and fourthly by the UCS – all contributed to a situation which Tuhoe were attempting to reverse in 1972. As Tuhoe leader Sonny White put it at a hui in 1974: ‘You all appreciate of course that one of the reasons for amalgamation is so that we cannot be picked off individually.’⁴²⁷ There spoke the voice of a bitter experience.

But we do accept that there is no evidence before us as to the actual costs of these amalgamations (and subsequent title work), or the degree to which the Crown assisted with those costs. That being the case, we cannot find in favour of the Wai 36 Tuhoe claimants on this issue.

19.6.11.2 Was the Minister at fault in securing legislative provision for Maori trust boards to accept land in trust?

As we discussed above, the Minister of Maori Affairs, Duncan MacIntyre, sought an amendment to the Maori Trust Boards Act in 1971 so as to ‘enable a Maori trust board to act as trustee in respect of property which is not to become a general asset of the board and does not affect the beneficiaries.’⁴²⁸ It was this law change that allowed the Tuhoe-Waikaremoana Maori Trust Board to become the responsible trustee for the four amalgamated blocks in 1972. Previously, the 1970 amalgamation of the ‘Tuhoe’ block had been vested in the New Zealand Insurance Company. The Minister’s amendment, which was enacted by Parliament as section 8 of the Maori Purposes Act 1971, was singled out by counsel for Tuawhenua as one of two key ‘non-court crown actions’:

The claimants do not only complain that the Court breached the principles of the Treaty. It is clear from the evidence that the Minister of Maori Affairs was involved

426. Crown counsel, closing submissions (doc N20), topics 18–26, pp 66–67, topic 36, p 13

427. ‘Minutes of meeting of Tuhoe Tuawhenua Trust held at Te Umuroa Marae, Ruatahuna on Saturday, 28 September 1974 at 1.30 pm’ (Bassett and Kay, supporting papers to ‘Ruatahuna’ (doc A20(a)), p 111)

428. Duncan MacIntyre, 15 December 1971, NZPD, vol 377, p 5344

in promoting and obtaining an amendment to the Tuhoe Maori Trust Board Act to enable the Trust Board to administer the assets of Tuhoe people.⁴²⁹

How did this amendment come about? On 10 April 1971, Tuhoe held a ‘general meeting’ at Tanatana marae, Waimana, at which a presentation was approved for the forthcoming visit of the Minister of Maori Affairs, Duncan MacIntyre. A fortnight or so later, on 23 April 1971, MacIntyre met with Tuhoe at Mataatua marae, Ruatahuna. Sonny White, chairman of the trust board, presented the Minister with a written submission ‘for and on behalf of Ngai-Tuhoe’, entitled ‘Nga Take A Ngai-Tuhoe: “Te Kotahi A Tuhoe, E Kata Te Po”’.⁴³⁰ Sonny White, John Rangihau, Reg Nikora, Len Rangi, and Tame Takao addressed MacIntyre on the various subjects covered in the submission.⁴³¹ While there does not appear to be a record of what was said at the hui, we do have a copy of Tuhoe’s written submission to the Minister.⁴³²

As noted in earlier chapters, Mr White began by noting the centenary of the hui at Tatahoata, Ruatahuna, in April 1871, ‘where it was decided that they give their allegiance to the Government as a Tribe’. On the present occasion, the tribe reaffirmed their ‘loyalty and allegiance to the Crown’, and also upheld the position of the Treaty of Waitangi.⁴³³ While many matters were then raised with the Minister, we are concerned here with the submissions that resulted in a law-change later in the year, to allow Maori trust boards to ‘act as trustee in respect of property which is not to become a general asset of the board and does not affect the beneficiaries.’⁴³⁴

The board’s submission stated:

Tuhoe are at the moment concerned about all its assets and the Board has initiated a study of the overall situation. It appears to us as an ideal that we would be better able to conserve our assets and to attend to the social and economic advancement of the Tuhoe people if it were possible to administer their assets through one authority . . . The Tuhoe Trust Board would like to discuss with your Department its objective of unified administration and means of achieving this objective by legislation where necessary.⁴³⁵

429. Counsel for Tuawhenua, submissions by way of reply (doc N34), p 38

430. Submission to the Hon Duncan MacIntyre, ‘Nga Take a Ngai-Tuhoe: “Te Kotahi a Tuhoe, E Kat ate Po”’, 23 April 1971 (Heather Bassett and Richard Kay, comp, supporting papers to ‘Ruatahuna: Land Ownership and Administration, c 1895–1990’, 3 vols, various dates (doc A20(c)), vol 3, pp 292–294, 296)

431. Nikora, ‘Te Urewera Lands and Title Improvement Schemes’ (doc G19), pp 25–27

432. ‘Nga Take a Ngai-Tuhoe’ (Basset and Kay, supporting papers to ‘Ruatahuna’ (doc A20(c)), pp 292–305)

433. *Ibid*, pp 293, 296

434. Duncan MacIntyre, 15 December 1971, NZPD, vol 377, p 5344

435. ‘Nga Take a Ngai-Tuhoe’ (Basset and Kay, supporting papers to ‘Ruatahuna’ (doc A20(c)), p 297)

This submission was the genesis of Duncan MacIntyre's proposal to amend the Maori Trust Boards Act. The rest of Tuhoe's submission emphasised the need to cancel earlier trust arrangements and to centralise control of Tuhoe lands in a single tribal authority, but it did not specifically state that this authority should be the trust board.⁴³⁶ A Tuhoe delegation met with MacIntyre in July 1971 to progress matters, but we do not know the detail of what was discussed. Tama Nikora, who was present at this meeting, referred to discussions about possible compensation for timber restrictions but made no mention of any further discussion about enabling Tuhoe to administer their assets through 'one authority'.⁴³⁷

In Tama Nikora's view, the Minister was very clearly acting on the express wishes of Tuhoe: 'On 17 December 1971 the Government responded to Tuhoe submissions by the passage of s 8 Maori Purposes Act 1971 which added s 24c to the Maori Trust Boards Act 1955 to enable the Trust Board to accept trusts'.⁴³⁸

This was also how the Maori Land Court understood matters at the time. A special amalgamation minute book was begun in 1973, in which an introductory passage stated:

The motivating forces behind the present proposals for these lands have been Mr John Rangihau, Mr Charlie Nikora and members of the Tuhoe Waikaremoana Maori Trust Board and peculiar to Tuhoe, the people have always inclined to the view that the Board would better manage the future of Tuhoe lands. To this end after the Minister of Maori Affairs had met the Tuhoe people at Ruatahuna in April 1971 and they had expressed their wish for the Board to control their lands. Legislation was passed in December 1971 to allow Maori Trust Boards to accept trusts – vide Section 8 of the Maori Purposes Act 1971 as an amendment to the Maori Trust Boards Act 1955. The Board has expressed its consent to accept any trust which the Court may see fit to make with regard to all the lands which will be set out in full later in these minutes.⁴³⁹

The Tuawhenua researchers noted this interpretation and did not dispute it.⁴⁴⁰

As we see it, the Minister rightly considered himself to be acting on the wishes of Tuhoe, as presented to him at the April 1971 hui. Also, section 24c was enabling, not prescriptive; if the Maori owners and/or the court thought proper, trust boards could now become responsible trustees for section 438 trusts, but nothing compelled either the owners or the court to use the trust boards for that purpose. Nor did MacIntyre's amendment provide any incentives for choosing a trust board as trustee, or any disincentives for not doing so. It simply enabled Maori owners (or the court) to make the choice.

436. Ibid, pp 298, 299, 302–303, 304

437. Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), p 28

438. Ibid

439. Whakatane Maori Land Court, minute book 58, 24 November 1973, fol 2; Fraser, 'Amalgamation of Urewera Lands' (doc F3), pp 16, 31

440. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p 446

19.6.11.3 *Was the 1972 amalgamation of titles an action of the Crown or an action of Tuhoe?*

The evidence before us is very clear that the 1972 amalgamation of titles in Te Urewera was the initiative of Tuhoe, not the Crown nor even the court. The board's hui with owners prior to the 1972 Maori Land Court hearing, its adoption of amalgamation as a solution to a number of problems, its prosecution of amalgamation in 1970 (with the reluctant acceptance of the New Zealand Insurance company as responsible trustee), its submissions to Duncan MacIntyre in 1971, its continued prosecution of amalgamation at hui and in court in 1972 and 1973; these facts all establish that the 1972 amalgamation of titles was the product of a major and intensive effort on the part of the Tuhoe leadership. The reports of Tama Nikora, Heather Bassett and Richard Kay, Clementine Fraser, and the Tuawhenua researchers are all in agreement on this point.⁴⁴¹

Yet there is a great deal of confusion, which we think has arisen for five reasons:

- ▶ witnesses have emphasised the extensive and unilateral powers that the 1967 Act gave title improvement officers and the court, even though they were not used on this occasion;
- ▶ the often-quoted statement of Chief Judge Gillanders Scott that the application was typed and submitted by officers of the Department of Maori Affairs;
- ▶ the High Court finding that there was a breach of natural justice at the February 1972 Maori Land Court hearing at which the amalgamations were first ordered;
- ▶ the emergence of disagreement on the part of some owners or groups of owners after 1972, which ultimately led to the dissolution of the Tuhoe Tuawhenua amalgamation; and
- ▶ the development of a view among some claimants that the trust board was an agent of the Crown, and thus the amalgamation of titles in 1972 – which the board clearly led – was an act of the Crown.

We deal with each of these points in turn.

19.6.11.3.1 WHO MADE THE 1972 APPLICATION TO THE COURT?

Counsel for the Tuawhenua claimants submitted: 'In 1967, the Crown adopted a policy and practice of investigation for title improvement that gave greater emphasis to general considerations regarding profitable land use and effective land management rather than the wishes of owners.'⁴⁴² This submission was based on Bassett and Kay's evidence about the powers and functions of title improvement officers and the court, as set out in the Maori Affairs Amendment Act 1967.⁴⁴³ Clementine Fraser, in her report for the Tribunal, also emphasised these powers but concluded that 'The Court was operating on the stated wishes of some of the

441. Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), pp 6–29; Bassett and Kay, 'Ruatahuna' (doc A20), pp 276–285

442. Counsel for Tuawhenua, closing submissions (doc N9), p 261

443. Bassett and Kay, 'Ruatahuna' (doc A20), pp 271–276

owners (via representatives) rather than making decisions as to what it thought they should do.⁴⁴⁴ We agree.

In brief (see the sidebar over for details and references to particular sections), part II of the 1967 Act required both the court and the improvement officer to carry out its main purpose: 'to promote the effective and profitable use and the efficient administration of Maori land in the interest of the owners'. In doing so, the title improvement officer was to investigate how land was being used or administered and whether this could be improved. The officer was to consult the owners so far as 'conveniently practicable'. Then, the officer was to decide which (if any) of a number of sweeping changes should be made to how the land was used or administered, including title amalgamation. Next, the registrar had to apply to the court for orders to carry out the improvement officer's decisions. In considering such applications, the court was to 'have regard to the main purpose of this Part' of the Act. In doing so, the court had to satisfy itself of two things: that the order sought would not be contrary to the interests of the owners; and that the improvement officer had carried out 'adequate consultation' with them. If satisfied on those points, then the court 'shall make the order notwithstanding any objection thereto by any owner or owners', so long as the order would not immediately diminish the value of objectors' interests, or (if an objector or objectors were in 'actual occupation') would not cause them 'substantial hardship'.

These were remarkably sweeping powers. Owners would be consulted as far as 'conveniently practicable' but the power of decision-making was almost entirely taken away from them. The improvement officer could decide, among other things, that their land should be partitioned (or have its partitions cancelled), that their titles should be amalgamated, that they should be formed into an incorporation or their land vested in trustees 'upon trust to alienate', and that roads should be put through their land. The only decision-making left to them was under section 17(j): if the improvement officer decided that the land should be sold or otherwise alienated, the provisions of the 1953 Act (including for meetings of assembled owners) would still apply. The improvement officer also set in motion the court's jurisdiction to make all kinds of orders – again, including for amalgamation of titles – and the court could make those orders even if the owners objected. The court's responsibility was to carry out the purpose of part II, so long as it was satisfied that adequate consultation had taken place, and that the interests of owners or objectors would not actually be harmed. These were draconian powers indeed.

Under part VIII of the 1967 Act, the court was given almost absolute power over trusts (see the sidebar over). The only right conferred on the owners by the new section 438 was to express an opinion as to who should be appointed trustees (or to be given a 'reasonable opportunity' to express an opinion). But the court did not have to accept that opinion: it could decide on its own motion to constitute a trust on whatever terms seemed suitable to it; it could appoint, vary, or dismiss whatever trustees it chose whenever it chose; and it could decide the terms of the trust, alter those terms, and even cancel the trust 'at any time'. Its prescribed

444. Fraser, 'Amalgamation of Urewera Lands' (doc F3), p 4

responsibility under section 438 was to arrange trusts that would facilitate the use, management, or alienation of Maori land. In practical terms, however, there was nothing in the Act to prevent the court from exercising all of these powers in reaction to applications from the owners or their trustees. As will be discussed, the

The Powers of Improvement Officers and the Court under the Maori Affairs Amendment Act 1967

Part II: Improvement officers and the court

Part II of the Act was entitled 'Promotion of Better Use and Administration of Maori Land'. Section 15 explained that the 'main purpose of this Part of this Act is to promote the effective and profitable use and the efficient administration of Maori land in the interest of the owners'.

Under Part II, the secretary for Maori Affairs could instruct an improvement officer to investigate any Maori land to determine whether or not its current use was the 'use to which the land is best fitted' (section 16). After 'such consultation as is conveniently practicable with the owners' and other interested parties, the improvement officer could then decide whether or not action should be taken to 'improve the fitness of the land for effective and profitable use, or to permit the more efficient administration of the land' (section 17). The 'action' that could be taken included: undertaking or cancelling partitions; amalgamation of titles; laying out or cancelling roads; setting up an incorporation; vesting the land in trust (for alienation); surveying boundaries; acquiring uneconomic interests; or the alienation of the land by the owners (section 17). Having decided what action should be taken, the improvement officer reported it to the registrar, who then applied to the court to exercise 'any of its jurisdiction which the Improvement Officer has determined to be necessary or desirable' (section 18).

Once an application had been made, section 19 stated that the court was to 'have regard to the main purpose of this Part' (quoted above). Then, if the court considered that 'the order sought would not be contrary to the interests of the owners and that adequate consultation [under section 17] has taken place with the owners or their representatives, it shall make the order notwithstanding any objection thereto by any owner or owners' (section 19). There was a proviso: no order should be made 'if the Court is satisfied that any owner objecting to the order sought would, if the order were made – (a) Suffer an immediate diminution of the value of his interests in the land; or (b) Being in actual occupation of any part of the land, suffer substantial hardship' (section 19).

Part VIII: the powers of the court in respect of amalgamations and trusts

Under Part VIII of the Act ('Miscellaneous Amendments'), Maori owners could apply to have their titles amalgamated. The provisions of section 141 (which

court's exercise of its section 438 jurisdiction in respect of the Te Urewera amalgamations was largely responsive to the wishes of the owners as the court understood them to be.

As noted, an amalgamation could take place either as a result of an application

became the new section 435 of the 1953 Act) applied, whether or not the amalgamation order was sought by the owners or the registrar (acting in response to the improvement officer). Under this new version of section 435, the court – where it was satisfied that land could be ‘more conveniently worked or dealt with as if it were held in common ownership under one title’ – ‘may’ cancel the old titles and make an amalgamation order, ‘substituting therefor one title for the whole of the land’ (section 435(3)). In making an amalgamation order, the court had to set forth the relative interests of the owners (corresponding to the relative values of their old interests). In doing so, the court had discretion whether or not to use capital or unimproved values, whether or not to use existing or new valuations, and also to give effect to agreements among the owners (allowing different relative interests altogether) (section 435(4)–(5)). If an entire piece of pre-amalgamation land was leased or mortgaged, the lessees or mortgagees had to give their consent to an amalgamation, or else the court had to decide that their interests would not be harmed (section 435(6)).

Section 142 inserted a new version of section 438 into the 1953 Act. This stated that the purpose of vesting land in trustees was ‘facilitating the use, management, or alienation’ of any Maori land (section 438(1)). A trust could be constituted in two ways: the court could do so on its own motion; or in response to an application (section 438(2)). And, as we have seen, an application could be made by the owners or by the registrar (acting in response to a decision of the improvement officer). The court had to satisfy itself that the owners had, ‘as far as practicable’, been given ‘reasonable opportunity’ to ‘express their opinion’ as to who should be the trustees (section 438(1)). Having satisfied itself on that point, the court could then – on its own motion or in response to an application – vest land in trustees, subject to the trusts declared in a separate trust order (section 438(2)). Section 438(3) provided for the court ‘at any time’ to add or reduce the number of trustees, replace trustees, vary the terms of trust, or terminate the trust. Section 438(5) required a trust order separate from the vesting order, which could authorise or direct the trustees to do various things (including alienation). The court’s order ‘may’ confer on the trustees any power ‘as the Court thinks fit’; otherwise, and subject to any express restrictions in the order, the trustees would have ‘all such powers and authorities as are necessary for the effective performance of the trusts’ (section 438(5)). In a trust order, the court could make whatever provisions as to accounts (keeping, filing, inspection, and auditing) as it thought ‘necessary or desirable’ (section 438(6)).

from the registrar (in response to a report from an improvement officer), or upon an application from the owners. We see no evidence to support the Tuawhenua claimants' view that the 1972 amalgamation came about because the Crown, in breach of the Treaty, 'adopted a policy and practice of investigation for title improvement that gave greater emphasis to general considerations regarding profitable land use and effective land management rather than the wishes of owners'.⁴⁴⁵ This submission could only be upheld if the improvement officer and registrar had exercised their powers under part II of the Act. Tuhoe were wary of such a prospect at the time. Tama Nikora, in his evidence for the Wai 36 Tuhoe claimants, set out the powers of the improvement officers under section 17 and noted:

on 15 November 1968, a Tuhoe seminar on land utilisation was held at Ruatoki where the question of the wide-ranging powers of the title improvement officers under the 1967 Act became a matter of concern. Tuhoe thought that there was nothing intrinsically wrong with encouraging the commercial use and development of Maori land but thought that the Maori Affairs Amendment Act 1967 was a heavy-handed answer to some of these problems.⁴⁴⁶

When Tuhoe made their submission to Duncan MacIntyre in April 1971, their leaders emphasised the tribe's intention to centralise administration of their lands for the purpose of 'better utilisation', to save those lands from alienation, and for the 'social and economic advancement of the Tuhoe people'.⁴⁴⁷ The Crown's assistance was sought to achieve those objects, and in particular to amalgamate lands for afforestation.⁴⁴⁸ The trust board asked for a title improvement officer to work with the people, specifying that it should be someone 'of Maori stock with a good working knowledge of the Maori language', and that the officer should work through a 'general committee representing the owners'. The board noted: 'The powers of the title improvement officer as defined by the Amendment Act of 1967 however give some cause for anxiety, but we accept that in particular instances they would be necessary'.⁴⁴⁹ Aware that a great deal of titles research and work was necessary for an amalgamation, Tuhoe leaders requested that the Minister direct the registrar to amalgamate lands suitable for afforestation, that the department undertake the scheme as a matter of national importance, and that (requested twice) the Minister direct the registrar to provide a title improvement officer to work with them on this amalgamation project. As a result, they hoped that their 'time, expense and man hours' would be reduced.⁴⁵⁰

While hui and discussions continued for the remainder of 1971, the amendment

445. Counsel for Tuawhenua, closing submissions (doc N9), p 261

446. Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), p 18

447. 'Nga Take a Ngai-Tuhoe' (Basset and Kay, supporting papers to 'Ruatahuna' (doc A20(c)), pp 297–298)

448. *Ibid*, p 299

449. *Ibid*

450. 'Nga Take a Ngai-Tuhoe' (Basset and Kay, supporting papers to 'Ruatahuna' (doc A20(c)), pp 302–303)

to the Maori Trust Boards Act (discussed above) was not obtained until 17 December 1971. From January 1972, therefore, amalgamated lands could be vested in the trust board. This happened soon after, in February of that year. It was seen by Tuhoe leaders at the time (and by the court) as the culmination of several years' work. There had been hui and general meetings of owners in the late 1960s and in 1970, resulting in the amalgamation of some blocks under the name 'Tuhoe' in July 1970, vested in the New Zealand Insurance Company as responsible trustee, with seven representatives of the owners as advisory trustees. In 1971, the hui with Duncan MacIntyre (at which Judge Gillanders Scott was present) was followed by discussions between the Tuhoe Western Tribal Executive and Tasman Pulp and Paper as to possible afforestation. According to the evidence of Tama Nikora, it was this executive which first explicitly nominated the trust board to be the trustee for amalgamated lands.⁴⁵¹

On 14 February 1972, the court sat to hear applications for the amalgamation of some 160 blocks of Te Urewera lands into four titles. The hearing was held at Rotorua and it was not advertised.⁴⁵² The day before, on 13 February, the Tuhoe Planning Committee (a trust board committee) held an all-day meeting at Rutaoki at which it was resolved to proceed with amalgamation. The registrar was present at that meeting, and then he returned to Rotorua to attend the court hearing the next day. It is not possible to say who exactly was present at this hearing, but the minutes recorded John Rangihau and Piki McGarvey 'for applicants and Tuhoe people generally in support', with the registrar and deputy registrar also in support of the applications. The deputy registrar told the court that the New Zealand Insurance Company was happy for the trust board to become the responsible trustee (of land currently vested in that company) when the titles were rearranged, cancelling the 1970 amalgamation. Then, the registrar stated:

I've attended 3 meetings of Tuhoe Trust Board at which this matter discussed[,] the last yesterday when almost whole day devoted thereto in open meeting with some 25 representatives of owners. Agreement unanimous. Also referable to meeting at Mataatua with Hon Duncan MacIntyre at special 2 day meeting.⁴⁵³

After that, Rangihau and McGarvey were recorded as saying 'Concur, ask for all appropriate orders.'⁴⁵⁴ And that was that; the amalgamation was ordered accordingly, with the land vested in the trust board under section 438(2).

In his later memorandum to the High Court, former Chief Judge Gillanders Scott explained:

The 1972 applications were made by Messrs Rangihau and McGarvey both of whom were and are still recognised as kaumatua of Tuhoe and, if my memory serves

451. Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), pp 42-43

452. Bassett and Kay, 'Ruatahuna' (doc A20), p 280

453. Extracts from Whakatane Maori Land Court, minute book 52, 14 February 1972 (Murton, comp, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(H)), p 108)

454. Ibid

me correctly, were at that time members of the Tuhoe Waikaremoana Maori Trust Board;⁴⁵⁵ in addition both those persons were senior officers of the Department of Maori Affairs . . .

I dealt with that and the other related applications as being a continuation, of matters that had long been before the Court and had been very extensively considered by the Tuhoe people at meetings called by the Court or held as part of Court proceedings . . . Because of the nature and extent of these meetings I dealt with the subject application [Tuhoe Tuawhenua] and the others associated with it on the basis that the form of those applications represented the ultimate outcome of the many meetings and consultations of which I had knowledge and of which those appearing on these applications were aware I had knowledge. Given the background to the matter I regarded it as unnecessary to go through a process of notification which had already been carried out over a space of many years and on a number of occasions. Associated with that process had been an extensive exercise of updating, by succession orders, the records of the ownership of the various lands of the Tuhoe people.

It is certainly not possible for me, at this time, to be exhaustive as to the material which was before me in 1972 but I know that it included resolutions in relation to the appointment of the Tuhoe Waikaremoana Trust Board as the Trustee for the amalgamations.⁴⁵⁶

In this 1984 memorandum, the chief judge also stated:

Looking now at the fresh applications it is clear that they were prepared and typed by the Department. Both Mr Rangihau and Mr McGarvey were on the staff. Mr Rangihau was District Welfare Officer; Mr McGarvey a Senior Officer in the 'Development' (Land utilization) Section.⁴⁵⁷

Counsel for the Tuawhenua claimants put some weight on this statement, arguing:

Officers of the Department of Maori Affairs, John Rangihau and Piki McGarvey, who also had interests in land of the Tuawhenua blocks, made the application for the amalgamation and the vesting of the block in the TWMTB. According to the judge it appeared that the applications 'were prepared and typed by the Department'.

The application for this amalgamation was not advertised or otherwise notified to the owners by the Court.⁴⁵⁸

455. Tama Nikora notes in his evidence that Mr Rangihau and Mr McGarvey were not members of the trust board at the time the application was made: see Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), p 53.

456. 'Memorandum of Retired Chief Judge K Gillanders Scott', [1984] (Bassett and Kay, supporting papers to 'Ruatahuna' (doc A20(a)), p 152)

457. 'Memorandum of Retired Chief Judge K Gillanders Scott', app (Bassett and Kay, supporting papers to 'Ruatahuna' (doc A20(a)), p 160)

458. Counsel for Tuawhenua, closing submissions (doc N9), pp 259–260

The amalgamation, under the Tuawhenua claimants' interpretation, was the action of the Maori Affairs Department, acting under the coercive powers in the 1967 Act, while the owners had not been notified and did not know what was happening.⁴⁵⁹ Crown counsel, on the other hand, submitted that Rangihau and McGarvey were not acting in an official capacity but were 'following through on tasks given them by Tuhoe hui', adding:

It would be absurd to exclude Tuhoe people who were particularly well qualified to shepherd the amalgamation through its various stages, from this role on behalf of Tuhoe, simply because they also worked for the Crown. If they had been performing their official duties as part of this amalgamation process, it is possible the question of a conflict of interest may have arisen. However, that is not the case here. There is no impropriety in their actions, and their actions are not those of the Crown or taken on behalf of the Crown in this context.⁴⁶⁰

On the evidence, we cannot accept that 'the Crown', in the words of the claimants, 'accepted from departmental officers with an interest in Tuawhenua lands an inappropriate application for the amalgamation of the Tuawhenua blocks.'⁴⁶¹ Clearly, as Crown counsel and counsel for Wai 36 Tuhoe submitted, Mr Rangihau and Mr McGarvey were not acting for or on behalf of the department.⁴⁶² The title improvement officer assigned to Te Urewera was JV Devcich, who worked with the trust board over the coming years to try to iron out the problems arising from flaws in the initial title orders.⁴⁶³ Fraser described his role as 'facilitator rather than instigator'.⁴⁶⁴ Devcich did not carry out an investigation or make a report to the registrar under Part 11 of the Act, and there was no application from the registrar under section 18 of the Act. The court was not operating under section 19. Court staff and the judge understood themselves to be dealing with an application from Tuhoe leaders, in particular the trust board, with wide support from Tuhoe owners in the affected blocks.

19.6.11.3.2 WHAT IS THE SIGNIFICANCE OF THE BREACH OF NATURAL JUSTICE AT THE 1972 HEARING ?

Clearly, the 1972 amalgamation of titles was initiated by Tuhoe, not the Crown. Nonetheless, the court did not deal properly with the applications. As noted above, Tuawhenua leaders sought a judicial review of the amalgamation decision in 1979. They claimed that the court's orders were made without jurisdiction on five grounds, but the key one was:

459. Ibid, pp 259–261, 270; counsel for Tuawhenua, second amended statement of claim (claim 1.2.12(b), SOC AA), p 222

460. Crown counsel, closing submissions (doc N20), topic 36, p 10

461. Counsel for Tuawhenua, second amended statement of claim (claim 1.2.12(b), SOC AA), p 222

462. Crown counsel, closing submissions (doc N20), topic 36, p 10; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 209

463. Fraser, 'Amalgamation of Urewera Lands' (doc F3), pp 21, 30–32, 54–55

464. Ibid, p 55

That the owners of the land contained in the 43 [Tuhoe Tuawhenua] blocks the subject of the application for amalgamation were entitled to be given an opportunity to be heard on whether or not an amalgamation order should be made but in breach of the rules of natural justice they were:

- (a) not given notice of the application and of the time and place for the hearing, and
- (b) not otherwise given an opportunity to be heard on whether or not an amalgamation order should be made.⁴⁶⁵

In 1984, Justice Savage found:

I am satisfied that the orders were made without jurisdiction and am prepared to find this conclusion on the one ground that the Maori Land Court was under a duty to give the owners of the lands involved a reasonable opportunity to be heard on whether or not the amalgamation order should be made and that in breach of that duty, and thus contrary to the rules of natural justice, it failed to provide the plaintiffs, or at least some of them, with that opportunity . . . Mr Hingston in some of his remarks – and I recognise his experience and knowledge in this rather specialised field of law – submitted that the Maori Land Court acted rather more informally than perhaps would be expected in other courts and relied a good deal on the results of discussions by departmental officers in the field talking at meetings on maraes. It may be accepted, too, as Mr Joyce conceded in his submissions, that the Maori Land Court has the advantage of its particular and peculiar knowledge in the fields in which it exercises jurisdiction. But, accepting all of those particular factors, I think that what happened here, whatever be the reason or reasons for it, goes beyond what is permissible.⁴⁶⁶

The High Court was constrained by the Maori Affairs Act 1953 in terms of what it could review: ‘Errors, irregularities or defects in form or in the practice or procedure of the [Maori Land] Court cannot be grounds for review by this Court.’⁴⁶⁷ A High Court review of the Maori Land Court could only consider whether or not it had acted with jurisdiction. Justice Savage therefore had to decide whether a breach of natural justice ‘amounts to a want of jurisdiction so as to make the decision of the Court a nullity’. He concluded: ‘The answer is clear: it does.’⁴⁶⁸ Although he did not need to consider the other grounds advanced by the plaintiffs, the judge observed that they ‘might well have been able to succeed on grounds other than the one based on a failure to meet the requirements of natural justice.’⁴⁶⁹ The court thus quashed the 1972 amalgamation and vesting orders for Tuhoe Tuawhenua.

465. *Jennings v Scott*, p 4 (Bassett and Kay, supporting papers to ‘Ruatahuna’ (doc A20(a)), p 166)

466. *Ibid*, pp 8–10 (pp 170–172). Mr Hingston was acting as counsel for the Tuhoe-Waikaremoana Maori Trust Board and Mr Joyce as *amicus curiae*.

467. *Jennings v Scott*, p 10 (Bassett and Kay, supporting papers to ‘Ruatahuna’ (doc A20(a)), p 172)

468. *Ibid*

469. *Ibid*, p 9 (p 171)

For our purposes, the significance of this court judgment is that it confirmed that those who objected to the amalgamation of titles or the vesting of the land in the board – and there later turned out to be some – did not have an opportunity to attend the hearing, find out what was happening to their land, and state any objections for the court to consider. They also had no opportunity to appeal because they had no knowledge of the hearing or the orders made at it. This does not change the other facts about the 1972 amalgamations; that is, that they were seen by the court and by Tuhoe leaders at the time as the culmination of several years' work, and not as something new or unknown to the owners. Some who disagreed were able to excise their land from Te Manawa o Tuhoe and Te Pae o Tuhoe because there were further hui and then a major adjustment of titles in a special court sitting for these blocks at Ruatoki in 1973. But those who disagreed about Tuhoe Tuawhenua and Tuhoe Kaaku had no opportunity to appeal a decision of which they had no knowledge. It was the registrar who applied for a rehearing, because of valuation issues, and his rehearing application was adjourned *sine die*.

The court's actions in 1972, while flawed, were not actions of the Crown nor were they caused by the legislation under which the court was acting.

19.6.11.3.3 WHAT IS THE SIGNIFICANCE OF LATER DISAGREEMENT ?

Clementine Fraser has provided us with a detailed analysis of such objections and disagreement as have survived in the written record.⁴⁷⁰ As we have noted, there was no opportunity for any objections to be made when the court made its initial orders in February 1972. It is also fair to say that none of the pre-1972 records hint at any disagreement among Tuhoe as to what should be done with these lands. Problems soon emerged because some of the amalgamated lands turned out to have been leased or to have substantial improvements, requiring an adjustment to the 1972 orders. Owners were also in occupation of some parts of the new blocks.⁴⁷¹ Some of these problems were cleared up with revised orders for Te Manawa o Tuhoe and Te Pae o Tuhoe in 1973, but not for Tuhoe Tuawhenua. Wharekiri Biddle, the Tuawhenua claimant, emphasised that the growth of opposition and dissent by the late 1970s was not directed at the trust board (see the sidebar over).⁴⁷² Rather, it was an expression of frustration that those who still lived at Ruatahuna, described by Mr Biddle as 'the home people' and by the Tuawhenua researchers as those who had 'ahi ka', were not free to try to use or develop these lands for their local community.⁴⁷³ From the trust board's view, this was part of internal Tuhoe debates about 'leadership, governance and management issues.'⁴⁷⁴

It also became clear that amalgamation and some of its consequences had not been widely understood in 1972. But, as Clementine Fraser observed, the

470. See Fraser, 'Amalgamation of Urewera Lands 1960–1980s' (doc F3)

471. Fraser, 'Amalgamation of Urewera Lands 1960–1980s' (doc F3), pp 46–54, 61–66, 70–79

472. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), pp 527–528

473. Ibid, pp 520–528; Bassett and Kay, 'Ruatahuna' (doc A20), p 293

474. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 80

Wharekiri Biddle's View of why the High Court Action Was Necessary

THE people of Ruatahuna reflected on the results of the High Court action. It had been a difficult thing to call their own tribal Trust Board and respected leaders of Tuhoe, John Rangihau and Piki McGarvey, as defendants in the case. But the system of court law demanded that these defendants be called, so that just as they had been parties to the formation of the amalgamation, they also became parties to the considerations regarding the request to quash it. Wharekiri Biddle summarises the thoughts in the minds of the plaintiffs at the time, and their understanding of the significance of the decision made by Justice Savage:

Koi ra taku titiro ko te whakakotahi hanga i te, te mea hanga kia whakakotahi hia nga taitara o nga whenua o Te Tuawhenua. E pa i te mea he kehi e whakahe ana ia tatau tonu, i to tatau poari. Ko to tatau poari i te marama ratau ki te kaupapa ki te whakakotahi i o tatau whenua, i te hiahia ratau ki tera kaupapa. Engari ko nga ture a whakaoti ki te whakakotahi whenua, kare ratau i mohio. Ko te kawana anake te hunga kai te mohio ki nga whakakotahitanga o nga whenua. Na na roia ke hoki matau i korero anei ke te whakakotahi, anei ke nga ahuatanga o te whakakotahi whenua. Na ratau nga ture ra i hanga mai ne, kare i eke ki nga ture nga ratau i whakatakoto mai, ka whakaotia e ratau i roto i te kooti whenua Maori, ka whakaotia. Koi ra te kehi o te Tuawhenua, a mutunga atu ka rarururu nei ko te tiati koia hoki te kai whakatau i nga ahuatanga, he aha nga kehi a nga Maori a mo te kehi o Te Tuawhenua na te tiati ra tera whakatau e kua oti ke ia ia te whakakotahi.

Engari no te rangahau hanga he aha i taea ai e ia tera, ka kitea iho e kare i oti tika te ahua o nga mahi o te whakakotahi i nga taitara o Te Tuawhenua. No reira te rarururu hanga mai ka whakakorehia nei te whakakotahi o nga whenua o Te

fundamental idea of amalgamating the titles and vesting the lands in the board was largely accepted for Te Manawa o Tuhoe, Te Pae o Tuhoe, and Tuhoe Kaaku.⁴⁷⁵ Nonetheless, those owners who objected (and who had not had an opportunity to be heard and make their objections known in 1972) undoubtedly suffered from the confusion that next developed in the court as to whether the titles had actually been amalgamated or not. Thus, while there were internal disagreements in the claimant community as to how to develop Tuhoe Tuawhenua and who should control that development, the Maori land titles system and the court inevitably had a role to play – and, for Tuhoe Tuawhenua, that role was disastrous.

As we have noted, the amalgamation process was finalised for Te Manawa o

475. Fraser, 'Amalgamation of Urewera Lands' (doc F3), pp103–104, 111; Clementine Fraser, answers to questions of clarification from counsel for Tuhoe-Waikaremoana Maori Trust Board', August 2004 (doc F23), para 16

Tuawhenua. E pa i te mea i hinga ko to tatau poari, kao ko nga ture ke a te kawana i uta ki runga, koi ra ke te kai patu i te ahua o te whakakotahi i o tatau whenua, he kore i tika ko te mahi kia eke ki nga ture i whakatakotohia e ratau.

That's how I view the amalgamation of the Tuawhenua titles. It was not a case about condemning our own, the Trust Board. Our Trust Board understood the purpose of amalgamating our lands, and they wanted this approach. But the laws for putting an amalgamation in place they did not understand. The government was the only party that understood the amalgamating of lands. It took the lawyers to explain to us this is what an amalgamation is about, these are the implications of an amalgamation. The laws were put in place, then they did not fulfil the laws that had been laid down, then they finished things off in the Maori Land Court. That was the case of the Tuawhenua, and in the end it was the judge that fell into trouble, as he was the one who made the decisions. That was the case of the Tuawhenua, that the judge made the decisions to form the amalgamation.

But when it was researched how he had been able to do that, it was found that proper procedures were not fulfilled for the amalgamation of the Tuawhenua. It was for these reasons that the amalgamation of the Tuawhenua was quashed. It is not as if our Trust Board was defeated, not at all, it was the laws of the Crown that were the undoing of the amalgamation of our lands, because the procedures to address those laws laid down by them were not followed properly.¹

1. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two: A History of the Mana of Ruatahuna from the Urewera District Native Reserve Act 1896 to the 1980s' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc D2), pp 527–528

Tuhoe and Te Pae o Tuhoe at a December 1973 hearing. For Tuhoe Tuawhenua and Tuhoe Kaaku, the court staff believed that the February 1972 orders were not final and that – in the meantime – the pre-1972 titles remained in effect. Thus, successions and other title changes continued throughout the 1970s, and concerned owners were advised that they could wait and have their objections heard whenever the adjourned rehearing took place. Individual owners also received rates notices.⁴⁷⁶ Gillanders Scott had become chief judge, and other judges made contradictory orders in ignorance of the 1972 amalgamation and vesting orders. Witnesses again put significant weight on the findings of the 1980 royal commission, that there were significant problems in how the court was serviced because of inexperienced and untrained staff.⁴⁷⁷ Gillanders Scott referred to understaffing

476. Fraser, 'Amalgamation of Urewera Lands' (doc F3), pp 58–69, 81

477. Ibid, pp 58–60; Bassett and Kay, 'Ruatahuna' (doc A20), pp 286–290

and a preponderance of junior personnel, with too few 'senior or medium graded officers on hand'.⁴⁷⁸ But the registrar, J E Cater, and Devcich himself – described by Clementine Fraser as 'the most senior Title Improvement Officer in the country'⁴⁷⁹ – shared the belief that the court had not made final orders in 1972.⁴⁸⁰ When Judge Smith examined the situation for the relatively small Tuhoe Kaaku block in 1985, he found that one of the pre-1972 titles had since been vested in the Maori Trustee and leased, one had been partitioned and mortgaged, and one had become a section 439 urupa reservation.⁴⁸¹

Whether or not the judiciary or the staff was ultimately to blame, the 'mistake' was finally uncovered in 1979 when Chief Judge Gillanders Scott sat to hear the trust board's application for a trust order defining terms of trust for Tuhoe Tuawhenua. At that point, the chief judge tried to get the Government to legislate to remove the difficulty, but he was not supported by either the department or other judges. Gillanders Scott, it should be noted, thought that legislation was necessary because conflicting post-1972 orders had been made, and not because his original orders were at fault.⁴⁸²

In a letter to the registrar, marked 'urgent', the chief judge pointed out that 'succession orders, Section 438 vesting order, partition order, as well as alienations' had occurred in respect of the pre-1972, invalid titles. The chief judge considered this to be a very serious matter. His proposed solution was an amendment to the Maori Affairs Act 1953, giving the court the power 'at any time' to 'cancel wholly or in part, any amalgamation made under this Act or under the corresponding provisions of any former Act whether or not that order has been registered under the Land Transfer Act 1952'. The court would be empowered to make the cancellation of an amalgamation retrospective 'to such extent as the Court thinks fit'. The agreement of the owners was not required; only a lessee or alienee or mortgagee would have to agree. Widening the scope of his suggested amendments, Gillanders Scott proposed to give the court the same powers to cancel consolidations. Thus, the court would be given yet more far-reaching powers that it could exercise without the agreement of the owners 'at any time'.⁴⁸³ The Government, however, did not agree to seek such an amendment to the legislation.

The sequel, as we have explained, was the eventual quashing of the 1972 orders by the High Court in 1984, the establishment of the Tuawhenua Steering Committee and its work to arrange a new 'composite trust', and the failure of this work for half of the blocks when the Maori Land Court sat to determine their application in 1987.

478. 'Memorandum of Retired Chief Judge K Gillanders Scott', [1984] (Bassett and Kay, supporting papers to 'Ruatahuna' (doc A20(a)), p157)

479. Fraser, 'Amalgamation of Urewera Lands' (doc F3), p 21

480. *Ibid*, pp 64–65, 73–74, 78

481. Whakatane Maori Land Court, minute book 77, 16 April 1985, fol 124 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(H)), p 125)

482. Bassett and Kay, 'Ruatahuna' (doc A20), pp 293–294

483. Chief Judge Gillanders Scott to Patrick, 1 November 1979 (Bassett and Kay, supporting papers to 'Ruatahuna' (doc A20(a)), pp 129–130)

Thus, the significance of later disagreement was not that there had been opposition to the trust board's plan at the time, but rather that the plan was not widely understood. Particular concerns soon emerged and appear to have been resolved satisfactorily for Te Manawa o Tuhoe and Te Pae o Tuhoe in 1973. This was not the case for Tuhoe Tuawhenua, where disagreement mainly arose towards the end of the decade. In that case, the amalgamation had to be cancelled altogether.

19.6.11.3.4 ACTIONS OF THE TUHOE-WAIKAREMOANA MAORI TRUST BOARD NOT ACTIONS OF THE CROWN

It was clear at our hearings that some discontent had arisen within Tuhoe about the role and functions of the trust board. A belief had become entrenched among some that the trust board was an agent of the Crown, controlled by the Crown and carrying out the Crown's agenda.⁴⁸⁴ In 1998, the joint ministerial inquiry into Waikaremoana issues (see chapter 16) noted that 'many' Maori owners 'regarded the trust boards as agents of the Crown, being responsible and accountable to the Minister of Maori Affairs, rather than to the beneficiaries.'⁴⁸⁵ Partly for this reason, the impetus for centralisation in the late 1960s and early 1970s, where Tuhoe sought a tribal authority to negotiate with the Crown and hold their forested lands in trust, has come to be seen as an action of the Crown rather than of Tuhoe. We note that this perception is relatively recent and that, at law, the trust board was not a Crown agent when it sought the amalgamation of Tuhoe titles and the trusteeship of the amalgamated lands.

What is also clear, however, is that the position and role of advisory trustees was insufficient to provide a second and local level of authority over particular lands for particular communities. If the role of advisory trustees had worked properly, there would have been a conduit of local knowledge, advice, and aspirations to the board (and vice versa). The late-1970s clash over Tuhoe Tuawhenua might have been avoided. This leads us to the next question: whether the legislation provided adequately for Maori rights and interests, authority, and relationships in respect of their lands.

19.6.11.4 *Did the Crown's legislative regime provide adequate and appropriate tools for title improvement and the collective management of Maori land?*

As we noted at the beginning of this section, we did not receive a general claim about post-UCS land laws and title issues. Instead, we received specific claims about such matters as the Te Whaiti lease, the 1972 amalgamations, and the failure of the 1987 Tuhoe Tuawhenua 'composite trust' scheme.

In the submission of the Wai 36 Tuhoe claimants, the legislation allowing for amalgamation and trusts was adequate to reconstitute a communal form of land holding and tribal land management. They have no issue with it, other than the costs, which they say the Crown should have paid. In the submission of the Tuawhenua claimants, on the other hand, the law gave too much power to the

484. See, for example, Matthew John Te Pou, brief of evidence, 14 February 2005 (doc K7).

485. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 560-561

Maori Land Court (which they saw as ‘the Crown’), and gave greater weight to improved land-use and management than the wishes of the owners. But, by the time the court sat to determine the Tuawhenua application in 1987, the claimants’ view was that the law allowed what they wanted – a ‘composite trust’ – so long as the judge agreed. Again, they blamed the court (‘the Crown’) for failure to achieve it.

As we have seen, what happened in 1987 was the inverse of what happened in 1972: when tested in open court, the Tuawhenua Steering Committee lacked explicit support from the owners of about half of the blocks concerned, hence eight blocks were vested in the trust board (because that was the owners’ preference) and a further 15 blocks had no orders made (because owner representatives were either not present or could not agree). For the 22 blocks that were vested in the new trust, the court did not appoint the majority of the proposed trustees, for reasons that seemed sufficient to the judge hearing the case. That task was one entrusted to the court by legislation, and its decision was not appealed. (In response to a question from counsel for Wai 36 Tuhoe, Ms Fraser agreed that this is still a task for the court today under Te Ture Whenua Maori Act.⁴⁸⁶) The legislation was not at fault, although we acknowledge that the Tuawhenua claimants were aggrieved by the outcome. The situation of these blocks, especially those for which no orders were made, still needs rectification.

We also agree with counsel for the Wai 36 Tuhoe claimants that the legislative provisions for amalgamation, while draconian on paper, did allow Tuhoe to make choices and pursue their own objectives, reconstituting a communal title with corporate, centralised, tribal management.

Where, perhaps, the law fell down was in not providing more effectively for a local voice, the voice of the home people, in the management of centrally administered tribal lands. It might be argued that it was the trust board’s task to communicate effectively with local communities and ensure owners were consulted and fully involved in its carrying out of the section 438 trusts. But, as Tama Nikora pointed out, this was difficult when there was no income coming in from these lands. The board was using its own (that is, its beneficiaries’) funds for any administration costs. Even so, the board held hui with the owners when decisions needed to be made, such as on the exchange/lease proposals.⁴⁸⁷ In any case, the system was supposed to provide a conduit for a flow of information and advice from the owners to the responsible trustees (and vice versa) by means of advisory trustees. When Tuhoe Tuawhenua lands were amalgamated in 1972, no advisory trustees were appointed. Instead, the court called for a draft trust order to be submitted to it as soon as possible, including provision for advisory trustees.⁴⁸⁸

At the time, the Maori land laws did not provide for advisory trustees, although

486. Fraser, answers to questions of clarification (doc F23), para 6.2

487. Nikora, ‘Te Urewera Lands and Title Improvement Schemes’ (doc G19), pp 54–55

488. Extracts from Whakatane Maori Land Court, minute book 52, 14 February 1972 (Murton, supporting papers to ‘The Crown and the Peoples of Te Urewera’ (doc H12(a)(H)), p107)

the practice of appointing them had become common.⁴⁸⁹ Section 49 of the Trustee Act 1956 was used. This general law allowed for trustees in the ‘administration of any trust property’ to act with an advisory trustee, but the responsible trustee retained ‘sole management and administration of the estate and its trusts as fully and effectually as if he were the sole trustee’. The advisory trustees could be consulted or offer advice, but the responsible trustee was not bound to take that advice, and could apply to the Supreme Court for direction if he or she wished.⁴⁹⁰ From 1974, the Maori Affairs Act had a new section 438(2a), inserted by the Labour Government, which provided:

Upon constituting a trust under this section or at any time thereafter the Court may appoint advisory trustees to act with the trustees of the trust, and the provisions of section 49 of the Trustee Act 1956 shall apply accordingly with such modifications as are necessary.⁴⁹¹

Despite the law change, Tuhoe Tuawhenua remained without advisory trustees while the trust board attempted to negotiate an exchange, lease, or some other form of arrangement with the Crown.⁴⁹² It was not until 1979, when these negotiations had failed, that the trust board applied (or possibly re-applied) for a trust order and the appointment of advisory trustees. As explained earlier, problems had arisen over poaching and Wharekiri Biddle’s initiative for deer hunting on the Ruatahuna lands. The board sought a trust order that would give it legal powers to let contracts for deer extraction. Counsel for the trust board, Ken Hingston, told the court that breakdowns in communication with the owners could be rectified by advisory trustees, and that local aspirations could be accommodated by the board, but by this time it was too late. The ‘home people’ wanted the board to at least give priority to their interests, but they also wanted to withdraw some lands from the amalgamation and cancel the board’s trusteeship. Because the court had just discovered its error in retaining the pre-1972 titles as still active, it only gave interim terms of trust but otherwise adjourned the applications so as to allow time for a remedy to be found. Soon after, the Tuawhenua claimants applied to the High Court for the 1972 orders to be quashed.⁴⁹³

The situation for Tuhoe Tuawhenua, therefore, was that the system of advisory trustees, under the Trustees Act 1956 and then the Maori Affairs Amendment Act 1974, never had an opportunity to work. Given this circumstance, we cannot find that the legislation or the advisory trustee system was at fault.

489. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 784–785

490. Trustee Act 1956, s 49

491. Maori Affairs Act 1953, s 438(2a); Maori Affairs Amendment Act 1974, s 59

492. The trust board may have used informal advisory trustees in 1974 but we can find no evidence of any formal appointments. When terms of trust came up for consideration in 1979, the trust board intended to seek nominations for the appointment of advisory trustees for Tuhoe Tuawhenua. Clearly, if informal advisory trustees were used early on, this was no longer the case later in the 1970s.

493. Bassett and Kay, ‘Ruatahuna’ (doc A20), pp 290–294

There remains the issue raised by Ngati Haka Patuheuheu, that the legislation did not provide for hapu trusts in 1972:

Article 2 of the Treaty imposes a duty on the Crown to protect the ‘hapu’ in their ‘rangatiratanga’ over their whenua. The Treaty refers to ‘hapu’ not to any other entities. Accordingly, it is submitted that the Crown should have ensured that the remaining Ngati Haka Patuheuheu lands were vested in an entity or body which is subject to the management by Ngati Haka Patuheuheu as a hapu.⁴⁹⁴

These claimants accept that the amalgamation in 1972 was carried out for ‘Ngati Haka Patuheuheu individuals’ and not the hapu, but ‘it is submitted that any individual titles are simply reflections of prior Treaty breaches relating to the individualisation of title through the Native Land Court and following the consolidation process’. Also, while the claimants accept that amalgamation and vesting in a trust board was a means of ‘effectively returning the shares to a communal title’ and communal management, it was wrongly carried out ‘at a wider level than the hapu.’⁴⁹⁵

In the Central North Island inquiry, the Tribunal noted that Te Ture Whenua Maori Act 1993 has provided for a ‘wider range of trusts’ than the 1953 Act and its amendments. This includes whenua topu trusts, about which the Tribunal commented:

Whenua topu trusts (section 216) enable Maori land to be held by trustees to promote and facilitate the use of the land in the interests of the hapu or iwi rather than the beneficial owners. Generally there is no succession to the interests vested in the trustees. This is the closest model of corporate management to a customary collective title held that exists within Te Ture Whenua Maori Act 1993.⁴⁹⁶

As we noted earlier (section 19.6.10), counsel for Ngati Haka Patuheuheu was not specific about what kind of trust arrangements his clients would prefer, although he did say that it was not necessarily a whenua topu trust.

It is indisputable that the law in force in 1972 – the Maori Affairs Act 1953 and the Maori Affairs Amendment Act 1967 – did not provide for hapu trusts. It did provide for blocks of land – however small or large, and whether the individual owners were of one main descent line or many – to be vested in trustees. Tuhoe leaders, it will be recalled, chose to amalgamate their lands because they wanted to restore collective management but also because they lacked what Tama Nikora called a ‘critical mass’. In other words, the pre-amalgamation lands were too small to use for afforestation, to attract investment finance, or even to negotiate effectively with the Crown.⁴⁹⁷

494. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp140–141

495. *Ibid*, p 140

496. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 792

497. Nikora, ‘Te Urewera Lands and Title Improvement Schemes’ (doc G19), p 48

The questions of whether a Ngati Haka Patuheuheu geographical subset of the Te Manawa o Tuhoe lands can be defined, and then of whether such a subset could form a viable trust on its own, are matters for the owners and the Maori Land Court. Here, we note simply that the claimants provided us with no evidence that the Ngati Haka Patuheuheu owners wanted to 'go it alone' in 1972, by a mix of partitioning and amalgamation, so as to separate out their interests and form their own trust. Such a trust could have been constituted under the law of the time, although it would almost certainly have been vested in either the Maori Trustee or the New Zealand Insurance Company, or some such corporate responsible trustee. The owners would then have had to rely on advisory trustees to make their wishes effective, as we saw in the case of Te Whaiti-nui-a-Toi. The owners would also have had to convince the court that a separate, moderately sized trust was in their best interests. Such a trust could not, however, have been made in favour of the whole hapu, because that would have included many non-owners as beneficiaries (those who had sold their interests). If the individual owners had decided to establish their own separate trust in the 1970s, it could presumably have been converted into a whenua topu trust after 1993, if that were the owners' wish.

But none of the evidence presented to us by claimant or Tribunal witnesses contained any suggestion that the Waiohau community or the Ngati Haka Patuheuheu people had ever sought or expressed an interest in a separate amalgamation of titles in their own trust, either in 1972 or at any point afterwards.

Thus, there were options open to the Ngati Haka Patuheuheu owners under the legislation of the time. While it was not possible to constitute a hapu trust *per se*, it was possible for them to have sought, by a judicious use of partitions and amalgamation, to constitute their own land trust. This would have been a smaller, perhaps less viable trust, but it would have enabled a form of re-collectivisation. Much would then have depended on the effectiveness of their advisory trustees. Alternatively, they could have formed their own incorporation. They did not choose either of these options, in 1972 or afterwards. There was certainly opportunity to do so, given the meetings of owners and the special court sitting in 1973, which adjusted the arrangements for Te Manawa o Tuhoe and saw some lands excised from that amalgamation in response to the wishes of their owners.

We cannot accept, therefore, the Ngati Haka Patuheuheu claim that 'the Crown should have ensured that the remaining Ngati Haka Patuheuheu lands were vested in an entity or body which is subject to the management by Ngati Haka Patuheuheu as a hapu'.⁴⁹⁸ This was a matter for Ngati Haka Patuheuheu owners in the 1970s, not the Crown, and they chose not to exercise the options open to them in 1973 (and afterwards). We think that the Ngati Haka Patuheuheu grievance really arises from earlier Crown actions, not the 1972 amalgamation of Te Manawa o Tuhoe. Today, however, the vesting of amalgamated lands in the trust board contributes to the sense of grievance. Alec Ranui, for example, told us that it added 'salt to injury'.⁴⁹⁹ We consider that our finding here does not detract from

498. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 141

499. Alec Mahanga Ranui, brief of evidence, 14 March 2004 (doc C14(a)), p 17

the gravity of the Crown's Treaty breaches in respect of Ngati Haka Patuheuheu, as found in other chapters of this report.

19.6.12 Treaty analysis and findings

From the preceding discussion, it will be clear that we agree substantially with the Crown: the specific issues raised in respect of the 1972 amalgamations and the 1987 Tuawhenua case 'largely concern differing desires within the community of owners and only tangentially involve the Crown.'⁵⁰⁰ Almost all of the actions complained of were either actions of Tuhoe leaders and the Tuhoe-Waikaremoana Maori Trust Board or actions of the Maori Land Court. As we explained in sections 19.6.8 and 19.6.9, the trust board and the court are not 'the Crown' or agents of the Crown. As we have also explained in section 19.6.11, Ministers of the Crown, officials, and empowering legislation were not at fault in the particular circumstances of these claims. Accordingly, we find that no Treaty breaches have occurred.

Nonetheless, we acknowledge that problems remain which need to be addressed. Given that these are the remnants of Tuhoe lands which have such a grievous title and alienation history, we urge the Crown to provide whatever assistance it can to the owners so that remaining title issues can be brought to a satisfactory conclusion.

500. Crown counsel, closing submissions (doc N20), topic 36, p2

CHAPTER 20

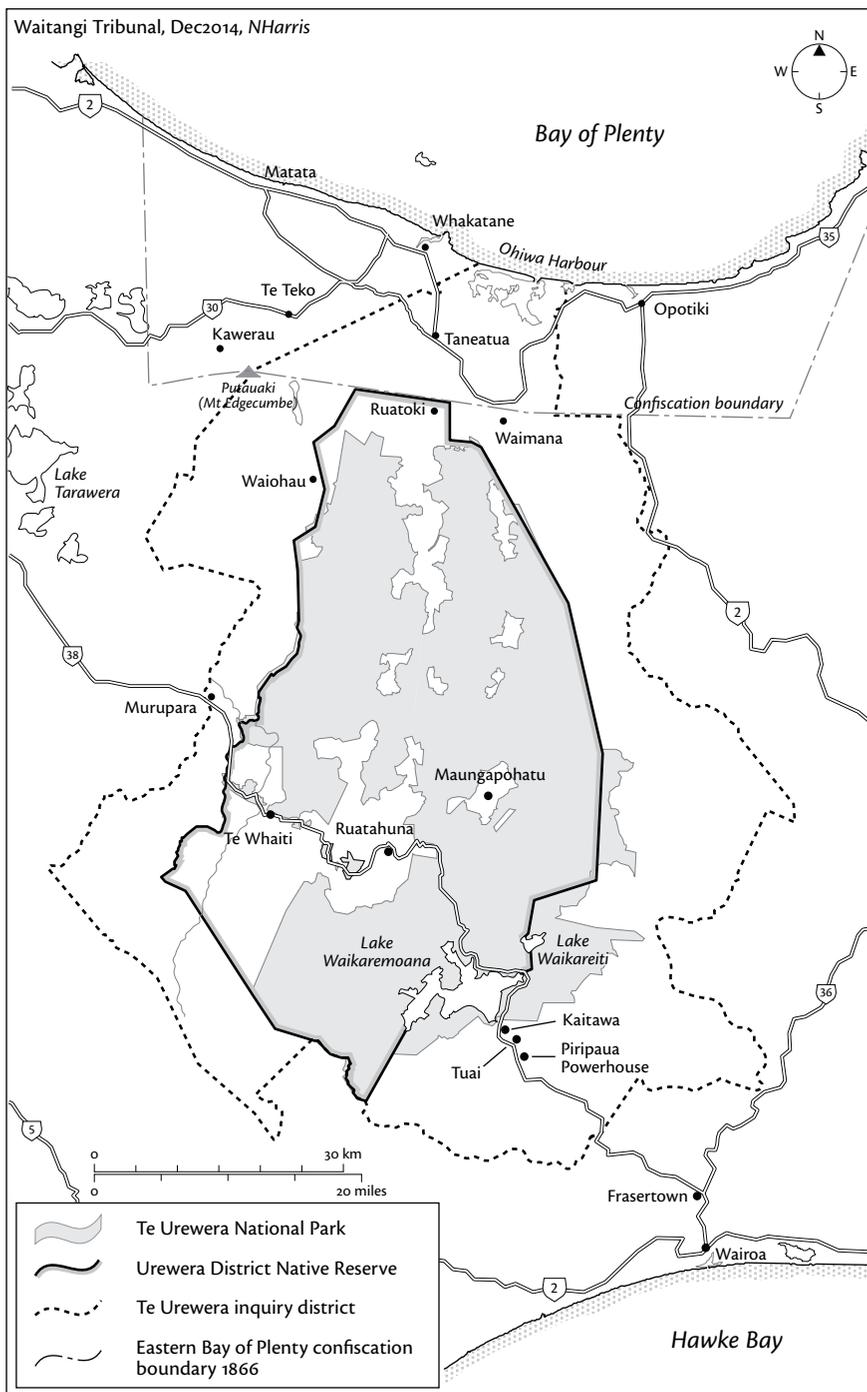
WAIKAREMOANA – THE SEA OF RIPPLING WATERS

20.1 INTRODUCTION

Lake Waikaremoana is a taonga of immense importance to Tuhoe, Ngati Ruapani, and Ngati Kahungunu (including Ngai Tamaterangi) claimants. In their tradition, the lake was formed as their ancestress Haumapuhia struggled fiercely to escape the wrath of her father Maahu, whom she had offended. Transformed into a taniwha, she thrashed about as she tried to reach the ocean, agitating the waters. Because of this, according to one tradition, the name Waikaremoana – sea of rippling waters – was given. Over many generations, tribal histories and occupation have been recorded in long-remembered traditions and in names all along the shores of the lake, its streams, and its springs. The waters of the lake have been used in rituals and for healing. Its birds and eels and shellfish have provided food. And before the Crown's wars of the early 1860s spread across the North Island, the peoples of Waikaremoana lived at their lake in many pa and kainga.

Since 1840, as we have found earlier in this report, those peoples have had an often unhappy relationship with the Crown. The remoteness of their lake in steep hill country did not protect them. The Crown launched harsh and unjustified military operations into upper Wairoa and Waikaremoana between December 1865 and April 1866, and further unprovoked attacks followed at Waikaremoana towards the end of the Crown's war against Te Kooti (see chapters 5 and 6). In the wake of war, destruction of their villages, and disruption of their communities, Tuhoe, Ngati Ruapani, and Ngati Kahungunu lost the four southern blocks, which bordered the lake to the south-east, to the Crown by 1877. The large Waikaremoana block, north of the lake, was later acquired by the Crown in the course of its Urewera Consolidation Scheme. We have been very critical of the circumstances in which these lands both north and south of the lake were alienated from their owners (see chapters 7 and 14). By 1930, Waikaremoana peoples retained only 4.3 per cent of the land they had held in 1875, and those who remained were living in poverty. They were, by then, already facing a further drawn-out contest with the Crown over their lake, which is the subject of this chapter.

The ownership of Waikaremoana was the subject of a legal battle between these claimants and the Crown, one of the longest in New Zealand's legal history (from 1913 to 1954). While the title was in dispute, the Crown used the lake as if it were a Crown possession, and in particular modified and used it for hydroelectricity. Once the claimants had finally obtained their legal title in 1954, there was another long contest before the Crown agreed to formalise its use of the lake in the



Map 20.1: Location map

national park in 1971 by means of a lease. Yet, the contest did not end there. Some of the claimants in our inquiry argued that the Crown's management of the lake since that time has fallen far short of what was agreed in 1971. They believed that the Crown as lessee has degraded their taonga when the intention was to preserve the ancestral waters for all time in their natural state.

Thus, the claimants raised many grievances in our inquiry. They argued that the Crown as their Treaty partner should never have contested their title in the courts. Further, they maintained that the Crown should have accepted the decision of the Native Land Court in 1918 or – at the latest – the decision of the Native Appellate Court in 1944 that Maori, not the Crown, owned Lake Waikaremoana. The claimants also argued that the Crown should have agreed to lease the lake sooner, and that it should not have treated the lake as its own possession (right up to 1971) without permission or payment to the true owners. They castigated the Crown for lowering the lake and damaging their taonga in 1946, and for not paying them for the use of the water for electricity generation. The eventual lease in 1971, they added, was unfair because the Crown only backdated its payment to 1967 when it had been using the lake for much longer in violation of their rights.

Some claimants also criticised the Crown's actions after entering into the lease, arguing that the lake was not cared for in the appropriate way as part of the national park. In particular, they pointed to the ongoing harm of lowered lake levels, the alleged pollution of their taonga with human waste, and other ways in which they believed the Department of Conservation had failed as lessee. These particular claim issues were not supported by the Tuhoe-Waikaremoana and Wairoa-Waikaremoana Maori Trust Boards. This highlights a division in the claimant community that is relevant to their claims, stemming in part from the decision in 1971 to transfer ownership of the leased lake from the individual owners named by the court to the tribal trust boards. Some claimants argued that the Crown was responsible for this transfer, and that it breached Treaty principles.

There was also some division between Tuhoe, Ngati Ruapani, and Ngati Kahungunu as to who has rights in the lake. In 1917, the Native Land Court found that 'each of the 3 contending parties has some ancestral rights to this region', and recognised all three in its award of title.¹ In our view, the evidence before this Tribunal shows that this aspect of the Native Land Court's decision was justified, and we accept that all three groups are entitled to bring claims about Waikaremoana against the Crown. Otherwise, their differences on this matter are not for us to consider because they do not concern actions of the Crown and are not the subject of claims before us.

In this chapter of our report, we have used the collective term 'Maori owners' to refer to these three groups, and also to the individuals (and their descendants) whose ownership was declared by the land court in 1918 and confirmed by the appellate court in the 1940s. From 1971–73 onwards, when the lakebed was transferred to the two trust boards, we use the collective term 'claimants' to reflect the

1. Wairoa Native Land Court, minute book 29, 3 August 1917, fol 78 (Richard Renata Niania, brief of evidence, 22 November 2004 (doc 138), app 3, p 121)



Lake Waikaremoana and Panekire Bluff

fact that the modern grievances about the lake and its management belong to those claimant communities who chose to put them before us and not necessarily to its legal owners. In a very important sense, all the tribal beneficiaries of the trust boards shared in the ownership of the lake, but its ownership at law was vested in the boards.

The Crown made no concessions of Treaty breach in respect of the Lake Waikaremoana claims. In its view, it was entitled to appeal the Native Land Court's decision in 1918, which – at the time – the Crown simply considered was wrong. Further, while the Crown accepted a share of responsibility for the long delay before its appeal was heard, Crown counsel argued that the claimants bore some of the responsibility for the delay, and that no lasting prejudice was caused.

The Crown also maintained that the 1971 lease was fair and in accordance with Treaty principles, and that the Maori owners of the lake were not entitled to be paid for the use of water (whether for electricity or otherwise). This is because water cannot be owned, in the Crown's submission. Aside from electricity, therefore, the Crown understood the negotiated settlement of 1971 to have disposed of all outstanding issues about its past use of Lake Waikaremoana, including use of the lake for the national park. The owners had the benefit of legal advice during the negotiations and made an informed and reasonable compromise when they agreed that the rent would only be backdated to 1967. In respect of the vesting

of the bed in the trust boards as a result of the Lake Waikaremoana Act 1971, the Crown's position was that Parliament simply gave effect to the owners' wishes as conveyed by their appointed representatives. The transfer of title was not the Crown's decision.

The Crown also denied that there have been any Treaty breaches or breaches of its responsibilities as lessee following the 1971 lease agreement. The Department of Conservation, in the Crown's view, has managed the lake appropriately as part of the national park. The Crown admitted that the main damage occurred to the lake in 1946, when it was permanently lowered for hydroelectricity purposes, but argued that the generation of power was necessary in the national interest, and that current effects are managed and mitigated under the Resource Management Act 1991.

Overall, the Crown considered that it has met its Treaty obligations to the claimants in respect of Lake Waikaremoana, especially as a result of its negotiation of a lease agreement that allowed them to retain ownership of their taonga and to secure a financial return, while the lake was cared for and shared with the nation in the national park. We will explore the Crown's position further below.

We turn next to set out the key issues raised by the Lake Waikaremoana claims, which are the subject of our analysis and findings in this chapter.

20.2 ISSUES FOR TRIBUNAL DETERMINATION

In order to determine whether the claims about Lake Waikaremoana are well founded, the Tribunal must consider the following issues:

- ▶ What were the origins of the contest between Maori and the Crown over ownership of lakes?
- ▶ What was the Crown's response to the Maori claims for legal ownership of Lake Waikaremoana?
- ▶ What were the effects of the Crown's denial of Maori ownership for 36 years?
- ▶ Why did it take so long for the Crown to negotiate an arrangement with the lake's owners after it accepted their title in 1954?
- ▶ Was the 1971 agreement fair in all the circumstances, and was it given proper effect in the Lake Waikaremoana Act 1971? What adjustments have been made since 1971, and with what results?
- ▶ What role have Maori played in the management of the lake since entering into the lease?

We turn now to outline some of the key facts that underlie our later analysis of these issues.

20.3 KEY FACTS

In this section, we set out a timeline of key facts and events covering the period from 1896 to 2000, for the assistance of readers.

1896: Parliament enacted the Urewera District Native Reserve Act. The northern shores of Lake Waikaremoana formed the southern boundary of the

reserve. The lake itself was left outside the Urewera District Native Reserve (UDNR).

1897: The first of many annual releases of trout ova into Lake Waikaremoana took place under acclimatisation society rules and regulations.

1898: The Government established an imported game reserve at Waikaremoana, which included the whole of the lake and part of the Waikaremoana block.

1903: The Tourist and Health Resorts Department opened Lake House, which (along with a Government launch and later a motor camp) began the Government's tourism enterprise at Lake Waikaremoana.

An Order in Council prohibited hunting of native as well as imported game in the Waikaremoana game reserve. A planned exemption for local Maori was removed at the last minute on the advice of the Department of Tourist and Health Resorts.

1904: The first serious investigation began of Lake Waikaremoana and the upper Waikaretaheke River catchment for hydroelectricity purposes. It was determined that there was 1,420 feet of fall² in the space of four miles.

1905: Te Reneti Hawira met with the manager of Lake House and wrote to Native Minister Carroll, objecting to Pakeha fishing in the lake without permission, and stating that the Government did not own the lake. (This letter was preceded by an undated meeting between Carroll and Hori Wharerangi on the same issue.) The Minister rejected these representations, and refused further requests that the Government pay for its tourists' use of Lake Waikaremoana.

1912: The Court of Appeal delivered its decision in the Rotorua lakes case, *Tamihana Korokai v Solicitor-General*,³ which found (in brief) that the Native Land Court had jurisdiction to hear Maori lake claims and determine whether Maori had title to lakebeds.

Waikaremoana leader Hurae Puketapu and 84 others petitioned Parliament to change the boundary of the UDNR and include Lake Waikaremoana inside the reserve.

1913: In response to Puketapu's petition, the Native Affairs Committee reported that Maori had not exhausted their legal remedy. Rawaho Winitana, Mei Erueti, and Matamua Whakamoe then filed a claim with the Native Land Court for ownership of Lake Waikaremoana.

1914: Ngati Kahungunu leaders filed a claim with the Native Land Court for ownership of Lake Waikaremoana.

1915: Maori applicants obtained a plan of the lake from the Survey Office and submitted it to the Native Land Court. The first hearing of the Lake Waikaremoana case was held in August, with Judge Jones presiding. There was no appearance from the Crown. The court sent the plan to the Survey Office after the hearing.

2. 'Fall' is the vertical drop which, in combination with the amount of water flow, determines the amount of power that can be generated.

3. *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321

1916: The second Native Land Court hearing was held in August, with Judge Jones presiding. There was no appearance from the Crown. On the advice of the Crown Law Office, the plan of the lake was withheld before the hearing. Judge Jones decided to proceed regardless.

1917: On the advice of the Crown Law Office, the Government proposed a special sitting of all the judges of the Native Land Court to determine in principle whether Maori or the Crown owned the beds of navigable lakes. The chief judge agreed and scheduled a hearing for January 1918. In the meantime, the Native Land Court held its third Waikaremoana hearing in July and August, with Judge Gilfedder presiding. Although the Government again withheld the plan, the court proceeded. At this hearing, the court made an interlocutory decision as to which Maori applicants owned the lake and therefore should contest title with the Crown at the special sitting. In August the court approved lists of individuals from Tuhoe, Ngati Ruapani, and Ngati Kahungunu as owners of Lake Waikaremoana.

Due to scheduling conflicts, the chief judge decided in November to cancel the special sitting. He advised judges that the lake cases would need to proceed in the usual way.

The Government surveyed Lake Waikaremoana for the purposes of establishing a hydroelectricity scheme. This was the first proposal from within Government to drive a tunnel through the natural barrier of the lake (which was eventually carried out during the Kaitawa phase of the Waikaremoana scheme).

1918: The fourth and final Native Land Court hearing of the Lake Waikaremoana case took place in May and June, with Judge Gilfedder presiding. There was no appearance from the Crown. The court finalised its orders on 6 June. Freehold orders were made in the names of 182 Tuhoe and Ngati Ruapani individuals (395 shares) and 92 Ngati Kahungunu individuals (132 shares), comprising 20 lists of owners. In some lists, children or descendants of certain owners were explicitly included, but not individually listed. The Crown appealed the court's decision on 28 June. Eleven other appeals were also filed against the decision, eight by Ngati Ruapani (seeking the removal of Ngati Kahungunu individuals from the lists) and three by Ngati Kahungunu.

The Government approved a long-term plan to develop a Waikaremoana power scheme, including control of lake levels by sealing leaks in the lake-bed and using a tunnel through the lake's natural dam, but deferred it until after the construction of the Napier–Gisborne railway (see map 20.2).

1920: With the support of the Government, the Wairoa Electric Power Board initiated a small, temporary power scheme at Tuai (completed in 1923).

1921: The Solicitor-General applied for the Crown's appeal to be heard before the Maori appeals, to which the other appellants agreed. The Native Appellate Court scheduled the Crown's appeal for hearing in August but the Government then sought an adjournment at Apirana Ngata's request, so as not to interrupt the Urewera Consolidation Scheme hui planned for

that month (see chapter 14). In return, Ngata agreed that the appeal should not proceed in 1922–23, while the Attorney-General was overseas.

The Crown and Te Arawa negotiated a settlement of the Rotorua lakes claim, which was given effect by legislation the following year. Section 27 of the Native Land Amendment and Native Land Claims Adjustment Act 1922 declared that the beds and the right to use the waters of 14 Rotorua lakes were ‘the property of the Crown, freed and discharged from the Native customary title, if any’. It also provided that the Governor could reserve to Te Arawa any portion of the lake bed or any part of the foreshore that was Crown land. Unalienated islands were reserved to Te Arawa. Te Arawa fishing rights in respect of indigenous fish were reserved to them, though such fish could not be sold. An annuity of £6,000 was payable from 1 April 1924. Provision was made to establish the Arawa District Trust Board, to administer the annuity and any other funds held by it for the benefit of ‘members of the Arawa Tribe or their descendants’.

- 1924: The Crown applied for its Waikaremoana appeal to be heard but could not proceed because the Maori owners were unable to get legal representation.
- 1925: The Crown applied for its Waikaremoana appeal to be heard but the chief judge was unable to arrange a fixture with a suitable number of appellate court judges.
- 1926: The Crown agreed to Ngata’s request that no fixture be made until the Maori owners could get legal representation (their lawyer having just been appointed chief justice).

The Crown and Ngati Tuwharetoa negotiated a settlement of the Lake Taupo claim, which was given effect by section 14(1) of the Native Land Amendment and Native Land Claims Adjustment Act 1926. This section declared the beds of Lake Taupo and the Waikato River (from the lake mouth to Huka Falls), together with the right to use their respective waters, to be ‘the property of the Crown, freed and discharged from the Native customary title (if any) or any other Native freehold title thereto’. Maori were guaranteed access to the lake and their fishing rights to indigenous species were reserved to them – though they could not sell their fish. The Act provided for the establishment of the Tuwharetoa Trust Board to administer the funds paid by the Crown in respect of Tuwharetoa’s rights to the bed of the lake: that is, a £3,000 annuity, and half of all revenue above this value derived from camping fees, licence fees, and fines levied for breaches of the fishing regulations.

Work began on the Tuai phase of the Waikaremoana power scheme, using the fall between Lake Kaitawa and the Whakamarino Flat (which was flooded to create an artificial lake, Lake Whakamarino). This part of the scheme was completed in 1929.

- 1929: The Native Land Court found in favour of the Maori applicants for the ownership of Lake Omapere in Northland. The Crown appealed this decision.

1932: Waipatu Winitana and Ngati Ruapani wrote to the Native Minister asking for information about the Lake Waikaremoana case and for 50 free fishing licences, because no compensation had been paid for the lake.

1934: The Native Appellate Court approached the Native Minister for the Crown to bring on its Waikaremoana appeal.

1935: The Crown Law Office sought a decision from the Government as to whether or not to proceed with the Waikaremoana appeal.

Five Maori leaders of 'the Wairoa district' wrote to the Prime Minister, asking that the Crown either prosecute its appeal or acknowledge their ownership of the lake.

The Public Works Department began excavating test tunnels and exploratory shafts near the lake for the Kaitawa (upper) phase of the Waikaremoana power scheme, but decided in 1936 to proceed with the Piripaua (lower) phase first.

1937: Prime Minister Michael Joseph Savage decided that a fixture for hearing the Crown's appeal should be sought, but none was applied for.

1938: Whena Matamua wrote to the Government, requesting information regarding the moneys received by the Crown for fishing and other uses of the lake. The Government declined to send this information.

A petition from Ngati Ruapani asked the Government to confirm and 'make permanent' their title to the lake. The Government replied that it was considering whether or not to proceed with its appeal.

Work began on the Piripaua (lower) phase of the Waikaremoana power development scheme, using the fall between Lake Whakamarino and the lower courses of the Waikaretaheke River. This part of the scheme was completed in 1943.

1939: The chief judge approached the Government and proposed to schedule a hearing of its appeal in April. The Government replied that the Crown Law Office was unable to proceed due to other urgent State matters.

Waikaremoana leaders wrote to Apirana Ngata, asking for his help. The Prime Minister responded to Ngata that the appeal could not proceed because the Solicitor-General was too busy.

The Waikaremoana owners engaged a lawyer (MH Hampson), who asked the Crown to agree that its appeal should be struck out for non-prosecution. The Crown refused. Hampson died soon after and the Maori owners were again without counsel.

1941: The Government approved the construction of a tunnel at Lake Waikaremoana for the Kaitawa phase of the Waikaremoana power scheme. Work did not begin until 1943.

1943: The communities of owners held a large hui at Lake Waikaremoana and agreed to hire a new lawyer and to apply to the Native Appellate Court for the appeals to be heard. In response, the Prime Minister agreed to proceed with the Crown's appeal as soon as possible. The respective lawyers (Prendeville for the Crown and SA Wiren for the owners) agreed to

proceed in October or November but a hearing was scheduled for March 1944, to proceed in tandem with the Whanganui River case.

An Order in Council was issued in May under the Public Works Act 1928, authorising works necessary for the use of Lake Waikaremoana for hydroelectricity. Work began on the Kaitawa (upper) phase of the Waikaremoana scheme, with construction of the tunnel beginning in December. Tunnelling through the broken rock of the natural dam took almost four years. In the meantime, the Piripaua phase was completed in 1943 and the Piripaua power station was opened.

1944: The Crown sought an adjournment sine die but it was not granted. The Native Appellate Court heard the Crown's Waikaremoana appeal and dismissed it on 20 September. The Solicitor-General then advised the Lands and Survey Department not to release any Lake Waikaremoana plan to the Native Land Court, so as to prevent the finalising of freehold orders. In the meantime, Supreme Court proceedings were planned by the Crown Law Office but not initiated. The Crown had 10 years in which to challenge the Native Appellate Court's decision under section 51(1) of the Native Land Act 1931, which provided:

No order made with respect to Native land by the Court or the Appellate Court shall, whether on the ground of want of jurisdiction to make the same or on any other ground whatever, be annulled or quashed, or declared or held to be invalid, by any Court in any proceedings instituted more than ten years after the date of the order.

1946: The Government installed temporary siphons over the top of the natural dam at Te Wharawhara Bay to increase the supply of water to the Tuai and Piripaua stations. Using these siphons, Lake Waikaremoana was lowered for the first time in what would turn out to be a permanent lowering of lake levels for the purpose of electricity generation.

Ten of the 11 Maori appeals were heard (all but one of the original appellants were dead by this time).

1947: The Government began construction of the tunnel intake on the lakebed at Te Kowhai Bay. The Government also extended the temporary siphons to a greater depth.

Prime Minister Peter Fraser resolved that the Crown should purchase Lake Waikaremoana as soon as the Maori appeals were settled, but this was not acted upon.

The Native Appellate Court heard the eleventh Maori appeal (that sought to have any Tuhoe owners without Ruapani ancestry removed from the lists). This appeal was allowed and seven owners were removed. The Ngati Ruapani appeals were dismissed. Four Ngati Kahungunu names were added to the lists of owners.

Overall, the court's changes increased the number of lists of owners from 20 to 22, although only four names were actually added.

- 1948: Construction of the tunnel intake was completed, the Kaitawa power station was opened, and the Government began constructing a sealing blanket to seal the natural leaks in the lakebed. When the sealing blanket was finished (which took until 1955), the Government's 1918 plan for the Waikaremoana power scheme was completed.
- 1949: The Maori owners approached Prime Minister Fraser, seeking an arrangement with the Government in connection with the future use of the lake for hydroelectricity, fishing, and tourism. They wanted a tribal annuity in return for the use of their lake. Although Fraser met with delegations of owners and told them that he was not in favour of further litigation, there were difficulties in reaching agreement about the lake's value and the question of an outright sale. Not much progress had been made when a change of government at the end of the year brought the negotiations to an end.
- The Supreme Court decision in the Whanganui River case *The King v Morison*⁴ found that the court did not need to decide the effect of riparian titles on the ownership of the riverbed, because the Crown had acquired all navigable riverbeds through the Coal-mines Act Amendment Act 1903. To avoid the costs of appeals to the Court of Appeal and Privy Council, the Crown and Whanganui tribes agreed to the appointment of a special commission of inquiry into the title of the bed of the Whanganui River.
- 1950: The new National Government decided not to continue Fraser's negotiations but instead to await the outcome of the Whanganui River commission of inquiry. In the meantime, the Maori Land Court asked the chief surveyor at Gisborne for the compiled plan of Lake Waikaremoana so that it could complete the freehold titles. At that point, the Government decided to take action in the Supreme Court to quash the Native Appellate Court's 1944 decision. The Department of Lands and Survey withheld the compiled plan from the Maori Land Court. But no actual proceedings were initiated in the Supreme Court (probably because the Whanganui River commission's findings were unfavourable to the Crown's case).
- 1951: Special legislation referred the Whanganui River case to the Court of Appeal.
- 1952: The Government began work on building permanent siphons to replace its temporary ones (which was completed in 1955). Three four-foot diameter pipes were installed over the top of the natural dam at Te Wharawhara, extending 100 metres under water from the lake shore.
- 1953: In February, the Solicitor-General advised the Government that the Crown's ability to seek writs in the Supreme Court would expire on 20 September 1954. The Government decided to await the outcome of the Whanganui River case in the Court of Appeal before making a decision whether or not to proceed. In October, it withdrew its appeal of the Native Land Court's Lake Omapere decision.

4. *The King v Morison* [1950] NZLR 247 (SC)

- 1954: The Court of Appeal's decision in the Whanganui River case was issued in July. In September, the Maori Affairs Department advised its Minister that the practical effects of allowing Maori 'to retain the benefit of their declared ownership of the bed' of Lake Waikaremoana 'might not be so very great'. Cabinet then decided on 13 September that no action would be taken in the Supreme Court. In October, the Government lifted its ban on supplying the Maori Land Court with the plan so that the title could be completed for registration, which duly happened.
- 1957: Maori leaders approached the Government, seeking an annuity of £4,500 for past and present use of Lake Waikaremoana, to be paid to a Waikaremoana Maori Trust Board. Government departments then debated how much should be paid and on what basis – in particular, whether the Crown still considered that it needed to own the bed of the lake. In the meantime, the Holland Government was defeated in the November general election, replaced by the second Labour Government under Walter Nash, who became Prime Minister and Minister of Maori Affairs.
- 1958: Officials advised Ministers that the Government did not need to buy the lakebed for either electricity or national park purposes, and that no compensation was owed for past use of (or damage to) Lake Waikaremoana. The Maori owners, on the other hand, approached Eruera Tirikatene and Nash, seeking the Crown's agreement to an arrangement for its use of the lake. A petition on behalf of Ngati Ruapani, Tuhoe, and Ngati Kahungunu was sent to the Prime Minister in May. In response, officials calculated that fishing revenues would only justify an annuity of £500.
- 1959: Nash advised the Maori owners that the Government was having difficulty finding a basis for negotiation and had not yet decided whether to purchase the lake. Behind the scenes, Nash insisted that officials come up with a Crown offer of 'compensation'. Still convinced that the Government did not really need to own the lake, Lands and Survey agreed with Treasury that a lump sum offer of £10,000 could be made. In the meantime, Nash met with a delegation of owners, who requested an annuity of £5,000 or a lump sum of £100,000, to be administered by a Maori trust board. These figures included payment for past use of the lake. The Prime Minister responded that this was not reasonable and the Maori Land Court might have to be asked to determine a fair compensation. Nash then sent officials back to the drawing board to come up with a higher counter-offer than £10,000. Lands and Survey proposed a lump sum of £25,000, partly because there was a new appreciation that lowering Lake Waikaremoana had created a permanent ring of dry, Maori-owned land around it. This was now believed to pose a significant problem for the national park authorities, in that users accessing the lake or building amenities on its shores could be liable for trespass. Nash met with the owners again in December but advised that the Crown did not yet have an answer for them. He invited representatives to meet him in Wellington in February 1960.

- 1960: No further meetings took place between the Government and the Maori owners, for reasons that are unclear. The Labour Government lost office in the November general election, replaced by Keith Holyoake's National Government.
- 1961: Lands and Survey advised the new Government that it was important for the Crown to purchase the bed of Lake Waikaremoana for the national park. It recommended purchase at £25,000, including a payment for past use dating back to 1947. Cabinet agreed after a further approach from a delegation of Maori owners, led by Sir Turi Carroll. In July, the Minister of Maori Affairs, Ralph Hanan, offered a £25,000 lump sum for the purchase of the lakebed, the islands in the lake, and Ngati Ruapani's Waikaremoana block reserves. This was explained to the owners as £10,000 (capitalising fishing revenues) plus £2,000 (for the islands and reserves) plus £13,000 for past use. A hui of the Maori owners rejected this offer in August. They were adamant that they would not sell their reserves but did reduce their requested annuity to £3,250 (representing a capital value of £65,000).
- 1962: The Government rejected the Maori owners' counter-offer, although it did accept that the reserves could not be purchased as part of an arrangement for the lake. Instead, it increased its lump sum offer to £28,000, confined to the lake and its islands. In May, Wiren met with Hanan and said that he was prepared to advise the owners to compromise at an annuity of £2,500 a year, but any lower would make it not worthwhile establishing a trust board. The owners rejected the Government's offer in June, insisting on an annual payment to a trust board (preferably by a lease) at a higher capital value. In response, the Government refused to change its offer but left it open, also rejecting officials' proposals that it should acquire the lake by compulsion.
- 1963: The owners' lawyer, SA Wiren, met with the Minister of Maori Affairs for further discussions but no progress was made. Hanan insisted that the only basis on which the Government would consider an annuity would be at 5 per cent of its offer of £28,000, and for a finite period. The owners were not prepared to make a counter-offer for an annuity on these terms.
- 1964: The Te Urewera National Park Board and the National Parks Authority pressed the Government to purchase the lake and reserves as soon as possible.
- 1965: The Government reopened negotiations with the Maori owners, requesting a counter-offer to its 1962 proposal (a lump sum of £28,000). The owners refused, awaiting a shift in the Crown's opposition to an annual payment. The Lands and Survey Department was willing to move on this point, proposing a new offer of either a lump sum of £30,000 or an annuity of £1,500. Treasury agreed that an annuity could be paid as a last resort.
- Completion of the national grid brought drastic draw-downs of Lake Waikaremoana to an end and enabled the Government to maintain the lake within a more stable regime of lake levels from then on.

- 1966: The Maori Affairs Department proposed that the Board of Maori Affairs summon a meeting of assembled owners to consider a Crown purchase offer for £30,000. The board approved the proposal, which held a £1,500 annuity in reserve as a concession if the owners insisted on an annual payment. Also, the Government was prepared to agree that the owners could invest the lump sum for administration by a trust board, and to go up to £35,000 on the day if necessary. Opposition members of Parliament attended the meeting of owners in November and advised that the Government's offer was far too low: the lake was worth six figures. It soon emerged at the meeting that the owners would not accept less than £60,000 to £80,000, and that they were determined to maintain an ongoing connection to their lake. They formally rejected the Government's offer and appointed a committee to negotiate.
- 1967: The committee of owners sought help from the member for Southern Maori, Whetu Tirikatene-Sullivan, who facilitated a meeting in November with the new Minister of Lands, Duncan MacIntyre, and senior officials. The deputation put the owners' proposal of how to break the deadlock in negotiations: a special commission of inquiry, consisting of Crown and owner representatives with a judge as chairman, should set the value of 'compensation' for the lake. MacIntyre agreed to a special tribunal, although not necessarily to that composition of it, and suggested a special Government valuation as a starting point. Officials then met with the Valuer-General in December to establish parameters for the special Government valuation.
- 1968: As part of the preparations for the special valuation, legal advice was obtained that Maori owned the lake water but that the value of its use for hydroelectricity should not be included in the valuation. When the Government formally commissioned the valuation, it specified (among other things) that it should not include any value in the use of water for electricity. The valuation was delayed, partly because of the need to survey and define the legal limits of the (now dry) lake shore. The pre-1946 mean annual maximum of 2,020 feet was taken as the limit of the Maori owners' property. The valuation was then completed in October. It gave the value of Lake Waikaremoana as \$147,000, consisting of \$73,000 for the marketable exposed lakebed, \$70,000 for the submerged bed, and \$4,000 for buildings and improvements on the bed. The Lands and Survey Department recommended that the Government should now offer the special Government valuation as a lump sum price, or as instalments over 10 years (with interest), or as the basis of an annuity, or as the basis for rental in a perpetual lease. These options were put to Cabinet through MacIntyre as Minister of Lands.
- 1969: Cabinet authorised MacIntyre to buy Lake Waikaremoana for \$143,000 (excluding the value of improvements), with capacity to go up by 15 per cent if necessary. The payment would be spread over 10 years with interest

at 5 per cent. A meeting of assembled owners took place on 26 September to consider this offer. Senior officials told the owners that the Crown's intention was to preserve the lake as part of the national park for all time. The owners voted to reject the Government's offer in favour of a lease for 50 years with a perpetual right of renewal, backdated to 1957, with rent reviews every 10 years and a rental at 6 per cent of Government valuation. They also elected a committee to negotiate terms with the Government. The owners' proposal was referred to MacIntyre, who agreed to the idea of a perpetual lease – but not necessarily on the terms offered. In December, Cabinet approved his recommendation that the Government should negotiate a perpetual lease, backdated to 1967 and with rentals fixed at 5 per cent of Government valuation (to be reviewed every 10 years). Cabinet also authorised a compromise on the rent (to go up to 5.5 per cent), and approved validating any lease by special legislation.

1970: Senior officials met with the committee of owners in May to negotiate the terms of a lease. They agreed that the rental would be set at 5.5 per cent, backdated only to 1967, and that the Crown would pay the rent to a special trust board (the 'May Agreement').

The New Zealand Electricity Department, the Te Urewera National Park Board, and the Nature Conservation Council negotiated a 'Gentleman's Agreement' that Lake Waikaremoana would be kept between 1,994 and 2,004 feet. If it rose to 2,006 feet, discharge of water was mandatory.

1971: The Health Department threatened to close Lake House because it was discharging raw sewage into Lake Waikaremoana. A pumping station to a soaking area was the proposed remedy, but it was not built.

The May 1970 agreement between the Crown and the owners' committee resulted first in a lease (signed by MacIntyre and the owners' committee in August) and then in validating legislation (the Lake Waikaremoana Act 1971) in December. The facts as to how the terms of the lease and Act were developed and agreed are disputed by the parties and will be discussed in section 20.9. Here, we summarise the terms of the lease and the Act.

- ▶ *The Lake Waikaremoana lease, 21 August 1971*: The Crown leased the lake (including the islands, except for Patekaha) for national park purposes for a period of 50 years (with a perpetual right of renewal). Rent was set at 5.5 per cent of \$143,000, backdated to 1 July 1967. The rent would be reviewed every 10 years. If the lessor and lessee could not agree on a new rental value, it would be decided by arbitration. The lessor and the owners of the Waikaremoana reserves were guaranteed access to the lake waters and to the Wairoa–Rotorua road. The lease was to have no effect until validated by legislation, and the rent would be paid to the Maori Trustee until legislation directed otherwise.
- ▶ *The Lake Waikaremoana Act 1971*: the Act validated the lease but its terms were particularly controversial in our inquiry (for a summary, see the sidebar over).

The Lake Waikaremoana Act 1971

Long title: 'An Act to validate the lease to the Crown of Lake Waikaremoana, and to provide for the administration of the rental therefrom by certain Maori Trust Boards'.

Section 3: The lease was declared 'a valid and effectual lease . . . as if it had been granted in due form by the Maori Trustee pursuant to a duly confirmed resolution of a meeting of assembled owners under Part 23 of the Maori Affairs Act 1953'. Any extension or variation of the lease was to be effected in the manner specified by section 116 of the Land Transfer Act 1952.

Section 4: The District Land Registrar was authorised and directed to register the lease under the Land Transfer Act, even though its form did not conform to the requirements of that Act.

Section 5: The Tuhoe Maori Trust Board was renamed the Tuhoe-Waikaremoana Maori Trust Board.

Section 6: The Wairoa Maori Trust Board was renamed the Wairoa-Waikaremoana Maori Trust Board.

Section 7: Of the 22 lists of owners approved by the Native Land Court, 14 were declared to be Ngati Kahungunu lists, and 8 were declared to be Tuhoe lists.

Section 8: As soon as practicable after the passage of the Act, a list of the owners of Lake Waikaremoana would be displayed at the Gisborne, Rotorua, Wairoa, and Whakatane Maori Affairs offices, and the Tuai and Ruatahuna post offices. The list would be divided into two 'portions': those whose interests were derived from the original Ngati Kahungunu lists, and those whose interests were derived from the original Tuhoe lists.

Section 9: Any person named in the list had six months to write to the Registrar from the date of its publication, requiring that his or her name be moved from one 'portion' to the other. After the six-month period, the Registrar would compile and certify an amended list.

Section 10: The persons named in the Ngati Kahungunu portion of the list would become beneficiaries of the Wairoa-Waikaremoana Maori Trust Board, along with their descendants.

Section 11: The persons named in the Tuhoe portion of the list would become beneficiaries of the Tuhoe-Waikaremoana Maori Trust Board, along with their descendants.

Section 12: Pending provision by regulations under the Maori Trust Boards Act, the Governor-General could appoint three additional members to each of the boards to represent the additional beneficiaries.

Section 13: After compiling the final list of owners, the registrar would calculate the aggregate share of each of the two groups of owners. The registrar would then make an order vesting Lake Waikaremoana in the two trust boards for 'an estate of freehold in fee simple' as tenants in common, according to their shares.

The order would have effect as if it were an order of the Maori Land Court. The district land registrar was authorised and directed to register it under the Land Transfer Act.

Section 14: The rent would be paid to the two boards in accordance with their respective shares in the lake. The rent would constitute an asset of the boards for the purposes of section 24 of the Maori Trust Boards Act. Until the boards' shares were determined, the rent would continue to be paid to the Maori Trustee.

1972: The registrar completed the work of dividing the owners between the two trust boards and vested the lakebed in the boards as tenants in common, with 148,000 shares in the Wairoa-Waikaremoana Maori Trust Board and 387,000 shares in the Tuhoe-Waikaremoana Maori Trust Board.

Lake House was closed but the Government-run motor camp continued to discharge effluent into Lake Waikaremoana. John Rangihau proposed a Maori tourism development to replace Lake House but this was ultimately rejected.

1977: After the 10-yearly rent review, the rental value was increased to \$430,000, with the new rent set at \$23,650 per annum.

1979: The Government's proposal to carry out additional sealing of leaks in the lakebed resulted in widespread opposition, including from local Maori, and in an application by the Te Urewera National Park Board to the Hawke's Bay Catchment Board to regulate the levels of Lake Waikaremoana.

Construction began on a new sewerage system for the Government's motor camp (completed in 1980).

1980: The catchment board's special tribunal altered the 'Gentleman's Agreement': the Ministry of Energy was required to operate within limits of 1,992 and 2,002 feet, with mandatory discharge at 2,004 feet.

1981: The Te Urewera National Park Board was replaced by the East Coast National Parks and Reserves Board. The Lands and Survey Department became the manager of the national park and the leased lake.

1986: The Hawke's Bay Catchment Board reset the management regime for lake levels at 1,994 and 2,004 feet.

1987: The Conservation Act 1987 was enacted: the Department of Conservation (DOC) would replace Lands and Survey as manager of the national park and Lake Waikaremoana.

The Electricity Division of the Ministry of Energy became a State-owned enterprise, the Electricity Corporation of New Zealand (Electricorp or ECNZ).

1988: The second 10-yearly rent review set the lake's rental value at \$1,412,180, with the rent set at \$77,669 per annum, backdated to 1 July 1987.

The Crown's Waikaremoana power scheme was transferred to ECNZ.

1993: The Crown sought an easement for its structures (and access to them) on the Maori-owned lakebed, to clarify ECNZ's position and the legality of what was transferred to ECNZ in 1988.

1994: DOC staff worked with the Waikaremoana Maori Komiti and a Ruatahuna committee to establish the Aniwhaniwa model of consultative 'joint' management for the southern part of the national park, including Lake Waikaremoana.

1995: The two Maori trust boards began proceedings in the Maori Land Court, claiming that the Crown was in breach of the 1971 lease by allowing the hydroelectricity structures to be on the bed of the lake, and allowing ECNZ to trespass on the lake. These proceedings resulted in a mediation, which began in December (completed in 1997).

ECNZ established a working party to carry out the necessary consultation and negotiations for obtaining RMA resource consents for its Waikaremoana power scheme.

1996: The trust boards began negotiations with ECNZ for an arrangement over easements and use of the lake for hydroelectricity.

Government plans to split up ECNZ and privatise the Waikaremoana power stations were put on hold as a result of the coalition agreement with New Zealand First.

1997: The Crown and the trust boards signed a variation of the lease, specifying that the Crown could not sub-lease for electricity purposes.

1998: The Government resumed plans to privatise the Waikaremoana power stations. The two trust boards formed a consortium to bid for these stations.

The trust boards and ECNZ reached an agreement in principle: the trust boards would grant a 100-year easement to ECNZ in relation to the structures on the lake in return for a licensing regime (involving undisclosed fees).

Nga Tamariki o te Kohu occupied lakeside land, arguing that they were re-entering the lease because DOC had mismanaged the lake and was in violation of the lease. After discussions with the Government, Nga Tamariki o te Kohu agreed to give up the occupation in return for a special ministerial inquiry into their grievances about DOC's management of the lake and the Crown's conduct as lessee. The Ministers of the Environment and Maori Affairs appointed the Maori Trustee, John Paki, and a solicitor, JK Guthrie, to hold the inquiry, which delivered its report in August.

The Hawke's Bay Regional Council granted ECNZ 41 resource consents to operate the Waikaremoana power scheme, subject to numerous conditions, for a period of 35 years.

The third 10-yearly rent review increased the rental value to \$2,251,000, with an annual rent of \$123,805, backdated to 1 July 1997.

1999: ECNZ and the trust boards signed a deed establishing a licensing regime for Lake Waikaremoana, the substance of which has been kept confidential.

The Government sold Contact Energy and split ECNZ into three State-owned enterprises: Genesis, Meridian, and MIGHTY River Power.

2000: The new, Labour-led Government cancelled the plan to privatise the Waikaremoana power stations and transferred them to Genesis Energy.

20.4 THE ESSENCE OF THE DIFFERENCE BETWEEN THE PARTIES

In this section, we summarise the key differences between the parties' arguments. Those arguments will be explained in greater detail in the later analysis sections; here, we convey the essence of the dispute between the claimants and the Crown.

20.4.1 What were the origins of the contest between Maori and the Crown over ownership of lakes?

The claimants stated that New Zealand 'does not provide a system of recognition of ownership to water'. But 'Urewera Maori, including Ruapani, have rights akin to ownership in the Waikaremoana water system'. The Crown's failure to 'recognise and preserve to Maori the ownership of their water' is an alleged Treaty breach.⁵ The claimants maintained that they have 'property rights in the water', which they said have been recognised in law, and that the Crown neither acknowledged those rights nor paid for the use of their water.⁶ Claimant counsel stressed the legal opinion (obtained in the 1960s as part of the valuation exercise) that Maori owned the water as well as the bed of Lake Waikaremoana.⁷ Counsel for the Wai 144 Ngati Ruapani claimants submitted: 'Ruapani argue that their rights to the water, if rendered in terms of property law, ought to be ownership'. In particular, Ngati Ruapani relied on the findings of the Waitangi Tribunal about ownership of water in its *Te Ika Whenua Rivers Report*.⁸

The claimants also argued that the Crown 'was opposed to any suggestion of a Maori title to the beds of large navigable lakes', including Taupo, Rotorua, Waikaremoana, and Wairarapa.⁹ Rather, the Crown believed that it should be 'the owner of all lakes in New Zealand'.¹⁰ This somewhat 'nebulous (even subconscious) imperative' drove all Crown officials, the claimants asserted, despite there being no support for it in English common law. Counsel for the Wai 945 Ngati Ruapani claimants pointed to *Halsbury's Laws of England*, which stated that the 'soil of lakes and pools, even when they are so large that they might be termed inland seas, does not of common right belong to the Crown'.¹¹

In general, the claimants argued, the Crown's motivation was to prevent Maori obtaining freehold titles to lakes, so as to protect settler interests of

5. Counsel for Wai 144 Ngati Ruapani, closing submissions, 3 June 2005 (doc N19), p 68

6. Counsel for Wai 36 Tuhoe, closing submissions, pt B, response to statement of issues, 30 May 2005 (doc N8(a)), p 146

7. *Ibid*; counsel for Wai 621 Ngati Kahungunu, closing submissions, 30 May 2005 (doc N1), p 129

8. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 68

9. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions, 30 May 2005 (doc N13), p 37

10. *Ibid*

11. *Ibid*

fishing, navigation, and other uses of lakes.¹² In the more particular case of Lake Waikaremoana, the immediate cause of the contest between the Crown and Maori was the Government's establishment of Lake House, its stocking of the lake with trout, and the establishment of a tourist recreational fishery; these were the 'catalyst' for the long-running legal contest that ensued over the ownership of Lake Waikaremoana. But the claimants also argued that the Government's interest in the lake for hydroelectricity was an important factor behind the scenes.¹³

Crown counsel did not address the origins of the contest in New Zealand for ownership of lakes, except to make the general point that the Crown 'assumed' it owned the lakebed, and there was nothing 'improper for it to have contested the important issue of title to the lake'.¹⁴ The Crown relied on *Halsbury's Laws of England* to argue that riparian owners have certain incidental rights but flowing water 'is not, at common law, the subject of property or capable of being granted to anybody'.¹⁵ Water, counsel said, 'is unowned at common law', and '[t]he owners of the Waikaremoana lakebed have no special rights to the waters of the lake'.¹⁶ Because of this, 'there is no corresponding duty on the Crown to protect that right'.¹⁷ On the specific origins of the contest over Lake Waikaremoana, the Crown did not accept that the establishment of Lake House and tourist fishing resulted in conflict or Maori opposition, although it noted a sharp divergence of views at the time between the Minister and Maori leaders over whether the use of the lake in these ways was appropriate.¹⁸ The Crown 'considered in good faith that title to the lakebed did not reside with tangata whenua'; in hindsight, it should have consulted the lake's owners first before introducing tourism and making use of the lake.¹⁹

20.4.2 What was the Crown's response to the Maori claims for legal ownership of the lake?

According to the claimants, article 2 of the Treaty required the Crown actively to protect Maori property rights and taonga, but the Crown – in breach of the Treaty – has instead denied, opposed, and sought to defeat their legal ownership of Lake Waikaremoana.

In brief, the claimants argued that the Crown should never have opposed their claim in the Native Land Court in the first place: 'In terms of the Treaty, the Crown should not have been an active litigant attempting to defeat Maori

12. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), p 37

13. *Ibid*, pp 40–41

14. Crown counsel, closing submissions, June 2005 (doc N20), topic 28, pp 5–6

15. *Ibid*, p 25

16. *Ibid*, pp 3, 25

17. *Ibid*, p 26

18. *Ibid*, pp 19–20

19. *Ibid*, p 20

title to the lake.²⁰ The Rotorua case *Tamihana Korokai* settled the law for New Zealand in 1912: the Native Land Court had jurisdiction to decide Maori lake claims, and the law should then have been left to take its course in the case of Lake Waikaremoana. Instead, the Crown continued to oppose the Native Land Court hearing lake claims or granting freehold title to lakes.²¹

Having decided to oppose Maori title in the Native Land Court, the Crown then showed bad faith by trying to thwart and impede the hearing,²² and by appealing the court's decision without having appeared and argued its case.²³ At the very least, the Treaty required the Crown to accept the court's decision in 1918 instead of continuing to oppose Maori ownership for several decades.²⁴ The claimants also argued that the Crown was fighting a losing battle, which it insisted on fighting long after 'the point was settled in favour of Maori both in the ordinary courts and in the Maori Land Court.'²⁵ The Crown's Waikaremoana appeal obviously 'lacked substantive merit' by the time it was heard in 1944.²⁶ Further, from 1924, when the Crown recognised Te Arawa's title to lakes (or the need to extinguish that title), the Crown had 'no business attempting to assert a title to the lake when, at law, it knew that it had not acquired title [as it had at Rotorua] and that therefore the title must have remained Maori customary title, in respect of which only Maori could claim ownership.'²⁷

In the claimants' view, there are also serious Treaty issues about the long, 26-year delay in hearing the Crown's appeal ('surely a New Zealand record'²⁸). In their submission, the delay was mainly the result of the Crown's vacillation, mismanagement, and its reluctance to have the appeal heard. At times, the Crown actively resisted prosecuting its appeal.²⁹ This unconscionable delay was then exacerbated by the Crown's refusal to accept the Native Appellate Court's decision for a further 10 years (until 1954), while it contemplated proceedings in the Supreme Court to quash the decision. This additional delay and denial of title was in itself a Treaty breach. In the claimants' submission, the appropriate time for that kind of judicial review had been back in 1918, when the Native Land Court first exercised its

20. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p145; counsel for Wai 36 Tuhoe, closing submissions, pt A, overview, 31 MAY 2005 (doc N8), pp 68–69

21. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), pp 37–40

22. *Ibid*, pp 41–42

23. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 118–119, 130–131

24. Counsel for Ngati Ruapani (Wai 945), Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), pp 37–40, 46–48

25. *Ibid*, pp 37–40, 46–48

26. *Ibid*, p 47

27. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 68

28. *Ibid*

29. Counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), pp 169–171, 176; counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), pp 42–45, 47, 49; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 145

jurisdiction.³⁰ ‘Justice delayed’, said the claimants, ‘is justice denied.’³¹ In their view, they had been denied due process and a path to establish their legal rights for decades, in violation of the Treaty, Magna Carta, and the rights of British subjects.³²

Crown counsel, on the other hand, argued that the Crown was entitled to contest such an important issue as the ownership of Lake Waikaremoana in the courts, including by way of appealing the Native Land Court’s 1918 decision. Crown counsel accepted that some of the delays in hearing the appeal could be attributed to the Crown, but maintained that there was no bad faith or deliberate policy of delay. Some of the postponements were to accommodate the claimants when they were unable to proceed. Between 1918 and 1944, the Crown honestly ‘considered that it would overturn the title to the Waikaremoana lakebed granted by the Native Land Court’. Until 1954, when any further appeal was abandoned, the Crown assumed that it owned the lake. This assumption did not change, we were told, until after the Crown’s abandonment of any possibility of further litigation.³³

20.4.3 What were the effects of the Crown’s denial of Maori ownership for 36 years?

According to the Crown, there were virtually no consequences from its long denial that Maori owned Lake Waikaremoana. Ultimately, it did not prevent Maori from obtaining legal ownership of the lake; in other words, Maori won. Further, the Crown argued that its activities ‘on the lake, and therefore on Maori land’ – stocking the lake with fish and running a tourism enterprise (including boating) – caused no harmful or prejudicial effects for Maori. In hindsight, the Crown accepted that it should have consulted the Maori owners, but argued that Maori either wanted these things (Tuhoe had requested trout) or benefited from them in some way.³⁴ Thus, any prejudice from the long delay in hearing the Crown’s appeal was ‘minimal’.³⁵

Further, the Crown accepted that it modified the lakebed for electricity purposes during the time that ownership was still disputed, and introduced a management regime which permanently lowered the lake. Crown counsel acknowledged that this had some harmful effects on the lake, mostly in terms of fisheries and shoreline erosion. But the Crown’s argument was that it did not need to rely on its (assumed) ownership because its actions were authorised by an Order in Council under the public works legislation, and would thus have taken place no matter who owned the lakebed. In the 1950s, a consensus emerged among Government

30. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 223–225; counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), pp 48–51

31. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 177–178

32. Ibid, pp 175–192; counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 128–133; counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), pp 47–48

33. Crown counsel, closing submissions (doc N20), topic 28, pp 2, 4–6, 20

34. Ibid, pp 2, 4–5, 19–20

35. Ibid, pp 2, 5

departments that the electricity structures were ‘too trivial’ an infringement to require compensation. Also, any outstanding issue in this respect, in the Crown’s view, was settled when the Crown leased the lake for a backdated rental in 1971.³⁶

The claimants, on the other hand, maintained that they suffered significant prejudice as a result of the Crown’s long denial of their just rights and title. Counsel for Wai 36 Tuhoe argued that the Crown’s actions had the effect of ‘preventing Tuhoe from obtaining a full economic return from its asset.’³⁷ Similarly, counsel for the Wai 621 Ngati Kahungunu claimants argued that ‘the Crown’s unwillingness to accept Maori ownership of the lake meant that the Maori owners were entirely excluded in the management of the lake’ from 1918 until 1971, while ‘the Crown and others trespassed, gained economic benefit, and modified the environment in and around the lake.’³⁸ Counsel submitted:

such dishonourable Crown conduct has denied to owners the economic, cultural and political leverage that would have been theirs since June 17 1918. Indeed it locked their asset up and left them with little choice but to make it available for national park purposes in 1971.³⁹

Claimant counsel argued that some kind of joint venture, lease, or easement would have allowed both the Crown and the owners to benefit from the lake’s use for electricity (if their ownership had been recognised at the time).⁴⁰ Even if the Crown could argue ‘necessity’ in its use of the lake for electricity or tourism, ‘if the Crown was prepared to actively breach the [Treaty] right of undisturbed possession of the lake . . . then it should have paid for it.’⁴¹

Also, the claimants argued that the Crown’s hydroelectricity scheme caused lasting damage to the lake and its environs; this could not have happened if Maori ownership had been recognised and respected, at least not without some form of compensation.⁴² In the claimants’ view, the Treaty required the Crown to respect (and compensate for) more than just its usurpation of their English-style property rights. The Privy Council decision in *Amodu Tijani*⁴³ showed what was required of the Crown at the time: to recognise the unique nature of a cultural or spiritual treasure and the customary law pertaining to it, and to compensate for any infringement of the spiritual relationship with that treasure or taonga. The Treaty also required the Crown to compensate the peoples of Waikaremoana for any damage done to their ‘mother’ the lake.⁴⁴

36. Ibid, pp 4–7, 12–17

37. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 72

38. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 130

39. Ibid, p 133

40. Ibid; counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 72–73

41. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 73

42. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), pp 48–49

43. *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399

44. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 175–202

20.4.4 Why did it take so long for the Crown to negotiate an arrangement with the lake's owners after it accepted their title in 1954?

In the claimants' view, their title to the lake continued to remain in limbo from 1946 to 1971 because the Crown pursued a strategy of overturning their title in the courts (until 1954). Also, it 'aggressively pursued' a campaign to extinguish their rights by means of purchasing the lake. In the meantime, the Crown continued to use the lake as it had before 1946, without permission or payment. To add insult to injury, the claimants argued that the Crown was determined to buy the lake at an extremely low price; it refused to value the lake properly or act consistently with the ways in which it had settled other lake claims. The Crown's efforts to justify its low offers were seen as nothing short of 'ludicrous', and its approach to the negotiations was described as 'dogmatic'. The Crown's determination to purchase Lake Waikaremoana, however, ran into the claimants' equal determination not to sell their taonga. The claimants submitted that they wanted a tribal annuity so that they could maintain their connections in the long term, both with the lake and each other. But the Crown was not prepared to raise its price or to compromise until the late 1960s, when the consequence of the exposed lakebed for national park users came to be considered urgent. Ultimately, in the claimants' view, it was not until the Crown was prepared to agree to an independent valuation and to a lease that there was a breakthrough in this long, debilitating deadlock.⁴⁵

Crown counsel noted that there had been 'lengthy negotiations between 1949 and 1969' but otherwise made no submissions on this particular issue. In the Crown's view, it all turned out well in the end with a fully consensual lease, fair terms, and no Treaty breach.⁴⁶

20.4.5 Was the 1971 agreement fair in all the circumstances, and was it given proper effect in the Lake Waikaremoana Act 1971? What adjustments have been made since 1971, and with what results?

The claimants and the Crown were sharply divided on this issue, and there were also some disagreements among the various claimant iwi.

20.4.5.1 Claims about the fairness of the terms of the 1971 lease

The first set of issues relates to the Crown and claimants' dispute as to whether the 1971 lease agreement was a fair one.

The Wai 36 Tuhoe claimants argued that 'the rental under the lease was not fair and consistent with the Treaty' for two reasons: first, the Crown wrongly refused to pay them for the modification and use of their lake for hydroelectricity between 1945 and 1998; and, secondly, the Crown refused to backdate the lease earlier than 1967. The result of the latter point, they told us, was that the Crown 'has never paid

45. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), p 50; counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 69–71; counsel for Wai 36 Tuhoe, closing submissions, pt C, schedule of primary findings and recommendations sought, 2005 (doc N8(b)), p 13; counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, pp 71–74

46. Crown counsel, closing submissions (doc N20), topic 28, pp 7–9

for the use of the lake for scenic and conservation purposes and as part of the National Park prior to 1967.⁴⁷

Counsel for Wai 144 Ngati Ruapani made a similar submission: ‘In terms of compensation, Ngati Ruapani seek payment for the Crown’s use of the lake between 1945 and 1998 for hydroelectric purposes, in addition to “back rental” accrued before 1967 as compensation for the Crown’s effective control and use of Lake Waikaremoana for scenic and conservation purposes and as part of the National Park.’⁴⁸ The justification for this argument was that the ‘terms and rental of the lease were not fair and consistent with Treaty principles, as after the many years of stalled negotiations, the lease settlement was simply based on the existing value of the Lake and no acknowledgement of past use or damage.’⁴⁹ According to counsel for Wai 945 Ngati Ruapani, the Government was able to get away with this because it failed to carry out the owners’ request that the valuation be settled by an independent commission of inquiry.⁵⁰

The Wai 621 Ngati Kahungunu claimants agreed that there should have been a ‘back payment’ to cover use of the lake’s water for electricity and its bed for hydroelectric structures.⁵¹ At the very least, in their view, the rental should have been backdated to 1954, when the Crown abandoned litigation and accepted Maori ownership of the lake.⁵²

In the Crown’s submission, the 1971 lease should be regarded as a full and final settlement of all matters raised during the lengthy negotiations leading up to it. The terms of the lease were arrived at by reasonable compromises on both sides, and settled by the free and informed consent of the owners’ representatives, who were ‘ably represented throughout the negotiations by experienced counsel.’⁵³ In the Crown’s view, the outcome was fair to both sides, and the lease ‘constituted a comprehensive settlement of lake issues, including that of the Crown’s lake use prior to 1971.’⁵⁴

In respect of hydroelectricity, the Crown also argued that there are no ownership rights in water and the claimants were not entitled to payment for the use of the lake’s water.⁵⁵ Under the public works legislation, compensation was only payable where land was taken or damage was done to property. In the Crown’s submission:

Compensation for previous use was considered extensively during the negotiations that led to the lease after being raised by the owners as an issue. The Crown formed

47. Counsel for Wai 36 Tuhoë, closing submissions, pt B (doc N8(a)), p146

48. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, p155

49. *Ibid*, p73

50. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), pp 50–51

51. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p134

52. *Ibid*, p129

53. Crown counsel, closing submissions (doc N20), topic 28, pp 8–9

54. *Ibid*, p 2

55. *Ibid*, pp 3, 25–26

the view that 'It can be argued that payment for past use, injurious affection etc, is unreal as the Maori owners have sustained negligible loss from such past use.' The Crown considers that insufficient evidence has been presented to the Tribunal concerning past use of, or injurious affection to, land that leads the Crown to change these views. . . .

All relevant issues including that of past use were considered in negotiations. Options considered included outright purchase, purchase with annuity, and lease in perpetuity. The eventual vehicle of a lease with annual rentals arose out of negotiations that considered the issues raised here. There is no outstanding issue concerning lakebed use prior to 1971, and no further payment for the use of the lakebed prior to 1971 is warranted.⁵⁶

In respect of adjustments or alterations since 1971, the Crown argued that the Maori owners have secured a substantial benefit since 1971 (backdated to 1967), that it has never defaulted on its legal obligations, that the rent reviews have been carried out and the rentals have always been agreed between the parties, and that there is no Treaty breach associated with the operation of the lease.⁵⁷ The claimants made no submissions about post-1971 adjustments (including those made to the rent) or the Crown's performance as lessee, except in respect of environmental management, as we shall set out in section 20.4.6.

20.4.5.2 Claims in relation to the Lake Waikaremoana Act 1971 and the vesting of the lakebed in the Maori trust boards

There was disagreement among the claimants as to whether the Lake Waikaremoana Act 1971 represented a fair and faithful 'validation' of the lease and the May 1970 agreement.

In the view of the trust board claimants (the Wai 36 Tuhoe and Wai 621 Ngati Kahungunu claimants), the Act simply gave effect to the wishes of the Maori owners at the time. Any disagreement, in their view, has arisen much later.⁵⁸ The Crown shared this view, and argued that it had no responsibility for the main point in contention: the transfer of legal ownership from individual owners to the Tuhoe-Waikaremoana and Wairoa-Waikaremoana Maori Trust Boards.⁵⁹ In particular, Crown counsel suggested that the idea of vesting the lakebed in the boards came from the owners themselves and was agreed to by the owners' committee and a meeting of owners. The proposal may not have been fully understood by all owners at the time but the Act gave effect to the owners' express wishes. The owners were consulted and agreed to the legislation, and there was 'no dissent or complaint from any lake owner'.⁶⁰ The Crown concluded: 'There was no reason why the Crown should have done anything in respect of the lease other

56. Crown counsel, closing submissions (doc N20), topic 28, p12

57. Ibid, pp 11, 13

58. Counsel for the Wai 36 Tuhoe claimants, submissions by way of reply, 9 July 2005 (doc N31), pp 30–31; counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 127–128, 134

59. Crown counsel, closing submissions (doc N20), topic 28, pp 9–11

60. Ibid, p 11

than introduce it [to], and support it through, Parliament by way of the Lake Waikaremoana Bill.⁶¹

The Nga Rauru o Nga Potiki and Ngati Ruapani claimants took a different view. They argued that the lease agreement was for a trust board to administer the rental; it was not supposed to have resulted in a transfer of legal ownership to the existing Maori trust boards or a general fund for the benefit of all the boards' beneficiaries.⁶² The fact that this could happen, in their submission, arose because the Crown failed to give proper effect to the agreement, and because it used validating legislation to subvert the owners' legal protections. Such protections included Maori Land Court vetting and confirmation of the lease.⁶³ The result, in these claimants' view, was that they lost ownership of their taonga, and have seen its control and benefits vested in others.⁶⁴

20.4.6 What role have Maori played in the management of the lake after entering into the lease?

One of the claimants' key concerns has been to assure the 'ecological future' of the lake.⁶⁵ In their view, this ought to have been assured by their leasing the lake for national park purposes, because the National Parks Act 1952 required the Crown to preserve parks as far as possible 'in their natural state', to preserve native species, to eradicate introduced species, and to maintain 'the Park's value of soil, water and forest conservation.'⁶⁶ In the Nga Rauru o Nga Potiki claimants' submission, the Crown has failed to do these things in its capacity as lessee.⁶⁷ Counsel for the Wai 144 Ngati Ruapani claimants suggested further that DOC has failed in its duty to care for the environment at Waikaremoana.⁶⁸ The lake has been used for hydroelectricity and its shores have been used to accommodate growing numbers of visitors: these uses, the claimants said, have resulted in ecological damage, pollution, and unauthorised building. Some of the damage done by hydroelectricity predated the lease but has had ongoing effects, which have not been remedied.⁶⁹ The long-term contamination of the lake with sewage was particularly offensive to the claimants.⁷⁰

In the claimants' view, ongoing damage has been permitted because they have been excluded from any say in the management of the lake and its levels for electricity purposes.⁷¹ They argued that they have also been excluded from DOC's

61. Ibid

62. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), pp 68–70

63. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 208–219

64. Ibid, pp 210–213

65. Ibid, p 202

66. Ibid, p 220

67. Ibid, pp 220–222

68. Counsel for Wai 144 Ngati Ruapani, submissions by way of reply, 8 July 2005 (doc N30), p 49

69. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 220–222, 226–227

70. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), pp 66–67; app A, pp 96–99, 105–106

71. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 229–230

management of the lake, even though its management plan requires it to consult with the lake's owners through the trust boards:

This obligation has been the subject of much criticism in the inquiry both with respect to allegations of the total absence of any consultation on key issues relating to the future use of the Lake and also with respect to ongoing operational matters that are already set into place.⁷²

We received a very different set of submissions from the Wai 36 Tuhoe claimants and from the Crown.

Although the Wai 36 Tuhoe claimants shared some concerns about ecological harm to the lake from its use for hydroelectricity,⁷³ they chose not to raise issues about its post-1971 management in our inquiry:

Since the enactment of the Lake Waikaremoana Act 1971 the ownership of Lake Waikaremoana has been vested in the two Trust Boards and the relationship between the Trust Boards and the Crown has been governed by the terms of the Lease Agreement set out in the schedule to the Act. The Trust Boards have separately addressed issues directly with the Crown in relation to the lease and have not pursued lease issues before this Tribunal (aside from issues of payments for use of the lake).⁷⁴

Similarly, counsel for the Wai 621 Ngati Kahungunu claimants also made no submissions about environmental issues or the management of the lake after the signing of the lease.⁷⁵

Crown counsel submitted that it is really internal issues that are at play in concerns about management and consultation. While, admittedly, the 1998 occupation arose from concern that DOC only consulted the trust boards, the Crown's view is that this was an internal matter for the boards and their beneficiaries to resolve. In the meantime, DOC had satisfied its obligations by consulting the owners (that is, the boards).⁷⁶ Nonetheless, the 1998 ministerial inquiry recommended the negotiation of a formal management agreement between tangata whenua, the boards, and DOC, to accord "tangata whenua a more inclusive and transparent role in issues relating to the management of the leased area at Lake Waikaremoana than at present".⁷⁷ In the Crown's view, this proved unnecessary because 'what was and remains in place gives effect to the inquiry's recommendation', and the local people were satisfied.⁷⁸ Further, the Crown submitted that any pollution of the lake was not necessarily the result of its actions (or inaction), and

72. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 236

73. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 147-148

74. *Ibid*, p 194

75. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1); counsel for Wai 621 Ngati Kahungunu, submissions by way of reply, 8 July 2005 (doc N29)

76. Crown counsel, closing submissions (doc N20), topic 33, p 13

77. *Ibid*

78. *Ibid*

that it has taken ‘substantial steps to address and redress’ pollution, including that from sewage.⁷⁹ But it is not possible to keep an environment with campers and visitors entirely pollution-free.⁸⁰ The Wai 945 Ngati Ruapani claimants appear to agree that the Crown has taken substantial steps to address sewage issues since 1979 and that consultation with local groups has improved since 2000.⁸¹

In respect of managing the lake for electricity (which is outside DOC’s control), the Crown’s submission is that Electricorp and its successor, Genesis, have consulted a ‘range of Urewera Maori groups and individuals.’⁸² The Crown accepts that hydroelectricity has had a significant ecological impact on the lake, especially in terms of fisheries and shoreline erosion.⁸³ Nonetheless, Crown counsel submitted that the effects are now managed appropriately under the Resource Management Act, by Genesis working with local groups ‘to manage environmental and cultural issues.’⁸⁴ For the period before the Resource Management Act, the Crown submitted, ‘Historically, whatever negative impacts the Waikaremoana power scheme had on the local environment must be assessed against the significant benefits its generation of electricity has provided to the country.’⁸⁵

In other words, the Crown’s view is that harm to Lake Waikaremoana was justified by the national benefits of an increased electricity supply. Clearly, this was not a view shared by the claimants.

We next turn to our analysis of these issues, beginning with the origins of the contest between Maori and the Crown over ownership of the lake.

20.5 WHAT WERE THE ORIGINS OF THE CONTEST BETWEEN MAORI AND THE CROWN OVER THE OWNERSHIP OF LAKES?

SUMMARY ANSWER: Lake Waikaremoana is a taonga of immense importance to Ngati Ruapani, Tuhoe, and Ngati Kahungunu. Kaumatua and kuia explained how the lake was created by their tipuna, Maahu, and his daughter, Haumapuhia, and how they have been its kaitiaki (custodians) for many generations. They explained the spiritual and cultural significance of the lake, and also its economic importance to them as a source of sustenance. The Crown’s interest in Lake Waikaremoana mainly dates from the first decade of the twentieth century, when it established a tourism enterprise there and ascertained the potential of the lake and its outflowing waters for hydroelectricity. The Crown–Maori contest over Lake Waikaremoana began in that decade, as a result of the Crown’s introduction of tourists who used it for boating and fishing. Each side tried to control the other’s use of the lake. The Crown made trout fishing subject to acclimatisation society rules, while hunting

79. *Ibid.*, topic 29, pp 42, 45–48

80. *Ibid.*, p 46

81. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), pp 56–58

82. Crown counsel, closing submissions (doc N20), topic 33, p 13; topic 28, p 2

83. *Ibid.*, pp 13–17

84. *Ibid.*, pp 2, 17

85. *Ibid.*, p 17

was banned by Order in Council. Senior Waikaremoana leader Hori Wharerangi met with Native Minister Carroll to discuss ownership of the lake and payment for its use. Te Reneti Hawira also raised these matters directly with the manager of Lake House and then with Carroll in 1905, but was rebuffed. The Crown refused to accept Maori ownership of or authority over Lake Waikaremoana at that time, but did not try to enforce its restrictions on hunting and fishing other than by persuasion. Neither side was prepared to push the contest to the point of open conflict.

At this point, the Crown–Maori contest over Lake Waikaremoana intersected with a similar contest at Rotorua. As a matter of context, the Crown had accepted Maori ownership of the Wairarapa lakes in the nineteenth century and obtained them by gift in 1896, and it had also accepted Maori ownership of Lake Horowhenua in 1905. Te Arawa's ownership of the important Rotorua lakes, however, was contested by the Crown in the 1910s, resulting in a Native Land Court claim and a case stated to the Court of Appeal. In 1912, the landmark judgment *Tamihana Korokai v Solicitor-General* decided that the Lake Rotorua case must be allowed to proceed in the Native Land Court: 'What the customary title to the bed of Lake Rotorua may be must be considered and determined by the only Court in New Zealand that has jurisdiction to deal with Native titles – the Native Land Court.' In theory, this cleared the way for the Native Land Court to hear and determine all lake claims.

In the same year (1912), Waikaremoana leader Hurae Puketapu petitioned Parliament to add Lake Waikaremoana to the Urewera District Native Reserve, where it would be subject to the control of committees provided for by the *UDNR Act*. The Native Affairs Committee declined to make a recommendation, stating that the petitioners had not exhausted their legal remedy. By this, the committee apparently meant that the petitioners should seek a title from the Native Land Court. With growing Pakeha interest in the lake as a scenic reserve or for hydroelectric development, a Native Land Court claim was indeed filed in 1913 by Rawaho Winitana, Mei Erueti, and Matamua Whakamoe. Ngati Kahungunu lodged their own claim in 1914.

Thus, one consequence of Parliament's rejection of the petition (and of the remedy it identified) was that Lake Waikaremoana would become subject to the only title available under the native land laws: individual ownership of undivided shares. Had a special taonga title or community title been available, much future grief could have been avoided.

20.5.1 Introduction

In this section, we discuss the origins of the contest between Maori and the Crown over ownership of Lake Waikaremoana. After the armed conflict of 1869 to 1871 (see chapters 5–7), the Crown established its control of the southern shores of the lake by building an armed constabulary outpost at Onepoto, and then by its purchase of the four southern blocks. But the restoration of peace in 1871 made the redoubt unnecessary and it was later abandoned. At first, this left the Government with little interest in the remote lake or its environs. No settlers arrived to set up claims or establish interests that needed protection. Instead, a forestry reserve was

created on the Crown's lands to the south of the lake. Maori retained the land on the northern shores, which became part of the Urewera District Native Reserve in 1896.

Lake Waikaremoana was an ancestral taonga of great significance to Ngati Ruapani, Tuhoë, and Ngati Kahungunu. That did not change. But on the Crown's side, the lake came to be seen (by the early 1900s) as vital to the Government's interests in tourism and hydroelectricity. In the first decade of the twentieth century, therefore, Crown and Maori clashed about the lake for the first time since 1871. This time, they contested each other's claims to authority over the lake, its fisheries, its birdlife, and its waters. The result was that Ngati Ruapani and Tuhoë made a claim for legal ownership of Lake Waikaremoana, lodged with the Native Land Court in 1913. Ngati Kahungunu filed counter-claims in 1914. We consider these land court claims in the next section. In this section, we are concerned with the events that pushed tribal leaders to lodge these claims with a court to which Tuhoë and Ngati Ruapani had previously been adamantly opposed.

20.5.2 Maori relationships with Lake Waikaremoana

Our starting point is the relationship of the people with their taonga. The Nga Rauru o Nga Potiki claimants explained it in this way:

The conception of Maori, which has been detailed extensively by a number of witnesses, was that the 'sea of rippling waters; Waikaremoana Whanaunga Kore' existed and was used, managed, conserved and controlled in a holistic way. It was also a taonga, extending far beyond protection of site-specific fisheries and watering holes, and is guaranteed as such by the Treaty. It has, in the context of these hearings, been referred to as the source of life, the Koka (mother) of the peoples of Waikaremoana. It is the home of Haumapuhia, who is the revered ancestress of many of the hapu who are nurtured by the cherishing waters of Waikaremoana.⁸⁶

The essence of this relationship today is captured in a waiata, composed by Tom Winitana in January 2003, which we reproduce here:

Ka makere mai matau i te awhi a te Tupuna nei a Hinepukohu

*Ka tiro atu ki nga Wai Hikuhiku o Waikaremoana
Mohio katoa matau kei te paihere matau ki nga wai e kore nei e tae ate patu
Kia Hinepukohu te tupuna me to timatatanga hoki a Papatuanuku
Ko nga wairua kei te paihere*

*Ka titiro ki te ngahere e heke rano mai ki te wai ke ki te hoki i te kakariki
O nga rakau e whakaora ana i nga hau a Tawhiri Matea e kore nei e mate
Hei whakanga mo tatau, mohio katoa matau he uri katoa nga rakau nei kia matau
Kei te paihere wairua katoa matau kia matau*

86. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p184

O matau whanaungatanga ki nga Ika a Tangaroa e whakapai i te wai hei oranga

Mo te Katoa, he oko horoi mo nga Tipuna

He hono Wairua matau kia matau

*Nga Manu katoa a Tane a whakakiki nei te ngahere kia ratau waiata ka riro ko ratau
ano hei kawē i nga kakano ki tawhiti*

Ko o matau Wairua kei te honohono ia matau

Ko te Tangata ka whawha mai ke reweke renei

I nga mahi tukuiho ki o matau uri

Kei te raweke i te aona nga Atua Maori i hanga

Koinei nei te tino putake ake o nga mahi a matau te Maori

Ko matau hoki nga Kaitiaki mai rano i te timatatanga mo nga uri whakaheke

When I unfold myself from the warm embrace of my Founding Ancestress

Hinepukohukohu

I gaze at the sparkling waters of Waikaremoana

And I know that I am inextricably tied

To the glistening waters

And to my Founding Ancestress

And to my Earth Mother Papatuanuku

Because of my wairua base

And when I look at the green forests that stretch down to the Water's edge

And see the continuous green mixing

With the neverending blue

I know that all these trees are my brothers and my sisters

And I am tied to them by my wairua connection

My relationship with the fish

And all that lives in the lake

Where my forbears bathed are also part of

My wairua link

And all the birds that reside in the

Evergreen forests are also tied to me

Because of the wairua link

And whoever destroys that or interferes with it,

Interferes with the very essence of

Who and what I am.⁸⁷

87. Counsel for Nga Rauru o Nga Potiki, submissions by way of reply, 8 July 2005 (doc N33), pp 4-5. The waiata is recorded as the composition of Tom Winitana, dated January 2003.

The claimants presented us with this waiata as part of their submissions in reply to the Crown, which had not – they felt – fully understood their role as kaitiaki of the lake and its environs, and the central importance of the lake to their cultural and spiritual well-being. They are the guardians of the mauri or life-force of the lake, its waters, and its aquatic species. The evidence of James Waiwai, Lorna Taylor, Paringamai o Te Tau Winitana, Neuton Lambert, and many other speakers shows they take this responsibility extremely seriously. The English word used by Pari Winitana was ‘custodians’. Their duty is ‘to the past and the future generations to protect their heritage.’⁸⁸ Rahui (bans on the use of a resource or a place) were a common way in which kaitiaki cared for the lake, its resources, and its people. Neuton Lambert told us: ‘Each whanau had kaitiaki who had a specific role. Each whanau obviously had their pakeke, who gave advice. They in turn talked with the other pakeke, because they would need consensus to put a rahui on a certain place.’⁸⁹ Their rights or authority as kaitiaki are sourced to whakapapa and whanaungatanga, and thus to their kin relationships with tipuna and with taonga (the lake and its aquatic life).

Dr Rangimarie Rose Pere expressed the relationship in these words:

Ki o matau koroua kuia he mauri to nga mea katoa, he mana ahua ake to nga mea katoa. Ina hoki i roto i nga pouhere korero tuku iho ki a matau i Waikaremoana nei – a waha, a ringaringa hoki, mo nga tau e hia mano – ka noho tatau hei whanaunga ki te nuku o te aorangi. Ano ko te kohu a to matau tipuna a Hinepukohurangi e toro ana ki tawhiti, kaore he tino wehenga. Ko matau a Waikaremoana, ko matau nga rakau o te wao tapu nui a Tane raua ko Hinewao. Ko nga ahuatanga ka pa ki a ratau, ka pa mai ano ki a matau.⁹⁰

To our old people everything had a life force that made it unique and everything had as much divine right to exist as they did. For in the understandings that have been passed down to us here in Waikaremoana, orally and experientially, for thousands of years, we know that we are related to everything and everybody throughout the length and breadth of the universe. Like the far reaching wisps of Hinepukohurangi we are inseparable, there are no boundaries. We are the ‘sea of rippling waters’, we are the great trees of Tane and Hinewao’s forest. What happens to them, happens to us.⁹¹

And Pari Winitana told us:

I am Pari Winitana. I was born in Waikaremoana, live here, went to school here, I breathe the breeze of wind that comes from the Lake, I feel my ancestors, I can feel their hurt, their cries of despair. Our ancestors are looking at us, nga hapu toru Ngati

88. Paringamai o Te Tau Winitana, brief of evidence, no date (doc H24), p19

89. Neuton Lambert, brief of evidence, 11 October 2004 (doc H57), p5

90. Dr Rangimarie Pere, brief of evidence, 18 October 2004 (doc H41), p5

91. Dr Rangimarie Pere, brief of evidence (English translation), 18 October 2004 (doc H41(a)), p5

Hinekura, Te Whanaupani, Ruapani ki Waikaremoana. They are waiting for a wake up call. I have worked, slept, cried, ate, partied, hunted and had korero with my ancestors. I have lived through them. If it wasn't for my ancestors, I would not have survived.⁹²

Many who lived near the lake spoke in this way.

Foremost among the tipuna associated with the lake are Maahu and Haumapuhia. Many witnesses spoke of these tipuna. From traditions as recorded by Elsdon Best, Tama Nikora described how the lake was created:

The origin of Waikaremoana is explained in the story of Haumapuhia. Maahu married Kau-ariki and had a daughter called Haumapuhia. Their home was at Waikotikoti at Wairau-moana. One evening, Maahu sent Hau to fetch water from Te Puna-a-Taupara (the spring of Taupara). That child would not go, and Maahu himself had to go. When Hau arrived after him, her father was so enraged, he drowned Haumapuhia in the Puna-a-Taupara. Haumapuhia thereupon changed into a taniwha or monster of the fierceful tuoro type. She struggled with great fury below the land, broke open the land and punched out the arms of Waikaremoana in search of an outlet to the ocean. She punched to the west to reach Herehere-taua – hence the Whanganui arm. She punched to the east – hence the Whanganui-o-parua arm. Eventually, Haumapuhia entered by the subterranean passages at Te Wha-ngaromanga, to reach Waikare-taheke. When she emerged to daylight, she was changed to stone, and she still lies there with her head to the ground, and her thighs pointing upwards. These are the explanations of the ancestors for Waikaremoana. The source or *te tino* of Waikaremoana is Te Puna-a-Taupara. It was when Haumapuhia thrashed forth with her hands and feet that the waters were disturbed and that is why it was given the name, Wai-kare-moana, because of the disturbance of those waters.⁹³

There are other traditions about how the lake received its name. Des Renata of Ngati Ruapani spoke of his ancestor Ruapani, who was raised by his grandparents at Turanganui-a-Kiwa. When Ruapani was a young man, he travelled inland with his grandfather Tahunga-ehe-nui-a-tara, a tohunga, to set his boundaries and 'put in place his area of authority'. At the lake, they met Maahu, who received them as honoured guests. He told them of the tragedy of losing his daughter Haumapuhia in the act of forming the lake. But after Tahunga had spoken about their mission, Maahu became nervous that he might lose his home (at the place now called Wairau-moana) to such a high born rangatira as Ruapani.⁹⁴ Ruapani detected his fear, and replied: 'Kati-ra kua maku nga rekereke i nga wai karekare o tenei moana' (it is enough that my heels are made wet by the rippling waters of this sea).⁹⁵

92. Winitana, brief of evidence (doc H24), pp 17–18

93. Tama Nikora, 'Waikaremoana' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc H25), pp 4–5

94. Desmond Renata, brief of evidence, 15 October 2014 (doc H49), paras 5.1, 8.1, 8.18–23

95. Ibid, para 8.23



Dr Rangimarie Rose Pere. At the Waikaremoana hearing, Dr Pere spoke of the spiritual world of the old people, the shattering impact on the hapu of Waikaremoana of the Crown's acts between 1865 and 1869, and the significance of the many names around the shores of Lake Waikaremoana and Lake Waikareiti. She sought the return of kaitiakitanga (custodianship) and mana whakahaere (authority) for the land and the taonga named in the evidence to the hapu of Tuhoe Potiki, Ngati Ruapani, and Ngati Hinekura of Waikaremoana.

Maahu's people noticed that Ruapani had called the lake a moana (sea) rather than a lake. But Maahu deeply regretted having spoken about his daughter's forming the lake to a chief of such mana as Ruapani, and he feared spiritual retribution. After the party had departed, Maahu sent a messenger after them to accept the name Ruapani had given the lake. This was his attempt to atone for his hara (sin) in having seemed to elevate himself above Ruapani; he gave to Ruapani the honour of naming the lake that Maahu's daughter had formed 'in the hope that perhaps by doing that he could redeem himself'. Tahunga, pleased, gave his mihi to those across the lake for honouring the words of his mokopuna.⁹⁶

Dr Robert Wiri, drawing on the oral history research of Timoti Karetu in the 1970s, explained the local tradition as to how the new body of water, along with the outflowing Waikaretaheke River, became a valuable food source:

96. Ibid, paras 8.24–8.25, 8.27–8.29, 8.33–8.34

Then Haumapuhia tried to escape by the east, from this attempt she formed the inlet known as Te Whanganui-o-Parua. Her final attempt to escape was by Te Wharawhara, this place is near Onepoto. While she was here, she could hear the waves of the sea breaking in the east, and she tried to reach there while it was still dark. However while she was emerging from Te Whangaromanga she was struck by the sun's rays. Because of that, Haumapuhia wailed aloud, and her voice was heard by her father. Upon that, the old man felt sorry for his daughter, and sent some food for her. That food included the korokoro or lamprey fish, the kokopu, the koiro or conger eel, and tuna or fresh water eel for his daughter, but the koiro would not face the fresh water and the tuna could not pass the Waiau river. Some of the other food sent by that old man included shellfish, and the shells of that food can still be found at that locality today. Haumapuhia was transformed into a rock upon the rising of the sun, and, the waters from Waikaremoana flow above her, as she lies beneath the Waikaretaheke River.⁹⁷

These traditions, argued Tama Nikora, showed his tipuna understood how water flowed underground at Te Wharawhara and into the Waikaretaheke River.⁹⁸ About half of the time, water also spilled into the river over the rim of the lake at Te Wharawhara. The resulting flows were sufficient for eels and possibly for other fish in the lake to migrate to and from the sea.⁹⁹ Elsdon Best visited Te Wharawhara with Tutakangahau in 1896, at a season when the lake was low and water only passed through the 'subterranean passages' to the river. He described the 'hoarse rumbling far below'.¹⁰⁰ Haumapuhia was later buried by a landslide during hydro-electric development, 'so that she can no longer be seen,' just before the diversion of the Waikaretaheke River away from 'the rocky path where Hau-Mapuhia lay'.¹⁰¹ Lorna Taylor told us:

The mauri of our moana has been totally disturbed. Waikaretaheke once flowed as a raging torrent from its outlet at Waikaremoana but with the advent of developments like the hydro its outlet has been replaced with a concrete canal which is dry most of the time.

97. Robert Wiri, "'Te Wai-kaukau o Nga Matua Tipuna": Myths, Realities, and the Determination of Mana Whenua in the Waikaremoana District' (MA thesis, University of Auckland, 1994) (doc A35), p75

98. Nikora, 'Waikaremoana' (doc H25), p121

99. Garth Cant, Robin Hodge, Vaughan Wood, and Leanne Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana and Lake Waikareiti, Te Urewera' (commissioned research report, Wellington: Waitangi Tribunal, 2004) (doc D1), p15

100. Elsdon Best, *Waikare-moana, the Sea of the Rippling Waters: The Lake; the Land; the Legends, with a Tramp through Tuhoë Land* (Wellington: Government Printer, 1897), p37 (Nikora, 'Waikaremoana' (doc H25), pp121-122)

101. Rodney Gallen and Allan North, *A Souvenir Booklet of Waikaremoana, Wairau-moana, Waikare-iti: A Concise History of the Lakes, the People and the Land* (Hamilton: Te Urewera National Park Board, 1977), p5

Sometimes the waters are released and it becomes a raging torrent again, I often wonder how this is affecting Haumapuhia our taniwha who protects our most precious taonga. We grew up with the knowledge that she is up the Waikaretaheke and we wonder how the management regimes are affecting her kainga. Mum told us that you could hear her wailing. I have not heard her. I wonder if she is still there.¹⁰²

There are differing views of the importance of Lake Waikaremoana as a food source for Maori. According to some documentary sources, eels were scarce in the lake and may have lived too deep to form part of the Maori food supply. Some even claim that there were no eels in the lake at all. As we shall see later in the chapter, one of the Crown's negotiating points in its efforts to acquire the lake was that no significant fishery existed there, other than introduced trout and one 'minor' native species.¹⁰³ The issue is complicated by the fact that the kainga around the northern shores of the lake were vacated as a result of Government pressure, following the completion of the Urewera Consolidation Scheme (see section 16.6.2). Inevitably, the more accessible fisheries of the upper Waikaretaheke Valley increased in importance when local communities relocated there to live permanently. Much of the tangata whenua evidence we received was about the rivers and waterways of the Waikaretaheke catchment.

But the lake remained an important source of fish and birds, especially ducks, for these communities during the 1930s and 1940s. Lorna Taylor told us how her father 'custom made 10 foot long heavy duty spears to catch the eels in Lake Waikaremoana.'¹⁰⁴ Eeling in the lake had a long history for her whanau, and also for other whanau living at Te Waimako. Trout from the lake, as well as eels from the lake and rivers, were an important part of the family diet when she was growing up.¹⁰⁵ Rangi Paku, who grew up at Tuai in the 1940s and early 1950s, said that her whanau ate 'trout by the galore.'¹⁰⁶ Kuini Te Iwa Beattie recalled that a trout fishing line was one of her grandfather's treasured possessions.¹⁰⁷ Neuton Lambert's evidence was that the rare eels caught in the lake in the 1980s were over 60 or 70 years old, long predating the hydro works. This confirmed his kuaia's stories about catching eels in the lake in the first decade of the twentieth century.¹⁰⁸ Charles Manahi Cotter told us that freshwater shellfish were abundant in the lake before the Second World War.¹⁰⁹

102. Lorna Taylor, brief of evidence, 18 October 2004 (doc H17), p 13

103. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 49–53

104. Taylor, brief of evidence (doc H17), p 7

105. *Ibid*, pp 6–7

106. Rangi Paku, brief of evidence, 18 October 2004 (doc H37), p 3

107. Kuini Te Iwa Beattie, brief of evidence, 18 October 2004 (doc H38), p 3

108. Lambert, brief of evidence (doc H57), p 6

109. Charles Manahi Cotter, brief of evidence, 22 November 2004 (doc I25), p 14



Matt Binns

Blue ducks (whio). An important seasonal food source for many of the claimant groups, blue ducks formed a vital part of the customary economy in the Lake Waikaremoana and Waikareiti areas. Hirini Paine and the Wai 795 claimants claimed that hydroelectricity developments had disrupted the habitat of the whio, a taonga tuku iho of Tuhoe, which had relocated to more remote parts. Gallen and North had noted in the 1970s that wildfowl (including whio), once numerous on Lake Waikareiti, were now seldom seen: 'all is silent, deserted and still'.



Kokopu. Known by Waikaremoana Maori as maehe, kokopu formed an important part of Maori diets and the customary economy at the lake, but introduced trout preyed on them.

Birding was also a vital part of the customary economy. Waterfowl at Lake Waikaremoana and Lake Waikareiti were a seasonal resource. Whio or blue ducks were traditionally important, which is a matter of significance to Hirini Paine and the Wai 795 claimants.¹¹⁰ Gladys Colquhoun observed that titi (mutton birds) used to be taken at certain times of year.¹¹¹

The importance of Lake Waikaremoana for the claimants as a food source is also recorded in documentary sources, certainly before their relocation southwards in the 1930s and the modification of the lake for hydroelectricity in the 1940s. Elsdon Best identified kokopu, called maehe at Lake Waikaremoana, as an important indigenous resource. Dr Rangimarie Pere's grandfather, Harry Lambert, recorded in his diary in 1923 that kokopu were known as maehe in the lake.¹¹² Best wrote in 1896, just before trout (which preyed on kokopu) were about to be introduced:

Then [we moved] on across the rippling waters to Wai-kopiro, another ancient settlement, with its wooded spurs and shrubs of many shades. At this place a small rivulet trickles down a rock-face into the lake, and these waters are said to possess some strange properties (*he wai kakara*, scented waters), for at certain seasons the

110. Hirini Paine, amended statement of claim, 28 March 2002 (claim 1.31(d)) (Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 28)

111. Gladys Colquhoun, brief of evidence, 15 October 2004 (doc H55), p 4

112. Pere, brief of evidence (doc H41(a)), pp 7, 9

little maehe fish come in myriads to drink these waters as they flow down the rock into the lake, at which times they are taken in great numbers by the Natives. This maehe, a small species of kokopu, is said to be the only fish in the lake, together with the koura, or fresh-water crayfish. Some Natives say that eels are also to be found, but that they have been introduced in late times from the Waikare-taheke River.¹¹³

There were also large numbers of shellfish, including freshwater mussels, which were part of the local diet. William Colenso, one of the earliest Pakeha visitors to Lake Waikaremoana and therefore an important manuhiri (guest), was fed on freshwater mussels ‘of a good size’ in 1841. In the 1940s, when the Government lowered the lake for the first time, thousands of shellfish were found decomposing around the lake shores.¹¹⁴ Colenso also observed that petrels were harvested at the lake.¹¹⁵ In Elsdon Best’s account, titi (muttonbirds) were once taken from the lake cliffs, but predation by rats had largely wiped out the lake’s titi population by the 1890s.¹¹⁶ On the other hand, trout soon became a major component of the local diet after its introduction in the 1890s, much to the lamentation of rangers and officials. There was also a large population of waterfowl, hunted for food and feathers. Brad Coombes noted that ‘Native ducks, especially in their juvenile state, were a key component of the Maori diet at Waikaremoana and Waikareiti.’¹¹⁷ The evidence is also clear that there was an eel population, possibly quite small, which Maori – as kaitiaki – may have introduced by hand from the Waikaretaheke River. According to Garth Cant’s research team,¹¹⁸ native species still present in the lake include koaro (maehe), bullies, smelt (introduced in 1948), and two species of eels ‘in low densities.’¹¹⁹ As we shall see, the Government was aware in the early 1900s – at the time when its contest with Maori began for control of the lake – that the lake was an important food resource for the local communities.

This evidence is important because of debates, discussed later in this chapter, about the effects of hydroelectric works on the lake and its aquatic life, the

113. Elsdon Best, *Waikare-moana, The Sea of the Rippling Waters: The Lake, the Land, the Legends: With a Tramp Through Tuhoe Land* (1897; repr Wellington: Government Printer, 1975), p 35

114. Tony Walzl, ‘Waikaremoana: Tourism, Conservation and Hydro-Electricity (1870–1970) (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A73), p 361

115. Cathy Marr, ‘Crown Impacts on Customary Interests in Land in the Waikaremoana Region in the Nineteenth and Early Twentieth Century’ (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A52), p 16; Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), pp 49–50

116. Best, *Waikare-moana*, pp 32–33

117. Brad Coombes, ‘Making “Scenes of Nature and Sport” – Resource and Wildlife Management in Te Urewera, 1895–1954’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A121), p 187

118. The team consisted of Dr Garth Cant, Dr Robin Hodge, Dr Vaughan Wood, and Leanne Boulton, who jointly prepared the report ‘The Impact of Environmental Changes on Lake Waikaremoana and Lake Waikareiti, Te Urewera’ (doc D1).

119. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), pp 49–50

economic or commercial value of the lake to Maori and to the Crown, and questions of compensation, economic loss, and prejudice.

But, as the claimants explained, the lake was much more than a component of their traditional economy. Water from certain places at the lake was used for rituals, spiritual cleansing, and also for rongoa (healing). The lake was central to their tribal identity. Dr Pere began her korero about the lake as follows:

No Waikaremoana Whanaunga Kore

He Atua!

He Tangata!

‘Waikaremoana whanaunga kore’ tenei matau ou Hapu, te tu whakamihi ki a koe, te wai ahuru, te wai kaukau, te wai whakaora, whakamahea ia a matau.¹²⁰

The sea of rippling waters who is beholden to no one

Behold a God/dess!

Behold a Mortal!

‘The Sea of Rippling Waters, who is beholden to no one,’ we your people conceived from the womb, salute, for you are the cherishing waters, the bathing waters, the healing waters, the waters that cleanse and clear us.¹²¹

Drawing together the threads of kaitiakitanga, and of reciprocal caring for the mauri of the lake and of the people, Lorna Taylor explained how the relationship with the lake is seen today:

Our waters have a healing energy. We use our wai as a spiritual cleanser and there is a particular part of the lake that I know of that was used for these purposes.

Our wai cleanses the whenua when the rain falls and it tells us when one of ours is about to pass away. We use the wai for rongoa and in our kai.

Successive Government action has led to contamination of our waters, controlling and changing the flows, and opening Waikaremoana up for general public usage has introduced boats, weeds, giardia, and cryptosporidium. The uncorrupted relationship we once had is under constant threat as people that are not of its water violate our mauri life force.

The kinship we have with the elements is essential to maintain balance and harmony. The idea that you only take enough for that meal, and to return your first catch to the water was practised by our father as he gathered kai for his whanau and is integral to this notion of balance and harmony.

Our kinship tie to the whenua has been eroded for we no longer have kainga around Lake Waikaremoana and there is a deep sense of grief as our links to our ancestors are clouded with the pain of confiscation and denial.¹²²

120. Pere, brief of evidence (doc H41), p 4

121. Pere, brief of evidence (doc H41(a)), p 4

122. Taylor, brief of evidence (doc H17), pp 13–14

In Mrs Taylor's view, the richness of Tuhoe culture, te mana motuhake o Tuhoe, and an entire way of life has been 'systematically eroded' at Lake Waikaremoana, to the great prejudice of all affected whanau.¹²³

We shall return to these claims later in this chapter.

20.5.3 The beginning of the Crown–Maori contest over Lake Waikaremoana

In 1894, during Premier Seddon and James Carroll's visit to Te Urewera (see chapter 9), Carroll selected the Whaitiri Headland as a suitable site for a Government lodging house or hostel at the lake. Thus, as Tony Walzl points out, the Government was already planning its own tourism venture at the lake, even before the 1895 agreement.¹²⁴ As we discussed earlier in the report, the introduction of tourism to Te Urewera was one of the Government's objectives in negotiating this agreement. The Te Urewera delegation agreed to roads, and – from the documentary sources – sought the introduction of English fish and birds to attract tourists and to increase their own food supplies. Although there is disagreement from some claimants that their tipuna really did ask for this, one result was the introduction of trout to Lake Waikaremoana in 1896 or 1897. For many years afterwards, fresh ova continued to be released so as to maintain or build up the trout population in the lake. Claimant counsel pointed out that the wording of the 1895–96 agreement was clearly intended to provide for the peoples of Te Urewera, not the Government, to control and manage the introduction of exotic fish in their waters. Instead, the Government acted directly and without further consultation, although there was evidence of some local Maori support.

The selection of a site for a future Government lodge in 1894 and the ongoing releases of trout from 1897 marked the Government's first steps towards active involvement in tourism at the lake. Possums and deer were also released at Lake Waikaremoana in 1898 and 1899 respectively with a view to future hunting and trapping. At the same time, the Crown land bounding the lake to the south (almost 17,000 acres) was set aside as two forest reserves in the 1890s. Mr Walzl suggests that the goal was primarily 'protection forest' to conserve waterways, although there was some thought of scenery preservation so as to maintain its value for tourism.¹²⁵ Waterfowl, such as swans and new duck species, were also introduced around this time, although we do not know exactly when or how that happened.

A key point is that these events in the 1890s set the stage for confrontation in the next decade, because the creation of reserves and the introduction of birds and fish by the acclimatisation societies also introduced new forms of authority and law at the lake. The societies were fostered by the Government, which gave them financial assistance and passed laws to protect new species until they became fully established. Because the mechanism for introducing trout was an acclimatisation society, the trout fishery at Waikaremoana was 'viewed as an acclimatisation fishery, subject to the rules and regulations which had been developed over the

123. Taylor, brief of evidence (doc H17), p 14

124. Walzl, 'Waikaremoana' (doc A73), p 46

125. Ibid, pp 49, 55–57

previous 30 years of acclimatisation in New Zealand.¹²⁶ Until 1901, Waikaremoana was part of the Hawke's Bay acclimatisation district and operated under regulations published in 1895, which provided for the issuing of licences and the periods when trout could be taken. Walzl comments that it is unlikely Tuhoë in 1895–96 intended to agree that such limitations would be placed on what was supposed to be an additional food source for them (as well as a tourist attraction).¹²⁷ The same situation applied to introduced birds – under acclimatisation rules, Maori would not be allowed unrestricted access to this food source either.¹²⁸

It must be noted, however, that the lake itself and the lands to the south were outside the Urewera District Native Reserve (UDNR) as established in 1896, and presumably outside the terms of the agreement upon which it was based. We have no evidence as to why the lake was left out when the boundaries of the reserve were drawn up in 1895. Cathy Marr commented, 'Presumably this was because the Government regarded it as a large navigable waterway where the Crown could assert ownership.'¹²⁹ That may be so but there is no evidence that the matter was discussed with the Te Urewera delegation, or that they agreed to the exclusion of the lake. The point was not raised, perhaps, because Hori Wharerangi and the Waikaremoana people tried to withdraw the rest of their lands from the UDNR soon afterwards, at the Te Waimako hearing of the Urewera commission in 1899. They were concerned – with good cause, as it turned out – that they would lose their lands if the commission was allowed to investigate titles.¹³⁰

In the meantime, the Government had established a game reserve at Waikaremoana in 1898. In May of that year, the Lands Department approached the Native Minister, James Carroll, with a suggestion that all shooting of newly introduced deer and birds should be banned at Waikaremoana.¹³¹ Carroll agreed that it was 'highly desirable that shooting should not be allowed in that part of the country.'¹³² On 17 June 1898, 40,000 acres of 'land' was brought under the Animals Protection Act 1880 as a protected reserve for imported game. As well as the lake itself, this reserve included part of the Waikaremoana block on its northern shores. Walzl commented that there was no evidence of consultation with local Maori, with the owners of affected land (who were also local Maori), and no effort by the Government to assess the likely effects on them. If such consultation had taken place, he argued, officials 'might have been informed' that a protected game reserve was contrary to the 1895–96 agreement. The introduced 'English birds' were supposed to create a new food supply for the peoples of Te Urewera. Walzl also notes that this was the first step in a series of acclimatisation measures after 1900 that increasingly put official limits on Maori hunting and fishing at Waikaremoana.¹³³

126. *Ibid*, p 61

127. *Ibid*, pp 61–62

128. *Ibid*, p 61

129. Marr, 'Crown Impacts on Customary Interests in Land' (doc A52), p 284

130. *Ibid*, pp 286–287

131. Walzl, 'Waikaremoana' (doc A73), pp 64–65

132. Carroll, minute, 11 May 1898 (Walzl, 'Waikaremoana' (doc A73), p 65)

133. Walzl, 'Waikaremoana' (doc A73), p 65



Unknown (Hawke's Bay Museums Trust, 16860)

The Lake House resort at Lake Waikaremoana. The house was opened in 1903 by the new Department of Tourist and Health Resorts. In the early twentieth century, tourism considerations were central drivers of Crown policy regarding Lake Waikaremoana and its environs. The assertion of Crown authority over the lake, as visitors went boating and fishing, brought a strong response from Waikaremoana leaders.

Thus, the 1895–96 agreement was implemented in such a way that conflict arose in the decade after 1900 between anglers, wildlife officials, and the peoples of Waikaremoana over access to trout and introduced game birds. This process was exacerbated from 1901 by the creation of the Department of Tourist and Health Resorts. In essence, this new department marked the Government's 'nationalisation of tourism'.¹³⁴ There had been a private tourism venture at Onepoto since the 1870s. A tourist lodge apparently survived there until 1900, although nothing much is known about it. Private excursion trips had been very small scale, due to the difficulty of getting to the lake and – once there – the 'uncertainty of obtaining canoes on hire to explore the shores of the lake'.¹³⁵ This all changed after the new department established its tourist lodge, Lake House, in 1903. Before that, closed seasons for kereru and even the creation of the imported game reserve had had little impact, because there were so few Pakeha in the area and virtually no official attention. Lake House brought a significant influx of Pakeha tourists to the lake, and for a purpose that encouraged them to use it for fishing and (later) shooting.¹³⁶

In part, changes came about because the Tourist Department moved quickly to establish itself as the sole Government agency in charge of the lake and its

134. Walzl, 'Waikaremoana' (doc A73), p75

135. RCL Reay to Native Minister, 24 July 1889 (Walzl, 'Waikaremoana' (doc A73), pp36–38)

136. Walzl, 'Waikaremoana' (doc A73), pp 69–70

environs, and to ensure that tourism interests were the primary consideration in Government policy about the region. In 1902, construction began on Lake House, and plans were in train to establish a Government launch on the lake.¹³⁷ As part of establishing a thriving tourism venture, officials decided that the 1898 imported game reserve did not suffice to protect the tourists' experience of wilderness – the ban on hunting needed to be extended to native birds as well. Officials were also concerned about the effect that a large number of tourists with guns might have on native species.¹³⁸ But Maori interests were considered too. The department's superintendent, Thomas Donne, had second thoughts about the proposal and on 25 September 1902 advised his Minister, Sir Joseph Ward,

Upon further consideration I find that if this were done it would probably cause discontent amongst the Urewera natives, as it would restrict their food supplies. If the matter has not yet been in any way dealt with will you kindly consider whether the prohibition to take or kill native game or birds should apply to all persons other than natives. The bird life at Waikaremoana provides a great charm, and I am afraid that when that Lake becomes a regular tourist resort there will be great destruction of birds unless such a proceeding is made illegal.¹³⁹

In the meantime, the department had already put its 'sanctuary'¹⁴⁰ proposal to Native Minister Carroll, who responded on 26 September:

I believe in protecting both imported and native game in this locality referred to but in doing so we must make an exception in favour of the Natives living in that country, because one of the conditions upon which the Urewera Reserves Act was passed was that we should augment their food supply and not exclude it from them. They will claim their right to kill game for food. I can however regulate them under their own act which will serve the purpose just the same.¹⁴¹

It seems therefore that Carroll intended that Maori should be exempt from prohibitions on killing both imported and native game at Waikaremoana, and that he may have thought, given the political realities, this would best be achieved by a regulation under the UDNR, rather than the Animals Protection Acts.¹⁴² If so, he evidently backed down.

137. *Ibid*, pp 75–76

138. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 159, 160, 163–164

139. Superintendent, Tourist and Health Resorts, to Minister, 25 September 1902 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 160)

140. Donne to Minister, Tourist Department, 15 September 1902 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 159)

141. Native Minister, minute on memorandum to Minister of Tourist and Health Resort, 15 September 1902 (Walzl, 'Waikaremoana' (doc A73), p 102); 'Lake Waikaremoana: History of Surrounding Lands', no date (Vincent O'Malley, comp, supporting papers to 'The Crown's Acquisition of the Waikaremoana Block, 1921–25', 3 vols, various dates (doc A50(c)), vol 3, p 854)

142. Coombes pointed out that Carroll must have intended to issue a regulation under section 24(4) of the UDNR Act (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 159).

The Minister of Tourist and Health Resorts, Joseph Ward, initially approved a draft Order in Council under the Animals Protection Act 1880 with the following provision:

Nothing however in this notification shall prohibit in any way the Urewera Natives or other Natives living in the immediate vicinity of the herein described area of land, from taking or killing, within the said area, native game and native birds, for food supplies, in accordance with native customs and usages.¹⁴³

Before the draft Order in Council was finalised, however, the Tourist Department received the first of what would become a series of damning but ill-informed reports about Maori hunting for food at Lake Waikaremoana. On 15 April 1903, the department's senior inspector, Frederick Moorhouse, objected to the exemption:

The natives of this district have the right to take and kill native birds for food supplies, and if this is allowed to continue, there will not be any birds left to protect. I was informed, when at Waikaremoana, that the natives are in the habit of catching the young duck flappers in hundreds and preserving them for use during the winter months.¹⁴⁴

As soon as he received this report, Donne ordered the exemption removed 'despite Carroll's earlier advice'.¹⁴⁵ Cabinet must have approved this change because the Order in Council was gazetted in July 1903 without the exemption.¹⁴⁶

Coombes and Walzl are both critical of this action, and we will discuss its significance further in chapter 21. Here, we note that the Tourist and Health Resorts Department continued to extend its power in the district. In 1907, the Rotorua acclimatisation society was brought under the direct control of the department. The following year, the territories of the Wairoa acclimatisation society (including Waikaremoana), along with its fish and game responsibilities, came under the department's control.¹⁴⁷ In 1908, the Government also placed the forest reserves to the south of the lake (almost 17,000 acres) under the direct control of the department. As Walzl noted, these events showed that the Government saw the lake primarily as a tourist resort.¹⁴⁸ This primacy was not seriously challenged until hydroelectricity became the Government's overriding use for the lake, later in the century.

Quite apart from its consolidation of administrative control over the region, the Tourist and Health Resorts Department had also finished establishing its

143. Draft proclamation, April 1903 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p161)

144. F Moorhouse to superintendent of Tourist and Health Resorts, 25 April 1903 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p162)

145. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p162

146. Ibid

147. Ibid, pp 112–114

148. Walzl, 'Waikaremoana' (doc A73), p 83

beachhead, Lake House, in 1903. In the 1903/04 year, 279 visitors came to stay at Lake House. By early 1904, the Government's motor launch was operating on the lake, which resulted in visitors staying longer. In the 1904/05 year, there were 314 visitors. The Government's hope of attracting overseas tourists was disappointed but the number of local visitors grew slowly, although with fluctuations. It was still relatively difficult for tourists to get to the lake (and to get anywhere else afterwards).¹⁴⁹ These were not large numbers of people in absolute terms, but even so they may have outnumbered local Maori in the holiday season. The Maori population at the lake around this time was about 200 people (of whom 40 to 50 were permanent inhabitants of the lakeside kainga).¹⁵⁰ Thus, there was a new and unprecedented influx of lake-users, seemingly brought in by the Government and protected by it, with different values and interests from Maori in regard to the lake and its aquatic life. Also, the manager of Lake House was made a ranger in 1903 to 'see that the law is given effect to'.¹⁵¹

Unsurprisingly, this new presence in their district provoked a serious response from Waikaremoana Maori leaders. Walzl suggests that it was not until the establishment of Lake House, and the introduction of a significant number of tourists each year, that the official restrictions on Maori access to game began to bite. Maori hunting, trapping, and fishing came under increasing 'official observation and scrutiny'. As a result, 'criticism of local Maori and intervention attempts began'.¹⁵² More even than paper proclamations and official licensing regimes and hunting bans, tourism precipitated a direct contest between the Crown and Maori for control of Lake Waikaremoana in the decade after 1903.

20.5.4 Maori attempts to reassert control over the lake: dialogue, 1903–05

At first, there was a little tension between the Lake House manager, John Ward, and local Maori leaders, but nothing too serious. Lake House provided employment in terms of tree-cutting and other work, and also acted as a source of medical supplies. Ward sometimes loaned the Government's launch to Maori for their use.¹⁵³ It was a priority for the Government to maintain good relations. Superintendent Donne reminded Ward in 1904 that his Maori neighbours could be 'a source of great assistance or nuisance' and it was 'not desirable to have them as our enemies'.¹⁵⁴ But nothing could disguise the fact that the Government was now claiming authority over the lake, sending its people onto the lake to fish or visit whatever spots they chose, and providing them with a boat to do so. As will be recalled, Patekaha Island was a wahi tapu and burial place of great importance to Ngati Ruapani. There were many other wahi tapu around the lake.

149. Ibid, pp 76, 82–86

150. Ibid, p 150

151. Donne, 'Department of Tourist and Health Resorts, Second Annual Report', 1 May 1903, AJHR, 1903, H-2, p xi (Walzl, 'Waikaremoana' (doc A73), p 103)

152. Walzl, 'Waikaremoana' (doc A73), p 87

153. Ibid, pp 78–81

154. Donne to Ward, 15 February 1904 (Walzl, 'Waikaremoana' (doc A73), p 81)

Two years or so after the establishment of Lake House and the introduction of a Government launch and tourist trout-fishing, Maori sought to reassert their control over the lake and its fisheries. At some point before April 1905, Hori Wharerangi, the Tuhoe and Ngati Ruapani leader who had represented Waikaremoana in the 1895 negotiations with Seddon,¹⁵⁵ went to Wellington to meet with the Native Minister about this matter. We do not know any details other than that the meeting was reported to have taken place.¹⁵⁶

Then, in April 1905, it was followed up by local representations to the manager at Lake House. As a result of a meeting there between Ward and Te Reneti Hawira on 11 April 1905, a second approach was made to Native Minister Carroll – this time in the form of a letter from Hawira, composed at the end of the meeting. Ward forwarded Hawira's letter to the Tourist Department, which sent it on to Carroll, along with Ward's covering letter and his transcript of the meeting.¹⁵⁷

Hawira's letter to the Minister, as translated by Ward, stated:

I wish to point out to you about the fish of Waikaremoana, that the coming of the Europeans (Foreigners to the Lake Water) for the purpose of fishing may cease. They, (the Pakeha foreigners), have no jurisdiction over this Lake (Waikaremoana). The Lake is not the government's – you understood this (the Lake was not the government's) through the interview Hori Whare Rangī had with you (on this same matter) in Wellington. And so I say, let the foreign (Pakehas) cease catching fish (in Waikaremoana).¹⁵⁸

In a covering letter to his superiors at the Tourist Department, Ward commented that he placed no weight on Te Reneti's 'commands' to halt tourists from fishing in the lake, nor on what he considered 'Hori Whare Rangī's deeper and probably more to be dreaded schemes to stop Trout fishing in Lake Waikaremoana – or its Tributary streams'. In his view, Tuhoe would soon be distracted by something else, but in the meantime the trout fishery was a 'Stalking Horse to obtain other and more valuable favours from the Government'.¹⁵⁹

In addition to translating Hawira's letter, Ward provided a transcript in English of his meeting with the chief, in which they debated the ownership, control, and use of Lake Waikaremoana. This debate illuminates the different positions of the Crown and Maori as at 1905, and we reproduce it in full (see the sidebar opposite).

Hawira's position was that the lake belonged to the Maori people of the Waikaremoana district, and that the people had not consented to Pakeha fishing

155. Judith Binney, 'Encircled Lands, Part 2: A History of the Urewera, 1878–1912' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A15), p 190

156. Walzl, 'Waikaremoana' (doc A73), p 95

157. *Ibid*, pp 93–96

158. Te Reneti Hawira to Native Minister, 11 April 1905 (Tony Walzl, comp, supporting papers to 'Waikaremoana: Tourism, Conservation and Hydro-Electricity (1870–1970)', 4 vols, various dates (doc A73(d)), vol 4, p 2207)

159. Ward to acting superintendent, Tourist and Health Resorts, 11 April 1905 (Walzl, 'Waikaremoana' (doc A73), p 96)

Debate between John Ward and Te Reneti Hawira, Lake House, 11 April 1905

Te Reneti: Friend Ward. I have a word to say to you.

Ward: Yes – Then say on my friend.

Te Reneti: My word (Command) is that all fishing in Waikaremoana shall cease. I don't object to you fishing for 'The House' (Te Whare) but I won't consent to other Pakehas fishing.

Ward: Indeed! Why are you of this mind now Reneti?

Te Reneti: Because the Lake is mine. And I (us all, the Maoris of the Lake District) never gave my consent to have these Pakehas (Europeans from Beyond the Lake) fishing in my Lake.

Ward: But friend Reneti, the fish these Pakehas catch in Waikaremoana are not your fish, they, (the Pakeha), paid a lot of money to have them brought from England to New Zealand and paid men big salaries to get them (the fish) up to the Lake, and have their eggs Hatched, then watch the eggs hatch out young fish, and grow into Big Trout. Don't you know that?

Te Reneti: Yes, I know that. But of what moment is it? (E aha kei ena?)

Ward: Oh! It's got a lot to do with it. If the fish these Pakehas catch in the Lake here were Maori fish, there would be a cause (or reason, He Putaki) for what you are now telling me! But they are not Maori Fish!

Te Reneti: Never mind that. (Haunga Ena) My word (Command) to you is that you tell all the Pakehas (Europeans) that come to your House (Lake House) to cease fishing in Waikaremoana.

Ward: Reneti! I cannot or won't tell my visitors that. They would not believe me only laugh at me.

Te Reneti: No! They would not. You tell them and stop them!

Ward: But listen Reneti. Have you thought how foolish this work is going to prove to you? Don't you think the Lake is free to all good men – Pakehas or Maoris – and therefore no one has the power, you, or me, or even the Government to stop people going on it (The Lake) if they desire to do so?

Te Reneti: No one has any right on Waikaremoana Lake without I, (ergo the Maoris of the Lake), consent for them to go on it!

Ward: Now you are talking too absurd for me to listen to you Reneti. Let the talk cease. I won't tell my visitors not to go on the Lake for it is free to all men. Nor will I tell them not to catch the European fish (Trout) and if you or your young men stop these Pakehas from fishing, you or your young men will be fighting with the Law! And you know, Reneti, only a foolish ignorant common person does that. Never a gentlemen like you (He rangatira hoki pena me koe). Tell me this though, do any of these fisherman interfere with or damage your property or plantations at Te Mokau, Te Hopuruahine or elsewhere?

Te Reneti: No, not at all.

Ward: I am pleased to hear that. If it is done at any time, let me know at once and who does it, and I'll get them (the people who wrought the damage) to pay you.

Te Reneti: There has been no work like that. It's only the fishing that must stop.

Ward: I cannot or won't interfere as I have already told you. What is the use of coming to me about this matter? Why won't some of you go to Wellington or write to the Government?

Te Reneti: George Heavenly House (Hori Whare Rangī) has been to Wellington and explained this thing (the fishing) to the Government (to the Honorable the Native Minister).

Ward: Well then Reneti, if the Honorable the Native Minister knows about this thing (the Trout fishing), why do you come to me? The Minister told George his (the Minister's) intentions I presume.

Te Reneti: Yes Perhaps! But I want you to stop Europeans fishing on the Lake.

Ward: Friend! I have already told you I can't or won't stop people who come to the House here (Lake House) from fishing so do not ask me. You must get the Government to do that.

Te Reneti: That is well! So I will, can you give me (the use of) a Room to write a letter to the Honorable the Native Minister?

Ward: Certainly Reneti, come into my office and write your letter.¹

1. Ward to acting superintendent, Tourist and Health Resorts, 11 April 1905 (Tony Walzl, comp, supporting papers to 'Waikaremoana: Tourism, Conservation and Hydro-Electricity (1870-1970)', 4 vols, various dates (doc A73(d)), vol 4, pp 2202-2206)

in the lake. His 'command' to Ward was that Ward must put a stop to tourists' fishing, although the manager himself was allowed to continue fishing to feed the visitors at Lake House. Ward's response was that the lake was 'free to all good men', whether Pakeha or Maori, and that 'no one has the power, you or me, or even the Government to stop people going on it'. Also, he conceded that Hawira would have a point if the tourists were catching 'Maori fish', but trout 'are not your fish' and had been imported by Pakeha at great expense.¹⁶⁰

Hawira's response was that it made no difference which fish were being caught because no one 'has any right on Waikaremoana Lake' unless 'the Maoris of the Lake . . . consent for them to go on it'. Ward replied that this was 'too absurd for me to listen to', but asked if any of the tourists interfered with or damaged Maori property or plantations. Hawira reassured Ward that there had been nothing like that,

160. Ward to acting superintendent, Tourist and Health Resorts, 11 April 1905 (Walzl, 'Waikaremoana' (doc A73), pp 94-95)

but persisted in his demand that the manager prevent any more visitors from fishing on the lake. Ward warned Hawira that ‘if you or your young men stop these Pakehas from fishing, you or your young men will be fighting with the Law.’¹⁶¹ He advised Hawira to take the matter up directly with the Government, which was when it was revealed that Hori Wharerangi had already met with Carroll and explained the people’s concerns about the fishing – presumably without success, hence the direct approach to Ward.¹⁶² The end result was the letter from Hawira to Carroll on 11 April 1905, quoted above.

The Department of Tourist and Health Resorts forwarded Hawira’s letter and Ward’s report to Native Minister Carroll, commenting: ‘The Natives are asking that fishing for trout by Europeans in Lake Waikaremoana be prohibited. The request of course is ridiculous. Half the lake-shore is Crown land, and one of the chief attractions of the Lake is the sport to be obtained by angling.’¹⁶³

According to Walzl, Carroll’s reaction in May 1905 was brief and to the point: ‘There is nothing in the objection.’¹⁶⁴ This is presumably what he had told Hori Wharerangi as well. The Government’s formal response to Hawira was left to the Tourist Department and was equally brief, simply stating that ‘your objection to Europeans catching fish in Lake Waikare-moana cannot be entertained.’¹⁶⁵

Hawira’s response to Carroll is important because it further clarified the Maori position in 1905; it also sheds light on the present claims brought to the Tribunal. Essentially, the Government and the western economy having arrived at the lake in a very material way – the people’s response was that the lake was their economic asset, not the Government’s, and that the Government should not use it without their permission and without paying for it.¹⁶⁶ As Tama Nikora explained to the Tribunal, this has always been the view of the Wai 36 Tuhoe claimants and it is still very much their position today.¹⁶⁷

Hawira’s letter to Carroll of 27 August 1905, as translated by officials, stated:

Friend. I have received your letter in reply to mine wanting to stop the Pakehas from coming to catch fish, because this Lake does not belong to the Government, well your reply was that the Government could not consider my application.

Friend, let the answer to my letter be clear, because I do not consent to their coming here and catching the fish, but payment must be made to me, then I will consent because I say positively that the Government did not purchase this Lake; enough then of that.

161. *Ibid*, p 95

162. *Ibid*

163. Acting superintendent to acting Minister of Tourist and Health Resorts, 28 April 1905 (Walzl, ‘Waikaremoana’ (doc A73), p 97)

164. Walzl, ‘Waikaremoana’ (doc A73), p 97

165. Acting superintendent to Reneti Hawira, 2 June 1905 (Walzl, ‘Waikaremoana’ (doc A73), p 97)

166. Walzl, ‘Waikaremoana’ (doc A73), pp 97–98

167. Nikora, ‘Waikaremoana’ (doc H25), p 135

O Friend, I object also to the steamer [the Government's launch] which absorbs the moneys derived from this Lake, my objection to the steamer is the same as that concerning the fishing, free use is made of my Lake, and I get no benefit therefrom, that is why I say that they must be sent back.¹⁶⁸

Ward's translation was more expressive: the Government's launch was 'eating the Riches of the Lake the same as the Fishing is', yet paying nothing for the privilege.¹⁶⁹

The question for the Government, which seems never to have doubted that it had right on its side, was whether or not the views represented by Te Reneti Hawira and Hori Wharerangi might result in some kind of physical challenge to fishing and boating on the lake. On 1 September 1905, Superintendent Donne advised Ward to ignore the presumably 'harmless' opposition: 'I do not think it is worth while taking any notice of the old Maori. I presume he is quite harmless, and not likely to interfere with either visitors, the launch or boats.'¹⁷⁰

From the evidence available to us, Donne's instruction to Ward was the end of this particular exchange between the people of the lake and the Government, presumably because tribal leaders were not prepared to resort to the kind of physical interference that the Tourist Department feared. Instead, there were three new developments. First, the focus of the local Crown–Maori dialogue changed in 1906 from Maori objections to Government use of the lake to Crown objections about Maori use of the lake. Secondly, the attention of tribal leaders was diverted temporarily to the second Urewera commission and the ownership of the Waikaremoana block. And, thirdly, Maori gave up on Ward and Carroll and chose a new arena for their challenge to the Crown about the lake: Parliament and the courts.

It was at this point, when the Waikaremoana people resorted to Parliament and the courts, that the broader issue of the ownership of all lakes came into play. We turn next to provide a brief context for the Crown's approach to Maori ownership of lakes at the time. This helps to explain why officials such as Ward and Donne, and even Native Minister Carroll, simply ignored Maori assertions that ownership and control of Lake Waikaremoana rested with them, so long as 'Maori fish' were not at issue.

20.5.5 The general contest between Maori and the Crown for ownership and control of lakes

Whether the Crown or Maori owned lakes was a strongly contested issue in the first half of the twentieth century. In the nineteenth century, however, the Crown's position was ambivalent. According to Ben White, the Government usually transacted with Maori when it wanted or needed to acquire a particular lake, no matter what was asserted in theory about the legal situation. Maori, for their part, were

168. Reneti Hawira to Native Minister, 27 August 1905 (Walzl, supporting papers to 'Waikaremoana' (doc A73(d)), p 2196)

169. Ibid, p 2199; Walzl, 'Waikaremoana' (doc A73), pp 97–98

170. Donne to Ward, 1 September 1905 (Walzl, supporting papers to 'Waikaremoana' (doc A73(d)), p 2198)

often content to allow Pakeha use of lakes, so long as it did not interfere with their own use or certain conditions were adhered to.¹⁷¹ Mr White commented:

But in the nineteenth century there were many instances when the Crown acknowledged Maori as the owners of lakes. It would seem that the Crown tacitly assumed the ownership of lakes but acknowledged the existence of Maori rights when it felt that it had no choice. When the Native Land Court investigated the title of lakes Rotorua and Rotoiti, it was told that had the Crown asserted in the 1880s that the lakes were not Maori property, a situation would have arisen that would have been more serious than the Waitara affair. Judge Acheson made a similar point in his decision as to the ownership of Lake Omapere. He considered that had the Crown stated that it intended to claim the ownership of the lakes during the negotiations surrounding the Treaty of Waitangi, Nga Puhi most certainly would not have signed. It would seem that at times the Crown did not challenge the rights of Maori to lakes because it was anxious to maintain the peace and secure Maori support for colonial rule.¹⁷²

In the period before the Native Land Court was established, the Crown had sole power to purchase land from Maori for settlement. As the Tribunal has found in several reports, the Crown's pre-1865 purchases often covered vast acreages and were inadequate in conveying precisely what was being acquired or what Maori rights were being extinguished. Some deeds of sale did specify that lakes were included in what the Crown was buying, but others did not. Nonetheless, the Crown maintained that its pre-1865 purchases extinguished any Maori claims to lakes in the purchased blocks.¹⁷³

In the Native Land Court era that followed, the Crown acted inconsistently. Sometimes, it argued that Maori rights in lakes were confined to fishing, and at other times it recognised full Maori ownership rights by negotiating for their purchase. The Crown tended to accept Maori customary ownership of small lakes as a matter of course, but it often asserted that the Crown owned large, navigable lakes. Ben White suggested that when the Crown contested Maori customary title to lakes in the late nineteenth century, it usually did so on the common law argument that it had acquired riparian lands (and so owned to the centre line, *ad medium filum aquae*), rather than making a prerogative claim to the public ownership of lakes.¹⁷⁴ In fact, at common law, he stated, the prerogative rights of the Crown do not extend to lakes, whether or not they are navigable. But in New Zealand, there was a widespread belief among nineteenth-century politicians and officials that the Crown should be the owner of all colonial waterways, so that 'it could act

171. Ben White, *Inland Waterways: Lakes*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1998) (doc A113), pp 252–256

172. *Ibid*, p 253

173. *Ibid*, pp 253–255; secretary for Maori Affairs to Minister of Maori Affairs, 10 September 1954 (Tony Walzl, comp, supporting papers to 'Waikaremoana: Tourism, Conservation and Hydro-Electricity (1870–1970)'; 3 vols, various dates (doc A73(c)), vol 3, p 1287)

174. White, *Inland Waterways* (doc A113), pp 68, 252–256

as a trustee to ensure that the public enjoyed rights of navigation, bathing, and fishing.¹⁷⁵

Yet however the Crown argued its claim to lakes, it did so on the basis of the English common law position that there is a separation between the ownership of the bed of a lake and its waters. What was at stake, in legal terms, was not ownership of a lake itself, but simply of its bed – the land beneath the waters. Water, according to common law, could not be owned. Thus a lake could not be owned.

The most important case in the nineteenth-century Native Land Court era is the Wairarapa lakes, where the primary issue was the right to open the lakes to the sea in order to prevent flooding of adjacent settler farms. In 1876, the Crown attempted to purchase individual interests in the lakes before title was decided in the Native Land Court. In purchasing these interests, officials were unsure whether the Government was extinguishing rights to the lakebed or just fishing interests. When tribal leaders petitioned Parliament in 1876 in protest against the alleged purchases, a select committee recommended that title to the lakes be investigated by the Native Land Court. The Waitangi Tribunal explained what happened next in its *Wairarapa ki Tararua Report*:

In January 1881, [Crown purchase agent Edward] Maunsell applied to have the Crown's interests in the lakes defined under the provisions of the Native Land Act 1873, section 107 of which empowered the Native Land Court to investigate and finalise incomplete Crown purchases. But, before the land court could investigate, the lakes' owners sought a Supreme Court ruling on whether the land court had authority to determine title to the bed of the Wairarapa lakes (which comprised the Wairarapa Moana block), as no rights of ownership to lake beds existed in Maori custom.

The Supreme Court ruled that it could not make a finding on the matter of whether Maori, by customary rights, owned the soil beneath the lakes. Instead, Justice Richmond referred the matter to the Native Land Court. However, he found that, supposing that such rights did not exist – and hence Maori did not own the lake beds – 'there seems to be no reason why the Native Land Court should not issue certificates of title to rights of fishing as tenements distinct from the right to the soil, which would then be in the Crown.'¹⁷⁶

The Supreme Court's decision was not appealed and the Native Land Court proceeded to award title to the lakebeds in 1882 and 1883, awarding the Crown 17 of 139 undivided shares on the basis of its 1876 purchase from several chiefs of their 'rights and interests of any kind whatsoever which we claim to have in such Lakes.'¹⁷⁷ The court issued a certificate of title to the Crown and the individual Maori owners as tenants in common in 1883. After further efforts to buy

175. White, *Inland Waterways* (doc A113), p 252

176. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 2, p 657

177. This transaction was known as 'Hiko's sale'; it is discussed in the Tribunal's *Wairarapa ki Tararua Report*, vol 2, pp 655–656.

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Lake Waikareiti. Located to the north-east of Lake Waikaremoana, Waikareiti lay within the Waipaoa block. The Crown was interested in acquiring the lake for scenic preservation and tourism purposes and achieved this in two stages. In 1889, when the Crown was allocated land in the land court for survey costs, the boundary was drawn to take in a third of the lake. The Crown then bought up individual Maori interests and secured the rest of the lake when its interests were partitioned out in two blocks in 1903. There was no legal protection for the lake from these processes, and its importance to the local people as a food resource and taonga was not recognised.

up individual interests, ongoing struggles with local authorities about opening the lake to the sea, and a commission of inquiry, the Crown finally acquired the lake by 'gift' in 1896. In return, the Crown covered the owners' extensive legal expenses (of £2,000) and promised 'ample' land in exchange.¹⁷⁸

In the 1880s and 1890s, therefore, the Crown appeared to have accepted the Native Land Court's jurisdiction to investigate Maori claims to lakes, and the joint Crown–Maori ownership of the Wairarapa lakes that resulted from the court's inquiry. On the other hand, it had effectively won the Wairarapa contest by obtaining full control and ownership of the lake by means of a 'gift'. In 1897, the year after the gift, Lake Waikareiti in our inquiry district came before the court. As we discussed in chapter 10, this taonga (some 948 acres in size) was located in the Waipaoa block, to the east of Lake Waikaremoana. The Crown secured part of the lake for survey costs in 1889 when the Waipaoa block was first heard and

178. Waitangi Tribunal, *Wairarapa ki Tararua Report*, vol 2, pp 657–673

partitioned by the Native Land Court.¹⁷⁹ It then purchased individual interests in the remainder of Waipaoa and obtained the rest of the lake when its interests were partitioned out in 1903. The Crown was interested in this lake for scenic preservation and tourism purposes, and so moved to acquire it as a priority along with the surrounding lands (see chapter 10). There was no legal protection for the taonga Lake Waikareiti from a process which allowed the Crown to target it when locating its purchased interests on the ground.

In 1896, the same year that the Crown acquired the Wairarapa lakes, it did not contest the court's reservation of Lake Horowhenua for its Maori owners, despite the Crown having acquired land around this lake. In 1897, the question of Lake Horowhenua was brought before Parliament. That lake, just a little larger than Waikareiti, was situated in the lower North Island. After the establishment of Levin, settlers wanted the Crown to buy the lake for a public reserve. Questioned in Parliament about this in 1897, the Government stated that it was willing to purchase the lake. From 1903, the new Tourist Department began work to acquire the lake as a scenic reserve but the Government had rejected the idea of a compulsory acquisition by 1905. In that year, the very year that Carroll, Ward, and Donne so confidently denied that Maori could own Lake Waikaremoana, Carroll and Seddon negotiated with Lake Horowhenua's Maori owners to permit public use of their lake.¹⁸⁰ But Ben White said that questions of whether the public could be stopped from fishing, whether Maori needed a licence to fish for trout, and whether they had ever or still owned the lake, remained in dispute in the decade after 1905.¹⁸¹

Fishing, especially trout fishing, became a major issue during this period, replacing drainage of lakes and flooding as the Crown's main concern. For Waikaremoana, the most relevant example was the Rotorua lakes, where trout fishing, Maori fishing rights, and the ambitions of the new Tourist Department resulted in a significant Maori counter-challenge to the Government.

According to Ben White, Rotorua tribes first discovered that the Crown claimed ownership of their lakes in 1906, when Premier Seddon announced it at an unveiling, leaving his audience (and his interpreter, Gilbert Mair) astounded. As at Waikaremoana, a 'tacit assertion of ownership' had already occurred in the form of increasing control of or interference with Lake Rotorua and its fisheries. In the 1880s, trout were established in the lakes and rivers. By the first decade of the twentieth century, the Government was operating a tourist launch service on Lake Rotorua, charging fees of other boat operators, and enforcing fishing licence regulations. It was also preparing for a direct showdown with Te Arawa over the ownership of the lakes. In 1908, a prosecution was allowed to go ahead: the Reverend

179. Emma Stevens, 'Report on the History of the Waipaoa Block, 1882–1913' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1996) (doc A51), pp 2–3

180. White, *Inland Waterways* (doc A113), p 71

181. *Ibid*, pp 73–77

Manihera Tumatahi was fined £5 for fishing without a licence. There was another high-profile prosecution in 1913.¹⁸²

Te Arawa complained to the Stout–Ngata commission and to Parliament in 1908, with the result that special legislation was passed to give them 20 cheap fishing licences.¹⁸³ In 1909, as will be recalled from chapter 10, the Liberal Government overhauled the nineteenth-century native land legislation and passed a new Native Land Act. The 1909 Act was partly the work of the new Solicitor-General, John Salmond. According to Salmond’s biographer, the Solicitor-General was responsible, ‘presumably on the instruction of Ministers’, for ‘a battery of privative and other clauses aimed at making Maori assertions of customary title non-justiciable against the Crown.’¹⁸⁴ We will consider these clauses in more detail in section 20.6.2.2. Here, we note that they were designed partly in anticipation of Te Arawa’s Native Land Court claim for ownership of the Rotorua lakes. This claim was duly lodged in 1910, creating something of a crisis for the Government.¹⁸⁵

The Crown responded initially by withholding a survey plan and thus preventing the Native Land Court from sitting. Te Arawa took their case to the Supreme Court in 1912. It was referred on to the Court of Appeal, which delivered its famous judgment in *Tamihana Korokai v Solicitor-General* in July 1912. The Court of Appeal’s decision was that the Te Arawa claim must be allowed to proceed in the Native Land Court: ‘What the customary title to the bed of Lake Rotorua may be must be considered and determined by the only Court in New Zealand that has jurisdiction to deal with Native titles – the Native Land Court.’¹⁸⁶ Although the Solicitor-General publicly refused to accept that the Court of Appeal had responded properly to the Crown’s case, its decision cleared the way for the Native Land Court to hear the Rotorua claims and any other lake claims.¹⁸⁷

In sum, there were strong assertions of Maori ownership of their lakes throughout these years. The Supreme Court’s 1912 decision was that the Native Land Court could and must ascertain Native title to the bed of Lake Rotorua. The Crown itself accepted the Wairarapa lakes as a gift and negotiated with the Maori owners of various lakes in which it became interested, and to that extent recognised their rights. There was a basic cultural and legal tension between the relationship of Maori with lakes that were their taonga, and introduced common law which distinguished between lake beds, that could be owned, and lake water, which could not. And in colonial New Zealand, the law of the colonists prevailed. It was not inevitable that it would do so, however, as we will see below, in the case of Lake Omapere.

182. Ibid, pp 103–106

183. Ibid, p 106

184. Alex Frame, *Salmond: Southern Jurist* (Wellington: Victoria University Press, 1995), pp 112–113

185. Frame, *Salmond*, pp 112–116; White, *Inland Waterways* (doc A113), pp 106–107

186. White, *Inland Waterways* (doc A113), p 108; see also pp 107–109.

187. Frame, *Salmond*, pp 116–118

20.5.6 Waikaremoana leaders go to Parliament to bring the lake into the UDNR

By 1906, the Government had dismissed Maori claims to the ownership and control of Lake Waikaremoana and its fisheries as ‘absurd’ and ‘ridiculous’. Although no concerted justification was given, officials referred to arguments that the Crown owned the riparian land on the southern lake shores, that the lake was a public space, that the trout fishery had been introduced by Pakeha, and that there were specific laws governing fishing and hunting at the lake which Maori as well as Pakeha had to obey. This latter point became the focus of growing pressure on Maori communities at Lake Waikaremoana, which continued to exercise their customary hunting and fishing rights under the closer scrutiny of Lake House, its visitors, and Tourist Department rangers. In 1903, as we noted, the manager of Lake House was made an honorary ranger. This appointment was supplemented by that of W A Neale, who became forest and game ranger for the Waikaremoana district in 1905.¹⁸⁸

Neale led mounting criticism of Maori fishing and hunting at the lake. In terms of fishing, he complained to Superintendent Donne in March 1906 that the sport fishery was damaged because Maori ignored the closed season. While Pakeha had to pay for licences,

Uriweras claim the other side of the Lake and say they can kill fish all the year round. It is our policy to keep in with our Aboriginal brother and have no friction, yet it is hard lines to pay a heavy fishing licence and know they are killing fish wholesale during the close months. My son and self do our best to stop it this side of the Lake but we are powerless to do anything on the other side.¹⁸⁹

Neale’s criticism was echoed in 1910, when the *Wairoa Guardian* condemned the ‘wholesale destruction of fish that is going on at the present time and has been going on for years, and the rangers are powerless to stop it.’¹⁹⁰ This article showed how the public perceived Maori fishing and hunting, reflecting a clash of values between those who saw fishing as a sport and wanted to enforce a regime designed to preserve trout for that purpose, and Maori who fished for food at the customary times in their customary waterways.¹⁹¹ Maori were seen as ‘poaching’ trout at the Waikaremoana spawning grounds. ‘Is it any wonder that enthusiastic sportsmen are disgusted?’, the newspaper inquired. Maori flouted the law because the Native Minister’s consent was needed to prosecute them, and Carroll ‘will not sanction proceedings against his own kinsmen’. It was also ‘well known’ that Maori were shooting birds out of season, and quite probably doing the same to deer. This, of course, referred to ‘seasons’ as prescribed by statute.¹⁹²

188. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 98

189. Neale to Donne, 5 March 1906 (Walzl, ‘Waikaremoana’ (doc A73), p 99)

190. *Wairoa Guardian*, 19 August 1910 (Walzl, ‘Waikaremoana’ (doc A73), p 99)

191. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), pp 164–167, 189–191

192. *Wairoa Guardian*, 19 August 1910, p 99 (Walzl, ‘Waikaremoana’ (doc A73), pp 99–100)

Thus, in the first decade of the twentieth century, there were contests about use of the lake and about fishing. Maori objected to the Government launch being on the lake without payment, and to Pakeha fishing without permission. Local Pakeha, on the other hand, objected to Maori disobeying the acclimatisation regulations, fishing out of season, and ‘poaching’ trout without licences. Each side wanted to control and regulate the other’s fishing and use of the lake.

In 1910, the Lake House manager advised the Government that Maori were indeed poaching deer and trout, while W A Neale sent telegrams and letters about their shooting of pigeons and ducks on the lake. Neale approached the police but was advised by the local constable that he could not take proceedings without the consent of the Native Minister. As Coombes notes, this deference to the Minister was a matter of policy rather than law.¹⁹³ Neale was outraged, commenting: ‘This I take it is a farce pure and simple.’ Maori hunting for food, in or out of season, without licences, was

enough to sicken any man whose heart is in sport and the protection of game. Why proclaim the Lake a Sanctuary; why go to all the trouble and expense of liberating Deer, Duck and Pheasants and Trout to feed those natives who recognise no Law, save that that nature gave them, viz, the stomach – and when that calls season or no season all is kai? I know full well that Government does not wish to come to loggerheads with these natives, and some persuasive means ought to be employed to stop this illicit shooting and poaching of trout.¹⁹⁴

The Government’s response to these and ongoing reports from Lake Waikaremoana (including in 1914) was that ‘extreme measures’ should not be taken. Instead, Maori should be advised that their actions were illegal, and officials should ‘dissuade’ them from hunting.¹⁹⁵ As Walzl put it, ‘the usual proposal was to try persuasion and resist any desire to use enforcement.’¹⁹⁶ Coombes suggests that this kind of pressure on Waikaremoana Maori to stop ‘poaching’ intensified from 1910.¹⁹⁷ Maori who lived at Waikaremoana (whether all-year round or seasonally) came under pressure from officials to buy licences for trout fishing and to stop hunting waterfowl altogether.

As we have discussed, the Crown also asserted its ownership of the lake in no uncertain terms. Attempts at dialogue with local Crown representatives and with Carroll had failed. Neither side was willing to push the dispute to extremes: the Government was not willing to risk any prosecutions, and Maori leaders were not prepared to actively resist Pakeha fishing or boating on the lake. Instead,

193. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), pp 99, 189–193

194. Neale to Robieson, 9 June 1910 (Walzl, ‘Waikaremoana’ (doc A73), p 105)

195. General manager, Tourist and Health Resorts, to C Dale, 8 August 1914 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 193); see also pp 189–193; Walzl, ‘Waikaremoana’ (doc A73), pp 102–107

196. Walzl, ‘Waikaremoana’ (doc A73), p 107

197. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), pp 189–193

Waikaremoana leader Hurae Puketapu petitioned Parliament in 1912. His petition contained 84 other signatures. According to the brief official description, the petitioners were '[p]rayering for an inquiry with regard to the boundary of the Waikaremoana Lake'.¹⁹⁸ At the opening of the Native Land Court hearing in 1915, Rawaho Winitana clarified that the intent of the petition was 'to alter the boundary of the lake set up in 1896 to include it within Urewera Native Reserve'.¹⁹⁹ It can be reasonably assumed that this was an effort both to preserve Maori ownership of the lake and to bring it under the authority of the UDNR General Committee, which had recently (if belatedly) been established in 1909.

After investigating the petition, the chairman of the Native Affairs Committee reported in August 1913 that, 'as the petitioners have not exhausted their legal remedy, the Committee has no recommendation to make with regard to this petition'.²⁰⁰ As Ben White commented: 'Presumably the committee meant that the petitioners could pursue a claim to the lake through the Native Land Court'.²⁰¹ This meant that the hope of the petitioners that the lake could be protected inside the UDNR and brought under the authority of its committees was thwarted.

In September 1913, presumably in response to the Native Affairs Committee's recommendation, Rawaho Winitana, Mei Erueti, and Matamua Whakamoe filed a claim with the court for ownership of Lake Waikaremoana.²⁰² The hearings of that claim, and others filed subsequently, would begin in 1915. We discuss the hearings in the next section.

In Tony Walzl's view, there was also a link between this application and 'rising calls' to take land from the Waikaremoana block for a scenic reserve on the lake's northern shores.²⁰³ In particular, the 1913 forestry commission recommended reserving 'all the land from the water to the skyline' for scenic and water conservation purposes.²⁰⁴ Although the commission's report and lobbying by chambers of commerce was focused on taking the bush (from shore to skyline) and not the lake itself, this was not how Maori understood it. On 30 August 1913, Eria Raukura had written to Prime Minister Massey, objecting to Lake Waikaremoana becoming a scenic reserve under (as they had heard) the control of the Wairoa County Council. Prime Minister Massey wrote back advising that their views would be given careful consideration – Walzl suggests that the Government may not have picked up on their misunderstanding that the lake was to be included in the proposed scenic reserve.²⁰⁵

198. 'Reports of the Native Affairs Committee', AJHR, 1913, 1-3, p 10

199. Wairoa Native Land Court, minute book 25, 18 August 1915, fol 47; Emma Stevens, 'Report on the History of the Title to the Lake-bed of Lake Waikaremoana and Lake Waikareiti' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1996) (doc A85), p 10

200. 'Reports of the Native Affairs Committee', AJHR, 1913, 1-3, p 10

201. White, *Inland Waterways* (doc A113), p 138

202. Wiri, 'Te Wai-kaukau o Nga Matua Tipuna' (doc A35), p 302

203. Walzl, 'Waikaremoana' (doc A73), pp 135-137

204. E Phillips Turner, 'Report of the Royal Commission on Forestry', 31 May 1913, AJHR, 1913, C-12, p xix; Walzl, 'Waikaremoana' (doc A73), p 134

205. Walzl, 'Waikaremoana' (doc A73), pp 126-136

The Government's interest in the lake for hydroelectricity may also have influenced the Maori decision to seek a legal title through the court at this time:

by 1913 there had been a similar rise in calls from Hawkes Bay and East Coast local bodies for the government to initiate a hydro-electric scheme focused on the storage capacity of Lake Waikaremoana. This campaign had begun initially in 1910 and had continued to the point that Government engineers were at the Lake in 1912 preparing a report on the potential for electricity generation.²⁰⁶

Maori may have been aware of this as another potential risk to their control and use of their lake.²⁰⁷

20.5.7 What was the consequence of Parliament's rejection of the petition?

By the end of 1913, Waikaremoana leaders' attempt to have their lake protected inside the UDNR had failed. In addition to Crown use of the lake for tourism and the imposition of hunting and fishing restrictions, there seemed to be a risk that the lake might be taken for scenic or hydroelectricity purposes. According to the Native Affairs Committee, the petitioners had a legal remedy available to them: to apply for a legal title through the Native Land Court. This would give their rights some recognition and provide protection in the courts.

The consequence of applying for such a title would inevitably be a transformation of the basis on which the Maori people possessed and related to their taonga, Lake Waikaremoana. In 1913, when they applied to the court, the title on offer remained limited in the ways which we have explained in chapter 10. A court hearing would result in a legal title vested in the individuals who had convinced both the Maori leaders compiling the lists of owners and the court (which had to approve the lists) of their customary interests. We have already pointed out the severe consequences of this form of title earlier in the report (see chapter 10). There was no escape from this individualisation of title in 1913 but some of its effects could be counteracted later if the individual owners chose to set up an incorporation. Incorporations, however, were not well understood outside the East Coast and were rare at this time.²⁰⁸

It should be noted, however, that, in real terms, the UDNR no longer promised the protection it once had. By 1912–13, the Urewera commissions had not produced the hoped-for hapu or community titles, and the Native Land Court's jurisdiction had been reintroduced to the reserve. Further, the promised General Committee had not been established until recently and was already at risk because of the Government's wish to circumvent its sole authority to approve sales, so that the Crown could buy land freely in the reserve. As we explained in chapter 13,

206. Ibid, p137

207. See also Wairoa Native Land Court, minute book 29, 3 August 1917, fol 78 (Niania, brief of evidence (doc 138), app 3, p 121).

208. See Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, (Wellington: Legislation Direct, 2008), vol 3, pp 777–781.

Crown purchase of undivided, individual interests was about to occur, breaching earlier promises, Treaty principles, and the law itself.

Given the fate of the Waikaremoana block in the 1920s, acquired by the Crown through consolidation of the scattered interests it had purchased in the reserve (even though no Waikaremoana interests had been sold), the lake may have been *more* vulnerable rather than less if it had been placed inside the reserve in 1913.

But this was not apparent to the Waikaremoana petitioners in 1912–13; they understood the creation of the UDNR to have protected their lands and resources from alienation, and to have placed their lands under the authority and management of elected committees. With the denial of their petition, the only way of securing any legal recognition and protection of their rights to the lake was to obtain individualised title to the lakebed under the native land laws. Under English law, titles derived from the Crown were usually limited to the beds of waterways and not the water above the beds. The native land laws would transform customary rights in a taonga, to which its peoples related through whakapapa and tikanga, substituting individual court-awarded shares in a piece of land. This was the inevitable consequence of the need in 1913 to protect Lake Waikaremoana within the settler state's legal system.

As we shall see later in the chapter, however, this legal change in title did not take place until the 1950s. By the time the transformation of title took effect in 1954, the Crown was no longer willing to pursue the predatory purchase of individual interests that had marked earlier times. Thus, in the 1950s and 1960s community leaders were still able to speak for their people in respect of negotiations about the lake. But the persistence of community control at a practical level did not mean that there was any recognition of kaitiakitanga, or provision for its exercise, in the Pakeha legal system. The new form of title did not allow them to continue to possess or control their taonga as a water system, whole and undivided, or to make full use of their lake in the economy. The title available under the land laws in 1913 (and finally conferred in 1954) was something significantly less than that which they had possessed in 1840. We discuss in section 20.11 whether this was consistent with the Treaty guarantees.

But all this lay in the future. There was to be a long battle before Maori could secure legal title to their lake. We turn next to consider the Crown's response in 1913–18 to the Maori claim for legal ownership of Lake Waikaremoana.

20.6 WHAT WAS THE CROWN'S RESPONSE TO THE MAORI CLAIM FOR LEGAL OWNERSHIP OF LAKE WAIKAREMOANA?

SUMMARY ANSWER: From 1915 to 1954, the Crown denied the Maori claim for legal ownership of Lake Waikaremoana, and resisted that claim by almost all means available to it. According to Crown counsel, it did so because it 'assumed' it owned the lake. In 1954, the very last date at which the Crown could still challenge Maori ownership of Lake Waikaremoana in the courts, it finally decided that 'the Maoris are to be permitted to retain the benefit of their declared ownership of the bed', as the Maori Affairs Department put it at the time.

In the claimants' view, the Crown:

- wrongly contested their title;
- tried to prevent the Native Land Court from sitting;
- failed to attend the court and present its case;
- wrongly appealed the court's decision;
- was largely responsible for an unconscionable 26-year delay in the hearing of its appeal;
- persisted with its appeal long after the issue had been settled elsewhere in favour of Maori;
- tried to prevent the appellate court from proceeding in 1944; and
- wrongly refused to accept the appellate court's decision for a further 10 years.

We have structured our discussion of these claims around the following four key sub-questions.

- *Did the Crown try to prevent the Native Land Court from determining Maori ownership of Lake Waikaremoana, and why did the Crown not appear to present its case?* At the first Native Land Court hearing in 1915, the applicants submitted a plan of Lake Waikaremoana that they had obtained from the Government, and which Judge Jones accepted as a sufficient plan for the purpose of hearing their claim. When the court sent the plan to the Survey Office at the end of the first hearing, it was then withheld on the advice of the Crown Law Office so as to prevent further sittings. Judge Jones, however, decided in 1916 that the approved plan need not be present in court for the hearing to proceed. A stalemate persisted for the rest of the hearings, with the Government refusing to supply the plan and the court sitting regardless.

The Solicitor-General's view was that Maori customary title existed only to the extent that the Treaty had been recognised in the Native Land Acts as a source of legal title. Neither the Treaty nor the Acts, in his view, had been intended to recognise Maori title to large inland waterways – that is, their beds – because that would be fatal to public interests in navigation and fishing. Thus, such waterways belonged to the Crown. Further, he argued that the most Maori could have held by custom was fishing rights and not rights in the bed of a lake. By 1917, Solicitor-General Salmond hoped that this question of Crown or Maori ownership of large, navigable lakes could be decided in principle by a sitting of all the Native Land Court judges. The chief judge agreed at first to this proposal but it proved impossible to schedule, and thus he directed the judges at the end of 1917 to proceed with their hearings in the usual way. In the meantime, Judge Gilfedder had made interlocutory orders vesting the lake bed in 274 individuals of Tuhoë, Ngati Ruapani, and Ngati Kahungunu descent. These orders were finalised in 1918, after allowing time for the Crown to appear and present its case.

The Crown never appeared at any of the Waikaremoana hearings between 1915 and 1918. For the most part, this was because the Solicitor-General was attempting to prevent individual judges from deciding lake titles until the issue could be settled in principle for all lakes. When this strategy failed at the end of 1917, the Crown still did not appear at the final Waikaremoana

hearing in May and June of 1918, despite a stated intention to do so. From the evidence available to us, neither the Lands Department nor the Crown Law Office was aware of the hearing until too late. In our view, there was either an unexplained breakdown in communication, possibly due to negligence on someone's part, or there was a misunderstanding by the court as to whether the Solicitor-General required notice in advance of a hearing or after final orders had been made. Regardless, there is no evidence of bad faith by the Crown in failing to appear at the 1918 hearing. The Crown filed its appeal on 28 June 1918.

- ▶ *Why was the Crown's appeal not heard for 26 years?* The Crown argued in our inquiry that there was no deliberate policy to delay the appeal. The unavailability of lawyers or judges, the Depression, and a long period when Maori were without counsel all contributed, and the Crown was not guilty of bad faith. The claimants, on the other hand, argued that the Crown was responsible for the delay, whether deliberately or as a result of vacillation. In our view, the truth lies somewhere between the two. In the early 1920s, in particular, the Crown did try to prosecute its appeal but agreed to have it postponed to accommodate the needs of the UCS, the unavailability of lawyers on one side or the other, and court scheduling problems. After it had settled the Rotorua and Taupo lake claims by 1926, however, the Crown stopped trying to get its appeal heard and was satisfied with the status quo. A Crown Law Office explanation in 1939 was that the Maori respondents had been without counsel and wanted to put the hearing off during the Depression, and that it had heard nothing about Waikaremoana between 1931 and 1939. The documentary sources, however, show that both Waikaremoana leaders and the Native Appellate Court made ever more urgent approaches to the Crown during that period. Maori leaders in particular tried to get the Crown to prosecute or abandon its appeal – preferably to abandon it and recognise them as the lake's legal owners. While there was debate within Government as to what to do, the outcome was that the Crown did nothing, leaving its appeal on the books and negating all attempts to get it heard.

In 1939, the Crown refused a request from the Maori owners to agree to dismissal for non-prosecution. In 1943, when the owners could again afford counsel, the Government agreed that the appeal should proceed – but tried to have it adjourned sine die in 1944 because it was still not ready to proceed. On the other hand, the Crown rejected advice that it should negotiate a settlement or legislate a solution at that time. Ultimately, the appellate court agreed that the Crown should have more time to prepare but refused a sine die adjournment, and it dismissed the Crown's appeal later in September 1944.

Thus, we accept that the delays in the early 1920s were not the responsibility of the Crown, and that the Crown was right not to insist on prosecuting the appeal during the Depression. Also, we accept that the Government had other priorities during the Second World War, of course, but the Native

Appellate Court was right to insist that this long-outstanding matter of national importance be finally settled. Ultimately, although there may not have been a deliberate policy to delay the appeal, that was in fact the practical effect of the Crown's refusal in the 1930s and early 1940s to either prosecute or give up its appeal, despite repeated requests from the Maori respondents and the Native Appellate Court that it do so.

- ▶ *What is the significance of the Crown's loss in the Native Appellate Court in 1944?* According to the claimants, the Crown's loss in the appellate court was 'entirely predictable', and it should have abandoned its appeal long before 1944. In support of this contention, the claimants argued:
 - that the jurisdiction of the Native Land Court had been settled in Tamihana Korokai in 1912, and it was pointless for Solicitor-General Cornish to argue, as he did in 1944, that the court had no jurisdiction to make its 1918 orders for Lake Waikaremoana;
 - that Salmond's arguments about ownership of lakes had been presented fully to the Native Land Court in the Lake Omapere case, and that Judge Acheson's 1929 decision had shown that these arguments could not succeed in the Native Land Court; and
 - that the Crown had negotiated settlements for the Rotorua lakes and Lake Taupo in the 1920s, and thus recognised Maori title to lakes (even if only to extinguish it).

In our view, there is some merit to these points, although the Crown had appealed the Omapere decision (which appeal was withdrawn in 1953). In our inquiry, the Crown did not respond to the claimants' arguments, simply stating that it was entitled to contest such an important matter as the ownership of Lake Waikaremoana in the courts. We note that the Native Appellate Court did, as the claimants put it, give the Crown's arguments in the Waikaremoana case 'very short shrift'. The Crown Law Office at the time was certainly aware of inconsistencies in how the Crown had dealt with lake claims in the past, noting the 'purchase' of Lake Wairarapa and part of Lake Tarawera, as well as the Rotorua and Taupo negotiated settlements. Faced with a definite fixture for Waikaremoana in 1944, the Solicitor-General recommended seeking an adjournment so that a settlement could be negotiated. The Government did not accept this advice and the appeal went ahead. But there is no indication that the Crown Law Office considered the case unwinnable or that the Crown was acting in bad faith.

- ▶ *Why did the Crown refuse to accept the appellate court's decision, and wait another 10 years before finally accepting Maori ownership?* The Native Appellate Court's decision did not end the Crown's procrastination over Waikaremoana litigation. For a further 10 years, it contemplated trying to overturn the decision in the general courts. It could not procrastinate for longer because, under section 51 of the Native Land Act 1931, Native Appellate Court orders could not be quashed 'by any Court in any proceedings instituted more than 10 years after the date of the order'. The Crown Law Office

went ahead and prepared an application for prohibition to the Supreme Court but it was never filed. From 1947, Prime Minister Fraser preferred to negotiate a purchase, and went so far as telling the Maori owners in 1949 that he was not in favour of further litigation and 'would ask the Government to accept the decision of the Maori Appellate Court'. The owners understood this as a commitment not to proceed in the courts, but discussions were interrupted by the 1949 election of a new National Government.

Officials were waiting in any case for the outcome of Whanganui River litigation. The new Government agreed in 1950 to await the decision of the Whanganui River commission. When the Maori Land Court sought the official plan of Lake Waikaremoana in June 1950 so as to have the titles completed and registered, the Government withheld the plan to prevent the court from acting. It also decided to proceed immediately with litigation but then changed its mind due to the unfavourable findings of the Whanganui River commission. Rather than accepting those findings, the Government referred the Whanganui River case to the Court of Appeal by special legislation in 1951. The Court of Appeal heard this case in 1953 but did not issue its judgment until July 1954, when it too found against the Crown (except on the application of the *ad medium filum* rule to the bed of the Whanganui River, about which it sought more information). This outcome was not encouraging for the likely success of any Waikaremoana litigation. On the advice of the Maori Affairs Department, Cabinet decided in September 1954 that the practical risk to the Crown of Maori ownership of Lake Waikaremoana was minimal, because the owners were unlikely to be able to sustain an action for trespass and damages against the Crown for its hydroelectric scheme. Thus, the 10-year deadline for litigation in the Waikaremoana case was allowed to pass without action. The Maori Land Court was then supplied with the plan so that the titles could be registered.

It is difficult if not impossible to see any kind of principled behaviour by the Crown towards the Maori owners of Lake Waikaremoana during this period. Rather than withholding the plan from the Maori Land Court indefinitely, the Crown should either have proceeded immediately in the Supreme Court in 1950 or abandoned its litigation option. To make the Maori owners wait another four years on the Whanganui River litigation, in which they were not involved and over which they had no control, and then to decide at the very last minute that Maori ownership of Lake Waikaremoana was of little practical importance to the Crown's interests anyway, was indefensible behaviour.

In 1957, the Maori owners' lawyer wrote to the Government on their behalf, setting out their anger and grief at how they had been treated by the Crown. In their view, the Crown had taken advantage of the Native Land Act to postpone dealing with them for a whole decade, while wrongly withholding the plan from the court and preventing them from getting their legal title. In 1949, they understood the Prime Minister to have assured them that the Government would accept the judgment of two courts, both against the

Crown, yet instead it had persistently disregarded their ownership and used their lake for electricity and tourism without payment or permission. ‘We submit’, they wrote, ‘it is clearly improper that the rights of citizens, be they Europeans or Maoris, when their rights have been established in the proper Courts, should be so disregarded.’

20.6.1 Introduction

In 1913, Ngati Ruapani and Tuhoe leaders filed a claim with the Native Land Court for the ownership of Lake Waikaremoana. In 1914, Ngati Kahungunu leaders also filed claims with the court. For 41 years, from 1913 to 1954, the Crown denied these claims and actively opposed the granting of title to Lake Waikaremoana to Maori. Its initial response was to try to prevent the Native Land Court from sitting, by withholding the requisite plan and, instead, seeking a special sitting of the whole Native Land Court bench to determine whether Maori could own the beds of navigable lakes. When this failed, and the Native Land Court ruled in favour of the Maori applicants in 1918, the Crown appealed the court’s decision. For reasons that we will examine shortly, the appeal was not heard until 1944, when the Native Appellate Court confirmed the original decision. The Crown then continued to withhold the necessary plans so as to prevent the issuing of title, and kept open its option of challenging the appellate court’s decision in the Supreme Court. It was not until the very final moment, in 1954, when the statutory time period for a Supreme Court action expired, that the Crown finally admitted Maori ownership of Lake Waikaremoana.

The claimants’ key arguments are that the Crown wrongly and deliberately delayed the hearing of its own appeal for 26 years, and that it should never have lodged an appeal or attempted to actively defeat Maori title in the first place. Instead, the Crown should have protected Maori title, at the very least from the point at which it was confirmed by the Native Land Court in 1918.²⁰⁹ The Crown’s position is that it was entitled to contest such an important matter as the ownership of Lake Waikaremoana. Also, its view is that the Crown had no deliberate strategy to delay the hearing of its appeal; rather, the appeal was delayed for a number of reasons, including requests from the Maori parties, who suffered no prejudice in any case since their title was ultimately confirmed.²¹⁰

In order to address the parties’ arguments on these matters, we have structured this section around the following questions:

- ▶ Did the Crown try to prevent the Native Land Court from determining Maori ownership of Lake Waikaremoana, and why did the Crown not appear to present its case? (See section 20.6.2.)
- ▶ Why was the Crown’s appeal not heard for 26 years? (See section 20.6.3.)
- ▶ What is the significance of the Crown’s loss in the Native Appellate Court in 1944? (See section 20.6.4.)

209. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 145

210. Crown counsel, closing submissions (doc N20), topic 28, pp 2, 4–5

- ▶ Why did the Crown refuse to accept the appellate court's decision, and wait another 10 years before finally accepting Maori ownership? (See section 20.6.5.)

20.6.2 Did the Crown try to prevent the Native Land Court from determining Maori ownership of Lake Waikaremoana, and why did the Crown not appear to present its case?

20.6.2.1 *Withholding the survey plan*

In 1913, when the first Waikaremoana application was lodged, the court warned the Maori applicants that 'it would not be possible to proceed with the case in the absence of a plan or sketch plan duly approved.'²¹¹ In 1915, the court was able to begin its hearings because the claimants had secured their own map from the Lands Department. It later emerged that officials had provided the plan, not realising that it was to be used in a court hearing, and they denied that it was a proper, approved plan for such a purpose.²¹² The Crown, as we noted above, had earlier withheld an approved plan of Lake Rotorua in order to prevent the Native Land Court from hearing Te Arawa's claim.

The base map for the Waikaremoana plan appears to have been the topographical map of the UDNR prepared in 1895, 'showing all the shore of the lake.' This plan had been approved by the chief surveyor at the time and deposited in the office. The chief surveyor reported in 1916:

Some time in the first half of last year [1915], a Native applied for a copy of the portion showing the Lake and an enlarged plan on 40 chains scale was made for him and for which he paid the fee demanded.

This plan found its way to the Native Land Court and I believe was for the purpose of illustrating a claim to the waters of the Lake, of which however, we never heard definitely. The Court evidently impounded the plan and returned it to us, and we gave it a Native plan number and have since retained it in the office. Strictly speaking, it is not a Native Land Court plan as it bears no imprint of the Court's approval or recognition and as before stated is merely an enlarged copy of a Government Topographical plan in no ways different from the information appearing on all published lithos.²¹³

Judge Jones decided that the plan supplied by the applicants met the necessary requirements, and so the Native Land Court sat to hear their claims in August 1915. The issue of the Crown's claim was raised on the very first day by JH Mitchell, who represented some of the Ngati Kahungunu applicants. Rawaho Winitana, who was leading the Tuhoe and Ngati Ruapani case, submitted, 'The Government

211. Wairoa Native Land Court, minute book 27, 21 August 1916, fol 284 (Niania, brief of evidence (doc 138), app 3, p 107)

212. Chief surveyor to Under-Secretary for Lands, 8 August 1916 (Tony Walzl, comp, supporting papers to 'Waikaremoana: Tourism, Conservation and Hydro-Electricity (1870-1970)', 4 vols, various dates (doc A73(a)), vol 1, p 268)

213. Ibid

say the lake belongs to them. Suggest the Court has jurisdiction. I say we retain our rights to the lake.²¹⁴

The Crown was not represented at this hearing. Judge Jones ruled:

The Court holds that it has jurisdiction to hear matter unless it is prohibited by Proclamation, it is Crown Land, is taken under Public Works Act or a title has already issued. None of these things as far as the Court is aware has happened. Under these circumstances the Court will proceed but some question may arise as to the question of whether the Native custom and usage applies to the bed of the lake. This is of course open for evidence to be given upon.²¹⁵

After this initial decision to proceed, the court heard evidence which mainly focused on the question of a boundary between Tuhoe and Ngati Kahungunu. The hearing was brief. The court adjourned on 21 August 1915 and it did not sit again for a year.²¹⁶

When the court resumed its hearing in August 1916, Judge Jones noted that time was limited and the question of jurisdiction had to be settled at some point. His view was that the court should proceed and determine which of the claimants were entitled to pursue the argument with the Crown.²¹⁷ First, however, the court had to decide whether it could proceed in the absence of the previously submitted sketch plan, which the Government was now refusing to give up. Judge Jones told the parties:

The Court said that up to the present it had not been able to obtain the sketch plan that was before it last year . . . The Court at the conclusion of its sitting [in 1915] returned the plan to the Survey Office for safe custody and the public convenience expecting it would be returned . . . Although two telegrams have been sent and ample time allowed the sketch has not been sent and from correspondence perused by the Court it appears it is being retained at any rate for the present because the Crown has some claim to the lake and the department has been advised to withhold it. The Crown of course has a right to appear and substantiate before the Court any claim it may have and the possibility of such a claim was mentioned at the first setting up of cases and it is still hoped that the Crown will see that its claim, whatever it is, is properly placed before the Court before its final adjudication is made out. The Court altogether dissents from the view which is apparently held that the Crown can by withholding the sketch debar the Court from exercising its jurisdiction. Any attempt to prevent the claimants from exercising their right to plead their claims before the

214. Wairoa Native Land Court, minute book 25, 18 August 1915, fol 47 (Niania, brief of evidence (doc I38), app 3, p101)

215. Ibid

216. Stevens, 'History of the Title to the Lake-bed' (doc A85), pp15-16

217. Grant Young and Michael Belgrave, 'The Urewera Inquiry District and Ngati Kahungunu: Customary Rights and the Waikaremoana Lands' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A129), p146

Court must have express statutory authority and this Court does not think that Rules of Court 20 and 21 are sufficient. The Court and the Natives having done their best to have the sketch here, the Court must proceed with the case.²¹⁸

From the documents supplied to the Tribunal by Tony Walzl, it appears that the Napier office wired head office on 7 August 1916, advising that Judge Jones wanted the plan ‘used . . . last year’ to be sent to him, and asking what action to take. The Lands and Survey head office asked the Solicitor-General for advice.²¹⁹ On 8 August 1916, in the telegram quoted earlier, the chief surveyor explained how the plan used by the court the year before had been acquired by the Maori claimants, and that it was not ‘[s]trictly speaking’ a proper Native Land Court plan, although the department had given it a native plan number when the court ‘returned it to us’ after the 1915 hearing.²²⁰

The Solicitor-General wrote to both the Lands Department and the chief judge on 10 August 1916. He advised the Under-Secretary for Lands that ‘the proper course is to refuse in the meantime to supply any plan of the Lake until definite information has been obtained as to the nature of these proceedings and the course which the Native Land Court proposes to take.’ The Crown was interested because of its ownership of the southern shores, as well as its general interest in Maori lake claims. One purpose of the rule about plans, the Solicitor-General advised, was to ‘enable the Crown to protect its interests by obtaining due notice of the nature and scope of all claims to customary land.’ He also noted that he had written to the chief judge for more information.²²¹ On the basis of this letter, the Napier office was ordered not to supply the plan for the meantime.²²²

In his letter to the chief judge, the Solicitor-General expressed surprise to learn that a plan was required ‘in connection with some application for investigation of title to the Lake.’ If that was so, then he noted the Crown’s interest in the proceedings, both on the general question of whether Maori had proprietary interests in lakes, and also on the specific question of ‘the precise boundaries of the title acquired by the Crown to the land on one side of the lake.’ In other words, Salmond implied that the Crown might raise the *ad medium filum* question in the Waikaremoana case. He also questioned how the Native Land Court could be sitting without a plan duly approved by the chief surveyor. Salmond asked the chief judge to explain ‘the exact nature of the proceedings before Judge Jones and the

218. Wairoa Native Land Court, minute book 27, 21 August 1916, fol 286 (Young and Belgrave, ‘Customary Rights and the Waikaremoana Lands’ (doc A129), pp 146–147)

219. Lands Department, Napier, to Under-Secretary for Lands, 7 August 1916; Under-Secretary, minute, 7 August 1916 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(a)), p 269)

220. Chief surveyor to Under-Secretary for Lands, 8 August 1916 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(a)), p 268)

221. Solicitor-General to Under-Secretary for Lands, 10 August 1916 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(a)), p 264)

222. Under-Secretary for Lands to chief surveyor, Napier, 10 August 1916 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(a)), p 263)

course which he proposes to take'. In the meantime, the plan would be withheld until 'more definite information has been obtained as to the present position'.²²³

It was this correspondence which led Judge Jones to state in court that the Crown was attempting to prevent his sitting by withholding the plan.²²⁴ The judge strongly disagreed that the 1915 plan was not a duly approved plan. As noted earlier, it had been approved by the chief surveyor as a topographical plan but not as a separate and specific plan for hearing title to Lake Waikaremoana. Judge Jones advised the chief judge that the plan had been 'approved and supplied by the Chief Surveyor [to the Maori applicants] and accepted by the Court as sufficient for the purpose'. The Maori application and the court sitting had been 'notified in the ordinary way'. Although the judge was keeping an open mind as to the court's jurisdiction, 'up to the present nothing has been shown to the Court which would deprive the Natives of their statutory right to have their claim heard by it'.²²⁵ In the belief that the absence of the plan was not a bar to continuing (since there had been an approved plan when the court started), Judge Jones refused to stop the 1916 hearing, and his explanation was forwarded to the Solicitor-General.²²⁶

From the above correspondence, we take it that the Solicitor-General had been unaware of the Waikaremoana case, despite it having been notified in what Judge Jones called 'the ordinary way'. Salmond attempted to withhold the survey plan so as to stop the court from sitting until the Crown had full information and was in a position to protect its interests, but failed in this attempt because the court proceeded anyway. Even so, the 1916 hearing was relatively brief. It was adjourned on 26 August.²²⁷ In her report on the lake, Ms Emma Stevens noted that the Crown elected not to be represented at this hearing, for reasons that she had been unable to discover.²²⁸ It appears from the documentary sources provided by Mr Walzl that the Solicitor-General was not aware in time that the court was sitting.

The question then became: what would the Crown do when the inquiry resumed in 1917? In April of that year, when Judge Jones was unavailable to sit, the Ngati Kahungunu applicants asked for the case to be delayed until he could

223. Solicitor-General to chief judge, 10 August 1916 (Walzl, supporting papers to 'Waikaremoana' (doc A73(a)), pp 261–262)

224. Chief judge to Judge Jones, 15 August 1916 (Walzl, supporting papers to 'Waikaremoana' (doc A73(a)), p 260)

225. Judge Jones to chief judge, 12 August 1916 (Walzl, supporting papers to 'Waikaremoana' (doc A73(a)), p 256)

226. Chief judge to Solicitor-General, 16 August 1916, on Judge Jones to chief judge, 12 August 1916 (Walzl, supporting papers to 'Waikaremoana' (doc A73(a)), p 257)

227. The 1916 hearing opened at Wairoa on 16 August 1916. The first two days were occupied in deciding whether the hearing should go ahead, because the court had very few days available, and whether the hearing should be held at Wairoa or Frasertown. On 17 August, the hearing was adjourned to Frasertown. It resumed on 21 August, at which point Judge Jones explained that the court could not obtain the 1915 plan but would continue in any case. The court heard evidence for five days (21–25 August). Then, on 26 August, the judge explained that the court would have to adjourn: see Niania, brief of evidence (doc 138), app 3, pp 106–120.

228. Stevens, 'History of the Title to the Lake-bed' (doc A85), pp 17–18

preside over it. Kaho Hapi and 41 others, ‘who are descendants of Ruapani and members of the Tuhoe tribe’ and the ‘permanent residents of Waikaremoana,’ petitioned the Native Minister for the case to proceed as scheduled before a new judge. They pointed out that the case had already been going on for a number of years, that elderly kaumatua witnesses were dying, that the evidence had been recorded in the minute books, and that attention was turning to the First World War. They asked for the Native Minister to instruct the judge to ensure the case was completed in 1917.²²⁹ This was to be the first of many appeals to the Crown over the years to help bring the Maori title claim to finality. In fact, the chief judge decided that the Waikaremoana case should proceed before Judge Gilfedder.²³⁰

In May 1917, noting that the case was about to come before the Native Land Court again, the Lands Department Under-Secretary asked his Minister for ‘the Solicitor General to be again communicated with in order that such steps as are necessary may be taken to protect the Crown’s interests.’²³¹ In response, the Solicitor-General set out (for the first time) the legal basis of the Crown’s claim to own the bed of Lake Waikaremoana, and a strategy for how to secure that ownership in the wake of the Court of Appeal’s decision in *Tamihana Korokai v Solicitor-General*. We turn next to explain this important development.

20.6.2.2 What was the legal basis of the Crown’s claim to own Lake Waikaremoana, and what was its strategy to secure that ownership?

The legal basis for the Crown’s claim to be the owner of Lake Waikaremoana (and of Lake Rotorua) should be understood against the background of the long-standing concern of the Solicitor-General, Sir John Salmond, to protect public rights to fishing, navigation, and other uses by ensuring that Maori could not be granted freehold titles to the beds of inland waterways, or foreshores and tidal waters, by the Native Land Court.²³²

As we discussed earlier, Salmond had drafted ‘privative clauses’ in the Native Land Act 1909 – that is, clauses which rendered customary rights in land unenforceable against the Crown – to meet just such a case as the Maori claim to Lake Waikaremoana. At the time, the focus had been on Lake Rotorua (which was to come before the general courts in the 1912 case of *Tamihana Korokai v Solicitor-General*).²³³ The Attorney-General, Sir John Findlay, explained in Parliament that the purpose of the clauses was to settle the uncertainty created by an 1894 case, *Nireaha Tamaki v Baker*.²³⁴ In that case, the Privy Council had ‘reversed a decision of the New Zealand Court of Appeal that: “the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction of this or any other Court in

229. Kaho Hapi and 41 others to Native Minister, 19 April 1917 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(a)), p 241)

230. Stevens, ‘History of the Title to the Lake-bed’ (doc A85), p 18

231. Assistant Under-Secretary to acting Minister of Lands, 23 May 1917 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(a)), p 240)

232. Frame, *Salmond*, p 119

233. *Tamihana Korokai v Solicitor-General* (1912) 15 GLR 95; Frame, *Salmond*, pp 116–118

234. *Nireaha Tamaki v Baker* (1894) 12 NZLR 483; Frame, *Salmond*, pp 112–113

The 'Privative Clauses' of the Native Land Act 1909

Clause 84: Save so far as otherwise expressly provided in any other Act[,] the Native customary title to land shall not be available or enforceable against His Majesty the King by any proceedings in any Court or in any other manner.

Clause 85: A Proclamation by the Governor that any land vested in His Majesty the King is free from the Native customary title shall in all Courts and in all proceedings be accepted as conclusive proof of the fact so proclaimed.

Clause 87: The Native customary title shall for all purposes be deemed to have been lawfully extinguished in respect of all land which during the period of ten years immediately preceding the commencement of this Act has been continuously in the possession of the Crown, whether through its tenants, or otherwise howsoever, as being Crown land free from the Native customary title.

Clause 100: In respect of any area of customary land the Governor may, at any time and for any reason which he thinks fit, by Order in Council prohibit the Native Land Court or the Appellate Court from proceeding to ascertain the title to that land or to make a freehold order in respect thereof; and no freehold order made in breach of any such prohibition shall be of any force or effect.

the Colony”²³⁵ But though Salmond drafted the privative provisions of the 1909 Act with the intention of mitigating the effect of the Privy Council's decision, the meaning of the provisions soon proved to be contentious.

In brief, section 84 provided that – unless otherwise expressly provided in any other Act – Maori customary title was not ‘available or enforceable’ against the Crown by any proceedings in any court or in any other manner. Section 85 stated that the Governor could proclaim that any land vested in the Crown was free from Maori customary title, and all courts and proceedings would have to accept this as ‘conclusive proof of the fact so proclaimed’. Section 87 prevented any Crown grant or Crown transaction from being questioned or invalidated on the grounds that Maori customary title had not been properly extinguished. And section 100 allowed the Crown, by Order in Council, to prohibit the Native Land Court or Appellate Court from ascertaining title to ‘any area of customary land’ or making freehold orders for it.

In Salmond's view one of the purposes of the provisions was to enable the Crown to prevent Maori from obtaining Native Land Court freehold titles to inland waterways (as well as foreshores and tidal waters). He meant, of course, the beds of such waterways (or the beds of ‘waters’ – the alternative term he used), reflecting the common law presumption that only beds (land under lakes) could be owned. It was ‘quite out of the question’, he wrote in 1914, ‘to allow freehold

235. Frame, *Salmond*, p 113

titles to be obtained by the Natives to such waters. Such titles would enable the Natives to exclude the whole European population from all rights of fishing, navigation and other use now enjoyed by them.²³⁶ His aim was not to defeat Maori claims altogether but to divert them from the courts to Parliament. He did not intend to stop the courts from investigating Maori claims to customary title, nor from declaring that customary title was established, but to render that title unable to be upheld by a court against the Crown. It would then be left 'to the Natives to claim from Parliament such fair compensation as they may be thought entitled to for the destruction of any rights or privileges possessed by them.'²³⁷ In Alex Frame's view, Salmond saw Parliament as a safer 'tribunal' for Maori than the courts.²³⁸

Salmond's opening gambit in the Rotorua Native Land Court claim – to withhold the survey plan – resulted in a case stated to the Supreme Court (which was then removed to the Court of Appeal). Salmond hoped that the Court of Appeal would declare that even if customary ownership of the lakes was possible and was established in this case, section 84 of the 1909 Act prevented it being asserted against the Crown. He was to be disappointed. The Court of Appeal's decision was summarised in the case reporter's headnote as follows:

The Native Land Court has jurisdiction to entertain and determine a claim by Natives to be owners of land claimed by the Crown, and to determine such a claim by an order binding the Crown, unless its power to do is brought to an end by a Proclamation under section 85 of the Native Land Act, 1909, or some such similar statutory provision, or the Crown shows title to the land. The mere assertion by the Attorney-General or the Solicitor-General that the land is Crown land is of no validity; the Crown must either prove the Proclamation or its title to the land.

It is a question for the Native Land Court in the first instance to determine upon proper evidence whether any particular piece of land is Native customary land or not, and in ascertaining this it may determine whether or not the Maoris were the owners of the bed of any lake or part thereof according to Native custom, or whether they had and have merely a right to fish in its waters.²³⁹

In the Solicitor-General's view, the decision in *Tamihana Korokai* settled nothing because the court had completely misunderstood the purpose of the provisions in question. Before leaving for London in 1912 to represent the Crown in a Privy Council case, Salmond instructed that a section 100 Order in Council should be prepared for the Rotorua case, prohibiting the Native Land Court from investigating the title and making freehold orders. It was to be issued, he advised, only if the court determined that, by Maori custom, the Rotorua lakes were the subject of proprietary rights that would justify the award of a freehold title. But

236. Salmond to Attorney-General, 1 August 1914 (Frame, *Salmond*, p 119)

237. *Ibid*

238. Frame, *Salmond*, pp 114–115

239. Case reporter's headnote, *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321

while the Solicitor-General was away, the new Reform Government under Prime Minister William Massey agreed in 1913 to Maori requests that sections 84 and 100 should be repealed.²⁴⁰ Frame suggests that the Government was ‘making a virtue out of necessity’, given the Court of Appeal’s ‘resounding’ rejection of the Crown’s case in 1912, and taking the opportunity to embarrass the opposition Liberal party which had introduced the measures in 1909.²⁴¹

Native Minister Herries explained to Parliament that ‘in 1909 we were drawing the bow a little too tight – we were giving more power to the Crown than we ought’. In what he called a ‘great concession to the Natives’, the Government decided to repeal ‘some of those obnoxious sections in regard to the rights of the Crown. Maori thus had restored to them ‘a perfect right now – they were barred before – of having the matter [claims to lake beds] tested, as the Treaty of Waitangi said they ought to have, in the Native Land Courts of the Dominion.’²⁴² This was an important development for the Lake Waikaremoana case, and the question of how the Crown would deal with it.

When he returned to New Zealand, Salmond tried, without success, to persuade the Government to re-enact section 100.²⁴³ In 1917, therefore, when the question of Lake Waikaremoana came to him for advice as to the Crown’s legal position, he lamented that it was no longer an option to simply stop the Native Land Court from deciding the case. He also had to explain (or explain away) the consequences of the Court of Appeal’s decision in *Tamihana Korokai*. Within these parameters, Salmond set out his advice as to what the Crown’s position should be in both the Rotorua and Waikaremoana cases. This explanation was, as we noted above, the first time that the Crown set out the legal basis on which it claimed to be the owner of Lake Waikaremoana.²⁴⁴ We therefore set it out in some detail.

In Salmond’s view, the Crown had to accept that Maori customary title was not limited to dry land but included small areas of land covered by water. His view was that ‘small unnavigable streams, lagoons, and other waters were undoubtedly merely appurtenant to the adjoining land and subject to customary title’. Such waters could thus be included in freehold orders issued by the land court to Maori owners. But this did not mean that all waters were subject to native title. The Supreme Court in *Waipapakura v Hempton*²⁴⁵ found that the tidal waters of New Zealand ‘are not and never have been Native customary land’. ‘There is a great deal to be said’, argued Salmond, ‘in favour of the view that the non-tidal but navigable waters of the Dominion are equally excepted from Native title.’ He suggested that Maori customary title existed at law only so far as the Treaty of Waitangi had been

240. This was achieved in the Native Land Amendment Act 1913: Frame, *Salmond*, pp 116–122.

241. Frame, *Salmond*, p 121

242. Herries, 28 November 1913, NZPD, vol 167, p 389 (Frame, *Salmond*, p 120)

243. Frame, *Salmond*, pp 121–122

244. Solicitor-General to Under-Secretary for Lands, 11 June 1917 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(a)), pp 229–234)

245. *Waipapakura v Hempton* (1914) 33 NZLR 1065. For a brief account of Salmond’s arguments in this case, and the Supreme Court’s decision, see Frame, *Salmond*, pp 105–106.

‘recognised and validated as a ground of legal title’ by the native land laws. The extent of customary title depended on ‘the true construction of that Treaty and of the validating legislation.’²⁴⁶

On this approach to the law and the Treaty, the question of whether there was a native title to lakebeds depended on ‘the expressed or implied intention of the grantor, namely the Crown and Parliament’. The Supreme Court had found that ‘the grantor’ had not intended to include harbours, foreshores, and tidal rivers, even though neither the Treaty nor the native land laws expressly excepted them. The ground for this was that ‘it would be unreasonable to presume an intention on the part of the Crown and the Legislature to destroy the public rights of navigation and access to the sea.’²⁴⁷ Even if Maori customary title to Wellington harbour, for example, could be proven to have existed, ‘this customary ownership has acquired no legal recognition or validity and no freehold order could be obtained in respect of such waters.’²⁴⁸ Salmond concluded,

I think that on a reasonable interpretation of the Treaty of Waitangi and the subsequent legislation a similar principle is to be applied to inland navigable waters. It is unreasonable to suppose that this Treaty or legislation was intended to vest Lake Taupo or Lake Rotorua or Lake Wakatipu in the Natives as the exclusive owners thereof to the destruction of the interests of the Crown and the public in the navigation of such waters. No such claim could have been in the mind either of the Natives or of the Crown or of Parliament.²⁴⁹

Salmond found support for this contention in *Mueller v Taupiri Coal Mines Company*,²⁵⁰ in which the Court of Appeal held that ‘the public interest of *de facto* navigation was sufficient to limit a Crown grant to the edge of the Waikato River’. The same must apply, he reasoned, to a Crown grant bounded by a large, navigable lake. The next logical step, as he saw it, was to apply this reasoning to the ‘grant’ implied in the Treaty and the native land laws:

If this is so with a Crown grant I think that it is reasonable to apply the same principle to the statutory grant involved in the Treaty of Waitangi and the Native land legislation. I am of opinion therefore that the Native customary title must on the true construction of that Treaty and legislation exclude not only tidal waters as already decided by the Supreme Court in *Waipapakura v Hempton* but also inland navigable waters.²⁵¹

246. Solicitor-General to Under-Secretary for Lands, 11 June 1917 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(a)), pp 230–231)

247. *Ibid*, p 231

248. *Ibid*, pp 231–232

249. *Ibid*, p 232

250. *Mueller v Taupiri Coal Mines Company Ltd* (1900) 20 NZLR 89 (CA)

251. Solicitor-General to Under-Secretary for Lands, 11 June 1917 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(a)), p 232)

The reservation of navigable waters for the public was thus an implied or presumed intention of the Crown when it entered into the Treaty and when Parliament enacted the native land laws. The question of fact for the courts to decide, therefore, was ‘whether the waters claimed are so extensive and so useful for the purposes of navigation as reasonably to support the presumption that these waters were reserved in the grant’.²⁵² In Salmond’s view, this was the question that the Court of Appeal had already decided for the Waikato River. There should be ‘no difficulty in applying it to lakes as well as to rivers’:

In small lakes or streams the public interest is either non-existent or is so small as not to be a sufficient basis for reading any implied reservation into the grant. With large lakes and rivers the opposite is the case. No hard and fast rule can be laid down. Every claim by the Natives to inland waters must be treated on its merits. Therefore in the Rotorua case the Court of Appeal refused to express any opinion leaving it to be decided on the facts by the Native Land Court.²⁵³

Thus, Salmond argued that the true construction of *Tamihana Korokai v Solicitor-General* was not simply that the Native Land Court should decide whether customary title existed to a particular lake. Even if such title existed (as for harbours), it could not prevail over the implied or presumed reservation of navigable waters for the Crown in the Treaty and the Native Land Acts. Instead, the Native Land Court should decide whether the lake in question was sufficiently large and navigable to have been implicitly reserved for the Crown in the Treaty.

If this argument failed, Salmond had another – and possibly preferred – argument ready. The Crown’s ‘alternative contention’, he said, quite independent of his ‘implied reservation’ argument, was that Maori custom did not give an ‘absolute right of ownership in extensive bodies of inland navigable waters but merely rights of fishery which would not serve as a basis for a freehold order’.²⁵⁴ While this was a question of fact which had to be tested by the Native Land Court, Salmond commented, ‘It is difficult to believe, however, that Native custom recognised Lake Taupo or Lake Wakatipu as the subject of exclusive rights of absolute ownership of the same nature as in the case of the adjoining land.’²⁵⁵ Thus, the Crown might not need to ‘rely on any presumed reservation of navigable waters’. What he feared, however, was that the Native Land Court would simply ‘assume that all waters are the subject of Native title and then to proceed upon that assumption to make freehold orders in favour of the [Maori] proprietors of the adjoining land’.²⁵⁶

Thus, Salmond arrived at two key conclusions: the first was that each judge in the Native Land Court cases for Rotorua and Waikaremoana should determine whether the particular lake was of such size and importance that it had been

252. Ibid, p 233

253. Ibid, p 233

254. Ibid, pp 233–234

255. Ibid, p 234

256. Ibid

implicitly reserved for the public in the Treaty and the native land laws; and the second was that – before such determinations took place – a specially constituted court should decide in principle whether Maori custom recognised ownership of large inland waterways or merely rights of fishery. This became the Crown's strategy for how to apply *Tamihana Korokai* to the Waikaremoana and other lake cases, given that the former statutory power to simply stop the court from hearing the claims had been repealed by Parliament.²⁵⁷

20.6.2.3 *The Crown's proposal for a special court*

On 11 June 1917, Salmond advised the Lands Department that, in light of *Tamihana Korokai* and the repeal of section 100, the Crown had no choice but to allow the Rotorua and Waikaremoana cases to be heard and decided by the Native Land Court. The Crown, he argued, should be present and represented in these cases, so as to 'dispute the right of the Natives' and assert the right of the Crown. Nonetheless, he argued that the question was too important to be left to individual judges to decide. Instead, he suggested that the 'preliminary question as to whether freehold orders can be made at all' should be put to a special sitting of the whole Native Land Court bench, presided over by the chief judge. If the question was decided against the Crown, the individual cases could then proceed – but an arrangement should then be made with the court to allow the Crown time to negotiate a deal for compensation before freehold titles were actually issued.²⁵⁸ In other words, he hoped that even if Maori won the right to seek and be granted freehold orders, the Crown might yet prevent the issue of titles to successful claimants by persuading them to accept compensation for their rights.

This advice was forwarded to the Minister of Lands on 12 June 1917, seeking authority to employ counsel at the special hearing, and the proposed course of action was approved by the Minister.²⁵⁹ As a result, the Lands Department tried to put a stop to the court acting in the meantime by once again withholding the Waikaremoana survey plan.²⁶⁰ (This tactic failed and the court again proceeded in the absence of a plan.) In July 1917, the chief judge agreed to the Government's proposal for a sitting of the full bench of the Native Land Court, and notified the district judges accordingly.

In these circumstances, the Native Land Court began its third sitting for Lake Waikaremoana at Frasertown on 24 July 1917, with Judge Gilfedder presiding. The judge read out a telegram from the chief judge:

257. Solicitor-General to Under-Secretary for Lands, 11 June 1917 (Walzl, supporting papers to 'Waikaremoana' (doc A73(a)), pp 229–234)

258. *Ibid*, pp 229–230

259. Under-Secretary to acting Minister of Lands, 12 June 1917 (Walzl, supporting papers to 'Waikaremoana' (doc A73(a)), pp 225–226)

260. Department of Lands, head office, to Napier office, 14 June 1917 (Walzl, supporting papers to 'Waikaremoana' (doc A73(a)), p 223)

Ownership of Lakes. Setting up special court of all the Judges to decide whether Maoris or Crown own the Lakes. If decided the Maoris are the owners then each Court can ascertain individual owners. When do you think Natives in your district will be ready to have the law points argued.²⁶¹

This matter was put to the parties, who objected to any delay: they had already made arrangements to stay at Frasertown for the hearing; the case had been outstanding for two years; and if ‘the owners are ascertained then we will know who should fight the Crown’. The claimants asked for an interlocutory order as to which of them owned the lake. That way, only the correct owners would bear the expense and responsibility of fighting it out with the Crown, and – if they won – the order could then be made final. Judge Gilfedder accepted this argument and decided to carry on with the hearing for that reason.²⁶²

On 31 July 1917, Gilfedder delivered his interim decision, stating that those who had ancestral and occupation rights to the lands surrounding the lake ‘should be considered to be best entitled to the Lake’:

The Court therefore considers that each of the three contending parties [Ngati Ruapani, Tuhoe, and Ngati Kahungunu] has some ancestral right to this region and that the extent of areas must depend on occupation. Lists of names and evidence of occupation will be received and heard and an interlocutory judgment will be given, to be made final if it is ascertained that the lake belongs to the Maoris and not to the Crown.²⁶³

The remainder of the 1917 hearing was spent arriving at lists of owners, and the court adjourned on 23 August.²⁶⁴

The Solicitor-General took great exception to Judge Gilfedder’s decision. On 13 September 1917, he wrote to the Native Affairs Department about the Crown’s proposal to have the question of Crown ownership dealt with at a special hearing of the Native Land Court bench. He wrote:

It has not been found possible, however, to induce Judge Gilfedder to co-operate in this matter. He has recently heard the application and given an interlocutory decision in favour of certain Natives as being the Natives entitled to Lake Waikare-Moana if that Lake is Native Land. He has left open for argument and decision on the making of a final freehold order the question whether the Lake is Native Land or not. He does

261. Wairoa Native Land Court, minute book 29, 24 July 1917, fol 18 (Young and Belgrave, ‘Customary Rights and the Waikaremoana Lands’ (doc A129), p 152)

262. *Ibid*, fol 18 (pp 152–153)

263. Wairoa Native Land Court, minute book 29, 3 August 1917, fols 78–79 (Young and Belgrave, ‘Customary Rights and the Waikaremoana Lands’ (doc A129), pp 165–166)

264. Young and Belgrave, ‘Customary Rights and the Waikaremoana Lands’ (doc A129), pp 166–180

not propose, however, to have this matter decided, except of course on appeal, by any Judges other than himself. No notice of the interlocutory decision was given by the Judge or Registrar to the Crown. It is feared that a similar course may be taken on the making of the final order in which case the Crown may be deprived of its right of appeal by not knowing of the matter until it is too late.²⁶⁵

Salmond asked the Native Under-Secretary if he could secure authorisation from his Minister to approach Judge Gilfedder and ask him to ensure that the Crown Law Office was notified promptly 'if any further order is made', so that the Crown would have opportunity 'by way of appeal to protect the rights of the Crown.'²⁶⁶ The Minister authorised his Under-Secretary to instruct Judge Gilfedder accordingly, and it seems that separate communications were sent to Judge Gilfedder and to the Tairāwhiti land court on 18 September 1917.²⁶⁷

Salmond's complaint, however, misrepresented what Judge Gilfedder had done. In fact, the judge did not propose to decide the matter himself in the usual manner, but to await the outcome of the special sitting as to whether Maori title existed to navigable lakes. The chief judge had decided to go ahead with the special sitting. He had consulted 'the wishes of representative Natives', the Solicitor-General, and the lawyers (presumably engaged by the Rotorua and Waikaremoana peoples) Earl and Skerrett, and then arranged for the special sitting to be held in January 1918.²⁶⁸

It was not until after the 1917 Waikaremoana hearing that this arrangement for a special sitting collapsed. On 14 November 1917, the chief judge advised his bench that Earl was no longer available in January 1918 and had asked for the hearing to be held in March 1918. This was simply impossible because of the timetable of court and Maori Land Board work: the only time the entire bench could assemble was in January. That being the case, Skerrett withdrew from the arrangement, submitting to the chief judge that 'the Natives have the right to present to the Court evidence of their "Takes" and obtain the Court's decision in the usual way subject to appeal afterwards.' The chief judge notified the judges 'That being his wish I feel I ought to comply with it and so the cases will have to go on in the usual way.'²⁶⁹

Chief Judge Jackson Palmer explained the Solicitor-General's response to the new situation:

The Solicitor General has intimated to me that the Crown is not interested in the litigation between the Natives as to which of them, if any, are entitled to the Lakes. The Crown's interest is only centred on the question as to whether the Natives or the

265. Solicitor-General to Under-Secretary for Native Affairs, 13 September 1917 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1170)

266. Ibid, pp 1170-1171

267. Various minutes on coversheet for Solicitor-General to Under-Secretary for Native Affairs, 13 September 1917, ACIH 16036 W2459/36 MA 5/13/78 pt 1, Archives New Zealand, Wellington

268. Chief judge, circular to judges, 14 November 1917 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1169)

269. Ibid

Crown are the owners. He claims that the Crown owns the Lakes and he will in all cases defend the Crown's right. He requires therefore, when the 'Takes' of the Natives are settled by the Court, to be notified, and he will then appear before the Court and produce the Crown's case so that the matter may go to appeal in the usual way.²⁷⁰

The chief judge thus cancelled the special sitting and the Native Land Court judges were instructed to proceed as usual.

20.6.2.4 Why did the Crown not appear at the 1918 hearing to present its case?

Thus, the Crown had failed to appear at the Waikaremoana hearings in 1915 and 1916 because, it was claimed, the Solicitor-General had not had sufficient notice of those hearings. In 1916, the Government's response was to try to prevent the hearing by withholding the survey plan. In 1917, the Crown was not represented either. This time, the Solicitor-General had a great deal of notice but expected the hearing not to take place, because the chief judge had accepted his proposal to refer the matter to a special sitting of the whole bench. Again, the survey plan was withheld so as to prevent the court from sitting – and, again, that stratagem failed.

By the time the Native Land Court resumed hearing the Waikaremoana case in 1918, it had already reached the stage referred to by the Solicitor-General above. That is, an interlocutory decision had been made as to which Maori groups were entitled to the lake, and lists of owners had been considered, and relative shares allotted to those whose names were admitted. It was now time for the Crown to appear and present its case. The Solicitor-General was well aware that this stage had been reached, and had indeed been very critical of Judge Gilfedder for proceeding so far in 1917. But when the court sat again in May 1918, the Crown was not present.

On 17 May 1918, Judge Gilfedder intimated:

the project to set up a special tribunal to settle a legal question as to whether the Lakes belonged to the Natives or to the Crown had ended in smoke. The case of Rotorua Lake seemed as far off decision as ever and in any case the position of Waikaremoana was not on all fours with Rotorua.²⁷¹

The court decided to postpone finalising its orders for a week, stating that this would be the last opportunity for objections to be raised. At the same time, it noted that the Crown had failed to appear at any of the Lake hearings since 1916:

This day week will be fixed for hearing any objections to making an order final as the matter cannot be hung up indefinitely. The investigation was begun in 1916 and continued in 1917 and now we are nearly half through 1918. The officers of the

270. Ibid

271. Wairoa Native Land Court, minute book 29, 17 May 1918, fol 234 (Niania, brief of evidence (doc 138), app 3, p130)

Crown have had ample opportunity if they thought fit to oppose the application of the Natives.²⁷²

The following week, on 24 May 1918, no one from the Crown appeared. The lists were considered again, and names and shares read out by the clerk of the court. The court then held the matter over for a further two weeks, before returning to the lists again on 6 June. Despite the two-week delay, no Crown counsel appeared. So, on 6 June 1918, duplicate names were removed from the lists, some shares were adjusted, lists were either passed or (in a couple of cases), deferred, and the court made final orders.²⁷³ The outcome was that 20 lists of owners were passed, with 132 shares for 92 Ngati Kahungunu owners, and 395 shares for 182 Tuhoe and Ngati Ruapani owners.²⁷⁴

Why did the Crown not appear? On 10 June 1918 the court registrar advised the Native Department Under-Secretary that, with reference to his memorandum of 18 September 1917, Judge Gilfedder had ‘delivered final Judgement herein’ at Wairoa on 7 June.²⁷⁵ The following day, 11 June 1918, the head of the Lands Department wrote to the chief judge:

It has unofficially come to my knowledge that certain orders have been made by Judge Gilfedder in respect of the bed of the Lake, but as no official intimation has been given to this Department of the case being brought before the Court, I am not aware either of the nature of the orders alleged to have been made by the Judge or the authority under which they may have been made. I shall be glad to receive definite information on these points as soon as possible, and also to receive such comments as you may desire to make respecting the failure of the Registrar of the Court to notify this Department of the date and place of the hearing of the case. A special request that the Registrars of Native Land Courts should notify this Department in writing under

272. Wairoa Native Land Court, minute book 29, 17 May 1918, fol 234 (Niania, brief of evidence (doc 138), app 3, p 130)

273. Young and Belgrave, ‘Customary Rights and the Waikaremoana Lands’ (doc A129), p 180

274. These figures have been calculated from the annotated 1971 lists given in the following source: J Rangihau and ‘other owners in title to Lake Waikaremoana’ to the Minister of Maori Affairs and the Lake Waikaremoana Committee, 21 August 1971. Compiling owner totals from the court’s 1917–18 minutes is no easy task. Wiren gave a total figure of 284 owners for the 1918 orders: Wiren to Minister of Maori Affairs, 18 April 1957 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), pp 1283–1284). Our calculated total is 274. The 1971 lists which Rangihau et al had had prepared comprised lists of the original owners and shares ‘in accordance with lists passed by the Court’ on 6 June 1918, but incorporated amendments made by the Native Appellate Court on 22 April and 10 September 1947, which have not been included here, and by the court on 10 March 1950: Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), pp 1297–1315. The 1950 changes saw four owners added to one list, after an individual petition to Parliament resulted in a section in the Maori Purposes Act 1948 empowering the Native Land Court to inquire into the matters raised in the petition and to include issue of a named individual as owners, if it was found they had rights. The main reason why the 1918 owner totals are markedly lower than the 1971 totals is because in 1918 children or descendants of owners in various lists were explicitly included, but they were not individually named and numbered till 1971.

275. H Carr, registrar, to Native Under-Secretary, 10 June 1918, AC1H 16036, W2459/36 MA5/13/78, pt 1, Archives New Zealand, Wellington

Rule 14 of all cases which directly or indirectly affect the Crown's title, was made to the Under Secretary, Native Department, on 4th September 1916.²⁷⁶

This request was met with silence. It was not answered until a month later on 13 July 1918, when the chief judge advised the Under-Secretary that he had not replied earlier 'owing to absence from Wellington'. He added 'you will no doubt know by this time that many appeals have been lodged including one by the Attorney-General on behalf of the Crown'.²⁷⁷ Indeed, the Crown had filed an appeal against the decision on 28 June 1918.²⁷⁸ Thus, the chief judge made no response to the Lands Department's request for an explanation, perhaps thinking it unnecessary to answer since the Crown had already filed an appeal anyway.

The claimants in our inquiry have been critical of the Crown for failing to appear in the Native Land Court hearings, and for lodging an appeal despite not having prosecuted a claim in the lower court. This was the first abuse of 'due legal process', it was felt, in the Crown's long and improper attempt to defeat Maori legal title to Lake Waikaremoana. How could the Crown refuse to accept the court's decision when it had never appeared, presented any arguments, or given the court any opportunity to consider its case when coming to a decision?²⁷⁹ These are not new criticisms. When the Crown's appeal was heard in 1944, counsel for the Maori owners, Mr Wiren, accused the Crown of trifling with the court and making a mockery of his clients. He read out passages from the original hearing, at which the Crown had failed to attend or present its argument over several years, and submitted that if the Crown had appeared then and stated its rights, it would have saved a lot of trouble and expense.²⁸⁰

In our inquiry, a key grievance for the Wai 621 Ngati Kahungunu claimants was the Crown's denial of their ownership of the lake from 1918 onwards. Counsel submitted that the Crown failed to represent itself at the hearings from 1915 to 1918, despite the advice of the Solicitor-General. This was very significant given the Crown's appeal of a decision in proceedings in which it had had ample opportunity to appear but had elected not to. In the claimants' view, this calls into question the Crown's 'bona fides' in appealing the decision in 1918, especially in light of the Crown's failure to prosecute its appeal for decades.²⁸¹

We will deal with the failure to prosecute the appeal in the next section, but there seems to us no doubt that the Crown was determined to prevent the peoples of Lake Waikaremoana from obtaining a legal title to their lake from 1915 to 1918. In the Crown's view, such lake claims should be settled politically by compensation, in order to ensure public 'rights' of fishing and navigation. Legally, the Crown

276. Under-Secretary for Lands to chief judge, 11 June 1918 (Walzl, supporting papers to 'Waikaremoana' (doc A73(a)), p 215)

277. Chief judge to Under-Secretary, Lands Department, 13 July 1918, ACIH 16036 W2459/36 MA 15/13/78, pt 1, Archives New Zealand, Wellington

278. Stevens, 'History of the Title to the Lake-bed' (doc A85), p 22

279. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 7, 118–119

280. Department of Maori Affairs, 'Lake Waikaremoana – Crown Appeal', 1944 (doc H2), pp 4–6

281. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 7, 118–119, 128–133

intended to argue either that lakes were an exception to the 'grant' of native title by the Treaty and the native land laws, or that Maori custom did not recognise any right in navigable lakes other than that of fishing. But these arguments were never tested in the Waikaremoana case because the Crown's proposal of a special court 'ended in smoke', and the Crown opted not to attend the 1916 or 1917 hearings but instead to try to prevent them by withholding the requisite plan.

The key question is why – these various strategies having failed – the Crown did not attend the 1918 hearing. From the evidence available to us, it appears that the Crown's failure to attend this hearing may have been the result of miscommunication, or of misunderstanding. The judge adjourned the hearing twice (for a week and then again for another two weeks), evidently to allow the Crown to attend. But for some reason the registrar or the Native Department failed to notify the Lands Department or the Solicitor-General, either before or during the hearing.

This breakdown in communications is unexplained. It may have been a simple omission or the result of negligence. But it is possible, alternatively, that the court interpreted various statements it had received on the matter to mean that the Solicitor-General should be advised when (not before) the court had made final orders. We refer to the chief judge's circular to the judges of 14 November 1917, and to the Solicitor-General's wording of his request to the Native Under-Secretary, and the subsequent letters sent to the court. Certainly the court registrar did notify the Under-Secretary promptly of the court's final orders.²⁸² We do not know how to interpret the chief judge's silence in response to the pointed questions put to him subsequently by the head of the Lands Department. We conclude, however, that in this particular matter of the Crown's non-appearance at the lake title investigation in mid-1918, there is no evidence of bad faith on its part.

A further argument raised by counsel for the Wai 621 Ngati Kahungunu claimants was that the Crown breached '[c]ivil procedural law extant at the time' by lodging an appeal without first seeking leave: 'only parties participating in Court of 1st instance have an appeal as of right.'²⁸³ But the provisions in force for the Native Appellate Court, contained in section 48 of the Native Land Act 1909, allowed 'any party to the proceeding in which the order is made, or . . . any person bound by the order or interested therein' to file an appeal within six weeks of the order appealed from. Leave was only required to appeal provisional or preliminary decisions.²⁸⁴

Claimant counsel went on to argue that a pattern had been established by 1918 which, in conjunction with the Crown's failure to prosecute its appeal for 26 years, showed that the Crown was treating both the court and the Maori owners with contempt.²⁸⁵ We turn next to the vexed question of why the Crown's appeal was

282. It is possible that the registrar also notified the Crown Law Office, but the only letter we have located is that to the Native Under-Secretary.

283. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 118–119

284. Native Land Act 1909, ss 48–49

285. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 118–119

not heard for such a long period of time. This was one of the most contested issues between the Crown and claimants in our inquiry into Lake Waikaremoana claims.

20.6.3 Why was the Crown's appeal not heard for 26 years?

20.6.3.1 The Crown's argument that there was no deliberate strategy to delay hearing of the appeal

In his report for the Tribunal, Tony Walzl commented:

Although it seems astounding that a delay occurred of more than 25 years between the 1918 decision and the hearing of appeals, there is nothing recorded in files which specifically suggests that such delay was deliberate Crown policy. Instead, a variety of reasons appear to account for the lapse of time from 1918 to 1944. The need to settle title of the Urewera lands through consolidation, which took place during the early 1920s through to 1925, seems to have impacted on the ability of the owners to deal with the Lake appeal at that time. Following this, the non-availability of senior Crown Law lawyers often featured as the reason for delaying planned appeal hearings. Similarly, at times it was the unavailability of Land Court judges which caused a difficulty in setting a hearing date. There is also evidence that the owners suffered from the difficulty of getting suitable counsel to act on their behalf. From the late 1920s through into the 1930s part of the problem was that the owners could not afford to hire a suitable legal representative. Yet another cause which affected both the Crown and the owners, was that counsel who had been identified to represent the parties would be appointed to the bench and would therefore not be available for the case.²⁸⁶

In Crown counsel's submission, we should accept this conclusion on the part of Mr Walzl. Crown counsel suggested that it was an 'over-simplification' to say that the Crown failed to advance its appeal, thus resulting in a 26-year delay (as Emma Stevens argued in her report for the claimants). Reasons for delays included:

- ▶ 'consensual adjournments to consider the Urewera consolidation scheme';
- ▶ from 1926 to 1939, 'Waikaremoana Maori had no legal representative with whom an appeal could be arranged';
- ▶ the Depression;
- ▶ Crown lawyers' unavailability; and
- ▶ court scheduling difficulties.

In the Crown's submission, the Government 'cannot be held responsible for all the delays'. In particular, the Crown relied on Mr Walzl's evidence that there is nothing to suggest a deliberate policy on the part of the Crown to delay the appeal.²⁸⁷ Hence, the Crown was not guilty of bad faith.²⁸⁸

We note, however, that three other important points emerge from Mr Walzl's evidence, which the Crown has not cited.

286. Walzl, 'Waikaremoana' (doc A73), p 321

287. Crown counsel, closing submissions (doc N20), topic 28, p 4

288. *Ibid*, p 5

The first is that Mr Walzl identified ‘an underlying feeling of reluctance by Crown officials to pursue the appeal as a matter of high priority’. If settling the lakebed title had been necessary to any of the Crown’s priority activities, then ‘it is likely matters would have been resolved earlier.’²⁸⁹ The Crown’s most important interests at Lake Waikaremoana by the 1920s and 1930s – forest preservation and hydroelectricity – were not seen as dependent on getting the lakebed title resolved. In terms of forest, the Crown obtained ownership of the Waikaremoana block in the 1920s through the UCS (see chapter 14). In terms of hydroelectricity, Walzl commented ‘it is a tempting assumption to draw that the Crown delayed the hearing of the lakebed to allow its planned hydro-electricity scheme at Waikaremoana to progress and be completed’ but ‘there is no evidence found to date which specifically supports this thesis’. The Crown continued with its hydro development and public works ‘under the belief that the 1903 water power legislation gave it unmitigated right to use the water in the Lake for the purposes of the generation of electricity, and the Public Works legislation gave it authority to undertake any work that was viewed as being in the public interest’. While the early phases of the hydro scheme impacted on some Maori lands, there was no effect on the lakebed itself until round about the time that the appeal was heard in the 1940s.²⁹⁰

The second point is that settling claims about other waterways, especially Taupo and Rotorua, was a much higher priority for the Government; anything which might impact negatively on that (such as a Maori win in court in the Waikaremoana appeal) was not something that the Crown was likely to prioritise. Other unsettled claims, such as the Whanganui River, had a similar effect on the Waikaremoana case – and continued to affect the settling of it even after the Crown’s appeal was heard, according to Mr Walzl.²⁹¹

Mr Walzl’s third point is that while the Crown may not have had a deliberate strategy of delaying its appeal, nor were officials and Ministers prepared to give up the Crown’s claim to Lake Waikaremoana. Maori attempts to have the appeal dismissed as lapsed, or requests that the Crown abandon or give up its appeal, were always rejected. Even after Maori won the appeal in 1944, the Crown continued to refuse to acknowledge their ownership of the lake. The Crown’s stance, Walzl notes, was sometimes based ‘on a belief that there was little substance to the [Maori] claim being made to Lake Waikaremoana.’²⁹²

Based in part on Mr Walzl’s evidence, the claimants took a very different view of the delay from that of the Crown. In their view, the Crown had actively obstructed their article 3 right to have their title decided by the courts for over a quarter of a century. This was held to be a ‘flagrant example of the common law principle of “justice delayed is justice denied”’.²⁹³ The Wai 36 Tuhoe claimants argued that ‘the delay was intended by the Crown.’²⁹⁴ Counsel for Nga Rauru o Nga Potiki

289. Walzl, ‘Waikaremoana’ (doc A73), p 322

290. Ibid, p 323

291. Ibid, p 322; see also p 314.

292. Ibid, p 323

293. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 128

294. Counsel for Wai 36 Tuhoe, closing submissions (doc N8), p 69

suggested that the delay was largely due to ‘vacillation on the part of the Crown’ and ‘the government’s failure to have the case proceed.’²⁹⁵ In particular, they cited a comment by the Chief Judge in 1944 that ‘it was up to the Crown in the past 26 years to initiate proceedings but the Crown had had no excuse for not having done so.’²⁹⁶

Counsel for the Wai 945 Ngati Ruapani claimants made detailed submissions. He accepted that the long delay was ‘[t]o some extent . . . caused by bad luck and obviously cannot wholly be blamed on the Crown. However Crown policy definitely played a role.’²⁹⁷ In his submission, the Crown ‘deliberately prolonged the hearing of its appeal.’²⁹⁸ It did so to suit its negotiations over other lakes in the 1920s, and then actively obstructed the Waikaremoana Maori owners when they sought to have the appeal heard in the 1930s. The Government’s success in delaying the appeal reflected its influence or control over the administrative question of when the appellate court would set the case down for hearing. Further, the Crown took advantage of Maori inability to participate and thus delayed the hearing, instead of assisting the Waikaremoana owners when it became clear that they could not afford counsel. In the Wai 945 Ngati Ruapani claimants’ view, these Crown actions are particularly serious because there was obviously no merit to the Crown’s appeal, and in the meantime it continued to use and manage the lake as if it were the owner.²⁹⁹

Given the great disparity between the claimant and Crown positions, we turn next to consider in detail what the evidence shows for the 26-year period in which the Crown’s appeal was delayed. As the Wai 36 Tuhoe claimants put it, this may well be ‘a New Zealand record for the delay in determination of an appeal.’³⁰⁰

20.6.3.2 What does the evidence show for the 1920s?

We begin with the Crown Law Office’s official explanation in 1939 for the delay in hearing the appeal. Mr Walzl relied heavily on this document for his account of the delay in the 1920s.³⁰¹ In response to an application from Maori to strike out the appeal for want of prosecution, Crown Solicitor Prendeville provided a formal explanation for the delay in hearing the appeal, setting out the details as he understood them:

- ▶ 1921: A sitting of the appellate court was scheduled to take place at Wairoa in June 1921 at the request of the Crown. The Solicitor-General applied for the Crown’s appeal to be heard at Wellington in advance of the Maori owners’ appeals. A conference of owners agreed and the hearing of the Crown’s appeal

295. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 169, 170

296. Ibid, p 173

297. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), p 43

298. Ibid, p 51

299. Ibid, pp 43–46

300. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 68

301. Walzl, ‘Waikaremoana’ (doc A73), pp 312–313

was set down for 16 August 1921.³⁰² Apirana Ngata then sent a telegram to the Attorney-General on 3 August 1921, asking that the appeal be adjourned sine die.³⁰³ The appellate court granted the adjournment. In return, Ngata appears to have agreed with the Attorney-General that the case ‘would not come on in 1922–23’ during the latter’s absence overseas.³⁰⁴

- ▶ 1924: The Crown was now ready again to proceed with the appeal. Attorney-General Bell arranged with Mr Myers KC to appear on behalf of the Crown. In March 1924, the Crown applied to the chief judge to arrange a suitable fixture but this proved to be impossible, because the Maori owners were having difficulty in arranging legal representation. Eventually, the owners briefed Mr Skerrett KC to appear for them.³⁰⁵
- ▶ 1925: Several attempts were made to arrange a date for a hearing but the chief judge wanted the appellate court to consist of as many Native Land Court judges as possible. It proved impossible to arrange a time that suited all the judges and counsel concerned.³⁰⁶
- ▶ 1926: Skerrett was appointed chief justice ‘and this left the Natives again without Counsel’. Ngata asked that no fixture be made until Maori could arrange suitable legal representation. The Crown solicitor writing the 1939 report commented: ‘Apparently no action was taken by the Natives in this respect and the Crown waited to hear from them.’³⁰⁷
- ▶ 1929: The Crown lost its counsel when Myers was appointed chief justice. This was also the year in which the Depression began. In 1929 and 1930, Ngata tried to ‘see whether the Natives could arrange to go on’ but finally, in 1931, he told the Crown Law Office that ‘owing to the depression, the Natives concerned had no moneys available to pay law costs and that the case had better stand over until conditions improved’. In the meantime, the Crown had appealed the Lake Omapere decision in 1929 (see the sidebar opposite). This appeal was held over until the Crown could prosecute the Waikaremoana appeal.³⁰⁸

This official account of the delays in the 1920s indicates that the Crown did attempt to have its appeal heard in 1921, 1924, and 1925. After that, it seemed that the inability of the Maori owners to afford a lawyer had put the appeal on hold. In our view, Crown counsel is correct to note the importance of the scheduling

302. Crown solicitor to Hampson and Chadwick, 30 June 1939 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(a)), p 476)

303. As readers will recall, the August hearing date would have interfered with the Taurau hui of 1–25 August 1921, at which the attendance of the Maori owners was crucial for making decisions about the UCS (see chapter 14), hence Ngata sought this adjournment.

304. Crown solicitor to Hampson and Chadwick, 30 June 1939 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(a)), p 476)

305. *Ibid*, pp 476–477

306. *Ibid*, p 477

307. *Ibid*

308. *Ibid*

Changing Context in the 1920s: The Settlement of the Rotorua and Taupo Lake Claims and the Native Land Court's *Omapere* Decision

In 1918, the Native Land Court began to investigate the titles of Lake Rotorua and Lake Rotoiti. Earl represented the Maori applicants and Prendeville appeared for the Crown. Once these two lakes had been dealt with, Te Arawa planned to file claims for the other Rotorua lakes. In November 1918, just days after the first hearing, the presiding judge, T W Wilson, died of influenza. Although fixtures were proposed for 1919 and 1920, the Crown appears to have prevented these from taking place. Eventually, the Government was successful in persuading Te Arawa to negotiate an out-of-court settlement by somewhat dubious tactics, including a threat to take the lakebeds by compulsion. Assisted by Sir Apirana Ngata, Te Arawa – evidently nervous of the looming costs of further litigation – negotiated a settlement in 1921. For Attorney-General Bell, the basis of the settlement was that ‘we did not admit you had anything to sell and therefore we had nothing to buy’.

But if that were so, why did the Crown need to settle at all? The simple answer is that it feared it would lose in court. Te Arawa had mounted a strong case to support their claim that they ‘held and exercised exclusive proprietary rights in the lakes’, and Solicitor-General Salmond was anxious to avoid an outcome in which ‘the Natives should be permanently recognised as the owners of the navigable waters of the Dominion’, as he put it. The Crown was also determined not to admit that it was buying the lake bed from Maori.

It agreed instead to make an annual payment of £6,000 to a tribal trust board, to give Te Arawa 40 trout fishing licences per year at a ‘nominal’ charge, and to guarantee indigenous fishing rights. The settlement was given effect by legislation in 1922, which declared that the lakebeds and the right to use the waters were ‘the property of the Crown, freed and discharged from the Native customary title, if any’. The wording of this statute was intended to reflect the Crown’s view (above) that Maori had nothing to sell and the Crown nothing to buy. The annuity was not indexed to inflation and there was no provision for reviews or increases.¹

In 1926, a similar agreement was concluded with Ngati Tuwharetoa over Lake Taupo and its tributaries. The Government undertook to pay £3,000 per annum to a tribal trust board. If fishing revenues exceeded that amount, one-half of the excess would be paid to the board. Further, Tuwharetoa received 50 free fishing licences per year. Legislation in 1926 gave effect to these arrangements and declared that the beds of Lake Taupo and the Waikato River (to the Huka Falls), ‘together with the right to use the respective waters’, were the property of the Crown, freed and discharged from native title, if any. Ngati Tuwharetoa understood this as an agreement

1. Ben White, *Inland Waterways: Lakes*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1998) (doc A113), pp 112–123

about fishing rights. In the 1940s (and afterwards), the tribe challenged the Crown about its use of Lake Taupo for hydroelectricity, without their consent or paying them compensation.²

A landmark decision was given by Judge FOV Acheson in the *Lake Omapere* case in 1929, after Maori claims to the lake, first filed in 1913, were finally heard. The Crown contested these claims, arguing that Maori custom did not recognise ownership of lake beds, and therefore the beds of lakes belonged to the Crown, and also (as a fall back position) that the Crown owned part of the lakebed by virtue of its acquisition of lands adjoining the lake. Judge Acheson found that Maori use and occupation of the lake had been continuous since 1840, and that the lake was incontrovertibly Maori customary land. In particular he stated that 'Maori custom and usage recognised full ownership of lakes themselves'. In his memorable phrase: 'The Maori was and still is a direct thinker and he would see no more reason for separating a lake from its bed (as to the ownership thereof) than he would see for separating the rocks and the soils that comprise a mountain.' In parts of the country with which the judge was most familiar, 'it was taken for granted that the lakes were tribal property'. Moreover native title to Lake Omapere had not been legally extinguished. The judge's decision placed considerable weight on the importance of the Treaty of Waitangi. The parties to the Treaty, he said, 'certainly intended it to protect the right of the Ngapuhis to their whole tribal territory' and such territory necessarily included Lake Omapere.³

2. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 4, pp 1303–1326

3. White, *Inland Waterways: Lakes* (doc A113), pp 225–239; *Lake Omapere* (1929) 11 Bay of Islands Minute Book 253, 259–263, 265–266, 271–273, 276

problem (which prevented the hearing in 1925, when both sides had counsel) and the loss of key lawyers on both sides after that time.³⁰⁹

In his report, Mr Walzl does not comment on these delays in the 1920s, other than to point out the poverty of Waikaremoana Maori communities in both decades. It meant that 'the inability of the owners to afford counsel must have remained a serious restriction against the appeal being heard'.³¹⁰ This difficulty was clearly a very real one for the owners. Writing in 1971 about his work researching owners' lists for the lake lease, Tama Nikora observed: 'I have worked on this problem on a voluntary basis at some cost to myself because of my deep sympathy

309. Crown counsel, closing submissions (doc N20), topic 28, p 4

310. Walzl, 'Waikaremoana' (doc A73), p 313

for the Waikaremoana people. In defending their case for title in the past they starved in order to raise sufficient funds to pay solicitor's fees.³¹¹

Emma Stevens stated that the Attorney-General in the early 1920s, Sir Francis Bell, considered it very important that the appeal be hard fought and well argued because Gilfedder's decision was a 'peculiarly dangerous one'.³¹² The delay in 1921–22 was sought by Ngata to facilitate the UCS. As we discussed in chapter 14, the Government agreed to this delay because it hoped to acquire the lakebed as part of the UCS arrangements for the Waikaremoana block, or – if this were not the case – because acquiring the northern foreshore would strengthen its claim to the lake when its appeal was finally heard. Although Commissioner Knight did propose giving the owners a guarantee that the Waikaremoana arrangements would not affect the outcome in the lake case, no such guarantee appears to have been made (see chapter 14).

Nonetheless, the Crown was keen to continue with its appeal after Sir Francis Bell's return from overseas. In 1924, the Crown solicitor at Gisborne employed a local Maori interpreter to research the facts about fishing and boating on the lake, and Maori uses of the lake. The Government was intent on prosecuting its appeal as soon as practicable, and it tried to arrange a fixture in 1925 (though without success).³¹³ We do not accept the claimants' argument that the Crown's negotiations over the Rotorua and Taupo lakes discouraged it from having the Waikaremoana appeal heard.³¹⁴ The Crown was most active in trying to get the appeal heard during the period of those negotiations (1921 to 1926). But the Crown, having successfully negotiated the Rotorua and Taupo lake settlements, and having lost the Lake Omapere case in 1929, seemed content with the status quo from 1926 onwards. Sir Francis Bell advised the Prime Minister in 1926 that a political settlement of the Taupo claim 'would practically dispose of the necessity for argument in the long pending appeal in the case of Lake Waikaremoana'.³¹⁵ This was a remarkable about-face. Based on the Crown solicitor's account in 1939 and the other evidence available to the Tribunal, it is fair to conclude that the Crown did nothing after 1926 to prosecute its appeal.

In the claimants' view, the Crown's settlement with Te Arawa and Tuwharetoa and its loss in the Omapere case in 1929 ought to have had the opposite result: it ought to have underlined the futility of continuing to deny Maori ownership of lakes. By 1929, in light of *Tamihana Korokai*, the Waikaremoana decision, and

311. Tama Nikora to Sir Turi Carroll, 23 August 1971 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1296)

312. Stevens, 'History of the Title to the Lake-bed' (doc A85), p 24

313. *Ibid*, pp 24–25

314. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), pp 43–44; see also Walzl, 'Waikaremoana' (doc A73), pp 314, 322.

315. Bell to Prime Minister, 9 March 1926 (White, *Inland Waterways* (doc A113), p 178)

now the Omapere decision, it was past time for the Crown to have given up this litigation.³¹⁶

20.6.3.3 What does the evidence show for the 1930s?

From 1931 to 1939, according to the Crown solicitor's account, 'nothing further was heard by the Crown in respect of Waikaremoana'.³¹⁷ In Tony Walzl's evidence, this was not the case and the situation changed markedly in the 1930s. He points to a sustained effort on the part of the Maori owners to get the appeal either heard or dismissed so as to finalise their title. Their efforts were complemented by those of the Native Appellate Court, which became increasingly concerned about the Crown's outstanding appeal.

In 1932, Waipatu Winitana wrote to the Native Minister on behalf of Ngati Ruapani, seeking 'information in regard to our Waikaremoana lake case' and asking for 50 free fishing licences 'in view of the fact that no compensation has been paid to us in regard to our lake'.³¹⁸ This was an appeal for the Government to consider a political settlement along the lines of those negotiated for Lake Taupo and the Rotorua lakes in the 1920s.

Although this approach was unsuccessful, the Native Appellate Court intervened in 1934 to try to get the Crown to prosecute its appeals. As far as we know, this was at the court's own initiative and not in response to an application by the Maori owners. The chief judge wrote to the Native Minister, observing that the Waikaremoana and Omapere appeals had been delayed by the Crown's negotiations with other Maori groups, and by the Maori owners' difficulty in 'finding the necessary costs to carry the matter to the Privy Council as the Supreme Court has suggested may be necessary'. Also, the chief judge suggested, the Waikaremoana and Omapere owners probably hoped for a settlement like those achieved for the Rotorua, Taupo, and Wairarapa lakes. But the situation must now be resolved:

The appeals, however have stood over so long that it is desirable that some finality should be reached with regard to them and I would be glad to know if there is any reason why the hearing of them by the Native Appellate Court should not be proceeded with after reasonable notice to the Crown and the Maoris interested.³¹⁹

The Native Department consulted the Crown Law Office. The Crown lawyer who had conducted the Rotorua lakes case, Mr Prendeville, researched the matter and reported to the Solicitor-General on 27 November 1934. He outlined the history of Maori claims to lakes and rivers, as well as the particular circumstances

316. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), pp 38–40, 46–47

317. Crown solicitor to Hampson and Chadwick, 30 June 1939 (Walzl, supporting papers to 'Waikaremoana' (doc A73(a)), p 477)

318. Waipatu Winitana to Native Minister, 7 January 1932 (Walzl, 'Waikaremoana' (doc A73), p 314)

319. Chief Judge Jones to Native Minister, 2 March 1934 (Walzl, 'Waikaremoana' (doc A73), p 314)

for Waikaremoana, the Whanganui River, and Lake Tarawera.³²⁰ Prendeville concluded:

The main issue therefore is whether the natives own the lakes under the Treaty of Waitangi and subsequent statutory provisions providing for the issue of the statutory title to other customary lands after investigation by the Native Land Court or whether the large lakes like tidal waters and enclosed areas of the sea remain vested in the Crown. The theory that a lake is land covered by water and therefore capable of private ownership, it is contended for the Crown, is a principle of law based on Roman Law and was not a principle known to the Maori. In most cases a further problem arises as to the rights of riparian owners. In respect of many lakes, particularly Waikaremoana, the Crown is the owner of nearly all the land along the border of the lake, and if the ordinary principle of *ad medium filum* applies a large proportion of the lakes would follow the riparian ownership. Foreseeing this and other similar difficulties, Sir John Salmond when drafting the Native Land Act 1909 provided in section 100 that the Governor-in-Council might prohibit the Native Land Court from proceeding to ascertain the title of any customary land if he thought fit, and section 85 that a proclamation by the Governor that any land vested in His Majesty is free from any native customary title shall be accepted as a conclusive proof of the fact so proclaimed. Section 100 was however repealed in 1913. As any Court proceedings for determining the questions in issue will be both long and expensive and as the Government has already settled by compromise Rotorua District and Taupo, it is a question of policy whether the same proceeding should not be followed in the case of other lakes like Waikaremoana that must essentially be owned and controlled by the Crown.³²¹

In other words, Prendeville suggested that long and expensive litigation should be avoided and the claims ‘settled by compromise’, as had been the case for Rotorua and Taupo, but that this was a policy call. As a bottom line, and as was constantly argued within Government, the ultimate result needed to be Crown ownership and control of major waterways. Everyone seemed to share this belief, in the Crown Law Office as in other Government departments. While Salmond’s ideas continued to dominate, there was also now reliance on the position created by the UCS, where the Crown had become the riparian owner of almost the whole of the lake’s shores.

In February 1935, Prendeville’s report was forwarded to the Attorney-General and the Native Minister. Solicitor-General Cornish had already met with the Attorney-General and received approval to go ahead with the appeals if Cornish ‘thought it desirable to do so’. Clearly, this was not Cornish’s preferred approach. There were other considerations than the ‘purely legal’, including matters of policy,

320. Stevens, ‘History of the Title to the Lake-bed’ (doc A85), pp 26–27

321. Prendeville to Solicitor-General, 27 November 1934 (Stevens, ‘History of the Title to the Lake-bed’ (doc A85), p 27)

and he put the matter to Ministers in writing and sought a formal decision from them as to whether the appeals should be prosecuted.³²² Cornish noted that the Crown could simply continue with the status quo: ‘The matter, can, of course, stand over further as it has done in the past, and I do not think that the Native Land Court would take the responsibility of dismissing the appeals for want of prosecution.’ But Cornish advised Ministers to make a decision whether to ‘go on with the appeals’ or abandon them. If the Government did give up the appeals, it could still legislate a solution. Sir Francis Bell had been consulted. His opinion was that the Crown should prosecute the appeals. The Crown ‘would be in no worse a position for purposes of legislation after a decision (even though adverse) of the Appellate Court than it is now.’³²³ According to Ben White, Cornish’s legislative solution was the ‘possibility of passing special legislation vesting all navigable lakes in the Crown – in much the same fashion as the Coal Mines Legislation had in respect to rivers.’³²⁴

Although we have no direct evidence as to what decision was made, practically speaking the outcome was that the Crown did nothing. It did not prosecute the appeal, it did not seek to negotiate a compromise with Maori, and it did not legislate to establish its ownership of all navigable lakes (which could have involved many more compensation claims). The safety net for the Crown, of course, was Cornish’s advice that the Native Appellate Court would not take responsibility on its own for dismissing the appeals if they were not prosecuted. This meant that, in many ways, the status quo of leaving the appeals on the books and taking no other action was the safest and certainly the easiest option for the Crown. In our view, this was a cynical approach. In the claimants’ submissions, however, the appellate court’s management of this case was seen as ‘feeble and far too deferential towards the government of the day.’ In their view, the court ought to have set the case down for hearing and then struck it out for non-prosecution. The Government should not have been able to rely on the court simply continuing to wait until it was convenient for the Crown to prosecute the appeal.³²⁵ In any case, nothing concrete eventuated from the chief judge’s approach to the Native Minister in 1934.

This was still the situation in November 1935, when five Maori leaders – Te Hata Tipoki, Patu Te Rito, Sidney Whaanga Christy, Tiaki Mitira, and Turi Carroll – wrote on behalf of the ‘Maoris of the Wairoa district’ to Prime Minister Forbes and Finance Minister Coates. This was the claimants’ second high-level approach in the 1930s, following that of Waipatu Winitana and Ngati Ruapani in 1932. One of the Wairoa community’s concerns was the lake:

322. Solicitor-General to Attorney-General and Native Minister, 15 February 1935 (Stevens, ‘History of the Title to the Lake-bed’ (doc A85), pp 27–28)

323. *Ibid*, p 27

324. White, *Inland Waterways* (doc 113), p 163

325. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), p 45

The Native Land Court has heard the claims of the Maori claimants to the bed of the Waikaremoana lake and awarded the same to the Maoris. The Crown has appealed against this award. During the depression, we did not desire to press this matter, but now that the Dominion appears to be emerging from the worst aspects of its difficulties, we desire to remind the Government of this claim and to ask that the Crown take the necessary steps to prosecute its appeal before the Native Appellate Court or alternatively that the Crown acknowledge the title of the Natives to the bed of the Lake.³²⁶

Researchers in our inquiry did not uncover a response from these Ministers to the Wairoa leaders, but the status quo continued through 1935 and 1936. The Crown neither sought a fixture to prosecute its appeal nor abandoned its appeal and acknowledged Maori title to the lake. The change of government at the end of 1935, when the first Labour Government took office, had an impact. Prime Minister Michael Joseph Savage (who was also Native Minister) met with the Attorney-General in 1937 and 'agreed that steps should be taken to have a fixture made for the Hearing of the Appeal'.³²⁷ Once again, however, nothing happened. In 1938, in response to a petition from Ngati Ruapani, the new Native Department Under-Secretary reminded his Minister that this meeting had taken place: 'Nothing has been done so far as I am aware,' he wrote, to carry out this course of action.³²⁸

There were two approaches from the Maori owners in 1938. First, on 15 April, Whena Matamua, secretary of the Ruapani Maori Labour Party Committee, wrote to the Minister of Internal Affairs requesting information as to:

- ▶ fishing licence fees for the lake;
- ▶ profits from the Government launch and boat hire fees on the lake;
- ▶ profits from private launch and boat hire fees on the lake;
- ▶ profits from Lake House;
- ▶ possum licence fees for the area around the lake; and
- ▶ deer licence fees for the area around the lake.³²⁹

The view within Government was that no information should be provided lest it be used to support the Maori claim to ownership of the lake. Also, the Native Department was concerned that even supplying the information might be taken as an admission of Maori ownership.³³⁰

Secondly, in June 1938, a petition from 104 signatories, identifying themselves as Ngati Ruapani 'who are resident at Waikaremoana,' was sent to Prime Minister Savage. The petitioners asked the Government to 'make permanent' the Maori

326. Te Hata Tipoki, Patu Te Rito, Sidney Whaanga Christy, Tiaki Mitira, and Turi Carroll to Forbes and Coates, 16 September 1935 (Walzl, supporting papers to 'Waikaremoana' (doc A73(d)), p 2015)

327. Under-Secretary, Native Department, to acting Native Minister, 29 June 1938 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1150)

328. Ibid

329. Walzl, 'Waikaremoana' (doc A73), p 315

330. Ibid, p 316

title to the lake.³³¹ The Native Department interpreted this as a request to either prosecute or withdraw the Crown's appeal.³³² As noted above, the Under-Secretary reminded his Minister that a decision had been made to proceed with the appeal back in 1937, but nothing had been done.³³³ A response was sent to Karu Rangihau and the other petitioners, to the effect that the Government was considering whether or not to proceed with its appeal, and that a decision would be made shortly. Again, nothing came of this.³³⁴

In February 1939, it was once again the turn of the chief judge to approach the Crown. In a memorandum to the Under-Secretary, he said that he was 'anxious' to see the Crown's appeal prosecuted because the other (Maori) appeals against the 1918 decision also remained unresolved. Chief Judge Jones proposed to set down a special sitting at Wellington in April 1939 with a full bench, 'if the Minister approves'. He noted that the matter of the Crown's appeal had been brought before the Native Minister 'some time ago' but that nothing definite had resulted. He also sought a swift decision so that as much public notice as possible could be given.³³⁵ The Under-Secretary consulted his counterpart in the Lands Department in March 1939, asking if there would be any objection to the appeal proceeding. The Lands Department consulted Solicitor-General Cornish, whose answer was that he planned to appear in this case himself but could not do so for 'some months to come', so the matter should be stood down in the meantime.³³⁶

The chief judge accepted that no hearing could take place in April or May 1939 but he continued to pursue the matter. The Solicitor-General's response was that 'no blame for the delay in hearing could be placed on the Chief Judge as [he] had mentioned it on many occasions'. Although Cornish promised to speak to the Attorney-General, he advised Chief Judge Jones in May 1939 that 'urgent state matters' meant that there was little chance of the Crown being able to deal with the appeal.³³⁷

In early June 1939, Waikaremoana Maori leaders wrote to their Member of Parliament, Sir Apirana Ngata, seeking advice and trying once again to get some progress in this matter. Savage responded to Ngata that the appeal could not be heard at present because the Solicitor-General was not available.³³⁸

By this time, the Maori owners had exhausted their extra-legal options. They had sent petitions and letters to Prime Ministers and Ministers from 1932 to 1939

331. Karu Rangihau and others to Prime Minister, 13 June 1938 (Walzl, 'Waikaremoana' (doc A73), p317)

332. Walzl, 'Waikaremoana' (doc A73), p317

333. Under-Secretary, Native Department, to acting Native Minister, 29 June 1938 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1150)

334. Walzl, 'Waikaremoana' (doc A73), p317

335. Chief Judge Jones to Under-Secretary, Native Department, 8 February 1939 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1149)

336. Under-Secretary, Native Affairs, to Under-Secretary for Lands, 20 March 1939 (Walzl, 'Waikaremoana' (doc A73), p317)

337. Chief Judge Jones, memorandum, 30 May 1939 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1146)

338. Walzl, 'Waikaremoana' (doc A73), p318

without result. They had sought the assistance of their Member of Parliament, again without result. They had put it to the Crown that it must either prosecute its appeal or confirm their title, with the hope that the Crown would agree to drop the appeal and negotiate a settlement with them. None of these strategies had worked. Despite the privations that would result from litigation, they now had no choice but to go back to court.

As a result, the Waikaremoana owners engaged a lawyer, MH Hampson, who wrote to the Solicitor-General on 20 June 1939. Hampson hoped the Crown would agree that ‘after 21 years [the appeal] can reasonably be said to have lapsed for want of prosecution’. Hampson proposed to apply to the appellate court to strike out the appeal.³³⁹ It was in response to this letter that a Crown solicitor prepared the document cited earlier, outlining the official view of the delay. According to this solicitor, ‘[n]othing further was heard by the Crown in respect of Waikaremoana’ between 1931, when the Crown agreed to wait during the Depression, and March 1939, when the chief judge sought to set down a fixture. Also, there had been no lawyer for the owners with whom the Crown could arrange a fixture ever since 1926.³⁴⁰ The Crown solicitor concluded: ‘In view of the foregoing I cannot see how you can claim that the Appeal has lapsed for want of prosecution by the Crown and I am directed to state that the Crown will oppose any application to strike out the appeal.’³⁴¹

We are surprised that the Crown Law Office claimed to have heard nothing about Waikaremoana between 1931 and 1939. The evidence is very clearly to the contrary. Either the Maori owners or the chief judge had kept the appeal before the Crown from 1934 to 1939 without result. In any case, the Maori owners’ solicitor, Mr Hampson, died soon after and they were once again without counsel.³⁴² A Crown Law Office memorandum noted in 1944 that ‘On his death the appeal was again left in abeyance.’³⁴³

In our view, it was the Crown’s responsibility to either prosecute or abandon its appeal. We accept that costs posed a serious problem for the Maori owners, especially during the Depression, and the Crown cannot be criticised for agreeing to postpone its appeal during such a serious economic crisis. As counsel for Nga Rauru observed, the ‘Maori contribution to the delays was largely based on the difficulties of mounting an appeal during the disruption of the consolidations [a reference to the UCS] or on their inability to afford suitable counsel to represent their interests.’³⁴⁴ Yet the financial situation during the Depression was such that we do not blame the Crown for not assisting the respondents with their costs at that time. As far as we are aware, the Depression era was the only period in which the

339. Hampson to Solicitor-General, 20 June 1939 (Walzl, ‘Waikaremoana’ (doc A73), p 318)

340. Crown solicitor to Hampson and Chadwick, 30 June 1939 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(a)), p 477)

341. *Ibid*, p 478

342. Walzl, ‘Waikaremoana’ (doc A73), p 319

343. Prendeville to Solicitor-General, 24 February 1944 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), p 1127)

344. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 176

owners' inability to proceed due to costs was raised directly with the Government. And the owners only sought a delay for that reason during the Depression – afterwards, as Wiren pointed out in the appellate court, Maori would have engaged counsel if the Crown had done its part and sought a fixture.

We note, too, that the Crown made no effort whatsoever to have its appeal prosecuted from 1926 to 1939 (and beyond, as we shall see in the next section). While the unavailability of lawyers and court scheduling problems were an issue in the early 1920s, the Crown could not really rely on this as an explanation for not proceeding or otherwise resolving matters in the 1930s. It is correct to say, as the Crown solicitor did in 1939, that there was no lawyer for Crown counsel to communicate with, but it was not the case (as he also said) that the Crown had heard nothing of Waikaremoana from 1931 to 1939. From 1932 (and more particularly from 1934 onwards), there were approaches to the Crown from both the Maori owners and the appellate court. In particular, the owners wanted the Crown to prosecute or abandon its appeal – preferably to abandon it and recognise them as the legal owners of Lake Waikaremoana. It is not the responsibility of respondents to try to force appellants to prosecute their appeal. The Crown's response throughout the 1930s was to do nothing: to leave its appeal on the books, comfortable in the belief that the court would not dismiss it for want of prosecution. While it is not always possible to pinpoint where or how the decision was made each time, the Government did not progress its appeal in the 1930s and negated all attempts to get it to do so.

20.6.3.4 What does the evidence show for the period 1940–44?

According to Mr Walzl, the loss of their lawyer (Hampson) and a chronic lack of funds prevented Maori from pressing the Crown or court further in respect of the lake, from 1940 to 1943.³⁴⁵ During that period, the Crown for its part still made no attempt to seek a fixture for the appeal. Thus, the Crown took advantage of this four-year period, when the Maori owners ceased to press it, to keep the appeal on the books without prosecuting it. No work was done on the appeal. The Crown was no readier to proceed at the appellate court hearing in 1944 than it had been in 1939. Although Solicitor-General Cornish tried to persuade the Maori owners in 1944 that the Crown was not treating them and their rights with contempt, his argument was not a convincing one.

The Maori owners took up the issue again in May 1943. A 'very big hui' was called at the lake. Bob Tutako, who chaired this hui, reported:

people from Ruatoki, Whakatane & Opotiki & Ruatahuna who represent Tuhoe tribe were present headed by a man named [Takarua] Tamarau. Ngatikahungunu, Tamaterangi were also represented by a very big crowd headed by Rev Huata &

345. Walzl, 'Waikaremoana' (doc A73), p 331

Peta Hema. The Waikaremoana people (which is the home people) represent Ngati Ruapani; well over 300 people assembled there.³⁴⁶

It was agreed at the hui to write to the chief judge and ask for a time suitable to the Crown so that all the appeals could finally be resolved. Lawyers' fees were inevitably discussed.³⁴⁷ Before Tutako even wrote the letter, however, the Prime Minister had apparently heard about the resolutions passed at the hui and agreed that the Crown would 'proceed with the appeal as soon as possible'. As a result, Tutako's letter was about *when* rather than *whether* a fixture could be arranged.³⁴⁸

Tutako's letter to the chief judge was followed up on 31 May 1943 by an approach to Eruera Tirikatene, member of Parliament, seeking advice. This letter was sent in the name of Manakore Tamihana, and it asked whether the time was right to raise the Treaty of Waitangi. As the first Ratana member of Parliament, this query would have had great import for Tirikatene. It was made in connection with the lake, which had, the owners said, still not been settled since 1917, 'but now we are working again to regain Waikaremoana'. The estimated cost to the people in legal fees would be between £300 and £400 – some had already donated towards the cost but others were waiting for advice (from Tirikatene) as to whether this was the right time to proceed under the banner of the Treaty. Tirikatene forwarded this letter to the Native Minister.³⁴⁹

We have no information as to what advice Tirikatene gave but some of the Maori owners had already engaged SA Wiren as their lawyer. By late June 1943, Wiren had met with Prendeville of the Crown Law Office and agreed that the appeal would be heard in October or November 1943. It was at this point that there was a new development: the Waikaremoana appeal became bound up with the Crown's Whanganui River appeal, which was to influence the Crown's position on Lake Waikaremoana for the next decade. On 14 October 1943, the chief judge held a chambers conference in Wellington with Wiren, Prendeville, and DGB Morison (who represented the Whanganui River people). Prendeville explained that the Crown Law Office was very busy with important war activities and would prefer the Whanganui River appeal to be delayed. But the chief judge scheduled hearing of both appeals to begin on 27 March 1944.³⁵⁰

At last, after a decade of effort from 1934 to 1943, the Maori owners and the court had succeeded in getting the Crown to agree to a hearing date. Now that this fixture had been set, the Government – for the first time since 1926 – began to seriously consider whether or not to go ahead with the appeal. HGR Mason, the

346. Bob Tutako to chief judge, 24 May 1943 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1139)

347. *Ibid*, pp 1139–1140

348. *Ibid*, p 1140

349. Tamihana to Tirikatene, 31 May 1943 (Walzl, 'Waikaremoana' (doc A73), p 332)

350. 'Wanganui River and Waikaremoana Lake Appeals', minute, chief judge's office, 14 October 1943 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1134)

Native Minister, suggested to Savage that it would be cheaper and easier to negotiate a settlement than fight the appeals:

In each case I imagine the Maoris to believe that fabulous sums are involved, but in my opinion compensation cannot be large and the cost and work of litigation is out of proportion to the values involved. If there is an intention of trying to settle Maori claims in the near future it might save much work and bother if early action to that end could be authorised.³⁵¹

As far as we can tell, though, nothing definite happened until the Crown Law Office received formal notification of the hearing on 21 February 1944.³⁵² At that point, Prendeville wrote a memorandum for the Solicitor-General, explaining that the Crown had been inconsistent in its approach to lake titles in the past. It had purchased Lake Wairarapa from Maori in the 1880s, he said. Later, it had purchased part of Lake Tarawera. By legislation it had declared Lake Horowhenua to be a 'Native Reserve'.³⁵³ And in more recent times 'there have been the compromise settlements of the Arawa Lakes and Taupo'. On the other hand, the evidence on record for the two claims (Lake Waikaremoana and Whanganui River) was not, he felt, 'very convincing either way'. Detailed research was necessary but could not be done in time for a March 1944 hearing.³⁵⁴

In light of all this, Prendeville suggested that the Crown had three options:

- ▶ to 'compromise the claims in the same manner as the Rotorua and Taupo claims were settled, ie by an annual payment thereby leaving the issue still at large';
- ▶ to pass legislation immediately, declaring that all lakes, rivers, and mud flats, 'unless expressly granted by the Crown, are and have always been vested in the Crown since 1840'; and
- ▶ to go on with the appeals – in which case, if the Crown lost it would have no choice but to 'purchase the interests of the Natives in order to retain control of the lake and the [Whanganui] river'.³⁵⁵

After considering this advice, Solicitor-General Cornish thought that the Crown should delay any hearing of the appeals and negotiate a settlement. He advised the Attorney-General and Native Minister accordingly:

351. Native Minister to Prime Minister, 29 October 1943 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1133)

352. Walzl, 'Waikaremoana' (doc A73), p 333

353. Prendeville was mistaken about Lake Horowhenua, which by legislation had been declared a public reserve, albeit one in which certain Maori rights were recognised and provided for – but he was not mistaken in the sense that the Crown had been inconsistent, since it had accepted Maori ownership of this lake in 1905 and negotiated with its owners.

354. Prendeville to Solicitor-General, 24 February 1944 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1127–1128)

355. *Ibid*, p 1128

Lake Rotoaira

In 1944, Prendeville's memorandum to the Solicitor-General pointed out that the Crown had acted inconsistently in respect of how it had treated Maori lake claims. He did not mention Lake Rotoaira in his account, but perhaps he should have done. Lake Rotoaira is a taonga of Ngati Tuwharetoa, who applied to the Native Land Court for legal ownership in 1937. The Crown appeared at the December 1937 hearing and opposed the claim, arguing that Maori custom did not recognise ownership of lake beds, and that Lake Rotoaira belonged to the Crown 'as an attribute of sovereignty' and because the Crown had purchased land abutting the lake. After a number of adjournments, the Crown withdrew its objection to the application in September 1943. Crown counsel 'put on record that such action should not be taken as a precedent in respect of the beds of inland waters'. In 1954, when Lake Rotoaira was again before the court, the Crown repeated that its non-objection was specific to Rotoaira and was not an acknowledgement that lakebeds were customary land. Thus, the Crown had withdrawn its objection to Maori ownership of Lake Rotoaira in 1943, the year before it proceeded with its Waikaremoana appeal.¹

1. Waitangi Tribunal, *Te Kahui Maunga: The National Park District Inquiry Report*, 3 vols (Wellington: Legislation Direct, 2012), vol 3, pp 1006–1007

I think the best course is to adjourn these hearings till the end of the war, in the hope that a settlement may be effected in the meantime. The fact is that the increase of work caused by war conditions makes it impossible to give the necessary preparation to the cases.³⁵⁶

Thus, both the Native Minister and the Solicitor-General thought it was better to negotiate a settlement rather than have the appeals heard. But the Government seemed unable to make a decision. We have no information as to why that was the case. Thus, on 6 March 1944, with the hearing only three weeks away, Prendeville wrote urgently to the Department of Lands and Survey that he still had no instructions from the Crown. The Native Appellate Court judges would be assembling, and representatives of the Maori claimants would also be coming to Wellington. The court would likely only agree to an adjournment if there was 'a definite

356. Solicitor-General to Attorney-General and Native Minister, 25 February 1944 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1128)

undertaking by the Government that the adjournment is for the purpose of negotiating a settlement.³⁵⁷

We have no information as to exactly what the Crown decided, except insofar as it can be inferred from Cornish's letter to the chief judge on 22 March 1944, five days before the hearing was due to start. He advised Chief Judge Shepherd that the Crown had intended to proceed with the appeals at the special sitting on 27 March but was unable to do so, due to 'exceptional pressure of work', aggravated by the illness of one Crown solicitor and the death of another. A 'great deal of research work' was still needed, and there was little prospect of it 'for some considerable time to come'. Thus, the Crown sought an adjournment – and not for a specific period but 'sine die'. Cornish suggested that Maori had already intimated that if the appeals were decided in their favour, 'and if the Government should decide to acquire such rights as they might be found to possess, the sum so fixed or agreed upon need not be paid until after the war. That being so, the interests of the Natives will not be prejudiced by a further postponement.'³⁵⁸

Clearly, the Government had rejected Cornish's advice to delay the appeals and settle with Maori in the meantime, or this would have been used as grounds for the adjournment. The Crown still intended to see whether it could win the appeals (and therefore might not have to pay anything). But preparation of the Crown's case had not been prioritised and would still not be prioritised for the foreseeable future. If Maori won, the Crown would buy out their interests – but that could wait until after the war.

In reply to the Solicitor-General, the chief judge wrote that an adjournment was a decision to be made by the appellate court. Nonetheless, he indicated that – given the length of time since the Crown had lodged its appeals, and given the efforts of Maori to get the appeals heard – it was likely 'only very substantial grounds for an adjournment would avail the Crown.'³⁵⁹

On 28 March 1944, the appellate court sat and Cornish applied for an adjournment sine die on much the same grounds as those put forward in his letter to the chief judge (indeed, the letter was read out in court).³⁶⁰ He also explained that the application might not need to be 'sine die' if the Crown could arrange for 'skilled assistance', and that – in a week or so – the Crown Law Office might be able to

357. Prendeville to Under-Secretary for Lands, 6 March 1944 (Walzl, supporting papers to 'Waikaremoana' (doc A73(a)), p 469)

358. Solicitor-General to chief judge, 22 March 1944 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1130)

359. Chief judge to Solicitor-General, 23 March 1944 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1129)

360. Department of Maori Affairs, 'Lake Waikaremoana – Crown Appeal' (doc H2), p 2. Document H2 is a typescript reproduction of the minutes for the Native Appellate Court hearing of the Crown's Lake Waikaremoana appeal in 1944. Unfortunately, some text has been omitted from the early part of the document. The missing material may be found in a reproduction of the minutes for the Native Appellate Court's April 1944 hearing in volume 59 of the Waitangi Tribunal's *Raupatu Document Bank*. For this reason, most of our references are to document H2, but some references are to volume 59 of the *Raupatu Document Bank*.

advise of a time by which it could be ready to proceed. But he also stated that this might not be possible.³⁶¹

Mr Wiren responded that the Crown was trifling with the court and making a mockery of his clients. He pointed out that the Crown had never turned up to argue its case in the original hearing, and had then lodged an appeal in 1918 and ‘from that date to this it has not done anything to see that the Maoris received justice. By justice I mean the right of a British subject to have his case dealt with by a Court and his rights determined.’³⁶²

Wiren also denied that his clients would not be prejudiced if the matter was held over until after the war (which, of course, no one knew would end in 1945). All of the Maori appellants from 1918 were now dead save one – the long delays were causing injury in respect of these other appeals. Also, Maori were unable to get compensation for use of or injury to their lake in the meantime. Wiren pointed out that the Government was in the process of modifying the lake for hydro-electricity, even as the appellate court was sitting, in the following exchange with Cornish:

Wiren: The Public Works Department is filling in a fairly large section of Lake Waikaremoana and they are tunnelling . . .

Cornish: I don’t know that that is correct.

Wiren: And they are tunnelling under the road for the purpose of extracting water from the Lake. For that the Maoris have no remedy until they get a freehold title. So long as this land is customary land claims for trespass can be brought only by the Crown. That is Section 116 of the Native Land Act, and in other words the Crown can trespass as it wishes so long as this case is in abeyance.³⁶³

Wiren also suggested that there was no question of fact to resolve – it was all a matter of law and there was no need for the Crown to do detailed research on matters of fact. Contrary to what Cornish had indicated, Wiren stated that none of his clients had ever intimated to the Crown that they would wait for the end of the war to receive compensation – but if that were to be the case they were entitled to have their claims resolved, the amount determined, and a rate of interest set.³⁶⁴

Cornish responded that he hoped Maori understood there was no ‘wilful, contemptuous disregard of their rights by the Crown. Nothing is further from the Crown’s intention than to do that. It is only because it is not possible adequately to prepare the case that the Crown is unable to go on.’³⁶⁵ Nonetheless, Cornish was very definite that the Crown was not prepared to abandon its appeals.³⁶⁶

361. Department of Maori Affairs, ‘Lake Waikaremoana – Crown Appeal’ (doc H2), p 4

362. *Ibid*, pp 4, 6

363. *Ibid*, pp 6–7

364. *Ibid*, p 7

365. RDB, vol 59, pp 22,348–22,349

366. *Ibid*, p 22,349

As Cornish had feared, the court was not prepared to adjourn the case sine die simply on the basis that the Crown was still not ready to proceed after 26 years. No reasons were given, although the chief judge later commented (in a remark cited by the Nga Rauru o Nga Potiki claimants): ‘After a lapse of years the matter has assumed very great importance. It was up to the Crown in the past 26 years to initiate proceedings but the Crown has had no excuse for not having done so.’³⁶⁷

The court adjourned the case for a week to allow the Crown time to prepare.³⁶⁸ When Cornish later asked for more time to prepare an ‘affirmative’ case that the Crown owned the lake, he was granted a three-month adjournment.

20.6.3.5 Our conclusions about who was responsible for the delays

Our conclusion is that the Crown did try to prosecute its appeal between 1921 and 1926, allowing for an agreed break in the middle to accommodate the UCS negotiations and Bell’s absence from the country. Its attempts failed in this period, through no fault of its own. From 1926 to 1929, the Crown did nothing to prosecute its appeal. This was later blamed on the fact that the Maori owners had not come back to it with the name of a new lawyer. We attribute it more to the successful negotiation of the Rotorua and Taupo lakes cases by 1926, which took the heat out of the need to prove the Crown’s case in Waikaremoana. The Crown’s loss in court in the Lake Omapere case must have served as a further disincentive to prioritise the Waikaremoana appeal. Then, from 1929 to 1932, the Crown acquiesced in a situation where Maori could not afford to participate in litigation during the Depression. Although this was the least punitive approach that the Crown could have taken (rather than insisting on its appeal being heard at that time), it did not take any positive steps such as re-evaluating whether it should continue with the appeal in light of the Taupo and Rotorua settlements and the Omapere decision.

From 1934 to 1943, the Crown negated all attempts of the Maori owners and of the appellate court to get it to either prosecute or give up its appeal. Whenever those attempts lapsed, as they did from 1940 to 1942, the Crown’s default position was to do nothing and preserve the status quo. Although we can find no evidence of a deliberate policy to continuously delay the appeal, such was the effect. A decision was apparently taken in 1937 to proceed with the appeal, but nothing happened. We agree with the Nga Rauru o Nga Potiki claimants that the delay was ‘largely due to vacillation on the part of the Crown’ and its failure to take steps to ensure the case proceeded.³⁶⁹ Nothing had really changed by 1944. The Crown still sought an adjournment sine die, even when it was forced to show up in court and prosecute its appeal. Certainly, there were other important priorities for the Crown during the war years. But this long-outstanding matter, supposedly of great importance to the public interest, had already been left in limbo for 26 years.

367. RDB, vol 59, p 22,362; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p173

368. RDB, vol 59, p 22,350; Walzl, ‘Waikaremoana’ (doc A73), p335

369. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 169, 170

We turn next to consider another of the claimants' arguments: that the Crown should not have insisted on keeping its appeal live – and acting as if it owned the lake in the meantime – when the law was so clear that the Crown never had any hope of actually winning in the courts.

20.6.4 An 'entirely predictable' result? What is the significance of the Crown's loss in the Native Appellate Court in 1944?

According to the claimants, the Crown should have abandoned its appeal long before 1944. It was 'entirely predictable' that Salmond's arguments would fail in the Native Appellate Court.³⁷⁰ In claimant counsel's submission, the Crown's appeal 'clearly lacked substantive merit'.³⁷¹ This was not, we were told, a submission based on 'hindsight'. According to counsel for Wai 945 Ngati Ruapani, the law giving the Native Land Court jurisdiction to decide these matters had been clearly stated in *Tamihana Korokai*, it was well known that English common law did not give the Crown 'a presumptive title to lakebeds', and the Crown had lost on all points in the Lake Omapere case back in 1929. It should not have come as any surprise, therefore, that the Crown's arguments got 'very short shrift' in the Native Appellate Court in 1944.³⁷² Further, counsel for Wai 945 Ngati Ruapani argued that if the Crown had had genuine doubts about the Native Land Court's jurisdiction to make the decision it had come to in 1918, then it should have taken that issue to the Supreme Court immediately. It failed to do so – presumably because it knew that it could not succeed.³⁷³

Because the Crown had succeeded in diverting the Rotorua lakes case out of the Native Land Court before it was finished, and had failed to turn up or make its case in the Waikaremoana proceedings, the first time that Salmond's arguments were put to the court and decided was in the Lake Omapere case in 1929. As is well known, Judge Acheson rejected any notion that there was an implicit reservation of all navigable waterways when Maori agreed to the Treaty of Waitangi. He also completely rejected the idea that Maori were not the customary owners of their lakes: a lake was a piece of land covered by water and Maori custom recognised territorial authority over and possession of such bodies of water (see the sidebar over). In his 1929 decision, Judge Acheson thus rejected the two main planks of the Salmond argument. The Crown appealed this decision but, as with Lake Waikaremoana, had not prosecuted its appeal by 1944.³⁷⁴

In Professor Boast's evidence, the decision in the Omapere case was decisive:

lakebeds are simply land to which the Crown must demonstrate that it has clearly extinguished native title before it is entitled to assert ownership. The legal position

370. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), pp 37–40

371. *Ibid*, p 47

372. *Ibid*

373. *Ibid*, p 48

374. For an account of the Lake Omapere case, see White, *Inland Waterways* (doc A113), pp 223–242.

Extracts from the 1929 *Omapere* Decision

Did the ancient custom and usage of the Maoris recognise ownership of the beds of lakes?

Yes! And this answer necessarily follows from the more important fact that Maori custom and usage recognised full ownership of lakes themselves.

The bed of any lake is merely a part of that lake, and no juggling with words or ideas will ever make it other than part of that lake. The Maori was and still is a direct thinker, and he would see no more reason for separating a lake from its bed (as to the ownership thereof) than he would see for separating the rocks and the soil that comprise a mountain. In fact, in olden days he would have regarded it as rather a grim joke had any strangers asserted that he did not possess the beds of his own lakes.

A lake is land covered by water, and it is part of the surface of the country in which it is situated, and in essentials it is as much part of that surface and as capable of being occupied as is land covered by forest or land covered by a running stream.

To the spiritually-minded and mentally-gifted Maori of every rangatira tribe, a lake was something that stirred the hidden forces in him. It was (and, it is hoped, always will be) something much more grand and noble than a mere sheet of water covering a muddy bed. To him, it was a striking landscape feature possessed of a 'mauri' or 'indwelling life principle' which bound it closely to the fortunes and destiny of his tribe. Gazed upon from childhood days, it grew into his affections and his whole life until he felt it to be a vital part of himself and his people. . . .

To the Maori, also, a lake was something that added rank, and dignity, and an intangible mana or prestige to his tribe and to himself. On that account alone it would be highly prized, and defended. . . .

Finally, to all these things there was added the value of a lake as a permanent source of food supply. . . .

. . . Lake Omapere . . . has been for the Ngapuhis a well-filled and constantly available reservoir of food in the form of the shell-fish and the eels that live in the bed of the lake. With their wonderful engineering skill and unlimited supply of man-power, the Maori could themselves have drained Omapere at any time without great difficulty. But Omapere was of much more value to them as a lake than as dry land.

Was Lake Omapere, at the time of the Treaty of Waitangi (1840), effectively occupied

and owned by the Ngapuhi Tribe in accordance with the requirements of ancient Maori custom and usage?

Yes! The occupation of Omapere was as effective, continuous, unrestricted and exclusive as it was possible for any lake-occupation to be.

It is not contested that for many hundreds of years the Ngapuhis have been in undisputed possession of this lake, and have lived around or close to its shore. . . . Great numbers of the Ngapuhi, must have grown up within sight of Omapere's waters, and have regarded the lake as one of the treasured tribal possessions. By no [process] of reasoning known to the Native Land Court would it be possible to convince the Ngapuhis that they or their forefathers owned merely the fishing rights and not the whole lake itself.

According to ancient Maori custom and usage, the supreme test of ownership was possession, occupation, the right to perform such acts of ownership as were usual and necessary in respect of each particular portion of the territory possessed.

In the case of a lake the usual signs of ownership would be the unrestricted exercise of fishing rights over it, the setting up of eel-weirs at its outlets, the gathering of raupo or flax along its borders, and the occupation of villages or fighting-pas on or close to its shores. . . .

In short, the Ngapuhis used and occupied Lake Omapere for all purposes for which a lake could be reasonably used and occupied by them, and the Native Land Court says that much less use and occupation would be ample, according to ancient custom and usage, to prove actual and effective ownership of the lake, bed and all.

It was contended (but not seriously pressed) on behalf of the Crown that sales by Natives to the Crown, of areas adjoining Lake Omapere, gave to the Crown rights in those portions of the bed of the lake fronting on to the portion sold.

This contention has no merit whatever. The sales to the Crown were of particular areas of land well defined as to area and boundaries, and could not possibly have been intended to include portions of the lake-bed adjoining. See also Judgment of Court of Appeal in re [*Mueller v Taupiri Coal Mines Co* (1900) 20 NZLR 89].

Also, the mere fact that Lake Omapere was 'customary land' was an absolute bar to sales of any portions of it to the Crown. Section 89 of 'The Native Land Act, 1909', forbids sales of 'customary land' to the Crown, and earlier statutory provisions were to the same effect.

Moreover, Lake Omapere was tribal territory, and therefore, according to established Maori custom and usage, no individual or groups of individuals had the right to alienate any portion of its bed. To hold otherwise would be to give support to

that lamentable doctrine which led, in the celebrated Waitara Case, to tragic and unnecessary wars between Pakeha and Maori.

There can thus be no presumption either in law or in fact that the sales of some lands to the Crown adjoining Lake Omapere carried with them portions of the lake or of its bed.

.

Are the words 'Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess,' contained in Article Two of the Treaty of Waitangi, ample in their scope to include Lake Omapere?

Yes!

According to both English Common Law and ancient Maori Custom, the term 'Lands and Estates' would be ample to include by description a lake or a lake-bed. But even if that were not so, the further term 'other properties collectively possessed' would be more than ample to include a lake occupied and possessed as was Omapere.

.

Did the parties to the Treaty of Waitangi contemplate, at the time of the signing, that the Natives would be entitled to the bed of Lake Omapere?

The parties to the Treaty certainly intended it to protect the rights of the Ngapuhis to their whole tribal territory. The Court has already shown that such territory necessarily included Lake Omapere, and that ownership of the lake necessarily included ownership of the lake-bed.

.

Did the parties to the Treaty of Waitangi contemplate, at the time of the signing, that the Crown would claim the bed of Lake Omapere?

No!

There was no Common Law Right of the Crown to lakes or to the beds of lakes in England, so it is impossible to suppose that the Crown's representatives who were negotiating with the Maoris took it for granted that New Zealand lakes would belong to the Crown as a matter of right.

.

... In these later days, (1929), it is not sufficiently realised how dependent the early settlers were on the Treaty of Waitangi, and what great benefits the white people derived from it for several decades.

.

In view of the considerations set out above, the Native Land Court holds that it is unreasonable to suppose that the Natives at the time of the Treaty intended to give up Lake Omapere or its bed to the Crown, and that it is equally unreasonable to suppose that the Crown at the time of the Treaty intended to claim the lake or its bed in opposition to the Natives.¹

1. *Lake Omapere* (1929) 11 Bay of Islands Minute Book 253, 259–263, 265–266, 271–273, 276

with respect to the bed of Lake Waikaremoana is, therefore, quite clear despite all the complexities and delays that have occurred with respect to this case.³⁷⁵

In the claimants' view, it was a travesty for the Crown to rerun Salmond's discredited arguments in the Waikaremoana appeal. From 1929 at the latest, the Crown should have abandoned its appeal, recognised the Maori owners' title, and negotiated a just arrangement with them about the use and management of the lake. Crown counsel did not respond in detail to this aspect of the claims, stating simply that the Crown was entitled to contest such an important matter as the ownership of Lake Waikaremoana in the courts.³⁷⁶

In the Native Appellate Court, Solicitor-General Cornish began with a preliminary argument that 'Judge Gilfedder's decision was a nullity because the Native Land Court had failed to determine on "proper evidence" that the land under investigation [that is, the lakebed] was indeed customary land'.³⁷⁷ Relying on *Tamihana Korokai*, Cornish suggested that the Native Land Court's task was to determine 'whether any particular piece of land is native customary land or not'. This might involve determining whether a lake or any part of a lake was navigable, and – if so – 'whether according to native custom the Maoris were and are the owners of the bed of such lake or whether they had and have merely a right to fish in the waters thereon'.³⁷⁸ Cornish also cited Justice Edwards' statement that a relevant question of law, raised by Solicitor-General Salmond, was whether a lakebed is subject to native title given the 'inherent probability' that the Treaty and the native land laws had not intended detriment to the public. Although Salmond had not spoken of 'lighting and power', Justice Edwards had added that there was a question as to whether the Treaty had 'destroyed' the Crown's right to use 'rain water that collects in this natural reservoir' for hydroelectricity. Cornish's suggestion to the appellate court was that Justice Edwards, in his part of the judgment, had accepted these as legal questions which had to be determined by the Native Land Court.³⁷⁹

According to Cornish's submissions to the appellate court, Judge Gilfedder had known of these legal questions in 1918 and had failed to investigate and determine them. Also, as Cornish saw it, there was only one piece of evidence in the whole Native Land Court inquiry – that of Hukanui Watene (see the sidebar over) – on which any finding of ownership could have been based. But, in Cornish's view, this piece of evidence was consistent with a claim to fishing rights as much as ownership of the bed.³⁸⁰

Thus, Cornish argued that Judge Gilfedder's decision was made without jurisdiction because there was no 'proper evidence' of Maori customary usage or

375. Richard Boast, 'The Crown and Te Urewera in the 20th Century: A Study of Government Policy' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A109), pp 280–281

376. Crown counsel, closing submissions (doc N20), topic 28, pp 5–6

377. Stevens, 'History of the Title to the Lake-bed' (doc A85), p 31

378. RDB, vol 59, p 22,353; *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA), 359

379. RDB, vol 59, p 22,353

380. *Ibid*, pp 22,353–22,356

The Evidence of Hukanui Watene

During the Native Appellate Court hearing in 1944, Solicitor-General Cornish cited the evidence of one of the Ngati Kahungunu witnesses in the original Native Land Court hearing. This witness was Hukanui Watene, whose evidence was also relied on in our hearings by the Wai 621 Ngati Kahungunu claimants and by counsel for Ngai Tamaterangi. The passage quoted by Cornish was as follows:

As to rights to [the] lake, the rights were the same as on the land. The people who surrounded the lake had the right to use it in common. They went on the lake for fishing, canoeing, bathing etc. From the lake they got food, a fish called the Maihi or Koari, fresh water crayfish, and the fresh water cockle. That is why we claim the lake as we were entitled to the food and used it for canoes to cross it. We have done this from the days of our ancestors. It was always recognised there were Maori owners of the lake. No outside tribes could fish or use the lake. They would have been killed had they attempted to do. *It was different to the ocean* in this respect. There the Maoris had rights to certain rocks and fishing places but with the lake the people who owned the surrounding land were only entitled to the use of the lake and its products. We would have the right to the bed of the lake and the water above it. [Emphasis in original.]¹

1. Department of Maori Affairs, 'Lake Waikaremoana – Crown Appeal' (doc H2), p 53

ownership of the bed of the lake.³⁸¹ Nor was there any other 'authoritative binding judgment of this Court' on the ownership of lakes – there was only the Omapere decision, which, he argued, had been criticised and was under appeal.³⁸² The Native Appellate Court therefore had no jurisdiction to affirm or reverse Gilfedder's decision, because that decision had itself been made without jurisdiction. Cornish asked the court to state a case to the Supreme Court to determine this point. Then, if he lost in the Supreme Court, he wanted to come back to the appellate court and proceed with an 'affirmative' case to prove that the Crown owned the lake. More time, however, would be needed before such a case could be made out.³⁸³

The chief judge refused to agree that a case should be stated to the Supreme Court. Instead, on 4 April 1944 he delivered the appellate court's decision about jurisdiction (see the sidebar opposite for the full text of this decision). In response

381. RDB, vol 59, pp 22,357–22,361

382. Ibid, p 22,361

383. Ibid, pp 22,361–22,362

The Native Appellate Court's Decision on Jurisdiction

The Solicitor-General has raised, as a preliminary point in the matter of this appeal, that there is no valid judgment before the Court upon which an appeal may lie, and has directed argument to show that under these circumstances this Court has no authority to hear the appeal. He has submitted that the Order purported to be made by Judge Gilfedder was and is a nullity because a condition precedent to the exercise of jurisdiction by the Court was not complied with. He submits that the Court has jurisdiction to investigate the title to customary land, and customary land alone, and that the Court could only determine whether or not the land the subject of the application was customary land upon proper evidence.

The Solicitor-General offered the opinion that there was no evidence upon which the Court could find that the lake was customary land. The Natives have a right to go to the Native Land Court to have their title investigated and the Native Land Court can only be prevented from performing its statutory duty, first, under the Native Land Act; or, second, on proof in that Court that the lands are Crown Lands freed from the customary title of the Natives, or, third, that there is a Crown title to the bed of the Lake – *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321.

The Crown was aware of the application to the Court but for some reason which we are not concerned to discover, its representatives refrained from attending Court or offering any evidence of title in the Crown. Under these circumstances, the Court had before it the uncontradicted evidence of the Natives' witnesses. Having examined the claims and the uncontradicted evidence adduced at the hearing, and after giving full consideration to the submissions of the Solicitor-General in this matter, we are of the opinion that sufficient material was presented to the Court to justify its conclusion that at the time of the signing of the Treaty of Waitangi, Lake Waikaremoana was land held by Natives under their customs and usages and, therefore, that the Court acted within its jurisdiction in making its order.¹

1. Department of Maori Affairs, 'Lake Waikaremoana – Crown Appeal' (doc H2), p 43

to the preliminary matter raised by Cornish, the court relied on *Tamihana Korokai* to find that Maori had a right to go to the Native Land Court to have their title investigated. The only things that could stop the court from performing this statutory duty were: first, some contrary provision in the Native Land Act 1909; secondly, proof in court that the Crown had extinguished Maori customary title; or, thirdly, proof in court of Crown title to the lakebed. For 'some reason which we are not concerned to discover', the appellate court stated, the Crown had been aware of the Lake Waikaremoana claim but 'refrained from attending Court or offering any evidence of title in the Crown'. In that circumstance, Judge Gilfedder

was entitled to rely on the ‘uncontradicted evidence of the Natives’ witnesses.’³⁸⁴ Having examined that evidence and the claims that were before Gilfedder, the appellate court was satisfied that

sufficient material was presented to the Court to justify its conclusion that at the time of the signing of the Treaty of Waitangi, Lake Waikaremoana was land held by Natives under their customs and usages and, therefore, that the Court acted within its jurisdiction in making its order.³⁸⁵

The question before the appellate court then became whether or not the Solicitor-General could now establish his ‘affirmative’ case that title to Lake Waikaremoana was actually in the Crown. We do not intend here to examine Cornish’s further attempts to remove the case to the general courts. Those attempts, and the basis on which they were made, will be considered in the following section. In this section, we are concerned with the case made by Cornish for the Crown, and the appellate court’s decision.

After hearing further argument on 21 April, the appellate court agreed to a three-month adjournment to allow the Crown time to prepare its case.³⁸⁶ The hearing resumed on 1 August 1944, before Chief Judge Shepherd and Judges Carr, Harvey, Dykes, Beechey, and Whitehead. Cornish argued the Crown’s case on three grounds:

- ▶ First, Maori custom did not recognise a ‘separate property in the bed [or ‘soil’] of a navigable lake’, and Judge Gilfedder was mistaken ‘on the subject of custom.’³⁸⁷ Maori conceptualised lakes as water, giving rise to a right of user or fishery, rather than the English conception of owning the land under the water.³⁸⁸
- ▶ Secondly, that ‘even if there was a native custom, it has never been recognised or given legal validity by our legislation on the ground of public interest in navigation, [and] that there never has been granted to the native population the beds of navigable waters.’³⁸⁹ This argument was based on the legal theory that native title and the Treaty of Waitangi had no force other than through statute (the native land laws), and that navigable waterways were implicitly exempted to protect the public interest in these ‘highways.’³⁹⁰
- ▶ Thirdly, ‘on the assumption that I may be wrong on all that’, that the Crown had acquired the lands abutting the southern shores of the lake before 1918, and thus had become an owner under the *ad medium filum aquae* rule.³⁹¹

384. Department of Maori Affairs, ‘Lake Waikaremoana – Crown Appeal’ (doc H2), p 43

385. Ibid

386. Ibid, p 45

387. Ibid, p 49

388. Ibid, pp 49–50, 51–59, 61, 67–69, 72, 80–81

389. Ibid, p 49

390. Ibid, pp 62–74

391. Ibid, pp 49, 74–89

Apart from the emphasis on the Crown's claim as the owner of riparian lands, this was indeed a rerun of arguments rejected by the Native Land Court in the Lake Omapere case.³⁹²

The Native Appellate Court's substantive decision was delivered on 20 September 1944 (see the sidebar over for the full text). In the claimants' submission, the court's unanimous decision was very short (just over two pages), saw matters as 'very simple', and rightly 'gave the Crown appeal very short shrift'.³⁹³ After confirming its preliminary decision on jurisdiction, the appellate court found that Lake Waikaremoana was native customary land and the lower court had correctly exercised its jurisdiction to make freehold orders. The Solicitor-General's arguments about an exception for public rights of navigation ('highway of necessity'), the *ad medium filum* rule, and the legal effects of the Crown's acquisition of lands abutting the lake were all irrelevant: 'There is abundance of authority that in New Zealand the rights of natives are safe-guarded without reference whatsoever to the incidents of English law.' The Maori claimants had satisfied the court that they held Lake Waikaremoana 'in accordance with their ancient customs and usages'. Those rights 'once established are paramount and freed from any qualification or limitation which would attach to them if the rules and presumptions of English law were given effect to', which would include the Crown's assertion of rights as owner of riparian lands.³⁹⁴

The court concluded:

In our view the matter before the Court is very simple. We have already decided that Lake Waikaremoana can be considered as native customary land and that sufficient evidence was adduced to the Native Land Court upon which it could proceed to make freehold orders. We can find nothing in the submissions of the Solicitor-General to vary this view and the appeal of the Crown must fail.³⁹⁵

20.6.5 Why did the Crown refuse to accept the appellate court's decision, and wait another 10 years before finally accepting Maori ownership of the lake?

The Native Appellate Court's decision in September 1944, remarkably enough, did not end the Crown's procrastination over Waikaremoana litigation. Section 51(1) of the Native Land Act 1931 provided:

No order made with respect to Native land by the Court or the Appellate Court shall, whether on the ground of want of jurisdiction to make the same or on any other ground whatever, be annulled or quashed, or declared or held to be invalid, by any Court in any proceedings instituted more than ten years after the date of the order.

392. See White, *Inland Waterways* (doc A113), pp 226, 229–239.

393. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), p 47

394. Department of Maori Affairs, 'Lake Waikaremoana – Crown Appeal' (doc H2), pp 153–154

395. *Ibid*, pp 154–155

This Act gave the Crown a 10-year period in which it could still seek a writ of prohibition or a writ of certiorari in the Supreme Court. A writ of prohibition is an order from a superior court to a lower court, directing that litigation cease or that orders not be given effect because the lower court does not have proper jurisdiction to hear or determine the matters before it. A writ of *certiorari* orders a lower court to deliver its record in a case so that the higher court may review it.

Even before the appellate court delivered its judgment, the Crown intended to challenge it as based on an inadequate inquiry. In arguing for an adjournment,

The Native Appellate Court's Decision, 20 September 1944

This is an appeal by His Majesty the King against a decision of the Native Land Court delivered on the 7th June, 1918, on the investigation of title to Lake Waikaremoana.

The Solicitor-General submits that there was insufficient evidence before the Lower Court to establish that Lake Waikaremoana was held by natives in accordance with their ancient customs and usages, and in addition or alternatively he submits that various dispositions of the lands adjoining the lake have the effect of disposing of the ownership of the bed of Lake Waikaremoana. He challenges the jurisdiction of the Native Land Court to make final orders in respect of the bed of the lake and the jurisdiction of this Court to review the orders so made. It was not explained to this Court why the Crown should file a notice of appeal and then argue that there was no jurisdiction to deal with the matter instead of adopting the usual means of having an invalid order set aside.

Before a Court can proceed to hear any matter whatsoever it must first be satisfied that it has the necessary jurisdiction to proceed. This applies to the Native Land Court no less than any other Court, and if the question of jurisdiction is raised at any time during the hearing the Court must first determine this preliminary issue. When it is found that a Court has proceeded to make a final order it is deemed to have arrived at the conclusion that it was acting within its jurisdiction.

In the absence of special statutory jurisdiction, the jurisdiction of the Native Land Court is limited to matters which concern native land and native customary land, and in making final orders in respect of Lake Waikaremoana it is clear that the Native Land Court, of necessity, must have considered the lake as being native customary land. At no stage of the proceedings was any contrary opinion expressed to the Lower Court either by the natives concerned or by the representatives of the Crown. If the Native Land Court was in error in assuming jurisdiction the proper course for the Crown to adopt was to apply to the Supreme Court for an order restraining the Native Land Court from proceeding further with the matter and nullifying the order already made. Such a course has not been adopted at any time by the Crown during the long space of time which has elapsed since the making of the order. During the present proceedings the attention of the Solicitor-General

the Solicitor-General had told the court that such a major decision, affecting the public interest, needed as much research and authority behind it as possible if the Crown were to rely on it to compensate or settle Maori claims:

I know of course that an argument of sorts can be presented to this Court, but an argument of sorts is not good enough. The Court is entitled to more than that, and the public interest demands more than that. As far as I know – I believe I am right – this particular issue now raised has never been dealt with in a considered judgment of this

was specifically drawn to this aspect of the matter but no such action has been taken. The Solicitor-General has been content to make the matter an issue before this Court, and this Court has proceeded to make a determination which affirms that not only did the Native Land Court possess the necessary jurisdiction to make the orders, but the quantum of evidence was sufficient to justify the making of such orders. In arriving at this conclusion it is apparent that this Court must necessarily have considered the question as to whether Lake Waikaremoana was or was not native customary land and as such a proper subject matter for the Native Land Court to investigate. The Solicitor-General has raised no ground of appeal which is not satisfactorily dealt with by this preliminary determination.

The questions of the application of the *ad medium flum* rule, highway of necessity and the effect of conveyances or memorials of ownership are of great interest, but are not applicable to the present case. There is abundance of authority that in New Zealand the rights of natives are safe-guarded without reference whatsoever to the incidents of English law. The natives successfully establish their title to Lake Waikaremoana once they satisfy the Court that it was held by them in accordance with their ancient customs and usages, unless it be shown that this title has been extinguished. This cannot be shown by the mere assertion of title by the Crown but satisfactory proof must be adduced to the Court. In the course of years there are many rules and presumptions which have become incorporated in English law but we are of the opinion that in New Zealand these are of no force or effect if it is found that they in any way conflict with the customs and usages of the Maori people. We consider that these rights once established are paramount and freed from any qualification or limitation which would attach to them if the rules and presumptions of English law were given effect to.

In our view the matter before the Court is very simple. We have already decided that Lake Waikaremoana can be considered as native customary land and that sufficient evidence was adduced to the Native Land Court upon which it could proceed to make freehold orders. We can find nothing in the submissions of the Solicitor-General to vary this view and the appeal of the Crown must fail.¹

1. Department of Maori Affairs, 'Lake Waikaremoana Crown Appeal', 1944 (doc H2) pp 153–155

Court. I venture to say, therefore, that this Court expects a very thorough examination of the subject of native customary title, its roots, its nature and its limits, and the Court, I assume, will wish to have addressed to it submissions on the place, if any, that Maori conceptions of possession and ownership have in a system of jurisprudence. Now only a determination of this Court following a reasoned, a comprehensive, and an exhaustive study of these disputes will be of any use, I venture to suggest with respect. Only a judgment of the Court following such an examination of the issues will satisfy the Government that the beds of lakes and streams were papatupu, and only such a judgment following such an examination will avail the natives. In the event of discussions taking place between the natives and the Government for compensation for rights claimed, the Government cannot be satisfied – as I imagine, because I am not the Government, I am not the Executive or any member of the Executive – but as I imagine, the Government, if or when it should proceed to consider compensation for the natives, would want to be satisfied by a judgment that convinced its reason that the natives did own in fact and in law the beds of our navigable streams and lakes. . . . Now I have, with my friend Mr Prendeville, made a serious effort to prepare this case for this Court, but we find, both of us, that in the time available to us we simply could not present to the Court a considered survey and examination of the position such as the needs of the case require.³⁹⁶

On the evening of 4 April 1944, the court made its preliminary decision on jurisdiction (see above). Having delivered the judgment, the chief judge said:

You told us this afternoon, Mr Cornish, that should the point go against you, you proposed to move in the Supreme Court for a writ of certiorari. We propose to facilitate your doing that all we can, and for that reason we propose to adjourn the hearing of this appeal until the 21st April, that is a Friday, and at that time we expect you either to have issued your writ, or to have applied to me for a further fixture.³⁹⁷

Cornish noted that he did not ‘tie myself down to certiorari’ and might seek a writ of prohibition instead.³⁹⁸

When the appellate court hearing resumed on 21 April 1944, Prendeville appeared for the Crown because Cornish was busy in the Court of Appeal. Prendeville asked for a sine die adjournment because the Crown intended to institute proceedings in the Supreme Court. Wiren objected. The Crown was already supposed to have instituted those proceedings if it was going to, and Wiren asked for a fixture to resume hearing the appeal. The court once again refused to adjourn the case sine die and set down a hearing for 1 August 1944.³⁹⁹ As noted above, this gave the Crown three more months to prepare its case.

When the court resumed on 1 August, the Crown had still not attempted to

396. Department of Maori Affairs, ‘Lake Waikaremoana – Crown Appeal’ (doc H2), p 3

397. *Ibid*, p 43

398. *Ibid*

399. *Ibid*, p 45

remove the proceedings to the Supreme Court. The Solicitor-General submitted his understanding that the jurisdiction decision delivered orally on 4 April 'was only an expression of the Court's opinion' and that it was still open for him to argue the point – as he proceeded to do.⁴⁰⁰ During this August hearing, Cornish prepared a series of questions and asked the appellate court to state a case to the Supreme Court for its opinion on the questions he had raised. While he was considering the possibility of an appeal to the Privy Council, Cornish suggested that it would be preferable and cheaper to get these matters resolved by way of a case stated to the Supreme Court. Mr Cornish said:

I would say quite frankly this; my own personal view is that if this case went to a full bench of the Supreme Court, and the material matters were decisively answered against the Crown, as far as I am concerned that would be the finish. I would be satisfied.⁴⁰¹

The appellate court resolved to consider the matter closely while it was deliberating on its judgment, and to state a case to the Supreme Court if it was felt necessary.⁴⁰² In point of fact, the appellate court did not consider it necessary. Judgment was delivered on 20 September 1944.

In essence, the Government did not like the answer that it got from the appellate court, and did not consider that the answer was correct in law, let alone convenient. Two strands of thinking interacted over the next decade: on the one hand, a desire to quash the Native Land Court and appellate court decisions through further litigation; and, on the other hand, to make the problem go away by reaching a one-off settlement with these particular Maori owners. The second possibility had been given some consideration before 1944, and it had always been a likely destination of the long, slow journey that was taking place. But Salmond's view that lake cases should be settled politically rather than through litigation was no longer predominant. Instead, it still seemed possible to overturn the appellate court decision and never have to settle with or compensate the Maori owners – this remained a live possibility for the full 10 years permitted by statute. It was not until the Crown finally had to give up on the option of litigation in 1954 that some kind of negotiated settlement (or the more extreme option, expropriatory legislation) became inevitable. The question of why it took another 16 years after that to reach agreement is the subject of section 20.8.

As far as we can tell from the record, no consideration was given to an appeal from the appellate court to the Privy Council, even though Cornish had foreshadowed the possibility during the 1944 hearings. Presumably, the view prevailed – as expressed in court by the Solicitor-General – that it would be cheaper and more sensible to have the matter dealt with by the Supreme Court in New Zealand.

400. *Ibid*, p 49

401. *Ibid*, p 152

402. *Ibid*

The option of seeking writs of certiorari and prohibition, however, was under consideration for the next 10 years. The very first thing that the Crown did, following the appellate court decision, was to take steps to prevent the court from completing the issue of titles. In late September 1944, Lands and Survey staff were instructed to follow the advice of the Solicitor-General:

If you are asked to approve a plan of the bed of Lake Waikaremoana for the purpose of completing the Freehold Orders made by the Native Land Court and confirmed by the Native Appellate Court, I should be obliged if you would communicate with me before taking any action.

The Crown does not acquiesce in the Freehold Orders referred to above and considers that to the extent that the Native Courts had any jurisdiction they acted wrongly and to the extent to which they had no jurisdiction anything that they did is a nullity. In the Crown's view the Natives are not entitled to the bed of Lake Waikaremoana and the Crown will take all necessary steps to establish this. It is therefore desirable that nothing be done to alter the status quo pending the taking of further steps in the matter.⁴⁰³

Nonetheless, the Crown did not initiate proceedings in the Supreme Court. In April 1945, Crown solicitor A E Currie wrote a memorandum for the Lands Under-Secretary, pointing out that 'fresh original proceedings in the Supreme Court have been contemplated'. In the meantime, Cornish had retired and no successor had been appointed. Currie noted that although the department had ordered its staff not to provide maps for freehold titles, it had not actually instructed the Crown Law Office to begin proceedings in the Supreme Court.⁴⁰⁴ A 1954 Cabinet paper revealed why no action was taken: at the time the Attorney-General 'proposed that issues in relation to Wanganui River should be determined in the Supreme Court first, in anticipation that the decision in that case would, to some extent at least, settle the issues in the Waikaremoana case.'⁴⁰⁵

Negotiation with the owners was impossible in any case because of the outstanding Maori appeals against Gilfedder's decision, which were heard after the Crown's appeal was dismissed.⁴⁰⁶ As will be recalled, a decision had been reached back in the 1920s to hear the Crown's appeal first, as, if the Crown won, then the other appeals would not need to be heard. Until these appeals were resolved (which happened in 1947), there was not a finalised group of owners with whom the Crown could arrange a settlement.

But the Crown was contemplating a more drastic resolution than litigation or

403. Solicitor-General to Under-Secretary, Lands and Survey, in Under-Secretary to chief surveyor, Gisborne, 20 September 1944 (Walzl, supporting papers to 'Waikaremoana' (doc A73(a)), p 463)

404. A E Currie to Under-Secretary, Lands and Survey, 9 April 1945 (Walzl, supporting papers to 'Waikaremoana' (doc A73(a)), p 462)

405. Minister of Maori Affairs to Cabinet, [September 1954] (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1289)

406. Walzl, 'Waikaremoana' (doc A73), pp 339-340

negotiation. In 1946, the Government considered passing legislation to establish the Crown's ownership of all lake and river beds, although the Native Minister feared that it might be necessary to reserve any rights arising out of current litigation (as at Waikaremoana). The Minister, H G R Mason, who proposed settling the issue in this extreme fashion, commented:

Consider, for example, Waikaremoana. It was probably a tribal boundary. Eels cannot live in it and therefore it can hardly be said to have been a source of food supply. It separated the tribes almost as much as an arm of the ocean would do. . . . By an accidental circumstance or oversight, the valueless bed may be held to be not included in the Crown acquisitions [of the land abutting the lake]. It is hard to see what value can be given to the bed of the Lake. The Maoris probably think that because it feeds the Hydro-electric Works their claim will amount to the whole value of the Hydro-electric Works. On any sort of proper estimation I do not see how it can be said to be substantial. The native agents and lawyers will make much money over what in fairness, is a little thing, though no one can say that it will cost the Crown little. . . . The Crown Law Office has a knowledge of these matters and has reported more than once that the whole matter should be cleared up by legislation. It is apparently because that Office is not an administrative office that this has not hitherto been done.⁴⁰⁷

Mason urged that legislation be passed before further claims were 'stirred up': 'it seems to me there is no emotional difficulty in passing legislation that will prevent their being stirred up and it ought to be done.'⁴⁰⁸

This option was rejected in 1946 but it remained a possibility. In the late 1940s, the Government's options were essentially to litigate, legislate, or negotiate.⁴⁰⁹ For the most part, right through to September 1954, litigation was the primary strategy, although a decision was made in either 1944 or 1945 to deal with the Whanganui River case first. The Government could not have predicted that that case would still be unresolved 10 years later, after a Supreme Court hearing, a royal commission, and a Court of Appeal hearing. Apart from a brief spate of discussions/negotiations in the late 1940s, there was no effort to negotiate about Waikaremoana while the Crown still had the option of litigation open to it.

The Government's short-lived recourse to negotiation came in 1947 to 1949. Prime Minister Peter Fraser had just taken over the Maori Affairs portfolio from H G R Mason, who had been very opposed to negotiating a settlement. In January of that year, Fraser had a meeting with his Maori members of Parliament and the Native Department Under-Secretary, Chief Judge Shepherd. Lake Waikaremoana was discussed at this meeting. Fraser's attitude was crucial. The appellate court's decision was wrong, in his view, but the Government needed to accept it and negotiate a settlement with the Maori owners:

407. Native Minister to Prime Minister, 24 July 1946 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1118)

408. Ibid

409. Walzl, 'Waikaremoana' (doc A73), pp 340-341

The Prime Minister said he thought that decision wholly wrong. He did not think anybody could own the bed of a lake unless he were prepared to go down into the bed of the lake and live there. The bed of the lake was only symbolical in so far as it was where the food of the Maoris was to be found. However it was one of those matters which would have to be dealt with and solved.⁴¹⁰

Shepherd pointed out that the Maori appeals had to be resolved first. He also observed that Mason had offered the Maori owners an annuity of £1,000 a year to settle their claim. We have no other information that Mason had made an actual offer. Rangi Mawhete, a member of the Legislative Council, responded that ‘the Maoris are talking about £6000 a year’.⁴¹¹

Fraser had clearly decided to negotiate. But rather than consider an annuity on the basis that the Crown was not acknowledging Maori ownership of lakes (as at Rotorua and Taupo), the Prime Minister decided on an outright purchase of Lake Waikaremoana. In April 1947, with the appellate court decision on the Maori appeals imminent, the Native Department advised its Minister:

Whether that will bring to an end all litigation over the lake does not yet appear – the Crown Law Office was, I believe, at one time considering whether the correctness or otherwise of the Appellate Court’s decision on the Crown Appeal should not be tested by some proceeding in the Supreme Court.⁴¹²

Fraser instructed the department to summon a meeting of assembled owners as soon as the titles were completed. The Crown would make a purchase offer for the bed of Lake Waikaremoana.⁴¹³ The Native Department let the Solicitor-General know about this development: ‘This information is passed on to you because it appears that the proposal will do away, at all events, for the time being, with the need for considering whether the Crown should proceed in the higher Courts.’⁴¹⁴

Thus, it seemed that the question had been decided: the Government would negotiate rather than litigate. But nothing was done until 1949, when the owners approached the Government asking for it to settle with them ‘for the future use of the Lake for hydro electric, fishing and tourist purposes’.⁴¹⁵ In June 1949, Fraser and his officials met with the owners’ representatives to discuss either an outright sale or an annuity on the model of the Rotorua and Taupo settlements.⁴¹⁶ The

410. ‘Notes of Conference Held in Rt Hon Prime Minister’s Room’, 29 January 1947 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), p 1115)

411. *Ibid*

412. Under-Secretary, Native Department, to Native Minister, 21 April 1947 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), p 1114)

413. Native Minister to Under-Secretary, 24 April 1947 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), p 1114)

414. Under-Secretary, Native Department, to Solicitor-General, 30 April 1947 (Walzl, ‘Waikaremoana’ (doc A73), p 342)

415. Under-Secretary, Native Department, to Minister of Native Affairs, 1 February 1949 (Walzl, ‘Waikaremoana’ (doc A73), p 342)

416. Walzl, ‘Waikaremoana’ (doc A73), pp 342–344

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Prime Minister Peter Fraser. From 1915 to 1954, the Crown denied the Maori claim for legal ownership of Lake Waikaremoana. It finally proceeded with its appeal against the Native Land Court's 1918 award of title to the lake bed to individuals of Tuhoë, Ngati Ruapani, and Ngati Kahungunu in 1944 but lost its appeal in the Native Appellate Court. From 1947 to 1949, Fraser sought to pursue a negotiated purchase of the lake or the payment of an annuity, rather than further litigation. But discussions were interrupted when Labour lost the 1949 election.

explanation for the delay between 1947 and 1949 may be that officials preferred to await the outcome of the Whanganui River case in the Supreme Court. On 11 July 1949, a memorandum (possibly from the Crown Law Office) to the Native Department revealed:

No proceedings have been filed in respect of Lake Waikaremoana. What will be done about this, unless the whole matter of Maori claims to subaqueous lands is dealt with as a matter of policy, will, no doubt, be considered by the lawyers after the Wanganui judgment has been given. In the circumstances, any talks with the Maoris on the footing that they are to be granted compensation for the abandonment of any rights they have in Lake Waikaremoana may be premature, unless the Maoris interested are given clearly to understand that the legal issues may still be debated in the appropriate forum. Perhaps you would consider whether the Minister might not ask the Attorney-General for an expression of his views before any meeting with the people is determined on.

If the Waikaremoana case is to be settled without a final ascertainment of the rights of the parties in the Courts, a point which you might think worthy of some consideration is whether the amount of compensation should not be determined by a tribunal such as a Commission to be set up for the special purpose.⁴¹⁷

This view was not shared by the Prime Minister. He went ahead and met with a deputation of owners in August 1949. We are not concerned with the substance of Fraser's 1949 negotiations at this point in our chapter – we will discuss that later, in

417. Memorandum to Under-Secretary, Native Department, 11 July 1949 (Walzl, 'Waikaremoana' (doc A73), pp 344-345)

section 20.8.2. Here, we are concerned primarily with the Crown's litigation option and how that was presented to the people. In brief, the August deputation asked for 'compensation' of £10,000 a year. Fraser replied that Cabinet would not consider such a sum. When the people explained their extreme lack of land, he proposed an exchange of land and stated 'The Appellate Court had made a decision and he was not in favour of any further appeal to the Supreme Court. He would ask the Government to accept the decision of the Maori Appellate Court.'⁴¹⁸ The Maori owners were pleased with this and reminded him of it at the next meeting in October 1949. He had, they said, 'intimated' that the 'appeal to the Supreme Court would not be proceeded with.'⁴¹⁹

Discussions between the Government and the Maori owners in late 1949, however, were interrupted by a general election and a change of government at the end of November. In January 1950, Maori Affairs Under-Secretary Jock McEwen was asked to summarise the Lake Waikaremoana situation for the new National Government.⁴²⁰ McEwen set out the issues and the content of discussions so far. He noted that the issues had become linked with the question of compensation for any damage to the lake arising from previous Crown or parliamentary actions, which would have included the recent hydroelectricity works and the lowering of the lake (see the next section). In addition to the questions of annuities, damages, and title, McEwen noted that recourse to the courts was still an option for the new Government:

Nevertheless, unless Government is prepared to consider the whole question of subaqueous lands and treat it as a matter of policy, and unless action is to be taken in the Courts to obtain a final determination of the law as to the property in the bed of Waikaremoana – a course of action which an appeal to principles would justify – it is suggested that the only means possessed by Government of apprising itself of the facts in relation to the Maori claims is by setting up a Commission to inquire into them and report thereon. Such a course would be in line with that adopted in the case of the Wanganui River.⁴²¹

In late 1949, the Crown had essentially won the Whanganui River case in the Supreme Court, but not on the basis of Salmond's navigable waterway arguments. In 1948, the Attorney-General decided that it was time to jettison Salmond's arguments:

Previously the Crown has relied largely on opinions attributed to Sir Francis Bell and Sir John Salmond which attempt too much and cannot be sustained, to the neglect

418. 'Notes of interview between Minister of Maori Affairs and a deputation of owners at Nuhaka on 27 August 1949' (Walzl, 'Waikaremoana' (doc A73), p 346)

419. 'Notes of representations made to the Rt Hon P Fraser, Minister of Maori Affairs, at Kohupatiki, Hastings, 8 October 1949' (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1186)

420. Walzl, 'Waikaremoana' (doc A73), p 348

421. McEwen, 'Notes on Waikaremoana Claim,' [circa early 1950] (Walzl, 'Waikaremoana' (doc A73), pp 349–350)

of points that undoubtedly can be sustained. These opinions would deny any ownership to the Maoris from the beginning, and neglect the point that the land under the water is presumed to pass with the sale of the land on the banks unless there are circumstances to contradict the presumption.⁴²²

Mason, no longer Native Minister but Attorney-General, thought that the Crown could win the Whanganui River case on that ground, and then apply it to Lake Omapere and Lake Waikaremoana.⁴²³

Accordingly, this was the argument put to the Supreme Court in *The King v Morison* in 1949.⁴²⁴ Justice Hay found that the Native Land Court's investigations of riparian land did not appear to have considered the effect of its titles on the riverbed. The court would need much fuller information about the surrounding circumstances before it could accept that the *ad medium filum* rule applied. Nonetheless, Justice Hay held that he did not need to decide the point because the Coal-mines Act Amendment Act 1903 had made the beds of all navigable rivers, including the Whanganui River, the property of the Crown.⁴²⁵ The Crown and the Whanganui River people held a meeting and agreed to avoid the expense of appeals from Justice Hay's decision to the Court of Appeal and Privy Council by setting up a special royal commission. This would inquire into whether the Whanganui River tribes had owned its bed under Maori custom (until the Coal-mines legislation), whether they were entitled to compensation, and – if so – how much.⁴²⁶

In May 1950, after the receipt of McEwen's advice, the new Government decided to wait for this commission's report before taking any action at all on Waikaremoana.⁴²⁷ In June of that year, however, the Maori Land Court disrupted the Government's plan by asking the chief surveyor at Gisborne for 'a compiled plan of Lake Waikaremoana which is needed to complete the freehold order made by the Court'.⁴²⁸ Thus, the situation foreshadowed back in 1944, when officials were instructed not to provide such a plan, had finally arrived. The Attorney-General met urgently with the Solicitor-General and instructed him 'to take appropriate proceedings in the Supreme Court to test the validity of the order made by the Maori Land Court and confirmed by the Maori Appellate Court'.⁴²⁹

On 12 July 1950, the Minister of Maori Affairs⁴³⁰ advised Ngata of what was about to happen. The Crown had no alternative but to comply with the Maori

422. Attorney-General to Prime Minister, 'Maori Claims to Wanganui River, Waikaremoana, Lake Omapere etc', memorandum, 13 February 1948 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1112)

423. *Ibid*

424. Waitangi Tribunal, *The Whanganui River Report* (Wellington: GP Publications, 1999), p 210

425. *Ibid*, pp 195, 210–212

426. *Ibid*, p 212

427. Walzl, 'Waikaremoana' (doc A73), p 350

428. Under-Secretary, Native Affairs, to Native Minister, 14 June 1950 (Walzl, 'Waikaremoana' (doc A73), p 350)

429. *Ibid*

430. The position of Native Minister was retitled as Minister of Maori Affairs in 1947.

Land Court's request or proceed in the courts: 'The Attorney-General feels that the Crown is obliged to adopt the second course and the Solicitor-General has been directed to file appropriate proceedings in the Supreme Court.'⁴³¹

But there the matter stalled. Waikaremoana leader Takarua Tamarau took advantage of a meeting with the Minister of Maori Affairs at Ruatoki in April 1951 to ask when compensation would be finalised for Lake Waikaremoana. The Minister, EB Corbett, put the matter off by agreeing that it should be finalised, and asking the people to 'discuss what would be a fair settlement'. After they had held such discussions, he said, they should let him know the outcome and the Government would then consider the matter.⁴³² Other than this one interchange, there had been no discussions or negotiations since the new Government had taken office.⁴³³

We do not know for certain why the Attorney-General's decision in 1950 was not acted upon. Certainly, the plan was withheld from the Maori Land Court to prevent the issue of titles, but no claim was filed with the Supreme Court. A detailed statement of claim had been prepared by Cornish back in 1944 and was ready to go. It sought a writ of certiorari to remove the records and judgments of the Maori Land Court and appellate court into the Supreme Court, for the purpose of quashing those judgments; a writ of prohibition to prevent the Maori Land Court or appellate court from taking any further steps to give effect to the judgments; and a declaration that the Crown was 'solely entitled to the Lake and the Islands therein.'⁴³⁴

In our view, it is very likely that the Attorney-General's intention was altered by the outcome of the Whanganui River commission. In May 1950, the Government had been planning to wait for this commission's report before deciding whether to take the Waikaremoana case to the Supreme Court. Then, the Maori Land Court request for the survey plan had precipitated a decision in June 1950 to start proceedings, which Corbett advised Ngata of on 12 July 1950. But a few days after Corbett's letter to Ngata, on 18 July 1950, the Whanganui River commission released its report. Sir Harold Johnston, a retired Supreme Court judge, endorsed the Native Land Court and Native Appellate Court decisions that the Whanganui River bed was Maori customary land (had it not been for the Coal-mines legislation), and that the Maori owners were entitled to compensation. This was not the outcome that the Crown had wanted or expected.⁴³⁵ Faced in 1951 with what it considered very exaggerated claims for compensation from Whanganui Maori, the Government inserted a clause in the Maori Purposes Act 1951 to refer this matter for further litigation in the Court of Appeal.⁴³⁶ The flow-on effect was once again to keep open but delay the option of proceedings about Lake Waikaremoana.

431. Minister of Maori Affairs to Ngata, 12 July 1950 (Walzl, 'Waikaremoana' (doc A73), pp 350–351)

432. 'Notes of interview', 16 April 1951 (Walzl, 'Waikaremoana' (doc A73), p 351)

433. Walzl, 'Waikaremoana' (doc A73), p 351

434. *Ibid*, p 352; Solicitor-General to director-general, Lands and Survey, 24 February 1953 (Walzl, supporting papers to 'Waikaremoana' (doc A73(a)), p 434)

435. Waitangi Tribunal, *The Whanganui River Report*, pp 217–219

436. *Ibid*, pp 219–220

On 24 February 1953, the Solicitor-General wrote to the Lands Department, pointing out that the Crown's ability to seek writs over Waikaremoana in the Supreme Court would expire on 20 September 1954. The Crown had to make a definite decision before then. The Director-General of Lands replied that no decision would be made until the outcome of the Whanganui River case in the Court of Appeal was known.⁴³⁷ The Court of Appeal heard this case in July 1953 but did not deliver its judgment until July 1954.⁴³⁸ In the meantime, on 4 May 1954, the Lands Department – anticipating that the Whanganui decision might be imminent – asked the Solicitor-General to discuss with the Government what to do about Waikaremoana.⁴³⁹

By a majority, the Court of Appeal decided in the Whanganui River case that the Crown 'failed on all issues' except one: whether the *ad medium filum aquae* rule had applied to land titles granted by the Native Land Court (before the coal-mines legislation). It seems that the Crown had relied on the Salmond arguments, in conjunction with the *ad medium filum* rule. The Court of Appeal rejected the Crown's argument that the Treaty of Waitangi had made the Whanganui River a 'navigable public highway' and the property of the Crown, with Maori rights restricted to fishing rights. The court declared instead that Maori had customary title to the riverbed at the time of the Treaty and after the acquisition of British sovereignty. On the *ad medium filum* issue, however, the court said that it needed more information. A section was inserted in the Maori Purposes Act 1954, enabling the Maori Appellate Court to take further evidence on questions submitted to it by the Court of Appeal.⁴⁴⁰

In September 1954, just weeks before the Waikaremoana deadline, the Maori Affairs Department prepared a draft Cabinet paper for its Minister. Again, the question of damage and interference with the lakebed was considered an issue. Also, 'if the declaration by the Maori Courts that certain Maoris own the bed of Waikaremoana is permitted to stand, an attempt might be made by injunction to interfere with the user by the Crown of the waters for hydro-electric purposes'. This was because the 'level of the lake is subject to control, and the control works have impinged on the bed to a minor extent'. Officials considered that an injunction was unlikely to be granted because 'the Court has a discretion to refuse an injunction and to award damages instead, especially where the injury to the plaintiffs is small and it would be oppressive to the defendant to grant an injunction'. The department considered that the Maori owners (if accepted as such) would likely win an action for trespass, but 'it is difficult to see that the measure of damages could be great'. Most land around the lake was now owned by the Crown or 'tenants or freeholders from the Crown'.⁴⁴¹

437. Walzl, 'Waikaremoana' (doc A73), p 352

438. Waitangi Tribunal, *The Whanganui River Report*, p 221

439. Director-general, Lands and Survey, to Solicitor-General, 4 May 1954 (Walzl, supporting papers to 'Waikaremoana' (doc A73(a)), p 531)

440. Waitangi Tribunal, *The Whanganui River Report*, pp 221–224

441. Minister of Maori Affairs to Cabinet, [September 1954] (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1289)

The draft Cabinet paper noted the significance of the drawn-out Whanganui River litigation, which the Government had decided to take first. This case had extended over a number of years and had only recently resulted in a decision from the Court of Appeal. The decision was described – accurately if not fully – as having ‘not dispose[d] of the matter finally’. In terms of Lake Waikaremoana, however, the only practical problem for the Government, if the 1944 appellate court decision was allowed to stand, was that Maori might be able to interfere with the Crown’s use of the lake and bed for hydroelectricity purposes. No other issue (such as tourism interests or compensation) was even mentioned. Nor were the interests of the Maori owners discussed, let alone given any kind of weight.⁴⁴²

The paper ended:

The question for the consideration of Cabinet is whether proceedings to test the validity of the decision of the Maori Courts – the proceedings being by way of an application for a writ of prohibition to prohibit the completion by the Maori Courts of the freehold order for the bed, coupled with an application claiming a declaration of the Crown’s ownership – should be filed in the Supreme Court *before* the 20th of this month, or whether the Maoris are to be permitted to retain the benefit of their declared ownership of the bed.⁴⁴³

On 10 September 1954, this paper was put to the Minister of Maori Affairs. The secretary for Maori Affairs’ advice focused on a single question: should this be treated as a matter of principle? If not, then – unlike the Whanganui River – the Waikaremoana case was no threat in terms of lakes in general, and the Crown had already withdrawn its appeal against the Lake Omapere decision:

Waikaremoana might be a horse of a different colour to that of Wanganui River. If, in the latter case, the Maoris can successfully set up, in relation to the bed of the river, a separate property unrelated altogether to the ownership of the riparian lands, it could possibly be that similar claims will be made in respect of other rivers, at all events, in the North Island. The practical effect of allowing the judgments of the Maori Courts about the bed of Waikaremoana to stand might not be so very great. The Rotorua Lakes and Taupo Lake will not be affected because of the settlements and money payments made. The Crown appeal in respect of Omapere was withdrawn, and there are no other lake claims on the stocks just now. So far as the South Island is concerned, it is not easy to see, in view of the terms of the deeds of purchase or cession to the Crown, that any claim could successfully be made by the Maoris either to lakes or river beds. Standing against all this, however, is the question of principle.⁴⁴⁴

442. Minister of Maori Affairs to Cabinet, [September 1954] (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), pp1288–1290)

443. *Ibid*, pp1289–1290

444. Secretary to Minister of Maori Affairs, 10 September 1954 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), p1287)

On 13 September 1954, Cabinet considered the Maori Affairs paper and decided that no action would be taken in the Supreme Court. The following month, the Government lifted its ban on supplying the Maori Land Court with the plan so that the titles could be completed.⁴⁴⁵ As well as the advice that, in practical terms, it did not much matter who owned the Waikaremoana bed so long as it did not interfere with use of the lake for hydroelectricity, the outcomes of the Whanganui River case in the royal commission (1950) and the Court of Appeal (1954) must have seriously discouraged the Crown from trying its luck in the general courts.

What is astonishing, in our view, is that in all the evidence and papers available to the Tribunal, the various Government departments and Ministers never once seemed to consider what would benefit Maori or what was in their best interests. Indeed, they had actively sought to defeat the rights claimed by Maori.

Not surprisingly, the Maori owners were very unhappy with what had now been 36 years of Crown procrastination and refusal to recognise the Native Land Court's decision that they were the owners of Lake Waikaremoana. Their view of this latest series of delays (from 1944 to 1954) was expressed in a letter from their solicitor, S A Wiren, to the Minister of Maori Affairs on 18 April 1957. This is an important letter and we quote it in full:

The Crown appealed against this [1918] decision but the appeal was not heard until 1st August 1944 and even then the Crown wished to delay the hearing. A special Court of six Judges of the Maori Appellate Court unanimously dismissed the appeal. The date of the judgment was 20th September 1944.

Section 51 of the Maori Land Act 1931 provided that no order made with respect to Maori Land by the Court or the Appellate Court should, whether on the ground of want of jurisdiction to make the same or on any other ground whatever, be annulled or quashed or declared or held to be invalid by any Court in any proceedings instituted more than ten years after the date of the order.

The Crown took full advantage of this section and intimated from time to time that proceedings were in contemplation to quash the order of the Appellate Court.

Finally on 18th October 1954 the Solicitor-General informed the writer that no such proceedings would be brought and the Crown would accept the Court's order. About the same time he informed the chief surveyor at Gisborne, who until that time had been forbidden to supply a plan for registration of title, that such a plan could be prepared. Our clients are now registered as owners of the Lake and have a full Land Transfer title.

We should mention that during the year 1948 [sic: 1949] the then Prime Minister told a deputation of owners in the presence of representatives of your Department, the State Hydro Department and the Lands Department that the Government would accept the judgment of two Courts which were both against the Crown. A stenographer was present and no doubt the report of that interview is available.

445. Walzl, 'Waikaremoana' (doc A73), p353

Notwithstanding all this, the Crown has persistently disregarded the ownership of the Lake, particularly in the activities of the State Hydro Department and the Tourist Department. We submit it is clearly improper that the rights of citizens, be they Europeans or Maoris, when their rights have been established in the proper Courts, should be so disregarded. The Maoris have, through all these years, been much more forbearing than Europeans would have been.⁴⁴⁶

Thus Wiren, for the owners, pointed out how the Crown had tried to prevent the appeal being heard even in 1944, and their view that it had used the provision in the native land laws to protect its position and prevent Maori from obtaining their rights for another decade. This was so despite a publicly recorded assurance from the Prime Minister that the Government would accept the judgment of the two courts – an assurance that was not honoured. In our view, this letter is an entirely accurate summary of the situation. The question, as the Maori Affairs Department put it in 1954, was ‘whether the Maoris are to be permitted to retain the benefit of their declared ownership of the bed’. For 10 years, the Crown denied them that benefit on increasingly flimsy grounds. This demonstrates how easily Maori rights could be read down in the face of what was perceived to be the public good. Even the Attorney-General admitted in 1948 that Salmond’s doctrines had no hope of success in the courts. Peter Fraser’s approach was the correct one: despite his personal belief a lakebed could not be owned, the appeal had gone against the Crown and he saw that the Government needed to accept that fact and enter into an arrangement with the Maori owners.

20.7 WHAT WERE THE EFFECTS OF THE CROWN’S DENIAL OF MAORI OWNERSHIP FOR 36 YEARS?

SUMMARY ANSWER: One effect of the Crown’s denial of Maori ownership for 36 years was to deprive the owners of any control over or economic return from their taonga. Instead, the Crown itself used the lake for tourism and hydroelectricity without permission or payment. The Maori owners have not ceased demanding payment for the use of their lake and its water for electricity from the 1950s (when the Crown accepted their ownership) to the present day.

We accept that the Crown had legal authority (by Order in Council under the public works legislation) to use, control, and modify the lake for hydroelectricity, regardless of who owned the lake, with the possible exception of constructing a sealing blanket. Nonetheless, the Crown does appear to have avoided its obligations to pay compensation under that legislation. Also, its management of lake levels for hydroelectricity purposes had significant impacts on the taonga. The lake was permanently lowered by approximately five metres, exposing a permanent ring of Maori-owned dry land around its circumference, and transforming

446. Wiren to Minister of Maori Affairs, 18 April 1957 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), pp 1283–1284)

Patekaha Island into a peninsula. The taniwha Haumapuhia, in her final resting place at the lake's outlet, was buried during a landslide associated with the power scheme construction. The littoral (inshore) habitat was reduced by one-fifth, with a significant impact on fisheries, and it was impossible to begin establishing a new equilibrium during the period of massive draw-downs (which occurred through the 1950s and early 1960s, finally coming to an end in 1965). Serious erosion and reduction of habitat and fisheries have been long-term consequences.

All this damage constituted a spiritual affront to the taonga and its kaitiaki, and had long-term impacts on the lake and its people. The economic value of Lake Waikaremoana was affected in two ways: revenue from fisheries was more limited, but a ring of dry land was created around the edge of a key visitor attraction in Te Urewera National Park, and which therefore assumed a high market value.

20.7.1 Introduction

In this section, we address the effects of the Crown's denial of Maori ownership of the lake on the people whose title was thus denied. We begin with the Crown's own description of the many acts which it asserted established its ownership, but which in fact were the acts it carried out without the permission of or payment to the true owners. We then consider the Crown's use of Lake Waikaremoana for hydroelectricity while it still disputed the title, focusing in particular on the works that it constructed and the effects of permanently lowering the lake in 1946.

20.7.2 The Crown continues to use the lake for tourism as if it were the legal owner

In 1944, the Solicitor-General tried to prove that the Crown had title to Lake Waikaremoana. In support of this contention, he referred to the following 'facts':

- ▶ that the Armed Constabulary and all other travellers before 1902 had used the lake as a public highway;
- ▶ that the Crown had established its own launch and rowing boats on the lake since around 1897;
- ▶ that, from 1903, Europeans needed the Crown's permission to hire out boats on the lake;
- ▶ that, from 1900, Europeans used the lake for recreational boating;
- ▶ that an acclimatisation society and the Tourist Department had kept the lake stocked with trout since 1897, and Europeans had been licensed to fish for trout 'without let or hindrance' from Maori;
- ▶ that, from 1903, the Crown had regulated the fishery by appointing local Europeans as fisheries officers; and
- ▶ that the Crown had regulated the lake under the Animals Protection Acts and other statutes for the control of hunting.⁴⁴⁷

Ben White summarised the situation thus:

447. Draft statement of claim in proceedings in the Supreme Court for certiorari and prohibition, [circa 1944], pp 14–15, ADOI 17084 CL200/2/16, Archives New Zealand, Wellington

From the late-nineteenth century, the Crown acted as if it were the legal owner of Lake Waikaremoana. Variouslly the Government stocked Lake Waikaremoana with trout, managed the fishery through licensing anglers and the appointment of rangers, ran a tourist launch service, and provided tourist accommodation on the lake's shore.⁴⁴⁸

A Crown Law Office paper of the time made this claim explicit. From 1898, the Crown had claimed ownership of the lake when it 'sailed boats on it, stocked it with fish, granted fishing licences, declared it a sanctuary and kept rangers. All these were consistent only with ownership having passed to the Crown.'⁴⁴⁹ One of the two main effects of the Crown's denial of Maori ownership for 36 years, from 1918 to 1954, was that the Crown continued in all these ways to act as if it owned the lake, without permission and without payment to those who had been declared the owners by the courts.

In Crown counsel's submissions to us, the Crown was clearly within its rights to build a Government tourist lodge on its own land next to the lake. In respect of its creation of a trout fishery, counsel argued that the peoples of the UDNR had consented to (indeed sought) the introduction of trout in their waterways.⁴⁵⁰ But the Crown accepts that the 'regulation of trout fishers and the operation of the launch – both activities which occurred on the lake, and therefore on Maori land – were not conducted with the consent of the land owners.'⁴⁵¹ Counsel added:

In fairness to the Crown, however, it considered in good faith that title to the lake-bed did not reside with tangata whenua. It consistently maintained this view from the time of its correspondence with Te Reneti in 1905 through to the dismissal of its appeal in 1944.

Hindsight shows that the Crown ought to have consulted the lake owners with respect to the regulation of fishing and the operation of the launch on the lake.⁴⁵²

We do not consider that hindsight was necessary. From the evidence discussed in earlier sections, the Crown knew of the Maori claim to ownership of the lake from at least 1905. It also knew of Maori objections to its regulation of fisheries and operation of a launch without permission or payment. From 1913, it was aware that tribal leaders had filed a claim with the Native Land Court to legal ownership of the lake. From 1918, it knew that the court had found Maori to be the owners of the lake. From 1944, this finding had been confirmed by the Native Appellate Court, and, in the meantime, the Crown had also lost the Lake Omapere case and had negotiated settlements of the Rotorua and Taupo lake claims. Given all these points, when should the Crown have finally accepted that it needed to consult

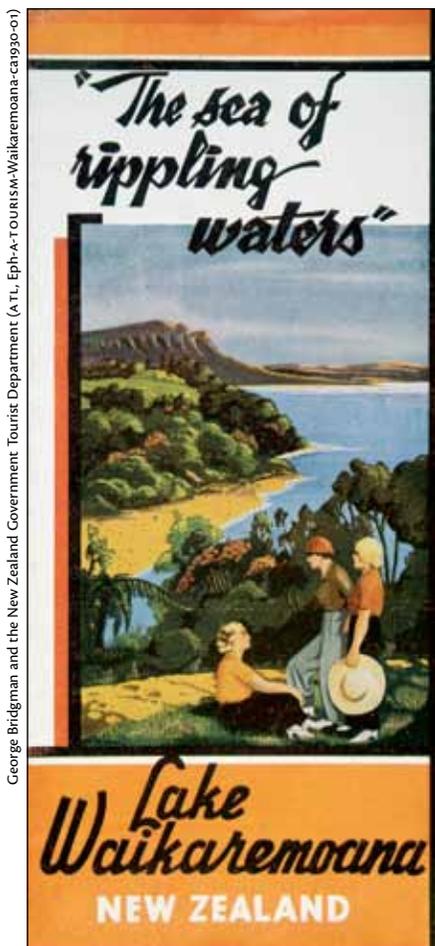
448. White, *Inland Waterways* (doc A113), p139

449. 'Miscellaneous Notes and Files', ADOI 17084 CL200/1/7, Archives New Zealand, Wellington (Stevens, 'History of the Title to the Lake-bed' (doc A85), p35)

450. Crown counsel, closing submissions (doc N20), topic 28, pp19–20

451. *Ibid*, p20

452. *Ibid*



Tourist Department brochure advertising Lake Waikaremoana's attractions to prospective visitors, circa 1930

Maori and obtain their permission to conduct and regulate tourist fishing and boating on the lake? In our view, given that Maori ownership was the presumption after 1918 (unless it could be overturned on appeal), that was the point at which the Crown at least needed to consider and make provision for the possibility that it did not own the lake.

It did not do so, however; rather, the Crown continued to use and benefit from the lake as if it were the owner. In our view, this was inexcusable in the decade following the appellate court's decision. The Crown should have taken legal action immediately (if it was going to) rather than delay matters for another 10 years before finally giving up the ghost at the last possible moment in 1954. As a result, the Crown continued to act as if it owned Lake Waikaremoana for 36 years after the Native Land Court first said that it did not, and appropriated to itself the sole benefit from the commercial exploitation of the Maori owners' property during

that time. The prejudice to the Maori owners in lost revenues, infringement of property rights, and loss of mana is clear.

To make matters worse, the Crown made no arrangement even after accepting in 1954 that Maori should ‘be permitted to retain the benefit of their declared ownership of the bed’.⁴⁵³ As we shall see in sections 20.8 and 20.9, the Crown took another 17 years to negotiate an agreement with Maori, and continued to use the lake as if it were the owner all the while. When a lease was finalised at the end of 1971, it was only backdated to 1967. As we shall discuss later in the chapter, the failure to backdate the lease (and the payment of rent) earlier than 1967 was a serious infringement of the Maori owners’ Treaty rights (see section 20.11).

Crown counsel suggests that the Maori owners did benefit indirectly from the presence of tourism in their district,⁴⁵⁴ but the Crown has not presented any evidence to that effect, and Mr Walzl’s report does not support this submission. While we accept that there was some limited employment in the maintenance of the Lake House grounds, and that the manager sometimes allowed Maori the use of the launch or dispensed medicines, that hardly makes up for the Crown’s arrogation to itself of all the commercial benefit from the use of the Maori owners’ taonga, Lake Waikaremoana.

20.7.3 The Crown’s use of the lake for hydroelectricity

In our inquiry, the claimants were very concerned about the Crown’s use and modification of the lake for hydroelectricity, without permission or payment.⁴⁵⁵ In section 20.3, we described the three stages of the Crown’s Waikaremoana hydro scheme (see map 20.2). From 1929 to 1945, the Crown used the waters of Lake Waikaremoana for hydroelectricity but relied on the natural outflow of water from the lake, and did not directly manipulate the lake itself. After the completion of the Tuai stage of the scheme in 1929, electricity demand (and funds) dropped during the Depression. Once demand recovered, the Piripaua and Kaitawa stages of the Waikaremoana scheme were built within 10 years (from 1938 to 1948).⁴⁵⁶

The idea of modifying the lake so that its water level could be controlled and lowered was first seriously proposed in 1917, when title to the lake was still being decided in the Native Land Court. Frederick Kissel (later general manager of the State Hydro-electric Department)⁴⁵⁷ reported to the chief electrical engineer that a tunnel could be driven through the lake barrier some 70 to 80 feet below the surface. This tunnel would have two uses: to lower the lake so that the ‘shattered lake rim [could] be made watertight’, and to take water through the barrier under

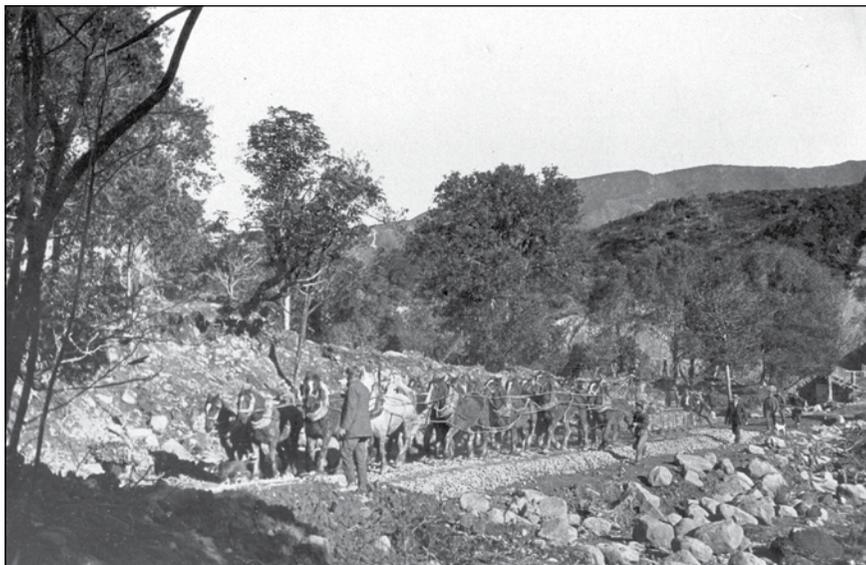
453. Minister of Maori Affairs to Cabinet, [September 1954] (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), pp 1289–1290)

454. Crown counsel, closing submissions (doc N20), topic 28, pp 2, 19–20

455. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, pp 76–79

456. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 151

457. The State Hydro-electric Department was established in 1946. From 1911 to 1945, it had been a branch of the Public Works Department. In 1958, the State Hydro-electric Department was renamed the New Zealand Electricity Department.



Unknown (ATL, PACOLL-4193-2)

A team of horses hauling a bedplate for the Waikaremoana power scheme arrive at the Power House Camp, circa 1927. This photograph was taken soon after work on the Tuai station began.

pressure to a power station downstream. As Garth Cant's research team commented, this was the concept behind the Kaitawa phase of the power scheme.⁴⁵⁸

The first Waikaremoana power station was completed at Tuai in 1929. The *Poverty Bay Herald* reported the Government's intention to lower the lake and seal the leaks, which would have to be done before the full Waikaremoana scheme was completed. But the means of lowering the lake had not been decided, nor was there any definite time frame for doing so. An overseas expert, Professor Hornell, inspected the lake for the Government in 1930. He advised that it should be lowered by a drainage tunnel 100 feet below the surface.⁴⁵⁹ The Public Works Department considered his report and decided that the lake would need to be lowered by 50 feet or more (with possible fluctuations of 30 to 40 feet below that). Its engineer-in-chief warned in 1931 that there would be 'grave criticism of the vandalism of the Public Works Department by a large section of the public'. Lowering the lake by 50 feet would create a band of bare rock around the sides and the lower end of the lake, and 'unsightly mud-flats in the upper arms'. Nonetheless, the hopeful prediction was made that 'nature soon restores the ravages of man . . . and not many years would elapse before all this bare ground would be clad with vegetation and the beauty of the Lake restored to something very similar to what it is at present.'⁴⁶⁰

458. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 190–191

459. *Ibid*, p 191

460. *Ibid*, p 192

A Hardcastle (ATL PACOLL-5671-11)



The official opening of the Tuai station, 1929. The station was the first of the Waikaremoana power scheme. By the 1930s, the Crown's most important interests in the lake were forest preservation and hydroelectricity. Tuai utilised the lake's natural outflow to power its turbines but left the lake generally undisturbed; a subsequent major extension of the scheme involved turbiner and artificially controlling the lake's water level.

The Depression meant that there was no need to rush because electricity demand was low and funds were short. Test tunnels and exploratory shafts were excavated near the lake in 1935 and early 1936, at a time when the Native Appellate Court and the Maori owners were trying without success to get the Crown to prosecute its appeal. Mr Walzl suggests that this exploratory work was stopped because of safety concerns. The Government decided to proceed with the Piripaua part of the scheme instead.⁴⁶¹ Engineers began to consider siphons instead of a tunnel to take water out of the lake. Professor Hornell had ruled this idea out as too limited, but that was in the context of his plan to lower the lake by 100 feet. In 1937, pumping water out of the lake was also considered and rejected. Finally, in 1941,

461. Walzl, 'Waikaremoana' (doc A73), p 302

approval was given for construction of the tunnel, although work did not begin until late December 1943.⁴⁶² As we mentioned earlier, the Maori owners were very concerned about this work. Their lawyer, Wiren, objected to the appellate court that they were powerless to stop it until the appeal was heard and title was finalised for the lake. But, as we discussed above, the Native Appellate Court's decision in 1944 was not the end of the matter. The Government decided to withhold survey plans and prevent the court from finalising its orders, keeping the possibility open of overturning Maori title in the general courts for another decade.

In the meantime, there was a severe electricity shortage in the mid-1940s. The Government decided that it could not wait for the tunnel intake. Instead, it built temporary siphons in 1946 to increase the supply of water to Tuai and Piripaua stations. Two of these siphons were extended to a greater depth in 1947, so as to allow more water to be sucked out of the lake.⁴⁶³

During the period between the Native Appellate Court ruling in 1944 and the Government's decision not to litigate further in 1954, the following structures were built on the lakebed:

- ▶ *The tunnel intake at Te Kowhai Bay:* The tunnel intake is a U-shaped amphitheatre with a series of concrete steps, the floor of which is at 1,960 feet above sea level. At its bottom is a short, vertical shaft through which water flows into a 10-foot diameter tunnel. Using this intake, the lake can be lowered to 1,970 feet. Excavations for the intake began in 1947, and 150 feet of the intake channel's base is located on the Maori-owned lakebed. Clearing of rock and other material from around the intake channel continued for several years after it was completed in 1948.⁴⁶⁴
- ▶ *The siphons and spillway:* In 1946, three four-foot diameter pipes were installed over the top of the natural dam at Te Wharawhara Bay to suck water out of the lake and discharge it into the Waikaretaheke River. This was intended to increase the supply of water for generation in the short term. These temporary siphons were replaced by two permanent concrete conduits, built between 1952 and 1955, completed a year after the Crown accepted that it did not own Lake Waikaremoana. These permanent siphons extend 100 metres underwater from the lake shore, and can lower the lake to 1,981 feet. They are used for backup or to allow water to be spilled from the lake in case of abnormal rainfall and potential flooding.⁴⁶⁵
- ▶ *The sealing blanket:* Built from 1948 to 1955, the blanket sealed former leaks in the lakebed and natural dam at Te Wharawhara Bay. The Waikaretaheke River was once supplied with about half its volume of water from these natural leaks. The sealing blanket has a foundation of layers of graded fill, coated

462. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p193

463. Ibid

464. Ibid, pp152, 171

465. Ibid, pp154, 172, 256

with a surface of small rocks and gravel. Work began with the removal of driftwood in 1948, after which material was dumped from barges and special temporary jetties to fill depressions and then deposit the graded sealing blanket.⁴⁶⁶ Gladys Colquhoun, who was a teenager at the time, recalled:

They used to have a big barge, with a big tractor, and they fill it up with soil and take it to a certain place and open the barge and all the stuff fell down under water, it was all rubbish. So you weren't allowed to touch the water, drink it or do anything, even the marae.⁴⁶⁷

Garth Cant's research team commented about this construction work:

Regrettably, it has not been possible, owing to the lack of correspondence available for inspection, to comment on the degree to which lakebed ownership was taken heed of during the execution of these works; nevertheless, it may be indicative that in the Crown's early negotiations over the lakebed, as reviewed by Walzl, the first mention that there may be a problem with the new works on the lakebed seems to have been a Cabinet paper from Maori Affairs in 1954. An examination of comments by Crown officials during the late 1950s suggests that the consensus was that as the engineering works occupied only a small area, and that on the margin of the lakebed, the infringement of title was too trivial to require any corrective action.⁴⁶⁸

From the evidence available to us, the Government did not at first consider the possibility that it needed to acquire the land for these public works or negotiate with the Maori owners, because it was convinced that the Crown, not Maori, owned the lake. As we have seen, it maintained this view from 1944 to 1947 and from 1950 to 1954. In 1947, Prime Minister Fraser, in an about-face, decided to recognise the Maori owners and buy the lakebed from them. But nothing happened until 1949, possibly because officials were awaiting the outcome of the Whanganui River litigation. In the meantime, work was completed on the tunnel intake and commenced on the sealing blanket in 1948. Fraser's efforts at negotiation in 1949 had not got far when there was a change of government. The new ministry again denied Maori ownership and obstructed the Maori Land Court from finalising the titles, while it waited (in vain) for a favourable outcome from the Whanganui River litigation. In the meantime, permanent siphons were built and the sealing blanket completed.

It was not until after 1954, as Cant's research team suggested, that the Government began to contemplate the fact that its Waikaremoana power scheme was reliant on structures that it had just built on Maori land without permission,

466. *Ibid*, pp155, 171

467. Colquhoun, brief of evidence (doc H55), p12

468. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p172

acquisition, or compensation. Yet, as we shall see in section 20.8, the Electricity Department remained unconcerned in the late 1950s and saw no necessity to acquire or pay for the land.⁴⁶⁹ Nor did the Crown actually require permission to take or modify land for hydroelectricity: the Public Works Act 1928 authorised those actions.⁴⁷⁰ Counsel for Wai 945 Ngati Ruapani speculated that the Maori owners might have been able to prevent unpaid-for works if their title had not been under dispute, or at least bring a civil case against the Crown for damages.⁴⁷¹ But one point that escaped researchers in our inquiry was that the Crown's lakebed works were authorised by an Order in Council in 1943. Crown counsel located the relevant *Gazette* notice. In their submission, this gave the Government the power to 'enter lands in order to construct and maintain hydro works', although compensation was still payable 'where land was taken or damage was done to property'.⁴⁷²

The Public Works Act 1928, under which the Order in Council was issued, empowered the Crown to take Maori or general land for hydro works without the usual processes of notification or opportunity for objection.⁴⁷³ It also empowered the Crown to:

- ▶ erect and use works, appliances, and conveniences;
- ▶ raise or lower the level of any lake and impound or divert the waters of any lake;
- ▶ construct tunnels, aqueducts, and flumes (artificial channels) on or under private land without being required to take that land; and
- ▶ have right of way to and along all such works.⁴⁷⁴

There is little doubt, therefore, that the Crown had the legal authority to construct its hydro works and manipulate the levels of Lake Waikaremoana, although it ought to have compensated the owners for any damage, once Maori title was confirmed.⁴⁷⁵ Only the Minister could initiate either a formal taking or a claim for compensation; owners of Maori land could not apply on their own behalf for compensation under the public works legislation.⁴⁷⁶ One point of uncertainty is the sealing blanket, which covers about three-quarters of a hectare of the lakebed in Te Wharawhara Bay.⁴⁷⁷ It appears to us that authority to impound the waters probably covered construction of the sealing blanket.⁴⁷⁸

469. See, in particular, general manager, Electricity Department, to Commissioner of Works, 1 September 1958 (Tony Walzl, comp, supporting papers to 'Waikaremoana: Tourism, Conservation and Hydro-Electricity (1870–1970)', 4 vols, various dates (doc A73(b)), vol 2, p 964).

470. Public Works Act 1928, ss 254, 276, 311

471. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), pp 48–49

472. Crown counsel, closing submissions (doc N20), topic 28, p 12

473. Public Works Act 1928, ss 254, 276

474. *Ibid*, s 311; Crown counsel, closing submissions (doc N20), topic 28, p 12

475. Public Works Act 1928, ss 311, 313

476. *Ibid*, s 104. This section remained in force until 1962: see Public Works Amendment Act 1962, s 6.

477. For the size and location of the sealing blanket, see Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 153, 155.

478. Public Works Act 1928, s 311(1)(c)

The Order in Council, 12 May 1943

CLN NEWALL, Governor-General

Order in Council

At the Government Buildings at Wellington, this 12th day of May, 1943

Present: The Hon DG Sullivan presiding in Council

In pursuance and exercise of the powers vested in him by section three hundred and eleven of the Public Works Act, 1928, and of all other powers in anywise enabling him in this behalf, His Excellency the Governor-General of the Dominion of New Zealand, acting by and with the advice and consent of the Executive Council of the said Dominion, doth hereby authorize the Minister of Works to erect, construct, provide, and use such works, appliances, and conveniences as may be necessary in connection with the utilization of water-power from Lake Waikaremoana in the Land District of Gisborne, and in connection therewith to raise or lower the levels of the said lake and to impound or divert or control the flow of water from same for the generation and storage of electrical energy, and in connection with the transmission, use, supply, and sale of electrical energy when so generated; also to use electrical energy so generated in the construction, working, or maintenance of any public work or for the smelting, reduction, manufacture, or development of ores, metals, or other substances, also to construct tunnels under private land or aqueducts over the same, erect poles thereon, and carry wires over or along such land without being bound to acquire the same, and with right of way to and along all such works and erections; and also to supply and sell electrical energy and recover moneys due for the same.

CA JEFFERY, Clerk of the Executive Council.¹

1. *New Zealand Gazette*, 1943, no 37, p 540

We note also that the compensation requirements of section 313 were broader than the Crown claimed in its submissions.⁴⁷⁹ Specifically, owners were not only entitled to compensation for ‘injurious affection’ but were also entitled to compensation where ‘the property of any person is at any time . . . used for any purpose mentioned in [section 311(1)(d)]’. But the only way they could obtain such compensation was for the Minister of Works to make a claim to the Maori Land Court, which he ‘may’ do ‘at any time’ (section 104). The Crown’s submission, however, was that compensation was only payable where ‘land was taken or damage was

479. Crown counsel, closing submissions (doc N20), topic 28, p 12

done to property'.⁴⁸⁰ No land was taken and, in the Crown's view, Maori had sustained 'negligible loss', hence compensation was not necessary.⁴⁸¹ In our view, however, the Act's provision for compensation to owners also included the use of their property for such purposes as tunnels, aqueducts, and flumes. This, we think, included the Waikaremoana intake structure and siphons. The owners were also entitled to compensation for any damage to their property that resulted from the Crown's manipulation of lake levels and of the outflow of water.

The Wai 36 Tuhoe claimants accepted no more than that the Order in Council purported to authorise the hydro works.⁴⁸² But for them, the fact that the law allowed the Government to act in this way was beside the point: 'The Crown has not engaged with the fundamental Treaty issue of whether the compulsory use of the lake for hydroelectricity purposes could be justified.'⁴⁸³ Just because the Crown *could* use compulsion did not mean that it had to do so, or that it should have done so in the case of a Maori-owned lake.

At the time, the Maori owners of Lake Waikaremoana saw the actions of the various Government departments, which were conducted without permission or payment over so many decades, as 'arrant trespasses' on their property. They saw the Electricity Department as no different in this respect. Also, regardless of any legal requirements, the Maori owners have been adamant from the 1950s to the time of our hearings that the Crown must pay them for the use of their asset to generate electricity. In 1961, for example, their lawyer, SA Wiren, pointed out to the Minister of Maori Affairs that Maori had had title to the lake since 1918, and 'over all these years the Crown in one capacity or another has been using the Lake as its own and deriving considerable revenue in so doing'. In calculating what the Crown should pay Maori for the purchase of the lake, Wiren stated that the owners were entitled to compensation for the Crown's use of their lake for over 40 years (by 1961). He added:

But since 1918 at all events the Crown has been disregarding the legal position in particular through the Tourist and Electricity Departments: For instance, tunnelling under the outlet, lowering the lake by as much as seventy feet, and siphoning water from it were arrant trespasses.⁴⁸⁴

In our inquiry, Crown counsel did not accept that there was any significant damage to Maori *land* worthy of compensation. Environmental damage to the lake was admitted, however, although – in the Crown's view – it was and is offset by the value of hydroelectricity to the nation.⁴⁸⁵ We turn next to consider the effects of the Crown's 'arrant trespasses' for electricity purposes.

480. Crown counsel, closing submissions (doc N20), topic 28, p 12

481. *Ibid*

482. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 31

483. *Ibid*

484. Wiren to Minister of Maori Affairs, 22 August 1961 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), pp 876–877)

485. Crown counsel, closing submissions (doc N20), topic 28, pp 12, 17

20.7.4 What were the effects of the Crown's management of lake levels?**20.7.4.1 Natural lake levels, 1921–45**

The natural levels of Lake Waikaremoana were recorded regularly in the period from 1921 to 1945. These records provide an essential point of comparison. Dr Cant's research team has outlined the results in their report for the Tribunal. The minimum level observed was in 1915, when the lake dropped to 2,001 feet. In the period from 1921 to 1945, the lake's lowest level was 2,006 feet and the greatest height it reached was 2,026 feet (in 1944). Otherwise:

- ▶ the mean annual level was 2,015 feet;
- ▶ the mean annual maximum was 2,020 feet (this figure was later used as the legal limit of the Maori owners' property);
- ▶ the mean annual minimum was 2,011 feet; and
- ▶ the annual range was mostly between 2 and 3.5 metres.⁴⁸⁶

The lake tended to be at its highest in October (mean level of 2,017 feet) and at its lowest in April (mean level of 2,013 feet). The lake's waters recharged for two to three months after the winter rains, and then the dry spring and summer months led the lake to drop steadily from October onwards. This natural 'periodicity' (high levels at the start of spring and low levels in autumn) was significant because it was reversed when the lake began to be managed for electricity generation.⁴⁸⁷

20.7.4.2 Dynamic and dramatic fluctuations in lake levels, 1946–65

The Government went into the Kaitawa phase of the power scheme expecting to do massive damage to Lake Waikaremoana. The Minister of Internal Affairs, WE Parry, wrote to the Prime Minister about it in June 1943:

There are two questions involved in the Waikaremoana scheme and also in the Taupo scheme. They are, the supply of hydro-electric power for the development of the country, and the effect the works will have on the country's scenic and freshwater fishing assets. As Minister in charge of the developments which have the responsibility of safeguarding these assets, I feel bound to draw your attention to the way in which, in my opinion, the assets will be affected.

Both of these lovely lakes – Waikaremoana and Taupo – are rapturously admired by thousands of our New Zealand citizens. They have been referred to as forming the future natural playgrounds of our Dominion. The lakes will be, as a result of the hydro-electric schemes, very seriously affected by the drawing-off of water to below the natural lake levels. The Waikaremoana will be very much more affected in this way than will Lake Taupo and will be ruined for fishing. The lowering of the lake level of Waikaremoana by some forty or fifty feet (which I think will be inevitable) will rob it of its rich and unique scenic beauty.

It is my firm opinion that the inflow of water into Lake Waikaremoana will not balance the outflow for the hydro-electric scheme, hence the inevitable lowering of the

486. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 188–189

487. Ibid, pp 188–190

lake. Constant lake levels over the years have caused beaches and sandy inlets, with a consequent accumulation of marine growth which provides food for the fish.

In the case of the Waikaremoana, it will take years and years for such growth to again accumulate, if it ever does, owing to the variation of the lake levels. Once the hydro-electric scheme is completed, fishing in the lake will be a thing of the past, to be remembered only by those who had the pleasure of enjoying it in former years.

I appreciate that for me to advance claims of the scenic and fishing interests of the two lakes, both for the present and the future, as against those of hydro-electric power for the development of the country, would not obtain for them the consideration to which I hold they are entitled and, in the circumstances, I recognise the fight would be as unfair as it would be futile. I am not unmindful of the imperative need for power to enable development to go on unimpeded to meet the enormous demands of the future. In the case of the lakes, as in many other cases, the planning for the full use of our natural assets and resources has not been kept far enough ahead. Surely it must be obvious to the most casually-minded person that ultimately we can harness only the rivers and artesian waters for electric power. The use of such waters should be so planned so that they can be duplicated, in place of having to draw water from our lakes and lowering their natural levels. This conclusion will be readily seen and as to what, in my opinion, will be the inevitable result at Waikaremoana.⁴⁸⁸

Lowering the lake, however, did not have the catastrophic effect of completely destroying its fisheries. It was not actually necessary to lower Waikaremoana permanently by the 40 to 50 feet anticipated by Parry, let alone the 100 feet proposed earlier. But it still had significant effects, especially for the first 20 years of lake-level control, when the levels were managed in such a way as to produce extreme variations. No new equilibrium was allowed to start emerging until well into the 1960s. For our analysis of these effects, we rely mainly on Dr Cant's research team, which has reviewed the relevant scientific literature and source material, and interviewed tangata whenua living at Waikaremoana.⁴⁸⁹

From 1946, using the temporary siphons, the State Hydro-electric Department began to lower the lake. In 1947, it was drawn down to 1,995 feet. During that year, the average was five metres lower than normal. Tourist Department officials were alarmed. They contacted Frederick Kissel, the general manager of the State Hydro-electric Department, asking what would happen with lake levels in the future. Kissel replied that it was impossible to say for certain, but the lake would certainly be kept lower than it had been naturally, and there would be a greater range of levels each year than was natural. The plan was to hold the lake at about 2,000 feet to aid construction of the intake tunnel, and then it would be allowed to rise.

488. Minister of Internal Affairs to Prime Minister, 21 June 1943 (Walzl, 'Waikaremoana' (doc A73), pp 359–360)

489. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1)

Extra capacity, however, would be needed for an expected gap in electricity supply in the early 1950s. Kissel warned that the lake would likely be drawn down to its engineering limit of 1,970 feet at that time.⁴⁹⁰

Events happened as Kissel predicted: the lake was kept low in 1947 and 1948, until the intake structure was completed, and then allowed to rise between 1948 and 1950. In 1951, the lake was lowered by more than nine metres to a level of 1,976 feet. But with power expected to come from a new station at Maraetai (completed in 1953), the lake was allowed to gradually rise again by 1954. In the winter of that year, it was up to 2,007 feet. According to the *Wairoa Star* in August 1954, the lake had 'recovered its full beauty with a restoration of its waters'.⁴⁹¹

But further 'wild fluctuations' followed. The changes in lake level were 'far greater in scale' in the 1950s than at any other time, before or since.⁴⁹² During that decade, Lake Waikaremoana was used to save the water in Lake Taupo as much as possible. As Cant's research team explained, the Waikato River power network was a much greater generator for the North Island and thus in greater need of conservation. Lake Waikaremoana, on the other hand, was less important to overall power generation and it had a higher rainfall and faster inflow, thus allowing it to recover faster than Taupo. In 1956, the drawdown was such that the newspapers predicted that Lake Waikaremoana might drop below the mouth of the intake shaft, thus shutting down its power stations and causing an electricity crisis. This was only just avoided, the lake dropping to 1,973 feet in 1956. But then a wet winter and the opening of a new power station on the Waikato River allowed the lake to be raised again, back up to 2,003 feet by the end of 1956 (a rise of more than nine metres in eight months).⁴⁹³

In 1958, a new electricity crisis caused the lake to be drawn down very low again. The *New Zealand Herald* complained in April 1958 that 'a brown and ugly band of barren foreshore about 40ft high now fringes Lake Waikaremoana'. Although not a 'dying lake', it was 'a very sick one'.⁴⁹⁴ The lake remained at its minimum generating level for the rest of 1958, dropping to its lowest recorded level (1,972 feet) in July of that year.⁴⁹⁵

In 1959, newspapers continued to publish critical articles and 'graphic images of the lake in its newly reduced state'.⁴⁹⁶ The supervisor of national parks, RW Cleland, visited Lake Waikaremoana in April 1959. He reported to the Director-General of Lands:

490. Ibid, p 194

491. Ibid, p 195

492. Ibid

493. Ibid, pp 196–197

494. *New Zealand Herald*, 28 April 1958 (Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 197)

495. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 197

496. Ibid

Much of Lake Waikaremoana's beauty, fish, launch and boating areas have been lost to hydro-electricity. The uncovering of the forest stumps as a result of the lowering of the level of the water has severely restricted movement and the submerged stumps are a constant menace near most of the shoreline.⁴⁹⁷

The Government's management of the lake was also criticised by JT Salmon, a biologist, who complained that the lake's forested shore had deteriorated to the point that lake and forest were separated by 50 feet. Acres of 'exposed mud flats grew weeds', and long-drowned stumps poked above the surface. In Salmon's understanding, the lake had by now been permanently lowered by 20 feet (with fluctuations below that).⁴⁹⁸ Cant's research team commented that the lake had certainly been lowered permanently, but that – as it was to turn out – it had not been *permanently* lowered by 20 feet.⁴⁹⁹

By this time, of course, the Crown had accepted that Maori owned the lakebed, which was being alternately exposed and covered to an extreme, artificial degree, thus modifying the bed and impacting on the lake's fisheries, with apparently no end in sight to these fluctuations. We will consider the post-1954 negotiations between Maori and the Crown in section 20.8, where the question of compensation for use of (and damage to) the lake naturally loomed large. Here, we note that Maori representatives raised the issue of lake levels with the Government in 1949 and again in 1959 and 1961, when there was widespread concern about how the Crown was manipulating the lake.

In 1949, as we have seen, Prime Minister Peter Fraser met with the owners to discuss the possibility of purchasing the lake or paying for its use, as they had requested. The owners suggested to him then that the scenic value and feeding grounds of the fish had been harmed by lowering the lake.⁵⁰⁰ This was confirmed by officials independently of Maori complaints. The Tourist Department had complained to Internal Affairs that the fishing was poor. The Rotorua conservator was sent to investigate the complaint of 'deterioration brought about by the use of the lake waters for hydro electric purposes.'⁵⁰¹ The conservator reported that lowering the lake had 'undoubtedly made a very big in-road into the fish food', by destroying shallow feeding grounds as well as shellfish and aquatic vegetation.⁵⁰² He recommended a scientific study by the Marine Department, which took place in 1950. This report indicated that the Waikaremoana trout fishery had always been pre-

497. RW Cleland to director-general, 9 April 1959 (SKL Campbell, 'Urewera Overview, Project Four: Te Urewera National Park 1952-75' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1999) (doc A60), p 59)

498. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 197

499. Ibid, pp 197-198

500. Walzl, 'Waikaremoana' (doc A73), p 347

501. Under-Secretary for Internal Affairs to the secretary for Marine, 22 November 1949 (Walzl, supporting papers to 'Waikaremoana' (doc A73(d)), p 2039)

502. Conservator of wildlife, memorandum, 31 October 1949 (Walzl, supporting papers to 'Waikaremoana' (doc A73(d)), p 2040)

carious but lowering the lake had caused a 'crisis': 'There is no doubt that lowering of the lake level has been detrimental to the bottom fauna and feeding grounds. The lake in normal times could ill afford to lose any shallows.'⁵⁰³

There was a further impact on the trout fishery because a large number of fish were being destroyed each year by being drawn down the intake tunnel to Kaitawa power station. Also, native species were affected. The lake's eel population had been cut off from the sea; migration was now impossible. The report recommended better screening of the intake tunnel, annual releases of trout fry, possibly introducing a new species of fish as food for trout, and close monitoring. No solution was suggested for eels.⁵⁰⁴

In 1959, Sir Turi Carroll, part of a deputation to discuss compensation for the Crown's use of the lakebed, informed Prime Minister Nash that 'the lake had deteriorated from a fishing point of view because the Electricity Dept's operations had reduced the level by a good 15ft and this had deprived the fish of quite a lot of food'. The delegation of owners was concerned that lowering the lake had 'exposed the shores where the marine growth was and exposed the vegetation.'⁵⁰⁵ Carroll raised this issue again in 1961. When the Government insisted that the lake's only monetary value came from fishing revenues, Carroll said that 'with regard to fishing licences of Waikaremoana the Hydro people had drained the water and this had resulted in ruining the feeding grounds and thus killing the fish.'⁵⁰⁶ In response, Nash 'promised to investigate this claim.'⁵⁰⁷

This resulted in a second Government inquiry as to the effects of controlling the lake for hydroelectricity. In 1961, the Maori Affairs Department asked Internal Affairs if there was any evidence to support the Maori owners' claim.⁵⁰⁸ The results were mixed. The Internal Affairs Department provided a report in November of that year, which Crown counsel cited extensively as follows:

- ▶ 'Alterations to lake levels had created problems in the management and utilisation of the fishery'.
- ▶ Fluctuations in lake levels had 'affected weed growing in shallow areas and the yield to shore-based fishers'.
- ▶ But, contrary to what had been expected, the abundance of smelt (principal food for trout) had not been affected.
- ▶ There had been 'little or no difference to the trolling yield', although trolling was now dangerous, especially after dark, and was not allowed after 11 pm.

503. Assistant Fishery Officer Dickinson, 'Report on Lake Waikaremoana', [circa September 1950] (Walzl, 'Waikaremoana' (doc A73), p 362)

504. Walzl, 'Waikaremoana' (doc A73), pp 362-363

505. 'Notes of deputation to the Right Hon the Minister of Maori Affairs, the Minister of Lands and the Minister of Forests', 19 August 1959 (Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 210-211)

506. 'Notes of deputation held in Hon Mr Hanan's rooms on Wednesday, 9 August, 1961', 18 August 1961 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 886)

507. Walzl, 'Waikaremoana' (doc A73), p 489

508. *Ibid*

- ▶ Screens had been erected over the siphon at Onepoto but their effectiveness had not yet been determined.
- ▶ Despite the limiting factors, the trout fishery was actually under-exploited and could sustain a greater degree of exploitation than at present.⁵⁰⁹

At first, Ministers and officials had denied that there had been any significant modification of the lake, or – at least – not much impact on the Maori owners if there had been. In part, this was because of their view that the lake was poor in native fish and had never been an important food source for its Maori owners.⁵¹⁰ By the 1960s, officials accepted that there had been a drastic effect at first in the late 1940s, but the trout fishery had always been precarious and was understood to have recovered in the 1950s, partly as a result of introducing smelt to serve as a new source of fish food. Even so, the growth of Waikaremoana's trout fishery may have been slower than it should have been. In terms of Maori claims, the Government's attitude to compensation was undoubtedly influenced by its view that the lake had never been important as a customary fishery.⁵¹¹ Counsel for Wai 945 Ngati Ruapani suggested that this point was 'simply irrelevant'.⁵¹² Regardless, Crown counsel in our inquiry accepted that lowering the lake had had significant effects on native and introduced fisheries.⁵¹³ Against this fact, the Crown cited two points: first, lake levels (and therefore fisheries) were more stable after 1965; and the value of hydroelectricity to the nation was such that the negative impacts – such as they were – were justified.⁵¹⁴

In 1968, when the lakebed was professionally valued for the first time, the Government's valuer found that there were two 'major drawbacks to really good fishing in Lake Waikaremoana'. Growth in fishing revenues had been far outpaced by Taupo and Rotorua as a result. First, the deeper parts of Lake Waikaremoana were of no use for fishing, and, secondly, the lake level 'is subject to fairly wide fluctuations'. These two 'drawbacks' had a significant impact on fishing revenue and therefore on the monetary value of the lake. Lake Waikaremoana's advantage was its comparatively long and sheltered shoreline.⁵¹⁵ As Dr Cant's team observed, the Government was directly responsible for the fluctuating lake levels but it had also contributed to the overall problem: permanently lowering the lake had reduced the shallow waters by almost one-fifth, and thus the fisheries.⁵¹⁶

By 1968, however, the more extreme fluctuations were a thing of the past and the lake was never again allowed to drop as low as it had in 1956 and 1958. The

509. Crown counsel, closing submissions (doc N20), topic 28, p16; Walzl, 'Waikaremoana' (doc A73), pp 489–490

510. See, for example, Walzl, 'Waikaremoana' (doc A73), pp 340, 349.

511. Walzl, 'Waikaremoana' (doc A73), pp 320, 335–336, 340, 349, 359–364, 420–422

512. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), p 50

513. Crown counsel, closing submissions (doc N20), topic 28, p17

514. *Ibid*, pp16–17

515. Valuer-General to Director-General of Lands, 'Lake Waikaremoana: Valuation for Purchase', 14 October 1968 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), pp 1095–1096)

516. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 208–209, 213

power crises of the 1950s were resolved by the commissioning of new power stations. Lake Waikaremoana was allowed to refill in 1959 and 1960. Heavy rain even led to flooding in December 1960, with the lake topping at 2,011 feet; there was an annual range in 1960 of 7.6 metres. A new equilibrium was not established, however, because there were further major drawdowns of the lake in 1962 and 1964, although on a 'lesser scale' than in the 1950s. The lowest level in those years was 1,985 feet.⁵¹⁷

Finally, in 1965, the Cook Strait power cable and the Benmore power scheme meant that the need for further 'drastic lowerings of the lake was largely eliminated'. Dr Cant's research team considered that there were no more wild fluctuations and drastic drawdowns of the lake after 1965.⁵¹⁸

We will consider the longer-term effects of lowering the lake later in the chapter. Here, we note that the effects were significant during this 20-year period when the lake levels fluctuated in such an extreme manner. They included reduction of littoral (nearshore) habitat, damage to fisheries (particularly shellfish and other species in the littoral zone), exposure of a permanent but fluctuating band of dry land at least 15 feet in height, navigational hazards (in the years when the drowned forest stumps were exposed), and the impossibility of establishing a new equilibrium while such extreme fluctuations occurred from year to year (and even within particular years).⁵¹⁹

Another immediate (and permanent) effect of lowering the lake was the transformation of Patekaha Island into a peninsula.⁵²⁰ This was of great concern to Ngati Ruapani. Claimant counsel explained that 'This has meant that the natural protections once afforded to Patekaha as an island have been lost, with urupa and other wahi tapu suffering from exposure.'⁵²¹

Claimant witnesses were also extremely concerned about the damage to the mauri of the lake. Kuini Te Iwa Beattie, who was brought up at Kuha in the 1950s and 1960s, told us:

The tampering with or contamination of our wai has been a calculated act of invasion upon the very existence of my people. That tampering is witnessed by the manipulations of our lake levels for hydro electricity developments and by the misguided attempts at managing rather than caring for our waterways. Our wai is polluted as much as the hearts and souls of its tamariki.

Our atua, our tupuna are not indulgent people. When obligations fail to be met, repercussions result. As a consequence of being denied the capacity to fulfill our kai-tiaki obligations we have been adjudged with strict culpability. The lake with its healing kaupapa, has taken the lives of two of my uncles Rehua Rurehe and Wa Aranga. Though we were without blame, we have paid the ultimate price for the interference to the lake.

517. Ibid, p 198

518. Ibid

519. Ibid, pp 207–213

520. Ibid, p 258

521. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 65

He mea ata whakarite ko te tanoanoa i to matau wai, i te mauri o to matau tuhauora. Kua kaikanohi i enei mahi i te raweketanga o te wai, ona taitimu, me ona taipari e whaihihiko noa iho ai nga whare hihiko ra, me ta ratau whakahaere kuri i te moana, he aha ai i kore ai i manaaki noa iho ai? Kua rite tahi te tanoanoatanga o te wai ki te tanoanoatanga o nga whatumanawa me nga wairua a nga tamariki.

Ehara o matau atua o matau tipuna i te tangata ngawari noa iho nei. Ki te kore e ea nga utu, ka utua e matau. Ko tetahi mea i puta i ta koutou tango i to matau mahi tiaki i te mauri o te whenua, ka whakapaea kehia ko matau. Na te mauri o te moana me ona kaupapa whakaora tangata ka mate i a ia oku na matua keke e rua a Rehua Rurehe, me Wa Aranga. Na te mea ehara na matau te hara kei te noho papa ko matau mo te tanoanoatanga o te moana.⁵²²

Interference with the lake in this way was a spiritual affront to the taonga and its kaitiaki. The burial of the form of the taniwha Haumapuhia, until then clearly visible in her final resting place at the outlet of the lake, was seen as a 'significant omen' or tohu. This occurred as the result of a landslide 'during power scheme construction'.⁵²³ Ngati Ruapani also saw it as the 'desecration of a significant historical site'.⁵²⁴ When further sealing of leaks was proposed in the 1970s, there were other tohu and the local people were strongly of the view that the 'lake outlet should not be interfered with further'.⁵²⁵ Sir Rodney Gallen stressed to us the importance to the kaumatua of the 'continuing and present significance' of Haumapuhia; for them, she was 'much more than a myth'.⁵²⁶

In her evidence, Kuini Beattie also referred to the erosion caused by lowering the lake. She described it as having defiled their mother, the lake, and 'eaten away the shores of Waikaremoana'.⁵²⁷ This was a significant and ongoing issue for the claimants, as Dr Cant's team found when interviewing tangata whenua.⁵²⁸ Although not many details were supplied, lakeshore wahi tapu have inevitably been affected, both by exposure of the lakebed and by construction works.⁵²⁹ Te Ariki Mei, for example, referred to the disturbance of burial sites during the excavation of the Kaitawa intake.⁵³⁰ Fortunately, the Minister of Works intervened to prevent the destruction of the important rock formation Nga Hoe a Kupe.⁵³¹

522. Kuini Te Iwa Beattie, brief of evidence, 11 December 2003 (doc B30), pp 7, 14–15

523. Evelyn Stokes, J Wharehuia Milroy, and Hirini Melbourne, *Te Urewera Nga Iwi Te Whenua Te Ngahere: People, Land and Forests of Te Urewera* (Hamilton: University of Waikato, 1986) (doc A111), p 216

524. Rapata Wiri, brief of evidence, 19 October 2004 (doc H52), p 21

525. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 216

526. Rodney Gallen, brief of evidence, no date (doc H1), para 43

527. Beattie, brief of evidence (doc B30), p 3

528. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 211, 258

529. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), pp 65–66; app A, pp 82–83

530. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 182

531. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, pp 82–83

Increased erosion has been one of the long-term consequences of the artificial management of lake levels. Not all of the effects were long term, and we will return to this question in section 20.10.

Finally, there was one remarkable impact of the Crown's lowering of the lake which would have unanticipated benefits for the Maori owners. By the 1960s, the lake was being maintained to a maximum level of 2,006 feet. Before 1946, the natural maximum each year was normally 2,020 feet. This meant that the hydro works had created a ring of dry land, Maori-owned, running all the way around the lake, about five metres or 15 feet in extent. This separated the bush from the shore (an eyesore for many) and it also separated the lake from the park lands. Prime lakeside land was now in the hands of the Maori owners and outside the legal grasp of the national park. Not only did this strengthen the Maori owners' bargaining position with the Crown in the 1960s, it doubled the commercial value of their property. As we shall see in the next section, the lake was professionally valued in 1968, at which time just over half the value of the bed came from this relatively small area of dry land.

20.8 WHY DID IT TAKE SO LONG FOR THE CROWN TO NEGOTIATE AN ARRANGEMENT WITH THE LAKE'S OWNERS AFTER IT ACCEPTED THEIR TITLE IN 1954?

SUMMARY ANSWER: If we take the starting point of negotiations between Maori owners and the Crown as 1949 (when Fraser's abortive negotiations took place), then it took 21 years for the Crown and owners to reach an agreement about Lake Waikaremoana. For part of that period (1950 to 1954), the Government was still considering litigation, which was not finally ruled out until September 1954. After the titles were registered, the owners sought to open discussions with the Minister of Maori Affairs, EB Corbett, during the period 1954 to 1957, but were rebuffed. They then sought to open negotiations with the Prime Minister in 1957. What followed was a decade of negotiations with first Labour and then National Ministers and Prime Ministers, which ended up in deadlock from 1962 until the end of 1967.

Why were these negotiations unsuccessful?

First, the Maori owners wanted to retain ownership or at least a permanent connection to their taonga, on the model of the Rotorua and Taupo lake settlements, by means of an annual payment to a Waikaremoana Maori trust board. The Crown, on the other hand, wanted an outright purchase of the lake and was extremely resistant to paying an annuity. These remained sticking points until 1969, when the Crown gave way on them.

Secondly, officials decided in 1957–58 that the Crown did not really need to own the lake to protect its interests in hydroelectricity, tourism, and the national park, and wanted (in essence) to keep using it for free. Also, they considered that Maori had no real claim for 'injurious affection' as a result of the lake hydro works. Nonetheless, Ministers (especially Walter Nash) insisted that the Crown come up with a respectable purchase offer for the lake. It was not until the 1960s, when it

became clear that the newly created ring of dry Maori-owned land posed a significant problem for the national park, that officials became serious about trying to acquire the lake. This was because they now saw a significant risk to the use of the lake in the national park, if visitors could be sued for trespass and no amenities could be built on the Maori-owned land close to the water's edge. As a result, the Government came up at first with a series of what the claimants called 'ludicrous' offers, based mainly on capitalising annual fishing revenue. The Maori owners, on the other hand, were convinced that the Crown must pay for its past and present use of their taonga (including its use for electricity generation), and that the value was much higher than even the highest Crown offer. As officials struggled to justify a value closer to the owners' expectations, they came to accept that the purchase price should include compensation for past use (although not for hydroelectricity). Nonetheless, even the greater incentive for the Government to settle in the mid-1960s could not produce a Crown offer higher than half what the owners wanted. The negotiations were deadlocked from 1962 to 1967.

A breakthrough came in late November 1967, when the Minister of Lands, Duncan MacIntyre, agreed to the owners' proposal for an independent commission to decide the value of Lake Waikaremoana. MacIntyre suggested, however, that the first step was to obtain a special Government valuation (GV). The parameters for the special GV were set by officials, who sought a legal opinion and decided that the use of the lake's water for electricity should be excluded from the GV. After a delay of several months, while the limit of the lake's pre-1946 shore was defined and surveyed, the special GV was finally completed in November 1968. The current value of Lake Waikaremoana was set at \$147,000, consisting of \$73,000 for the marketable exposed lakebed, \$70,000 for the submerged bed, and \$4,000 for buildings and improvements on the bed. This outcome showed that the Crown's offers in the 1960s (the latest being in 1966) had seriously undervalued the lake. After receipt of the GV, the next step should have been the appointment of a commission, representing the owners and the Crown (with a judge as chairman), to determine the relationship between the present capital value and compensation for past use, so as to set an overall value for the lake. This did not happen, however, and the Government proceeded to make another purchase offer in September 1969, based on the special GV (minus improvements). Although Cabinet considered the possibility of a lease in perpetuity or an annuity at that time, it once again preferred outright purchase – this time for the sum of \$143,000, to be paid in instalments. Negotiators were authorised to increase this offer by 15 per cent if necessary. This was the first time since 1961 that the Crown's offer did not include a component for past use.

At the meeting of assembled owners on 26 September 1969, the Crown's purchase offer was rejected in favour of a counter-offer to lease Lake Waikaremoana for 50 years (with a perpetual right of renewal), backdated to the reopening of negotiations in 1957. Officials reported back to MacIntyre that the only way the Crown could obtain the lake was by lease, never by purchase. The Minister agreed and proposed to Cabinet that the counter-offer of a lease should be accepted,

although not on all the terms and conditions sought by the owners. Cabinet agreed in December 1969. The two key points here are that:

- ▶ the special GV was the first key breakthrough, enabling the Crown to make an offer much closer to what the Maori owners were willing to accept; and
- ▶ the second key breakthrough was the Government's agreement in December 1969 to stop insisting on outright purchase and accept a lease with annual payment to go to a Maori trust board.

These breakthroughs enabled the conclusion of negotiations in 1970–71, which is the subject of section 20.9.

20.8.1 Introduction

Once the Crown abandoned the idea of further litigation in 1954, it took until May 1970 to negotiate an agreement in principle about the lake with the Maori owners. Negotiations began in 1957, after a failed attempt by Peter Fraser to arrange a settlement in 1949. During this period, the Crown continued to use the lake as it had before, without a single concession – as far as we are aware – to the legal rights of the Maori owners.

In this section of our chapter, we rely mainly on Tony Walz's research report and his extensive collection of supporting documents. We explore the claimants' arguments about the negotiations, and why it took so long to reach agreement. In the claimants' view, the Crown singlemindedly pursued an outright purchase to the exclusion of other arrangements which would have provided better for Maori interests. This postponed agreement for many years but the Crown gradually increased its purchase price until finally, by the late 1960s, it seemed that 'some owners would capitulate and sell to the Crown.' This might have happened if tribal leaders had not countered by offering a lease in 1969, which the Crown was prepared to accept.⁵³² The 1971 lease represented a 'hard fought victory' and a 'relatively simple solution to an often vociferously fought dispute.'⁵³³ It took so long to resolve this dispute, in the claimants' view, because the Crown also remained 'dogmatic' in its efforts to keep the amount paid to Maori as low as possible, even when it acknowledged that there were inconsistencies with its settlement of other inland waterway claims, and that there was no clear basis for the value it was attaching to the lakebed.⁵³⁴ In claimant counsel's submission, the Crown 'endlessly sought to find such a basis with often ludicrous results.'⁵³⁵ Finally, the deadlock in negotiations was broken in 1967 because the owners came up with the idea of a special commission to inquire into the value.⁵³⁶

532. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 69–70; counsel for Wai 36 Tuhoe, closing submissions, pt C (doc N8(b)), p 13

533. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 70

534. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), p 50

535. Ibid

536. Ibid

The Crown offered no submissions about the negotiations, confining itself to arguments about the 1971 lease and its terms. Crown counsel did, however, stand by the position developed by Ministers and officials during the negotiations, that the Maori owners would have had little or no claim to ‘injurious affection’ as a result of the Crown’s hydroelectric works and lowering of the lake.⁵³⁷

20.8.2 First serious engagement: negotiations with Peter Fraser in 1949

As we discussed in section 20.6.5, the first serious engagement between the Crown and the Maori owners of Lake Waikaremoana occurred in 1949. Prime Minister Peter Fraser had decided to make a purchase offer for the lakebed in 1947. Nothing happened, however, until the Maori owners approached him as Minister of Maori Affairs at the beginning of 1949. On 1 February, his department informed him that the owners’ lawyer, Wiren, had approached the Government on behalf of his clients. They ‘were desirous of coming to some arrangement with the Government in connection with the future use of the Lake for hydro electric, fishing and tourist purposes.’⁵³⁸ As the Under-Secretary understood it, there ‘seems to be some suggestion that the Government should either purchase the lake or come to some arrangement similar to the Rotorua and Taupo lake settlements’ (in which the Crown had settled Maori claims without actually acknowledging their title to the lakes).⁵³⁹ But this was not in fact an offer to sell the title that the people had just secured at such cost to themselves. Later in the year, Fraser acknowledged that ‘the Maori owners were not prepared to sell.’⁵⁴⁰ If possible, they sought some other arrangement with the Government under which it would pay them for the use of their lake. This became one of the key points for debate: what exactly was the Crown buying from or settling with Maori, and how should it be valued?

Under-Secretary TT Ropiha advised Fraser in February 1949 that he should avail himself of this opportunity to ‘bring the matter to a head’ and open negotiations with the Maori owners. That being the case, officials collected information about the revenues generated by the lake, including those from fishing licences and boating fees. This was a problematic exercise. Fishing licences issued at Lake Waikaremoana in the 1948–49 year had generated about £121, but this was only part of the revenue because any Rotorua fishing licence entitled the licensee to fish at the lake. The revenue from the Government launch was £778 for the same year but ‘overheads and depreciation meant that there was little profit.’⁵⁴¹ Overall, the Lake House tourism industry had generated some £10,000 in revenue but had actually operated at a loss in 1948–49.⁵⁴² Since the Government-run tourism project was not actually profitable, what share of the revenue could or should be

537. Crown counsel, closing submissions (doc N20), topic 28, p 12

538. Under-Secretary to Minister of Maori Affairs, 1 February 1949 (Walzl, ‘Waikaremoana’ (doc A73), p 342)

539. Ibid

540. ‘Notes of interview with Minister of Maori Affairs’, 5 October 1949 (Walzl, ‘Waikaremoana’ (doc A73), p 346)

541. Walzl, ‘Waikaremoana’ (doc A73), p 343

542. Ibid

set aside for the owners of the lake? On the other hand, there would have been no Waikaremoana tourism revenue at all without the use of the lake, its fisheries, and its scenic attractions.

While this information was being collected, Fraser met with a small delegation of owners at Wairoa on 19 June 1949. The delegation consisted of Ngati Kahungunu leader Turi Carroll and R McGregor, accompanied by two of their kaumatua, and had been authorised by Tuhoe (as well) to open discussions with the Crown. The goal was to discover whether Fraser would be willing to negotiate an arrangement and, if so, of what kind. Fraser's response was that he wanted a concrete proposal from the owners to consider. This was to become a feature of negotiations: the Crown and Maori, both unsure of the exact basis on which to proceed, each sought to put the onus for designing a solution on the other. At this point, however, the Maori owners did have a solution in mind: they wanted an annual grant similar to those for Rotorua and Taupo, but in this case with the distinction that they had a court title and were the proven legal owners of the lake. Further, they wanted a grant that could be utilised by the people as a whole and not by each individual owner. Fraser made no promises in response but said that the Government was keen to settle all Maori claims, and that the matter would now be dealt with by officials.⁵⁴³

In July and August 1949, while information was being collated about the Crown's revenue from Lake Waikaremoana, officials debated what steps to take. Within the Maori Affairs Department, advice prevailed that a settlement should take the form of compensating Maori for 'the abandonment of any rights they have', with the proviso that the legal issues might still be 'debated in the appropriate forum' (that is, the courts). As for the level of 'compensation', a recent commission of inquiry (the 1948 Myers commission) had found that the Government overpaid Maori in the 1920s lake settlements. A commission of inquiry should therefore be used to determine the amount of compensation, if the Government decided to settle 'without a final ascertainment of the rights of the parties in the Courts.'⁵⁴⁴

Thus, two opposing positions took shape: Maori wanted an annual payment for the Crown's use of their lake, of which they would retain ownership; and the Crown wanted them to give up all their rights (of whatever kind) for a compensation payment, with the possibility still of resorting to the courts to prove that their rights had not amounted to ownership.

On 14 July 1949, 37 Maori owners living at Tuai sent a petition to the Prime Minister and Minister of Maori Affairs, as the Minister responsible for Maori claims 'passed down from Government to Government'. They asked him to visit their marae at Tuai so that matters could be settled there, at their home marae at the lake: 'We the people directly interested in the Lake would like to hear you personally give your decision re the lake on our marae'. They also felt that if he could

543. Ibid, pp 343-344

544. Memorandum to Under-Secretary, Maori Affairs, 11 July 1949 (Walzl, 'Waikaremoana' (doc A73), pp 344-345)

see the poverty in which they lived, and their shortage of farmland, he ‘might be influenced to settle the Lake claim to help us to live better.’⁵⁴⁵

Although Fraser replied that the lake negotiations were now in the hands of officials, Tony Walzl notes that the Prime Minister did in fact meet with a delegation at Nuhaka in August 1949. At that meeting, Matamua and Rurehe asked for an annuity of £10,000.⁵⁴⁶ As we noted earlier, Fraser told the owners that he was not in favour of further litigation and would ask his Government (presumably Cabinet) to accept the Maori Appellate Court decision. But Cabinet, he said, would not agree to a yearly payment of £10,000. The Prime Minister exposed a gulf between the Crown and Maori positions when he noted that the owners ‘were not prepared to sell and if the bed of the Lake was not to be sold he could not see where there was a basis for a claim’. They could not, he said, ‘claim for the water on the bed’. Rather than respond directly, Matamua pointed out that the Waikaremoana people were virtually landless, and Fraser hit upon a new solution: an exchange of ‘land’ – the bed of the lake for ‘land for the people to live on’. Fraser promised to get his officials to find out what lands were available for exchange.⁵⁴⁷

The results of this meeting were then debated among the communities of Maori owners. It seemed that the Government would not agree to an annuity based on continued Maori ownership, and that it was willing to exchange farmland for their rights in the lakebed. The next meeting took place at Kohupatiki, Hastings, on 8 October 1949. The delegation of owners was led by Turi Carroll. Its spokesperson was R McGregor, and he reported the consensus at which the communities of owners had arrived. The titles determined so long ago by the Native Land Court and the appellate court had created individual owners:

The question had to be decided by the people whether they should insist on individual rights of ownership. They agreed to waive their rights in that respect and hand the matter over to the people and that any funds [were] to be applied for the welfare and benefit of the people generally and not for the individual owners. It was hoped in view of that decision that the Government would consider a more generous settlement. . . . He had been asked by the people to make a tentative offer subject to the approval and consent of the Government of an annual grant of £6,000 in full settlement of their rights.⁵⁴⁸

Thus, the Maori owners were willing to agree to the Crown’s insistence on alienation of ownership, on the basis that they would give up their individual rights

545. Tamihana Ranginui and others to Prime Minister, petition, 14 July 1949 (translation) (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), p 1190)

546. Walzl, ‘Waikaremoana’ (doc A73), p 346

547. ‘Notes of interview with Minister of Maori Affairs at Nuhaka on 27 August 1949’, 5 October 1949 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), p 1188)

548. ‘Notes of representations made to the Minister of Maori Affairs at Kohupatiki, Hastings, on 8 October 1949’, 21 October 1949 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), pp 1186–1187)

in return for an annual payment to 'the people' collectively. The owners were not prepared to entertain a land exchange:

The people living round the lake were very poor. The land was of very poor quality and was almost impossible to be used for farming. The houses were in a deplorable condition. If an annual grant was made, the owners hoped to assist the people by providing homes, improving the maraes and by purchasing suitable areas of land for farming. Those people who were too old for farming would be assisted in other ways. A suggestion had been made that the Crown should make a grant of land to enable the people to farm and improve their living conditions. This proposal had been considered and it was found that although it might be suitable to the young people it would not benefit the older people. A grant in perpetuity would be more desirable.⁵⁴⁹

Also, the owners were prepared to reduce their asking price by £4,000 a year. They had arrived at a 'tentative' figure of £6,000 because they 'were finding it difficult to decide upon a fair and adequate amount'. McGregor said that the people wanted the Government to investigate this issue, taking into account the lake's 'scenic value' and the damage that lowering the lake had done to its fisheries.⁵⁵⁰

In response, the Prime Minister agreed that the 'people near the lake were on poor land', but he also noted that it was the Government's responsibility to do something about that, and about their poor living conditions, regardless of any arrangement made about the lake. He also assured the delegation that the Government was 'anxious' to reach a settlement with them, but acknowledged common ground in respect of the difficulty in finding an appropriate basis for calculating 'compensation'. What would the Crown be paying for? Scenery alone, he said, could not provide a reason for compensation. Fishing rights were a possibility but there was little basis for comparison – Lake Taupo, for example, was not comparable in that respect. 'It would be difficult', he added, 'to fix a basis on the water.' Maori Affairs officials would look into the matter but (falling back on advice from officials in July) it might be necessary to set up a special commission to 'assess the amount to be paid.'⁵⁵¹

There was a marked shift of position here on both sides. Originally, it had been the Maori owners who had opposed a sale but they were now willing to consider it on the basis of giving up individual rights for the communal good. On the other hand, Fraser now appears to have been following the advice received from officials in July 1949. Instead of purchase, he was talking about compensation for rights and the difficulty of determining an exact formula for that compensation. He ventured no opinion on whether the compensation should take the form of an annuity. He talked about fishing rights, scenery, and water but, as far as we can tell from

549. Ibid

550. 'Notes of representations made to the Minister of Maori Affairs at Kohupatiki, Hastings, on 8 October 1949', 21 October 1949 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1187)

551. Ibid

the record of the meeting, did not mention paying for ownership of the bed. As discussed earlier, it was put to Fraser that he had given up the idea of going to the Supreme Court. He did not deny it.⁵⁵²

The parties seemed as far apart as ever in mid-October 1949, despite significant concessions from the Maori owners. Both sides were really feeling their way as to what might be an acceptable compromise that each could live with. There were serious difficulties to surmount in respect of what exactly was being transacted and on what basis it should be valued. Nonetheless, a promising dialogue had begun. Further progress came later in October 1949, when agreement was reached within Government to abandon Fraser's idea of a land exchange. This was because the 'allocation of good land to the Urewera people who have undoubted need of it' would not settle the claims of those owners who lived in Wairoa or further afield.⁵⁵³ But no other progress was made. As we noted in section 20.6.5, the Labour Government lost office in November 1949. The new National Government preferred the litigation strategy. Engagement between Maori and the Crown did not resume for eight years. We explain why in the next section.

20.8.3 Re-engagement between the Crown and Maori, 1957–61

20.8.3.1 Attempts to engage with Corbett and the Holland Government

As will be recalled from section 20.6.5, the National Government considered its options in 1950 and decided not to continue Fraser's negotiations with the Maori owners of Lake Waikaremoana. The new Government preferred to await the outcome of the Whanganui River litigation and then proceed with the Waikaremoana case in the courts. In the meantime, the lake was included within the boundaries of Te Urewera National Park, although it was not technically part of the park (see chapter 16). In 1954, the time limit for litigation expired and Cabinet decided to accept the legality of Maori ownership of the lakebed. The Department of Lands and Survey released the plans so that the Maori Land Court could complete the titles for registration. This was duly done.

As far as we can tell, there was no engagement between Maori and the National Government, either before or after the finalisation of title in 1954, until the owners took a new initiative in 1957. Mr Walzl commented:

By the mid-1950s, the owners had had an unsatisfactory experience of negotiations with the Crown. Although great hope had attended negotiations with the first Labour Government, it was soon found that the parties had markedly different views as to the value they each placed on the Lake. The subsequent Holland-led National Government, however, had even less empathy with the owners' cause and negotiations soon ground to a halt. But although the same Government was in power in

552. 'Notes of Representations Made to the Minister of Maori Affairs at Kohupatiki, Hastings, on 8 October 1949', 21 October 1949 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1187)

553. Walzl, 'Waikaremoana' (doc A73), p 348

1957, the owners judged that it was time to reinitiate an approach to try and have their grievances settled.⁵⁵⁴

In the period from 1954 to 1957, the efforts of Tuhoe leaders had been concentrated on battling timber restrictions and negotiating a settlement of the UCS roading claim (see chapters 14 and 18). They had some victories in both cases, including the establishment of the Urewera Land Use Committee (to evaluate Ruatahuna lands for milling) and the roading settlement with EB Corbett, Minister of Maori Affairs, in 1957. Nonetheless, Waikaremoana leaders did try to approach Corbett during the period 1954 to 1957 through the Maori Member of Parliament Tiaki Omana, who had facilitated the October 1949 meeting with Fraser. The response was always that 'Mr Corbett was too busy with matters that were more pressing' to meet with them about the lake.⁵⁵⁵

On 18 April 1957, the owners' lawyer, S Wiren, made a formal, direct approach to the Minister, in the letter quoted in section 20.6.5. Wiren pointed out to Corbett that, notwithstanding all the attempts of his clients to have their title to the lake confirmed, the Crown was simply disregarding their ownership, 'particularly in the activities of the State Hydro Department and the Tourist Department'. 'We submit', he wrote:

it is clearly improper that the rights of any citizens, be they Europeans or Maoris, when their rights have been established in the proper Courts, should be so disregarded. The Maoris have, through all these years, been much more forbearing than Europeans would have been.⁵⁵⁶

Wiren also suggested that in other such situations, and acting in conformity with the Treaty of Waitangi, the Crown had purchased lakes from their Maori owners. Because of the number of interested Government departments (and presumably because of the previous failed approaches to Corbett), Wiren asked the Minister to arrange a meeting with the Prime Minister.⁵⁵⁷

Corbett's private secretary, JH Grace, replied to Wiren that this matter was one for the Ministers of Tourism or Public Works, not the Minister of Maori Affairs. He also suggested that Wiren's clients could arrange a meeting with the Prime Minister directly, but that they should have a 'concrete proposal' ready to put to the Government if they did so.⁵⁵⁸ This is important because it indicates a

554. Ibid, pp 390–391

555. 'Report on Visit of Prime Minister and Minister of Maori Affairs to Wairoa on 22.5.59 and Held at Taihoa Marae', typescript, 22 May 1959 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1249)

556. Wiren to Minister of Maori Affairs, 18 April 1957, p 2 (Walzl, comp, papers in support of 'Waikaremoana' (doc A73(c)), p 1284)

557. Ibid

558. JH Grace to Wiren, 1 May 1957 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1282)

surprising lack of interest on the part of the department that was charged with dealing with Maori matters, possibly reflecting Corbett's earlier deflections of the lake issue. Wiren responded in May 1957 that the Minister of Maori Affairs ought to be the most interested of all, and that previous meetings had been arranged by his department.⁵⁵⁹

A second initiative, this time from Turi Carroll, sought another route for dialogue with the Government. He proposed bringing in the Urewera Land Use Committee to deal with the lake, as the vehicle for discussions with the Maori owners. This proposal resulted in a meeting between T T Ropiha and DM Greig, the heads of the Maori Affairs and Lands Departments respectively, in May 1957. As we discussed in chapter 18, the Urewera Land Use Committee had been created in 1954, composed of officials and a Tuhoe representative, to classify land as millable or unmillable. Ropiha was in favour of using the committee 'to go and see the Maoris and to give them some idea of what the Crown considered the lake was worth'. Although it would not be easy, he considered that Lake Taupo was the obvious point of comparison: 'Similar matters would be taken into account, that is, value of fishing revenue and other privileges which brought in money to the Crown. The offer would, of course, have to be on today's value.'⁵⁶⁰

Greig's response was that 'the lake was used today by the Crown without cost' and 'had been for a long time'. For him, the question was limited to the lakebed: 'Was there much value in the bed which was exploitable?' In his view, the Crown should take no account of the Taupo arrangements and simply offer a straight-up capital sum for the bed. Ropiha agreed that this could be done but the purchase should, he suggested, not only include the lakebed but also the Maori-owned reserves on the lake's shores. He suggested offering a capital sum of £12,000, or possibly an annuity of £3,000 a year.⁵⁶¹ As far as we are aware, this is the first time that officials suggested a value of their own, rather than reacting to the figures proposed by the owners in 1949 (at first £10,000 and then £6,000 a year).

This was the beginning of an intense and long-lasting debate within and between Government departments as to what exactly was being purchased and how it should be valued, which complicated negotiations and delayed settlement for many years. Ropiha thought that the Crown would have to pay for 'privileges which brought in money to the Crown', which (in the owners' view) included hydroelectricity. But Greig's approach was different. In any case, the question of involving the Urewera Land Use Committee was referred back to Corbett, who rejected it the following month. In the Minister's view, it was the Maori owners who should first agree among themselves and put a definite proposal to the Crown, through their solicitor, for it to consider – and this view had been conveyed to Wiren.⁵⁶²

559. Walzl, 'Waikaremoana' (doc A73), p 391

560. 'Note for File: Lake Waikaremoana', 15 May 1957 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 984)

561. Ibid

562. Ibid; secretary for Maori Affairs to Director-General of Lands, 17 June 1957 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), pp 983–984)

In the meantime, Wiremu Matamua had written to the secretary for Maori Affairs on 16 May 1957, inviting him to visit Tuai and discuss matters with the people. This proposal was turned down. Again, the Government urged the people to come up with a definite proposal or offer of their own.⁵⁶³ In response, a hui of the owners was convened at Tuai on 27 July 1957. This meeting was ‘well attended’ and its resolutions were approved unanimously: that a trust board similar to the Te Arawa and Tuwharetoa trust boards be established; and that the Crown pay an annuity to the people through such a board, at the rate of £4,500 a year. This proposed annuity had two components. First, the Government would pay £3,000 a year for current and future use of the lake. Secondly, the annuity would include a component of £1,500 a year in compensation for past use of the lake while it was in Maori ownership. The figure of £1,500 was calculated by assuming that the Crown should have paid £30,000 since Maori ownership was finalised 10 years earlier in 1947 (when the Maori appeals were settled). The sum represented 5 per cent interest on £30,000, on the basis that if they were paid what the Crown owed them in 1957, they would have £30,000 in the bank and would thenceforth get £1,500 a year in interest on it.⁵⁶⁴ Mr Walzl commented: ‘The period of Crown use from 1918–1944 whilst the title was delayed by the maintenance of the Crown’s appeal, was not featuring in negotiations at this stage.’⁵⁶⁵

Wiren reported the results of this hui to the Minister on 13 August 1957. In his letter, the solicitor reminded the Government that the courts had decided that Maori owned the lake at the time of the Treaty, and the Treaty ‘confirmed and guaranteed them in their possession’, and that nothing had happened since 1840 to ‘take away that ownership’. While it may be true that the Treaty can be altered by Act of Parliament, it is

binding upon the honour and conscience of the Crown and any Government facing the question of altering the Treaty by legislation must consider whether it is honourable to do so. The Maori Land Court was constituted for the purpose of conferring upon Maoris in respect of their lands the nearest equivalent in English law which is the freehold tenure. Freehold tenure of lakes is a commonplace in English law, and the effect of the judgment is that my clients were entitled to this tenure.⁵⁶⁶

Having thus set out what he saw as the owners’ entitlements in Treaty and legal terms, Wiren outlined the resolutions of the July 1957 hui. He also emphasised the poverty of the Waikaremoana people, a recurring concern during negotiations, and put forward the view that theirs was the only lake that the Crown used without purchasing it from its proper owners.⁵⁶⁷

Now that a definite proposal had come from the owners, as sought by Corbett,

563. Walzl, ‘Waikaremoana’ (doc A73), p 392

564. *Ibid*, pp 393–394

565. *Ibid*, p 394

566. Wiren to Minister of Maori Affairs, 13 August 1957 (Walzl, ‘Waikaremoana’ (doc A73), p 393)

567. Walzl, ‘Waikaremoana’ (doc A73), pp 393–394

the issues of purchase and price were debated among the various Government departments until they were overtaken by the general election on 30 November 1957. The Holland Government was defeated, replaced by the second Labour Government led by Walter Nash. Nonetheless, this discussion of issues and positions within and between departments was crucial for how matters would develop under Labour.⁵⁶⁸

In brief, the Maori Affairs Department took the view that no compensation should be paid for past use of the lake, and that the matter should be viewed as one of current use only. In part, this was because the owners had not specified any past losses; in other words, the Government needed an itemised list of actual losses before considering compensation. Nor, in the department's view, had the owners specified what exactly they would lose if they conveyed the lake to the Crown. This was a reversal of Ropiha's opinions earlier in the year. He had been replaced by M Sullivan as secretary for Maori Affairs. Nonetheless, it was Maori Affairs' view that the Crown had definitely decided to purchase the lake. The key point was therefore what value should be attached to it – and this was a matter for Lands and Survey to take the lead on.⁵⁶⁹

The Director-General of Lands consulted the State Hydro-electric Department on 8 October 1957. He noted that the owners' proposals resembled the Lake Taupo arrangements, and suggested:

There is some comparison between the two Lakes. Both are used to a major extent for the generation of hydro-electricity although there is at Taupo the added value of the fishing. You may consider that it would be preferable to pay the Maori owners a lump sum in cash but from the tone of their solicitors' letter it seems fairly definite that the owners will require compensation on an annuity basis.⁵⁷⁰

Tony Walzl commented that negotiations between the Crown and Maori essentially began in 1957, and, 'at the beginning of negotiations, the State Hydro Electric Department could not conceive that the use of the Lake for power generation and the impact this had brought on Lake levels would play an important part in addressing the owners' claims for compensation.'⁵⁷¹ In essence, the department's view in December 1957 was that the Crown did not need to buy the lake for the purposes of hydroelectricity, although it might want to buy the lake for other reasons. Such other reasons might include the precedent of having purchased lakes in the past, or the interests of Te Urewera National Park, but they had nothing to do with power generation:

568. Walzl, 'Waikaremoana' (doc A73), pp 394–396

569. *Ibid*, p 394

570. Director-General of Lands to general manager, State Hydro-electric Department, 8 October 1957 (Walzl, 'Waikaremoana' (doc A73), p 395)

571. Walzl, 'Waikaremoana' (doc A73), p 396

So far as this Department and its operations are concerned there is no need for the bed of the lake to be vested in the Crown. The only advantage seen in ownership by the Crown is that the settlement of compensation claims arising out of the Department's use of the lake would thereby be avoided. The Department has drawn down the level of the lake considerably over a long period, and areas of lake shore which under natural conditions would be under water have been continuously exposed. It can presumably be expected that if the bed of the lake is not purchased, claims will be made by the Maori owners for compensation for injurious affection. While there might not be a great deal of substance in such claims, they would probably be difficult to settle on an acceptable basis to both parties, and it would be worth something to dispose of such claims.

However, the question of acquisition will probably be decided on other grounds, such as precedents that have already been established elsewhere, and the value of the lake to the Urewera National Park. . . .

This Department has no information and can give little assistance in connection with the supposed value of the Maoris' rights of ownership for compensation *purposes, or the amount of compensation* that might be payable for injurious affection if the lake bed is not acquired. However, the Department will be glad to take part in any discussion with the Maori Affairs Department. [Emphasis in original.]⁵⁷²

By this time, however, Walter Nash had become Prime Minister and also held the portfolio of Maori Affairs, reflecting – Walzl suggests – the tight alliance between Labour and Maori. This created a new environment in which Maori had more political clout. Would it make a difference? We discuss the outcome in the next subsection.

20.8.3.2 Engagement between the Maori owners and the second Labour Government, 1958–60

The Maori owners of Lake Waikaremoana raised their issues with the new Labour Government in March 1958. A deputation met the Minister of Forests, Eruera Tirikatene, while he was visiting Rotorua. They asked for his assistance to bring the matter of the lake before the Prime Minister. He encouraged them to invite Nash, as Minister of Maori Affairs, to visit them.⁵⁷³

In the meantime, the Ministry of Works had been considering the Electricity Department's view that it was unnecessary for the Crown to buy the lake because it did not actually need to own it. This view, which reversed that behind the Crown's

572. General manager to Commissioner of Works, 10 December 1957 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 976. The first sentence was underlined in pen, which was likely done by an official in the Lands and Survey Department after receipt of this letter. The term 'purposes, or the amount of compensation' was typed in vertical on the side of the page and are likely an insertion by Davenport.

573. Walzl, 'Waikaremoana' (doc A73), p 396

Walter Nash. After Labour won the 1957 election, Nash became the Prime Minister and also held the Maori Affairs portfolio. Despite the hopes of Lake Waikaremoana's Maori owners that a settlement would be reached with Nash, and Nash's agreement that the Crown should purchase the lake and provide compensation for past use, the parties remained far apart on a suitable lump sum, annual payments, or a figure for compensation. Nash reached the end of his term in 1960 without any final agreement having been made.



Unknown (ATL, 1/2-059930-F)

long opposition to Maori title up to 1954, was now adopted by the Commissioner of Works as well. In April 1958, the commissioner advised the Director-General of Lands that there was no pressing need to purchase the lakebed:

There is no evidence whatever that the construction or use of the public work for the control of the level of the lake have resulted in any injurious affection or damage to the land of the Maori owners (in this case the owners of the bed of the Lake). As far as I am aware, no claims have ever been made and the works have been operating for several years [and] it is most unlikely that no claims would have been made if there had been injurious affection.

Furthermore, it is some years since the work was carried out and it appears that all claims are now Statute barred by the effluxion of time.⁵⁷⁴

This analysis was deeply flawed for three reasons. First, under the public works legislation in force at the time, only the Crown could lodge compensation claims in respect of Maori land, including claims for injurious affection.⁵⁷⁵ Secondly, the Crown had disputed Maori ownership of the lake until 1954, which meant that the Crown did not accept that there were Maori owners on whose behalf a claim should be made for compensation. For the Crown, therefore, to rely on the 'effluxion of time' and the failure of owners to make claims was doubly unjust, and

574. Commissioner of Works to Director-General of Lands, 15 April 1958 (Walzl, 'Waikaremoana' (doc A73), p397)

575. Public Works Act 1928, s104

entirely careless of the position in which the Crown itself had placed the Maori owners. Thirdly, the owners' entitlement was not limited to compensation for injurious affection. As we discussed earlier, our view is that they were also entitled to compensation for the placing of the siphons and intake structure on their land – but again, only the Minister could make the claim on their behalf. We note that, as Wiren told Corbett in 1957, the owners had been forbearing all this time and had been waiting to negotiate with the Government.⁵⁷⁶

In any case, as Labour was about to reopen negotiations with the Maori owners, key Government departments were coming to the view that the Crown did not really need to own the lake, and nor were Maori owed any compensation for the Crown's past use of (or damage to) the lake. In response to the views of the Electricity Department and the Ministry of Works, the Director-General of Lands saw the likely consequence: that, if the Crown only needed the lake for the national park, the entire payment was going to come out of his budget. Partly for that reason, he too now supported the view that the Crown did not need to own (and therefore to buy) the lake. On 18 June 1958, he replied to the Commissioner of Works:

I note your comments and the opinion expressed that the primary factor in considering the purchase of the bed of Lake Waikaremoana is its inclusion in the Urewera National Park. Certainly from added scenic views the lake is of value to the Park but apart from this is not an integral part of the Park. Any restrictions governing the Park area do not affect the lake nor do they conflict with the lake's use. Consequently it is of no great concern whether the lake forms part of the Park or not.⁵⁷⁷

This left the issue of whether the Government needed to buy the lake because of 'precedent'. Wiren had argued on more than one occasion that the Maori owners were entitled under the Treaty to the same treatment as other lake owners and that the Crown was obliged to provide them with an annuity for the use or ownership (or both) of their lake. The Director-General of Lands felt that budget difficulties prevented the payment of Maori for precedent alone, and the Crown simply did not need to buy the lake for any other reason. He wrote to the Commissioner of Works:

Having in mind therefore, the present non availability of government funds for other essential requirements and the general shortage of funds, purchase of the lake on the grounds of precedents is not warranted or possible. If you concur with this view I propose to suggest to the Secretary for Maori Affairs that the claimants be advised that the Crown does not feel that it is essential that the Lake be in Crown

576. Wiren to Minister of Maori Affairs, 18 April 1957 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1284)

577. Director-general to Commissioner of Works, 18 June 1958 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 970)

ownership nor is it considered that there has been any injurious affect to the owners because of use of the water flowing from the lake for hydro electric purposes.⁵⁷⁸

As the departments lined up behind the view that the Crown did not need the lake, the Maori owners began to lobby the Labour Government. In May 1958, a petition from 159 Waikaremoana owners was sent to Walter Nash. The petitioners identified themselves as Ngati Ruapani (53), Ngati Kahungunu (44), and Tuhoë (62).⁵⁷⁹ The first signatory was Wiremu Matamua.⁵⁸⁰ The petitioners stated:

This matter has been in a state of suspension for forty years and the owners of the lake have had no benefits from being owners. However, in this period of forty years all Maori claims from other parts of the island seem to have been satisfied, including claims to confiscated lands. The claimants to Lake Waikaremoana alone seem to be unappeased.

Therefore we your Maori people here fervently pray that you will be able to visit us and by deliberation we may be able to arrive at some arrangement satisfactory to your Government and to us the Maori owners and maybe we can fulfill in a small measure the hopes of our grand old people who have gone to the great beyond.⁵⁸¹

Wiren followed this petition up on 28 May 1958. He wrote to Nash, asking him to meet with a committee of representative owners.⁵⁸²

On 3 June 1958, the secretary for Maori Affairs reopened the question with the Director-General of Lands. He commented, 'It is understood that no settlement has been reached as between your Department and the other two Departments concerned about the questions of purchase of the lake and of any compensation that might be involved.' The owners had approached the Minister, expressing concern at the lack of progress, and the secretary asked for an expedited process.⁵⁸³ It must have been clear to all concerned that Nash was taking an interest and wanted action. As Walzl noted, this 'reactivated' the debate between the departments, essentially on a new basis that the Crown must develop a counter-offer of its own in response to the owners' proposal for an annuity of £4,500.⁵⁸⁴ Lands and Survey and Works agreed that the Government's main interest in the lake was for hydro-electricity, with the national park as an 'adjunct'. The Tourist Department also had an interest because of the use of the lake by Lake House visitors, especially its

578. Director-general to Commissioner of Works, 18 June 1958 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 970)

579. Walzl, 'Waikaremoana' (doc A73), p 398

580. Wiremu Matamua and others to Minister of Maori Affairs, 16 May 1958 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1266)

581. *Ibid*, p 1263

582. Wiren to Prime Minister, 28 May 1958 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1262)

583. Secretary for Maori Affairs to Director-General of Lands, 3 June 1958 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 972)

584. Walzl, 'Waikaremoana' (doc A73), p 399

launch. It was agreed that all these departments would confer anew on the Maori 'offer' and develop a definite counter-offer.⁵⁸⁵

In particular, Lands and Survey and Ministry of Works officials wanted to know what revenue was generated by fishing, boating, and any other tourist activities, and whether the State Hydro-electricity Department could give 'some idea of what it would consider to be a reasonable sum to pay for use of the water'. Also, they wanted to know if the hydro works affected Maori land and, if so, whether the land had been acquired and for what compensation.⁵⁸⁶ The Commissioner of Works suggested to the head of the Electricity Department⁵⁸⁷ that 'it would be in the interests of your Department to make some contribution towards the cost of acquiring the bed of the lake'. This was because purchasing the bed would preempt the 'question of compensation for the use of the lake which is being made by the Crown for hydro-electric purposes', which had 'never been investigated, and it is quite possible that it may be raised at some time in the future.'⁵⁸⁸ The commissioner stressed that a contribution would only need to be made if the Electricity Department agreed that there was an advantage in Crown ownership of the bed, giving the Crown the complete control of the lake.⁵⁸⁹

A E Davenport, general manager of the Electricity Department, provided a detailed and thoughtful response, which we consider at length. He began by saying:

in one sense the monetary value of the bed of the lake for hydro-electric purposes is very great indeed, because it holds the water by which millions of pounds worth of equipment functions and produces large sums in revenue, without which the equipment would be useless. But the value of the lake bed or the water in it is clearly not to be measured according to the amount of money required to be spent in developing it. It could be said that the lower the cost of development, the greater is the value of the lake.

Until large sums have been spent in development the lake really has no value. Whatever value it may have is entirely contingent on the expenditure of the amount required for development.⁵⁹⁰

Thus, Davenport's first point was that the use of the lake produced 'large sums in revenue' but only because large sums had been spent first in developing it. We note that some of these improvements been constructed on what was still Maori

585. Ibid

586. Assistant administration officer, file note, 27 June 1958 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 968)

587. In 1958, the name of the State Hydro-electricity Department was changed to the New Zealand Electricity Department. For ease of reference here, we refer to it as the Electricity Department.

588. Commissioner of Works to general manager, State Hydro-electricity Department, 15 July 1958 (Walzl, 'Waikaremoana' (doc A73), p 400)

589. Walzl, 'Waikaremoana' (doc A73), p 400

590. General manager, Electricity Department, to Commissioner of Works, 1 September 1958 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 963)

land, and that Davenport's thinking may have been out of step with valuation theory.⁵⁹¹ This underlines for us the point that the Government had not sought expert advice from its specialist department responsible for valuations, and did not do so for many years to come. This is especially puzzling because the Crown was not permitted to buy Maori land at less than GV, and there was no such valuation for the lakebed.

Next, Davenport posited a counterfactual: what if the Electricity Department had to pay for a licence to use the water of Lake Waikaremoana, as private power companies were required to do? Private licensees had to pay the Crown a rental of 2s 6d per kilowatt per annum. On that basis, the Electricity Department would have paid almost £17,800 in the 1957–58 year for the right to generate electricity from Lake Waikaremoana. This, too, Davenport rejected as a basis for analysis: 'But it must be admitted that the sum of 2/6 is not fixed on any scientific basis. It is arbitrary, and has no relation to any royalty that might be payable to the owners of the lake for the use of their water.'⁵⁹²

Davenport then turned to the issue of profit. He calculated that the cost of generating power from the lake in the 1957–58 year was £727,274. Revenue from selling electricity 'is in general only sufficient to cover costs, there being no net surplus or profit accruing to the State from the use of the lake.' In other words, the Government was not running the hydroelectricity sector on a business footing. Davenport added that 'The value to the community of the power that is generated is impossible to measure.'⁵⁹³

From the Electricity Department's point of view, therefore, it was hard for the Government to compare itself to a private concessionaire or to calculate the commercial or market value of a lake for hydroelectricity. This was especially so since the Crown had already developed the lake and had the statutory right to use its water for power generation:

It is hard to know on what principle the commercial value of a concession, or the possession of a right, to use the lake for hydro-electric purposes could be assessed. Many factors could influence the value to private interests seeking to acquire the right to develop a lake for power purposes. Private interests might be prepared to pay a high price, but of course the Crown is not in the same position, and the same considerations should not be taken into account.

The Department is not in the position of having to consider the value of the water, or of the right to use it, on a commercial basis. The sole right to use water for the purpose of generating electricity has been vested in the Crown since the Water Power Act of 1903, and the Department has full statutory powers, subject only to the payment of compensation.⁵⁹⁴

591. See Bruce Stirling, 'Te Urewera Valuation Issues' (commissioned research report, Taneatua: Tuhoë-Waikaremoana Maori Trust Board, 2005) (doc L17)

592. General manager, Electricity Department, to Commissioner of Works, 1 September 1958 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 963)

593. Ibid

594. Ibid, pp 963–964

Profits for the Waikaremoana Power Stations

An Electricorp publication in 1992 used official statistics to calculate profits for the Waikaremoana power stations, once system and station costs had been taken into account.¹ A snapshot was offered for the years 1955, 1966, and 1986. These figures relate to the period before corporatisation.

Station	1955	1966	1986
Tuai	\$192,000	\$446,000	\$3,370,000
Piripaua	\$117,000	\$324,000	\$2,200,000
Kaitawa	−\$ 2,000	\$110,000	\$1,290,000

1. Gilbert Gardner Natusch, *Power from Waikaremoana: A History of Waikaremoana Hydro-Electric Power Development* (Gisborne: Electricorp Production, 1992), pp 73–74

From Davenport's perspective, the only legal obligation that the Electricity Department had to consider was whether it should pay compensation for 'injurious affection':

Thus the only question of money payment involved is in relation to compensation for injurious affection. Any claim for injurious affection would now be statute barred, and in any case the injurious affection does not seem very great. Certainly the level of the lake has from time to time been drawn down lower than under natural conditions, but this has not seriously prejudiced the Maori owners so far as is known. Claims from them could however have a nuisance value.⁵⁹⁵

Having considered all these matters, Davenport concluded:

To sum up, I am unable to suggest a proper basis for putting a value on the use of the lake water by this Department for hydro-electric purposes. This seems to be a matter for speculation.

The purchase of the lake by the Crown would not benefit this Department in any apparent way, other than by removing the possibility of compensation claims.⁵⁹⁶

Given his view of such claims, the general manager stressed that his department would only be liable for a small contribution to any purchase price, and that it would certainly not be willing to incur an ongoing liability for an annuity.

595. Ibid, p 964

596. Ibid

Next, Davenport addressed the question of his department having built structures on Maori land (a point, it should be recalled, that Wiren raised in the appellate court in 1944 at the beginning of the construction work described in section 20.7). According to Davenport:

No portion of the bed of the lake has been acquired for the development of water power, and it is not intended to take any part of it. In fact the [Crown] land around the outlet has not been acquired by the Department either, but action is now being taken to acquire it from the Lands Department, less a chain strip along the lake margin.⁵⁹⁷

In 1956, the department had been advised by the chief surveyor, Gisborne, that Maori owned the bed up to ‘mean high water mark’, ‘roughly defined as the edge of the permanent vegetation’. That being the case, Davenport conceded that ‘both the main intake structure or channel in Onepoto Bay and the siphon intake near the outflow of the Waikaretaheke River extend out into the bed of the lake and encroach on the Maoris’ title’. Nonetheless, he saw no need to acquire title for this land, and considered the department’s obligation to be restricted solely to a claim for injurious affection.⁵⁹⁸ Legally speaking, he was probably correct that the Crown was not obliged to acquire the title, but acquiring land was not the only circumstance under which compensation was required. Damage or use of it was also compensable under certain circumstances (see section 20.7). Even so, some Ministers and officials remained worried about the possibility of a civil action for trespass.⁵⁹⁹

The Electricity Department did not consider Lake Waikaremoana in a vacuum: other claims to the Tribunal reveal a pattern of departmental resistance to recognising Maori lake and hydroelectricity claims. Simultaneously, there was something of a legal turn-around on the part of the Maori Land Court, which began to recognise Maori rights in water. In 1955–56, for example, the court empowered the Lake Omapere trustees to sell or lease the lake’s water.⁶⁰⁰ A similar trust order was made for Lake Rotoaira in 1956, which empowered the trustees to:

make arrangements or contracts with the Crown or any department thereof for the use of the water from the said Lake for hydro electric or other purposes and to arrange and decide on behalf of the Maori beneficial owners upon the conditions affecting the rights to carry out such works including fixing the consideration of compensation payable to the owners thereof.⁶⁰¹

597. General manager, Electricity Department, to Commissioner of Works, 1 September 1958 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p 964)

598. Ibid

599. Walzl, ‘Waikaremoana’ (doc A73), p 451

600. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wellington: Legislation Direct, 2012), pp12, 42; Waitangi Tribunal, *Te Kahui Maunga: The National Park District Inquiry Report*, 3 vols (Wellington: Legislation Direct, 2012), vol 3, pp 1157–1159

601. Waitangi Tribunal, *Te Kahui Maunga*, vol 3, p 1157

The Rotoaira trustees proposed a licensing regime which was to be put in place by legislation in 1959. As the National Park Tribunal explained, the Electricity Department succeeded in getting the Minister to insist on exempting the Crown's powers to use Rotoaira for electricity (and other public) purposes. The Tribunal noted that a similar exemption was sought (and granted) in respect of Omapere.⁶⁰²

In the case of Lake Rotoaira, the trustees had proposed to establish permits and fees which would (among other things) have required the Crown to pay for its use of the lake in its Tongariro Power Development scheme. The Electricity Department was adamantly opposed to this proposal in 1959 and succeeded in quashing it.⁶⁰³ The National Park Tribunal quoted Davenport's objections, which for our purposes reveal the approach that underlay his apparent one-off proposition above: that hydroelectricity could play no part in valuing Lake Waikaremoana for purchase from its Maori owners. Davenport wrote:

In view of the proposed development of the Tongariro and other rivers in the locality for hydro-electric purposes, which is at present under investigation, this Department would view with concern the passing into law of the [Maori Purposes] Bill [1959]. The use of Lake Rotoaira and the Poutu River is an integral and essential part of these proposals, and it is considered that the provisions of the Bill in their present form would be likely to add to the cost of, impede, or even prevent the construction and operation of works for the use of the lake and river.

. . . The Department is not only perturbed about the possibility of inflated compensation claims, but is also concerned about the exclusive rights relating to entry on the lake, river and surrounding land that the Bill creates. The statutory rights of entry of the Department, the Ministry of Works and others concerned with the investigation, construction and operation of power schemes are contained in sections 107 (relating to surveys) and 311 and 312 (relating to construction and operation) of the Public Works Act 1928. It is most undesirable that any legislation affecting any particular piece of land, especially if it features prominently in a power scheme, should derogate from these wide and general powers.

It is desired therefore that even if it is decided to proceed with the Bill . . . the rights of entry under the Public Works Act without the need for an entry permit should be preserved. This could be done by making the provisions relating to the need for entry permits without prejudice to the rights of the Crown, its servants, agents or contractors under the Public Works Act.⁶⁰⁴

Together, the Omapere, Rotoaira, and Waikaremoana cases show that the Electricity Department was familiar with Maori lake claims in the period 1956–59, and opposed them so as to avoid any risk of having to pay or compensate Maori for the use of their lakes. Even though there was, as far as we are aware, no plan to use

602. Ibid, pp 1157–1158

603. Ibid

604. AE Davenport, general manager, to assistant law draftsman (referred to Maori Affairs Department), 28 July 1959 (Waitangi Tribunal, *Te Kahui Maunga*, vol 3, p 1158)

Omapere for electricity, the department still insisted on safeguarding the Crown's rights. It is in this context that we should view Davenport's insistence in 1958 that there was no obligation to compensate the owners of Lake Waikaremoana, and no way in which electricity was a factor in setting the value or price that should be paid for the purchase of their lake.

With both Davenport for the Electricity Department and the Commissioner of Works denying that hydroelectricity was a factor, the Lands and Survey Department was left in 1958 to calculate a counter-offer for the Crown. It fell back upon the idea that compensation for Rotorua and Taupo had been based on fishing revenues, and that this was the only factor upon which the value of Lake Waikaremoana should be calculated. The Wildlife branch had reported in July 1958 that the licence fees for fishing at Waikaremoana were difficult to disentangle from more general fees, but probably amounted to £4,035 over the past six years.⁶⁰⁵ On 18 November, a Lands official noted that the request for £4,500 per annum seemed 'a bit high in comparison' with the Rotorua and Taupo settlements. The lake might only reasonably be worth £12,000, which would result in an annuity (at 5 per cent) of only £600. But officials admitted that this was 'arbitrary' as there was no settled opinion among the various departments as to how to value the lake, or what its value might be.⁶⁰⁶ If looked at purely in terms of fishing revenue, and the Taupo model of half such revenue going to Maori, then the offer should only be £500 a year. Officials pondered: 'Does £500 a year seem low? So low that it might be offensive to the Maoris. Should we offer a cash settlement of £10,000?'⁶⁰⁷

In December 1958, almost six months after the petition and Wiren's offer to meet, the Maori Affairs Department chased this matter up with Lands and Survey. On 22 January 1959, the director-general replied that it was proving difficult to find 'a substantial reason as to why the Crown should buy Lake Waikaremoana.' He observed:

It has been agreed however, that the Crown has some interests in the lake. The waters of the lake are used for State Hydro purposes, it is surrounded by the Urewera National Park and the Crown does obtain some revenue from the sale of fishing licences. Precedents have been established by the purchase of other lakes from the Maoris, notably Lake Taupo and Lake Rotorua and it could be expected that the Crown would also purchase Lake Waikaremoana.

There is no settled opinion from any of the interested Departments as to the value of the lake and apart from finding this in some arbitrary manner it is doubtful how a value can be established.⁶⁰⁸

605. Walzl, 'Waikaremoana' (doc A73), p 400

606. *Ibid*, p 402

607. Lands and Survey Department, file note, 18 November 1958 (Walzl, 'Waikaremoana' (doc A73), p 403)

608. Director-general to secretary for Maori Affairs, 22 January 1959 (Walzl, 'Waikaremoana' (doc A73), pp 403-404)

Given the Electricity Department's view that it did not need to pay for use of the lake, and that any injurious affection had been very minor, and also given the relatively low fishing revenue generated by this lake, the director-general was certain that the Crown would have to make an offer much lower than the owners' expectations. Before fixing on a precise offer, however, he intended to consult Treasury.⁶⁰⁹

The Maori Affairs Department advised Nash to write to Matamua and Wiren, informing them that the Crown had not yet made a decision as to whether to buy the lakebed.⁶¹⁰ In his letter to Wiren of 4 February 1959, Nash told the Maori owners that the Government was having 'difficulty in finding a basis upon which negotiations might proceed if a decision to purchase were taken'. 'The question is still being examined,' he wrote, 'and assuming that negotiations for purchase go forward, the matter will be the subject of further advice to you.'⁶¹¹

In late January 1959, there was a meeting between Lands and Survey Department and Treasury officials about the proposed purchase. A crucial point for officials was that Prime Minister Nash 'would not approve of any refusal of the Crown to pursue compensation.'⁶¹² Officials agreed that it was politic to settle the matter and so they had to come up with a definite counter-offer for Ministers to consider. The best the Lands and Survey Department could propose was a lump sum payment of £10,000. The 'rough consensus' within the department was a figure of £600 a year, which would equate to the interest on a principal of £12,000, but this would be too low for the owners to accept. For Lands officials, it had become an inescapable truth that the Government did not really need to own the lakebed:

This Department is of the opinion that there is little reason or obligation on the Crown to purchase Lake Waikaremoana. *The waters of the lake have been used for hydro purposes for many years with the tacit consent of the Maoris.* However, now that the issues have been raised and comparisons made with other Crown purchases, past experience would indicate that a refusal to purchase will only lead to further representations on the highest political level and possibly to repeated petitions to Parliament until some satisfaction is obtained. It is possibly politic therefore to settle the issue rather than let it become a long drawn out series of representations and petitions. [Emphasis added.]⁶¹³

In other words, this was seen as a political issue requiring a political settlement. Even so, we query the statement that Maori had given their 'tacit consent' for the use of the waters of the lake for electricity for many years – the historical evidence

609. Walzl, 'Waikaremoana' (doc A73), p 404

610. Ibid

611. Nash to Wiren, 4 February 1959 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1257)

612. Department of Lands and Survey, file note, 2 March 1959 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 952)

613. Director-general to secretary for Treasury, 27 January 1959 (Walzl, 'Waikaremoana' (doc A73), p 405)

does not support this contention at all. In any case, as Tony Walzl commented, officials made it clear that they would not even consider purchasing the lakebed were it not for the political alliance between Labour and Maori.⁶¹⁴

So what basis, if any, was there for going ahead, other than political reasons and ‘precedents’? In discussions, a Lands official told Treasury that it was ‘desirable’ to own the lakebed because the Crown used the water for electricity, and because the lake was ‘an essential adjunct’ of the national park. But it was not *essential* to own the bed for electricity purposes, because ‘we had used the waters of the lake for years without interference’. Politically, the Lands Department considered that the Waikaremoana owners had as good a case as the Rotorua and Taupo peoples; the Crown used the lakes in the same ways, and it made an annual cash payment to ‘Trust Boards representative of [those] owners.’⁶¹⁵

At the meeting between the Treasury and the Lands and Survey Department, it seems to have been agreed that £10,000 would be too low but it could at least serve as a starting point for negotiation.⁶¹⁶

The secretary for the Treasury advised his Minister accordingly on 20 March 1959. It is interesting to note that there was already some rewriting of history going on: the secretary suggested that the delay between 1944 and 1954 had been caused by sorting out ‘sectional appeals’ (that is, the appeals of the Maori owners) and not by the Crown.⁶¹⁷ In any case, the Secretary recommended that the Crown did not need to pay for its use of the lake for electricity because of the 1903 Water-power Act and its successors. He also suggested that the only interference with Maori land was the two ‘intake systems’ which projected from the shore out onto the bed of the lake, and for which any claim would be minimal. Therefore, the only real basis for compensation was an arrangement in line with fishing revenues as with the Taupo and Rotorua settlements. On that reasoning, the Waikaremoana Maori owners’ request for £4,500 a year was ‘excessive and unreal’. Also, Treasury disliked annuities and could not recommend one. Hence, it advised its Minister that the Crown should make a lump sum offer of £10,000.⁶¹⁸

The Minister of Finance and the Minister of Lands supported this recommendation.⁶¹⁹ Walzl notes, however, that a Cabinet paper was not prepared straight away. Instead, Ministers requested more information from the Electricity Department about the comparative value of Lake Taupo and Lake Waikaremoana for hydro-electricity generation. On 22 April 1959, Davenport responded that there was no practical method for determining the value of a lake for electricity purposes, and therefore no such comparison could be made. In terms of respective output and storage capacities, he thought that Waikaremoana was worth no more than one-

614. Walzl, ‘Waikaremoana’ (doc A73), p 405

615. Department of Lands and Survey, file note, 2 March 1959 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p 951)

616. *Ibid*, pp 951–952

617. Secretary to Treasury to Minister of Finance, 20 March 1959 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p 949)

618. *Ibid*, pp 949–950

619. Walzl, ‘Waikaremoana’ (doc A73), p 406

quarter of the value of Taupo (but there was no method to calculate what that value might be).⁶²⁰

In May 1959, after all of this debate between Ministers and departments, a Cabinet paper was finally prepared by the Minister of Lands. It suggested that:

- ▶ an annual payment of £4,500 was excessive;
- ▶ an arbitrary method had been used to determine a value because none of the departments had a method for valuing a lake;
- ▶ the Crown already had the right to use the waters for electricity;
- ▶ there was little validity to any claims of injurious affection;
- ▶ the lake had some 'scenic' value for tourism, for the national park, and for Lake House; and
- ▶ the Crown should make a purchase offer for a lump sum payment of £10,000.⁶²¹

The cost of the purchase was to come out of the Lands and Survey Department budget, charged to the 'National Parks – Acquisition' item.⁶²²

In terms of the negotiations that would need to follow, the Minister noted that the owners were not simply seeking a purchase to the exclusion of some other kind of arrangement: 'The owners, in 1957, asked the Crown to either purchase the bed of the lake or otherwise compensate them for past and future use thereof.' Also, the Minister noted some restraint on the part of the Maori owners because, even though their ownership had been determined many years ago, they were only seeking compensation for the past 10 years of the Crown's use of the lake.⁶²³

The Minister also summarised the official view of how the lake had been valued. 'Lake Waikaremoana,' he wrote, 'is partly comparable with Lake Taupo from the point of view of hydro electric generation.' On the basis of how many units of electricity each lake supplied, 'the relative values of the lakes would be approximately 1:6 at present, rising to 1:8 in 1964' (because generation from Taupo was planned for a significant increase). But Lake Waikaremoana stored more than one season's units of electricity so its relative value was actually higher than first appeared (1:4). On an area basis, the 'comparison with Taupo is 1:11'. The Minister concluded: 'It is difficult to convert these values to £.s.d. The only real comparison that can be made on a monetary basis is in respect of fishing revenue.' Hence, the Crown had derived a figure based solely on comparative fishing revenues and no other consideration, resulting in £500 a year, capitalised at £10,000.⁶²⁴

Thus, the Crown did consider the question of value for electricity generation purposes in some depth in 1958 to 1959, despite the Electricity Department's opposition. Ultimately, it was ruled out because of the Crown's statutory right to use the waters, and the difficulty of deciding how to express the generation capacity of a lake in monetary terms. It seems particularly narrow, however, to have come

620. Ibid, p 407

621. Ibid, pp 407–408

622. Minister of Lands to Cabinet, 21 May 1959 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 944)

623. Ibid, p 943

624. Ibid, p 944

to the conclusion that the lake's only monetary value came from its annual fishing revenue.

Before this paper could be presented to Cabinet, however, it was overtaken by a new approach from the owners on 22 May 1959. On that date, Nash met with three owners' representatives (Turi Carroll, H E McGregor, and Wiremu Matamua) at Wairoa. McGregor told the Prime Minister:

However, although all the original owners were now deceased, he felt that if there was anything due to their descendants this was the time for a settlement. The Waikaremoana housing position was the worst in the district and their Marae were all very decrepit and it was evident that assistance in this direction would be more than justified. However, all the beneficiaries were not there. Some were living in other areas partly in the Bay of Plenty, but he would leave the matter at this juncture to the Minister who would no doubt, in his wisdom, suggest some means of finalising the issue but in conclusion he would again ask that, if possible, a further meeting with representatives of the owners and the Minister be arranged.⁶²⁵

In a written submission to Nash, McGregor and Matamua noted:

Although the hydro-electric operations are still functioning and the supply of electricity is flowing to all parts of New Zealand, the rightful owners are still awaiting a definite decision. We further reiterate that the claims of the Maori owners should be settled and we feel Sir, that with your knowledge and experience of the case and your sympathy for your Maori people we will reach a speedy and favourable settlement.⁶²⁶

The Prime Minister replied that 'previous amounts asked for had been too high' and that there should be further discussions with the owners' representatives. In his view, 'various authorities on valuations etc. would have to be consulted to settle an equitable compensation for this claim.' At this stage, he thought that a lump sum might be 'the most reasonable' form of settlement. Nash asked that a deputa-tion visit him soon 'in an attempt to finalise the issue.'⁶²⁷

The Cabinet paper, seeking authority for the Minister of Lands to negotiate a purchase with a lump sum offer of £10,000, continued to be held over in the meantime. Mr Walzl suggests that this was because Nash wanted to meet first with a full delegation of owners, after the preliminary meeting in Wairoa.⁶²⁸ This meeting took place on 19 August 1959. It was the first significant Crown–Maori engagement on the Lake Waikaremoana issue since the meetings with Prime Minister

625. 'Report on Visit of Prime Minister and Minister of Maori Affairs to Taihoa Marae, Wairoa, 22 May 1959' (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1249)

626. McGregor and Matamua, 'Waikaremoana Lake Bed Issue', [May 1959] (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1250)

627. 'Report on Visit of Prime Minister and Minister of Maori Affairs to Taihoa Marae, Wairoa, 22 May 1959' (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1249)

628. Walzl, 'Waikaremoana' (doc A73), p409

Fraser in 1949. It was thus a very important meeting, at which the Maori owners reformulated, explained, and advocated for a new offer to the Crown: an annuity of £5,000 or a lump sum payment of £100,000, to be held in trust and used for the owners' benefit by a Waikaremoana trust board.

Key points made by the owners' representatives were:

- ▶ The lake was being used by the Electricity Department for 'national purposes'. They accepted that was important to the nation and so the owners sought 'a settlement now and one that was reasonable in that it should meet all requests for all time'.
- ▶ The fishery had been damaged because the Electricity Department had lowered the lake's level by a good 15 feet, which had deprived the fish of a large quantity of food, and also because thousands of fish were destroyed every year 'through being drawn in through the tunnel down to the power house' (although the department had recently installed screens to try to stop this happening).
- ▶ That the history of this claim went back to 1915, that the people had been brushed off by the previous National Government, and the new Labour Government must now fulfil 'the late Mr Fraser's wishes'. McGregor emphasised that the 'owners had never at any time consented to the use of the lake for hydro-electric purposes. The Government simply took it over and has effectively used it for years.' Yet the people had been patient and had not taken interference with the lake for electricity purposes to court, and their forbearance needed to be recognised in any settlement.
- ▶ That the Maori Land Court and Maori Appellate Court had recognised Maori 'ownership of the lake', which had value for fishing, as a 'scenic asset', and for 'hydro-electric generation'. For all these reasons, 'the owners had something to sell to the Crown that was of value to the Country but not for an inadequate consideration'. In terms of detail, the Crown derived revenue from fishing licences, camping grounds, and the use of the bed and waters for hydro-electric generation. There were also islands in the lake, for which payment was necessary, although Maori wished to retain their burial grounds and their reserves, which were of great traditional importance to them.
- ▶ Other lake claims had been dealt with by an annual payment, and Waikaremoana was the last (and long outstanding), although the owners were willing to consider a lump sum if that would get the matter settled.
- ▶ That for many years the owners had 'the empty title of being the owners with no rights whatsoever', and a just and equitable settlement was now required for this 'grave injustice'.
- ▶ In concrete terms for such a settlement, the owners proposed that the lake was worth an annual payment of £3,000 a year (which meant a lump sum of £60,000 at 5 per cent interest). Past use at £3,000 a year for 15 years (back to 1944) represented a capital sum of £45,000. Adding these two together (and rounding it down), the owners would accept a lump sum of £100,000, although they would prefer an annual payment of £5,000.

- ▶ The money should be paid to a trust board and used to repair their marae and alleviate their extreme poverty. The people ‘threw themselves on a generous Government to provide a just settlement.’⁶²⁹

In response, Prime Minister Nash agreed that the Crown was obliged to ‘purchase and provide compensation’, but noted that the fishing revenues generated by Lake Waikaremoana were less than one-tenth of those from Lake Taupo: ‘Perhaps the people in the light of that would not maintain that the lake was worth all that they said’. Then, he noted that the Crown already had ‘all the rights it needed to the waters of the lake’; no further payment was necessary for that, was the implication. The Crown certainly wanted to buy but the people’s compensation figure was too high. Nash noted that the owners had come down from their earliest request of £10,000 a year to £3,000 a year, although compensation for past use raised that figure again to somewhere in the vicinity of £5,000. But the clear import of his speech was that they would have to come down further still: ‘They should go a good bit lower than what they thought.’ Nash also suggested that if the Crown and Maori could not ultimately agree on a figure, then the Maori Land Court could be asked to determine a fair compensation. In the meantime, he wanted the people to reconsider their position and try to reach a more ‘reasonable’ figure.⁶³⁰

Others who spoke on the Government side included Eruera Tirikatene, the Minister of Forests, who supported the owners as having ‘put up an excellent case’, although he was more interested in forestry matters. The Minister of Lands, CF Skinner, and the Maori member of Parliament Tiaki Omana, both supported the idea of ‘fair’ compensation, suggesting that it be determined by the Maori Land Court if the parties could not agree.⁶³¹

Turi Carroll responded to the Prime Minister, thanking him and suggesting that the Crown and the owners could surely ‘agree on compensation but how could they assess a fair and equitable figure’? This was truly a dilemma for both sides, especially in light of their wildly divergent views of what the final figure should be. Nash promised that the Government would consider this question further and try to determine ‘something equitable’. Although he was ‘fearful’ of the gap in expectations between the parties, he ‘thought that something could be offered which was fair.’⁶³²

As Mr Walzl noted, this meeting and the Prime Minister’s assurances scuppered the May 1959 Cabinet paper. The result was a significant shift within Government

629. Walzl, ‘Waikaremoana’ (doc A73), pp 410–413. For a full account of the meeting, there are two different sets of minutes, which are located in Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), pp 925–938.

630. Walzl, ‘Waikaremoana’ (doc A73), pp 413–414; ‘Notes of Deputation to the Minister of Maori Affairs, the Minister of Lands and the Minister of Forests’, 19 August 1959 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), pp 935–936)

631. ‘Notes of Deputation to the Minister of Maori Affairs, the Minister of Lands and the Minister of Forests’, 19 August 1959 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), pp 936–938)

632. Walzl, ‘Waikaremoana’ (doc A73), p 414; ‘Notes of Deputation to the Minister of Maori Affairs, the Minister of Lands and the Minister of Forests’, 19 August 1959 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p 938)

towards a more reasonable counter-offer, rather than one based solely on fishing revenue without compensation for past use or, indeed, any other kind of use of the lake. Ministers sent their departments back to the drawing board to see if they could come up with a figure more likely to result in settlement than one-tenth of the sum being sought by Maori.⁶³³ As Fraser told the owners, the lead in negotiations would be taken by the Minister of Lands, and so it was his department which took responsibility for coming up with a new counter-offer.

First, the director-general asked the Maori Affairs Department if Nash already had a view as to what a fair offer might be.⁶³⁴ Maori Affairs officials spent a week trying to work out a new formula for arriving at a Crown position as to purchase price, now including (for the first time) compensation for past use. As a starting point, they ignored the owners' claims about hydroelectricity and took the view that claims were legitimately based on the scenic value of the lake, the fishing rights, and the islands. They also took a lead from Nash's statement at the recent meeting that the solution should be worked out on the same or similar lines as for Lake Taupo.⁶³⁵

The Maori Affairs Department began with scenic value. In that respect, officials thought that by comparing the size of the two lakes, Waikaremoana would be worth £300 a year, but by comparing the length of shorelines (considered more important in terms of beauty), Waikaremoana could be worth about £1,000 a year. Nonetheless, this latter figure was too high because, in the officials' view, Maori had not made much use of the lake for either transport or food, and would therefore not suffer much monetary loss from either the sale or the infringement of their ownership rights. On the other hand, the figure of £300 was clearly too low. So, compromising these two figures, a payment of £500 could be justified.⁶³⁶

But this only got the Crown back to where it had started, this time by applying a monetary value to the scenic value of the lake (as an attraction for the national park): a lump sum payment of £10,000 or an annual payment of £500. There were still the fishing and other revenues to consider. Based on what Walzl called some 'extraordinary assumptions', the department recommended:

- ▶ half of all fishing, boating licences, and other revenue (in excess of £500);⁶³⁷ plus
- ▶ half of camp site fees, fines, and penalties (all of which had been considered in the Taupo settlement); plus

633. Walzl, 'Waikaremoana' (doc A73), p 414

634. Director-general to secretary for Maori Affairs, 25 August 1959 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 924)

635. Walzl, 'Waikaremoana' (doc A73), p 414

636. *Ibid*, p 415

637. That is, any revenue generated in excess of the first £500, which the Government would retain. Maori were guaranteed payment of the first £500 under the heading of 'scenic value', or alternatively that would be capitalised at £10,000. This was modelled on the Lake Taupo settlement, where the Crown paid a guaranteed £3,000 per annum, and then topped it up with 50 per cent of annual revenues received in excess of £3,000.

- ▶ a lump sum payment for 12 years' past use (back to 1947) at £500 per annum, plus interest (totalling £6,150); plus
- ▶ a lump sum payment of £10,000 for scenic value (or £500 per annum).⁶³⁸

From a later explanation, the Maori Affairs Department was actually proposing a lump sum payment of £16,150 (the third and fourth items), plus annual payments of the revenues derived from the first two items.⁶³⁹ Alternatively, officials suggested that if agreement could not be reached, the Government should take the lakebed compulsorily under the Public Works Act 1928 and leave it to the Maori Land Court to determine compensation.⁶⁴⁰

On 3 September 1959, Nash approved these suggestions to be sent to the Lands and Survey Department for its consideration.⁶⁴¹

It took three months for Lands and Survey to respond. On 8 December 1959, the Minister of Lands, CF Skinner, agreed to the annual payment or lump sum component (£500 or £10,000), but felt that supplementing it from the actual revenues would only add £100 a year at most. Given the cost of administration, this was simply uneconomic. The Minister was also opposed to the idea of paying Maori half the camp fees, since they had not contributed to the costs and did not own the land – this should not be mixed up with ownership of the bed, in his view. While agreeing that there should be compensation for the past 12 years' use of the lake, and compensation for Maori losing their sole fishing rights, he thought it best to simply offer a lump sum payment of £25,000 to cover all the bases identified by the Maori Affairs Department.⁶⁴²

Why was Lands and Survey now willing to go so far beyond the £10,000 of six months previous? According to Mr Walzl, it was not only because of the Prime Minister's assurances at the August 1959 meeting. The department was beginning to realise the significance of an issue that once again made it seem necessary (rather than desirable) that the Crown own the lakebed. This was the issue that we noted as so influential in chapter 16: the permanent lowering of the lake had created a ring of Maori-owned dry land that meant, legally speaking, Maori could deny any access to the lake for private or public purposes. The owners could also prevent the national park from building the kinds of facilities and services necessary on the lakeshore for visitors' use and enjoyment of the lake and its surrounds. The Minister of Lands noted this (and its significance) in his response to the Maori Affairs Department's figures. Walzl argues that from this point on, 'the

638. Assistant Secretary to Minister of Maori Affairs, 2 September 1959 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 921)

639. 'Matters for presentation to Minister of Maori Affairs, to be submitted to a meeting to be held in Te Otene building, Taihoa Marae, on 10 May 1961' (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1234)

640. Assistant Secretary to Minister of Maori Affairs, 2 September 1959 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 922)

641. Walzl, 'Waikaremoana' (doc A73), p 416

642. *Ibid*

tone of negotiations change' because the Maori owners were suddenly perceived to be in a much stronger position.⁶⁴³

This was not immediately apparent to the Maori owners. During a visit by Nash to Ruatahuna on 11 December 1959, the lake question was raised with him by the kaumatua and pressed by John Rangihau. He reminded the Prime Minister of the long period of time since their claim had begun, and that all the people involved had now died (although, 'as our elders say, "Mate atu he tete ara mai he tete" meaning that though some may die there will always be others to take their stead'). The people had heard many things about how loyal other tribes had been. 'So have we been loyal to the Crown', Rangihau said: 'There are many of our boys overseas who lie there forever. There is the proof of our loyalty.' Rangihau pressed Nash for a decision now, that there should be no more waiting. The Prime Minister replied: 'I cannot agree more about the delay of time', and he was unable to account for it. But nor could he give an immediate answer. Instead, he promised 'to let you know what I think' before Christmas 1959.⁶⁴⁴ As a result, on 23 December 1959, Nash sent a telegram asking six owner representatives to visit him in Wellington in February 1960.⁶⁴⁵

The year 1960 saw the negotiations peter out in confusion about a series of missed meetings. Despite the telegram of December 1959, Wiremu Matamua and others wrote to Nash on 25 February 1960, stating that they had received no further news about Lake Waikaremoana and were still awaiting a long-overdue settlement. On 14 March 1960, Nash replied to the effect that a deputation of owners should visit him in Wellington. From his study of the files, Walzl suggests that confusion ensued for the remainder of 1960.⁶⁴⁶ The owners' deputation did not turn up when the Government expected it, whereas, from the owners' perspective, they were still waiting for the Government to make definite arrangements with them. As a result, no meeting took place for the whole year. Walzl was unable to explain this 'breakdown of communication.' From a meeting that occurred in April 1960, between Ministers Nash and Tirikatene and officials, Walzl suggests that the Government clearly intended to pursue the dialogue and reach a settlement.⁶⁴⁷ From the Government's point of view, an appointment had been made but the delegation had not turned up.⁶⁴⁸ From the owners' point of view, no definite reply

643. Ibid, p 417

644. 'Extracts from representations to the Minister at Ruatahuna by the Tuhoe people on Friday, 11 December 1959, no date (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1246-1247)

645. Walzl, 'Waikaremoana' (doc A73), p 418

646. Tony Walzl also says: 'Although Nash was further urged to act when he attended a hui in May 1960 where Waikaremoana was discussed, nothing occurred and in November 1960, the Labour Government lost power': Walzl, 'Waikaremoana' (doc A73), p 440. This is based on a mistaken date in the original source - the reference was to a hui with Minister Ralph Hanan in May 1961, not with Nash in May 1960 - see doc A73(c), pp 1231-1232.

647. Walzl, 'Waikaremoana' (doc A73), p 418

648. 'Matters for presentation to Minister of Maori Affairs, to be submitted to a meeting to be held in Te Otene building, Taihoa Marae, on 10 May 1961' (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1235)

had been received from Nash in 1960, 'apparently because he was waiting for the final result of the election.'⁶⁴⁹

Thus, the benefit of engagement between Nash, Tirikatene, and the owners in 1958 to 1959 was dissipated by a year of inaction in 1960. Even so, as Mr Walzl observed, it seemed as if matters were shaping up for an impasse anyway because the parties' views were so far apart. The Labour Government was determined that the Crown would arrange a settlement, and had tried to get officials to arrive at a reasonable counter-offer. But officials found it difficult to justify acquisition at all, let alone any particular method of valuation. In the end, they moved up from a lump sum of £10,000 to £25,000, partly because of assurances made by the Prime Minister, but also because the Lands Department was beginning to appreciate the risk for the Government created by the permanent lowering of the lake. While still unwilling to compensate for hydroelectricity, the Government was now prepared to compensate for scenic values, fishing rights, and 12 years' past use by the Crown. This was quite a big move, although it fell far short of the £100,000 sought by the Maori owners.⁶⁵⁰

20.8.3.3 Culmination of negotiations: Maori owners reject Crown offer, 1961

The Labour Government lost office on 26 November 1960, and was replaced by Keith Holyoake's National Government. This did not mark the end of the negotiations that had started under Walter Nash. As we noted earlier, the director-general had become concerned about the implications of the ring of now-permanent dry Maori land encircling the lake. Tony Walzl pointed to further expressions of concern in early 1961. In March, the National Parks Authority raised its concerns about this issue. Then, in April 1961, the Hamilton commissioner of Crown lands drew the director-general's attention to a problem with the Government-run motor camp. This camp was in need of improvements, which were being deferred because it might actually be located below the original lake level and thus on Maori land. The director-general replied that there was an 'even chance' that at least part of the camp was on Maori land. As a temporary solution, he instructed that its layout must not be shown on 'anything published or which can be seen by the public.'⁶⁵¹

In the same month, Director-General Webb brought the proposed purchase to the attention of the new Government. He advised that it was important for the Crown to own the lakebed for both hydroelectricity and national park purposes. But, as was by now agreed among the departments, he played down the significance of hydroelectricity. Webb noted that the Crown had the right to use

649. 'Matters for presentation to Minister of Maori Affairs, to be submitted to a meeting to be held in Te Otene building, Taihoa Marae, on 10 May 1961' (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1232)

650. Walzl, 'Waikaremoana' (doc A73), pp 436-440

651. *Ibid*, pp 442-443

the water anyway, and infringement on the Maori title for that purpose had been 'small' and its value 'nominal'.⁶⁵² Clearly, in his view, the interests of the national park were uppermost:

The settlement of the dispute concerning the bed of the lake is very desirable and the National Parks Authority is being prejudiced in its plans for the development of the Park because it cannot establish parking areas, conveniences or other facilities, near the water's edge, as these would be on Maori land.⁶⁵³

Webb was also keen to obtain the Waikaremoana reserves for the same reasons. He recommended that the Crown offer the Maori owners a lump sum of £25,000. Adapting the Maori Affairs Department's 1959 calculations, this figure was made up of:

- ▶ the original £10,000;
- ▶ £8,500 for past use;
- ▶ £2,000 for the Maori reserves in the old Waikaremoana block; and
- ▶ £4,500 in '[r]ecomense for good will and in lieu of payment of fines, penalties and rentals etc'.⁶⁵⁴

Although the figure put on the reserves is not in direct issue here, we note as a matter of important context that the special Government valuation seven years later valued these reserves at \$50,000. In chapter 16, we noted that this estimate of £2,000 in 1961 was simply risible. This did not augur well for the remainder of the department's calculations.

The figure of £4,500 was later described purely as a 'good will' payment, so we emphasise here that it was partly to replace Maori Affairs' suggestion of sharing a proportion of lake-related revenue with Maori. That suggestion, in turn, had been based on the Crown's settlement of the Lake Taupo claim in the 1920s. The proposed payment for past use of £8,500 was later explained as £600 a year for 14 years (rounded up to £8,500).⁶⁵⁵ So this proposal was dated back to 1947, the year in which title was finalised because all appeals had been disposed of. Recalling the Maori owners' 1957 proposal, the use of 1947 seemed a point of common agreement. We note, however, that in 1959 the Maori owners had proposed 1944, the date at which the Crown's appeal was dismissed and Maori ownership confirmed, as the date from which compensation for past use should be calculated.

The Minister of Lands approved Webb's memorandum to go to Cabinet, subject to a favourable Treasury report.⁶⁵⁶ In the meantime, the Maori owners had

652. Director-general to Minister of Lands, 24 April 1961 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 915)

653. *Ibid*, p 917

654. *Ibid*

655. Minister of Maori Affairs, paper, 7 August 1961 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 901)

656. Walzl, 'Waikaremoana' (doc A73), p 444

already put their take before the new Minister of Maori Affairs, JR Hanan, at a hui at Taihoa Marae, Wairoa, on 10 May 1961. Led by Turi Carroll, they outlined what they saw as Nash's failure to make a decision or respond to them in 1960, and asked the new Minister 'What is the attitude of the present Government towards final settlement of this matter? . . . This claim has been going on too long and we would appreciate a settlement as soon as it is possible to do so, while some of our "Kaumatuas" are still alive.'⁶⁵⁷

On 2 June 1961, the secretary for the Treasury wrote to the Minister of Finance, recommending that he should support purchase of the lakebed for a lump sum payment of £25,000. Treasury noted that there was no 'established basis' on which to calculate value and that the Lands and Survey Department's method was 'probably as good as any'. But Treasury was concerned to avoid annuities (because they 'cost much more in the long run') or long delays (which would inevitably push the price up). The Minister of Finance accepted this advice and the paper went up to Cabinet, which approved its recommendations on 20 June 1961.⁶⁵⁸

At last, after four years of internal debate and discussions with the Maori owners, the Crown had arrived at a definite position and was ready to make a formal counter-offer to their proposals of 1957 and 1959. The owners were invited to send representatives to a meeting in Wellington to discuss the Crown's offer. Hanan outlined the details in a letter to Wiren in July 1961. The Government wanted to buy the lakebed, the islands in the lake, and the Waikaremoana reserves for £25,000. In return, the owners had to give up all claims about hydroelectricity and past legal expenses:

The price is to be considered as including the settlement of any claims whatsoever that the owners may feel they have against the Crown in respect of its use of the bed and the waters for hydro-electric purposes, and it extends to cover any claim against the Crown for any legal costs, whether in the Maori Courts or otherwise.⁶⁵⁹

Thus, without any acknowledgement of the validity of such claims or compensating them, the owners were to be required to acknowledge that all such claims were settled.⁶⁶⁰

The proposed meeting took place on 9 August 1961. The 665 owners⁶⁶¹ were represented by Turi Carroll, Wiremu Matamua, Jimmy Moses, Max Tipene, Thomas Ranginui, John Rangihau, Mr Mei Mei, Dave Ranginui, Mr Kahurore, and their

657. 'Matters for Presentation to Minister of Maori Affairs, to be Submitted to a Meeting to be Held in Te Otene Building, Taihoa Marae, on 10 May 1961' (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1232)

658. Walzl, 'Waikaremoana' (doc A73), p 444

659. Minister of Maori Affairs to Wiren, 21 July 1961 (Walzl, 'Waikaremoana' (doc A73), p 445)

660. Minister of Maori Affairs, paper, 7 August 1961 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 899)

661. Ibid

lawyer, SA Wiren. The Crown was represented by the Minister of Maori Affairs, the Minister of Lands, and senior officials.

Wiren responded to the Crown's offer on behalf of the owners, who had already held a meeting to discuss it. In their view, it was not high enough, nor did they want a lump sum payment that would have to be divided up among so many owners. As they had made clear before, they wanted an annuity to be administered by a trust board. Hanan replied that he took the Crown's offer of £25,000 as having been rejected. Wiren responded that 'at present it could not be accepted'. Wiren also noted that the owners were not willing to part with their islands or their reserves (which we note had just been introduced into the negotiations by this offer from the Crown).⁶⁶²

There was debate about the reserves and islands, with Wiremu Matamua asking that the people 'be allowed to retain their islands'. Hanan agreed to reconsider whether the Government really needed them for the park.⁶⁶³ But the key issue for the Crown was the price: if the Maori owners would not accept £25,000, did they have an alternative basis for arriving at a value for the lake? Wiren noted that the owners were now willing to come down to an annuity of £4,000 per annum. Hanan (incorrectly) stated that he understood from the files that they had preferred a lump sum.⁶⁶⁴

Turi Carroll intervened at this point and reminded the Crown of the long-standing failure to settle this claim:

He felt the claim should be settled. It was most unfair for Government after Government to postpone the settlement. If it were a Pakeha matter it would have been settled in 5 minutes but because it was a Maori owned Lake it had been delayed too long. They were looking to the Minister and the Government to settle.⁶⁶⁵

In response, Hanan 'intimated the Pakeha would jump at £25,000'. Carroll retorted that the revenue from fishing licences, what Hanan called the 'only basis for comparison', was too low because the fishery had been damaged by the hydroelectric works. He also felt that the Maori owners could do a better job than the Government at running the tourist resort and 'could build that up as had been done at Taupo and elsewhere'.⁶⁶⁶

Nonetheless, Carroll promised to put the Crown's offer to a formal meeting of the owners, but said that he thought a Minister of the Crown must be present for any offer to succeed. Hanan replied that this was inappropriate until the matter had

662. 'Notes of deputation held in Hon Mr Hanan's rooms on Wednesday, 9 August, 1961', 18 August 1961 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 885)

663. *Ibid*, pp 886-887

664. Walzl, 'Waikaremoana' (doc A73), p 446

665. 'Notes of Deputation Held in Hon Mr Hanan's Rooms on Wednesday, 9 August, 1961', 18 August 1961 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 886)

666. *Ibid*

been settled.⁶⁶⁷ He did, however, agree to make inquiries about one of the owners' key concerns: whether the lowering of the lake had damaged the trout fishery, thus reducing the value on which at least part of the price had been calculated.⁶⁶⁸

Later in the day, there was a separate meeting between some of the representatives and the secretary for Maori Affairs, JK Hunn.⁶⁶⁹ Turi Carroll 'threw out a feeler' as to whether the Crown would accept a lower annuity of £3,200. Hunn responded that this meant a capitalisation at £65,000, which was out of the question. From the official record of this meeting: 'Various other annual sums were spoken of but the reply made was confined to what these sums represented by way of capital.'⁶⁷⁰ Hunn, it should be noted, had expressed strong opposition back in 1960 to settling this claim by an annuity, much preferring a single lump sum payment.⁶⁷¹ Also, Hunn – as authorised by the Minister – gave the owners the breakdown of figures behind the £25,000, so that they would know how it had been calculated.⁶⁷²

On 19 August 1961, the owners held a meeting at Tuai to consider the outcome of this hui with the Ministers. It was very clear that the Maori owners were angry with the Crown's first concrete offer. Director-General Webb decided that the Crown should not be represented at the meeting, lest – instead of generating a counter-offer – it devolve into argument and embarrassment for the Government.⁶⁷³ About 80 owners were present, 'including all the leaders of the people.' The Crown's offer was formally rejected and a counter-offer was proposed: an annuity of £3,250. The seven islands in the lake were included in this offer (not including Patekeha) but the people were adamant that they would not alienate their Waikaremoana reserves.⁶⁷⁴

Wiren communicated this counter-offer to the Government on 22 August 1961. He noted that the Crown's offer, as explained to the owners, was understood to have included:

- ▶ £10,000 for the lake ('based on capitalising a fishing revenue averaging £500 per annum');
- ▶ £2,000 for the reserves and islands; and

667. Walzl, 'Waikaremoana' (doc A73), p 446

668. *Ibid*, p 447

669. This meeting was attended by Turi Carroll, Wiremu Matamua, Rangī Mitchell, and Mac Stevens for the owners.

670. 'Note for File', August 1961 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1217)

671. JK Hunn, acting secretary for Maori Affairs, minute, 1 April 1960 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1242)

672. 'Note for File', August 1961 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1217)

673. Director-general to Minister of Lands, 11 August 1961 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 890)

674. Wiren to Minister of Maori Affairs, 22 August 1961 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 876). For a summary of this important letter, see Walzl, 'Waikaremoana' (doc A73), pp 447–449.

- ▶ £13,000 for 'past use of the lake'.⁶⁷⁵

Clearly, the Crown had not informed the owners that part of the £13,000 figure was actually for 'good will' and in commutation of future revenue from fines and other sources. Wiren pointed out that if the Government had compromised the Waikaremoana claim back in 1919 in the same way as it had for Taupo and Rotorua, then an annuity based on 'so small a sum as £20,000' would have already resulted in £42,000 for the Maori owners. Instead, 'over all these years the Crown in one capacity or another has been using the Lake as its own and deriving considerable revenue'.⁶⁷⁶

Wiren explained the owners' reasons for rejecting the Crown's valuation:

the owners do not accept £10,000 as the value of the Lake, nor do they accept that the value is to be based, except in part, on the fishing revenue derived from it. The value is rather to be sought in its beauty and scenic and tourist attractions and its availability for water conservation, and in these respects Waikaremoana is unique. It is extensively used for travelling by boat or other vessel. Nor does an examination of previous purchases by the Crown, and this is the last large Lake remaining to be purchased, lead one to think that fishing revenue has played a dominant part.⁶⁷⁷

Wiren stressed that the preservation and importance of Lake Waikaremoana for water conservation (which, of course, was crucial for hydroelectricity) had not been a factor when calculating the price of other lakes.⁶⁷⁸ Further, he pointed out that values in 1961 were much higher than when the last lake settlements had been negotiated in the 1920s:

at the present time quite small lakeside properties fetch the £25,000 which you have offered.

In addition, if you wish to capitalise the annual sum which is asked for, there is the factor that the Crown has for many years been using Lake Waikaremoana as its own without right or title.⁶⁷⁹

Since 1918, the Maori owners had had title to the lake, confirmed by the appellate court in 1944. Yet, as the owners saw it, the Crown had trespassed on the lake for hydroelectricity and tourism purposes without permission or payment, and was still doing so in 1961. Further, the Electricity Department's trespass had had

675. Wiren to Minister of Maori Affairs, 22 August 1961 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 876). These appear to have been the figures supplied by Hunn at the 9 August 1961 meeting.

676. Wiren to Minister of Maori Affairs, 22 August 1961 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 876)

677. Ibid

678. Ibid, pp 876, 877

679. Ibid, p 877

the effect of diminishing the fishing revenue, on which such a significant part of the Crown's valuation was dependent.⁶⁸⁰

Wiren added that the owners had two other, crucial, reasons for rejecting the Crown's offer. The first was that for Maori, with their strong spiritual relationship with the lake, an annuity was considered to be a lasting connection with the lake. Wiren was clearly wary of advancing this point, perhaps fearing that it would not receive a sympathetic reception from the Government in 1961. The Hunn report was released that year, advocating the transformation of such connections into a stake in modernity, such as modern home ownership (see chapters 15 and 18). Wiren was quick to add that there was another, 'more powerful' reason why the owners would not agree to a lump sum payment: a one-off payment was of no long-term benefit to the people. We are certain, however, from the evidence of the witnesses in our inquiry, that the spiritual relationship with and ancestral connection to the lake was in fact of overriding importance to the Maori owners, then as now.

Wiren stated:

It is not quite in this way [as a payment for past and present use] that the owners regard the matter. To them the Lake is part of them – it dominates the history and traditions of their tribe. It is almost a spiritual relationship. They do not wish that it should go from them forever. The fact that an annual income is received for it is something in the nature of a rent retaining some part of it for the good of their people. That is one reason why they ask for an annual payment.

Another, and more powerful, reason is this. Any sum divided amongst the large number of owners would produce to the individual only a small amount which it would be difficult to put to permanent use. Much of it would in fact be wasted. The Ngati-Ruapani are a good people, but practically landless. If they could use an annual sum for such purposes as educating children, establishing persons in occupations, and the like, this would be a great advance to their [illegible: people?] Their need is great, and the provision of such help would be of advantage to State Welfare services.⁶⁸¹

Further, Wiren commented that the Maori owners were not only poor (compared to other tribes) but also disempowered: the 'responsibility of administering a Trust Board must have a good influence upon a Maori people.'⁶⁸²

Wiren also noted that the owners had had to pay £,1559 in legal costs since 1944: they had had to 'fight for their rights over a long period of years' and 'the Crown should repay at least part of the costs.'⁶⁸³

In light of all these reasons, the Maori owners' counter-offer (which had been revised significantly downwards) was derived as follows: 'The £3250 per annum

680. Wiren to Minister of Maori Affairs, 22 August 1961 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 877)

681. Ibid, pp 877–878

682. Ibid, p 878

683. Walzl, 'Waikaremoana' (doc A73), p 449

which is mentioned in the owners' resolution may be regarded as the capitalisation of £60,000 for the Lake including the use of it for over 40 years plus £250 per annum being half the present fishing revenue.⁶⁸⁴

All of the islands except for Patekaha were included in this offer, which was to sell the bed of the lake in return for a permanent annuity, administered by a trust board. Patekaha was an urupa.⁶⁸⁵

Soon after the receipt of this counter-offer, the importance of the issue for the national park was again underlined when the commissioner of Crown lands wrote to the director-general, explaining that a proposed road extension had to be put on hold because it might run over Maori land at the edge of the lake. Also, he reported rumours that Maori were about to lease some of their land below the original lake level for holiday homes or camping. He commented: 'The vexed question of ownership of the lake shore causes complications of many kinds and as a Park Board is about to be appointed it would be desirable to have this problem cleared up as soon as possible.'⁶⁸⁶ There was growing concern within Government at this time that the owners could carry out development of their lake, its islands, and their reserves to the detriment of the national park.⁶⁸⁷

Nonetheless, Mr Walzl notes that the offer and counter-offer of August 1961 resulted in a deadlock that lasted for several years.⁶⁸⁸ On 15 November 1961, Hanan forwarded Wiren's letter to the Minister of Lands, observing that the Maori counter-offer was 'quite unacceptable' but that the owners could be induced to accept less.⁶⁸⁹ In essence, this remained the Crown's view for the next five years.

20.8.4 Negotiations in deadlock, 1962–66

At the end of 1961, the Crown and Maori knew each other's positions and also understood something of the reasoning behind them. This development both helped and hindered negotiations. On the one hand, the Crown had not laid its cards on the table before August 1961. This was the first time that it had told the Maori owners what it thought the lake was worth, and how it had calculated that worth. The owners were not aware of the significant shift in Government thinking between 1957 and 1960, away from the original idea that they should receive a one-off payment of £10,000 based solely on capitalising fishing revenue. Instead, they had been presented with a figure of £25,000 and had been told (not entirely accurately) that it was derived from £10,000 (capitalising the fishing revenue), £2,000 for the islands and reserves, and £13,000 in compensation for past use.

In turn, the Crown had been presented with three proposals:

684. Wiren to Minister of Maori Affairs, 22 August 1961 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 877)

685. *Ibid.*, pp 876–878

686. Commissioner of Crown lands, Hamilton, to Director-General of Lands, 26 September 1961 (Walzl, 'Waikaremoana' (doc A73), pp 449–450)

687. Walzl, 'Waikaremoana' (doc A73), p 450

688. *Ibid.*, p 449

689. *Ibid.*, p 450

- ▶ in 1957, a £4,500 annuity based on £3,000 for present and future use and £1500 for past use;
- ▶ in 1959, a £100,000 lump sum or a £5,000 annuity; and
- ▶ in 1961, a significantly lower annuity of £3,250, based on a capital value of £65,000 (which included compensation for past use and £250 per annum for fishing rights).

Each side now had something concrete to work with in terms of the other's expectations and goals. But there were some apparently insurmountable obstacles. The Government insisted on a one-off payment and thought that the owners had massively over-valued the lake. In part, this was because it refused to take hydro-electricity into account. The Maori owners, on the other hand, were determined to obtain an annuity to be administered in trust by a board, and they considered that the Crown had barely offered one-quarter of the lake's true value. These would not be easy positions to bridge, although Maori poverty and growing desperation to achieve a settlement favoured the Crown, whereas the Crown's relatively new concern about the ring of Maori land around the lake became an incentive for it too to compromise.

20.8.4.1 More of the same: a 'new' offer in 1962

In late 1961, the Government was adamant in its rejection of the Maori owners' counter-offer. J R Hanan, the Minister of Maori Affairs, refused to even consider it. He was, as we have noted, convinced that the owners could be persuaded to accept a lower figure. Officials hoped that a slight increase to the Crown's offer would suffice. The Lands and Survey Department and the Maori Affairs Department suggested raising the offer to £30,000 (but then lowered it by £2,000 because the reserves were now subtracted). The Minister of Lands approved this new price of £28,000 in February 1962, and it was sent to Treasury for comment the following month.⁶⁹⁰

Interestingly, the Lands and Survey Department's draft Cabinet paper (prepared in late 1961) made no mention of the ring of dry Maori land separating the national park from the lake, despite growing concerns about it. Instead, the only risk to the Crown was said to be the possibility of litigation over the hydroelectric works. As the department understood it, the owners' legal recourse would be 'an action against the Crown for trespass to the bed of the Lake' and to seek an injunction. It was 'difficult to see that they would get other than a nominal award of damages'. Nor were they likely to get 'an injunction prohibiting the Crown from entering on the Lake for hydro-electric purposes because an injunction would, in the circumstances, be oppressive'.⁶⁹¹

The Cabinet paper also referred to the fact that 'informal discussions' had been held with Turi Carroll. Apparently, he had suggested that the owners would accept a much lower sum than previously stipulated if it was put to them again – the

690. Walzl, 'Waikaremoana' (doc A73), pp 450–451

691. Minister of Lands to Cabinet, draft Cabinet paper, [1961] (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), pp 881–882)

sum of £30,000 was talked about, but it had to be lowered by £2,000 because the Crown was no longer buying the reserves and all the islands.⁶⁹²

Thus, the Government reassured itself that there was no significant risk from a delay or even a halt to the purchase, and that the owners would soon come to terms at only a slightly higher price. Treasury supported the proposal, warning that 'Past experience has shown the desirability of settling Maori Land claims as soon as it is practicable. The claims invariably grow when settlement is long drawn out.'⁶⁹³

The Minister of Lands' recommendations were accepted by Cabinet in April 1962, after which the offer of £28,000 was put to the owners on 21 May 1962. Hanan told the owners that this offer was final and that there was a limited time for them to accept it.⁶⁹⁴

An initial discussion occurred with Wiren two days later, in which he advised that the owners might come down to an annuity of £2,500.⁶⁹⁵ Then, on 25 May 1962, Wiren met with Hanan and officials, urging them to accept the owners' preference for an annual payment to a trust board, which they could use for education, to look after their old people, and to repair their marae. Clearly, the owners recalled the travesty of land purchasing in the 1910s and 1920s. Wiren warned that they did not want the money dissipated in small payments to so many individuals. Nor did they want interest from investing a lump sum, preferring the security of an annual payment direct from the Government. And it was difficult for them to understand why such an arrangement could not be made, when it had been done for other lakes. A trust would also give the people responsibility and 'something to look after and administer'. This was, in our view, an important point in terms of their aspirations for mana motuhake. Wiren told the Minister that he had met with the owners and recommended that they lower their requested annuity to £2,500; any lower than that and it would not even be worthwhile setting up a trust board.⁶⁹⁶

Hanan was not ultimately responsible for the purchase and he had to consult RG Gerard, the Minister of Lands. Gerard expressed disappointment that the owners were still pressing for an annuity, and referred the matter to his officials in the Lands and Survey Department. FT Barber responded that the Crown's new offer was 'generous enough', that Treasury was unlikely to go higher, that it would not be reasonable to go higher in any case, and that there was a reasonable chance of success if the Crown persisted with the current offer.⁶⁹⁷ Gerard therefore recommended to Hanan that the Crown should keep its offer open for a while.

692. Ibid, p 882

693. Secretary to Treasury to Minister of Finance, 27 March 1962 (Walzl, 'Waikaremoana' (doc A73), p 451)

694. Walzl, 'Waikaremoana' (doc A73), p 451

695. Ibid

696. 'Notes of Interview in Hon JR Hanan's Office with Mr Wiren', 25 May 1962 (Walzl, 'Waikaremoana' (doc A73), p 452)

697. Director-General of Lands to Minister of Lands, 1 June 1962 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 851); Walzl, 'Waikaremoana' (doc A73), pp 452-453

On 2 June 1962, a committee of the owners considered the Crown's new offer and unanimously rejected it. Wiren communicated this in a letter of 21 June 1962. He made some very important points:

They [the owners] do not consider that the sum offered for the Lake is sufficient, either in view of the intrinsic value of this beautiful lake or in the view of what was paid for other lakes at a time when monetary values were much less. They do not consider that sufficient allowance has been made for their established legal rights having been ignored by Government Departments over a long period, and profitably ignored. You will understand that they are the people of the Lake, and their history and traditions have centred around the Lake from time immemorial. They would much prefer to retain the ownership, and be paid by the Government under lease or otherwise for the use of it.

Some years ago they consulted us regarding what action could be taken against trespassers. They did not then take the actions available because they felt this might embarrass the Government. They have renewed these discussions, because they think some action is necessary when their rights are just being flouted. For instance, we have no doubt that the Lake boundary extends to the land, already visible, where it stood before the Ministry of Works lowered the level some 14 feet. Rights are now being claimed by individuals over this strip of land.⁶⁹⁸

Previously, Wiren had indicated that the owners saw an annuity as recognition of their ongoing connection with the lake, but now he referred to the possibility of a lease for the first time. It fell on deaf ears. An official minuted Wiren's letter to the effect that the Crown's offer did include payment for past use of the lake. While the State's investment in the lake was considerable and could not be moved elsewhere, the Government's view was that there had been no 'real damage to the asset' and no attempts in the past to bring an action for trespass.⁶⁹⁹ Here, matters stalled and the Government began to contemplate the possibility not of a lease but of a compulsory taking.

20.8.4.2 Negotiations in deadlock, 1962–66

In June 1962, the Maori owners rejected the Crown's new offer of £28,000. In response, officials began to debate the possibility of taking the lake under the Public Works Act and leaving it to the Maori Land Court to sort out the level of compensation. A Lands and Survey official minuted Wiren's letter with that suggestion. But, as Mr Walzl notes, another official in the department pointed out that the Maori Land Court was likely to arrive at a sum 'much more than £28,000 judging by other instances'.⁷⁰⁰ This was to prove a significant deterrent to compulsory acquisition. Quite how such a taking would be justified was unclear, but it continued to be debated throughout 1962.

698. Wiren to Minister of Maori Affairs, 21 June 1962 (Walzl, 'Waikaremoana' (doc A73), p 453)

699. Walzl, 'Waikaremoana' (doc A73), p 453

700. Ibid, p 454

Given the Crown's determination not to budge, Lands and Survey officials prepared an explanation and defence of its current position. In their view, the Maori owners had not suggested a credible basis for an alternative valuation. It was difficult for anyone to suggest an 'intrinsic' value but the Crown had tried comparisons with other lakes, including correlations in respect of area and hydro generation. Officials admitted that the Crown had interfered with the Waikaremoana lakebed but emphasised that the physical impact of the hydro structures was very low; any injurious affection claim could only arise from the lowering of the lake. In that case, Maori remained the owners of the exposed lakebed so their title was not affected. Nor had there been any legal claim for injurious affection in the past. Overall, the risk of litigation seemed as low as it had when the 1961 offer was rejected, so there appeared to be no pressing need for the Crown to raise its offer.⁷⁰¹

The director-general's advice to his Minister was that the Crown had made an 'equitable' offer, even though it was 'difficult to assess a firm basis of value'. Maori had made 'vague statements as to intrinsic value of the lake and its value as ancestral land', but the Director-General did not consider this a firm basis for negotiating a different price. He advised the Minister to cut through further argument and consider taking the lake compulsorily for public works, leaving it to the Maori Land Court to determine appropriate compensation. The only risk there was that this might result in a higher sum than the Crown's current offer.⁷⁰²

The option of a compulsory taking was clearly getting some consideration at the highest level, although it was not particularly serious or sustained consideration. In July 1962, however, Lands and Survey officials came up with a new proposal to break the deadlock. The Crown could pay an annuity for a limited period of time, as had been arranged in the Ngai Tahu settlement. Officials proposed £2,500 a year for 17 years: 'On a 5% basis this has a present value of £28,185. The Maoris would receive a total of £42,500.'⁷⁰³ A draft memorandum was prepared from the Minister of Lands to the Minister of Finance, to secure Treasury approval for this proposal, but it may not have been sent. Compulsion was clearly rejected in this draft memorandum – it was specified that the arrangement would need to be approved by a proper meeting of owners before any legislation resulted, vesting the bed in the Crown.⁷⁰⁴ In any case, this innovative compromise seems to have disappeared without trace. There was no sense of urgency. In September 1962, when the supplementary estimates were being prepared for Vote: Lands and Survey, officials agreed that no money need be sought to fund a lake purchase. They were not expecting resolution any time soon.⁷⁰⁵

701. Ibid

702. Director-General of Lands to Minister of Lands, draft submission, 'Purchase of Lake Waikaremoana', no date (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 848)

703. 'Lake Waikaremoana', 5 July 1962 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 843)

704. Minister of Lands to Minister of Finance, draft ministerial, [1962] (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), pp 840–841)

705. 'Leases, Titles', 4 September 1962 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 842)

In November 1962, the commissioner of Crown lands also raised the possibility with the director-general of a compulsory taking – this time, to preserve not the Crown's use of the lake for hydroelectricity but its use of the lake for tourism and fishing. He reported a rise in feeling among local Maori that action should be taken to prevent visitors using the lake, especially for fishing, while their claim remained outstanding. He urged a speedy acquisition, perhaps by compulsion, and noted that the price would only rise as more time went by.⁷⁰⁶

But nothing happened for several months. In March 1963, Wiren raised the matter at a meeting with the Minister of Maori Affairs. He put the people's view that they were being treated differently (and unfairly) compared to other Maori lake owners, and asked the Minister to attend a meeting with them and explain why this was the case. A file note stated:

The Minister traversed the case and said that he could not see that the Crown could go any higher. Neither on the basis of the production of electricity or fishing revenue, nor on any other ground such as size, could he see how the offer could be increased. If Mr Wiren could translate the offer into an annual payment, the Minister would be prepared to ask Treasury to consider the business afresh.⁷⁰⁷

From the Government's point of view, it now rested with the Maori owners to come up with a new proposal. Wiren requested the original Cabinet paper proposing the Crown's offer, so that the owners could see the basis on which the Government had arrived at a sum of £28,000, but the Government declined to supply it. In the view of officials and Ministers, the Crown did not have to justify how it had arrived at its offer, and it would be positively dangerous to provide the requested information: it might disturb the existing lake settlements, and would only provide 'ammunition' for the Waikaremoana owners.⁷⁰⁸

Nothing happened between the March 1963 meeting and March 1965. For two years, the Government waited for Wiren to arrange a counter-offer, although it is difficult to see how he could do so on the basis stipulated by Hanan: that Wiren explore how the Crown's current offer of £28,000 could be turned into an annuity. Perhaps Hanan expected the owners to come up with the Lands Department's idea of converting the amount into a 5 per cent annual payment for a specific period of time. This had the potential for the Crown to spend a greater sum in the long run, although still not as much as the owners wanted. But no counter-offer was forthcoming. It may be that the owners were waiting in hope that there would be a new Government returned in the general election at the end of 1963. If so, they hoped in vain.

706. Walzl, 'Waikaremoana' (doc A73), pp 455–456

707. RJ Blane, Department of Maori Affairs, file note, 10 March 1963 (Walzl, 'Waikaremoana' (doc A73), pp 456–457)

708. Walzl, 'Waikaremoana' (doc A73), pp 457–458; Minister of Lands to Minister of Maori Affairs, 8 July 1963 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 833)

In the meantime, the Hamilton commissioner of Crown lands wrote to the director-general again in December 1964, emphasising a new threat to the national park arising from the ring of Maori land around the lake. The Te Urewera National Park Board was anxious to prevent buildings springing up around the lake, but now a number of 'huts' had been built, some on this ring and others on the Maori reserves. The park board wanted the Government to resolve matters so that these huts could be removed.⁷⁰⁹ On 22 December 1964, the new director-general, RJ MacLachlan, replied to the commissioner, advising that the park board's concerns had been referred to a recent meeting of the National Parks Authority. The Authority agreed that buildings around the lake would be 'most undesirable and that the land in question should be added to the Park if at all possible. It resolved that as a matter of policy, steps should be taken to acquire the reserves and the lake bed as soon as practicable.'⁷¹⁰ MacLachlan noted that there were legal restrictions on the Waikaremoana reserves, which could not be leased, but that there was nothing to stop the Maori owners from leasing or building on the ring of Maori land around the shores of the lake.⁷¹¹

This situation spurred the Government back into action in 1965.⁷¹² MacLachlan wrote to Wiren that the Government was still waiting for a counter-offer. He suggested that the Crown was 'most anxious to conclude a sale.'⁷¹³ In 1962, the Crown had accepted that Maori did not want to sell their reserves but now it exerted new pressure to acquire the reserves as well as the lakebed in one negotiated arrangement.

MacLachlan met with Wiren in March 1965, soon after this renewed approach from the Crown. The owners' lawyer suggested that the Crown should arrange formal meetings of assembled owners for the lake and the various reserves, as well as a special GV of the reserves. In his view, the old valuation of £2,000 was far too low, but the owners might be willing to consider a sale if annuities could be arranged for the reserves as well as the lake, all being paid to the same Waikaremoana trust board.⁷¹⁴

In May 1965, the Crown had to face some challenging issues if it were to break the deadlock. Ministers and officials had been adamantly opposed to a Taupo-style annuity ever since negotiations began in 1957. Was it time to reconsider this approach? In 1962, the Lands and Survey Department had contemplated a *temporary* annuity that would give the owners a greater sum, more affordable for the Crown because spread over 17 years. But this idea had gone nowhere. Now, in May 1965, MacLachlan advised Treasury and the Maori Affairs Department that the

709. Walzl, 'Waikaremoana' (doc A73), p 458

710. Director-general to commissioner of Crown lands, 22 December 1964 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 830)

711. Ibid

712. Walzl, 'Waikaremoana' (doc A73), pp 458–459

713. Director-general to Wiren, 4 March 1965 (Walzl, 'Waikaremoana' (doc A73), p 459)

714. Walzl, 'Waikaremoana' (doc A73), p 459

Crown was unlikely to be able to acquire the lake unless it gave in on the question of an annuity.⁷¹⁵

On the other side of the deadlock, the Te Urewera National Park Board tried a direct approach to the Maori owners, seeking to persuade them to come to terms and sell the lakebed. The board believed that there was common ground in the Maori people's desire to preserve and protect their taonga, the lake and its environs, and the Crown's wish to add the lake and reserves to the national park. Tama Nikora and Reverend Laughton (members of the board) held a hui with a large number of owners at Waimako Pa in May 1965, to 'explain why the board held it to be necessary to include lake and reserves in the park if the owners wanted them to be reserved for all time'.⁷¹⁶ They reported back to the park board that they 'had been given a very difficult hearing':

The owners replied that they had been willing to hand over the lake 15 years ago and had stated their terms but had heard no more since; meanwhile the Government, Tourist Department, Electricity Department and general public had all been using the lake as they wished. The reserves were a separate matter and they were not prepared to discuss their transfer until the matter of the Lake had been settled. They saw no reason why the terms should be any different from those under which the Rotorua and Taupo lakes were transferred. They did not want a lump sum payment as there was a danger it could be eroded away even under a Trust; they wanted a fair annual payment in perpetuity.⁷¹⁷

On 29 June 1965, Wiren wrote to MacLachlan, asking why nothing had been heard from the Government since the March 1965 meeting. On his understanding, the owners were awaiting a new offer from the Crown at a meeting of assembled owners, at which tikanga required them to reach a unanimous decision. He pointed out that the owners remained determined that they would not accept a lump sum, because it would result in 'smallish payments to a large number of owners and much of the money would inevitably be put to more or less useless purposes'. At the March 1965 meeting, Wiren had understood that the objection to an annuity came from Treasury, and that MacLachlan was going to pursue this matter and see if the objection could be removed. Wiren said that the lake involved a whole tribe and – in similar situations – trust boards had been created for other tribes. He made it clear that the next move was the Crown's; the owners would not be coming up with a new offer to the Crown.⁷¹⁸

In the meantime, the commissioner of Crown lands (who chaired the park board) had suggested uncoupling the lake and reserves, dealing with the lakebed

715. Director-general to secretary to Treasury, copied to secretary for Maori Affairs, 26 May 1965 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 824)

716. Cecilia Edwards, 'Selected Issues: Te Urewera National Park, Thematic Issue 33' (commissioned research report, Wellington: Crown Law Office, 2005) (doc L12), p 81

717. 'UNP board minutes', 5–6 May 1965 (Edwards, 'Te Urewera National Park' (doc L12), p 81)

718. Wiren to Director-General of Lands, 29 June 1965 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 821)

first. In July 1965, the Lands and Survey Department agreed to that idea, and had a concrete proposal ready to put to Treasury. Going back to the last official owners' position, MacLachlan suggested to Treasury that an annuity of £3,250 was too high because it meant the lake had a capital value of £65,000. Instead, he recommended that the Government give way over payment of an annuity while sticking to £30,000 as the value of the lake. The Government should call a meeting of assembled owners and offer £30,000 cash or an annuity of £1,500 a year (5 per cent of £30,000).⁷¹⁹

This proposal shows at least some shift within Government towards a compromise. MacLachlan was willing to separate the lake and the reserves and to agree to an annuity, although his figure was virtually the same as before and was still far below the Maori owners' expectations. By the end of August 1965, there was a further shift: Treasury agreed that an annuity could be paid 'if this proves to be the only alternative'.⁷²⁰

But Walzl points out that, for unknown reasons, nothing happened then for six months. It was not until March 1966 that MacLachlan approached the secretary for Maori Affairs with a proposal to call a meeting of assembled owners.

MacLachlan's 1966 memorandum made the by-now usual points that the Government did not need to own the bed for hydroelectric purposes and that any claim for injurious affection would be small, and made comparisons with other lakes. The director-general summarised the well-rehearsed arguments about hydroelectricity, although – seven years on from the 1958–59 debate – there was less certainty that raising and lowering the lake had minor effects:

At one time enquiries were made from the Electricity Department on the value of ownership of the lake bed for hydro electric purposes. The sole right to use water for electricity generation has been vested in the Crown since the Water Power Act 1903 subject only to payment of compensation [for injurious affection]. In the case of Waikaremoana *apart from variation of the levels from time to time the injurious affection has not been great* and there had been no formal claims for compensation. There has not been great interference from a permanent occupation point of view as only a small area of the lake bed is occupied by the intake structures. It was not possible to arrive at a value for the lake on the basis of cost of generating power from it in relation to the sale of electricity because revenue from power sold by the Department is in general only sufficient to meet costs and service capital investments. [Emphasis added.]⁷²¹

The impetus for acquiring the lake therefore came from the national park:

719. Director-General of Lands to secretary to Treasury, 16 July 1965 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 820)

720. Director-General of Lands to Minister of Lands, 31 August 1965 (Walzl, 'Waikaremoana' (doc A73), p 460)

721. Director-General of Lands to secretary for Maori Affairs, 4 March 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 811)

It is felt that a large lake such as Waikaremoana should be in Crown ownership in view of its situation within the Urewera National Park, its use for recreational pursuits and its scenic attractions. All the other major lakes within New Zealand are in Crown ownership. I think it is generally accepted among the owners that sale to the Crown is the proper course to follow and the question then arises of what the price should be.⁷²²

In making this statement, MacLachlan may not have been aware that Wiren had earlier mentioned a lease, or the owners' view that an annuity would go some way towards retaining their permanent link with the lake by providing ongoing recognition and benefit. In any case, MacLachlan noted the owners' preference for an annuity and indicated a major shift in the Crown's position. The Crown would not suggest an annuity itself because there might be individual owners who had a use or need for their share. But if the owners at the meeting wanted an annuity then the Crown could agree to it as a last resort. The price would be increased from £28,000 to £30,000 because 'some time has passed' since the last offer was made. But, as always, MacLachlan noted that there was no real way of valuing a lakebed (even by comparison to other lakes). This purchase offer worked out at almost £2 10s an acre, which he thought was 'not ungenerous'.⁷²³

The Maori Affairs Department put this proposal to the Board of Maori Affairs in April 1966. The paper to the board specified that if the Maori owners insisted on an annuity, then the Crown would make an offer of £1,500 a year at the meeting, 'which is equivalent to a lump sum payment of £30,000'.⁷²⁴ On 7 April 1966, the board agreed to call a meeting of assembled owners to consider the Crown offer to purchase the lakebed for £30,000.⁷²⁵

Hanan and Gerard met with officials in June 1966 to discuss the Government's strategy for the meeting of owners. The Ministers had indicated their willingness to attend this meeting but officials persuaded them not to do so because it would 'give the owners the opportunity of raising various outstanding grievances and could put Government in a position of having to close a deal which could better be negotiated independently [that is, in its own right, without the other grievances having to be addressed]'. Instead, Secretary McEwen and FT Barber of Lands and Survey would represent the Crown.⁷²⁶ In the event, this left the meeting vulnerable to influence by Opposition members of Parliament, as we shall see.

In terms of the annuity, a new issue was raised in this era of growing inflation: 'It was generally agreed that a cash offer be made to the Maoris and that this would be more advantageous than an annuity which would lose its worth through depreciation over the years'. If the owners still wanted a trust board, Hanan could

722. Director-General of Lands to secretary for Maori Affairs, 4 March 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 811)

723. *Ibid.*, pp 811–813

724. Board of Maori Affairs, 'Proposed Acquisition of Maori Land by the Crown', 7 April 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 808)

725. Walzl, 'Waikaremoana' (doc A73), p 461

726. 'Notes of meeting in the office of the Minister of Maori Affairs 9.15 am 15.6.66', 16 June 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 806)

consent to their investing the lump sum in land or some other investment 'so that they would have the benefit of the capital increment in the future.'⁷²⁷ The risk of inflation appears to have been introduced as an argument for the Crown to use in combatting the owners' request for an annuity. Methods were available for inflation-proofing an annuity (see chapter 19), but there was no discussion of how such methods might be used to protect the owners' interests. In other words, this was a tactic rather than a concern; the Government still wanted to avoid an annuity if it possibly could.

The meeting of assembled owners took place on 16 November 1966. More than 150 people attended, of whom 72 were confirmed as owners.⁷²⁸ Going into the meeting, officials expected to be able to gain agreement and were prepared to go up to £35,000, which they thought would suffice.⁷²⁹ As a result of 'inquiries made privately' before the meeting, they believed that the owners would settle at that sum. But in the opening speeches, Sir Eruera Tirikatene advised the owners that £30,000 was 'quite inadequate' for their beautiful lake and they should 'demand something very much higher than that.'⁷³⁰ In his view, they should hold out for a six-figure price.⁷³¹ Although Sir Eruera left the meeting temporarily after that, Secretary McEwen reported that 'it was apparent that his remarks had carried a considerable amount of weight with the owners.'⁷³² Already, the Crown's new strategy was in trouble.

FT Barber opened for the Crown, stating that all other major lakes in New Zealand were publicly owned, and that Lake Waikaremoana should be added to the national park. He also advised that the Crown would pay an annuity if required but that inflation could make it worth a lot less within five or six years.⁷³³ This meeting was the first time the Crown put forward the idea that inflation could soon render an annuity valueless. Officials suggested that the Waikaremoana owners follow the example of Whakatohea, and use the lump sum payment to buy a successful farm, administered through a trust board.⁷³⁴

Barber's opening speech was followed by a debate of the matters at issue. Although pressed by Matamua and Carroll, he refused to explain exactly how the Crown had arrived at the figure of £30,000. Barber did confirm that it included

727. Ibid

728. Secretary to Minister of Maori Affairs, 13 December 1966; FT Barber, 'Note for File: Lake Waikaremoana', 21 November 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), pp783, 789)

729. Walzl, 'Waikaremoana' (doc A73), p 461

730. Secretary to Minister of Maori Affairs, 13 December 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p783)

731. FT Barber, 'Note for File: Lake Waikaremoana', 21 November 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p789)

732. Secretary to Minister of Maori Affairs, 13 December 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p783)

733. 'Statement of Proceedings of Meeting of Assembled Owners', Wairoa, 16 November 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1405)

734. Secretary to Minister of Maori Affairs, 13 December 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p783)

compensation for past use.⁷³⁵ There was discussion about the significance of using the lake for hydroelectric purposes, and the Crown's position that it did not need to pay for doing so (because of its statutory right as sole user).⁷³⁶ The Maori owners, on the other hand, wanted royalties for electricity as part of their annuity.⁷³⁷ Although it is not recorded in the minutes, Barber's explanation apparently included an assertion that the water belonged to the Crown. Reverend Rangiihu disputed this point, arguing that Barber's 'reference to the water in the lake belonging to the public was incorrect as this was contrary to the Treaty of Waitangi'. Rangiihu added that, in any event, 'the best prospect for the owners would be to obtain an annual payment in perpetuity'. Barber replied that he was authorised to consider an annuity if that was what the owners wanted. Also, the commissioner of Crown lands suggested that the whole public had paid (indirectly) for the Waikaremoana electricity scheme and so it belonged to everyone. Barber claimed that the future use of the lake was limited for electricity purposes and its great value was as a public amenity. Assurances were given that the lake would be included in Te Urewera National Park and would not be developed.⁷³⁸

Also important was what happened in the lunch hour. The officials had a private talk to Sir Turi Carroll, who asked them if the Crown would go up to £35,000. Lands and Survey officials replied that it would do so. Carroll thought that there was 'some prospect' of getting agreement at that amount.⁷³⁹ But in the meantime, Sir Eruera Tirikatene had returned, bringing Norman Kirk, the Leader of the Opposition. They asked to address the hui without the Crown representatives present.⁷⁴⁰ There is some disagreement about what exactly Kirk said to the owners. Mr Walzl suggests that the Leader of the Opposition promised them a higher payment if his party became Government.⁷⁴¹ Secretary McEwen, however, understood that Kirk was asked this question by the owners 'but that Mr Kirk was not prepared to commit himself'.⁷⁴²

Nonetheless, there was no prospect of agreement, even at a higher price of £35,000. When the officials returned to the meeting, they were advised that the resolution (sale to the Crown for £30,000) would be formally rejected. But the owners were not giving up. They intended to appoint a steering committee to negotiate with the Crown. Officials considered asking the owners for a

735. 'Statement of Proceedings of Meeting of Assembled Owners', Wairoa, 16 November 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1405–1406)

736. Barber's speech notes, section entitled 'Value for Hydro Electric Purposes', [November 1966] (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 795)

737. 'Maoris Refuse £30,000 for Waikaremoana Bed', *Hawke's Bay Herald-Tribune*, 23 November 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 787)

738. 'Statement of Proceedings of Meeting of Assembled Owners', Wairoa, 16 November 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1406)

739. FT Barber, 'Note for File: Lake Waikaremoana', 21 November 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 789)

740. Ibid

741. Walzl, 'Waikaremoana' (doc A73), pp 462–463

742. Secretary to Minister of Maori Affairs, 13 December 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 783)

counter-offer at once but were advised against this by Sir Turi Carroll. McEwen believed that this was good advice because 'if we did so at this stage, the answer would be up among the stars'.⁷⁴³ In his notes of the meeting, Barber recorded:

We had learned from various sources during the luncheon recess that there was no hope of settlement at under £60,000 possibly a figure between that and £80,000. I personally do not think there is any hope of acquiring the lake at less than £60,000. It is hard to justify this offer but the price will go all the higher the longer we leave the matter.⁷⁴⁴

There was another aspect to consider, however, and that was the question of the owners' continued connection to the lake. How was this to be provided for? Could a way be found to provide for the needs and interests of both parties? The commissioner of Crown lands reported to MacLachlan on 29 November 1966 that he had been informed that, 'had we asked them to reserve this land as part of Urewera National Park in such a manner that the Maori people were not having all their ancestral ties (if any) severed completely from it[,] we would not have met with any opposition on cost'.⁷⁴⁵

The method discussed by the owners at the meeting (outside the formal proceedings) was a section 439 trust. They were willing to consider putting such a trust under the control and administration of the park board (presumably because of their informal representation on and influence in that board). The disadvantages, from the Crown's perspective, were that a section 439 reservation could later be revoked by the owners, and it would be inalienable – that is, the Crown had no hope of eventually purchasing the lakebed while it remained in such a trust. Legislation might be needed to create a special trust more in keeping with the Crown's longer term interests. But either way, a section 439 trust or a specially legislated trust, the commissioner thought that this kind of solution might remove difficulties over price.⁷⁴⁶

MacLachlan replied in December 1966 that he was happy to discuss either of these possibilities with the steering committee, but that the next move and initiative needed to come from the committee, not the Crown. He seemed annoyed by the outcome of the meeting, suggesting that it had only been called because of 'persistent pressure from representatives of the owners'; the ball was now firmly back in their court.⁷⁴⁷

The key issues seemed as far away from resolution at the end of 1966 as they had been at the end of 1961. The Crown's offers had inched up from £25,000 to

743. Ibid, p784

744. FT Barber, 'Note for File: Lake Waikaremoana', 21 November 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p790)

745. Commissioner of Crown lands, Hamilton, to director-general, 29 November 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p786)

746. Ibid

747. Director-general to commissioner of Crown lands, 8 December 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p785)

£28,000 to £30,000, but were still less than half of what the owners wanted. The Government was finally willing to consider an annuity but only as a last resort, and the annuity it was willing to consider (£1,500) was very low. There was no intention of making it inflation-proof. The Government had given no serious thought to making an arrangement that protected (or enhanced) the owners' links with their taonga, although this was known to be a serious issue for them since at least 1961, when Wiren raised it. Nor had any thought been given to the many representations about the owners' poverty, or of the benefits of a Maori-controlled trust to the owners.

Throughout, the Crown's main considerations seem to have been the protection of its hydroelectricity scheme, and keeping the price as low as feasible while still obtaining the lake. The Crown and Maori owners held irreconcilable views as to whether payment should be made for use of the lake to generate electricity. Every offer since 1961 had included compensation for other past uses, yet the Crown seems to have had no problem about continuing to use the lake for free in the meantime with no apparent end in sight. Where there was concern within Government, it was mainly about actions that the Maori owners might take – especially in the courts – to stop the Crown's use of the lake. The Government made no attempt to negotiate an interim arrangement so as to respect the legal rights of the Maori owners until agreement could be reached.

It must have seemed in December 1966 that the deadlock might carry on for another decade. But there was growing incentive for the Crown to compromise. As Tony Walzl explained it,

Despite there being little reason for hope [by the end of 1966] that the negotiations would be successfully concluded, a collection of events associated with the National Park and the increasing awareness of the nature of Maori rights of ownership placed pressure on Crown officials to accept a compromise. Compared with earlier negotiations, this process occurred over a comparatively short timeframe, such were the influences which came into force.⁷⁴⁸

Even so, the negotiations took another five years to complete. We explain why in the next section.

20.8.5 Negotiation of a settlement, 1967–70

20.8.5.1 *The deadlock is broken, November 1967*

In 1967, the negotiations deadlock was finally broken when the Crown and the Maori owners agreed on a method for establishing the value of the lake. As Mr Walzl notes, there was growing pressure on the Crown to find a new way forward at this time. In December 1966, the Marine Department discovered that it could not enforce boating regulations on the lake, and that there was in fact no public right of navigation on Lake Waikaremoana. The Crown Law Office supplied the Marine Department with a legal opinion to that effect on 8 December 1966:

748. Walzl, 'Waikaremoana' (doc A73), p 464

Because the level of the Lake has been drawn down by the use of the water for the hydro-electric power stations there is a margin of dry land round the Lake which is included in the Maoris' title. There is no public right of navigation on the Lake unless the Maori owners have in some way granted such rights, and there is no evidence that they have done so . . .

Even if there were a public right of navigation it seems that boat owners would have to cross privately owned land in order to obtain access to the water. The position seems to be that persons boating on the Lake are probably in law trespassers. At best they would appear to be licensees of the Maori owners who do not seem to attempt to exercise any control over the use of the Lake for boating and seem to permit boating without restriction.⁷⁴⁹

E Rockel, the Crown counsel who wrote the opinion, concluded that the Marine Department had no authority to make regulations concerning navigation on the lake.⁷⁵⁰

The secretary for Marine was 'rather disturbed' to discover that Waikaremoana was a 'private lake' and that there was no public right of navigation. The Motor Launch Regulations 1962 did not apply, and anyone boating was probably trespassing. Given the importance of this as a public safety issue, the Marine Department considered opening negotiations with the Maori owners to come to some arrangement about navigation and boating. Officials from Lands and Survey, however, were worried that this might prejudice the Crown's negotiations to purchase the lakebed. Presumably, their concern was that highlighting the owners' rights in this way (and negotiating separately on the issue) might complicate matters and drive the price up, although this was not stated openly. After discussions between officials from the two departments, the Marine Department agreed to take no action and 'let sleeping dogs lie'.⁷⁵¹

The same approach had been taken back in 1961, when Lands and Survey sought to conceal the motor camp's encroachment on Maori land rather than acknowledging the owners' rights. A similar issue arose in October 1967, when the national park board wanted to erect a large complex beside the lake to serve as park headquarters. By now, of course, the park authorities were only too well aware of the strip of permanently dry Maori land around the lake. Everyone was anxious to ensure that the new building was not located on Maori land. But, as we described earlier, the Electricity Department had raised and lowered the lake with significant fluctuations before 1965, sometimes quite extreme. Officials were unsure where the outer boundary of the Maori-owned lakebed was located. Upon inquiry, there was no record of a particular lake level having been adopted as the official title boundary for the lake.⁷⁵² On the one hand, officials were anxious to

749. E Rockel to secretary for Marine, 8 December 1966 (Walzl, 'Waikaremoana' (doc A73), p 464)

750. Walzl, 'Waikaremoana' (doc A73), p 464

751. Secretary for Marine to commissioner of Crown lands, Hamilton, 3 January 1967; commissioner of Crown lands, Hamilton, to Director-General of Lands, 20 January 1967 (Walzl, 'Waikaremoana' (doc A73), p 465)

752. Walzl, 'Waikaremoana' (doc A73), p 465

avoid any publicity about this 'question of boundary definition', presumably for fear of alerting the Maori owners and drawing more attention to the whole question. On the other hand, the department decided that it needed to survey the lake shore to determine the official shoreline.⁷⁵³

While this matter was being debated within Government, the committee of owners (appointed back in 1966) approached Sir Eruera Tirikatene's daughter, Mrs Whetu Tirikatene-Sullivan, member of Parliament, to see if she would help them reopen a dialogue with the Government.⁷⁵⁴ Tirikatene-Sullivan had recently taken her father's place in Parliament at the beginning of 1967. She agreed to meet with the Waikaremoana owners in November of that year. Before doing so, Tirikatene-Sullivan approached the new Minister of Lands, Duncan MacIntyre, to find out what was happening on the Crown's side and for 'an indication of the amount Government would be prepared to consider as a just compensation.'⁷⁵⁵ MacIntyre replied that the Government was still waiting for a counter-offer from the steering committee. Rather than commit himself as to a figure, the Minister recited the Government's view of the history of the negotiations, including that fact that it had been willing to consider paying up to £35,000 in 1966. This, he said, 'gives you some indication of the Crown's ideas of value'. He added that if the steering committee was willing to make a 'reasonable offer this will be carefully investigated by Government.'⁷⁵⁶

On the face of it, this response from MacIntyre was not promising. A year had gone by since the Crown's last offer had been firmly rejected, but Government thinking had not moved past the top figure it had been willing to offer back in 1966. Officials knew that a figure of £35,000 was completely unrealistic. Barber had advised after the 1966 meeting that the Crown could not get the lakebed for less than £60,000.⁷⁵⁷ Despite the growing incentives for the Crown to settle, it seemed as if the Government was stuck. If there were to be any kind of breakthrough, it would have to come from the Maori owners.

After meeting first with Tirikatene-Sullivan, a deputation of owners met with MacIntyre, McEwen, and Barber on 21 November 1967. Tirikatene-Sullivan introduced the owners, who were recorded in the official minutes as Messrs Matamua, Tawera, and eight 'other members of the Tuhoe Tribe', all residents of Tuai.⁷⁵⁸ She

753. Walzl, 'Waikaremoana' (doc A73), p 466

754. Minister of Lands to Whetu Tirikatene-Sullivan, 6 November 1967; Minister of Lands to Whetu Tirikatene-Sullivan, 10 November 1967 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), pp 778-780)

755. Minister of Lands to Whetu Tirikatene-Sullivan, 10 November 1967 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), pp 778-779)

756. *Ibid*, p 779

757. FT Barber, 'Note for File: Lake Waikaremoana', 21 November 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 790)

758. 'Meeting of owners of Lake Waikaremoana with Minister of Lands on Tuesday 21 November 1967 at 9.25 am' (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 775); see also handwritten notes of meeting, 21 November 1967 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 776)

Evening Post (ATL, Dominion Post Collection)



Whetu Tirikatene-Sullivan, the member of Parliament for Southern Maori. In 1967, the Lake Waikaremoana owners' committee approached Tirikatene-Sullivan for assistance. She facilitated a meeting with the Minister of Lands, Duncan MacIntyre, which resulted in agreement that a new Government valuation for the lake should be commissioned. The 1968 valuation was much higher than any sum the Government had previously offered, though it still excluded the value of the lake's use for hydroelectricity. It became the basis of the settlement with the owners, agreed in 1970, for a Crown lease of the lake with perpetual right of renewal. In 1971, the lease was validated by legislation.

then 'outlined the reasons for the deputation.'⁷⁵⁹ This included the Maori owners' 'long-standing grievance' about the Crown's use of the lake without paying compensation.⁷⁶⁰ After a meeting at Wairoa earlier in the year, the owners had resolved on a new course of action: they had 'come to a decision to ask for a Commission of Enquiry to be established to place a valuation on the Lake Bed.'⁷⁶¹

In response, the Minister noted that at the last meeting with officials, the owners had rejected an offer of £30,000 and had appointed a steering committee to negotiate with the Crown. MacIntyre asked for confirmation that it was this committee which 'had now decided on the establishment of a Commission of Enquiry'. Tirikatene-Sullivan duly confirmed this. She added that the owners would require representatives on the commission alongside Government representatives, with an independent judge as chairman (perhaps a Maori Land Court judge). MacIntyre responded that such a commission would 'probably have to start with a special Government valuation of the property'. He also asked McEwen and Barber if the officials had any objections to the proposed commission. They responded that they did not.⁷⁶²

759. 'Meeting of owners of Lake Waikaremoana with Minister of Lands on Tuesday 21 November 1967 at 9.25am' (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 775)

760. Handwritten notes of meeting, 21 November 1967 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 776)

761. 'Meeting of Owners of Lake Waikaremoana with Minister of Lands on Tuesday 21 November 1967 at 9.25am' (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 775)

762. Ibid

Then, the official minutes of the meeting state: ‘Mr Matamua eloquently put forward the feelings of his people on this subject and concluded by asking for such an independent tribunal’, which was supported by Mr Tawera.⁷⁶³ From handwritten notes taken by one of the officials present, ‘Mr [Matamua] recalled the unhappy state of his people almost with tears. Govt had known of his people’s ownership since award in 1918 confirmed in 1944. No firm attempt to compensate’. Matamua suggested that a commission made up of six representatives of the owners and six Government representatives should be chaired by a Maori Land Court judge. The owners wanted this commission to set compensation which the Government would then be obliged to pay.⁷⁶⁴

Barber then introduced the subject of the Waikaremoana reserves, asking whether they should be included in the work of the commission. Mr Matamua responded that the people wanted to retain ownership of these reserves but that there would be no objection to valuing them. After discussion of the reserves, the Minister concluded by ‘thanking the deputation and saying that he realised both sides were keen to arrive at a solution. He agreed to look at their proposal and to make a recommendation to Government that their wishes be met.’⁷⁶⁵

After the deputation had left, MacIntyre held a private meeting with Barber and McEwen, at which it was agreed that the tribunal should consist of a Supreme Court judge or retired judge, as well as one assessor for the Maori owners and one assessor for the Government. MacIntyre and the heads of Maori Affairs and Lands and Survey also agreed that a submission should be prepared for Cabinet, proposing the establishment of this tribunal to ‘fix the compensation award’. The Minister asked his officials to meet with the Valuer-General and arrange a valuation of the lakebed.⁷⁶⁶

This breakthrough ended the deadlock. The Crown and the Maori owners agreed that the lake should be valued by professional Government valuers, after which a commission – with representatives from both sides, chaired by an independent judge – would set the figure to be paid. Although the second half of this agreement was never carried out, the Government did abide by the professional Government valuation, which established that the Crown had significantly undervalued the lakebed in its previous offers.

20.8.5.2 Government gets a special valuation, December 1967 – November 1968

The November 1967 agreement was not followed by rapid progress. It took a year to get a special Government valuation, and then another nine months after that

763. ‘Meeting of Owners of Lake Waikaremoana with Minister of Lands on Tuesday 21 November 1967 at 9.25am’ (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p775)

764. Handwritten notes of meeting, 21 November 1967 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p776)

765. ‘Meeting of Owners of Lake Waikaremoana with Minister of Lands on Tuesday 21 November 1967 at 9.25am’ (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p775)

766. Handwritten notes of meeting, 21 November 1967 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p777)

before the Crown was ready to make the owners an offer. Potential stumbling blocks remained:

- ▶ the Government and the Maori owners did not agree on the composition of the proposed tribunal to set ‘compensation’;
- ▶ the relationship between the special Government valuation (of present capital value) and compensation for past use was yet to be determined by the proposed tribunal; and
- ▶ it was still not clear how the owners’ wish for a permanent, ongoing connection with and benefit from their lake could be reconciled with the Crown’s desire for a one-off lump sum payment in compensation and to purchase the freehold of the lakebed.

We do not intend to explore the special Government valuation in detail in this section. The details are a matter for section 20.9, where we consider the claimants’ argument that the resultant lease (including the level of rent) was unfair. Here, we provide a brief outline, focusing on why it took a whole year to carry out the valuation, and how the results enabled the Crown and Maori owners to finally reach agreement in 1970.

Barber and McEwen met with the Valuer-General in December 1967. At this meeting, the officials debated how to carry out a Government valuation of a lakebed. An assumption was noted that ‘the waters of the Lake are owned by the Crown. The bed is vested in Maori owners.’ Because of the activities of the Electricity Department, part of the bed was known to be dry land, some of it now occupied (with ‘improvements’) by the Tourist Hotel Corporation and the national park board. Fortunately, the departments agreed that it was possible for the Valuation Department to go ahead and value the lakebed. But the Valuer-General asked the Lands and Survey Department to get legal advice as to whether there were any court cases bearing on the valuation of a lake, and also to confirm that ‘the legal situation was as we thought’ (that is, that the Crown owned the water and Maori owned the bed).⁷⁶⁷

It took a couple of months to get this legal opinion. In brief, the Lands and Survey office solicitor, R Heenan, found that there were no relevant judicial decisions about how to value a lakebed. Also, although the solicitor took the view that Maori owned the water as well as the bed, his advice was that this should have no bearing on the valuation because the Crown had the sole statutory right to use the water for electricity. Hence, the special valuation should take no account of hydroelectricity. As Heenan understood it, the water was used for hydroelectricity after it had flowed out of the owners’ lake, and they had no right to stop the water from flowing for that purpose because of the Crown’s statutory rights. Therefore, ‘It would appear that the owners could not claim any value in the water for its subsequent use for generating electricity but that they could prevent anybody using

⁷⁶⁷ ‘Note for file: Lake Waikaremoana: Purchase by the Crown’, 5 December 1967 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p 773)

the lake for any other purpose, such as fishing.’ Also, he confirmed that Maori still owned the exposed parts of the lakebed.⁷⁶⁸

After receipt of this legal opinion in February 1968 and discussion with the Minister, the director-general finally made a formal request for a special Government valuation of the lake on 26 March 1968. In doing so, he set parameters for the valuation:

- ▶ the Maori owners owned the whole of the bed (including the now permanently exposed strips of dry land resulting from the lowering of the lake);
- ▶ the Maori owners – in view of ‘the fact that I have no evidence to the contrary’ – also owned ‘the waters of the lake’ but this had no relevance for the valuation, at least as far as hydroelectricity was concerned, because the owners had no legal right to stop the Crown using the water for electricity generation, and could ‘not claim any value in the water for its subsequent use for generating electricity’;
- ▶ the Maori owners had the right to ‘prevent anybody using the lake for any other purpose, such as fishing’; and
- ▶ the valuation should have regard to the Rotorua and Taupo lake settlements as precedents.⁷⁶⁹

Although the Valuation Department now had its instructions, it took another four months before it could get information from Lands and Survey as to the exact boundary of the lakebed. On 10 July 1968, the surveyor-general advised that the legal limit of the lake was its maximum pre-1946 level (according to usual seasonal fluctuations, not unusual conditions). Thus, the ‘boundary of the bed of Lake Waikaremoana should be the 2,020 feet contour.’⁷⁷⁰ This meant that the ring of permanently dry land extended to a line 15 feet above the water of the lake (from 2,006 feet to 2,020 feet).

On 24 July 1968, Mrs Tirikatene-Sullivan wrote to inquire what progress had been made since the meeting in November 1967. There was a flurry in the Lands and Survey Department in response. One official suggested that a ‘hurry up’ be given the Valuation Department ‘and anyone else concerned in negotiation for purchase of bed of lake.’ Officials were beginning to worry that the continued delays might result in the Maori owners selling off parts of the lake shore to private interests. They were also worried that the Waikaremoana reserves were vulnerable to alienation, and there would be an even longer wait to sort out the reserves because the Maori owners wanted the bed dealt with first.⁷⁷¹ In response to the ‘hurry up,’ the Valuation Department stated that it was aware of the urgency but

768. Walzl, ‘Waikaremoana’ (doc A73), pp 467–468; R Heenan, solicitor, ‘Lake Waikaremoana: Purchase by the Crown’, 8 February 1968 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p762)

769. Director-General of Lands to Valuer-General, 26 March 1968 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p756)

770. Walzl, ‘Waikaremoana’ (doc A73), p 469

771. Minutes on Minister of Lands to Whetu Tirikatene-Sullivan, July 1968 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p1109)

had been waiting for the necessary information about the exact boundaries of the lake, which the surveyor-general had only just provided.⁷⁷²

The Minister replied to Tirikatene-Sullivan in August 1968:

You will recall that when you introduced the deputation to me it was agreed that the first step was to obtain a special Government valuation of the Lake bed. The Valuation Department was requested to undertake this valuation. This was delayed on account of the need for up to date boundary definitions but the valuation is now in hand and I hope it will be completed very soon.⁷⁷³

It took nearly three further months to carry out the valuation itself, which was completed in mid-October 1968. In brief, the valuers ascribed just over half of the lakebed's value (\$73,000) to the marketable parts of the ring of dry land around the lake. The submerged lakebed was held to be worth slightly less (\$70,000), its value derived from fishing and other revenues (excluding hydroelectricity). Finally, a relatively small value was attached to the improvements that had been made on the bed (\$4,000). Again, hydroelectricity structures were excluded from that calculation, as were temporary buildings intended for removal (baches) and jetties. Thus, the present value of the lake was set at \$147,000.⁷⁷⁴

After receiving the special Government valuation, the Director-General of Lands forwarded it to his Minister a month later, on 12 November 1968. The proposal being put to the Minister was written by Barber on behalf of the director-general, for MacIntyre to discuss with his Cabinet colleagues. Barber recommended that the Crown should once again approach the Maori owners. This time, however, the Crown might actually succeed, since it would be offering almost the top figure that the owners had sought back in 1966. Also, the Lands and Survey Department was now willing to consider a lease instead of buying the lakebed. This was a breakthrough on two of the major stumbling blocks.

Barber recommended four options for Ministers to consider:

- ▶ purchasing for a lump sum of \$147,000;
- ▶ purchasing for \$147,000 by means of a downpayment and instalments (with interest) over 10 years;
- ▶ a perpetual lease with rent at 5 per cent of unimproved value (\$143,000); or
- ▶ purchasing by way of an annuity.

Barber was not sure how a value should be set for a permanent annuity, noting that it would not necessarily be appropriate to pay 5 per cent of Government valuation for that purpose.⁷⁷⁵

772. Ibid

773. Minister of Lands to Whetu Tirikatene-Sullivan, draft for signature, August 1968 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 1106)

774. Walzl, 'Waikaremoana' (doc A73), pp 469-472; Valuer-General to director-general, 'Lake Waikaremoana: Valuation for Purchase', 14 October 1968 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), pp 1094-1100)

775. Barber for director-general to Minister of Lands, 12 November 1968 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 1092)

Decimal Currency: Comparing the Values in Pounds and Dollars

In 1967, New Zealand switched from pounds, shillings, and pence to dollars and cents. In the old currency, there were 12 pence in a shilling, and 20 shillings in a pound. With the switchover to decimal currency, one shilling became 10 cents. Because there were 20 shillings in a pound, one pound became two dollars.

In his instructions to the Valuer-General in March 1968, Director-General MacLachlan stated that the Crown's offer in 1966 (£30,000) equated to \$60,000. The special Government valuation in 1968 (\$147,000) thus valued the lake at more than twice what the Crown had offered in 1966. FT Barber reported in 1966 that the Maori owners wanted from £60,000 to £80,000, which would have put the value of the lake in dollar terms as \$120,000 to \$160,000. The upper limit here was higher than the 1968 valuation by only \$13,000. At the 1966 meeting of assembled owners, Sir Eruera Tirikatene had suggested that the lake was worth six figures, which would have represented a sum of at least \$200,000. Tirikatene's estimate was thus closer to the £100,000 sought by the owners back in 1959.

When we take inflation into account, it is possible to express the Crown's offers in 1968 dollars.¹ They are tabulated below.

Year	Crown offer	Value in 1968 dollars	GV in 1968
1961	£25,000	\$64,626	\$147,000
1962	£28,000	\$71,177	\$147,000
1966	£30,000	\$67,181	\$147,000

1. Calculated from the Reserve Bank of New Zealand's consumer price index inflation calculator, based on the quarter in which the Crown's offer was first communicated to the owners and the date on which the 1968 GV was completed. The calculator is located at http://www.rbnz.govt.nz/monetary_policy/inflation_calculator.

Nothing was mentioned, however, about compensation for past use, which had been a component of all previous Crown offers. Nor was there any mention of convening the agreed tribunal to consider the Government valuation (and any other factors) before setting the price or compensation. On the other hand, Barber knew that if the provisions of the Maori Affairs Act 1953 were followed, the transaction would end up in front of the Maori Land Court for confirmation, and that court might well require the Crown to offer more than the minimum (GV).⁷⁷⁶

⁷⁷⁶ Barber for director-general to Minister of Lands, 12 November 1968 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), pp 1090-1093)

We will return to issues of valuation in the next section. Here, we note Barber's explanation of the Crown's incentive to settle this matter and acquire the lakebed:

The control of Lake Waikaremoana should be in the hands of the Crown so that its boating, fishing and scenic attractions will be preserved for the public for all time. The land outside the title boundary forms the major part of the Urewera National Park and the National Parks Authority is being prejudiced in its plans for the development of the Park because it cannot establish parking areas, conveniences etc. near the water's edge as these would be on Maori land. Furthermore if the Maori owners cared to exercise their rights of ownership they could stop all access to the lake.⁷⁷⁷

MacIntyre agreed with Barber's position but a Treasury report had not been sought as yet, and there would be no money to pay for a purchase until a sum could be set aside in the 1969 budget under Vote: Lands and Survey (Item: National Parks acquisition).⁷⁷⁸ As it turned out, however, no further action was taken in the next six months, and no money was set apart in the 1969–70 budget, which might otherwise have accounted for the delay. In the meantime, the Minister remained concerned about the amount of temporary holiday accommodation being built around the lake, and further inquiries were made about it. It remained a factor in MacIntyre's view that there was an urgent problem to resolve.⁷⁷⁹ He told Cabinet that 'Already elaborate tent camps and the first house boat have appeared on parts of the Maori title area.'⁷⁸⁰

In June 1969, the Minister of Lands made a formal submission to Cabinet. Mr Walzl observed that the submission was mostly a repeat of Barber's November 1968 paper, except that Treasury advice had been obtained. Treasury favoured outright purchase with the payment spread over 10 years, but without paying interest (which Barber had proposed). This was obviously the cheapest option for the Government but the Minister of Lands did not favour it because he thought that there was no way the Maori owners would agree to it. Walzl also notes that the major difference was a change in the value ascribed to the lake: 'it had been decided that the offer being made should not take into account improvements made by others'. So the proposed basis for a purchase price or annuity was dropped to \$143,000.⁷⁸¹ We will consider this point further in section 20.9.

Also, MacIntyre introduced a new option (or, in fact, Fraser's preference from 1949 was reintroduced): swapping the lakebed for an equivalent value in Crown land. This does not appear to have been a very serious proposal:

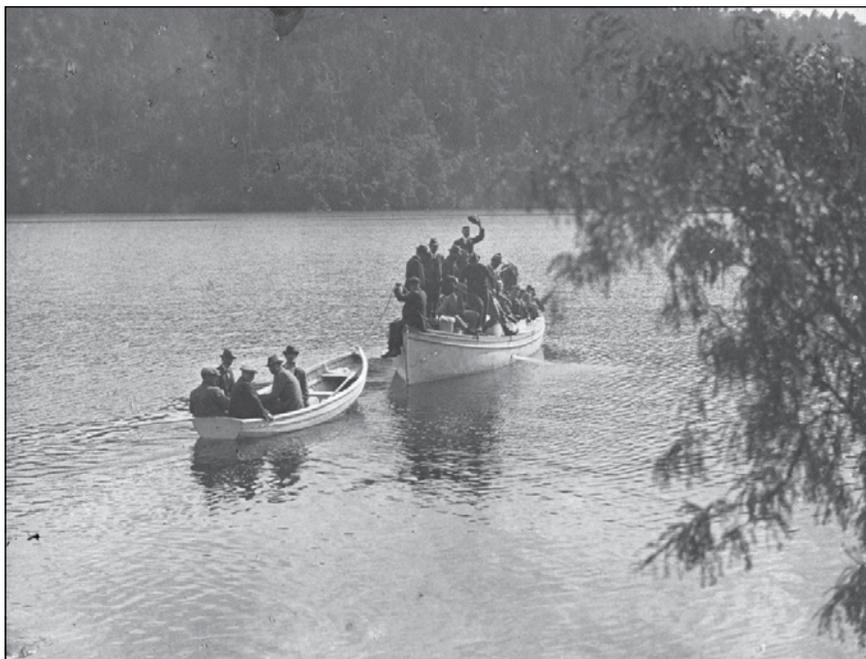
777. Barber for director-general to Minister of Lands, 12 November 1968 (Walzl, 'Waikaremoana' (doc A73), p 472)

778. Barber for director-general to Minister of Lands, 12 November 1968 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p1093)

779. See correspondence, December 1968 to March 1969 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), pp 1079–1089).

780. Minister of Lands, memorandum to Cabinet, [circa 1968–69] (Walzl, 'Waikaremoana' (doc A73), p 474)

781. Walzl, 'Waikaremoana' (doc A73), p 473



Unknown (Hawke's Bay Museums Trust, 16859)

Visitors take a tour of Lake Waikaremoana. In the mid-1960s, a major reason for the Government's decision to try to purchase the lakebed (as opposed to using the lake without payment) was to ensure continued access for fishermen and other recreational users. The lowering of the lake level for hydroelectricity purposes had resulted in a permanent ring of dry land around the lake to which Maori, the owners of the bed, had title. Officials believed this would create problems for the National Parks Authority, as lake users crossing this land might be liable for trespass.

Consideration could also be given to the exchange of the lake bed for either undeveloped or developed Crown land of equal value, although at the present time I have no particular area in mind and the owners have not offered this as a possible solution.⁷⁸²

Having considered these various options, MacIntyre's recommendation to Cabinet was that the Crown should purchase the lakebed for \$143,000, paid in instalments over 10 years with interest at 5 per cent a year. He hoped that this would enable the Crown to purchase the bed outright while still meeting the Maori owners' aspiration for 'payment spread'. He also recommended authorising an increase of 15 per cent in the price if necessary. His advice to Cabinet was that,

⁷⁸² Minister of Lands to Cabinet, 'Acquisition of Lake Waikaremoana', [June 1969] (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 1077)

because the lake was known to be such a 'desirable purchase', the owners might 'request a minimum price of valuation plus 15% in which case we might have to increase our offer to \$164,450'.⁷⁸³

In his submission to Cabinet, the Minister emphasised that there was some urgency for the Crown to get this matter resolved. A visiting national parks advisor from the United States had suggested that New Zealand urgently needed to rationalise its park boundaries, with 'Lake Waikaremoana and the surrounding Maori land as the top priority'.⁷⁸⁴ MacIntyre told his colleagues:

Purchase of the lake bed has been mooted for some time and the longer it is deferred the more the price will escalate with the growing popularity of Urewera as the nearest national park to the greatest concentration of population in New Zealand. Delay in purchase will also compound the problems as boating use of the lake goes uncontrolled. Already elaborate tent camps and the first house boat have appeared on parts of the Maori title area.⁷⁸⁵

MacIntyre sought Cabinet approval for two recommendations:

Negotiations to purchase the bed of Lake Waikaremoana at a price of \$143,000 with authority to increase this by up to 15% if the owners are not prepared to settle at a lower figure; payment to be by equal annual instalments over a 10 year period with interest on the balance outstanding at 5 % per annum and –

The introduction of special legislation to authorise the transactions subject to the agreement of the owners to the sale.⁷⁸⁶

On 16 June 1969, the secretary for the Cabinet advised the Minister of Lands that Cabinet had agreed to his recommendations. A file note dated 17 June 1969 recorded Cabinet approval and noted that the Minister wanted 'urgent action . . . he does not want it hanging on till end of year'.⁷⁸⁷ MacIntyre was determined to get negotiations under way, even though there was no provision for the purchase in the 1969–70 budget, and any payment would need to wait until the new financial year.⁷⁸⁸

A month or so later, Jock McEwen, the secretary for Maori Affairs, was opposed to any action so close to a general election. He was worried about a repeat of the owners' meeting in 1966, when – in his view – the Maori owners tried to get a better offer from Opposition Members of Parliament. But Barber insisted that the

783. Ibid, p1076

784. Ibid, p1077

785. Ibid

786. Ibid, pp1077–1078

787. Walzl, 'Waikaremoana' (doc A73), p 474

788. Minister of Lands to Cabinet, 'Acquisition of Lake Waikaremoana,' [June 1969] (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p1077)

Minister wanted a meeting of owners no later than mid-September 1969, and that the meeting should go ahead ‘irrespective of political considerations.’⁷⁸⁹ As a result, a paper went forward to the Board of Maori Affairs in early August, which duly approved the Government’s proposal to call a meeting of assembled owners. At that meeting, the owners would consider the Crown’s offer to buy the lakebed at ‘not less than \$143,000’, allowing room for negotiations up to the 15 per cent ceiling approved by Cabinet.⁷⁹⁰

MacIntyre advised Tirikatene-Sullivan of developments on 19 September 1969, describing the Crown’s offer as \$143,000 for ‘the unimproved value of all the area within the title boundary.’⁷⁹¹ The owners, of course, were not to know that the Government was prepared to pay up to \$164,450. Nor did they know that the options of a lease and an annuity had been put to Cabinet and rejected. What they did know was that this was an unprecedented offer, much higher than before and apparently derived from a professional valuation. They were not supplied with the valuers’ report itself.

The meeting of assembled owners took place on 26 September 1969. We only provide a brief account here because we will be consider aspects of it further in the next section. Barber addressed the meeting on behalf of the Lands and Survey Department, telling the owners that the Crown wanted ‘to have the Lake in public ownership as part of the Urewera National Park when it would be available to all the people of New Zealand – including the Maori people.’ The commissioner of Crown lands, who also chaired the park board, told the meeting that the lake would become a reserve for the people of New Zealand for all time.⁷⁹² These statements were influential because the Maori owners wanted their lake preserved and protected.⁷⁹³

After Barber explained the details of the valuation, the owners asked for an adjournment. When the meeting was resumed, the owners voted unanimously to reject the Crown’s offer. The owners then passed a resolution of their own to offer the Government a lease for 50 years with a perpetual right of renewal, backdated to 1957. We will consider the details in the next section. Here, we note that Sir Rodney Gallen, who became the owners’ lawyer at this time, told officials that this alternate proposal would ‘effectively give the Government control and at the same time Maori ownership would be retained.’⁷⁹⁴ In response, officials replied that they had no authority to accept such a proposal. In 1966, the meeting of owners had preceded a Cabinet decision so that matters could be negotiated and the resultant

789. FT Barber, ‘Note for file’, 4 August 1969 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p 1067)

790. Board of Maori Affairs, ‘Proposed Crown Purchase of Lake Waikaremoana’, July 1969 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p 1066); Walzl, ‘Waikaremoana’ (doc A73), p 474

791. Minister of Lands to Tirikatene-Sullivan, 19 September 1969 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p 1063)

792. Walzl, ‘Waikaremoana’ (doc A73), p 474

793. Rodney Gallen, brief of evidence (doc H1), para 28

794. Walzl, ‘Waikaremoana’ (doc A73), p 475

deal taken to Cabinet, but that was not the case for the 1969 meeting. The owners then asked officials to refer their resolution to the Government for a response.⁷⁹⁵

The Government valuation of the lake was the decisive factor both in Cabinet's June 1969 decision and at this September meeting of assembled owners. This was a 'game changer'. Tama Nikora explained how close the owners came to agreeing to the Crown's purchase proposal in 1969:

The first major issue of disagreement was in relation to the sale of the lake. Some of the owners preferred to sell the lake and receive the proceeds of sale. Others were opposed to sale, but appeared resigned to a sale happening (as with Lake Taupo and the Rotorua lakes) as they could not see an alternative. In this respect I disagree with Sir Rodney Gallen's comment [in his evidence to the Tribunal] that there was never any prospect that the owners would sell the land. I know for a fact that by 1969 [there] was a real possibility of a sale because the owners were moving in that direction. John Rangihau told me that he was concerned that the price of \$143,000 was so high that it would not be possible to prevent a sale by the owners. It was only when John Rangihau put forward the idea of leasing the lake to the Crown in perpetuity in 1969 that there appeared to be a viable alternative to sale.⁷⁹⁶

The Crown was unaware that it had come close to succeeding. The Maori owners reached consensus, either before the meeting or during the break, and presented a unanimous position to the Government's representatives. On 10 October 1969, Lands and Survey officials advised their Minister that 'There is no possibility that the owners will agree to the Crown taking over the Lake on any other basis [than a lease].'⁷⁹⁷ MacIntyre had already been prepared to accept a lease back in June, and he instructed his officials to prepare a Cabinet paper seeking approval for a lease. The Government, however, would want to negotiate the terms, especially the rent.

On 8 December 1969, Cabinet approved MacIntyre's recommendations for a perpetual lease, special legislation, and negotiations over rentals – but, for 'some unclear reason', as Mr Walzl notes, the owners were not informed until the end of April 1970.⁷⁹⁸ After that, agreement in principle was reached at a meeting between officials and the owners' committee on 8 May 1970. We will consider the negotiations over the lease and the rental in the next section.

20.8.6 Our conclusions as to why it took the Crown so long to negotiate an agreement with the owners of Lake Waikaremoana

For an agreement to be reached, it took: 52 years from the Crown's appeal of the Native Land Court decision in 1918; 26 years from the Native Appellate Court decision in 1944; 21 years from Peter Fraser's opening of negotiations in 1949;

795. Ibid

796. Nikora, 'Waikaremoana' (doc H25), p 125

797. Walzl, 'Waikaremoana' (doc A73), p 475

798. Ibid

and 16 years from the Crown's decision to give up on litigation and accept Maori ownership in 1954. For all those years, Maori had been the declared owners of the lake and the Crown had acted, in the words of claimant counsel, as if 'possession was nine-tenths of the law and it could proceed in treating the lake as its own.'⁷⁹⁹ Counsel for the Wai 621 Ngati Kahungunu claimants argued:

such dishonourable Crown conduct has denied to owners the economic, cultural and political leverage that would have been theirs since June 17 1918. Indeed it locked their asset up and left them with little choice but to make it available for national park purposes in 1971.⁸⁰⁰

In this section of our chapter, we are concerned with the question of why it took so long to reach agreement after the Crown had decided to give up on litigation in 1954 and accept Maori title to the lake. The evidence outlined above shows some key points:

- ▶ Having opposed Maori title for 36 years (1918 to 1954), the Government decided in 1958 that it did not really need to own the lake after all. For some time after that, the Crown was ambivalent about the necessity of coming to any kind of arrangement with the Maori owners. Its overriding concern at first was the use of the lake for hydroelectricity. After much debate in 1958 and 1959, officials and Ministers agreed that hydroelectricity was not to be a factor in valuing the lake, or in compensation for past use. Also, the Government was quite certain that its legal position was unassailable – Maori could at most win slight damages in any action for trespass or 'injurious affection'. Gradually, however, the interests of the national park came to be seen as at risk, especially by the mid-1960s. This was not in itself enough of an incentive for a significantly higher offer to the Maori owners, although it convinced the Government that it must continue to pursue an agreement. Otherwise, negotiations might have lapsed for much longer after 1962.
- ▶ The Maori owners, on the other hand, wanted compensation for past, present, and future use of their lake by the Crown, including a component for hydroelectricity. They wanted to retain ownership if possible but were willing to relinquish individual ownership in favour of a tribal annuity that preserved an ongoing connection to (and benefit from) the lake. Their bottom line was a permanent annual payment to be administered by a trust board. They offered lower and lower sums in the hope of obtaining agreement from the Crown, but never low enough to satisfy the Government.
- ▶ Positions that were developed in 1958 to 1959 essentially dominated Government thinking for the next 10 years. The Crown remained opposed to an annuity or any arrangement other than outright purchase. Other options were not seriously considered until 1969, and even then Cabinet still stuck with outright purchase in its offer to the Maori owners. From 1961, the

799. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 176

800. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 133

Crown was willing to include compensation for past use in its purchase offers (although not for hydroelectricity), but it remained convinced that the lake's monetary value came solely from the relatively low fishing revenues.

- ▶ Both sides acknowledged that it was hard to determine a fair value for the lake. From time to time, the Government referred to the possibility of an independent body, the Maori Land Court, determining the compensation, but this option was linked to a compulsory taking and so was not chosen.
- ▶ The Maori owners held out for a much higher price than the Crown was willing to pay. The professional valuation in 1968 showed that they had been right to do so. Before 1965, however, it was not clear how much marketable dry land there would be around the lake, because of the extreme fluctuations in levels (see section 20.7). At times, it seemed that there would be a much wider strip of permanently dry land than proved to be the case by 1968. Regardless, the Government valuation showed that even with its highest offer in 1966, the Crown was offering less than half of the value of the lake.
- ▶ The result was a deadlock, in which the Government continued to insist on outright purchase for a low, lump-sum payment, and Maori continued to refuse all such offers. The Crown, in its turn, refused all Maori counter-offers of an annuity. Breakthrough came in 1967, when the Crown and the owners agreed to a special commission to set a value for the lake, with a special Government valuation as its starting point. Once the special GV established beyond doubt that the Crown had seriously under-valued the lake, the Government's offer in 1969 was finally raised to something that Maori might conceivably accept. When the owners continued to hold out for ongoing ownership and permanent benefit, in the form of a lease, the Government dropped its insistence on purchase and agreed to a lease, so long as it contained a perpetual right of renewal.

While agreement in principle (to a lease in perpetuity) had finally been reached by May 1970, the proposed commission of inquiry had not been convened, and there were still crucial issues to resolve about the valuation and rental, the questions of hydroelectricity and compensation for past use, and the terms of the lease and any validating legislation. We turn next to consider the negotiation of the lease and the claimants' concerns about the outcome in 1971, which they consider was unfair and in breach of Treaty principles.

20.9 WAS THE 1971 AGREEMENT FAIR IN ALL THE CIRCUMSTANCES AND WAS IT GIVEN PROPER EFFECT IN THE LAKE WAIKAREMOANA ACT 1971? WHAT ADJUSTMENTS HAVE BEEN MADE SINCE 1971 AND WITH WHAT RESULTS?

SUMMARY ANSWER: Was the 1968 valuation fair? The claimants were concerned about the focus on European property considerations in setting the value of a Maori taonga. We would agree if the purpose had been (as the Crown intended) extinguishment of all their rights by purchase, but in the event the result was a lease, in which Maori retained ownership of their taonga. We also accept that the

value of 'improvements' was rightly excluded from the rental value. We note that the submerged part of the lake may have been under-valued – the valuers' concern on this point was not followed up. But, in our view, the key deficiency of the valuation was its exclusion of any value in the lake or its water for hydroelectricity. That was fundamentally unfair to the Maori owners of Lake Waikaremoana.

Were the negotiations conducted fairly? The Crown and the Maori owners' committee negotiated an agreement in May 1970. We agree with the Crown that the negotiations were conducted fairly. The Maori owners proposed the terms (some of which were accepted), the Crown made some appropriate compromises, and the owners had access to legal advice. The owners' committee made informed choices. Nonetheless, we do not consider that the parties were negotiating on an even playing field. The Crown had acted as the owner of Lake Waikaremoana for decades without permission or payment, and had clearly been prepared to continue doing so throughout the 14 years of negotiation since 1957 – and presumably would continue to do so for as long as it would take to get agreement. The owners, in the meantime, were very poor and their bargaining power appeared slight; they were still not treated in any sense as the owners of Lake Waikaremoana, and had suffered that situation for decades. As we see it, they had little choice but to accept the Crown's position on key terms, such as the exclusion of payment for hydroelectricity, the rental value, and the backdating of the lease (to pay for past use), if they were to finally have their rights acknowledged and obtain some form of return on their 'asset'.

Was the negotiated outcome a fair one? In our view, the Crown made appropriate (if belated) compromises when it agreed to a lease and to a rental in the form of an annual payment to a Maori trust board. It also agreed to 10-yearly rent reviews, external arbitration (if the parties disagreed about rent adjustments), and a rental set at 5.5 per cent (instead of its negotiating position of 5 per cent). In return, the Crown secured a taonga of immeasurable value for the Te Urewera National Park. Nonetheless, there were key flaws in the negotiated outcome. The evidence is that the Maori owners thought (and were advised by their lawyer) that the valuation was still too low. They agreed to it, however, for the sake of bringing this very long contest to an end. We think that was an appropriate compromise for the sake of reaching a lasting agreement with the Crown. But the owners were required to make some compromises which we think were excessive. First, the lease was based solely on the current GV with only a small component for past use (by backdating to 1967), which was a major departure from a position hitherto agreed between the parties – that the Crown should pay for its past use of Lake Waikaremoana. Secondly, although the claimants were prepared to compromise on past use (by backdating to 1957 instead of 1954 or even 1944, as they had earlier sought), they were asked to give up too much when the Crown insisted on 1967 as the date from which it would pay rent for using Lake Waikaremoana in the national park. This was fundamentally unfair, and was not a compromise on which the Crown should have insisted. Thirdly, as noted earlier, the exclusion of any payment for hydroelectricity was unfair. We do not, therefore, accept the Crown's position that the

1971 lease represented a full and final settlement of all the issues raised during the lengthy negotiations, and that no additional payment is required.

Was the negotiated agreement given fair and proper effect by the Lake Waikaremoana Act 1971? It took 19 months to turn the May 1970 agreement into a lease and have it validated by the Lake Waikaremoana Act in December 1971. There was disagreement between the Wai 36 Tuhoe and Wai 621 Ngati Kahungunu claimants on the one hand, and the Nga Rauru o Nga Potiki and Wai 144 Ngati Ruapani claimants on the other, as to whether the Act gave fair and proper effect to the negotiated agreement.

After reviewing all the relevant evidence, we accept the Crown's argument that the choice to vest the lakebed in the existing Tuhoe and Wairoa Maori Trust Boards was made by the owners' committee, not the Crown. While there were definitely a significant number of owners at the time who either did not know of this choice or did not understand its implications, the Crown was nonetheless obliged to give effect to the deliberate decision of the owners' chosen representatives. It did so in the Lake Waikaremoana Act 1971. The principal reason for the delay in introducing the Act was the length of time it took for the owners' committee and the Crown to agree on an appropriate mechanism for assigning the owners to one of the two trusts. We do not accept the argument put forward by some claimants that the validating legislation was used to circumvent their legal protections, such as vetting of the lease by the Maori Land Court. While we note the distress of some claimant witnesses about the current situation, it is a matter for the claimants to resolve and does not arise from any action or omission on the part of the Crown at the time of the negotiations. The difficulties of assigning individual owners in the lake bed to trusts at this time would have been avoided, however, had a community title to the lake itself been available to the court in 1918.

Have post-1971 adjustments changed the situation (and for better or worse)? The 10-yearly rent reviews have resulted in periodic re-valuation of Lake Waikaremoana and consequent rent increases. As far as we are aware, the rent increases have been agreed between the parties and have not generated any fresh issues for the Tribunal. In the 1990s, the process of corporatisation provided an opportunity for the Maori owners of the lake to seek ownership of the Waikaremoana power scheme or – at the least – negotiate an agreement about the hydroelectricity structures on the lakebed. In the event, the power scheme was not privatised but rather was transferred to State-owned enterprise Electricorp and then to Genesis. But the Tuhoe-Waikaremoana Maori Trust Board and the Wairoa-Waikaremoana Maori Trust Board did succeed in negotiating an easement and licensing regime with Electricorp in the late 1990s. Thus, all claimant groups maintain that the Crown must pay them for the use of Lake Waikaremoana for hydroelectricity for the period from 1946 to 1998.

20.9.1 Introduction

As we discussed above, the Crown and the Maori owners reached agreement in principle about a lease in May 1970. Many of the trickiest issues were resolved at a

meeting between the owners' committee and officials on 8 May 1970. At that meeting, the parties agreed to a lease in perpetuity, backdated to 1967, with a rental at 5.5 per cent of unimproved value, and with 10-yearly rent reviews. Nonetheless, it took over a year to negotiate the details. The lease was not signed until August 1971, after which it was validated by the Lake Waikaremoana Act in December 1971. This Act provided for the vesting of the bed of the lake in the Tuhoe-Waikaremoana Maori Trust Board and the Wairoa-Waikaremoana Maori Trust Board. It also made the rental an asset of the boards for the benefit of all beneficiaries, whether former owners of the lakebed or not.

For some of the claimants in our inquiry, their issues are with the Act rather than the lease. They argue that the lease agreement was not supposed to have resulted in a change of legal ownership or a general fund for the benefit of all the boards' beneficiaries.⁸⁰¹ The Crown, they say, breached the Treaty by failing to give proper effect to the lease agreement, and by dispensing with protections such as Maori Land Court confirmation of the lease.⁸⁰² Other claimant groups, including the Wai 36 Tuhoe and Wai 621 Ngati Kahungunu claimants, have no quarrel with the 1971 Act. In their view, the Crown simply carried out the deliberate choices of the owners' representatives.⁸⁰³ All claimant groups, however, argue that the lease itself was unfair because the Crown refused to compensate them for its past use of the lake for tourism and national park purposes, and also refused to pay for use of the lake for hydroelectricity. As a result, they see the lease and the rental as unfair.⁸⁰⁴

In the Crown's submission, the terms of the lease were:

- ▶ proposed by the Maori owners;
- ▶ arrived at by reasonable compromises;
- ▶ fair to both sides; and
- ▶ settled by the free and informed consent of the owners' representatives.⁸⁰⁵

While the Crown accepts that some owners misunderstood part of the agreement, which was to vest the bed in the legal ownership of the boards, it saw its responsibility as to give effect to the deliberate wishes of the owners' representatives.⁸⁰⁶ Also, the Crown denies that there are any outstanding issues about its past use of the lake: the 'lease constituted a comprehensive settlement of lake issues, including that of the Crown's lake use prior to 1971.'⁸⁰⁷

We begin our discussion with the 1968 valuation, on which the rental was based.

801. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), pp 68–70

802. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 208–219

803. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), pp 30–31

804. See, for example, counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 146; counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 134; counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, pp 73, 155.

805. Crown counsel, closing submissions (doc N20), topic 28, pp 8–9

806. *Ibid*, pp 10–11

807. *Ibid*, p 2

20.9.2 The 1968 valuation

We discussed the 1968 valuation briefly in the previous section. Here, we provide additional detail about how the valuation was conducted, and the Government's response to some of the issues that it raised. These matters have great significance for the question of whether a fair rent was agreed as part of the lease arrangements in 1970 to 1971. The key issues here are:

- ▶ the concentration on European property values to the exclusion of Maori values;
- ▶ the exclusion of hydroelectricity from the valuation when the parameters were set in 1968;
- ▶ the possible under-valuation of the submerged bed, and the Government's response to the valuer's cautions on that point;
- ▶ the Government's decision in 1969 to exclude improvements from the capital value (or selling price) of Lake Waikaremoana, despite its legal obligation to offer Government valuation as a minimum price; and
- ▶ the unexpected consequence that the Government valuation resulted in rates being levied on the lakebed.

We deal with each of these issues in turn.

20.9.2.1 *The use of 'European ideas of property' to the exclusion of Maori values*

Relying on the evidence of Belgrave, Deason, and Young, the Nga Rauru o Nga Potiki claimants have criticised the 1968 valuation for its limitation to 'English ideas of property'.⁸⁰⁸ Belgrave, Deason, and Young suggested:

The distinction between what Europeans valued in terms of waterways and Maori values was particularly problematic for this Lake because when valued according to these European assumptions the Lake had little to recommend it . . . The problem was that the issues discussed by the valuers were fundamentally linked to European ideas of property ownership and took no account of values associated with Maori use and ownership of the Lake that could not be reduced to economic value. Food collecting could be included, but ancestral association with the Lake could not.⁸⁰⁹

In that sense, Lake Waikaremoana was undeveloped and had relatively poor fisheries. Yet no value was accorded its sacred sites, its conservation status, or its beauty.⁸¹⁰ Counsel submitted:

The Claimants' difficulty was that the issues discussed by the Crown in regards to the valuation were fundamentally linked to selected English ideas of property

808. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 203–204

809. Michael Belgrave, Anna Deason, and Grant Young, 'The Urewera Inquiry District and Ngati Kahungunu: An Overview Report of Issues Relating to Ngati Kahungunu' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A122), p 74

810. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 177

ownership as expressed in the Valuation of Land Act 1951 and took no account of values associated with Maori use and ownership.⁸¹¹

We agree that this would have been a significant flaw if the valuation had been used to set a purchase price, in which the Crown negotiated compensation with the Maori owners not simply for what it believed it was acquiring but also for what they believed they were giving up. But this was not quite the case for the 1971 lease. The Crown was acquiring the use of the lake for the national park but the Maori owners were retaining their ancestral taonga. They were also, perhaps, gaining a new level of respect and protection for their values in connection with the lake, through formal recognition as its lessors. For these reasons, we do not think that this potential flaw in the valuation was a material point in our inquiry.

20.9.2.2 *The exclusion of hydroelectricity from the valuation*

The claimants were also critical about the exclusion of hydroelectricity from the valuation.⁸¹² As we discussed in section 20.8, Government departments debated the question of hydroelectricity in 1958 and 1959. Their conclusion was that it was not possible to attach a monetary value to the use of the lake's water for power generation, and that the Crown's statutory right to use the water for that purpose made it unnecessary to do so in any case. This remained the Government's view from 1959 to 1967, when Barber and McEwen met with the Valuer-General to discuss how a Government valuation might be carried out for a lakebed. As a starting premise, officials noted that 'the waters of the Lake are owned by the Crown. The bed is vested in Maori owners'. Barber agreed to get legal advice to confirm this point before formally requesting a valuation.⁸¹³

In February 1968, the Lands and Survey office solicitor, R Heenan, supplied a legal opinion:

Briefly my view is that the Crown does not own the waters of Lake Waikaremoana. I refer to *Johnston v O'Neill* (1911) AC 553 where in the course of several wordy judgments the following propositions were stated with authority:—

- (1) The Crown is not of common right entitled to the soil or water of an inland, non-tidal lake.
- (2) No right can exist in the public to fish in the waters of an inland non-tidal lake.

Lake Waikaremoana is a non-tidal lake. The bed is vested in Maori owners and unless there are statutory provisions[,] the water while in the lake, would be in the ownership of the persons owning the bed of the lake or riparian rights.⁸¹⁴

811. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 204

812. *Ibid*, p 203

813. 'Note for file: Lake Waikaremoana: Purchase by the Crown', 5 December 1967 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 773)

814. R Heenan, solicitor, 'Lake Waikaremoana: Purchase by the Crown', 8 February 1968 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 762)

Heenan rejected the possibility that the Crown had acquired any riparian rights, but went on to conclude that Maori ownership of the water entailed no rights in respect of hydroelectricity:

S.306 Public Works Act 1928 provides '(1) Subject to any rights lawfully held, the sole right to use waters in lakes, falls, rivers, or streams for the purpose of generating or storing electricity or other power shall vest in Her Majesty'. It would appear that the prior rights referred to are rights to use the water for the purpose of generating or storing electricity, etc. and not subject to any prior rights of ownership of the water itself. While the water is in the lake the Maoris have complete ownership but have no right to stop the water flowing from the lake.⁸¹⁵

Because of that section in the Public Works Act, it followed, in Heenan's opinion, that 'the owners could not claim any value in the water for its subsequent use for generating electricity but that they could prevent anybody using the lake for any other purpose, such as fishing.'⁸¹⁶

In our inquiry, Crown counsel preferred the approach in *Halsbury* that water is unowned at common law, stating that Heenan's opinion 'was not a Crown Law Office opinion and is wrong in law.'⁸¹⁷ Here, the material point is that Heenan's opinion still held that no value (for the Maori owners) could attach to the use of their lake for hydroelectricity. After receipt of Heenan's opinion and discussion with MacIntyre, the Lands and Survey Department did not query Heenan's conclusions or refer the matter to the Crown Law Office. The director-general advised the Valuation Department that he had sought legal advice, as requested, and that section 306 of the Public Works Act 1928 was applicable: 'It would appear that the owners could not claim any value in the water for its subsequent use for generating electricity.'⁸¹⁸ This position was accepted as authoritative for the purposes of the valuation. In the 1968 Government valuation, the valuer recited section 306 and noted that 'No account can therefore be taken of the value of the water of the lake for the generation of electricity and this factor has been excluded from the valuation.'⁸¹⁹

Gladys Colquhoun recalled that the Maori owners saw it very differently:

how the hell can it be their water when we named it Lake Waikaremoana. When did they come and say this is their water? We told them if they felt that way to come and take their water off our lakebed; they said they had nowhere to put it; that was way back in the 1970s. When did they come and name it Lake Waikaremoana?⁸²⁰

815. Ibid

816. Ibid

817. Crown counsel, closing submissions (doc N20), topic 28, p 25

818. Director-General of Lands to Valuer-General, 26 March 1968 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 756)

819. Valuer-General to director-general, 'Lake Waikaremoana: Valuation for Purchase', 14 October 1968 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 1099)

820. Colquhoun, brief of evidence (doc H55), p 13

20.9.2.3 The possible under-valuation of the submerged bed

As we have noted, the use of the lake for hydroelectricity was specifically excluded from the Government valuation. The exposed and submerged parts of the lakebed were calculated to have a sale value of \$143,000. This value came from the commercial exploitation of fishing, boating, and 'scenic attractions'. Boating on the lake was not just for fishing or tourist recreation; the lake was also an important means of accessing difficult or impractical places otherwise for hunters and trappers, including commercial deer hunters, to get to. Net income from tourist operations, including Lake House and motor camps and motels, from fishing licences, and from boating was all taken into account and compared to other lakes.⁸²¹

The valuer also noted that there were no New Zealand court cases relevant to determining the value of a lake. In his assessment, there was clearly a market for the Waikaremoana lakebed, whether as a whole or subdivided, and whether for purchase or lease. There would be a 'firm demand for the purchase and control of such an attractive private lake'. Hypothetical purchasers included private individuals, syndicates, organisations or local clubs, and the Crown itself (as a neighbour, giving the zoning of the lake as 'National Park'). Also, overseas interests 'desirous of obtaining control of remote and attractive sporting grounds' numbered among 'would-be purchasers'.⁸²² Thus, it was possible to determine a capital value or 'selling price' for the lake.

Having stressed that there were no agreed principles for valuing a lake in New Zealand, and the factors that he took into account, the valuer concluded that there were three separate sources of value:

- ▶ 'the value of the land now exposed and dry between 2006 feet and 2020 feet';
- ▶ the 'value of the residue of the lake area';
- ▶ 'the value of improvements'.⁸²³

In this subsection, we are concerned with the value of the submerged bed (estimated at 12,500 acres). This was assessed as earning net annual revenue from fishing and boating of \$3,500 per annum. The valuer noted that there were two 'major drawbacks to really good fishing in Lake Waikaremoana'. The first was that the deeper parts of the lake were unproductive in terms of fishing, and the second was that the lake level 'is subject to fairly wide fluctuations'. As we discussed earlier, the period of extreme fluctuations was over by 1968. The valuer stated that the lake was unlikely to exceed a maximum operating level of 2,006 feet in future, but his report confirms that the modification of lake levels had had a significant impact on fishing (and therefore revenue from licences).⁸²⁴ As Dr Cant's research team concluded, the lake's shallow zone, where the fish food and spawning grounds were

821. Valuer-General to director-general, 'Lake Waikaremoana: Valuation for Purchase', 14 October 1968 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), pp 1094–1099). The valuation was carried out by MR Mander, supervising valuer (rural) of the Valuation Department. His valuation report was supplied to the Lands and Survey Department under the name of the Valuer-General.

822. Valuer-General to director-general, 'Lake Waikaremoana: Valuation for Purchase', 14 October 1968 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 1098)

823. *Ibid*, p 1099

824. *Ibid*, pp 1095–1096

located, had been significantly reduced by the permanent lowering of the lake (see section 20.7). In 1998, Electricorp accepted that fisheries in Lake Waikaremoana had been reduced but its proposed mitigation was to create ‘angling opportunities’ elsewhere in the Wairoa district, working with the Eastern Region of Fish and Game New Zealand.⁸²⁵ Not only did this not help to compensate the Maori owners for the loss of fishing in their lake, it actually created new competition.

In any case, in 1968 the value of the fishing and boating revenue was capitalised at 5 per cent to give a total value of \$70,000. The valuer then cautioned:

It could be argued that due to the nature of this type of enterprise, 5 per cent is too low a capitalisation rate. However, it is considered that as this is a very moot question, any doubt regarding the capitalisation rate should be decided to the vendor’s advantage.⁸²⁶

In other words, the valuer thought that capitalisation of the value of the submerged lakebed at 5 per cent might be too low – and if doubt was felt about this point, it should be resolved in favour of the Maori owners. As far as we can tell from the evidence available to us, the Government took no notice of this warning and did not resolve the question in favour of the owners. Nor were the owners advised of this point. Again, from the evidence available to us, the owners were not supplied with the valuer’s report, and were not warned that the value of the lakebed may have been set too low.

20.9.2.4 The exclusion of improvements from the Crown’s purchase offer

In his request to the Valuation Department, the director-general asked for a valuation ‘for the purpose of assessing a purchase price.’⁸²⁷ In doing so, the valuer assessed improvements that had been made on the lakebed (excluding roads and the intake tunnel and siphons). Two park board huts at Marauti and Te Puna were located below the 2,020-foot boundary, valued at \$3,600. A boatshed belonging to the Wairoa Anglers’ Association at Mokau was also sited on the lakebed, valued at \$400. Thus, the value of improvements was set at \$4,000, and the total capital value estimated at \$147,000.⁸²⁸

In his submission for the Minister of Lands, Barber summarised the main points of the valuation report but did not mention the idea that the value of the submerged bed might have been under-capitalised, or that any doubt should be resolved in favour of the Maori owners. He did, however, refer to the Crown’s legal

825. Electricity Corporation of New Zealand, ‘Waikaremoana Power Scheme: Assessment of Effects on the Environment’, April 1998, p 102; see also Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 86

826. Valuer-General to director-general, ‘Lake Waikaremoana: Valuation for Purchase’, 14 October 1968 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p 1099)

827. Director-General of Lands to Valuer-General, 26 March 1968 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p 756)

828. Valuer-General to director-general, ‘Lake Waikaremoana: Valuation for Purchase’, 14 October 1968 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p 1100)

obligations to buy Maori land at a special Government valuation, and in some cases at a special valuation plus 15 per cent.⁸²⁹ Another requirement was that the Maori Land Court vet and approve purchases. The valuer's report had found that there was a market for the lake, involving several kinds of would-be purchasers. In that circumstance, Barber thought it 'likely that the Maori Land Court would request a minimum price of valuation plus 15% and this would raise the figure to \$169,050. Negotiations could commence at \$147,000.'⁸³⁰ In terms of a possible lease, however, Barber suggested that the rent should be based on the unimproved value of the lakebed.⁸³¹

After consultation with Treasury, the value of improvements was subtracted from the Crown's purchase offer. MacIntyre's explanation for this to Cabinet was that construction of the permanent buildings (the park board huts and the boatshed) had not been paid for by the owners. Other 'improvements' (baches and the like) would have to be removed once the Crown acquired ownership. Hence, the value of improvements should not be part of the purchase price: 'It is proposed to offer unimproved value only ie \$143,000 as the major improvements were effected by the National Park Board and the others are unauthorised structures which will have to be removed.'⁸³²

We note that Barber explained these points at the meeting of assembled owners, and there were no objections (then or later) to excluding the value of these buildings and using the unimproved value as the basis for a lease.⁸³³

20.9.2.5 An unexpected consequence of the Government valuation: the first rates demand and the question of who would pay the rates

There was an unexpected consequence of the special Government valuation in 1970. In November of that year, the Wairoa County Council wrote to the Minister of Maori Affairs noting that there was now a rateable assessment of the lakebed at \$143,000. For the first time, therefore, rates would be levied on the lake in 1971. At the present rate, this would result in a demand of \$8,386 for 1971.⁸³⁴ The rent, which was going to be \$7,865,⁸³⁵ would not even cover the rates. The council wrote to ask the Minister whether rates would be paid on the lake and, if so, by whom? Would the Crown pay the rates as the future lessee? Would this be included in the

829. Barber for director-general to Minister of Lands, 12 November 1968 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p1091)

830. Ibid, p1092

831. Ibid

832. Minister of Lands to Cabinet, 'Acquisition of Lake Waikaremoana', [June 1969] (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), pp1075-1076)

833. 'Minutes of Meeting of Owners held at Wairoa, 26 September 1969' (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), pp1058-1059)

834. County clerk, Wairoa, to Minister of Maori Affairs, 17 November 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p1027)

835. Heenan, 'Lease of Waikaremoana', 6 July 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p1035)

lease negotiations? The council also made the point that rates remained unpaid on all the Waikaremoana reserves as well.⁸³⁶ On 3 December 1970, MacIntyre replied that ‘a clause exempting the area from payment of rates’ would be included in the validating legislation for the lease: ‘The question of payment of rates on this area is therefore resolved.’⁸³⁷

This was not, however, the eventual solution to the question of rates. Instead, it was a term of the 1971 lease that the Crown would pay rent to the owners, free of all deductions, and would pay ‘all rates and charges associated with the land.’⁸³⁸ Thus, the Crown as lessee agreed to pay the rates, in addition to its annual rental payments, thereby preventing the Maori owners from losing the whole of their rent in paying rates. We have no information as to why the Government’s initial idea of a rates exemption was not included in the Lake Waikaremoana Act 1971.

20.9.3 Negotiating the rent and the terms of the lease

As we discussed above, the Crown’s purchase offer was rejected at the meeting of assembled owners on 29 September 1969. The meeting was held at Wairoa and was attended by 200 people, including 68 owners and 12 proxies. One of those proxies was held by Rodney Gallen,⁸³⁹ who was elected a member of the owners’ negotiating committee. Barber explained the Crown’s offer to the assembled owners, including the valuation, and then the officials withdrew so that the owners could discuss the proposal. When the officials returned to the meeting at 1.30 pm, they were presented with a series of decisions:

- (1) The Crown’s offer to purchase had been rejected.
- (2) The Owners would not appoint the Maori Trustee as their agent to negotiate sale or lease to the Crown.
- (3) The Owners appointed a Sub-Committee comprising Sir Turi Carroll and 8 others (Secretary: Mr RG Gallen, Solicitor of Napier). This Committee was empowered to carry on further negotiations with the Crown along the lines of the next paragraph.
- (4) The Owners had, during the absence of the Crown’s representatives, resolved that the Crown be offered a lease for a term of 50 years from 1957, the lease to

836. County clerk, Wairoa, to Minister of Maori Affairs, 17 November 1970 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p1027)

837. Minister of Lands and of Maori Affairs to county clerk, 3 December 1970 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p1025)

838. ‘Lake Waikaremoana: Background Paper Prepared by Te Puni Kokiri’, 1998 (Brian Murton, comp, supporting papers to ‘The Crown and the Peoples of Te Urewera, 1860–2000: The Economic and Social Experience of a People’, various dates (doc H12(a)(1)), p140)

839. Sir Rodney Gallen appeared as a witness in our inquiry. We heard his evidence on 19 October 2004 at our Waikaremoana hearing. When we address this evidence, we refer to the witness as ‘Sir Rodney’. When, however, we are dealing with events and sources of the time, we refer to him as ‘Gallen’.

contain the perpetual right of renewal with 10 yearly reviews of rental, the first of such reviews to be in 1977, the rent to be 6% of the Government Unimproved Value of \$143,000.⁸⁴⁰

It is important to note that the Government valuation assessed the present selling price or capital value of the lakebed, which had been adjusted downwards to the unimproved value only. But the value of the bed had only ever been one component of what were often referred to as negotiations for 'compensation'. As we explained in section 20.8, all the Crown's offers since 1961 had included a sizeable component in payment for past use. The special Government valuation, of course, was only supposed to be the first step in arriving at a value for the lake. The November 1967 agreement was for the final amount to be determined by a special commission, comprised of Government and owners' representatives and chaired by an independent judge. In Mr Walzl's view, the Government abandoned this idea because it was likely to increase the price that the Crown had to pay.⁸⁴¹

The Maori owners did not raise the issue of a commission at the September 1969 meeting, but they did propose the backdating of the lease to 1957, the date at which these negotiations began. As at 1969, this would have involved the Crown in paying for 12 years' past use, which represented a significant compromise on the part of the owners. Previously, they had wanted the Crown to pay for past use from either 1944 (when its appeal was dismissed) or 1947 (when their titles were settled by the appellate court). The Government's approach in the 1960s was to accept that it should pay for past use of the lake, dating back to 1947. Now, however, Barber proposed 1967 (the date of agreement to obtain a special valuation) as the starting date for any lease. In his account:

I told the meeting that I did not think the Government would accept the Owners offer, firstly because the valuation of \$143,000 was an up to date one and the value in 1957 would be less. I further explained that if the Crown did accept this, it would be for the benefit of the whole of the New Zealand public. I considered that the rental, should a lease be accepted, must be reasonable. I welcomed the fact that a Committee of Owners had been appointed to negotiate and I suggested that a lease beginning in 1967 at a reasonable rental could be considered as a most likely solution. I explained further that in effect the type of lease proposed would require the authority of special legislation and I would ask Government to consider the proposition after some better arrangements for rent terms etc, were settled.⁸⁴²

The official minutes of the meeting state:

840. FT Barber, file note, 6 October 1969 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p1057)

841. Walzl, 'Waikaremoana' (doc A73), p 472

842. FT Barber, file note, 6 October 1969 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p1057)

Gallen family



The Honourable Sir Rodney Gallen. The lawyer for the Waikaremoana owners, Sir Rodney was a member of the owners' committee that negotiated the lease of the lake bed with the Crown. He had a long association with many Waikaremoana kaumatua. Sir Rodney passed away in 2012, after a distinguished legal career.

Discussion ensued as to the valuation upon which the rental was to be initially assessed – it being pointed out that the 1957 Valuation could quite possibly be less than the current (1969) valuation as arrived at by the Crown. Mr Barber pointed out that the valuation was not specified in the new Resolution. Mr Gallen stated that in fixing the 1957 valuation this gave some recognition of the Committee's doubts about the valuation and it was an offer generously made. It would effectively give the Government control and at the same time Maori ownership would be retained.⁸⁴³

While the wording of these minutes is ambiguous, Gallen seems to have meant that the owners had doubts about settling at Government valuation. Their offer of backdating only to 1957 (but at the 1968 value) was a generous way of resolving those doubts. In his evidence to the Tribunal, Sir Rodney explained that the owners hoped for a more favourable reception from Duncan MacIntyre than from previous Ministers, who had insisted on a purchase. MacIntyre, it was thought, 'might be more receptive to some other arrangement and in particular to taking a lease in favour of the then Urewera National Park.'⁸⁴⁴ From the owners' perspective, the idea of a lease to (essentially) the national park board was influential in securing their agreement, because they wanted to preserve the lake and felt that the park was controlled by a board consisting 'largely of local people including

843. 'Minutes of Meeting of Owners held at Wairoa, 26 September 1969' (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p1059)

844. Gallen, brief of evidence (doc H1), para 9

representatives of the owners'. In Gallen's view, this was part of why the owners accepted a lease at less than what they believed was the lake's full value.⁸⁴⁵

At the 1969 meeting of owners, officials had authority to negotiate a purchase at up to 15 per cent above the unimproved value, but could not entertain a proposal for a different kind of alienation. Barber advised the owners that he had no authority to accept their counter-offer. Sir Turi Carroll responded that a lease was preferable to the owners foregoing title and was a genuine attempt to resolve the situation. If any negotiations were required, the owners had nominated a committee for that purpose: 'The Committee so authorised were Messrs Gallen, John Rangihau, Sir A T Carroll, Turi Tipoki, Canon Rangihū, Aussie Huata, William Waiwai and Wiremu Matamua.'⁸⁴⁶

In October 1969, Barber reported the outcome of the meeting to the Minister of Lands, explaining his view that there was 'no possibility that the owners will agree to the Crown taking over the Lake on any other basis'. If the Minister agreed, Cabinet would need to approve entering into a lease, which would also require special legislation. But further negotiation would be necessary because the terms offered by the owners were 'not acceptable.'⁸⁴⁷

MacIntyre accepted Barber's recommendations and requested a short Cabinet paper, proposing a new Crown offer:

1. To accept a lease for 50 years with R/R [right of renewal].
2. RV [rental value] \$143,000
3. Date of commencement 1.7.67
4. Rent to be reviewed every 10 years
5. Rent to be 5% or as a better bargaining basis to go up to 5½%
6. Govt to sponsor legsn [legislation] to validate lease.⁸⁴⁸

Cabinet approved these proposals on 8 December 1969.⁸⁴⁹ The Cabinet paper basically repeated what had been discussed by MacIntyre and Barber. It included the statement that there was no possibility of the owners agreeing to the Crown taking over the lake on any basis other than a lease. The Government had to compromise on this point: 'It is most desirable that the control of Lake Waikaremoana should be in the hands of the Crown and [therefore] a lease should be negotiated.' But a rental rate of 6 per cent was considered 'too high', although no reason was

845. Gallen, brief of evidence (doc H1), paras 10, 31

846. 'Minutes of Meeting of Owners held at Wairoa, 26 September 1969' (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p1059)

847. Barber for director-general to Minister of Lands, 10 October 1969 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p1056)

848. FT Barber, minute, 22 October 1966 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p1056)

849. Secretary for the Cabinet to Minister of Lands, 9 December 1969 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p1052)

given. Also, MacIntyre noted: 'I have been informed the owners might settle for a term commencing in 1967.' No source was given for this information.⁸⁵⁰

As we noted in section 20.8, there was a four-month delay before the terms of the Government's offer were conveyed to the owners' lawyers on 27 April 1970.⁸⁵¹ On 8 May 1970, the Assistant Director-General of Lands and the secretary for Maori Affairs met with the owners' committee. For our purposes, this was a crucial meeting. The committee had been empowered to negotiate on behalf of the owners. At this meeting in May 1970, the Crown – having accepted a lease – won agreement to all of Cabinet's stipulations. The contested issues were the rental rate and the backdating of the lease: the owners wanted an interest rate of 6 per cent of the unimproved value and a lease backdated to 1957; the Crown wanted an interest rate of 5 per cent and a lease backdated to 1967. Cabinet had authorised officials to go up to an interest rate of 5.5 per cent but was not prepared (at this stage) to agree to what was already a compromise starting date from the perspective of the owners. As will be recalled from section 20.8, the owners had originally wanted the Crown's payment for past use to start from 1944 or 1947.

Our only documentary source for this meeting is a report prepared by the Assistant Director-General of Lands for his Minister. From his account, the owners began by renewing their request for a 6 per cent rental and a term beginning on 1 July 1957. The assistant director-general responded:

the rental value was established in 1968 and the rental rate [ie, 5 per cent] was related to current interest rates. Backdating the commencement of the lease would involve a revaluation, and a lower rental rate, which would in the long term not be to the owners' advantage, as the rental rate would remain unchanged for 50 years.⁸⁵²

This led to a discussion on the method of fixing the rental value at the 10-yearly reviews. The owners wished to provide for arbitration if agreement was not reached, but accepted the officials' suggestion of using the Land Valuation Court 'as the final authority.'⁸⁵³ After resolving that point, the Crown agreed to three of the owners' requests: to pay the expenses of the meeting (so long as agreement was reached about the lease); to preserve a right of access to the lake for the owners of the Waikaremoana reserves; and to pay the rent to a special trust board.⁸⁵⁴

Discussion then returned to the two sticking points, which were the rental rate and the backdating of the lease. The assistant director-general merely recorded:

850. Minister of Lands to Cabinet, [December 1969] (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 1055)

851. Director-general to Gallen, 27 April 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 1051)

852. Assistant director-general to Minister of Lands, 12 May 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 1048)

853. *Ibid*

854. *Ibid*

‘after further discussion agreed to grant a lease from 1 July 1967 at 5½% rental – the terms approved by Cabinet.’⁸⁵⁵

We have the benefit of evidence from the late Sir Rodney Gallen, who was (we understand) the only surviving member of this committee at the time of our hearings. Sir Rodney told us that there were two main reasons the owners’ representatives accepted a valuation, and therefore a rental, ‘less than they believed the Lake interests were actually worth’. He described the first:

They felt ground down by what more than one elder said to me was nearly one hundred years of effort for which there had been very little response, or recognition. They wanted to bring things to a conclusion and actually get some return for the people. They felt that for the first time in many years there was some chance of achieving some recognition and they believed that once the lease was in place a true recognition of the worth of the Lake interests would follow on renegotiation of rentals under the lease in the future. They were worried that in view of the flat refusal of the Crown in the past to accept their concerns they would endanger a settlement if they sought more. This was not a good basis for settlement. But it reflected the historical frustration of the owners.⁸⁵⁶

The second reason was that the lake was a ‘sacred place of importance to the owners far beyond its monetary value’ and there was a strong feeling that the lake and its shores ought to be preserved:

There was a fear that individual owners despairing of ever receiving any return on their interests might be persuaded to sell or dispose of their shares to outsiders. There was also a worry that rates might be levied on an interest which could not yield a monetary return to pay these.⁸⁵⁷

As we have seen, the worry about rates was a valid one. The Wairoa County Council, having discovered that there was now a valuation in place for Lake Waikaremoana, did seek to levy rates in 1971 that were higher than the Crown’s proposed annual rental.

Gallen’s advice to the owners at the time was:

the value the Crown placed on the Lake Bed did not adequately take into account the true monetary value of the land. The lowering of the Lake level had made extensive areas of prime lakeside land free of water and available for possible use. There had already been, I was told approaches from interested parties to purchase land, but the owners did not wish to alienate it or to see such development.⁸⁵⁸

855. Assistant director-general to Minister of Lands, 12 May 1970 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p1048)

856. Gallen, brief of evidence (doc H1), para 27

857. Ibid, para 28

858. Ibid, para 29

Also, in Gallen's advice to the owners, the value had been 'artificially reduced by planning, and restrictions occasioned by the proximity of the Park'. In his belief,

The valuers took the view that owners would not have been able to make private sales for development because development would have been prevented by planning considerations and the fact that the Park was adjacent. I consider this distorted the true value of the land and this distortion reflected in the rentals both initially and subsequently. The fact that the owners wished to see the land preserved ought not to have reduced the value placed on it. Such money as has been available from rental has therefore in my view not represented the value return of the land and through the two trusts not benefited the owners to the full extent that it ought to have.⁸⁵⁹

As far as we are aware, the valuer's report was not supplied to the owners. In 1968, the valuer did consider that there was a private market for the lakebed, whether as a whole or subdivided. The zoning as national park was noted but the valuer considered that there would still be private interests wanting to develop such a desirable tourist asset, including overseas interests. More than half the unimproved value came from the areas of dry land which could be exploited commercially. On the other hand, as we noted above, the valuer was concerned that a 5 per cent capitalisation was too low to reflect the true value of the submerged bed, and this concern had resulted in no corrective action from the Government.

In terms of the issue of compensation for past use, Sir Rodney advised that this question was not actually discussed at the 1970 meeting. It was, of course, implicit in the owners' request for the backdating of the lease to 1957. Sir Rodney's point was that neither the owners nor the Crown understood that past use had been included in the deal – except, we presume, for the three years back to July 1967. Nor was hydroelectricity discussed, although it remained part of the owners' concern that the lake had been under-valued, despite the professional exercise undertaken in 1968.⁸⁶⁰

The negotiation between the owners' representatives and the Crown at this May 1970 meeting was exactly that: a negotiation, and a culmination of negotiations that really began in 1949. Both sides gave up some of their key positions. The Crown compromised on the following points:

- ▶ a lease instead of an outright purchase;
- ▶ an annual payment to a trust board;
- ▶ a rental rate of 5.5 per cent of unimproved value (instead of 5 per cent);
- ▶ 10-yearly rent reviews;
- ▶ backdating of the lease (but only for three years); and
- ▶ a rental value of more than double the value that it was previously prepared to accept, prior to the special Government valuation.

The Maori owners' compromises included:

- ▶ a lower rental rate (5.5 per cent instead of 6 per cent)

859. *Ibid*, para 30

860. *Ibid*, paras 32, 58

- ▶ a lower valuation than they felt was fair, especially because hydroelectricity was excluded but also for other reasons; and
- ▶ only three years' compensation for past use instead of 13 years (their negotiating position) or 23–26 years (their pre-1970 position).

While we accept that compromises are necessary in negotiations, we will consider the Treaty implications of the process and outcomes in section 20.11.

According to Tama Nikora, the owners never accepted that the Crown should not pay for its use of the lake for hydroelectricity. Rather, this issue was shelved to be fought again another day. As Gallen noted, the lease was conceived as a lease to the park board for national park purposes – indeed, so prominent was this aspect that the board became a party to the lease, even though it was not technically the lessee. Mr Nikora told the Tribunal:

When the lease of the lake was negotiated with the Crown between 1969 and 1971 the lake was leased for National Park purposes. It was not leased for hydro electricity purposes. The valuation provided by the Crown to set the lease rental took no account of the use of the lake for hydro electric purposes, and the rental payable by the Crown has never paid for the use of the lake for hydro electric purposes.⁸⁶¹

The opportunity to fight that battle came in the 1990s, which we discuss below.

20.9.4 A risk of unravelling: from agreement to legislation, 1970–71

It took 19 months to turn the May 1970 agreement into a signed lease, validated by legislation. During that period, further negotiations took place and details were decided or adjusted. The Wai 36 Tuhoe claimants and the Wai 621 Ngati Kahungunu claimants were satisfied that the Lake Waikaremoana Act was a fair representation of what was agreed between the parties. The Wai 144 Ngati Ruapani claimants and the Nga Rauru o Nga Potiki claimants, however, have raised concerns with the Tribunal about the outcomes of this process. In their view, the Lake Waikaremoana Act failed to carry out the proper intent of the lease agreement, for which they hold the Crown responsible. Key issues for us to consider are:

- ▶ the switch from creating a new Waikaremoana trust board to using the existing tribal trust boards;
- ▶ the transfer of legal ownership to the trust boards; and
- ▶ the question of whether the use of validating legislation allowed the Crown to evade protections for Maori in the Maori Affairs Act 1953.

20.9.4.1 *Who was responsible for the switch from a Waikaremoana board to tribal boards, and the vesting of legal ownership in those boards?*

On 14 May 1970, Duncan MacIntyre notified his formal acceptance of the 8 May agreement to the owners' lawyers. He promised that they would be consulted

861. Nikora, 'Waikaremoana' (doc H25), p131

‘to ensure that the terms of the legislation cover all the points you consider necessary.’⁸⁶²

The task of drafting the legislation was given to the Maori Affairs Department. Sir Rodney Gallen’s evidence to the Tribunal was that legal ownership of the lakebed did not need to be transferred to a trust board for the 1970 agreement to be carried out. That is, a board or boards could still have administered the rents on behalf of the owners without any change to the underlying legal ownership. But this would have caused administrative difficulties, especially with ‘negotiation of renewals and the like’. He commented,

No such proposal was discussed and it was not until years later that I learned of dissatisfaction by some beneficiaries. The Crown had nothing to do with the transfer of assets. *This was initiated by the committee* and put to the meeting of owners in the absence of the Crown Representatives. [Emphasis added.]⁸⁶³

Thus, Sir Rodney’s evidence is that the idea of vesting the lakebed in the new trust board (or the existing boards) originated with the owners’ committee. According to his account, the possibility of a board administering rents but not assuming legal ownership was not even discussed. Crown counsel relied on this evidence, submitting: ‘The Crown played no role in suggesting that title to the lakebed be vested in the two trust boards.’⁸⁶⁴

From other evidence available to us, however, the idea may have come from the Crown. In between May and August 1970, the owners’ committee was waiting for the Government to draft the lease and legislation. On 5 June 1970, E W Williams of the Maori Affairs Department wrote to the Director-General of Lands, setting out his proposals for the Lake Waikaremoana Bill. As far as we can tell, this was the origin of the idea that the bed would be vested in the proposed trust board, which could then act as lessor and take over renegotiation of the rental payment. It appears, therefore, that this idea originated with the Crown and was then put to the committee of owners in August 1970, although it may have been the committee’s intention all along.

Matters were still very inchoate when the Maori Affairs Department began this work. Any lease would need to be validated by legislation because it had not been negotiated in the way prescribed by law. But it had not even been decided that there needed to be a lease, since legislation might suffice without it. Williams put the following queries and suggestions to the director-general:

An important question is the form to be taken by the legislation. Should there be a full and formal lease document drawn up and executed on behalf of the Crown and

862. Minister of Lands to Lusk, Willis, Sproule, and Gallen, 14 May 1970 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(b)), p1047)

863. Gallen, brief of evidence (doc H1), para 23

864. Crown counsel, closing submissions (doc N20), topic 28, p 11

the owners to be validated by legislation? Alternatively, should the legislation itself create the leasehold tenure and set out all the terms and covenants? From a technical drafting point of view, I am inclined to lean toward the first course. It would be preferable to keep some of the detail out of the Bill.

We are inclined to feel there should be a separate 'Lake Waikaremoana Settlement Bill' or something of the sort which should proceed as follows:

- (a) Recital of meeting and of agreement and execution of formal lease document.
- (b) Validation of lease and some provision for registration.
- (c) The Maori Trust Boards Act 1953 [1955] to be amended to include a new 'Waikaremoana Maori Trust Board' whose income will be the rental from the lake, the beneficiaries being the owners and their descendants. *Land could be vested in the Board which would take over the rates and responsibilities of the lessor for the purposes of executing renewals and negotiating new rentals.*

Would you please let me have your views on this matter. No doubt when we reach agreement, we will have to put something to the solicitors acting for the owners. [Emphasis added.]⁸⁶⁵

On 12 June 1970, the Lands and Survey Department forwarded a draft Bill to the Hamilton commissioner of Crown lands, so that he could draw up the proposed lease.⁸⁶⁶ This draft Bill, based on the points made by Williams in his memorandum, was entitled: 'An Act to validate the lease to the Crown of the bed of Lake Waikaremoana, and to constitute a Maori Trust Board to administer the rental therefrom.'⁸⁶⁷ This title adequately captured the essence of what had been agreed with the Maori owners to date, but the Bill itself went from Williams' tentative 'land could be vested in the Board' to a definite proposal to do so. Clause 5 vested the bed of Lake Waikaremoana in a Waikaremoana Maori Trust Board.⁸⁶⁸ The director-general envisaged the possibility of creating such a board first, vesting title in it, and then having the board grant the lease to the Crown.⁸⁶⁹

The Crown's draft lease and Bill were sent to the owners' committee on 21 July 1970. There was a delay because one of the committee members was overseas. Gallen advised the Government that the committee would not be able to consider the drafts until September. At this point, the Government was expecting speedy confirmation of the lease and Bill, followed by legislation before the end of 1970.⁸⁷⁰

865. EW Williams, Assistant Maori Trustee, to director-general, 5 June 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), pp 1043–1044)

866. Director-general to commissioner of Crown lands, Hamilton, 12 June 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 1037)

867. 'Lake Waikaremoana Act', 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 1038)

868. Ibid, p 1042

869. Director-general to commissioner of Crown lands, Hamilton, 12 June 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), pp 1036–1037)

870. Director-general to Lusk, Willis, Sproule, and Gallen, 21 July 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1351); director-general to Minister of Lands, 3 August 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 1033)

In the event, the owners' committee did not respond until 8 October 1970.⁸⁷¹ In the meantime, the Maori Affairs Department contacted Gallen by telephone to find out what was happening. ACP MacRae discovered that the committee had met on 18 September 1970 and the Bill and lease were now being redrafted. First, the committee wanted to use existing trust boards (mainly for 'cost' reasons), and therefore the 'bed of the lake should be vested in both the Tuhoe and the Waikaremoana [sic: Wairoa] Maori Trust Boards jointly'.⁸⁷² Thus, the committee agreed with the proposal to vest legal ownership in a board, but wanted it to be the two existing trust boards, which were to be renamed and their membership increased by direct representation of the Waikaremoana owners. Secondly, the committee did not want the income to be disposed of in the broad proportions established by the original Native Land Court decisions, which would be two-thirds to Tuhoe and one-third to Ngati Kahungunu. Instead, they wanted an exact division by current owner affiliation. Whare Cotter and Tama Nikora had been sent off to Gisborne to search the Maori Land Court titles and try to sort this out.⁸⁷³

In response, MacRae told Gallen that the committee's proposals could involve some difficulties. He recommended legislation in the present session, validating the lease but paying the rental to the Maori Trustee in the meantime, with further legislation later to finalise matters. Gallen, however, did not favour this idea because he thought 'the time was ripe, while the present co-operation existed between the Tuhoe and Kahungunu peoples, to hammer out a final agreement'. Sir Turi Carroll had recently been admitted to hospital with a broken hip but Gallen feared that if there was a delay, and if it were anyone other than Carroll and John Rangihau handling the negotiations, 'there could be trouble between the two groups and reaching agreement could be difficult'.⁸⁷⁴

MacRae replied that the Minister wanted the Bill passed in 1970 if at all possible. Gallen promised to send the amended lease and Bill in the next week or so and hoped that an Act would still be achievable by the end of the year. But MacRae felt that 'what is now proposed is vastly different from the legislation originally drafted' and that there would be legal difficulties in trying to carry it out.⁸⁷⁵

On 5 October 1970, Secretary McEwen warned MacIntyre that it was unlikely legislation could be passed in 1970, either in interim or final form, because the lease was still not ready to be signed and the further work necessitated by the owners' change of mind would take some time.⁸⁷⁶

871. Gallen to director-general, 8 October 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1340)

872. ACP MacRae, administration officer, to secretary for Maori Affairs, [September 1970] (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1347)

873. Ibid

874. Ibid

875. Ibid

876. Secretary to Minister of Maori Affairs, 5 October 1970; ACP MacRae, administration officer, to secretary for Maori Affairs, [September 1970] (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), pp1343-1344)

Gallen sent the committee's written response on 8 October 1970.⁸⁷⁷ He reported that the committee members were

concerned over the expense involved in the setting up and administration of an additional Trust Board. It was felt that the cost of this would seriously diminish the annual income and that it would be preferable to use existing organisations if this could be done.⁸⁷⁸

Thus, the issue was presented to the Government entirely as matter of expense and administration costs. After 'a considerable amount of discussion', the committee had agreed unanimously to use the existing trust boards as 'administering authorities': owners with 'Tuhoe affiliations to go in the Tuhoe Trust with their shares', owners with 'Ngati Kahungunu affiliations to go into the Wairoa Maori Trust with their shares', and rental and 'any other income relating to the lake bed to be divided between the two trusts in accordance with the shares of the owners going into each trust'.⁸⁷⁹

Both trust boards were to add 'Waikaremoana' to their names, and would have three additional members 'to be elected by those beneficiaries with interests in the bed of Lake Waikaremoana'. The inaugural appointments for each trust would be nominated by the committee. Both 'reconstituted' trust boards were to 'act jointly as lessors of the lake bed'. Any future negotiations about the lake or the lease would be conducted by 'the three representatives of the Waikaremoana beneficiaries on each Board'.⁸⁸⁰

An immediate problem was the division of all the owners into two lists. The delay between the 18 September meeting and the 8 October letter was because the committee hoped that 'representatives of both sides' would carry out this exercise. Gallen reported, however, that 'they were not able to agree and it looked as though there could be some difficulty'. Then, a meeting took place between John Rangihau, Sir Turi Carroll, and Gallen, at which they decided 'the best way to deal with the division would be to provide for each owner to have a right of election which would avoid any difficulties or bad feeling'. Any owners who did not make a choice within 12 months would be placed on one of the two lists by the Maori Trustee – and provision for that had been made in the Bill as redrafted by the owners' lawyers. Having redrafted parts of the Bill, Gallen accepted that further substantial changes might be needed from the Crown's legal draftsmen.⁸⁸¹

877. Gallen to Director-General of Lands, 8 October 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), pp1030–1032); see also 'Meeting of Committee of Owners of Bed of Lake Waikaremoana Held at Wairoa on Friday September 18th 1970' (counsel for Wai 621 Ngati Kahungunu, memorandum, 6 October 2004 (paper 2.647), attachment A)

878. Gallen to Director-General of Lands, 8 October 1970, p1 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p1030)

879. Ibid

880. Ibid, p2 (p1031)

881. Ibid

It seemed less and less likely that a Bill could be introduced in 1970. A significant delay ensued while the Crown and the committee negotiated on exactly what mechanism would be used to assign current owners to one of the two trusts. In response to Gallen's letter of 8 October, MacRae told Secretary McEwen that the owners' proposals 'are just not on'. In particular, he objected to clauses 5 to 7 of the amended Bill, which

provide that within 12 months of the passing of the legislation all owners in the bed of the lake must elect to be members of either the re-constituted Wairoa-Waikaremoana or Tuhoe-Waikaremoana Maori Trust Boards. In the case of owners who do not make an election within that time, the Maori Trustee has been asked to determine their affiliation having regard to the tribal background in each case.⁸⁸²

And clause 10 of the redrafted Bill 'provides that the land is to be vested in the two re-constituted Trust Boards as tenants in common in proportion to the shares owned by the Tuhoe owners or the Kahungunu [owners], based on an election in accordance with clauses 5, 6, and 7'.

The owners had not consulted the Maori Trustee, who in any case was not

in any position to accept the responsibility of determining an owner's affiliation, and it is manifestly impossible for legislation to be passed now, vesting the bed of the lake in the two re-constituted trust boards on the basis of some future determination of the owners' affiliations, either by the owners themselves or by the Maori Trustee. It seems that this point was not realised by the owners' committee in formulating their proposals.⁸⁸³

Gallen was going to meet with the Lands and Survey Department on 21 October. MacRae proposed to advise him of these objections, and that it was now too late to pass legislation in 1970.⁸⁸⁴

In the meantime, it appeared as if the May 1970 agreement might unravel. Gallen had written to MacIntyre on 9 October, urging him to secure legislation as soon as possible. After the committee meeting on 18 September, trouble had arisen 'between the two tribal groups most concerned as to the means of division'. This was 'substantially resolved' by an agreement that owners could choose which tribal trust they would join. Sir Turi Carroll and John Rangihau both supported this solution but 'it is desirable to conclude the matter fairly soon so that no opportunity exists for future disagreement amongst the beneficiaries'. The present unanimity of purpose is very worthwhile and worth pursuing.⁸⁸⁵

882. MacRae to secretary for Maori Affairs, 14 October 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1339)

883. Ibid

884. Ibid

885. Gallen to Minister of Maori Affairs, 9 October 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1337-1338)

Tama Nikora explained what was happening behind the scenes. According to Mr Nikora, the idea of using the two existing trust boards came from Tuhoe, and in particular from Waikaremoana leader John Rangihau. Part of Rangihau's motivation, according to Nikora's account, was to correct the exclusion of the Waikaremoana people from the trust board and the benefits of the UCS roading settlement:

During that time he had considered it most unacceptable that his own Waikaremoana people were not part of the Tuhoe Trust Board simply because they were not beneficiaries of the Trust Board. The beneficiaries of the Trust Board (up until the Lake Waikaremoana Act 1971) included only the owners and the descendants of the owners of the original 156 blocks of land which contributed to the arterial roading. That did not include Waikaremoana. Accordingly, as John Rangihau saw it at the time, the Waikaremoana settlement with the Crown provided an opportunity for the Waikaremoana owners to also become beneficiaries of the Trust Board, and for Tuhoe to thereby be united.⁸⁸⁶

Sir Rodney Gallen's account supports this interpretation.⁸⁸⁷

In Mr Nikora's evidence, there was another reason for the suggested division of owners between two tribal trust boards. Since 1949, the owners had always talked of using any funds for their general welfare:

This same attitude of using the lake for the general benefit of the people was present in all of the discussions between 1969 and 1971 when the lease was being negotiated. For many years the owners had been considering a Trust Board, much like Te Arawa and Tuwharetoa. But the idea of using a single Trust Board had major problems. To put it frankly, Tuhoe did not trust Ngati Kahungunu and it may well have been that Ngati Kahungunu did not trust Tuhoe. When the prospect of the lease payment was raised in the media at the time, it was suggested in the newspaper that the Takitimu Marae was about to be upgraded. The Tuhoe owners took this as a warning that Ngati Kahungunu already had their own plans for what would be done with the money. As I have said, the meetings had been very heated and tense and the issue of a single Trust Board was the subject of much debate.⁸⁸⁸

According to Mr Nikora, however, the 'most contentious issue' was the question of 'how people would decide whether to be beneficiaries of the Tuhoe Maori Trust Board or the Wairoa Maori Trust Board.'⁸⁸⁹ It seemed that Sir Turi Carroll and John Rangihau had agreed upon a solution. The Government had immediately accepted the committee's decision to use the existing trust boards in 1970. But its objection to the proposed method for assigning owners between the trusts (as

886. Nikora, 'Waikaremoana' (doc H25), pp 126–127

887. Gallen, brief of evidence (doc H1), paras 19, 25

888. Nikora, 'Waikaremoana' (doc H25), p 126

889. *Ibid*, p 127

agreed by Carroll and Rangihau) threatened to destabilise the whole deal. Hence, Gallen urged the Government to agree to it in October 1970, and to enact legislation as soon as possible.

On 19 October 1970, the Minister replied to Gallen that he too was anxious to see legislation passed as soon as possible but that it was no longer achievable in the present year. This was because of the owners' proposed amendments to the Bill. The Minister said that the Maori Trustee 'does not have the staff or the facilities to undertake additional work of this sort at the present time, nor would he be particularly anxious to have the responsibility for deciding what is after all very much the business of individual people'. Also, the lakebed could not be vested in the boards on the basis of some future determination of the owners' affiliations: that would have to precede the vesting. Thus, the owners' committee would now need to reconsider these two points and come up with some alternative proposals. In the meantime, MacIntyre suggested that the lease could still be finalised and signed.⁸⁹⁰

On 21 December 1970, Gallen wrote to the secretary for Maori Affairs in response to the Government's concerns. After discussions with Sir Turi and John Rangihau, a new proposal had been prepared to submit to the wider committee. The solution for owners who did not elect which trust they wanted to belong to within 12 months was to allot them to the trusts 'on an alphabetical basis in proportion to the interests of those who have elected during the period of the year. This would obviate the need for inquiry into the background of owners and avoid any need for decisions to be made by some third party.'⁸⁹¹

Gallen included draft provisions for the Government to consider. These provisions retained a role for the Maori Trustee, who would be the one to apply the proposed formula and direct remaining owners into one trust or the other. Other suggestions from Carroll, Rangihau, and Gallen were that the exact proportions of the bed being vested in the two trusts need not be specified in the Act: 'In the circumstances it would be reasonable if the section merely stated that the land was vested jointly in the two trust boards without specifying the proportions.'⁸⁹²

This time, Gallen sought the Government's views ahead of a proposed committee meeting early in 1971, and – if possible – to reach agreement with the Government prior to the meeting.⁸⁹³

Secretary McEwen replied to this initiative on 1 February 1971. He advised that he did not favour the proposed method of determining which owners would go into which trust. On his understanding, the Maori Land Court had 'settled on a fixed proportion of shares' for each group, and that lists of owners were settled on that basis. If that was correct, then the owners needed to 'stick by the

890. Minister of Maori Affairs to Gallen, 19 October 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1336)

891. Gallen to secretary for Maori Affairs, 21 December 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1330)

892. *Ibid*, p 1331

893. *Ibid*

determination under which they derived their rights.⁸⁹⁴ Rangihau had indicated to McEwen that he planned to check the Maori Land Court records and report back to the next committee meeting. If the position was not as McEwen had thought, then some other way would need to be found to allocate owners to the trusts, but the Government was unlikely to agree to any proposal 'which does not tie the whole thing up hard and fast'.⁸⁹⁵

In May 1971, the Crown and the owners' committee reached agreement on the wording of the lease.⁸⁹⁶ The finalised lease was forwarded to the Te Urewera National Park board, which approved it for signing on 14 June.⁸⁹⁷ The lease was thus ready to go but the proposed legislation was still far from settled. On 17 June 1971, E W Williams wrote to Gallen on behalf of the secretary, now concerned that there might not be any legislation in 1971 either. The Government was concerned at the delay and, presumably, aware of intense debate and disagreement among the communities of owners. Thus, the Maori Affairs Department proposed a new solution: scrap the proposed Lake Waikaremoana Act and insert sections validating the lease into the Maori Purposes Bill for 1971. Williams sent draft provisions to Gallen for approval. Their effect was to validate the lease and provide for the rent to be paid to the Maori Trustee until the owners had been split between the trust boards. In that way, the Government hoped to get the lease finalised and signed 'with a limited piece of legislation merely ratifying the lease'. Williams noted, however, that the owners might have an issue with not getting their own separate Act.⁸⁹⁸

If the Government's solution had been adopted, it would have had the effect of dividing the rent between the two trust boards but the ownership would have remained with the then current owners. The Crown would accept a lease from the committee on behalf of the owners as lessors, which would be validated as if it were a properly confirmed lease from the Maori Trustee, and the bed was not to be vested in the trust boards.⁸⁹⁹ If accepted, this would have been largely what the Nga Rauru o Nga Potiki and Wai 144 Ngati Ruapani claimants say that they were seeking at the time. In our view, this underlines the point that it was not the Crown that was insisting on the vesting of title in the boards.

There is no response from Gallen or the owners' committee recorded on the Maori Affairs files supplied to us in evidence, and no further information until

894. Secretary for Maori Affairs to Gallen, 1 February 1971 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1329)

895. Ibid

896. Director-general to secretary for Maori Affairs, 28 May 1971 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 1022)

897. Te Urewera National Park Board, minutes of meeting of executive committee, 14 June 1971 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 1015). The park board's agreement was necessary because it was named as a party to the lease.

898. E W Williams, for secretary for Maori Affairs, to Gallen, 17 June 1971 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1317)

899. 'Lease of Lake Waikaremoana to the Crown', draft clauses for Maori Purposes Bill, 1971 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1318–1319)

August 1971, when Duncan MacIntyre went to Wairoa to sign the lease. Dated 21 August 1971, the day that the Minister and committee signed the lease at Taihoa Marae, John Rangihau 'and other owners' made a submission to the committee about how to allocate persons to trusts. This submission revealed what had been going on in the meantime.

Rangihau began by arguing why a split of the owners was necessary, and why existing trust boards should be used:

- ▶ The 'area of interest extends from Ruatoki in the north to Wairoa in the south and is too wide to administrate fairly, effectively and economically'.
- ▶ A single trust (with only one source of income) might find it difficult to do more than make educational grants.
- ▶ 'It would lead to tribal competition for funds.'
- ▶ Tuhoe did not want to 'umpire' Ngati Kahungunu 'domestic applications', and they did not want Ngati Kahungunu umpiring theirs either.
- ▶ 'The aims and objects of Tuhoe and Ngati Kahungunu differ.'
- ▶ Setting up a new body with similar functions and responsibilities to those of existing bodies was unnecessary and would entail extra administrative costs for no good reason.⁹⁰⁰

The owners represented by Rangihau had held public meetings in Rotorua, Ruatoki, Waikaremoana, Waimana, and Ruatahuna – the 'proposal for a division has been mooted and approved unanimously.'⁹⁰¹ In terms of methodology, their proposal was to use Maori Land Court records to carry out the division. So far, they had located the original lists as finalised in 1918 and 1947 (though without successions, so that there was no current list of owners). The next step would be to identify successions and prepare two lists for the two different trusts, and then make those available on public display at Wairoa and Rotorua. Owners would be allowed 'a limited time to object to the Committee and to exercise a right to nominate their classification.' Thus, instead of the earlier proposals for self-nomination, it would work the other way around: owners would be assigned to a trust and given a limited period of time to object. This process, if approved, could then be given legislative force.⁹⁰²

We do not have minutes or an official record of the 21 August 1971 meeting in the evidence that has been supplied to us. What appears to have happened is that the people gathered for the signing of the lease. The question of whether there should be a single new Waikaremoana trust board or use made of the Tuhoe and Wairoa trust boards was debated intensely. In addition, if the two existing trust boards were to be chosen, there was disagreement as to how the rent (and owners) should be divided. At this meeting, Whare Cotter proposed a 50/50 division, to which Tuhoe objected. John Rangihau presented the Tuhoe submission outlined

900. J Rangihau and other owners, submissions to the Minister of Maori Affairs and the Lake Waikaremoana Committee assembled at Wairoa, 21 August 1971 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1297–1298)

901. Ibid, p 1298

902. Ibid

above, proposing automatic selection according to the Maori Land Court lists, with a right to object and self-nominate as a necessary protection.⁹⁰³

Sir Rodney Gallen's recollection of this meeting was that these matters were debated without the official party present. He had explained the proposed arrangements in English, including the vesting of title in the two boards, but could not recall who gave the explanation in Maori. 'The explanation in Maori', he noted, 'was important as that was the first language for many of those present.'⁹⁰⁴ Sir Rodney commented:

I have since learned that some Waikaremoana people did not understand that their interests were to be transferred to the Tuhoe Trust. I was not aware of such a misunderstanding at the time and cannot say what explanation was given in Maori at the meeting.⁹⁰⁵

The meeting was generally favourable to the proposals but 'there was a considerable dispute over the constitution of a trust.' Ngati Kahungunu representatives preferred setting up a new trust with all the Waikaremoana owners as beneficiaries, whereas Tuhoe leaders preferred using existing trusts. According to Gallen, there 'was a fear that the Kahungunu members might dominate any trust formed and this was not acceptable to some at least of the people living at Waikaremoana.'⁹⁰⁶ We note, too, John Rangihau's concern, as Tama Nikora recalled, that the Waikaremoana people were not beneficiaries of the Tuhoe Trust Board and the roading compensation: 'the Waikaremoana settlement with the Crown provided an opportunity for the Waikaremoana owners to also become beneficiaries of the Trust Board, and for Tuhoe to thereby be united.'⁹⁰⁷

The meeting was unable to reach consensus and 'eventually it was moved from the floor that the issue be decided by the committee.' Sir Turi Carroll then made the decision that the existing trusts should be used:

He did not further consult the committee and there was no further discussion after he had spoken. Sir Turi made the decision he did, as he later explained to me, because he felt that there would be difficulty in the two peoples working together administering one trust, and in making the decision that he did, he went against the views of his own people.⁹⁰⁸

In response to questions in writing from counsel for the Wai 621 Ngati Kahungunu claimants, Sir Rodney confirmed that this decision was taken after a

903. Tama Nikora to Sir Turi Carroll, 23 August 1971 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1295-1296)

904. Gallen, brief of evidence (doc H1), para 15

905. Ibid, para 22

906. Ibid, para 16

907. Nikora, 'Waikaremoana' (doc H25), pp 126-127

908. Gallen, brief of evidence (doc H1), para 17

long period of discussion (since September 1970), and because consensus between the groups could not be reached:

When the question was referred back to the committee I believe most people expected Sir Turi to make the decision. He was the Chairman and a Rangatira of great status. It would not have been proper for anyone else to speak after him let alone question his decision. It is important that the decision was not his personal preference. I know that he would have preferred one new trust but as I said before, he later told me that he had made the decision as he did because he thought there would be difficulty in reaching agreement on administration of one trust bearing in mind the differing views of the two tribal groups.⁹⁰⁹

Reay Paku, who was Sir Turi's driver and 'aide-de-camp' from 1965 to 1974, and was present at all of the meetings, confirmed Sir Rodney's account of what happened: 'Of particular importance, and which I say is absolutely correct, is the evidence which has shown how Sir Turi conducted the committee leading up to the decision for the Lakebed Settlement to be administered by two already existing Trust boards.'⁹¹⁰

From the evidence of Maria Waiwai and other Ngati Ruapani witnesses, there was a view among some Ngati Ruapani at the time that there should be a third, separate tribal trust for them. In answering questions from counsel for the Wai 144 claimants, however, Mrs Waiwai clarified that what may have been meant was the original idea of a specific trust for just the Waikaremoana owners. As she recalled it, agreement was reached instead to use the Tuhoe (and Wairoa) Trust Boards, but 'to administer the money that we were going to receive . . . not to take control of everything.'⁹¹¹

Mrs Waiwai's recollection probably refers to this 21 August 1971 meeting, although it could also perhaps refer to the consultation meeting held earlier in the year at Waikaremoana. In either case, many owners shared the view that the 1971 agreement was to use the tribal trust boards to administer the rent. Not all owners were present, of course. And, as we shall see, there were some people in the years immediately afterwards who had not understood that the intention was to transfer their legal ownership to the trust boards. According to Sir Rodney Gallen's recollection, he did explain this point in English. But debate focused on which trust board should be used; it is not at all surprising that the vesting of the bed in the board or boards, and its ramifications, may have been overlooked or not widely understood.

Nonetheless, an owners' hui in 1969 had entrusted the negotiations to a committee of representatives, and now a second hui had agreed in 1971 that the final

909. RG Gallen, answers to questions in writing from counsel for Wai 621 Ngati Kahungunu, 11 October 2004 (doc H68), para 9

910. Reay Paku, brief of evidence, 22 November 2004 (doc I35), para 3.4

911. Maria Waiwai, under cross-examination by counsel for Tuawhenua, Waimako Marae, Tuai, 21 October 2004 (transcript 4.11, pp 175-176)

decision would be made by this committee. The decision was made immediately by the committee's chairperson and announced to the hui, and acquiesced to by all according to custom. From the beginning – or at least since its first discussion of a draft Bill in September 1970 – the committee had agreed that the lakebed should be vested in a board or boards, which would then become the lessor(s) of the lake. We accept, therefore, the submissions of the Wai 36 Tuhoe and Wai 621 Ngati Kahungunu claimants that the vesting of the lakebed in the boards was a deliberate decision by the owners' representatives. We also accept Crown counsel's submission that the vesting of the lakebed in the boards was not an action or decision of the Crown, and that the Government of the day was entitled to rely on the committee's decisions as the body appointed by the owners to represent them. The owners had quite deliberately chosen their own committee in 1969, and had resisted any idea that the Maori Trustee should be their negotiator. There had also been a long period of discussion (from September 1970 to August 1971), a number of consultation hui throughout the district to consider the proposals (led by tribal leaders such as John Rangihau), a great deal of conflict and discussion, and finally a resolution which was binding on the honour of the two sides in these negotiations: the Crown and the Maori owners of Lake Waikaremoana.

On the afternoon of 21 August 1971, Duncan MacIntyre and the committee members signed the lease. Only one point of dissent was raised with the Minister, after the lease was signed. According to Sir Rodney, the issue of hydroelectricity was not allowed to fade entirely into the background: 'No compensation was ever made for the taking or use of the water. I heard an elder complain of this to the Minister after the Lake Lease had been completed but the subject was not pursued.'⁹¹² It is not surprising, given the long history of disagreement and protest on this issue, that even though hydroelectricity had been firmly rejected as a matter for compensation, disagreement on the point could not be entirely suppressed, even at this historic occasion.

20.9.4.2 A final opportunity for dissent: Maori Affairs Select Committee investigation, November 1971

Following the August 1971 meeting, the Government forged ahead with legislation 'dealing with the whole matter and declaring which [original Maori Land Court] lists are Tuhoe and which Kahungunu'. A new Bill was prepared, providing for current owners to be divided into a Tuhoe list and a Kahungunu list, which would be made available for inspection at the local Maori Affairs offices in Gisborne, Wairoa, Rotorua, and Whakatane, and possibly in the post offices at Tuai and Ruatahuna. Once these lists were ready, owners would be given six months to notify the Maori Land Court registrar at Gisborne that they wanted to swap lists. Otherwise, at the end of six months the 'lists [were] to be final, and be

912. Gallen, brief of evidence (doc H1), para 58

the basis of division of Waikaremoana [lakebed] and proceeds between the two Trust Boards.⁹¹³

Thus, the Crown gave way on its earlier insistence that the division must take place – and the proportions vested in each trust board be defined – before the legislation was enacted. Instead of vesting the lake in the boards, the revised Act would provide for the registrar to make vesting orders after the Act was passed. The methodology proposed by Rangihau at the August 1971 meeting was adopted. The Maori Land Court lists would ‘dictate the split between the Trust Boards’, but allowing for objections and people to have their names transferred to the other list. Because the assignment of owners would determine the split of rent between the boards, it appears owners could not recognise dual whakapapa and opt to belong to both boards; they had to be on one list or the other.⁹¹⁴ The work of preparing up-to-date lists began in September 1971, and Gallen made arrangements for the Government to pay for this work in the meantime, to be repaid out of the rent.⁹¹⁵

Duncan MacIntyre introduced the Lake Waikaremoana Bill on 4 November 1971. It was referred to the Maori Affairs Select Committee. Whetu Tirikatene-Sullivan told the House that the majority of the Maori owners agreed that the Bill needed to go to a select committee ‘even though they are almost entirely satisfied with it. This was because, she explained, ‘they wish to reconsider the drawing up of separate lists for the Kahungunu tribal beneficiaries and the Tuhoe beneficiaries.’⁹¹⁶ The select committee, however, only recommended one small amendment: that the rent should be paid to the Maori Trustee until the shares of the respective trust boards were finalised. According to Te Puni Kokiri’s report for the ministerial inquiry in 1998, none of the submissions to the Maori Affairs committee have survived, although the records show that John Rangihau and Sir Rodney Gallen appeared and gave evidence.⁹¹⁷

On 15 December 1971, the Bill was reported back to the House. Duncan MacIntyre stated:

The Bill has been to the [select] committee, where the representatives of the Tuhoe and Ngati Kahungunu tribes said they were happy with its provisions. . . . The Bill has been drafted in close consultation with the representatives of the owners and without reservation they agree it does precisely what they want.⁹¹⁸

913. E W Williams, Assistant Maori Trustee, to district officer, Gisborne, 1 September 1971 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), p 1293)

914. Nikora, ‘Waikaremoana’ (doc H25), p 127

915. Gallen to secretary for Maori Affairs, 6 September 1971 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), p 1292)

916. Duncan MacIntyre, 4 November 1971, NZPD, vol 376, p 4332 (‘Lake Waikaremoana: Background Paper Prepared by Te Puni Kokiri’, 1998 (Murton, supporting papers to ‘The Crown and the Peoples of Te Urewera’ (doc H12(a)(1)), p 141))

917. ‘Lake Waikaremoana: Background Paper’, 1998 (Murton, supporting papers to ‘The Crown and the Peoples of Te Urewera’ (doc H12(a)(1)), p 141)

918. Duncan MacIntyre, 15 December 1971, NZPD, vol 377, pp 5347–5348

‘WE must accept that any unsettled Maori land matters will always be a matter of concern and even bitterness to the beneficial owners in the tribes concerned. Some have even said there could never be complete biracial harmony until all Maori land grievances have been settled. However, in this Bill, the Lake Waikaremoana issue has been settled. . . . This Bill respects the wishes for self-determination of the beneficial owners of Maori land. This has been the central point of my concern. In this Bill recognition is given to the self-determination and decision-making abilities of the beneficial owners or their leaders. Here I should like to pay tribute to the logical rationality, to the business acumen, and to the astute leadership of Sir Turi Carroll. With a man of such calibre willing and able to lead his tribal people in their decisions there is no need for an officer like the Maori Trustee. In recognising the self-determination of the Lake Waikaremoana owners, as this Bill does, I hope it creates a precedent by which the Government will always pursue decisions relating to Maori land. . . .

‘In negotiations on this measure there was adequate consultation with the people involved. The matter was discussed in some detail before the Bill was introduced. The Government has established a vital precedent. From the owners’ response, and the degree of satisfaction that this Bill has already gained – and I spoke about the Bill to Sir Turi Carroll only a few moments ago – I know that the Minister will realise that consultation with the Maori owners concerned on legislation affecting their land is both a necessary and wise prerequisite to legislative proposals. In Maoridom it is highly ideal. This Bill recognises the need felt by Maoris to retain their land. It is their inalienable right and they have the ability to decide what shall be done with their own land. . . .’

Whetu Tirikatene-Sullivan¹

1. Whetu Tirikatene-Sullivan, 4 November 1971, NZPD, vol 376, p 4333

The select committee process was the last chance for any dissenters to object to the provisions of the Bill. Unfortunately, we have no information as to what lay behind Tirikatene-Sullivan’s statement that, although the majority of owners supported the Bill, they wanted the select committee to reconsider the making of separate tribal lists. Was this a last ditch attempt to overturn the decision to have two trust boards? Given that the select committee’s records have not survived, all we have is the report back to Parliament that the owners’ representatives had told the committee that they were ‘happy with its provisions . . . and without reservation they agree it does precisely what they want’. In our view, it is inconceivable that the Minister of Maori Affairs could make this statement in Parliament without contradiction, if that was not what had actually happened in the select committee.

Section 13 of the Act provided that, after the two lists of owners were finalised, the Maori Land Court registrar would calculate the aggregate share of each of the

Section 13 of the Lake Waikaremoana Act 1971: Vesting the Lake in the Boards

13. Vesting in Maori Trust Boards of Lake Waikaremoana—(1) Upon completing the compilation of the final list of owners of Lake Waikaremoana [meaning ‘that piece of Maori freehold land known as Lake Waikaremoana’] pursuant to subsection (3) of section 9, the Registrar shall calculate the aggregate share in the land of each of the two groups of owners, and shall express the share of each of the two groups as a proportion of the whole.

(2) The Registrar shall thereupon make an order vesting Lake Waikaremoana in the Wairoa-Waikaremoana Maori Trust Board and in the Tuhoe-Waikaremoana Maori Trust Board for an estate of freehold in fee simple (but subject to the lease to the Crown validated by section 3 of this Act) as tenants in common in stated shares which shares shall be as expressed by the Registrar pursuant to subsection (1) of this section for the Ngati Kahungunu group of owners and for the Tuhoe group of owners respectively.

(3) The order made pursuant to subsection (2) of this section shall have effect as if it were an order of the Maori Land Court, and the District Land Registrar is hereby authorised and directed upon the application of the Registrar of the Maori Land Court to register it accordingly under the Land Transfer Act 1952.

two groups. The registrar would then make an order vesting the lake in the two trust boards ‘for an estate of freehold in fee simple . . . as tenants in common.’ This order would have effect as if it were a vesting order of the Maori Land Court, and could be registered under the Land Transfer Act.

Section 14 of the Lake Waikaremoana Act made the rent an asset of the trust boards, for the purposes of section 24 of the Maori Trust Boards Act 1955. As was later explained by TPK officials to a ministerial inquiry in 1998:

This meant that the rent from the lake could be applied to a number of purposes including the promotion of health, social and economic welfare and education, for the benefit of trust board beneficiaries. The Act made no distinction between those persons who had become trust board beneficiaries by virtue of their previous ownership of Lake Waikaremoana, and other trust board beneficiaries.⁹¹⁹

On 5 September 1972, the division of owners between the two trust boards was finally completed. The Maori Land Court vested 148,000 shares in the Wairoa-Waikaremoana Maori Trust Board and 387,000 shares in the Tuhoe-Waikaremoana

919. ‘Lake Waikaremoana: Background Paper’, 1998 (Murton, supporting papers to ‘The Crown and the Peoples of Te Urewera’ (doc H12(a)(1)), p142)

Maori Trust Board. The Te Puni Kokiri report noted the outcome, which was a matter of significant complaint before the 1998 ministerial inquiry:

The trust boards received a freehold estate in fee simple as tenants in common; they did not take the lake bed on trust. A certificate of title in the names of the trust boards was issued by the Gisborne District Land Registrar on 15 June 1977.

Descendants of the previous owners of Lake Waikaremoana can no longer succeed to shares in the lake bed. The list of owners referred to in sections 8 and 9 of the Lake Waikaremoana Act 1971 is now simply a reference to enable persons on the list and their descendants to establish their right to enrol as a beneficiary of one of the two trust boards.⁹²⁰

Duncan MacIntyre, the Maori Affairs Committee, and Parliament were all satisfied that these arrangements (and the Act which gave effect to them) did exactly what the Maori owners wanted. From the evidence available to us, they had no reason to think otherwise. Tama Nikora's evidence supports this conclusion. In his view, the owners' representatives made a deliberate attempt to restore tribal ownership and control by means of the trust boards. At the time, tribal leaders saw this as a major victory in their long struggle with the Crown over Lake Waikaremoana, as well as (in effect) a treaty between Tuhoe and Ngati Kahungunu.⁹²¹

We accept the Crown's submissions that:

The legislation drafted by the Crown was designed to give effect to the lease, and to the owners' arrangement that title would be vested in the two trust boards. As noted above, the owners were consulted with and agreed to that legislation. There was no dissent or complaint from any lake owner.

There was no reason why the Crown should have done anything in respect of the lease other than introduce it [to], and support it through, Parliament by way of the Lake Waikaremoana Bill.⁹²²

In his evidence at our Waikaremoana hearing, Professor Pou Temara told us that one effect of the new arrangement, in contrast to the 1918 title, has been to include the whole tribe in the ownership of the tribal taonga.⁹²³ Soon after the passage of the 1971 Act, however, it emerged that some owners may not have understood or intended that their legal ownership would be transferred to the trust boards. That was certainly the perspective put to us by many claimant witnesses. This brings us to the third point raised in this section: whether the protections of the Maori Affairs Act 1953, including Maori Land Court examination and confirmation of the lease, were evaded when Parliament validated the lease. In essence, the argu-

920. 'Lake Waikaremoana: Background Paper', 1998 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(1)), pp142-143)

921. Nikora, 'Waikaremoana' (doc H25), pp124-128

922. Crown counsel, closing submissions (doc N20), topic 28, p 11

923. William Rangiaua (Pou) Temara, brief of evidence, 2004 (doc H61), paras 15-20

Unknown



Professor William Rangiuia (Pou) Temara, an acknowledged pou korero of Tuhoë. Professor Temara spoke to the Tribunal about both the waiata of leading nineteenth-century composer Mihikitekapua and the traditional history of Waikaremoana.

ment is that a Maori Land Court hearing would have clarified before it was too late that many owners – perhaps a majority – did not intend to divest themselves of their ownership or their specific entitlement to the benefits of the lease, when the lease was signed in August 1971. We now turn to consider this question.

20.9.4.3 *Would a Maori Land Court hearing have exposed that some owners (perhaps many) did not intend to divest themselves of their legal ownership as part of the lease agreement?*

For this issue, we have relied mainly on the documentary sources cited in Emma Stevens' report.⁹²⁴ We begin by testing what that evidence shows about the level of understanding among the owners at the time. For the most part, the evidence comes from soon after the vesting of the lakebed in the trust boards, yet close enough in time to illuminate what might have been exposed at a 1971 Maori Land Court hearing on the lease, had one occurred. As a result, the first question for us to consider is: What does post-1971 evidence show about the level of agreement or understanding in respect of vesting the lakebed in the trust boards?

The Crown admits that there may have been a 'misunderstanding' on the part of some owners.⁹²⁵ Counsel for the Wai 36 Tuhoë claimants denies that there was any misunderstanding:

924. Stevens, 'History of the Title to the Lake-bed' (doc A85), pp 60–63. The documentary sources cited in Stevens' report are located in MA 8/3/484, vols 2–3, Maori Land Court, Gisborne.

925. Crown counsel, closing submissions (doc N20), topic 28, p 10

The complaint that there was a ‘misunderstanding’ has arisen approximately 30 years since the discussions took place and by a different generation of owners and beneficiaries who were not party to the solemn decision that was made in 1970. Sir Rodney Gallen confirmed that the legislation reflected what was agreed to.⁹²⁶

But counsel for Nga Rauru o Nga Potiki, relying on the research of Emma Stevens, asserts that the evidence is clear that many owners did not intend or agree to transfer their legal ownership to the trust boards.⁹²⁷

In our view, the answer to this question is revealed by debate soon after the passing of the Act, which occurred because the Maori Affairs Department tried to have the lakebed classified as ‘European’ land, and because individual owners sought succession orders from the Maori Land Court.⁹²⁸

In between the passage of the Maori Affairs Amendment Act 1967 and Labour’s Maori Affairs Amendment Act 1974, it was Government policy to promote the reclassification of Maori land as general land. For Lake Waikaremoana, this policy came into play at the beginning of 1973, after the registrar and the court had completed the statutory process of dividing the owners between the trust boards in 1972. Part 1 of the 1967 Act provided for Maori land ‘owned by not more than four persons’ to cease to be Maori land after an investigation of its circumstances and a status declaration by the registrar.⁹²⁹ The Maori Affairs Department in 1973 considered that the bed of the lake remained Maori freehold land but that there were ‘two ways of arranging for the land [the bed of Lake Waikaremoana] to be recorded as European land’.⁹³⁰ One was for the registrar to make a status declaration, as provided for in Part 1 of the 1967 Act. The other was to use section 30(1)(i) of the Maori Affairs Act 1953, which gave the court (not the registrar) the jurisdiction to ‘determine for the purposes of any proceedings in the Court or any other purpose whether any specified land is Maori freehold land or is European land’. Officials considered that an application should be made to the court under section 30, but perhaps after consultation with the chairs of the two trust boards.⁹³¹ There is no evidence of such a possibility having been discussed during the pre-1972 negotiations. From the evidence available to us, this is the first mention of it.

The registrar consulted Judge Gillanders Scott, who responded in a crucial memorandum, dated 2 May 1973, pointing to widespread misunderstandings among Maori about the effect of the 1971 Act:

A large section of the Maori persons whose names appeared in the Maori Land Court Title schedules of ownership prior to implementation by Registrar’s order of the vestitive provisions of the Lake Waikaremoana Act 1971 firmly expect to be paid

926. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), pp 30–31

927. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 208–219

928. Stevens, ‘History of the Title to the Lake-bed’ (doc A85), pp 60–63

929. Maori Affairs Amendment Act 1967, ss 3, 4, 6

930. Stevens, ‘History of the Title to the Lake-bed’ (doc A85), p 60

931. JH Dark for Maori Trustee, to R Graham, deputy registrar, 14 March 1973, and annotations, MA 8/3/484, vol 2, Maori Land Court, Gisborne

out each half year their entitlement of the rent in direct proportion to the shares now held by them in the present Tuhoe and Kahungunu lists. Another section of the Maori persons hold the view that the 1971 Act precludes such individual distributions of rent, and that the Lake bed alike the rents form part of the assets of the two respective Trust Boards. Another section of the Maori persons hold the view that the land comprising the bed of the Lake is still owned by them subject only to the lease, whereof the rents go to the Trust Boards for its general purposes and not for individual distribution. In addition there are variations of these understandings . . .

Put broadly, but I think accurately, the only thing certain is the uncertainty of thinking and understanding on the part of probably the majority of the Maori persons concerned with Lake Waikaremoana.

The sooner all questions (not merely the question of Status of land) are cleared up the better.⁹³²

Judge Gillanders Scott thought that there were two routes for clearing up these questions. First, he suggested that either the Government or the trust boards could make a public statement, although this would only be 'persuasive' and have 'no binding legal significance'. The second route was to test the meaning of the Lake Waikaremoana Act 1971 in the Maori Land Court or the general courts. The Government should, in his view, take responsibility for carrying this out. The Minister, the secretary for Maori Affairs, or the registrar all had the ability to apply to the Maori Land Court for a status declaration. The judge also suggested that the Government or anyone interested could apply to the court to make vesting orders in respect of the estates of deceased owners. Alternatively, matters could be sorted out by application to the Supreme Court under the Declaratory Judgments Act. In Gillanders Scott's view, the courts were the preferable route for resolving these matters, but legislation might be necessary to fix them:

The Lake Waikaremoana Act 1971 has had its mixed genesis in the Lands Department and the Department of Maori Affairs. With the gravest respect, if there is doubt as to Status of Land and/or as to the effect of the legislation, then it should be resolved (so far as that is possible) under para 5(c) and para 5(d) [by applications to the courts] – though some if not all of the other aspects may very well have to be resolved by Legislation.

I intend to keep an open mind on these matters. Lake Waikaremoana lies within Tairāwhiti Judicial District and I have no intention of going into the merits or demerits of the situation save upon a formal hearing in open Court.⁹³³

Officials were puzzled by this advice from the judge because it seemed to them that the statute very clearly vested ownership of the lakebed in the boards, and did so at the deliberate request of the owners' committee. On 25 May, EW Williams, writing for the secretary for Maori Affairs, told the district officer in Gisborne:

932. K Gillanders Scott to registrar, 2 May 1973, MA 8/3/484, vol 2, Maori Land Court, Gisborne

933. Ibid

‘With the greatest respect to all concerned, this matter seems to be getting well away into the realms of phantasy.’⁹³⁴ The ‘Head Office views’ were:

- (a) The land is vested effectively in the two Maori Trust Boards free of any trust. It forms part of the Boards’ general assets and no beneficiary has any vested interest in it.
- (b) Since there are no beneficial interests remaining in the former owners, there is no scope for vesting or other orders of the court. The question of status is unimportant.
- (c) However, since no share in the land is now owned by a Maori the land is, by the ordinary definition (s2(1) 1953) European land.
- (d) The land was vested in the Boards by an order which, though it was to take effect as if it were an order of the court, is not said to be such an order. Accordingly, the land must be deemed by section 2(2)(f) [1953] to be European land.⁹³⁵

Williams added:

Perhaps these views are wrong, but I can see no reason why, in the meantime, our actions should not be framed in accordance with them. If anyone else objects, then it is up to them to put the wheels in motion for authoritative rulings by a Court. In the meantime, individual Maoris making inquiries should be referred to the appropriate Trust Board. I might say that the intention of those who played a part in the arrangement was along the lines of (a) above. The question of future status of the land [whether Maori freehold land or not] was not adverted to. . . . In short, this Department is quite happy with things as they are and is not at all likely to be lodging any applications. No applications from or in respect of former owners should be accepted in respect of the land.⁹³⁶

The following year, the matter was debated between the Maori Land Court and the Tuhoe-Waikaremoana Maori Trust Board. On 26 March 1974, the registrar wrote to the secretary of the trust board:

In recent correspondence with [the board’s solicitors] it was mentioned by them that you still regard the title to the Lake (bed) as being Maori freehold land and as such is still subject to vesting orders on succession. If I have been correctly advised, then it is pointed out that:

- (a) Since there are no beneficial interests remaining in the former owners, there is no scope for vesting or other orders of the Court;
- (b) Since no share in the land is now owned by a Maori the land is, by the ordinary definition (Sec.2(1)/1953) European land;

934. EW Williams for the secretary, to district officer, Gisborne, 25 May 1973, MA 8/3/484, vol 2, Maori Land Court, Gisborne

935. Ibid

936. Ibid

- (c) The land was vested in the two Trust Boards by an Order which, though it was to take effect as if it were an Order of the Court, is not said to be such an order. Accordingly the land must be deemed by Section 2 (2)(f)/1953 to be European land.

I trust that, if applicable, these views will be of interest to you and will explain why applications to determine succession to the interests of former owners in the title are not being accepted by this Registry.⁹³⁷

The trust board's new solicitors replied to this letter on 16 May 1974. Emma Stevens, in her evidence for Ngati Ruapani, and also the Nga Rauru o Nga Potiki claimants in their submissions, have emphasised the trust board's reply.⁹³⁸ It shows that even the board in which the lakebed had been vested misunderstood the intent (and therefore the effect) of the 1971 legislation.

After discussing it with the board, and also with the board's former solicitors, their response was:

Our view is that the correct interpretation of the Lake Waikaremoana Act 1971 is that the owners intended that only the revenues from the Lake should go to the Trust Boards and not the ownership of the lake itself. It was this intention of the owners to which the statute gives effect.

A European lay person might well think that since the Lake is let on perpetual lease there is nothing left to the owners. However, because of the special feeling that Maori people have for their ancestral land it is quite understandable that they should wish to retain ownership of the land itself even though neither they nor any of their descendants would ever derive any monetary benefit from such ownership.

From a legal point of view we think that it is clear that the Act did not intend to take away the owners' interest in the land because if this was the intention of the Legislature then the Act would have made the Lake itself an asset of the Board and not just the income.

If our views set out above are correct then the owners are still the equitable owners of the land itself subject only to the Trust in respect of all revenues derived from the land.⁹³⁹

This matter was referred to the Maori Affairs head office for advice, and received the following response from JH Dark:

We cannot, of course, say definitely why the law is, but it does seem to us clear that the intention was to vest the land in the Trust Boards absolutely, ie, not in trust. In our view this is what has been done. The former owners, after the passing of the Act,

937. BE Attewell for registrar, to secretary, Tuhoe-Waikaremoana Maori Trust Board, 26 March 1974, MA 8/3/484, vol 3, Maori Land Court, Gisborne

938. Stevens, 'History of the Title to the Lake-bed' (doc A85), p 62; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 209

939. Urqhart, Roe and Partners to registrar, 16 May 1974, MA 8/3/484, vol 3, Maori Land Court, Gisborne

became beneficiaries of the Boards, whose prime object is to deal with the income (ie, rental) from the Boards' share of their 'asset' for the benefit of their respective beneficiaries (as decided by the Act) and their descendants. This follows the usual practise of boards and their beneficiaries.

If anyone wishes to argue the matter it is suggested that they raise it with Mr RG Gallen of the legal firm of Lusk, Willis, Sproule and Gallen . . .⁹⁴⁰

The Maori Land Court continued to refer all applicants to the trust boards. In 1979, the Maori Affairs Department's district officer commented:

Many people still regard the list referred to in Sections 8 & 9 of the 1971 Act as the list of owners and shareholding in the Lake and are surprised and disappointed to find that they cannot succeed to or otherwise deal with the interests and shares shown in that list which is now simply a reference one to enable the persons shown therein and their descendants to establish their claim to enrol on the roll to be prepared in accordance with Sections 42 & 43 of the Maori Trust Boards Act 1955.⁹⁴¹

It was clear in the 1998 ministerial inquiry, and in claims to this Tribunal, that many people still believe that the Lake Waikaremoana Act was to be interpreted as vesting administration of the rentals in the boards (and nothing else), because any other interpretation did not give effect to what had been agreed in 1971.⁹⁴²

In our view, the evidence is compelling. The committee of owners' representatives intended that the lakebed should be vested in the boards, and this intention was given effect by the Lake Waikaremoana Act. But the revelation immediately afterwards in 1973 and 1974 that many owners saw it differently, the Tuhoe Waikaremoana Trust Board understood it differently, and that Judge Gillanders Scott thought that there were serious issues in need of resolution, raised a major quandary. Two paths were identified at the time: the Government or the boards could issue statements (and inform the beneficiaries fully) about the legal position; or the matters could be clarified and resolved in the courts, and mended by legislation if necessary. The Government chose the first path, explaining the legal position to the Tuhoe-Waikaremoana Maori Trust Board and leaving it to the board or former owners to take whatever action they thought necessary. As far as we are aware, the board took no action – presumably it accepted the Government's explanation of the meaning and effect of the Act, although it continued to resist

940. JH Dark for Maori Trustee, to Gisborne office, 29 May 1974, MA 8/3/484, vol 3, Maori Land Court, Gisborne

941. This 1979 statement was quoted in: MJ Fryer, registrar, to secretary, Wairoa-Waikaremoana Maori Trust Board, 5 September 1995, MA 8/3/484, vol 3, Maori Land Court, Gisborne.

942. 'Joint Ministerial Inquiry – Lake Waikaremoana: Report to the Minister of Maori Affairs, Hon Tau Henare, Minister of Conservation, Hon Dr Nick Smith', 27 August 1998 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(1)), pp 149–150); Maria Waiwai, brief of evidence, no date (doc H18), pp 23–25; Maria Waiwai, under cross-examination by counsel for Tuawhenua, Waimako Marae, Tuai, 21 October 2004 (transcript 4.11, p176)

any suggestion that the lakebed had become 'European' or general land. Individual owners continued to apply to the Maori Land Court for successions, and continued to be referred to the trust board. While the Government could, perhaps, have done more to assist in the resolution of this matter, it was properly an internal issue for the trust boards and the Waikaremoana peoples to resolve.

It was very clear to the Tribunal that this has not happened. Claimant witnesses spoke on both sides, some arguing that the lake is a tribal taonga that rightly belonged to all and should be administered as such, while others maintained that ownership and authority should be vested in those who lived on the lake's shores, and that benefits should flow directly to them. We note this ongoing division and the bitterness it has caused. Both, in our view, had their origins decades before in the Native Land Court's decision to award shares in the lakebed to individuals, which was the only option available to it under the native land laws of that time.

Back in 1917, Judge Gilfedder had referred to the difficulty of investigating the title 'to an area of water of such dimensions as Lake Waikaremoana'; how then could there be evidence of 'occupation'? He concluded that 'hapus or persons that had the best right to the surrounding lands bordering on the Lake [would] have a better title to the Lake than those whose occupatory rights are in lands more remote'. The decisive factor would thus be occupation of the lands adjacent to the lake.⁹⁴³

The court had no means of awarding tribal title to a lake. In 1918, Judge Gilfedder thus awarded ownership of the lakebed to lists of individual owners, specifying their relative shares. On the one hand, this meant that those awarded shares in accordance with the court's criteria had – by 1971 – waited a very long time for any benefits that might accrue, and had defended those shares as representing the only tangible legal recognition of the rights of their tupuna. Many owners of very small shares in land throughout the country found themselves in exactly that position by the mid-twentieth century. On the other hand, many belonging to the hapu and the wider iwi who had not been afforded any form of legal recognition of their relationship with and their rights to the lake may have considered the vesting of Waikaremoana in trust as finally offering benefits to the wider tribal communities. We understand the positions of those on both sides, and we reiterate that both positions, ultimately, were the result of the limitations of the native land legislation, and its failure to provide for collective, tribal titles for taonga such as Lake Waikaremoana.

Tuhoe kaumatua Professor Pou Temara explained the issue and its effect, as he saw it:

the land under Crown rules, has been divided into hea (shares) and that has made the apportioning of the land heahea, or confusing. We are certainly confused by this Crown custom.

943. Wairoa Native Land Court, minute book 29, 25 August 1917 (Niania, brief of evidence (doc 138), app 3, p 121)

However, this rule is advantageous for those who have big shares in Waikaremoana. Next to Kui Wano, I am a significant shareholder and that should please both Kui and me.

The only problem is, it is Crown-imposed tenure and it excludes others. If you are not descended from an owner on the original lists, then you don't have a foothold in Waikaremoana – and here you were thinking that you were part of Waikaremoana.

Further, your tribal saying by which you identify yourself and which says that Waikare is the lake and Tuhoe is the tribe, or Waikare is the lake and Ruapani is the tribe, would seem hollow and meaningless.

There are in my estimation 8,000 shareholders to the lake at present [calculating the descendants of the owners named in the 1971 lists]. If we were to localise that figure as being Tuhoe, then let me point out to the Tribunal that there are 30,000 Tuhoe people. Under this Crown imposed tenure, we have managed to exclude 22,000 Tuhoe.

I therefore say that despite being a personal disadvantage to me, I favour overwhelmingly a *tikanga*, a Maori custom that allows everyone to be part of Waikaremoana.⁹⁴⁴

Thus, the seeds of the bitterness that arose after 1971 were sown in 1918, and the destructive impact of the native land laws is still a source of distress, grievance, and division today for the claimants who appeared in our inquiry.

There was some possibility that the Crown's failure as at 1918 to provide for tribal title could have been remedied in 1944 when the appellate court made its orders. By then the Labour Government had provided an option to create Native Reservations, which could be vested in trust for 'any persons or *classes of persons*' [emphasis added].⁹⁴⁵ This form of title came closest at the time to providing for a tribal title. Indeed, Ngapuhi tried to take advantage of it in 1940; rather than submitting names of individuals in whom title might be vested, they sought to make Lake Omapere a Native Reservation for all of Ngapuhi.⁹⁴⁶

This option of a Native Reservation was not pursued by the owners of Lake Waikaremoana when their appeals were heard in 1946–47. We have no direct evidence from the claimants or the Crown on this point but we can make what we believe is a fully justified inference.

The court in the Omapere case had not yet determined lists of owners in 1940. The appellate court's task for Waikaremoana, on the other hand, was to hear appeals that had been lodged for the inclusion or exclusion of persons from the lists approved in 1918.⁹⁴⁷ The appellate court did make some comments indicating its general views: it considered that Ngati Ruapani were a hapu of Ngati Kahungunu, and that Tuhoe claims which were not also sourced from Ruapani had no validity because the boundary between Kahungunu and Tuhoe was the

944. Temara, brief of evidence (doc H61), paras 15–20

945. Native Purposes Act 1937, s 5

946. White, *Inland Waterways* (doc A113), pp 240–241

947. Tairarwhiti Native Appellate Court, minute book 27, 22 April 1947, fol 50

Huiarau Range.⁹⁴⁸ These aspects of the appellate court's decision caused anger that was still evident among the witnesses in our inquiry.⁹⁴⁹ As we discussed in chapter 7, however, the appellate court's decision in this respect was mistaken. It had failed to understand the unusual circumstances in which the Crown successfully pressured Tuhoe and Ngati Ruapani, under threat of confiscation, to withdraw their case seeking recognition of their ownership of the four southern blocks from the land court, and instead sell their rights to the Crown (see section 7.5.7.2.1).

Nonetheless, the practical effect of the appellate court's disagreement with the lower court was quite limited in respect of changes to the 1918 lists of owners. The court saw its task strictly as the granting or denying of the filed appeals. Lists that had not been appealed were not before the court.⁹⁵⁰ Nor was the court willing to include anyone who had not filed an appeal in 1918, even where the owners had agreed to their admission. Turning down a '[r]equest by counsel for both parties to admit additional persons as owners, by consent', the court found:

The proceedings of the lower Court extended over a long period, and all persons entitled had ample opportunity of putting in claims or of having their names included in lists.

If any claimants considered that they had been wrongly excluded they should have appealed against the decision, as was done in some cases.

This Court cannot now admit as owners persons who made no claim for admission before the lower Court. To do so would be to allow for a reopening of the claims.⁹⁵¹

We do not, therefore, see how the circumstances of this hearing of appeals in 1946–47 would have enabled the owners to apply to change the lakebed title to that of a native reservation. Once the appeals had been heard and determined, it was theoretically possible for the finalised, listed owners to have applied to establish a tribal reservation. But the appellate court in 1947 would not have allowed Tuhoe to be a 'class of persons' for whom a tribal reservation could be made. That, too, would have prevented any such application from being made by the owners as then constituted.

Ultimately, therefore, the owners were stuck with the only form of title that had been available in 1918. By 1971, they had been defending their possession of that title for a long time indeed.

The question for the Tribunal in this section of our chapter is whether the Crown was at fault in 1971 for failing to have the Maori Land Court vet and confirm the lease. If the Crown had proceeded in accordance with this protective

948. Young and Belgrave, 'Customary Rights and the Waikaremoana Lands' (doc A129), pp 194–202

949. See, for example, Wharehuia Milroy and Hirini Melbourne, 'Te Roi o Te Whenua: Tuhoe claims under the Treaty before the Waitangi Tribunal' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1995) (doc A33), p 281.

950. Tairawhiti Native Appellate Court, minute book 27, 22 April 1947, fols 46–58; see also Niania, brief of evidence (doc 138), app 2, pp 91–100

951. Tairawhiti Native Appellate Court, minute book 27, 22 April 1947, fols 57–58; see also Niania, brief of evidence (doc 138), app 2, p 99

provision in the Maori Affairs Act 1953, the confusion of some owners (and perhaps fundamental lack of agreement) about the relinquishment of individual title might have been exposed before the 1971 Act was passed. We now turn to consider that question.

From the evidence available to us, there was no specific design on the part of the Crown to avoid Maori Land Court scrutiny of the lease. There was no mention of the Maori Land Court by Ministers and officials or by the owners' committee in any of the documents that have been supplied for our inquiry. Back in 1969, when a purchase was planned, the Government clearly intended to follow the steps prescribed in the Maori Affairs Acts. The Lands and Survey Department accepted that Maori Land Court confirmation of a sale would be required, and might – it was feared – result in the court enforcing a higher price than the Crown had offered.⁹⁵² The application to the Board of Maori Affairs in July 1969, to call a meeting of owners, clearly anticipated obtaining Maori Land Court confirmation of any resolution to sell.⁹⁵³ When it came to a lease in 1970, there was specific debate about whether the approval of the Maori Affairs Board was still needed, since the lease would be validated by legislation anyway.⁹⁵⁴ Although it was not strictly necessary, the Government went ahead and got the approval of the Maori Affairs Board for the lease.⁹⁵⁵

In the Government's draft 1970 Bill, there was a clear intention to dispense with the Maori Land Court confirmation. The lease was declared to be:

a valid and effectual lease of the land therein described and to have effect according to its tenor as if it had been granted by the Maori Trustee pursuant to a *duly confirmed* resolution of a meeting of assembled owners under Part XXIII of the Maori Affairs Act 1953. [Emphasis added.]⁹⁵⁶

As will be recalled from section 20.9.4, this draft Bill was sent to the owners' committee, which had full input into its redrafting as the eventual Lake Waikaremoana Act 1971. The final version stated:

The lease is hereby declared to be a valid and effectual lease of Lake Waikaremoana and to have effect according to its tenor as if it had been granted in due form by the Maori Trustee pursuant to a duly confirmed resolution of a meeting of assembled owners under Part XXIII of the Maori Affairs Act 1953.⁹⁵⁷

952. Barber for director-general to Minister of Lands, 12 November 1968 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p1092)

953. Board of Maori Affairs, 'Proposed Crown Purchase of Lake Waikaremoana', July 1969 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p1066)

954. E W Williams, Assistant Maori Trustee, to director-general, 5 June 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p1043)

955. Lake Waikaremoana Act 1971, preamble. The preamble states that the Board of Maori Affairs approved the lease.

956. 'Lake Waikaremoana Act', 1970 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p1040)

957. Lake Waikaremoana Act 1971, s3

As that wording suggests, there was not actually a resolution of a meeting of assembled owners for the Maori Land Court to confirm. The meeting of owners in 1970 had passed a resolution that the Crown be offered a lease (with certain terms), that the Maori Trustee not be appointed to act as their agent in negotiating the lease, and that an elected committee negotiate on their behalf instead. After that, the terms of both the lease and the validating Bill were negotiated and agreed by the Crown and the owners' committee. Although the lease was discussed by a large gathering of the owners at its signing in August 1971, this was not a formal meeting of assembled owners to endorse or confirm the committee's arrangements.

Thus, although there is no evidence that the Crown (or the owners' committee) actively wanted to avoid a Maori Land Court hearing, the effect was that the protective provisions of the Maori Affairs Acts were not followed.⁹⁵⁸ Counsel for Nga Rauru o Nga Potiki stressed that the lease arrangements should have been confirmed by the Maori Land Court.⁹⁵⁹

The Maori Land Court's power to refuse to confirm a lease and its power to modify the terms of a lease had been significantly reduced by the Maori Affairs Amendment Act in 1967 (see the sidebar over). The Act had previously provided for the court to review all the details and circumstances of a transaction, and to withhold confirmation if it emerged that a lease (or an aspect of it) was contrary to equity or good conscience, or not in the best interests of the owners. But the 1967 amendment Act restricted the subject of inquiry to a very narrow focus on the amount of remuneration. We cannot be certain that such an inquiry would have uncovered the fact that the lakebed was to be vested in the trust boards. The deed of lease made no mention of this point, which was effected later by the Lake Waikaremoana Act. The deed of lease stated that the lessor was 'the Committee appointed by the owners of the land'. Under its terms, payment of rent was to be made to the committee as lessor. Revaluation was to be the subject of agreement with this lessor. There was no mention of the boards anywhere in the lease.⁹⁶⁰ It seems unlikely that an inquiry into the lease, focused on the fairness of the rent provisions, would have uncovered the intention to replace this lessor with the trust boards by legislation. But it may have done. It was, after all, a major component of the May 1970 agreement that the money would be administered by a trust board.⁹⁶¹

There was, however, no risk for the Crown. MacIntyre had already accepted that the owners should decide how they wanted the rent paid and to whom. Although officials thought it would be more straightforward to negotiate revaluations and renewals with a settled board, the Crown had no real interest either way. As we mentioned earlier, MacIntyre was prepared to pass legislation which paid the rent

958. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 213–216

959. *Ibid*, p 215

960. The lease is reproduced as a schedule to the Lake Waikaremoana Act 1971.

961. Counsel for Nga Rauru o Nga Potiki submitted that the Crown also evaded the requirement that a lease for longer than 42 years could not be granted without a 75 per cent quorum at the meeting of assembled owners, but this requirement was not introduced until 1974: counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 217–218.

**Relevant Provisions of the Maori Affairs Act 1953
and the Maori Affairs Amendment Act 1967**

Part 19 [1953]: No alienation could be confirmed unless the court was satisfied (among other things) that the alienation was not ‘contrary to equity or good faith, or to the interests of the Maori alienating’, that the alienation was not in breach of any trust, and that the ‘consideration (if any) for the alienation is adequate’ (section 227). Except in special circumstances, the instrument of alienation had to be accompanied by a special Government valuation, although the court was not bound by the valuation (section 228). On hearing the application for confirmation, the court could make any modification whatsoever to any aspect of the alienation, if it seemed that ‘some modification in favour of the Maori owners should in justice be made’. This could include increasing the amount of rent in a lease. The alienee had to consent to any such modification – if that consent was withheld, the court could refuse confirmation (section 229). The court could also direct that rents be paid otherwise than to the Maori Trustee for distribution to individual owners (section 231).

These protective powers of the court were greatly reduced by the Maori Affairs Amendment Act 1967. First, the original section 227 was completely replaced by a new section 227, which reduced the circumstances in which the court could refuse confirmation to two: the inadequacy of the consideration or the undue aggregation of farmland. Otherwise, alienations had to be confirmed ‘as a matter of right’. The power of the court to refuse confirmation if the alienation was contrary to equity or good faith, or not in the interests of the Maori owners, was repealed (1967, section 100). Secondly, section 229 of the 1953 Act was amended so that the only term of an alienation that the court could modify

to the boards but left the underlying ownership unchanged. On this matter, the Government simply accepted the decision of the owners’ committee. It is difficult to see, therefore, that there was any reason for the Crown to have avoided placing the lease under the scrutiny of the Maori Land Court. We do not accept the argument that the validating legislation was enacted (even in part) for the purpose of evading any protections in the Maori Affairs Acts.

The Nga Rauru o Nga Potiki claimants have also suggested that the Crown avoided protections in the Maori Affairs Act 1953 by the nature of the vesting provision itself (section 13). Originally, the Government intended the Lake Waikaremoana Act to vest the lakebed in the trust board(s). The owners’ revisions to the Bill meant that the vesting had to take place after it was enacted, because the exact proportions to be vested in each board were yet to be calculated. Thus, in a compromise negotiated with the owners’ committee, section 13 stated that the registrar would calculate the aggregate shares of each list of owners and then make an

was the purchase price, which it could increase. This meant that the court could not modify the terms of a proposed lease at all, let alone with the previous broad discretion to modify the terms in any way whatsoever (1967, section 102).

Part 20 [1953]: Unless provided for in any other Act, no lease of Maori freehold land could be for a longer term than 50 years (including any renewals to which the lessee was entitled) (section 235). The Maori Trustee was to be the agent of the Maori owners for all renewals of leases (section 237).

In 1967, section 235 was amended so that leases could not exceed 42 years, but introducing new exceptions (including leases that were the subject of a resolution of a meeting of owners) (1967, section 108). Thus, a lease for longer than 42 years did not require validation by special legislation in 1971 so long as it had been granted by a duly confirmed resolution of a meeting of assembled owners. In 1974, three years after the Waikaremoana lease was validated, the Maori Affairs Amendment Act introduced a new, stringent restriction. It required a quorum of 75 per cent at any such meeting to consider a resolution to lease for longer than 42 years (section 36 of the Maori Affairs Amendment Act 1974).

Part 21 [1953]: The Crown may acquire (by purchase, lease, exchange, or otherwise) Maori land through a resolution of the assembled owners, passed and confirmed in accordance with Part 23. When any resolution has been confirmed by the court, it will be submitted to the Board of Maori Affairs for final approval (in other words, the Crown was not committed to the alienation until after the court had confirmed and possibly modified the resolution) (section 259).

Part 23 [1953]: After the court has confirmed a resolution of the assembled owners for the alienation of any land, the Maori Trustee would become the statutory agent of the owners to execute all instruments and 'to do on their behalf all such other things as may be necessary to give effect to the resolution' (section 323).

order vesting the lake in the boards, which would 'have effect as if it were an order of the Maori Land Court'.

Counsel for Nga Rauru o Nga Potiki examined the protections for owners in the Maori Affairs Act 1953, which applied whenever the court transferred ownership by means of a vesting order. They submitted that under sections 213 and 222 there had to be a voluntary arrangement to make the transfer, signed by the owners and witnessed in due form, before the court could make an order vesting land in a trust board.⁹⁶² They submitted:

Firstly, it is contended that there was no agreement or arrangement between the true owners and the Trust Boards to transfer land to the latter in accordance with

962. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 218–219

s 213(1). Secondly, even if there was such an agreement, it was not recorded in writing, the owners did not execute it and it was not attested to.⁹⁶³

In essence, the Crown is said to have avoided these protections by legislating for the registrar to make an order as if it were an order of the court, but without the requirement (which the court was supposed to enforce) for the owners to first sign a written agreement. Counsel also argued that the ‘purported transfer’ may be invalid, because it did not comply with these sections of the Maori Affairs Act 1953. We note, however, that these arguments fail because the statutory protections on which claimant counsel relied⁹⁶⁴ were inserted in the Maori Affairs Act by amendments introduced in 1974 and 1975.⁹⁶⁵ More broadly, vesting by the registrar (as if by the court) was a compromise on the Government’s part, in order to meet the owners’ committee’s wish to have the vesting come after the Act, so that time could be given for the process of assigning owners between the two trusts. In our view, there was no intention to evade the protections of the 1953 Act, such as they were at the time of the validating legislation in 1971. Fundamentally, as we have said, the Crown was entitled to rely on the deliberate and informed decisions of the owners’ representatives.

20.9.5 What adjustments have been made since 1971, and with what results?

20.9.5.1 Lease variations

As we mentioned earlier, some owners accepted what they considered to be a valuation and rent that was too low in 1970, in the belief that the paramount concern was to get the Crown to agree to a lease at all. With provision for regular rent reviews, and for the resolution of disputes by the Land Valuation Court, it was hoped that a more satisfactory rent could be negotiated in future.

At the close of our hearings in 2005, there had been three rent reviews:

- ▶ In 1977, the rental value was increased to \$430,000 and the rent was set at \$23,650 per annum from 1 July 1977.⁹⁶⁶ The Tuhoe-Waikaremoana Maori Trust Board’s share was \$17,107 a year.⁹⁶⁷ The variation to the lease was signed on 11 October 1977 by V S Young, Minister of Lands, for the Queen, and by the chairpersons, secretaries, and one member each of the Tuhoe-Waikaremoana Maori Trust Board and the Wairoa-Waikaremoana Maori Trust Board.⁹⁶⁸

963. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 219

964. Subsection 1(d) of section 213 was inserted in 1975. Subsection 7 of section 213 was inserted in 1974. Before that, section 213 did not apply to vesting in a trust board (introduced by the addition of subsection 1(d) in 1975), and the requirements of section 222 regarding written and witnessed voluntary arrangements did not apply to section 213 until introduced by the addition of subsection 7 to section 213 in 1974.

965. See Maori Affairs Amendment Act 1974, s 28; Maori Purposes Act 1975, s 3(2)

966. ‘Lake Waikaremoana: Background Paper’, 1998 (Murton, supporting papers to ‘The Crown and the Peoples of Te Urewera’ (doc H12(a)(i)), p 143)

967. A B Atkinson, for secretary for Maori Affairs, to Minister of Maori Affairs, 28 January 1980 (Murton, supporting papers to ‘The Crown and the Peoples of Te Urewera’ (doc H12(a)(i)), p 177)

968. Variation of lease, 11 October 1977, ‘Joint Ministerial Inquiry – Lake Waikaremoana’, 27 August 1998, app 2 (doc H13)

Did Rental Values Keep Pace with Inflation?

Year	Rental value	Previous rental value adjusted for inflation (CPI)
1967	\$143,000	
1977	\$430,000	\$365,485 (= \$143,000 after 10 years' inflation)
1987	\$1,412,180	\$1,467,987 (= \$430,000 after 10 years' inflation)
1997	\$2,251,000	\$1,914,588 (= \$1,412,180 after 10 years' inflation)

These figures have been calculated using the Reserve Bank of New Zealand's consumer price index calculator¹ as the measure of inflation and the backdated start date (1 July) as the reference point. The consumer price index uses the cost of 'a basket of goods and services' and so does not include land values. On this measure, the rental value of Lake Waikaremoana kept ahead of inflation in 1977, lagged behind it in 1987, and outstripped it in 1997.

1. http://www.rbnz.govt.nz/monetary_policy/inflation_calculator

- ▶ In 1988, the rental value was increased to \$1,412,180, with the rent set at \$77,669 per annum, backdated to 1 July 1987.⁹⁶⁹ This variation to the lease was signed on 21 December 1988 by DA Field, regional manager of the Department of Conservation, for the Queen, and the chairpersons, secretaries, and one member each of the two trust boards.⁹⁷⁰
- ▶ In 1998, the rental value was increased to \$2,251,000, with an annual rent of \$123,805, backdated to 1 July 1997. Although the Crown began paying the new rental in 1998, the variation of the lease was not formalised until 2001.⁹⁷¹

Although there will have been a further rent review in 2008, after the close of our hearings, we have not been provided with the outcome of that review.

In their closing submissions, the claimants made no comment about these rent revaluations, or the question of whether the increased rentals now represent a fair annual payment. Counsel for Nga Rauru o Nga Potiki pointed out that there was no evidence on the record about 'the changing nature of the valuation of conservation land, something that has been incorporated into the new state services regime, and its impact on the current rent reviews'. In the absence of evidence,

969. 'Lake Waikaremoana: Background Paper', 1998 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(1)), p143)

970. Variation of lease, 21 December 1988, 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998, app 2 (doc H13)

971. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(1)), p150); Peter Williamson, documentation provided in response to questioning during first Crown hearing week, 12 May 2005 (doc M34), p3; variation of lease, 30 April 2001 (doc M34(e))

this matter could not be taken further.⁹⁷² The Crown's position is that the lease is (and has always been) a fair and Treaty-consistent arrangement, and that the rental revaluations have been negotiated by informed agreement. No recourse to the courts has been necessary. The information about the 1998 rent review was provided by Mr Peter Williamson, conservator, in his evidence for the Crown.⁹⁷³ Mr Williamson gave the Tribunal the details of the special Government valuation, on which the renegotiated rental value was based.⁹⁷⁴

In January 1998, Valuation New Zealand carried out a 'valuation of bed of Lake Waikaremoana for lease rental renewal purposes'. The valuation was completed and forwarded to the Department of Conservation on 18 February 1998.

The valuers noted certain conditions which defined the parameters of the valuation. First, the lease restricted the uses and control of the bed to those authorised by the National Parks Act 1952. The dry land component of the bed was designated 'National Park' in the district plan. The valuation was therefore made on the basis that if the title area was sold, it would be with the dry land designated 'National Park' (and underlying zone of 'rural' for the rest). The valuers added that there was 'no suggestion that the National Park zoning or designation has a detrimental effect upon values as such', but it did mean that the property would have to be sold on the basis that it could only be used in ways 'complementary to the aims and ideals behind the National Park concept', which was also a stipulation in the lease itself.⁹⁷⁵

Secondly, the valuation still excluded hydroelectricity (as in 1968), relying on section 306 of the Public Works Act 1928, which vested the sole right to use 'waters in lakes, falls, rivers or streams for the purpose of generating or storing electricity' in the Crown. The valuers concluded: 'No account can, therefore, be taken of the value of the water of the lake for the generation of electricity, and this factor has been excluded from the valuation.'⁹⁷⁶

The legal position at the time was actually more complex than this (possibly erroneous) statement suggests, since the Crown had given up its sole statutory right to use water for the generation of hydroelectricity back in 1987, during the corporatisation of the electricity sector.⁹⁷⁷ Also, the Public Works Act 1928 had itself been repealed in 1981. Nonetheless, the valuers stated that they were relying on it for the exclusion of hydroelectricity from the valuation.

Thirdly, the principle of deriving the value of the submerged bed from capitalisation of profits was continued as before. The valuers noted that there were 'no

972. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p177

973. Peter Williamson, brief of evidence, 8 February 2005 (doc L10), pp 21–22

974. 'Valuation of Bed of Lake Waikaremoana for Lease Rental Renewal Purposes', 18 February 1998 (Peter Williamson, comp, attachments to brief of evidence, February 2005 (doc L10(a)), attachment K)

975. Ibid

976. Ibid

977. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 223

recorded sales of comparable bodies of water within New Zealand. In the absence of market comparison the only option available is the capitalisation of profits.⁹⁷⁸

In that respect, there were no separate fishing licences for Lake Waikaremoana. The valuers relied on data from back in 1970, which suggested that 10 to 12 per cent of the Rotorua fishing licences were for Waikaremoana. Visitor and camping numbers were high in the mid-1990s but profits from boating and camping were not necessarily reflective of that fact.⁹⁷⁹ The commercial launch operating from Home Bay for tourists had been going for 12 years but was not 'showing profitability', while the high cost of removing all waste from the national park had impacted on economic returns for the motel and camping grounds: 'It is unlikely that the motel and camping ground facilities show an economic return on replacement cost despite the high level of occupancy during the holiday period.'⁹⁸⁰

The valuation was as follows:

- ▶ Zoning was taken into account. The Crown as an adjoining owner was a potential purchaser, and 'overseas interests' could not be ruled out as potential purchasers either. But the 'zoning and designation would discourage most forms of intensive commercial development'.
- ▶ Improvements were valued because this was a requirement of the Valuation of Land Act, but they had been 'ignored when determining the Rental Value'. Although clause 3 of the lease 'does not specify the manner in which the Rental Value is to be determined', 'natural justice would suggest that Lessees should not pay rent on their own improvements.'⁹⁸¹ Structural improvements were valued at \$300,000.⁹⁸²
- ▶ Fishing licence revenue: for the last six years, the income from Rotorua fishing licences had averaged \$805,503. Relying on the one 1970 statistic, the valuers estimated that a 10 per cent share for Lake Waikaremoana would amount to \$80,550 per annum.⁹⁸³ This value was capitalised at 7 per cent, 'leaving 1.5% administrative costs', to arrive at a rental 'value of lake' at \$1,150,714, rounded to \$1,151,000.⁹⁸⁴ Revenue of \$5,709 from the launch and boat hire was not counted, because of a '7% return on asset value of \$85,000 being in advance of the revenue'. So the value of the submerged lakebed was calculated solely on the basis of a guessed 10 per cent of Rotorua fishing licence revenue. We note, however, that the valuer's doubt back in 1968 that a 5 per cent capitalisation was too low was rectified in this 1998 valuation, where a figure of 7 per cent was used.⁹⁸⁵

978. 'Valuation of Bed of Lake Waikaremoana for Lease Rental Renewal Purposes', 18 February 1998 (Williamson, attachments to brief of evidence (doc L10(a)), attachment κ)

979. Ibid

980. Ibid

981. Ibid

982. Ibid

983. Ibid

984. Ibid

985. Ibid

- ▶ ‘Value of land’: two commercial sites at Home Bay and Mokau valued at \$300,000; ‘20 separate blocks around lake @\$40,000’, totalling \$800,000, giving a dry land value of \$1,100,000.⁹⁸⁶ We note that the value of the ring of dry land around the lake was no longer the higher of the two valuation figures by 1998.

These calculations gave a rental value of \$2,251,000 at 5.5 per cent, giving a recommended annual rental of \$123,805, which was an increase of 59.4 per cent to the annual rental.⁹⁸⁷ Although the Crown appears to have started paying this new rental in 1998, backdated to 1 July 1997,⁹⁸⁸ a variation of the lease was not formalised until 2001.⁹⁸⁹

As we noted above, the claimants have not raised any issues about the rental revaluations, nor have they commented on whether or not the current rental (as it was at the time of our hearings) had reached a figure more acceptable to them. The Crown, on the other hand, has pointed out that the 1998 valuation was accepted by all parties as the agreed basis for a renegotiated rental. In the Crown’s view, the rental value was a fair one, and this was not contradicted by the claimants. We have no information as to why this process took until 2001 to complete, although it may have been delayed by the ever-recurrent issue of hydroelectricity.

We turn to consider that point next.

20.9.5.2 Negotiations and agreement about hydroelectricity in the 1990s

The Crown’s stance that it did not need to pay for using the lake for hydroelectricity, including use of the Maori land on which the intake structure and siphons were located, was finally overturned in 1998. This was one of the consequences of the corporatisation of the electricity sector in the 1980s and 1990s. The trigger was the creation of the Electricity Corporation of New Zealand (Electricorp or ECNZ) and the sale of ‘all of the Crown’s interests in certain assets and contracts’ to the corporation in 1988. The three Waikaremoana power stations were included. Tama Nikora told us that there was no consultation with ‘the two Trust Boards which by then owned the lake’. As part of what Mr Nikora called the ‘tidying up of the “loose ends” of transfer of assets to ECNZ’, the Crown ‘realised that it had a problem with the structures on the bed of Waikaremoana.’⁹⁹⁰

Five years after the sale, on 10 February 1993, the Department of Survey and Land Information wrote to the Tuhoe-Waikaremoana Maori Trust Board:

When the three power stations near Waikaremoana were constructed a few of the structures and access to them was on land that was not Crown land. Some of these are on the bed of Lake Waikaremoana and it is about these that I am writing to you. The

986. ‘Valuation of Bed of Lake Waikaremoana for Lease Rental Renewal Purposes’, 18 February 1998 (Williamson, attachments to brief of evidence (doc L10(a)), attachment κ)

987. Ibid

988. ‘Joint Ministerial Inquiry – Lake Waikaremoana’, 27 August 1998 (Murton, supporting papers to ‘The Crown and the Peoples of Te Urewera’ (doc H12(a)(1)), p 150)

989. Williamson, documentation (doc M34), p 3

990. Nikora, ‘Waikaremoana’ (doc H25), p 131

structures are parts of the outlet (a large concrete bay) and part of the spillway/siphon at the start of the Waikaretaheke River. . . . The Crown would like to obtain easements over both of these areas.⁹⁹¹

Mr Nikora commented:

The effect of this letter was to finally clarify for the Trust Board that the structures were located on the title of the lake. . . . The Trust Board had never been clear as to what had taken place with the construction of the outlet and siphon, i.e. whether they were within the boundaries of the title, whether they were authorised by law and whether any compensation had been paid in respect of them.⁹⁹²

As a result of this approach from the Crown, the two boards met in Wairoa on 22 February 1993. They agreed to act together and to hire a Wellington lawyer to represent their interests, which led to ‘much correspondence and communications with the Crown and finally a meeting with Treasury in Wellington on 9 July 1993’. Tama Nikora explained what happened at that meeting:

The Trust Boards’ aim was to begin negotiations with the aim of securing from the Crown payment for past and present use of the lake for hydro electric purposes. The Treasury staff said that they only had authority to obtain security for ECNZ assets and to determine what was sold to ECNZ on 1 April 1988. They claimed that the Crown had a power to sublease to ECNZ. We learnt at the meeting that two Treasury officials had no authority to negotiate any further. I objected to the Treasury position and stated that it would be an absolute misuse by the Crown of its powers if it were to sublease given that the lake was not leased for hydro electric generation purposes. Treasury offered to discuss the matter further. As it transpired the discussions did not proceed any further until 1995.⁹⁹³

In the meantime, the Government was planning further reforms to the electricity sector. Its intention was to set up a free market in electricity and to break up ECNZ into competing companies. Further, the Government intended that ECNZ would divest itself of ‘non-core’ assets in the process, which was held to include the three Waikaremoana power stations.⁹⁹⁴ This changed the situation considerably. Suddenly, not only did the Crown have to resolve the question of what had been sold to ECNZ in 1988, but now it wanted to on-sell the stations (including the siphons and intake structure which supplied the water) to private enterprise.

In July 1995, the Tuhoe-Waikaremoana Maori Trust Board wrote to the Minister of Finance, advising him that a claim had been lodged with the Waitangi Tribunal

991. Ibid, pp 131–132

992. Ibid, p 132

993. Ibid

994. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 225

(Wai 133). This claim concerned the use of the lake for electricity generation without consent or compensation. The board suggested to the Minister that the transfer of the three power stations to the two trust boards was ‘an obvious solution to compensation for past and future use of the lake’. In the board’s view, section 27B memorials would not provide any real protection, and the power stations should form part of any Treaty settlement.⁹⁹⁵ In the same month, Dr Rangimarie Pere wrote to the local Maori member, Koro Wetere, on behalf of the Haumapuhia Waikaremoana Authority, which was based at Tuai. The Authority objected to any privatisation of the power stations until ‘everything has been properly accounted for between the Crown as one Waitangi Treaty Partner, and ourselves as representing the Maori Partner’.⁹⁹⁶ The Wai 621 claim, filed for the Wairoa-Waikaremoana Maori Trust Board in 1996, and Te Okoro Joe Runga’s claim Wai 687 in 1997, also argued that the power stations should not be sold until Treaty claims had been settled.⁹⁹⁷

In July 1995, the trust boards also resumed their pressure on the Government about ownership of structures on the lakebed, which had been left in abeyance since the unsuccessful discussions with the Department of Survey and Land Information and Treasury in 1993. The Tuhoe-Waikaremoana Maori Trust Board advised Bill Birch, the Minister of Finance, that the Crown was ‘fully aware that it did “not have a legal right to have its structures on the bed of Lake Waikaremoana”’.⁹⁹⁸ Negotiations for easements had gone nowhere.⁹⁹⁹ In August 1995, the boards began proceedings in the Maori Land Court against the Crown (as lessee) and ECNZ. They claimed that ‘the Crown was in breach of the lease in allowing the structures to be on the bed of the lake and that ECNZ was trespassing on the bed of the lake’.¹⁰⁰⁰ The boards sought the removal of the structures as well as damages. Tama Nikora commented: ‘This brought the Crown and ECNZ to the negotiation table.’¹⁰⁰¹

The result was a mediation, which began in December 1995. The parties did not reach agreement until 1997. According to Mr Nikora, the mediation resulted in a variation to the lease, which provided that ‘the Crown could not sublease the lake or any part of it without the prior consent of the Trust Boards (the original lease had not provided any restriction on subleasing)’.¹⁰⁰² The 1998 Te Puni Kokiri report for the ministerial inquiry clarified that there could be no subleasing for electricity

995. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 226

996. Haumapuhia Waikaremoana Authority to Koro Wetere, 7 July 1995 (Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 226)

997. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 227; Elizabeth Cox, ‘Lake Waikaremoana and District Scoping Report’ (commissioned scoping report, Wellington: Waitangi Tribunal, 2001) (doc A8), p 6

998. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 226

999. Ibid

1000. Nikora, ‘Waikaremoana’ (doc H25), p 133

1001. Ibid

1002. Ibid

purposes: 'a clause was added to the lease. It provides that the lessee shall not sublet any part of the lake to any person for electricity purposes without the prior written consent of the lessor.'¹⁰⁰³ This variation to the lease was signed on 20 June 1997.¹⁰⁰⁴

In the meantime, negotiations continued between the boards and ECNZ about its structures on the lakebed. These negotiations took from 1996 to 1998. Mr Nikora explained:

While the Trust Boards believed that they had a good case to take and that the Crown's refusal to pay for use of the lake for hydro electric purposes was wrong, it soon became clear to the Trust Boards that pursuing the case would be extremely expensive and success could not be guaranteed. We attempted to find a precedent for the valuation of a lake for hydro electric purposes, but could find none. This made the valuation task very difficult.¹⁰⁰⁵

Quite apart from these problems, there appeared to be a key weakness in the boards' case: 'we were faced with the realisation that the Crown could rely on the State-Owned Enterprises Act 1986 to grant the easements required by ECNZ with or without the consent of the Trust Boards.'¹⁰⁰⁶ ECNZ told the boards that it would rely on section 23(1) of the 1986 Act, which stated that, notwithstanding 'any Act, rule of law, or agreement', the Ministers could grant to the State enterprise 'leases, licences, easements, permits, or rights of any kind in respect of any assets or liabilities of the Crown'. The boards' response was to point to section 9 of the Act, which provided that nothing in the Act 'shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi'.¹⁰⁰⁷

Mr Nikora characterised the conclusion of negotiations in 1998: 'Ultimately the Trust Boards and ECNZ reached an agreement and the Court proceedings were settled. The easements were granted to ECNZ and from 1998 onward ECNZ has paid for the use of the lake for hydro electric purposes.'¹⁰⁰⁸

In his evidence for the Wai 621 Ngati Kahungunu claimants, Richard Niania stated that Tama Nikora's evidence on these points had been prepared in discussion with the Wairoa-Waikaremoana Maori Trust Board, and that Mr Nikora's account also stood for them.¹⁰⁰⁹

Hence, the position of the Wai 36 Tuhoe and Wai 621 Ngati Kahungunu claimants is that the Crown has failed to pay for the use of the lake for hydro-electricity purposes between 1946 and 1998. In the claimants' submissions, the

1003. 'Lake Waikaremoana: Background Paper', 1998 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(1)), p 143)

1004. Variation to lease, 20 June 1997 (Williamson, attachments to brief of evidence (doc L10(a)), attachment 1)

1005. Nikora, 'Waikaremoana' (doc H25), pp 133-134

1006. *Ibid*, p 134

1007. *Ibid*

1008. *Ibid*, p 135

1009. Niania, brief of evidence (doc I38), p 78

economic potential of the lake should not have been expropriated, and the hydro works could have proceeded by means of a fair and equitable arrangement with the lake's owners. Leasing and easements were and are 'commercially viable'. Since 1998, ECNZ and Genesis have recognised that there is such an obligation. In doing so, the claimants' view is that they have confirmed that the Crown has had an obligation ever since 1946.¹⁰¹⁰

We received evidence from Tracey Hickman for Genesis Energy. Her evidence focused on environmental management and the renewal of resource consents, which was happening at the same time as negotiations over the easements. Ms Hickman did not mention the 1998 agreement.¹⁰¹¹ The parties did not advise us as to the detail of what was negotiated in 1998, either in terms of exactly what was acknowledged by the parties as being paid for or settled, or in terms of the amount which ECNZ (and its successor Genesis) has paid to the Maori owners. Instead, we received a joint statement from the Tuhoe-Waikaremoana Maori Trust Board, the Wairoa-Waikaremoana Maori Trust Board, and Genesis Energy:

In 1998 the Trust Boards and ECNZ entered into an agreement in principle ('the settlement') whereby the Trust Boards would grant an easement to ECNZ in relation to the structures on the lake for a period of 100 years from 26 March 1998 in return for a licence regime. The agreement in principle expressly provided that the settlement did not settle any claims against the Crown in the Waitangi Tribunal.¹⁰¹²

A supplementary deed in January 1999 created the proposed licence regime, backdated to 1 March 1998, 'the details of which are and remain confidential'.¹⁰¹³ The Maori Land Court then made orders creating the easements in November 1999, and a new deed was signed in 2001 to transfer ECNZ's rights and obligations to Genesis. The Wai 36 Tuhoe claimants and the Wai 621 Ngati Kahungunu claimants state that 'the deed resolved issues as between the Trust Boards and Genesis Power Limited in relation to use of the Lake for hydro electricity purposes from 1 March 1998 until the end of the term of the easements and any payment for such use'.¹⁰¹⁴ But the claimants note that this was not a settlement of their Treaty claims, and that they still seek findings of Crown 'liability' (to have paid for use of the lake for electricity prior to 1998).¹⁰¹⁵

In response to a question from Crown counsel, Tama Nikora clarified what it was that the claimants believe the Crown should have been paying for between 1946 and 1998:

1010. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 73; counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 134

1011. Tracey Hickman, brief of evidence, 7 February 2005 (doc L11)

1012. Counsel for Wai 36 Tuhoe, counsel for Wai 621 Ngati Kahungunu, and counsel for Genesis Power Ltd, joint memorandum, 25 February 2005 (paper 2.782), p 3

1013. *Ibid*, p 4

1014. *Ibid*

1015. *Ibid*, pp 1, 4-5

It is in fact for right of access, over private land, for right of access to the lake by the power stations as first obtained about 1945 when the tunnel was completed and activated. It is for use of the Lake as a dam, the sealing of holes belonging to the lake and use of extra water obtained via the bypass tunnel to the power stations. It therefore includes use of water for generation and the structures on the bed of the lake.¹⁰¹⁶

While the boards were negotiating the 1998 agreement with ECNZ, the sale of the Waikaremoana power stations had been put on hold from 1996 to 1998. This was because of the National Government's coalition with New Zealand First, which was opposed to asset sales. When the coalition ended in 1998, the Government resumed plans to privatise Contact Energy and to split ECNZ into Genesis, Meridian, and Mighty River Power. With the sale of 'non-core' assets back on the agenda, consultation took place between the Crown and Maori groups in the Waikaremoana district. The Government's plan was to sell the Waikaremoana stations to either a power company or to 'Maori within the region of the power station'. According to the evidence of Dr Cant's research team, the two trust boards formed a consortium and supported the idea of an immediate sale to them as part of a joint venture, but it appears that Ngati Ruapani and the Waikaremoana Maori Komiti wanted Treaty claims settled first before the power stations could be sold.¹⁰¹⁷ Ultimately, however, the new Labour Government cancelled the privatisation of the Waikaremoana power stations in 2000. Instead, the stations were transferred to one of the new State-owned enterprises, Genesis Energy, in order to increase its generating capacity.¹⁰¹⁸ Thus, the stations remained publicly owned at that time, and – it seemed – still potentially available for consideration in settlement of Treaty claims.¹⁰¹⁹ Hence, the proposed sale process did not figure in the claims as presented at our hearings in 2003 to 2005 because the issue appeared to have been resolved.

20.9.6 Our conclusions about the 1971 lease

In sum, the Crown has made four major arguments about the lease, which have been explored in the preceding discussion:

- ▶ First, that the Crown agreed to a lease, thus compromising on its earlier position that an absolute alienation was required.
- ▶ Secondly, that the terms of the lease were first proposed by the Maori owners, were arrived at by reasonable compromises, were fair to both sides, and were achieved by a robust process resulting in the free and informed consent of senior owners' representatives. This included full consultation about (and

1016. Tamaroa Raymond Nikora, answers to questions of clarification from the Crown, 30 March 2005 (doc H26(a)), p 16

1017. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 227

1018. Ibid

1019. Cox, 'Lake Waikaremoana and District Scoping Report' (doc A8), p 6

agreement to) the terms of the lease itself and the validating statute. All rent revaluations have been reached by free and informed agreement.¹⁰²⁰

- ▶ Thirdly, that some owners may have misunderstood that the bed of the lake was to be vested in the two trust boards. Nonetheless, the decision to use the two existing trust boards instead of a Waikaremoana board, and to vest the bed in those trust boards, was made by senior representatives of the owners and had nothing whatsoever to do with the Crown.¹⁰²¹
- ▶ Fourthly, that there was retrospective payment of rents back to 1967. Nonetheless, the Crown considered (and still considers) its past use of the lake caused virtually no losses to the owners, and so expectation of compensation was 'unreal'. But, to the extent that compensation was appropriate, it must be held to have been discharged by the arrangement that was reached in 1971: that is, the annual rental and lease (paid back to 1967) settled all claims.¹⁰²²

The claimants have accepted the first of these points but dispute aspects of the other three, as we have discussed above.

Overall, we accept that the 1971 lease was the result of negotiated compromises on the part of the Maori owners and the Crown, which reflected creditably on both sides. There were many positives. The Crown, for example, agreed to a lease instead of insisting on a purchase. This enabled Maori to retain their taonga while protecting it as part of the national park and deriving an ongoing commercial benefit from it. This was a significant victory for the owners. The Crown also decided to pay the rates, abided by the results of a professional valuation, and consulted the owners' committee about all points in the lease and Lake Waikaremoana Bill. For their part, the owners agreed not to insist on backdating the lease to 1957, to accept a perpetual lease, and to accept a lower rental rate (5.5 per cent) and lower valuation than they would have liked. We presume that any weaknesses in the 1968 valuation, such as the possible under-valuation of the submerged bed, have since been corrected by agreement in the revaluation negotiations. In the absence of any claimant submissions on that point, we take it no further.

From the evidence considered in sections 20.9.2 to 20.9.5, it is very clear to us that the agreement forged in 1970 and 1971 cannot be considered as settling all prior claims about the lake. Compensation for past use was an explicit part of the negotiations from 1961 until the Crown's final purchase offer was rejected in 1969. The owners' counter-offer of a lease, backdated to 1957, was clearly a compromise proposal to secure part of what was owed for the Crown's prior use of the lake. The Crown agreed to backdate the lease but only to 1967. There was no specific negotiation about or settlement in respect of past use of the lake in 1970 or 1971. Sir Rodney Gallen's evidence confirmed this point. No such settlement was recorded in the terms of the lease or the Lake Waikaremoana Act. Further, the 1968 valuation, on which the agreement was based, was conceived of solely

1020. Crown counsel, closing submissions (doc N20), topic 28, pp 8–9, 11

1021. *Ibid*, p 11

1022. *Ibid*, p 12

as giving the lakebed's current value. As counsel for the Wai 945 Ngati Ruapani claimants pointed out, this Government valuation was supposed to have been followed by a commission to set an overall value. Instead, the Government valuation was used on its own, 'based simply on existing values with no acknowledgement of past use or damage'.¹⁰²³

We do not, therefore, accept the Crown's submission that there is 'no outstanding issue concerning lakebed use prior to 1971, and no further payment for the use of the lakebed prior to 1971 is warranted'.¹⁰²⁴ Rather, we accept the claimants' submission that the lease and rental remain unfair because the Crown has not paid for use of the lake for hydroelectricity between 1946 and 1998, and has not paid for use of the lake 'for scenic and conservation purposes and as part of the National Park prior to 1967'.¹⁰²⁵ We agree with the claimants that the 1998 hydroelectricity settlement was both long overdue and is evidence that there was something to settle. We accept, too, that the 1998 hydroelectricity agreement did not settle past claims or Treaty claims. We will return to these points in our Treaty analysis and findings section.

On the question of the switch from a Waikaremoana-specific trust board to the two tribal trust boards, the evidence is clear that this was a choice made first by the owners' negotiating committee in September 1970, and then delegated to that committee for a final decision at the August 1971 meeting. The issue of the vesting of the bed, however, is less clear cut. The idea seems to have been proposed first by the Crown, as a way of simplifying future rental revaluation and lease renewal negotiations. But the owners' committee certainly adopted the idea, if they did not originate it. The legislative vesting of the bed in 1971 was the deliberate wish of the owners' representatives. But the evidence from 1973 to 1979 is clear that many owners did not understand this or expect it – indeed, in 1974 the Tuhoe-Waikaremoana Maori Trust Board denied that it had happened at all.

We accept the Crown's submissions in respect of this point, that there was 'no reason why the Crown should have done anything in respect of the lease other than introduce it [to], and support it through, Parliament by way of the Lake Waikaremoana Bill'.¹⁰²⁶ There had been a lengthy period of consultation on the draft lease and the Bill, between the Government and the owners' committee, and also internally among the claimant communities. The Government was entitled to rely on the committee's decisions in August 1971, and on the expressions of support for and acceptance of the Bill as it passed through Parliament. We do not discount the evidence from the 1970s that a significant number of owners had neither understood nor intended that their legal ownership would be extinguished by the Act, but our view is that this was an internal matter for the trust boards and beneficiaries to resolve.

1023. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), pp 50–51

1024. Crown counsel, closing submissions (doc N20), topic 28, p 12

1025. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 146

1026. Crown counsel, closing submissions (doc N20), topic 28, p 11

We add, however, that the difficulties caused by this issue, so long after ownership had been decided by the Native Land Court, underline the limitations of the title options available to the court in 1918. Had it been able to vest the lake itself in community title, perhaps in a single trust at that time, neither the tribal representatives nor the descendants of those deemed individual owners of the bed would have faced the problems they did in 1970–71. The Crown's failure to provide forms of title that took account of and gave effect to Maori relationships with waterways that were their taonga would, in the case of Lake Waikaremoana, have long-term prejudicial effects.

Finally, we note that it took 19 months from the May 1970 agreement to the passage of the Lake Waikaremoana Act in December 1971. Much of this final delay – in a negotiations process marked by chronic delays – was caused by disagreement between the Crown and the owners' committee on one crucial point: the exact mechanism by which owners should be assigned to one or other of the trust boards. After examining the details of the dispute in section 20.9.4.(1) we think that it is to the Crown's credit that it did not force the issue, and that time was allowed for working out an appropriate mechanism. Ultimately, it took over a year but the owners found a solution acceptable to both parties.

20.10 WHAT ROLE HAVE MAORI PLAYED IN THE MANAGEMENT OF LAKE WAIKAREMOANA AFTER ENTERING INTO THE LEASE? THE CLAIMS OF NGA RAURU O NGA POTIKI AND NGATI RUAPANI

SUMMARY ANSWER: The Wai 36 Tuhoe and Wai 621 Ngati Kahungunu claimants made no allegations about the post-1971 management of Lake Waikaremoana, preferring to resolve matters directly with the Crown as lessee. The Nga Rauru o Nga Potiki and Wai 144 Ngati Ruapani claimants, however, made allegations about the Crown's management of water levels for hydroelectricity, its management of the lake as part of the national park (allowing pollution and an infestation of exotic weeds), and their exclusion from the co-governance and co-management which, they said, ought to have followed upon the lease. The Crown denied these claims, although it accepted that lowering the lake in 1946 had long-term effects on fisheries and shoreline erosion. In the Crown's view, this was the inevitable price of the nation's need for power, and current effects are being managed appropriately under the Resource Management Act.

We deal with each of the claim issues in turn.

- ▶ *The Crown's management of water levels:* In the 1970s and early 1980s, the aspirations of the Maori owners and the national park authorities on this matter were the same: both wanted tight management of water levels within strict limits. During this period, the owners were content to let the park board(s) speak for them on this issue. The lake's water levels, however, were managed not by the park authorities but by the New Zealand Electricity Department. At first, all seemed well because the 'Gentleman's Agreement' served to keep the lake within agreed limits, and the park authorities – despite their commitment to preserving the park in as natural a state as

possible – agreed that the prior manipulation of lake levels for electricity must continue now that Lake Waikaremoana was part of the national park. When the department sought to carry out additional sealing of leaks, Maori and the park authorities remained aligned and they objected to the proposed sealing. The park board then applied to replace the ‘Gentleman’s Agreement’ with enforceable limits and a return to a more natural, seasonal regime, which Maori supported.

It was not until the 1990s that the park authorities and local Maori appeared to diverge on the issue. Electricorp’s application for resource consents in that decade resulted in a major consultation exercise which set conditions designed to prevent or mitigate the effects of erosion, and to restore cultural losses – principally of eels in the Waikaretaheke River. Electricorp’s working party process succeeded in resolving many issues about the immediate effects of the power scheme, although its longer-term effects (and the need for compensation and to settle Treaty grievances) remained unresolved. Water levels were to be managed more tightly than ever under the resource consent conditions. Again, there was some congruence between Maori and DOC aspirations, but discontent on the part of some Maori was revealed by the lakeside occupation in 1998. In particular, erosion and the failure to settle Treaty grievances were burning issues, although questions of authority and ownership were paramount. The ministerial inquiry in 1998 agreed that erosion as a result of lake-level manipulation was ‘excessive’ but hoped that it could be reduced by keeping the range tightly controlled and constant, and urged Maori and DOC to use RMA processes to get Electricorp to ‘avoid, mitigate, or remedy the erosion that is occurring’.

The evidence is that Electricorp and then Genesis have been careful since 1998 to operate within the agreed limits, but that erosion remains a serious concern – as, for example, in the case of the oxidation pond. Nonetheless, the effects of lowering the lake permanently in 1946, and then of raising and lowering it to control the flow of water for electricity, have been immense. The Crown did not deny the evidence that reduced fisheries and shoreline erosion have been long-term consequences, but argued that effects can now be managed and mitigated through RMA processes. We note that the shoreline will become more stable over generations, once the lake has been held within stable limits for sufficient time, but that the reduction of nearshore habitat (and thus of aquatic life) seems to be permanent or at least very long term. Also, the taonga has been permanently altered, with a new shoreline that is being eroded, and the spiritual consequences for the taonga and its kaitiaki have been significant.

- ▶ *The management of the lake as part of the national park (pollution and weeds):* The claimants’ main concerns under this head were the pollution of Lake Waikaremoana by sewage; the presence of giardia in the lake; and current or potential infestation by exotic weeds.

During the period of the lease, untreated or partially treated effluent from Lake House (until it was closed down) and the Government’s motor camp

flowed into the lake until 1980. Witnesses agreed that the Crown was aware of the problem and of the remedial action necessary, but delayed taking it for a decade. The new treatment plant (an oxidation pond) was not completed until 1980. Contamination of a taonga by human waste carries physical and spiritual consequences for the taonga and its kaitiaki. The Crown accepted in our inquiry that preventing pollution was of paramount importance to the claimants, and argued that significant attempts had been made to fix the problem in recent times. We agree but note that the new treatment plant itself became problematic for the claimants, who objected to its location and feared leakage or even a breach as a result of erosion. The Crown denied that there was a problem or risk for many years (notably also in the ministerial inquiry in 1998) but took emergency action in 2004 as a result of a discovered leak and severe erosion. We accept that local Waikaremoana Maori have been involved in managing the problem since then, particularly through the vehicle of the Waikaremoana Maori Komiti. Nonetheless, the effects of long-term pollution by human waste have been serious, and – during the period of the lease, at least – were avoidable if the Crown had taken the necessary action. Steady improvement is now evident.

Giardia is present in Lake Waikaremoana, and its spread is likely related to the pollution of parts of the lake by human waste. Nonetheless, giardia is also spread by animals and birds. Its presence in Lake Waikaremoana was probably unpreventable.

Although the national park ethos requires the preservation of Lake Waikaremoana in as natural a state as possible, an aspiration shared by the claimants, it appears that the exotic weeds currently in the lake are unable to be removed, but are not a significant threat to indigenous aquatic life. There is, however, a risk of invasion by more aggressive exotic species – the Crown and Maori agree that this requires careful monitoring and swift remedial action, so as to prevent the enormous harm that could occur to the taonga. Local Maori are involved through the Aniwanui system of cooperative management (see below).

- ▶ *The exclusion of Maori from governance and management:* As we found in chapter 16, Maori had no formal or statutory representation on the park's various governance boards. In the 1970s, their influence was at its height due to informal representation – three of the nine park board members were Maori who were understood to represent Tuhoe, Ngati Ruapani, and Ngati Kahungunu. But their influence was progressively reduced once the number of Maori members dropped from three to two and the Te Urewera board was replaced by regional boards responsible for multiple parks and reserves. In our view, an important opportunity was also missed in the 1970s: just as Waikaremoana representatives were added to the Maori Trust Boards as a result of the lease and the Lake Waikaremoana Act 1971, so too should representatives of the lessors have been given statutory seats on the park's governance boards. Nonetheless, the practical effects were mitigated for a time by the congruence of views between Maori and park authorities as to the

protection and preservation of Lake Waikaremoana in its natural state. Also, there were fewer occasions for conflict: Maori customary uses did not clash with preservationist aspirations in the way they did for other parts of the national park.

Nonetheless, there was growing anger among some Maori communities in the 1990s at what they saw as mismanagement of the lake (see the above discussion regarding erosion, pollution, and exotic weeds), resulting in the lake-side occupation of 1998 and Treaty claims to this Tribunal. The occupation interrupted a promising new initiative, called the 'Aniwaniwa model', which involved informal joint or cooperative management by DOC field staff and local Maori bodies, primarily (for the lake) the Waikaremoana Maori Komiti. After the Aniwaniwa model was restored by late 1999 or 2000, cooperative management resumed and the relationship between DOC and local Maori groups improved. Although there were weaknesses – under-funded, informal (and therefore impermanent) systems, and restricted to arrangements and decisions in the field – the model showed great promise. The kiwi restoration programme demonstrated what can be achieved. It also suggests that similar 'partnership' arrangements could work with Genesis as the manager of lake levels, with potential for expanding the Aniwaniwa model to include Genesis when necessary. Again, the Electricorp working party of the 1990s shows what works and what can be achieved. One-off projects such as the kiwi restoration programme are capable of replication, so long as Maori have an appropriate role in governance and management.

20.10.1 Introduction

In 1971, the Maori owners leased Lake Waikaremoana to the Crown for inclusion in Te Urewera National Park. In the terms of the lease, the Crown and the Te Urewera National Park Board covenanted with the Maori lessors to 'administer control and maintain the said [lake] in accordance with the powers and provisions of the National Parks Act 1952'.¹⁰²⁷ As counsel for Nga Rauru o Nga Potiki pointed out, this undertaking required the lake to be managed (as far as possible) in such a way as to preserve it in its natural state, to preserve its indigenous flora and fauna, to exterminate exotic flora and fauna, and to maintain its value for soil and water conservation.¹⁰²⁸ Unfortunately, however, neither the lease nor its validating legislation prescribed any role for the Maori lessors in the governance or management of the lake. Although the lessors were given statutory representation on the reconstituted Tuhoe-Waikaremoana and Wairoa-Waikaremoana Maori Trust Boards, they were not accorded representation on the park board. As a result, the lessors became – we were told – submitters to other authorities.

Such authorities have been many and varied since the lease was signed. The park board was replaced by four other boards in succession between 1981 and 2009. Nor was the lake solely managed by the park authorities, which did not control the

1027. Lake Waikaremoana Act 1971, sch: 'Lease of Lake Waikaremoana'

1028. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 220

water. Instead, the water was subject to the Government's electricity authorities and to local councils. The Electricity Department became the Electricity Division became Electricorp became Genesis, while catchment boards were replaced by regional councils, as statute followed statute in swift succession.

Te Urewera Maori communities, meanwhile, continued to struggle with the problems brought by urbanisation, corporatisation, and poverty, yet tried to engage as a Treaty partner with this complex, ever-shifting landscape of management and authority over their lake. For them, it did not matter which department or council or board had responsibility for any one particular issue; they wanted their taonga preserved and protected in its natural state, as they were promised in 1969 when they offered to lease it to the nation for that purpose as part of a national park. When they saw shoreline erosion apparently unchecked; when they saw effluent running into the lake from the Government's tourist facilities; when they saw exotic weeds growing thick in Home Bay; when they saw freedom campers disposing of waste on the lake shores; when they grew sick from drinking lake water; and when they saw that they had little or no voice in the authorities responsible for preventing these things, then some of the claimants in our inquiry came to regret the 1970 agreement and sought to re-enter the lease. It is their claims which we consider in this section of our chapter.

20.10.2 Differing opinions among the claimants

Before we begin our analysis of the claims about post-1971 management of Lake Waikaremoana, we need to note that there was a variety of opinions among the claimants.

In the 1990s, some Waikaremoana hapu were critical of the Tuhoe-Waikaremoana Maori Trust Board, as one of the two bodies which owned the lake and administered the rental. They felt that the local hapu were the proper kaitiaki of the lake, yet they had little or no input to the decisions of the Government and the board. They also felt that the lake's ecology had been mismanaged by the Government. The trust board, on the other hand, considered itself to be acting on behalf of all its beneficiaries, and appears to have had no serious concerns about the way in which the lessee (effectively DOC) was managing the lake.

These divergent views were brought to light in the 1998 lakebed occupation and ministerial inquiry. The occupiers brought 22 specific charges against the Crown as lessee, which fundamentally amounted to a charge that DOC was not managing the lake properly under the terms of the National Parks Act 1980.¹⁰²⁹ The two trust boards, on the other hand, were supportive of DOC at the 1998 inquiry.¹⁰³⁰ The boards 'asserted a good relationship between themselves and the Department of Conservation and recorded that neither believed there to be any breach of the lease or basis for the complaint.'¹⁰³¹ This divergence of views was very important, not

1029. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), pp 6–7. The specific allegations are itemised (a) to (v): see pp 7–15.

1030. *Ibid*, pp 10, 16

1031. *Ibid*, p 10

least because the boards were the legal owners and lessors of the lake, responsible for the lease that – it was alleged – had been repeatedly breached by the Crown as lessee.

The positions were slightly different at the time of our hearings. Counsel for the Wai 36 Tuhoe claimants and counsel for the Wai 621 Ngati Kahungunu claimants made no submissions about the post-1971 management of the lake. They neither supported nor denied others' claims of Crown mismanagement. Counsel for Wai 36 Tuhoe explained that 'The Trust Boards have separately addressed issues directly with the Crown in relation to the lease and have not pursued lease issues before this Tribunal (aside from issues of payments for use of the lake).'¹⁰³² The exception to this position was a claim about damage to the lake from its use for hydroelectricity (which was related to the claim about the Crown's failure to pay for use of the lake).¹⁰³³ Further, counsel for the Wai 36 Tuhoe claimants submitted that the trust board is not an agent of the Crown: disagreements about the lake between the board and its beneficiaries are not the business of this Tribunal.¹⁰³⁴

The Wai 621 claimants did not mention post-1971 management of the lake in their statement of claim or their closing submissions.¹⁰³⁵ Clearly, they shared a general claimant view that tangata whenua have not been sufficiently included in the governance and management of the national park.¹⁰³⁶ In research interviews with Dr Cant's team, Reay Paku and Te Ariki Mei also shared general concerns about issues of shoreline erosion, pollution, and lake weeds. But, in respect of pollution and weeds, Paku and Mei considered DOC was doing a good job.¹⁰³⁷

The Nga Rauru o Nga Potiki and Ngati Ruapani claimants, on the other hand, brought evidence and submissions that the lake had been mismanaged since the signing of the lease, and that they had been excluded from the Government's decision-making about the lake. They were particularly concerned about the issues of lakeshore erosion, pollution, and resultant harm to their taonga, which they said were the result of the Crown's mismanagement.¹⁰³⁸ The Ngai Tamaterangi claimants shared these concerns, although they did not present detailed evidence or submissions about them.¹⁰³⁹

In summary, the Nga Rauru o Nga Potiki and Ngati Ruapani claimants have made two specific claims and a third, overarching, claim:

1032. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p194

1033. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p31

1034. *Ibid*, pp 81–84

1035. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1); counsel for Wai 621 Ngati Kahungunu, second amended statement of claim, 15 August 2003 (claim 1.2.6, SOC 6); counsel for Wai 621 Ngati Kahungunu, addition to second amended statement of claim: environmental pleadings, 12 April 2004 (claim 1.2.6(a), SOC 11)

1036. Paku, brief of evidence (doc 135), paras 4.3–5.3

1037. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 115–116, 139, 207, 239

1038. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, pp 79–83, 96–99, 104–108; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 220–222, 237, 239

1039. See counsel for Ngai Tamaterangi, closing submissions (doc N2), esp pp 62–64, 66–68; counsel for Ngai Tamaterangi, closing submissions, attachment A (doc N2(a)), pp 66–67, 92–95, 108.

- ▶ the Crown's management of water levels for electricity purposes has harmed the ecology and mauri of the lake (addressed in section 20.10.3);
- ▶ the Crown's management of the lake for national park purposes has allowed it to become polluted, as well as contaminated with giardia and infested with exotic weeds (addressed in section 20.10.4); and
- ▶ the Crown's governance and management of the lake has largely excluded Maori when the Treaty required – and the lease implied – nothing less than partnership and co-management (addressed in section 20.10.5).

It is these claims which we discuss in this section of our chapter. We begin our analysis with the Crown's management of lake levels in the post-lease period to 2004.

20.10.3 The management of lake levels

As we have already discussed in chapters 16, 18, and 19, the 1970s was a decade of intensive work for the Tuhoe-Waikaremoana Maori Trust Board. It was involved in protracted negotiations with the Crown over forestry development, amalgamation of land titles, land-exchange or leasing of land to the national park, and – in the early part of the decade – the Waikaremoana reserves. During the 1970s, management of the lake itself was a matter left to the Te Urewera National Park Board. Both Maori trust boards relied on their (unofficial) representatives on the park board; they had few resources otherwise to devote to Government planning and processes affecting the lake, and were confident that John Rangihau and Tama Nikora, as well as Reay Paku, would have influence and receive a sympathetic hearing from the Pakeha majority on the board. This situation did not change until the 1980s, after the disestablishment of the Te Urewera park board and the beginnings of significant disagreement as to how the lake should be managed.

In terms of managing the lake as part of the national park, there were two key issues in the 1970s and 1980s:

- ▶ fluctuating water levels (and consequential shoreline erosion and harm to aquatic species dependent on the littoral zone); and
- ▶ pollution from the park's visitors, especially in the form of sewage from Lake House and the motor camp.

We deal with pollution in the following section. Here, we are concerned with how the Crown managed lake levels for hydroelectricity purposes, now that the lake was officially part of the national park.

20.10.3.1 From sole management to dual management: the Electricity Department and the Te Urewera National Park Board, 1965–80

Before 1967, the Electricity Department had sole authority to manage lake levels. As we saw above, this coincided with 'wild' fluctuations and periodic, drastic draw-downs of the lake. From 1967, however, the Water and Soil Conservation Act allowed for regulatory oversight, in this case by the Hawke's Bay Catchment Board. Ironically, it did so just after the department began to maintain more stable lake levels. With the creation of the national grid, the three Waikaremoana stations only generated a small proportion of the country's electricity, and there was

enough supply to prevent the extremes in lake management that had been such a feature of the 1950s and early 1960s. Yet the issue of fluctuations was still considered a problem, despite maintaining the lake in a more stable range. A high level in 1968 (2,008 feet) had caused serious erosion to lakeshore facilities. The park board, which still had no authority over the lake at that time, complained to the department about the need to control ‘undue fluctuation’ in the future.¹⁰⁴⁰

The result was negotiations between the Electricity Department, the park board, and the Nature Conservation Council. Other than through their informal representatives on the park board (John Rangihau and T C Nikora), the Maori owners do not appear to have been consulted. The board tried to get the department to agree to keep the lake between 1,996 feet and 2,004 feet. Electricity officials wanted a much larger range (between 1,970 feet and 2,006 feet). Even so, the department acknowledged that it tried in practice to keep within the limits sought by the board. This enabled a ‘Gentleman’s Agreement’ to be reached in 1970: as far as possible, the lake would be kept between 1,994 feet and 2,004 feet, and the department had to discharge water if the level rose to 2,006 feet. This made fluctuations more controlled and predictable for all concerned. Also, this annual range of 10 feet was close to what it had been in nature (although at a lower height, and in a pattern the reverse of the natural, seasonal pattern).¹⁰⁴¹

The following year, the Maori owners leased the lake to the Crown and it became a formal part of the national park. The park board at once assumed authority over boating and lakeside structures, including ramps, marinas, jetties, house boats, water-skiing, and jet-boating.¹⁰⁴² In 1977, it published the blueprint for its management of the lake:

- (a) Maintenance of the value of the lake as a soil, forest, and water conservation area.
- (b) Protection of the remote and peaceful character of the lake in its natural wilderness setting of a National Park.
- (c) Freedom for the public to enjoy as fully as possible all forms of recreation that do not conflict with the above aims.¹⁰⁴³

The question for the board, and in particular its Maori members, was whether these aims could be delivered while the lake was also managed by the Electricity Department for quite different purposes. As the claimants have observed, the board’s responsibility was to give effect to the National Parks Act, with its emphasis on preserving the lake in its natural state ‘as far as possible.’¹⁰⁴⁴ Maori

1040. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), pp 198–199

1041. *Ibid*, p 199

1042. Brad Coombes, ‘Preserving a “Great National Playing Area” – Conservation Conflicts and Contradictions in Te Urewera, 1954–2003’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A133), pp 86–87

1043. ‘Urewera National Park Board: News’, No 20, April 1977 (Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 87)

1044. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 220

park board members had to represent the values and aspirations of their people to their fellow board members,¹⁰⁴⁵ but they also had to act conscientiously to ‘obtain the objectives of the National Parks Act.’¹⁰⁴⁶ In the particular case of managing the lake, the claimants’ view is that their aspirations and those of the National Parks Acts coincided: both sought the preservation of the lake’s ecology in its natural state.¹⁰⁴⁷ But could this be reconciled with lowering and raising the lake to control flows to downstream power stations? In the claimants’ view, it could not because the ‘natural character of the foreshore which coastal ecosystems rely so heavily upon for survival and growth has been detrimentally affected through the ECNZ’s power station reducing dramatically the lake levels.’¹⁰⁴⁸

The park board offered its answer to this question in 1976. The Te Urewera National Park management plan of that year stated:

Although the use of Park waters for power generation is generally not in keeping with the national park concept, in this case the construction of the hydro scheme preceded the creation of the Urewera National Park. It may also be said the generation of hydro-electric power, provided it does not cause permanent ecological or physical damage, may be in the greater public interest despite the conflict with national park objectives.

In the circumstances it is the policy of the Park Board to ensure adequate and close co-operation with the NZ Electricity Department in order to keep fluctuations in lake levels to a minimum and to seek compensation and/or remedial work if and when damage to the resource or public facilities occurs.¹⁰⁴⁹

Thus, the board considered that the key issue was the manipulation of lake levels. Hence, its stated policy was to cooperate with the Electricity Department to try to keep fluctuations to a minimum, and to seek compensation or remedy where necessary. This was based on a philosophical position that the lake could be part of a national park and still be used and modified for hydroelectricity within certain bounds. Damage would inevitably occur but the board saw its task as to prevent any new damage from becoming ‘permanent’. This position was only possible because physical modification of the lakebed had long been a *fait accompli* by the 1970s, when the lake formally became part of the national park. To the extent that there was ongoing modification of the natural state of the lake, it was understood to be limited to the regular manipulation of lake levels. And, by means of the ‘Gentleman’s Agreement’, the board thought that lake levels would be controlled and stable.

1045. Paku, brief of evidence (doc 135), paras 4.1–5.3

1046. TR Nikora to chairman, Te Urewera National Park Board, ‘Composition of Te Urewera Park Board’, 18 June 1973 (Brad Coombes, comp, supporting papers to ‘Making “Scenes of Nature and Sport”’ and ‘Preserving a “Great National Playing Area”’, various dates (doc A121(a)), p 140)

1047. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 117–118, 220–222

1048. *Ibid*, p 220

1049. Te Urewera National Park Board, *Urewera National Park Management Plan, 1976* (Hamilton: Urewera National Park Board, 1976), pp 35–36

In the late 1970s, however, the Electricity Department and the Ministry of Works destabilised the ‘Gentleman’s Agreement’, because they proposed to carry out further physical modification of the lakebed. New technology had identified deeper leaks north of Te Wharawhara, which the Ministry planned to stop by creating a new sealing blanket. Less water would then escape from the lake, and officials estimated that \$650,000 worth of power generation elsewhere would be saved by this more efficient use of Lake Waikaremoana. Capacity could be improved in this way without necessarily changing the existing water levels regime. But the proposal aroused strong resistance. Local hapu were very opposed to any further modification of the lakebed. Locals were also worried that stopping these natural leaks would reduce their water supply. The park board and the Conservator of Wildlife also objected. These authorities were concerned that more sealing would allow the department to keep the lake even higher in summer, which was unnatural for that time of year. Springs and streams would be further reduced, and the natural character of the lake and its environs further altered. This was unacceptable to the park board.¹⁰⁵⁰

From 1974 to 1977, fisheries scientist Peter Mylechreest had been studying the impact of water level fluctuations on species in the littoral zone.¹⁰⁵¹ His purpose was:

to try and determine a suitable regime for hydro lakes aimed at utilising their inherent power-generating capabilities to maximum effect with minimal damage to recreational fisheries. Failing this, it was to lessen the effects of such fluctuations, coupled with suggestions for adjusting lake levels compatible with periods of highest angling use.¹⁰⁵²

Mylechreest’s final results in 1978 identified ‘historical’ changes, which included ‘a disproportionately great loss of littoral area’ when the lake’s level had been permanently lowered, and a reduction in all aquatic species as a result.¹⁰⁵³ But there were also concerns about the current management of lake levels, because of the way in which the lake was kept high in summer and lower in winter. This reversed the natural seasonal state of the lake (‘reversed seasonal periodicity’). Mylechreest suggested that the effect was to reduce the productivity of the littoral zone in summer, reduce species diversity in that zone, and reduce trout popula-

1050. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), pp 155, 174–175, 220

1051. This work was commissioned by the Internal Affairs Department and the New Zealand Electricity Department – see Te Urewera National Park Board, minutes of meeting, 12 September 1974 (Cecilia Edwards, comp, supporting papers to ‘Selected Issues: Te Urewera National Park; Thematic Issue 33’, various dates (doc L12(a), p 417).

1052. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), pp 84–85

1053. P Mylechreest, ‘Some Effects of a Unique Hydroelectric Development on the Littoral-Benthic Community and Ecology of Trout in a Large New Zealand Lake’ (MA thesis, University of British Columbia, 1978), fols 97–98 (Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 85)

tions. While further research was needed, he recommended restoring the natural seasonal ‘periodicity’: higher levels in the wetter, winter months and lower levels in summer. If necessary, he argued that the country could use more thermal power stations to help meet winter demand.¹⁰⁵⁴ In 1979, Mylechreest suggested that ‘reversed seasonal periodicity’ would become even worse if the sealing project was allowed to go ahead.¹⁰⁵⁵

In November 1979, Ministry of Energy¹⁰⁵⁶ staff met with the park board to discuss its concerns. Mylechreest was present at the meeting. Ministry officials told the board that less summer storage was likely in future, and that it planned to restore the seasonal pattern of rising levels in winter. This was apparently now possible because the Pukaki dam in the South Island had been completed, and the Huntly thermal station was about to come on line, reducing the need to store so much water in Lake Waikaremoana in summer. Officials assured the park board that lake levels would stay within the limits set by the ‘Gentleman’s Agreement’, but they refused to give up on the sealing project. Instead, the Ministry of Works carried out testing in 1980 to try to determine how much water would be lost to farms and waterways if more leaks were sealed.¹⁰⁵⁷

In the meantime, the park board decided that a formal arrangement would have to be made, to control how the Electricity Division managed the lake’s water levels.¹⁰⁵⁸ Under the Water and Soil Conservation Act 1967, the National Water and Soil Conservation Authority or a regional water board¹⁰⁵⁹ had the power to set maximum and minimum lake levels. This power could be exercised ‘where the action seems warranted in the circumstances’. If it chose to exercise its power, the board or the Authority had to consult representatives of ‘all interested bodies and persons’ when making its decision. As well as setting lake levels, the Act provided for setting water quality standards in lakes and rivers, and flow rates for rivers. The water board’s power was recommendatory; the final decision rested with the Authority.¹⁰⁶⁰ In 1980, the park board invoked this jurisdiction and sought a formal ruling from the Hawke’s Bay Catchment Board.¹⁰⁶¹

As required by section 20(5)(d) of the Water and Soil Conservation Act, the

1054. PHW Mylechreest, ‘Hydroelectric-induced Changes in Lake Waikaremoana’, *Wildlife: A Review*, 10, 1979, pp 46–47 (Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), pp 85, 199)

1055. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 201

1056. In 1978, the New Zealand Electricity Department became the Electricity Division of the new Ministry of Energy.

1057. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), pp 175, 199–201

1058. *Ibid*, p 201

1059. The Act provided for catchment boards to be regional water boards. The Hawke’s Bay Catchment Board acted as a regional water board for the purposes of this Act.

1060. Water and Soil Conservation Act 1967, ss 14(3)(o), 19(1)-(2), 20(5)(d)

1061. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 201

catchment board requested submissions from parties that it knew to be interested. This included the lake's Maori owners. The board approached Tama Nikora and Reay Paku, the two members of the park board who were understood to represent the Tuhoe and Ngati Kahungunu trust boards respectively. It also sought a submission from Sam Rerehe of Waimako Pa. According to Dr Cant's evidence, all three 'indicated verbally that with respect to lake levels, the interests of their respective groups would be served by the statutory interests of the Urewera National Park Board'.¹⁰⁶² As members of the park board, Nikora and Paku had confidence that its submissions would take account of local iwi concerns.¹⁰⁶³ Apart from this point, there was also the constant problem that Maori organisations of the time were over-stretched and under-resourced. The Tuhoe-Waikaremoana Maori Trust Board advised the park board that it simply did not have the time and resources to come up with its own submission, and asked that the park board's submission 'stand for it as well'.¹⁰⁶⁴

In brief, the park board's position was that it was happy with the current operating range (1,994 feet to 2,004 feet) but it wanted the maximum and minimum set formally under the Act. It also wanted to ensure that maximum generation of power from the lake 'commenced well before the 2004ft (610.8m) limit be reached'.¹⁰⁶⁵ Other submitters included the Rotorua conservator, an angling club, and the Nature Conservation Council. Of these, two groups wanted to set 2,000 feet as the summer maximum, while the Nature Conservation Council called for a return to 'natural periodicity' (that is, lower in summer, higher in winter). The Electricity Division was already trying to restore something closer to natural seasonal patterns anyway, but it objected to setting 2,000 feet as a summer limit.¹⁰⁶⁶

The catchment board appointed a special tribunal to consider the submissions and decide the matter. This tribunal decided to keep the now normal operating band of 10 feet (3 metres) but lowered it by two feet overall to a new minimum of 1,992 feet (with a maximum of 2,002 feet). Catchment board staff had advised that the threat of erosion was significantly greater above 2,002 feet, especially for tourist facilities in Home Bay. The need to prevent further erosion seems to have resulted in this setting of levels significantly lower than in the 'Gentleman's Agreement'. The mandatory discharge level was also dropped by two feet to 2,004 feet. The tribunal's decision allowed the Ministry of Energy to breach the minimum in urgent circumstances. The lake could be lowered to 1,990 feet if there was a 'recognised national shortage of energy'. Any drop below 1,990 feet was only allowed if the national shortage was 'extreme'. The National Water and Soil Conservation Authority ratified these formal limits in November 1980.¹⁰⁶⁷

1062. *Ibid*, p 221

1063. *Ibid*

1064. *Ibid*, p 202

1065. *Ibid*

1066. *Ibid*

1067. *Ibid*, pp 202–203

20.10.3.2 Regulated management, 1981–86

In 1983, with the new rules in place, the ministry tried to proceed with the sealing of the lakebed. It proposed to start removing rock outcrops from the bed so that the sealing could start. Dr Cant's research team was unable to find out what happened next, but the Ministry apparently abandoned its plans and no new sealing work ever took place.¹⁰⁶⁸ According to Tracey Hickman, it was 'strong opposition to the proposals' which brought them to an end, and she noted that 'Genesis Energy has no intention to undertake additional lake sealing'.¹⁰⁶⁹ In any case, Dr Cant suggested that the Ministry did in fact keep its assurances to the park board and the catchment board about trying to restore (as far as possible) natural seasonal patterns.¹⁰⁷⁰ Its efforts still did not go far enough for Mylechreest and the Rotorua Conservator, who later called for more to be done.¹⁰⁷¹

The catchment board reviewed the new rules in 1986. This time, nine submissions were made by interested organisations or individuals, but again there were no submissions from Maori groups.¹⁰⁷² By then, the Te Urewera National Park Board had been replaced by the East Coast National Parks and Reserves Board, and day-to-day management had become the responsibility of Lands and Survey. This department's view was that the lease provided for Maori interests because the owners 'retain a management role through membership on the parks and reserves board responsible for the national park as well as the leased area'.¹⁰⁷³ Thus, the park administrators' view in 1985 was that board membership gave the lake's owners a sufficient voice in its management. As we noted in chapter 16, however, the replacement of a Te Urewera park board by an East Coast board had reduced Maori influence, already limited because Maori members were a minority. Dr Cant commented:

It is interesting to note that none of the submissions came from Waikaremoana iwi or their representatives; possibly they may have voiced their opinions via the East Coast National Parks and Reserves Board submission, but even if they did – unfortunately no correspondence has been seen on this issue – the dilution of Urewera governance in the new enlarged body probably meant that Waikaremoana iwi had less input into the 1986 lake level determinations than they had in 1980.¹⁰⁷⁴

1068. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 175–176

1069. Hickman, brief of evidence (doc L11), p 8

1070. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 203

1071. *Ibid*, p 222

1072. *Ibid*

1073. Lands and Survey Department, 'New Zealand Case Study: Traditional Rights and Protected Areas', Third South Pacific National Parks and Reserves Conference, Apia, June–July 1985 (Coombes, 'Preserving a "Great National Playing Area"' (doc A133), p 162

1074. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 222

Submitters were mostly unhappy with the new lake levels as set in 1980. There were a range of complaints from the Wildlife Service, Lands and Survey, and ‘the Friends of the Urewera Association’, in particular that the lower regime was more erratic, that it risked holing boats again, and that it had actually increased erosion instead of helping prevent it. According to these submitters, the fairly constant regime from 1965 to 1980 had started to stabilise the shoreline, but this was undone when the whole regime was lowered by two feet.¹⁰⁷⁵ Crown counsel questioned Dr Cant on this point, as to how long the lake levels needed to be stable before the shoreline itself would also stabilise. Dr Cant replied that it would actually take several generations to complete, but that ‘most of the stabilisation might take place within say 15 to 25 years.’¹⁰⁷⁶

The Electricity Division was neutral on the issue of the 1980 levels. So long as it could retain an operating range of 10 feet, with a buffer of two feet either side, the department was not concerned as to whether the minimum was 1,992 feet or 1,994 feet.¹⁰⁷⁷

As a result of the near unanimity of all parties, the catchment board and the Authority agreed to return to the pre-1980 lake levels for Waikaremoana.¹⁰⁷⁸

20.10.3.3 New management and regulatory regimes

The lake levels set in 1986 were due for review at the end of 1990. In the meantime, new management regimes had been established and a new regulatory regime was in the process of being set up. The fourth Labour Government had begun to corporatise various State enterprises, including electricity production, alongside a process of resource management law reform.

In 1987, the Electricity Corporation of New Zealand (Electricorp) took over the Waikaremoana power scheme, including management of lake levels. At the same time, the Crown’s monopoly on electricity generation was removed – the possibility of privatising this power scheme was now open, as we discussed in section 20.9.5.2. In the same year, the Conservation Act was passed. The Government established the Department of Conservation (DOC), which replaced Lands and Survey as the day-to-day manager of Te Urewera National Park. Management practice began to change soon after, with the creation of Kaupapa Atawhai staff to liaise between DOC and iwi in the early 1990s.¹⁰⁷⁹ The East Coast National Parks and Reserves Board was replaced in 1990 by a conservation advisory board,¹⁰⁸⁰ and DOC became the primary management authority for the park (see chapter 16).

1075. Ibid, p 203

1076. Garth Cant, under cross-examination by Crown counsel, Waimako Marae, Tuai, 20 October 2004 (transcript 4.11, p 133)

1077. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 203

1078. Ibid, p 204

1079. Ibid, p 223

1080. Specifically: 1990 – the East Coast Conservation Board; 1998 – the East Coast Hawke’s Bay Conservation Board; 2009 – the East Coast Bay of Plenty Conservation Board.

In the late 1980s, the East Coast board was in the process of reviewing the Te Urewera National Park management plan, which had been in place since 1976. Submissions from local Maori noted restoration of a natural regime for lake levels as a high priority for them.¹⁰⁸¹ In its final form, the new 1989 management plan stated that DOC would negotiate with ‘the appropriate catchment authority, the Ministry of Energy and Electricorp, to seek an operating regime that will minimise the effects of hydro-electric power generation on the ecology of the lake and lake-shore, shoreline stability, the interests of the Maori people and the use of the lake for boating and other public uses.’¹⁰⁸² Dr Cant’s research team called this a ‘slight advance’ on the 1976 plan, because ‘the National Park “manager” was now seeking to minimise the effects of fluctuations, rather than the fluctuations themselves, and there was now a clearer statement of what was meant to be protected.’¹⁰⁸³ Also, the new plan provided that ‘the owners of the bed of Lake Waikaremoana will be consulted through their Trust Boards on any matters affecting their interests in and around the lake.’¹⁰⁸⁴

It seemed as if the scene was set for DOC to consult with Maori so as to ensure the protection of their interests during the upcoming review of lake levels in late 1990. This did not occur, however, because the review was overtaken by the resource management law reform process. As part of replacing the Water and Soil Conservation Act (and other laws) with the RMA, all existing use conditions were allowed to remain in place for up to 10 years. This meant that Electricorp’s management of lake levels did not need to be reviewed until 2001. But the standard to be met was also much higher than under the Water and Soil Conservation Act: Electricorp would have to apply to the regional council for resource consents to keep using the lake and its outflowing rivers, and it would have to prove that environmental effects from its use of the lake were ‘either avoided or mitigated.’¹⁰⁸⁵ Also, while the previous law had made the catchment board responsible for identifying and consulting with all interested parties, the RMA placed this responsibility on Electricorp. As an applicant, it had to notify and consult all relevant Maori organisations and groups.¹⁰⁸⁶ Both the applicant and the regional council (in making its decision) had to provide for the relationship of Maori with their waters and their ancestral taonga as a matter of national importance. They also had to have

1081. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 381

1082. Department of Conservation East Coast National Parks and Reserves Board, *Te Urewera National Park Management Plan, 1989–1999* (Rotorua: Department of Conservation, 1989), p 63 (Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), pp 223–224)

1083. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 224

1084. Department of Conservation, *Te Urewera National Park Management Plan, 1989–1999*, p 63 (Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 224)

1085. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 224

1086. *Ibid*, pp 224–225

particular regard to kaitiakitanga, and to take into account the principles of the Treaty.¹⁰⁸⁷

The result was a three-year research and consultation process unparalleled under the previous legislation. Electricorp began consultation and commissioning research in 1995. It seems to have begun this process much earlier than allowed because the new National Government wanted to break the corporation up, transfer its power stations to competing State-owned companies, and to privatise ‘non-core’ generating assets. As we discussed earlier, the Waikaremoana power stations generated a very low share of the nation’s power by this time, and were slated for privatisation.¹⁰⁸⁸ Electricorp’s application for resource consents, and the trust boards’ response on behalf of the lake’s Maori owners, were both coloured by the expectation that the power stations would soon be transferred to new state entities or sold. For the Maori trust boards, the focus was on the Crown’s long-standing use of the lake for electricity without payment, its structures on the bed of the lake, and the ‘obvious solution’ that the power stations should be transferred to the owners of Lake Waikaremoana in compensation.¹⁰⁸⁹

Although corporatisation and privatisation were put on hold from January 1997 to August 1998 (as a result of the National coalition with New Zealand First), they remained likely in future. The process resumed in late 1998 after the coalition fell apart. As we discussed earlier, the two trust boards and Ngati Ruapani then formed consortiums and bid for the Waikaremoana stations.¹⁰⁹⁰ Throughout the resource consents process, therefore, the attitudes of a significant component of the Maori community may have been influenced by the fact that they might become the owners and operators of the power scheme. As Electricorp’s project manager for the resource consents noted, however, consultation with the trust boards gave ‘no indication that they would put business interests ahead of their interest in the environment around Lake Waikaremoana.’¹⁰⁹¹

20.10.3.4 *Electricorp and the resource consents process*

The RMA required Electricorp to consult with affected parties and local Maori, and to undertake a process to identify possible effects and propose means by which they could be avoided, remedied, or mitigated. In practice, as Dr Cant noted, these

1087. Resource Management Act 1991, ss 6–8. For a summary of the relevant obligations under the Resource Management Act, see Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), pp 54–63.

1088. In her evidence for Genesis, Tracey Hickman noted that the Waikaremoana power scheme is of vital local importance to the East Coast. It is the only major source of electricity in that region. If the East Coast is cut off from the national grid, which happens from time to time, the Waikaremoana power scheme maintains electricity supply for the region: Hickman, brief of evidence (doc L11), p 7.

1089. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), pp 225–226

1090. *Ibid*, pp 227, 242

1091. Peter Anthony Canvin, brief of evidence to Hawke’s Bay Regional Council, [1998], p 20 (Tracey Hickman, comp, supporting papers to brief of evidence, 7 February 2005 (doc L11(a)), p [34])

The Waikaremoana Maori Committee

Kararaina Rangihau described the Waikaremoana Maori Committee as the central body for all of the Waikaremoana hapu:

This forum is the people's mandated reporting entity in the community. It is made up of nominated delegates of our Hapu.

Community, Iwi and Hapu issues are discussed and recommendations and decisions are made on behalf of the people at monthly Hui. All activities, projects, visitors, Officials are reported to this forum. Reports are then relayed back to Hapu/Whanau and discussed for the next monthly Hui.

The Waikaremoana Maori Committee has a functional relationship with all community, Iwi, Hapu, people and land-based, organisations here in Waikaremoana.¹

1. Kararaina Rangihau, 'Waikaremoana Housing Project Community Profile', October 2003 (doc H43, app), pp 13–14

two processes were combined, so that consultation was designed to identify effects and agree on solutions.¹⁰⁹²

A key early development was the establishment of a working party in April 1995, to supervise research and debate the results. It provided a forum for Electricorp to iron out issues with interested organisations before the formal consent hearings took place. A number of organisations were represented on the working party. Local Waikaremoana hapu, Ngati Hinekura and Te Whanau Pani, authorised the Haumapuhia Waikaremoana Authority to take part on their behalf, and Electricorp also held a series of separate meetings with the Authority.¹⁰⁹³ The Wairoa-Waikaremoana Maori Trust Board was the other Maori organisation represented on the working party. Although the Tuhoe Waikaremoana board did not sit on the working party, it was also involved in consultation and had meetings with Electricorp. There were also meetings and discussions with the Waikaremoana Maori Committee and the Panekire Tribal Trust Board (see the sidebars above and opposite).¹⁰⁹⁴ Apart from Electricorp and the various Maori representatives, the working party also had members from DOC, the local councils, the Eastern Fish

1092. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 228

1093. Hickman, brief of evidence (doc L11), pp 12–13

1094. Canvin, brief of evidence to Hawke's Bay Regional Council, pp 6–8, 12 (Hickman, supporting papers to brief of evidence (doc L11(a)), pp [19]–[21], [25])

Panekire Tribal Trust Board

Vernon Winitana stated that the Panekire Tribal Trust Board was established by Ngati Ruapani in 1982 as a result of a hui held in 1981. At that hui, he said, John Rangihau proposed that 'we form our own organisation to manage our own affairs'. The trust had nine elected trustees, three to represent Kuha Marae, three to represent Waimako Marae, and three 'to represent those living outside Waikaremoana'. Mr Winitana added:

John Rangihau gave us our name and kaupapa, which was to look after the last remaining lands of Ruapani at Te Kopani and Heiotahoka. The focus on our maunga [mountain] 'Panekire' allowed it to be quite specific as to whom it represented. The role of the Trust expanded quickly, and soon it was the first port of call for any issues that came up in Waikaremoana.¹

1. Vernon Winitana, brief of evidence, no date (doc H28), pp 4–5

and Game Council, Federated Farmers, the Hawke's Bay Canoe Club, and (later) Forest and Bird.¹⁰⁹⁵

Dr Cant suggested that the 'working party process was an important opportunity for Waikaremoana Maori and ECNZ to contribute face to face and seek solutions to environmental problems.'¹⁰⁹⁶ It certainly helped identify potential adverse effects. From research and from the various consultation initiatives, environmental effects were found to include erosion, decreased near-shore habitat, and impeded fish migration in the Waikaretaheke River.¹⁰⁹⁷

But a number of other issues were exposed, related to Electricorp's exploitation of the lake, which Electricorp did not necessarily have to deal with in order to get resource consents. The Haumapuhia Waikaremoana Authority, for example, raised issues of compensation for past and present losses, and the provision of free

1095. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 228

1096. Ibid, p 229

1097. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 231; see also Emma Christmas, William Chisholm, Mark James, and Clive Howard-Williams, 'Review of the Effects of Lake Level Fluctuations on the Ecology of Lake Waikaremoana: Report to the Lake Waikaremoana Working Party', December 1995; Emma Christmas, William Chisholm, and Jennifer McQuaid-Cook, 'Lake Waikaremoana Power Scheme: Report on the Scoping of Environmental Effects (Draft), Report to the Waikaremoana Working Party' (Wellington: Electricity Corporation of New Zealand, 1996)

electricity.¹⁰⁹⁸ In theory, ‘mitigation’ could cover a number of different remedies for the damage that came from permanently lowering the lake. Electricorp, however, seems to have ruled out any possibility of compensating the Maori owners. Its focus was on preventing avoidable ecological damage in the future, remedying or mitigating unavoidable damage, and restoring lost opportunities for cultural and recreational use of the lake and its outflowing waterways. To help restore the environment, Electricorp pledged \$100,000 a year to DOC for 10 years, to be spent on local projects.¹⁰⁹⁹ It also undertook to construct works that would prevent further erosion at Home Bay and Mokau Landing, and to repair boat ramps.¹¹⁰⁰

The \$1 million for ‘ecosystem restoration’ was seen by DOC as a contribution towards redressing damage from the original and permanent lowering of the lake, as well as the ongoing ‘rising and lowering of the lake.’¹¹⁰¹ But Electricorp considered it a matter of ‘ecological enhancement’, not ‘restoration’, and did not formally accept that there had been ‘significant adverse effects on the environment as a result of the level of water in Lake Waikaremoana being lowered some 50 years ago.’¹¹⁰² According to Electricorp, the ‘shoreline ecosystem [had] largely recovered from the 1946 lake lowering.’¹¹⁰³

By the time of our hearings, however, Genesis Energy (Electricorp’s successor) had a different position. In response to questions from counsel for Wai 144 Ngati Ruapani, Tracey Hickman stated:

The agreement in general (in my understanding) was to offset historic effects related to the lowering of the lake in the [19]40s, which I guess created a corridor around the margin of the lake and had some impact over that time on the ecological status of the shoreline and associated margins of the lake. So my understanding was that there was an agreement reached between ECNZ and DOC to mitigate that effect and to contribute funding toward a number of aspects, including kiwi recovery and a number of other ecological species around the lake, and vegetation as well. So that’s broadly my understanding of that agreement.¹¹⁰⁴

Claimant counsel raised the issue of who should have received and administered payments in mitigation of historical damage: DOC or the resource-owners who suffered the damage? Ms Hickman replied that she was not sure but that the

1098. Hickman, brief of evidence (doc L11), p 14

1099. *Ibid*, p 20

1100. Canvin, brief of evidence to Hawke’s Bay Regional Council, pp 4, 10 (Hickman, supporting papers to brief of evidence (doc L11(a)), pp [17], [24])

1101. Peter Williamson, evidence given under cross-examination by counsel for Nga Rauru o Nga Potiki, first Crown hearing, 1 March 2005

1102. ‘Agreement between Genesis Power Limited and the Minister of Conservation’, 23 September 1999 (Williamson, attachments to brief of evidence (doc L10(a)), attachment M)

1103. Electricity Corporation of New Zealand, ‘Waikaremoana Power Scheme: Assessment of Effects on the Environment’, April 1998, p 86

1104. Tracey Hickman, evidence given under cross-examination by counsel for Wai 144 Ngati Ruapani, first Crown hearing week, 28 February 2005

damage to be mitigated was ongoing, and DOC was responsible for managing the national park.¹¹⁰⁵

In any case, according to Ms Hickman, the working party reached consensus in 1998 over all issues except for the management of lake levels.¹¹⁰⁶ Here, the primary clash was between Electricorp and DOC. The department wanted to confine Electricorp more tightly within the set limits, so as to stabilise the lake and prevent further damage by lake levels going too high or too low. Electricorp would have to discharge water earlier, thus preventing increased erosion and damage to fauna in the littoral zone. DOC also wanted an absolute prohibition on lowering the lake below the set minimum, which had previously been permitted in times of electricity shortage. Electricorp suggested that shoreline profiles and vegetation were gradually adapting to the current operating range, and so the tighter limits would actually start a new cycle of erosion.¹¹⁰⁷

This issue was still unresolved in April 1998, when Electricorp applied to the Hawke's Bay Regional Council for the 45 consents necessary to operate the Waikaremoana power scheme. But further discussions between DOC and Electricorp resulted in agreement before the regional council held its hearings. In essence, Electricorp agreed never to discharge water from the lake once it reached the minimum level or fell below that level. It also agreed to mandatory discharge at prescribed rates at the upper level, which would begin as soon as the lake reached the maximum limit and would increase if the lake rose higher. Under the previous (1986) conditions, there had been a 'buffer': compulsory discharge had not been required until the lake rose two feet above the maximum, and there had been no prescribed rates of discharge. Electricorp also agreed that it would manage water levels so that – 'insofar as this is practicable' – the lake never went outside the upper or lower limits. In turn, DOC conceded that Electricorp should be left to manage this for itself, reporting any infringements within 24 hours. But Electricorp agreed that if any avoidable 'excursions' were allowed within the next five years, then it would submit to prescribed mandatory discharges even before the lake reached the upper limit.¹¹⁰⁸

This tight control of the water levels so as to minimise erosion and further harm to the littoral zone was a goal supported by Maori. In his evidence for DOC, Peter Williamson understood that Maori had shared 'common concerns' with his department in the consents process: 'the wellbeing of the environment, the wellbeing of the lake edge, potential erosion issues, [and] general common concern for the ecological issues inherent in having a power scheme, and the water rising and falling.'¹¹⁰⁹ DOC had also known of Maori spiritual concerns, including the effects

1105. Ibid

1106. Hickman, brief of evidence (doc L11), p 14

1107. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 231–232

1108. Canvin, brief of evidence to Hawke's Bay Regional Council, pp 14–15 (Hickman, supporting papers to brief of evidence (doc L11(a)), pp [28]–[29])

1109. Williamson, evidence given under cross-examination by counsel for Nga Rauru o Nga Potiki, first Crown hearing, 1 March 2005

of the scheme on the taniwha Haumapuhia, but those had not figured in its objections to the consents.¹¹¹⁰ As far as we are aware, the lake's legal owners (the two trust boards) were satisfied with what DOC had achieved in respect of lake levels. As Electricorp's project manager noted, the boards made no submissions to the regional council, neither supporting nor opposing the consents.¹¹¹¹

As part of developing the conditions for its consents, Electricorp agreed to annual monitoring of shoreline erosion, and, as noted earlier, it pledged \$1 million (over 10 years) for DOC projects around the lake.¹¹¹² It undertook to remedy or mitigate any adverse future effect, which would include any actual or potential erosion.¹¹¹³ Also, in order to restore lost cultural and recreational uses, conditions were agreed to restore 'residual flows' to assist 'native fish passage below a number of WPS structures'.¹¹¹⁴ An 'Eel Passage Management Plan' was developed in consultation with Maori, to capture eels and release them above the artificial obstacles, and to research 'downstream passage for eels'.¹¹¹⁵ Maori supported this plan, in the hope of restoring the natural cycle of the eels. It was not considered entirely satisfactory because it only got eels up – and not back down – the rivers: 'they have yet to get the whole cycle sorted out'.¹¹¹⁶ This plan related to the rivers, not the lake itself.

The consultation process appeared to have satisfied almost all Maori groups, and there were few objections during the resource consents hearing. The exceptions were Vern Winitana (on behalf of the Wai 144 Ngati Ruapani claimants and the trustees of Te Kopani and Heiotahoka reserves) and Wayne Taylor. The Te Moana o Waikaremoana Trust also objected, but its objection was withdrawn after further consultation with Electricorp.¹¹¹⁷

Vern Winitana did not refer to these matters in his evidence to the Tribunal, and Wayne Taylor was not a witness in our inquiry. Dr Cant provided the following summary and analysis of their objections:

Vern Winitana and Wayne Taylor raised a range of Maori concerns, some addressing the legality of the ECNZ position and others the practicalities of kaitiakitanga

1110. Williamson, evidence given under cross-examination by counsel for Nga Rauru o Nga Potiki, first Crown hearing, 1 March 2005

1111. Canvin, brief of evidence to Hawke's Bay Regional Council, p 20 (Hickman, supporting papers to brief of evidence (doc L11(a)), p [34])

1112. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 233

1113. Canvin, brief of evidence to Hawke's Bay Regional Council, pp 21–22 (Hickman, supporting papers to brief of evidence (doc L11(a)), pp [35]–[36])

1114. Hickman, brief of evidence (doc L11), p 14

1115. Canvin, brief of evidence to Hawke's Bay Regional Council, p 11 (Hickman, supporting papers to brief of evidence (doc L11(a)), p [24])

1116. James Anthony Waiwai, brief of evidence, no date (doc H14), p 25. Tracey Hickman noted that the eel management plan required a mechanism for safe downstream passage to be developed within 10 years: Hickman, brief of evidence (doc L11), p 19.

1117. Canvin, brief of evidence to Hawke's Bay Regional Council, pp 18–25 (Hickman, supporting papers to brief of evidence (doc L11(a)), pp [31]–[39])

and resource management. To begin with, Winitana noted that the lakebed hydro-electric works had never been legalised – a point that could also be raised relative to the Mangaone Diversion – and hence he argued that no resource consents should be granted until the settlement of the Wai-144 Treaty claim he had lodged for the Panekiri Tribal Trust. Winitana went on to raise issues to do with the extent of consultation with Ruapani landowners (notwithstanding the discussions with the Haumapuhia Waikaremoana Authority), and then addressed a number of very specific environmental issues including the lake level regime at Waikaremoana, the control of lake weeds, minimum flows and eel and fish passage in the affected watercourses, and impacts on water supply downstream from the Mangaone Diversion, and at Lake Whakamarino. Taylor's main concern, was that tangata whenua should have more say in assessing the consents, and that the 'true' tangata whenua had not been consulted. In August 1998 ECNZ obtained a legal opinion on the matters raised by Winitana and, on the basis that it did not own the Mangaone Diversion dam, withdrew four of the related consents.¹¹¹⁸

We would add to this summary that the importance of iwi deciding consents (rather than appearing as submitters) was also raised, as were issues about compensation, royalties for the use of water, and the protection of wahi tapu and important sites around the lake and its environs.¹¹¹⁹

As noted, Electricorp withdrew the four of its 45 applications related to the Mangaone diversion, which was then discontinued. Trainor Tait considered this a significant benefit.¹¹²⁰ DOC supported the remaining applications, and the Hawke's Bay Regional Council granted the 41 consents for a period of 35 years, subject to 'numerous conditions'. In relation to lake levels, Electricorp had to come up with procedures to avoid 'reverse seasonal periodicity', to record the level every 30 minutes, to provide detailed reports on any 'excursions', and to undertake surveys on shoreline vegetation (above water level) and shoreline morphology. These had to be reported annually to the two Maori trust boards, the regional council, DOC, and the Eastern Fish and Game Council. In respect of the issues of Treaty settlements and consultation, raised by Winitana and Taylor, the regional council 'made it clear that it could not take Treaty claims into account'. Also, the council was satisfied that adequate consultation had taken place 'with the appropriate Iwi parties'. Its own decisions, it said, had paid 'adequate regard' to kaitiakitanga and the principles of the Treaty.¹¹²¹ There were no appeals to the Environment Court.¹¹²²

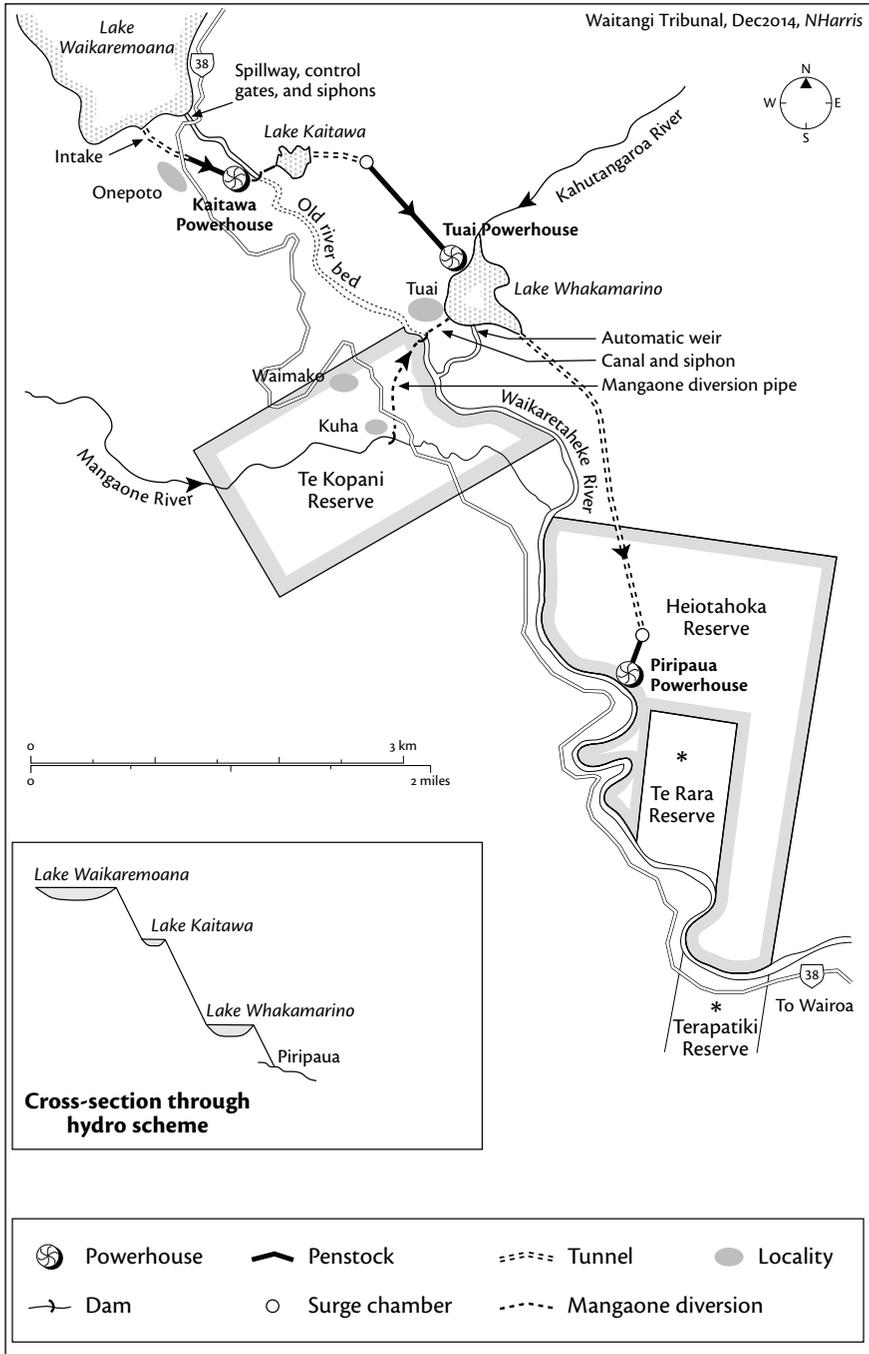
1118. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 234

1119. Canvin, brief of evidence to Hawke's Bay Regional Council, pp 7, 19–25 (Hickman, supporting papers to brief of evidence (doc L11(a)), pp [7], [19]–[25])

1120. Tahuri o Te Rangi Trainor Tait, brief of evidence, 18 October 2004 (doc H29), p 20

1121. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 235

1122. 'Agreement between Genesis Power Limited and the Minister of Conservation', 23 September 1999 (Williamson, attachments to brief of evidence (doc L10(a)), attachment M)



Map 20.3: Lake Waikaremoana hydro scheme

In essence, iwi in 1998 had to live with the permanent alteration of the lake and its ongoing effects, but these would now be ‘mitigated’ (although not compensated). Also, all parties – especially Electricorp, DOC, and the trust board-lessors – would monitor things closely and work hard to prevent any new or avoidable damage to the lake and its ecology. We are impressed with the effort undertaken to consult Maori groups and devise consent conditions to address some of their concerns about how the lake was being used, and the harmful effects on their taonga. None of the claimants appearing before us have made submissions criticising the consents process.

But all was not as well as might have seemed from the relative lack of objections, and the extensive consultation and solutions worked out by Electricorp and the working party. In early 1998, while consultation was still in process, a group of Maori occupied the lakebed. Supported by Bill Waiwai, the last surviving signatory of the lease,¹¹²³ the occupiers claimed that they were re-entering their land because the Crown had failed to meet the conditions of the lease.¹¹²⁴ The occupation, and the ministerial inquiry that followed, exposed deep concerns and grievances about the lake, which the consultation process had not solved. Trainor Tait called them ‘deep rooted scars.’¹¹²⁵ The many points raised by Vern Winitana and Wayne Taylor, especially about the need to settle Treaty grievances, would not go away simply because Electricorp was not responsible for resolving them.

As we will discuss later, issues of authority and ownership were paramount for many of the occupiers and their supporters. But there also very specific concerns about the environment, erosion, and the fact that the permanent lowering of the lake had had long-term, ongoing effects on the lake and its people – effects which could not be ‘mitigated’ by the kinds of solutions devised in the resource consents process.¹¹²⁶ As James Waiwai put it:

The Power Dams have had a huge effect on our people. The effects are still seen today in their descendants. People here had received little or no benefit from these schemes – there’s so much unemployment. Our community has had our backyard ruined, we’ve paid the environmental price, and we’ve received nothing in return.¹¹²⁷

In respect of the specific complaint about erosion and lake levels, the ministerial inquiry understood it to be a present-focused concern and reported accordingly, recommending that it be dealt with through RMA processes:

1123. Anaru Paine, brief of evidence, 18 October 2004 (doc H39), p 10

1124. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 236

1125. Tait, brief of evidence (doc H29), p 20

1126. Joseph Takuta Moses, brief of evidence, 18 October 2004 (doc H15), pp 6–7; Paine, brief of evidence (doc H39), pp 5–12; ‘Joint Ministerial Inquiry – Lake Waikaremoana’, 27 August 1998 (doc H13), pp 7–8

1127. James Waiwai, brief of evidence (doc H14), p 25

Allegation: ‘Erosion’ – It is alleged by reason of its management of the lakeshore the Department of Conservation has been allowing erosion to occur in a way that could have been avoided.

Department of Conservation Response: The Department of Conservation agrees that lakeshore erosion is occurring in a number of places at an excessive rate. The principal cause of this is the Lake having been lowered below its natural operating range, and variations and fluctuations in range that now occur as a result of the use of the Lake as a hydro electricity reservoir.

Our Comment: We understand that erosion can be minimised if the present mean lake level and fluctuation range is kept constant. The Electricity Corporation of New Zealand Limited as the manager of water levels at Lake Waikaremoana should be further encouraged by the participation of tangata whenua and the Department of Conservation in Resource Management Act 1991 processes, to take steps to avoid, mitigate or remedy the erosion that is occurring, particularly at Mokau Landing and Home Bay.¹¹²⁸

While this did not remove the underlying grievance, Dr Cant suggested that the management of lake levels has been ‘fairly uneventful since 1998’ – in contrast to DOC’s management of other issues.¹¹²⁹ The monitoring set up under the resource consents shows that Electricorp and its successor, Genesis, have ‘generally met the standards’ set by the regional council. By 2004, the time at which Dr Cant’s evidence was prepared, Genesis had been ‘cautious’ in its operating range and there had been no ‘excursions’ outside a high rainfall event in 2001. This meant that the lake was being managed carefully within the tight constraints set for it in 1998. As a result, Genesis had even come in for criticism from the Government in 2002, for not storing enough water in the lake during the energy crisis of that year.¹¹³⁰ Tracey Hickman emphasised Genesis’ ‘excellent’ compliance record, and noted that the 2001 event was managed as required by the mandatory discharge of water as soon as the lake reached the maximum level.¹¹³¹ But, according to Dr Cant, the period between 1999 and 2003 had been less positive in respect of natural seasonal levels.¹¹³²

20.10.3.5 What have been the effects for the claimants?

Although it is difficult to untangle some of our claimants’ concerns from wider issues about the impacts of the power scheme on outflowing rivers and the Waikaretaheke catchment, we note that they were distressed about the specific

1128. ‘Joint Ministerial Inquiry – Lake Waikaremoana’, 27 August 1998 (doc H13), pp 7–8

1129. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 240

1130. Ibid, pp 240–241

1131. Hickman, brief of evidence (doc L11), pp 17–18

1132. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 241

effects on their taonga, Lake Waikaremoana. Kuini Beattie (also known as Kui Wano) expressed to us in most eloquent terms the effects of manipulating the lake's level for its kaitiaki. She told us that tampering with the water in this way is a form of contamination, which can result in sickness or even death for the kaitiaki. Harm to the wairua of the lake is seen as poisoning the people's mother (the lake), and the mana and mauri of the lake's guardians are inevitably affected by it. In particular, Mrs Beattie stressed that manipulating lake levels for electricity is symptomatic of a larger cultural disjunction: it is about *managing* rather than *car-ing for* waterways.¹¹³³

Other witnesses were also concerned about ecological effects, including shoreline erosion, the reduction of aquatic life (especially in the near-shore zone), the invasion of the new shoreline by non-native plants and pests, and the unnatural state of the lake and its waters.¹¹³⁴ The ancestral landscape has been permanently altered; not only are there now a road, tracks, and buildings on land that used to be covered by water, but Patekaha Island has ceased to be an island and is now a peninsula.¹¹³⁵ Wahi tapu have also been affected on the lake's shores, although details were not shared with the Tribunal. As claimant counsel noted, witnesses such as Dr Rangimarie Pere struggled with whether to reveal the locations and ancient names of wahi tapu, for fear that the information could be co-opted or misused.¹¹³⁶

In their report for the Tribunal, Dr Cant's research team concluded that the key effects of abruptly and permanently lowering the lake were:

- ▶ serious shoreline erosion;
- ▶ invasion of parts of the newly exposed lakebed by weeds and species which provide an ideal habitat for mustelids, which has increased the threat to Waikaremoana kiwi and other native birds;
- ▶ reduction of nearshore habitat; and
- ▶ reduction of aquatic life.

The shoreline and aquatic life will eventually become more stable once the lake has been held at a lower level for sufficient time, but the reduction of near-shore habitat (and its effects) appears to be permanent or at least very long term.¹¹³⁷ Claimant counsel concluded that 'the Crown has failed to protect the lands, waters and areas of special ancestral importance of Waikaremoana Maori'

1133. Beattie, brief of evidence (doc B30), pp 6–7

1134. Moses, brief of evidence (doc H15), pp 6–7; Waiwai, brief of evidence (doc H14), pp 20–21, 23–25; Taylor, brief of evidence (doc H17), p 13; Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 32–38, 206–213

1135. Dr Rangimarie Pere, under cross-examination by counsel for Wai 36 Tuhoe, Waimako Marae, Tuai, 18 October 2004 (transcript 4.11, p 51); counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 65

1136. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 200; see also Coombes, 'Preserving a "Great National Playing Area"' (doc A133), pp 145–149.

1137. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 206–213

from devastation and harm in the process of developing and using the lake for hydroelectricity.¹¹³⁸

Under cross-examination by counsel for Nga Rauru o Nga Potiki, the regional conservator, Peter Williamson, explained DOC's view that ecological harm has been done to the lake and its catchment, and that it must be redressed. In referring to the payment of \$1 million over 10 years, which was the subject of a formal agreement with Genesis in 1999, Mr Williamson stated:

We made a point [during resource consent consultation] that the rising and lowering of the lake, and, indeed, the original lowering of the lake, had contributed, in our view, to detrimental ecological conditions for some of the species in that catchment. And we were proposing that we would embark upon a plan to restore the ecosystem of the lake, and Genesis, at the end of the day, were happy to contribute to that as a contribution to that ecosystem restoration.¹¹³⁹

In our inquiry, the Crown was not really in a position to deny that the lake has been significantly altered for hydroelectricity purposes, or that this has had damaging effects. Crown counsel commented, 'Clearly, the Kaitawa station had an impact on lake levels.' The Crown also accepted that its actions have permanently lowered the lake: 'In general, the lake level has remained approximately five metres below the natural lake level since 1946.'¹¹⁴⁰ Initial impacts were: the 'reduction of fish food and fish numbers due to lower lake levels'; fish getting caught in the intake pipes; 'erosion of the exposed lakebed'; and the destruction of freshwater shellfish.¹¹⁴¹ The Crown also accepted that lower lake levels in the 1950s 'are thought to have affected access to spawning grounds' for trout and bullies.¹¹⁴²

The situation varied in the 1950s and 1960s. There were some favourable years for fishing, but the Crown accepted that shoreline erosion was happening – in part, because of major draw-downs at that time. In response to Maori complaints about the effects of low lake levels on fishing, a Government investigation in the 1960s found that alterations and fluctuations in the lake levels had created problems for fisheries, but that the trout fishery was nonetheless capable of sustaining a greater amount of angling. One long-term effect, the Crown conceded, has been the growth of new forms of shoreline vegetation around the lake edge, which has created an 'excellent habitat' for animals that prey on native birds, including kiwi.¹¹⁴³

1138. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), p 54; see also counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 226–229.

1139. Peter Williamson, evidence given under cross-examination, first Crown hearing, 1 March 2005

1140. Crown counsel, closing submissions (doc N20), topic 28, p 14

1141. *Ibid*, pp 14–15

1142. *Ibid*, p 15

1143. *Ibid*, pp 15–16

Whites Aviation Ltd (ATL, Whites Aviation Collection, WA-21820-F)



Hydroelectric power works in the Kaitawa area, with Lake Waikaremoana behind, 1949. Work on the Kaitawa phase of the hydro scheme began in 1943, and the lake level was permanently lowered in 1946. The impact of this on the taonga, and the subsequent raising and lowering of the water level, has been immense. There has been a long-term reduction of nearshore habitat and fisheries, excessive, long-term erosion of the shoreline, and exposure of wahi tapu. The Waikaretake and its tributaries, the connection between the lake and sea, was also impacted, with the drying-up of the upper river bed for much of the year, a loss of habitat and mahinga kai, and the stopping of fish migration, especially of eels.

Relying on Dr Cant's evidence, the Crown suggested that the lake's level 'has been fairly stable from 1965 onwards.' Even so, Crown counsel accepted that the power scheme continues to have a variety of effects on the lake. But the power scheme can only keep operating today if it has the necessary resource consents under the RMA. In the Crown's submission, Electricorp conducted a long and thorough consultation process in the 1990s, with Maori groups represented on the working party and participating through other meetings and discussions. As a result, options for mitigation or remedy were developed cooperatively with Maori and others, and the resource consents were granted accordingly. The regional council was satisfied that the conditions to mitigate adverse effects had been agreed with stakeholders, and that adequate consultation had occurred with 'appropriate iwi parties.' The council monitors compliance and undertakes regular inspection, including monitoring of shoreline erosion.¹¹⁴⁴

1144. Ibid, pp 16-17

Based on this view of the evidence, Crown counsel submitted that there is no longer an issue for the Tribunal to be concerned about:

Clearly the Tuai, Piripaua, and Kaitawa power stations have had an effect on Lake Waikaremoana, perhaps most significantly on lake levels. The principal consequential effects have been on native and introduced fish stocks, and on shoreline erosion.

However, these issues are currently being managed by Genesis Energy with input from tangata whenua and other groups.¹¹⁴⁵

In respect of past damage to the lake, counsel summarised the Crown's argument as 'Historically, whatever negative impacts the Waikaremoana power scheme had on the local environment must be assessed against the significant benefits its generation of electricity has provided to the country.'¹¹⁴⁶ In other words, the Crown saw no problem – in Treaty terms or otherwise – if the lake and its people paid an environmental price for the nation's power, now that present-day effects are being managed more appropriately under the RMA.

We will return to these arguments later in the chapter, when we analyse these matters in light of Treaty principles and make our findings.

Next, we consider the second specific issue of great importance to the claimants: the claim that the Crown has allowed the lake to become infested with giardia and exotic weeds, and polluted by human waste, despite its supposed protection as part of the national park.

20.10.4 Pollution and contamination

In some claimants' view, the Crown's management under the lease has allowed the lake to become infested with giardia and exotic weeds, and polluted by sewage. That is the opposite, they said, of what they wanted and expected when they leased the lake for a national park in 1971. Lorna Taylor told us:

Successive Government action has led to contamination of our waters, controlling and changing the flows, and opening Waikaremoana up for general public usage has introduced boats, weeds, giardia, and cryptosporidium. The uncorrupted relationship we once had is under constant threat as people that are not of its water violate our mauri life force.¹¹⁴⁷

As the primary manager of the lake since 1990, most of the blame has been focused on DOC. Indeed, many witnesses believed that DOC had been administering the lake long before the department was created, reflecting a degree of continuity between DOC and its predecessor, Lands and Survey. Matekino Hita explained the 1998 occupation (or noho whenua) in the following way:

1145. Crown counsel, closing submissions (doc N20), topic 28, p 17

1146. Ibid

1147. Taylor, brief of evidence (doc H17), p 13

I was one of the protestors involved in an occupation here a few years ago. We were just trying to convey to the Department of Conservation that they had breached their obligations. There were many obligations that they breached and they were having a significant, negative impact on our lake. They were using poisons, toxins and allowing sewage to be distributed directly into the lake. They had also affected the level of the water in the lake; and had deliberately lowered it.¹¹⁴⁸

There was a widespread belief that DOC had been using 1080, which might enter the lake, despite DOC's denial at the 1998 ministerial inquiry that it had ever used this poison in the lake catchment.¹¹⁴⁹ This is indicative of a degree of underlying mistrust which persisted at the time of our hearings, despite improved relationships in recent years.

The Tribunal commissioned technical research to examine the claimants' concerns about the contamination of the lake by giardia, exotic weeds, and sewage. Dr Cant's team concluded:

- ▶ Giardia is present in almost all water bodies, and it is spread by animals and birds as well as human beings: there was virtually no way to prevent its introduction to Lake Waikaremoana, even if sewage from Lake House, 'freedom campers', and other national park visitors had been stopped from entering the lake.¹¹⁵⁰
- ▶ Exotic weeds may have been present in the lake since the nineteenth century but the primary threat to native aquatic species was quite recent – *Lagarosiphon major*, a very invasive noxious weed. It was most likely spread by boats and fishing equipment, and was first discovered in the lake at Rosie Bay in 1999. After its discovery, DOC implemented a very aggressive policy of removal and monitoring, which appears to be succeeding. Signage at camping and boating facilities warns that all equipment must be checked before use in the lake.¹¹⁵¹
- ▶ For 50 years, sewage was deposited in the lake from septic tanks at Lake House and other visitors' sites around its shores. Efforts to improve this situation in the 1970s did not succeed until 1980, after the closure of Lake House and the upgrading of sewerage facilities at Home Bay, but sewage has continued to leak into the lake nonetheless. This was a major grievance for local hapu at the time of the 1998 occupation. Before the late 1980s, the authorities resisted public participation, including that by Maori, in decisions about

1148. Matekino Hita, brief of evidence, 11 October 2004 (doc H58), p10

1149. 'Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), p7

1150. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp133–136; Garth Cant, Robin Hodge, Dr Vaughan Wood, Leanne Boulton, and Craig Innes, 'The Impact of Environmental Changes on Lake Waikaremoana and Lake Waikareiti, Te Urewera: The Evidence of Garth Cant and Robin Hodge' (commissioned summary report, Wellington: Waitangi Tribunal, [2004]) (doc H11), pp12–14

1151. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp136–142; Cant, Hodge, Wood, Boulton, and Innes, 'Evidence of Cant and Hodge' (doc H11), pp13–14

these facilities. But that situation has changed and – with ongoing sewage leaks an admitted problem – new prevention measures were being developed by DOC and the Waikaremoana Maori Committee in 2004, at the time of our hearings.¹¹⁵²

20.10.4.1 Exotic weeds

We begin our analysis with the issue of exotic weeds. The evidence available to the Tribunal does not establish when or how different varieties of weeds were introduced to Lake Waikaremoana or what effects they have had on the lake's ecology.

As a general point, it has been acknowledged that native weeds are not usually problematic, whereas introduced weeds can overwhelm and choke waterways and their fisheries. According to Dr Cant's team, the main species of exotic weed in Lake Waikaremoana are Canadian pondweed (*Elodea canadensis*); curly pondweed (*Potamogeton crispus*); and water buttercup (*Ranunculus tricophyllus*).¹¹⁵³

All three species are 'well established', with *Elodea* dominant among these exotic plants. *Elodea* may have been introduced with trout at the end of the nineteenth century, since its introduction to New Zealand came with fish ova in the 1860s.¹¹⁵⁴ Alternatively, it may have been introduced as a result of a fish bowl at Lake House.¹¹⁵⁵ Dr Cant considered it 'likely' that all three weeds have been in the lake since the nineteenth century, well before the establishment of the national park.¹¹⁵⁶

Clearly, the national park ethos and strategies required the removal of exotic species wherever possible, but we received no evidence from DOC witnesses as to what – if anything – the park's managers have done over the years to control or remove these species. According to the 2003 management plan, native plants are dominant in the lake and DOC had no strategies to remove the existing exotic weeds. This contrasted with the control measures in the plan for excluding or eradicating any new, 'more vigorous' species of weed.¹¹⁵⁷ In 1998, DOC officials advised the ministerial inquiry that *Elodea* (the most common species) was not a threat

1152. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 92–119; Cant, Hodge, Wood, Boulton, and Innes, 'Evidence of Cant and Hodge' (doc H11), pp 7–10, 33–35; Robin Hodge, answers to Crown questions of clarification, [2004] (doc H65), p 3. For the question of public participation and Maori ability to have input, see also Coombes, 'Preserving a "Great National Playing Area"' (doc A133), p 368 (Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 109).

1153. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 136; Cant, Hodge, Wood, Boulton, and Innes, 'Evidence of Cant and Hodge' (doc H11), p 13

1154. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 136

1155. Lambert, brief of evidence (doc H57), p 9

1156. Cant, Hodge, Wood, Boulton, and Innes, 'Evidence of Cant and Hodge' (doc H11), p 13

1157. Department of Conservation East Coast/Hawkes Bay Conservancy, *Te Urewera National Park Management Plan, 2003* (Gisborne: Department of Conservation East Coast/Hawkes Bay Conservancy, 2003), pp 18, 23, 25, 71–72

to native plants or fish, and that it was too widespread for any practical chance of removing it.¹¹⁵⁸ Riripeti Haley-Paine, however, told the ministerial inquiry that ‘aquatic weed had become overwhelming in and around Lake Waikaremoana; that locals could recall a time when it did not exist; and that it was rampant in bays like Home Bay where boats were moored for long periods.’¹¹⁵⁹

Dr Cant’s evidence focused on *Lagarosiphon major*,¹¹⁶⁰ which appeared to be a very significant threat in Lake Waikaremoana. It is a noxious weed and can rapidly overwhelm an ecosystem. Once introduced, it is extremely difficult to eradicate. *Lagarosiphon* was first discovered in Rosie Bay in 1999, as a result of DOC’s regular diving checks. As soon as it was discovered, DOC took a very aggressive approach to eradicating it. Divers removed it by hand (‘by the truckload’) from Rosie Bay, and then regular checks were carried out to ensure that any new presence was immediately removed.¹¹⁶¹ By the time of our hearings in 2005, *Lagarosiphon* appeared to have been eradicated but ongoing monitoring showed occasional plants from time to time. Evidence has established that the plant is not spread by waterfowl: it appears that boats and fishing nets are to blame. In the claimants’ view, *Lagarosiphon* (and other weeds) have got into the lake because national park visitor activities – in this case boating – have been poorly managed by the Government.¹¹⁶² Dr Cant commented:

The department undertakes an education programme at the lake. Signs are in place at boat ramps and at Waikareiti to warn users to check their equipment. Notices in the motor camp kitchen, store and Aniwanuiwa visitor centre provide information about the main weed threats.¹¹⁶³

Peter Williamson advised that DOC can close parts of the lake to boating if necessary, to help control and eradicate any new outbreak.¹¹⁶⁴ He reassured claimant counsel that DOC would not use chemicals in the lake to combat *Lagarosiphon*.¹¹⁶⁵

Although some claimant witnesses mentioned a general concern about aquatic weeds, no one spoke in detail on the matter.¹¹⁶⁶ Nor did claimant counsel make

1158. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 139

1159. *Ibid*, p 138

1160. *Lagarosiphon* is the common name as well as the Latin name for this species.

1161. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), pp 136–139, 141; Peter Williamson, under cross-examination by counsel for Nga Rauru o Nga Potiki, 1 March 2005

1162. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), pp 136–139, 141

1163. *Ibid*, p 138

1164. Williamson, brief of evidence (doc L10), p 31

1165. Peter Williamson, under cross-examination by counsel for Nga Rauru o Nga Potiki, 1 March 2005

1166. See, for example, Neuton Lambert, brief of evidence (doc H57), p 9.

any closing submissions about exotic lake weeds. Clearly, the Waikaremoana Maori Committee and others were worried by the discovery of *Lagarosiphon*, but, according to the evidence of Dr Cant, Waikaremoana hapu were satisfied with the way that DOC was handling that threat.¹¹⁶⁷

It is difficult, therefore, to address the issue of aquatic weeds at any but the most general level. The main exotic species have most likely been present in the lake since the nineteenth century, long before the establishment of the national park in 1954 or the leasing of the lake in 1971. DOC's view is that these aquatic weeds are not dominant, that they pose no threat to native species (or, presumably, the ecology of the lake), and that it would be impractical to try to remove them at this late stage. We received no technical evidence or submissions on these points. The predominant issue now appears to be protecting the lake from new, more invasive species. The claimants did not provide us with evidence or submissions on that issue. Dr Cant's team suggested that, at the time of our hearings, DOC was managing this threat capably and had responded successfully to the discovery of *Lagarosiphon* in recent years. Waikaremoana hapu were reportedly satisfied with DOC's efforts to eradicate this threat. Dr Cant's and Dr Hodge's evidence on this matter was not challenged in cross-examination, other evidence, or submissions.

This leaves us with the question of authority and decision-making. Peter Williamson told us that, in respect of DOC's measures to control and prevent invasive aquatic weeds, 'We have kept the Waikaremoana Maori Committee informed of all actions to date and will continue to do so.'¹¹⁶⁸ Here, perhaps, is a key point. Who is to decide whether boating should be restricted so as to prevent the spread of exotic weed, and how is that decision to be made? The claimants in our inquiry wanted to be part of all such decision-making in respect of the lake and the national park; they did not wish merely to be informed. According to Glenn Mitchell, who was interviewed by Cant's research team in 2004, the control of *Lagarosiphon* had become one of the issues 'discussed' by DOC and hapu leaders through the Aniwanuiwa model of consultation and decision-making.¹¹⁶⁹ We will return to that point below.

20.10.4.2 Pollution by sewage

Many claimant witnesses expressed their abhorrence at the pollution of the lake by sewage, which made it impossible for them to use the affected areas as a food source: treating their taonga as a toilet bowl, as Anaru Paine put it.¹¹⁷⁰ The most detailed account came from James Waiwai, who explained that the problem had been of concern for decades:

1167. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 139

1168. Williamson, brief of evidence (doc L10), p 31

1169. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 139

1170. Paine, brief of evidence (doc H39), p 7

The sewerage problems have been around for years – I’ve heard stories from the koroua that back in the 1950s and 60s grey water ran straight out there and raw sewerage would be pumped straight into the Lake. Sewerage would be tipped on to the bank, and the run off from that would make its way to the Lake as well.¹¹⁷¹

Dr Cant’s evidence confirmed that partially treated sewage from septic tanks flowed into the lake from the 1920s to the 1970s, ‘through the commercial operations of various Crown agencies relating to tourism.’¹¹⁷² At first, Lake House managed to operate without discharging into the lake, but by the late 1920s or 1930s it was piping effluent directly into the water. The other main source was the motor camp in Home Bay. Here, again, discharge into the lake was avoided at first, by the use of Kemico toilets. But from the 1930s, the camp used a septic tank with a pipe which ran into the lake. By the beginning of the 1970s, the Lake House and motor camp facilities were so overloaded that raw sewage was being pumped into the lake. The Health Department threatened to close Lake House for this reason in the summer of 1970–71. In addition, there were many huts with long drops, and some visitors who simply used the lake shore.¹¹⁷³

Dr Cant and Dr Hodge commented, ‘It has not been possible to judge whether the Crown should, or could, have provided more adequate systems at the time prior to the 1970s.’¹¹⁷⁴ But at the beginning of the 1970s, when the lease was signed, the Government recognised that there was a serious problem which needed to be addressed. The proposed remedy in 1971 was ‘a pumping station to a soakage area’, at a likely cost of \$15,000. Lake House was closed in 1972 but the motor camp continued to discharge sewage into the lake until 1980. The main reason for the delay in fixing the problem seems to have been Cabinet’s decision in 1972 to halt the planned redevelopment of tourist accommodation at the lake, in favour of allowing private enterprise the opportunity.¹¹⁷⁵ As we discussed in chapter 16, there was a bid from John Rangihau and Rodney Gallen to establish a new tourist facility and to re-establish accommodation for Maori owners of the Waikaremoana reserves. This bid was rejected on the grounds that new buildings must not be established on the lake shore – inexplicable, since the whole point for the Government was to redevelop or substitute for Lake House and the motor camp (see section 16.6.2).¹¹⁷⁶

From 1972 onwards, there were debates between the Tourism and Health Corporation (which owned the visitor facilities), Te Urewera National Park Board, and the Wairoa council about who should own and develop new facilities, and what standard of sewage treatment and disposal was acceptable. In 1975, the

1171. Waiwai, brief of evidence (doc H14), p 18

1172. Cant, Hodge, Wood, Boulton, and Innes, ‘Evidence of Cant and Hodge’ (doc H11), p 33

1173. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), pp 101, 247–248

1174. Cant, Hodge, Wood, Boulton, and Innes, ‘Evidence of Cant and Hodge’ (doc H11), p 8

1175. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), pp 101–102

1176. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), pp 57–59

Wairoa council ruled out any further use of septic tanks. In the meantime, sewage continued to flow into the lake from the camping grounds. Dr Mylechreest's studies suggested that nutrient enrichment was encouraging the growth of exotic weed and changing the natural character of the lake even further. By the mid-1970s, the Government had rejected all private bids to develop tourist facilities and was once again planning its own revamp of the motor camp. The park board preferred the permanent closure of Lake House, and the restriction of visitor accommodation to Home Bay, and this view prevailed. After a series of further delays, work finally began on building a new sewage treatment plant in 1979, which was completed and became operational in 1980.¹¹⁷⁷

The new plant consisted of 'a holding tank and pump in the camping ground, an oxidation pond half-a-kilometre along the lake edge from the camp, and an irrigation system to spray treated effluent onto forested ground on the Ngamoko Range.'¹¹⁷⁸ Glenn Mitchell, in his evidence for DOC, clarified that the treated effluent is piped two kilometres away from the lake, where it is dispersed by sprinklers. Tree roots absorb and finally dispose of it 'via their leaves in the process of photosynthesis.'¹¹⁷⁹ 'A visitor to the sprinkler field site', he told us, is 'unlikely to notice anything different to the surrounding vegetation or forest floor.'¹¹⁸⁰ Testing at Rosie Bay, the closest part of the lake to the distribution site, has confirmed that effluent is not reaching the lake by means of any underground water movement.¹¹⁸¹

Dr Cant and Dr Hodge concluded that 'Until the erection of the new treatment plant in 1979–80, the Crown did not take every precaution to avoid pollution of Lake Waikaremoana.'¹¹⁸² Also, the Maori people of Waikaremoana had been excluded from all input to decisions about visitors' facilities and sewerage schemes at that time, unless they were able to have a say through the park board.¹¹⁸³

Maori concerns did not disappear with the construction of the new sewerage system. From the mid-1980s, DOC began to replace all long drop toilets around the lake with sealed vault toilets, 'to avoid contamination and particularly to recognise the concerns of Tangata Whenua.'¹¹⁸⁴ This has proven a lengthy and costly exercise, which was not entirely completed by the time of our hearings. It involved the design and construction of a barge, special tanks, and also sealed dump stations for the use of visitors. In Glenn Mitchell's evidence, DOC shared hapu concerns about sewage and did its best to eliminate all possibility of contamination.¹¹⁸⁵

James Waiwai explained that the claimants' main concern was with the oxidation pond, which was installed close to the lake shore:

1177. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 102–107

1178. Cant, Hodge, Wood, Boulton, and Innes, 'Evidence of Cant and Hodge' (doc H11), p 33

1179. Glenn Mitchell, brief of evidence, 7 February 2005 (doc L9), p 5

1180. Ibid

1181. Ibid, pp 7–8

1182. Cant, Hodge, Wood, Boulton, and Innes, 'Evidence of Cant and Hodge' (doc H11), p 34

1183. Ibid

1184. Williamson, brief of evidence (doc L10), p 28

1185. Mitchell, brief of evidence (doc L9), pp 9–11

There is an oxidation pond only about 40 metres away from the shore of Lake Waikaremoana, hidden by the toetoe but seeping into our Lake. We've been concerned for many years about the closeness of the oxidation ponds to the Lake and the leakage that occurs.

We were concerned that the pond might crack, but DOC told us that the clay in the bottom of the pond would prevent that. Not long after that, in about 2000, DOC found a leak.¹¹⁸⁶

Ongoing concerns about sewage and pollution were a key motivator in the 1998 occupation. Dr Cant's team has reproduced material from Nga Tamariki o te Kohu submissions to the ministerial inquiry, showing their belief that the oxidation pond was leaking, that there were large cracks in the lining which might result in additional leaks, that erosion might cause the pond to collapse and spill into the lake, and that waterfowl were swimming in the uncovered pond and then in the lake.¹¹⁸⁷ DOC's 1989 management plan seemed to confirm that sewage was leaking into the lake from the oxidation pond.¹¹⁸⁸ Maori were also distressed at the pumping of treated effluent into the forest, and the use of the leased lakebed for sewerage and camping ground facilities. By this time, DOC had virtually finished replacing long drop toilets around the lake with sealed vault units, but there was concern that waste from these was transported across the lake by barge, with risks of contaminating the lake.¹¹⁸⁹ Overall, it appeared that nothing less than the transportation of all human waste out of the Waikaremoana district for disposal could ensure the safety of the lake from any contamination.

In 1998, the ministerial inquiry accepted DOC's assurances that the oxidation pond was not leaking, and was not at risk of leaking in the future. There was a concrete wave band designed to protect the pond from erosion – although cracks in the wave band did not carry a risk of leaks, they had nonetheless been repaired.¹¹⁹⁰ Dr Cant's team could find no information as to why DOC officials had changed their minds, since the statements made about leakage in the 1989 management plan.¹¹⁹¹ The ministerial inquiry concluded:

We are satisfied that the plant works efficiently and that contamination of nearby lake waters from the sewage treatment plant is not shown to be occurring.

1186. Waiwai, brief of evidence (doc H14), pp 18–19

1187. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 110–111

1188. Ibid, p 107; Department of Conservation, *Te Urewera National Park Management Plan, 1989–1999*, p 14

1189. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 108, 112–113

1190. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), pp 12–13; Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 113–114

1191. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 107

What DOC's *Te Urewera National Park Management Plan* Said in 1989

THE intensive use made of Lake Waikaremoana poses the problem of pollution. For example, in the Home Bay area scientific research . . . indicates that sewage enrichment of the lake waters has already occurred. Steps have been taken to correct this. A sewage scheme has been installed for the Motor Camp to divert effluent away from the lake. An oxidation pond is located next to Home Bay. The effluent is initially treated at Home Bay and then pumped out of the lake catchment over the Ngamoko Range to be dispersed by spray irrigation. . . .

In spite of a sewage scheme for Home Bay some of the anomalies in the bay's flora and fauna persist. An example of this is the expansion and increasing density of Elodea beds in Home Bay in comparison with the static growth patterns observed elsewhere in the lake . . . This means that some effects of the Home Bay pollution may be long term and that nutrient enrichment is still occurring on a reduced scale. For example, Vincent et al, (1980) noted high phosphate and ammonium values at concentrations expected for sewage, from a small discharge beneath the oxidation ponds into Home Bay. This suggests that there is leakage from the oxidation ponds . . .

Department of Conservation East Coast National Parks and Reserves Board¹

1. Department of Conservation East Coast National Parks and Reserves Board, *Te Urewera National Park Management Plan, 1989–1999* (Rotorua: Department of Conservation, 1989), p 14

The significance for tangata whenua of the contamination of the waters of the Lake with sewage effluent is of paramount significance and the Department should continually be alert to ensuring that its system is working efficiently, that pollution is not occurring and that technology upgrades are committed to as soon as they can be justified in terms of both capital and the importance of the Lake to Maori.¹¹⁹²

In 2000, DOC discovered that sewage was seeping out of the oxidation pond and had likely entered the lake.¹¹⁹³ Glenn Mitchell contacted James Waiwai and arranged for a joint inspection of the site with members of the Waikaremoana Maori Committee. Consultants AgFirst recommended immediate remedial action, as well as replacing the pond altogether. A 'joint DOC-hapu team' was formed to deal with the issue. It was agreed to install a soakage field and a submersible pump to recycle the leak back into the pond, which monitoring showed was a successful

1192. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), pp 12–13

1193. Mitchell, brief of evidence (doc L9), p 6

The Vexed Issue of the Emergency Outlet Pipe

The Home Bay sewage treatment system, installed in 1980, had a pipe running out into Lake Waikaremoana so that effluent could be discharged 'into deep parts of the lake in emergencies'.¹ The existence of this pipe, and whether or not it had actually been used, was a sore point between DOC and claimant witnesses in our inquiry. James Waiwai told us that he had not realised that the pipe existed until the Waikaremoana Maori Committee inspected the site of the oxidation pond leak in 2000. He found it difficult to believe DOC's assurances that the pipe had been unhooked back in 1996, and he was understandably appalled that, '[w]hen the sewerage pond overflows, it goes straight into our Lake'.² Glenn Mitchell, in his evidence for DOC, confirmed that the pipe had been disconnected in 1996. Although he could not be sure, Mitchell believed that the pipe had never been used, with the possible exception of in 1988 when Cyclone Bola caused extreme weather conditions.³

1. Department of Conservation East Coast National Parks and Reserves Board, *Te Urewera National Park Management Plan, 1989–1999* (Rotorua: Department of Conservation, 1989), p 14

2. James Anthony Waiwai, brief of evidence, no date (doc H14), p 19

3. Glenn Mitchell, brief of evidence, 7 February 2005 (doc L9), p 9

interim solution. DOC also finally agreed to relocate the pond away from the lakeshore. After investigating sites, the 'joint DOC-hapu team' decided that Okereru (the former Lake House farm), 400 metres from the lakeshore, was the safest option in all the circumstances. At the time of our hearings in 2005, plans to build the new oxidation pond and treatment plant were still in progress. James Waiwai appeared satisfied that local hapu had been properly involved in the decision-making on this matter.¹¹⁹⁴ The alternative of transporting all waste out of the district by truck was, as Te Ariki Mei and Reay Paku explained, simply not feasible.¹¹⁹⁵

In the meantime, further concerns about the existing oxidation pond had arisen: by 2004, DOC agreed that 'rapid erosion' posed a serious risk to the pond. The risk was considered so great that DOC officials could not wait for a process to determine Genesis' liability or to put remedial work out to tender. Instead, DOC immediately contracted for 'emergency works' to protect the pond from the effects of erosion in the interim. Genesis agreed to pay half the costs until its final

1194. Ibid, pp 6–9; Waiwai, brief of evidence (doc H14), pp 19–20; Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 114–116

1195. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 115–116

responsibility could be decided.¹¹⁹⁶ The claimants were critical of the time it took for DOC to accept that erosion was a significant threat, and were concerned that only a temporary fix had been made. To them, it appeared that DOC and Genesis were not taking the problems of erosion seriously enough in general, and that the focus in the 1990s on protecting sites at Home Bay had been too narrow.¹¹⁹⁷

20.10.4.3 *Giardia*

Closely related to the issue of sewage, some claimants expressed concern that drinking water has to be boiled, because of the presence of *Giardia intestinalis* in the lake. Dr Cant's research team reported: 'Members of Nga Rauru o Nga Potiki, in explaining that Waikaremoana was their lifeline, the source of their water at Tuai and the Wairoa, resented the need to boil it, which they had not done in the past.'¹¹⁹⁸

Giardia is a parasite which infects the intestines of humans, animals, and birds. It forms cysts, which are then excreted and can survive for months in cold water. Dr Cant and Dr Hodge explained:

Giardia can be transferred from person to person, by contaminated food, inadequately treated water, and poorly disposed human waste. It is also spread by animals and birds. Clinical manifestations of the disease include diarrhoea, nausea, lethargy, and weight loss.¹¹⁹⁹

For the claimants, giardia was closely connected to the contamination of the lake with sewage.¹²⁰⁰ Anaru Paine told us, 'Not only have they allowed our lake to be contaminated but so too the springs which are fed from it and many of us have experienced the explosive short term symptoms.'¹²⁰¹ The connection between giardia and pollution of the lake by human waste was one of the grievances in the 1998 lakebed occupation. Cant and Hodge summarised the issue as follows:

The presence of giardia was one cause in the 1998 lakeside occupation by Nga Tamariki o Te Kohu. Various Waikaremoana claimants allege that the Department of Conservation was responsible for giardia's introduction to the Waikaremoana environment through poor control of tourism. Included under this general heading are toilet facilities in private huts and camps, unthinking waste disposal by freedom campers

1196. Williamson, brief of evidence (doc L10), p 24; 'Signed Contract for Remedial Work at Lake Waikaremoana', 15 January 2004 (Williamson, attachments to brief of evidence (doc L10(a), attachment 0)

1197. Waiwai, brief of evidence (doc H14), pp 20–21; see also James Waiwai, under cross-examination by Crown counsel, Waimako Marae, Tuai, 21 October 2004 (transcript 4.11, pp 171–172)

1198. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 135–136

1199. Cant, Hodge, Wood, Boulton, and Innes, 'Evidence of Cant and Hodge' (doc H11), p 13

1200. Paine, brief of evidence (doc H39), pp 6–7

1201. *Ibid*, p 7

and trampers, and by sewage effluent flow into Lake Waikaremoana. The department rejects the allegation. The Area Manager, Glenn Mitchell, said that giardia has been discussed by the department and Waikaremoana hapu within the Aniwanuiwa agreement and that hapu representatives now accept that giardia is carried by animals and birds as well as humans. Therefore, he added, even if the spread of the parasite by human campers could be prevented, birds and animals would continue to disperse it in their droppings.¹²⁰²

In other words, it was beyond the power of any Government agency to stop the spread of giardia to Lake Waikaremoana, even if contamination by human waste had been prevented. Giardia is now considered to be present in ‘almost all’ New Zealand waterways: animals and birds will spread it even if humans do not.¹²⁰³ This was also the conclusion of the 1998 ministerial inquiry, based on the evidence available to it.¹²⁰⁴ Nonetheless, we understand why the claimants find it difficult to dismiss pollution as a cause of giardia in their waters. Dr Cant noted that, as at 2004, DOC’s website advised the public that giardia ‘is mainly spread as a result of poorly disposed toilet waste.’¹²⁰⁵

The argument we are required to consider is this:

- ▶ giardia is ‘mainly spread’ by human waste but is also spread by animals and birds;
- ▶ giardia is present in Lake Waikaremoana, as it is in ‘almost all’ of our waterways; and
- ▶ giardia could not have been prevented from entering Lake Waikaremoana, because – even if there had been no discharge of partially treated effluent into the lake – it would have been introduced by animal and bird droppings.

Although we have no doubt that pollution by human waste contributed to the presence of giardia in Lake Waikaremoana, we accept that the parasite’s introduction to the lake could not have been prevented.

20.10.4.4 What have been or could be the effects for the claimants?

If an invasive exotic weed such as *Lagarosiphon* took hold in Lake Waikaremoana, the results would be devastating – both for the kaitiaki and for their ancestral taonga. Although the claimants (and the national park ethos) would prefer no exotic plants at all, it seems that the three main species of exotic weed have probably been in the lake since the nineteenth century, and would be too difficult to eradicate by today’s technology. If, as DOC claimed, those species do not threaten the predominance of native plants, then the impact on the taonga (and its kaitiaki) must be minimal. Today, recreational use for boating and fishing makes Lake

1202. Cant, Hodge, Wood, Boulton, and Innes, ‘Evidence of Cant and Hodge’ (doc H11), p 13

1203. Ibid

1204. ‘Joint Ministerial Inquiry – Lake Waikaremoana’, 27 August 1998 (doc H13), pp 8–9

1205. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 134

Waikaremoana vulnerable to invasive exotic weeds, and the impact of such weeds, if they became established, would be very significant – a point upon which the evidence of DOC and the claimants was in agreement.

In respect of pollution, Crown counsel maintained that it was not possible to keep the lake absolutely ‘pollution-free’ but also accepted that pollution by sewage was ‘of paramount significance’ to the claimants. Further, the Crown accepted that long-term discharge of effluent into the lake had occurred, but it argued that significant attempts – ‘particularly in more recent times’ – had been made to ‘ameliorate and prevent this sort of damage.’¹²⁰⁶ Overall, the Crown’s assessment was that the effects had not been severe: ‘It is submitted that “devastation” has not occurred, and that any pollution that has occurred does not amount to Treaty breach.’¹²⁰⁷

The evidence of DOC and the claimants agreed that pollution of the lake by human waste must be avoided, although their perceptions differed as to consequences.¹²⁰⁸ DOC was concerned purely with the biological consequences. In 1989, for example, DOC identified nutrient enrichment and denser lake weed at Home Bay as persistent and possibly long-term effects of sewage discharge.¹²⁰⁹ For the claimants, however, the consequences were not merely the physical dangers that came from a contaminated water source, or the ecological effects of nutrient enrichment. There were also spiritual effects, particular to Maori culture, from mixing effluent with a waterway that is also a taonga and a food source. The water, the plants growing in the water, the fish, and the waterfowl – none could be consumed, even if scientifically ‘safe’ for consumption. Also, as claimant counsel noted, lakeside wahi tapu would have been ‘detrimentally affected.’¹²¹⁰ One problem for the claimants has been a lack of certainty. Freedom campers could have been disposing of waste on the lakeshore without anyone knowing where, and the claimants had also been concerned for many years that the oxidation pond either was or could be leaking into the lake. In addition, given the period of time in which effluent was discharged directly into the lake (50 years), and the claimants’ long-standing concerns about it, the impacts on the claimants have been occurring for generations. We agree with the Crown that ‘devastation’ to the lake has not occurred – but, again, this was based solely on a biological view of matters. The effects for the claimants have been long term and highly unacceptable.

20.10.5 Questions of authority

We have already considered issues of authority and management for Te Urewera National Park in chapter 16. We do not intend to repeat that analysis here. In brief, we found that:

1206. Crown counsel, closing submissions (doc N20), topic 29, pp 45–48

1207. Ibid, p 42

1208. See, for example, Glenn Mitchell, evidence given under cross-examination by counsel for Wai 144 Ngati Ruapani, 1 March 2005.

1209. Department of Conservation, *Te Urewera National Park Management Plan, 1989–1999*, p 14

1210. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 67

- ▶ Despite attempts to provide for greater and statutorily guaranteed representation on the Te Urewera National Park Board in the 1970s, Maori members of this governance and management body remained a minority and only informally representative of their constituencies. Although Maori board members did contribute to decision-making and represented Maori views to the board (and vice versa), their influence was limited and the results were mixed.
- ▶ This situation worsened in the 1980s. Again, attempts to secure greater numbers and more formal representation were defeated. At the same time, without consulting Maori communities or the Maori trust boards, the local park board was replaced by a distant, regional board with a much larger area and an advisory or planning role. Maori influence in decision-making was reduced. The imbalance was not redressed by the increased ability of Maori to contribute to the national park's management plan.
- ▶ The situation improved in the 1990s and 2000s after the transfer of management to DOC, which was formally committed to acting in accordance with the Treaty, and which instituted the Aniwanīwa 'informal joint management' model from 1994. We found, however, that the Aniwanīwa model was too limited in its geographical scope (it only covered part of the park), and too insecure (it operated outside formal DOC policies and institutions, and depended on particular local DOC staff for its success and continuation).
- ▶ Overall, we found that Maori had far too little influence, given the unique circumstances of this national park, which was such a profound presence in their lives and lands. We also considered that there was a fundamental divergence between the preservationist–recreational model established by the National Parks Acts, and the interests and values of the Maori people of Te Urewera. This divergence was revealed by clashes over customary uses, access, trespass, park management of hunting and pest-destruction, and many other issues. It was the fundamental reason why, despite the Treaty clause in the Conservation Act 1987, DOC could not administer Te Urewera National Park in a manner consistent with Treaty principles.

There are some particular or unique aspects of the management and governance of Lake Waikaremoana which require additional comment.

20.10.5.1 Formal representation and co-management: a lost opportunity

First, we note the significance of legal ownership, and what it meant for the feasibility of co-management arrangements. According to Brad Coombes, indigenous ownership of land that was part of a reserve or national park made it much harder for third parties to oppose or prevent the adoption of co-management provisions for that land.¹²¹¹ The 1971 lease of Lake Waikaremoana, however, contained no provisions for the lessors to be involved in the management of the lake, once it was leased for the national park.¹²¹²

1211. Coombes, 'Preserving a "Great National Playing Area"' (doc A133), pp 17–20

1212. Lake Waikaremoana Act 1971, sch: Lease of Lake Waikaremoana

This was an important missed opportunity, in our view. As Tama Nikora observed in the early 1970s, world opinion at that time was moving in favour of including indigenous peoples in the management of national parks.¹²¹³ We received detailed evidence on that point from Brad Coombes, who explored developments in Australia and Canada at that time.¹²¹⁴ The owners' committee had provided in 1971 for the Waikaremoana people to be formally represented on the Maori trust boards, which were about to become the owners of the lakebed. The Crown should have provided for the owners to be similarly represented on the park board. As we discussed in chapter 16, the formal representation of Maori on Te Urewera National Park Board was sought by Tuhoe in the 1970s and debated throughout the decade, but was ultimately rejected. Instead, Reay Paku joined Nikora and Rangihau on the board as a member who was understood to represent the views of the Wairoa-Waikaremoana Maori Trust Board, presumably in recognition of Ngati Kahungunu's increased presence in the park after the lake was added to it. Attempts to secure formal, statutory representation of Maori groups also failed in the 1980s.¹²¹⁵

In chapter 16, we noted that even if there had been formal Maori representatives on the park boards (and in greater numbers), it would not have improved matters so long as western-style conservation and recreational interests were predominant. National park objectives remained fundamentally incompatible with those of Maori and always outweighed them. Only occasionally, when national park and Maori objectives coincided, was there really an opportunity for Maori to take a more active role in policy or decision-making (see section 16.9.5). We turn next to consider the unique situation of Lake Waikaremoana in its national park context, which gave rise to just such a rare coincidence of national park and Maori objectives. But, because of their formal exclusion from governance and management, and the lack of consultation, the opportunity for Maori came mainly from 'working in' with the park boards.

20.10.5.2 'Working in' with park boards: how successful was this strategy for Maori influence on the management of Lake Waikaremoana?

As we discussed earlier in this chapter, Maori organisations were under-resourced and struggling in the 1970s, even where participation was possible or allowed. In that circumstance, Maori leaders relied on the Te Urewera National Park Board to represent their views in respect of lake levels during the Hawke's Bay Catchment Board's inquiry in 1980. In our view, that was an important demonstration of confidence in the park board, and in the fact of convergent interests, such that the board's submissions could 'stand for [theirs] as well'.¹²¹⁶

1213. TR Nikora to chairman, Te Urewera National Park Board, 'Composition of Te Urewera Park Board', 18 June 1973 (Coombes, supporting papers to 'Making "Scenes of Nature and Sport" and Preserving a "Great National Playing Area"' (doc A121(a)), pp 138–140)

1214. Coombes, 'Preserving a "Great National Playing Area"' (doc A133), pp 17–20

1215. See also Coombes, 'Preserving a "Great National Playing Area"' (doc A133), pp 162–172

1216. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 202

As we see it, this was in part a reflection of informal Maori representation on the park board. But it was more than that. There was a convergence of views and interests in Lake Waikaremoana, which can be seen as early as the 1960s, even though the park board of that time wanted to secure full control of the lake and its ring of recently exposed Maori land. It is quite clear that many Maori wanted to protect and preserve the lake and its surrounds in their natural state. There was strong support for the removal of unauthorised huts from Maori land and the leasing of the lake for the national park.¹²¹⁷ This view is perhaps epitomised by John Rangihau, who told the park board (after the offer of the lease) in 1969: ‘Speaking for the Maori people he felt sure that they were completely with the Board in its endeavours to preserve the park in all its beauty.’¹²¹⁸

In other parts of the park, where Maori land had been lost in breach of Treaty principles, we have identified a significant conflict between preservationism and customary use, in which recreational pursuits were the only uses prioritised by the national parks legislation (see chapter 16).¹²¹⁹ At Lake Waikaremoana, we consider that the situation was different. The evidence before us did not identify any clash between park authorities and Maori over customary use of the lake and its resources. That clash was mostly over by the time of the lease. As we discussed in chapter 16, the lakeside communities had had to move away from the Waikaremoana block to live on the southern reserves at Te Kuha and Waimako. A long Crown campaign to prevent any alienation or use of the Waikaremoana block reserves culminated in the early 1970s, soon after the signing of the lease, when the reserves were made historic and scenic reservations (see section 16.6.2.3). Although there were issues about access and trout fishing, there was no clash over the lake between national park ‘preservationism’ and customary uses of the kinds which were so problematic in other parts of the park.

As the claimants explained, Lake Waikaremoana was a taonga of the utmost importance, requiring the most stringent of protections:

The Waitangi Tribunal has previously established that if the taonga in question is ‘highly valued, rare and irreplaceable, and ‘of great spiritual and physical importance’, then the Crown is under an ‘affirmative obligation’ to ensure its protection ‘to the fullest extent reasonably practicable’. Many of the natural landmarks and resources within the Te Urewera national park estate must surely meet this threshold – in many instances the resources are, after all, considered tipuna. The obvious examples are Maungapohatu and [Lake] Waikaremoana which have been variously described as the ‘father’ and the ‘mother’ of the hapu that are nestled beneath and within their embrace and who are sustained by them.¹²²⁰

1217. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), pp 56–57, 83–87, 94; Gallen, brief of evidence (doc H1), paras 9–10, 28, 30–31, 39–40, 43–47; Sir Rodney Gallen, affidavit, 9 April 1997 (‘Joint Ministerial Inquiry – Lake Waikaremoana’, 27 August 1998 (doc H13), app 3, doc 2)

1218. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 56

1219. See also Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 69.

1220. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 108–109

In our inquiry, the claimants' position was that the park authorities had not been stringent enough in preserving the lake in its natural state, and in controlling or minimising other uses of the lake. DOC, we were told, had failed to meet its strict obligations under the National Parks Act.¹²²¹ In particular, the claimants' critique of Crown actions relied on its 'undertaking' as lessee to manage the lake (according to the requirements of the Act) in a way that:

- (a) Preserves as far as possible National Parks in their natural state.
- (b) Preserves as far as possible native flora and fauna, and exterminate as far as possible introduced flora and fauna.
- (c) Maintain the Park's value of soil, water and forest conservation.¹²²²

Throughout the period under review in this section, both Maori and the park's managers wanted to preserve Lake Waikaremoana in as close to its natural state as possible. Differences between them, therefore, were differences of degree. Both sides were prepared to at least consider limited development for tourism and (recreational and customary) use, consistent with their own particular values.¹²²³ Maori, however, became increasingly impatient with what they saw as visitors' actions despoiling their lake. Also, both sides wanted to exert authority over the lake in order to ensure its protection from inappropriate or damaging uses. For the claimants in our inquiry, such uses included the discharge of effluent, artificial fluctuation of lake levels, infestations of exotic weeds, the possibility of 1080 poison entering the lake, and many other management or visitor-related activities. Some wanted to turn the clock back to before 1946, to restore the natural flow of water from the lake to Haumapuhia and the Waikaretaheke River. Above all, kaitiaki wanted to restore the ecological health and the mauri of the lake and ensure its protection into the future.

The question was: who would control the use (and abuse) of the lake? Having negotiated the 1971 lease, Maori leaders of the time saw it as a matter of influencing and working through the park board. In 1973, John Rangihau spoke at a meeting between the park board and the Tuhoe-Waikaremoana Maori Trust Board. A record of the meeting reveals:

He considered that the Urewera National Park was not just a national park, but an international park. It was unique in that the Tuhoe people had inhabited it for more than 1,000 years. Due mainly to their remoteness they had had less contact with modern civilisation than other tribes, they had retained strong tribal and family ties and had preserved their Maori language. They were most interested in the Park because

1221. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 117–118, 220–222

1222. *Ibid*, p 220

1223. See, for example, counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, pp 103–104; Vernon Winitana, brief of evidence, no date (doc H28), p 6.

for them it was a living thing, part of their life-being; and they, therefore, wanted to work in with the Park Board to ensure that it is preserved for further centuries to come.¹²²⁴

The most obvious opportunity to ‘work in with the Park Board’ was through Maori membership of that board. As discussed earlier, Tuhoe sought formal, statutory representation on the park board in the 1970s. They wanted to exercise authority ‘as of right’. Although the Government did not agree to these requests, its process of informal representation ensured that Maori members made up one-third of the board by the mid-1970s. The number of Maori board members was lower in the late 1970s, however, when the Tuhoe ‘representatives’ were reduced from two to one. This underlined the insecurity of informal representation, and the defeat of the Tuhoe initiative to obtain two statutory board members as their formal representatives. Nonetheless, Maori leaders of the time were confident that their views would have influence on the board.¹²²⁵

The witnesses in our inquiry did not reveal any clashes between Maori and the board about Lake Waikaremoana in the 1970s. Instead, as noted, Maori leaders relied on the board representing their views in respect of lake levels. Similarly, the park board strongly opposed any additional sealing of the lakebed, which was in accord with Maori wishes (see above, section 20.10.3). One potential source of conflict in the 1970s was the decade-long delay in stopping the discharge of effluent into the lake. Here, too, there seems to have been a convergence of Maori and park board views. In the early 1970s, the board pressed for the closure of Lake House. Then, from 1974, it worked with the Tourist Hotel Corporation to try to solve the sewage problem, upgrade facilities at the motor camp, and develop a completely new sewage treatment system. There was a five-year delay until construction began, but ultimately the park board’s goal appears to have remained aligned with that of Maori: to stop effluent being pumped into the lake.¹²²⁶ Brad Coombes emphasised, however, the point that consultation was limited in the 1970s and that local hapu had no other avenue to express their strong concerns about sewage.¹²²⁷

There was an exception to the Maori–park board alignment in 1972, when John Rangihau proposed development of a conference centre and tourist

1224. ‘Notes on meeting between the Urewera National Park Board and the Tuhoe Maori Trust Board held at the Tatahoata marae at Ruatahuna on 16 March 1973’ (Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p161)

1225. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), pp161–172; Edwards, ‘Te Urewera National Park’ (doc L12), pp73–77

1226. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), pp101–109

1227. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p368; see also Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p109.

accommodation, with facilities for the home people as well, on Maori land near the lake, which the park board opposed.¹²²⁸ Otherwise, park board and Maori aspirations for Lake Waikaremoana seemed closely aligned in the 1970s.

This situation changed in the 1980s when Lands and Survey assumed the day-to-day management of the park, and the local park board was replaced by a new, more distant board with an advisory role for a number of parks and reserves. Within this new structure, officials considered that the Maori lessors participated in management of their lake through the new East Coast National Parks and Reserves Board. In 1985, the Lands and Survey Department argued:

Because of their traditional links with the area, the Maori owners were not prepared to sell. They . . . did however agree to lease the lake to the Crown for 50 years from 1/7/1967 renewable for similar terms . . . This is an example of where broad society goals have been achieved while the Maori owners have retained ownership and *retain a management role through membership on the parks and reserves board responsible for the national park as well as the leased area*. In addition, the rent paid for the lake can be channelled into the work of the two tribal trust boards. [Emphasis added.]¹²²⁹

Dr Coombes, however, argued that minority, non-statutory membership of the new board did not amount to ‘the retention of a management role.’¹²³⁰ Reay Paku, in defending the East Coast board to his people in 1983, stressed that its Maori members did look after Maori interests: ‘He has known all the Maori members of the Urewera National Park Boards and could assure the people that their interests were always looked after, and always would be so long as there was a Maori member on the Board.’¹²³¹ Coombes described this as:

one of many instances wherein a Maori representative of the UNP Board or ECNPRB was confident that their role on a conservation authority made a difference for local Maori. On many other occasions, however, tangata whenua representatives argued that they were outnumbered by other ‘stakeholder’ groups, and that their position was fraught with political difficulty.¹²³²

In his evidence to the Tribunal, Reay Paku told us that he did not want to criticise the ‘many fine men and women’ who had worked in the park or for organisations such as the ‘Friends of the Urewera Park’. Those people shared with local Maori ‘a reverence akin to love of Mother Nature.’¹²³³ He also noted that the majority of

1228. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), pp 57–59

1229. Lands and Survey Department, ‘New Zealand Case Study: Traditional Rights and Protected Areas’, Third South Pacific National Parks and Reserves Conference, Apia, June–July 1985 (Coombes ‘Preserving a “Great National Playing Area”’ (doc A133), p 162

1230. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 162

1231. ‘Notes from meeting with Whirinaki Action Council and Minginui residents held at Minginui on 30 August 1983’ (Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 164)

1232. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 164

1233. Paku, brief of evidence (doc 135), para 5.1

board members did try to ‘show respect for tikanga Maori.’¹²³⁴ Nonetheless, his experience during 15 years of board membership was that official ‘policy and practice’, driven by non-Maori values, usually prevailed over the views of Maori board members.¹²³⁵ Questioned on this point by counsel for Nga Rauru o Nga Potiki, Mr Paku gave the use of 1080 as an example, noting that the Maori members of the board were outnumbered and that it was common for the other members to support the officials on such matters.¹²³⁶ Maori were not ‘equal co-managers’ on the Te Urewera National Park Board; and that, Mr Paku said, was not ‘fair and right.’¹²³⁷

But the Government had then replaced the local board with a wider regional body in 1981, without consulting local Maori or the Maori trust boards. The result was a ‘dissipation of Tangata Whenua input’ in a distant board focused on a much larger region.¹²³⁸ Thus, in Mr Paku’s view, the situation was significantly worse in the 1980s, at a time when the official climate was, in theory, more receptive to Maori input.

Dr Coombes’ evidence agreed with that of Mr Paku. Coombes argued that local farmers, and to a lesser extent environmental and recreational groups, dominated the Te Urewera National Park Board from 1962 to 1981.¹²³⁹ There were also two Government officials on that board. Tamaroa Nikora, who was a Tuhoë ‘representative’ on the board, told Coombes that the Maori members were ‘outnumbered by English gentleman farmers . . . We were there, but not equal.’¹²⁴⁰ Dr Coombes’ evidence was also in agreement with Mr Paku over the change in the 1980s, when Maori (and local Te Urewera) influence was significantly reduced in the management of the park.¹²⁴¹ This must have had an impact on the growing divergence of views between park authorities and local Maori by the 1990s, over how to manage Lake Waikaremoana.

As we discussed in chapter 16, relationships between the park staff, park boards, and Maori communities were strained in the 1970s and 1980s, despite Maori board membership and some honorary Maori rangers. It was impossible to get away from what the chief ranger called the underlying ‘history of suspicion and doubt’, which was aggravated by issues with permits, hunting, access, and other flash points for conflict. These included the long, slow failure of the negotiations for land exchange as a means for economic development.¹²⁴² As a general point, however, most of the conflict in values and practice between park administrators and Maori arose from conflicts over land and bush, not over the lake, where Maori and park managers seemed quite well aligned. Behind the scenes, however, local

1234. Ibid, para 4.3

1235. Ibid

1236. Reay Paku, under cross-examination by counsel for Nga Rauru o Nga Potiki, Rangiahua Marae, Frasertown, 2 December 2004 (transcript 4.12, p 207)

1237. Reay Paku, brief of evidence (doc 135), para 5.3

1238. Ibid, paras 4.5–4.6

1239. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), pp164–167

1240. Ibid, p 168

1241. Ibid, pp 204–209, 214–218, 222

1242. Ibid, pp 182–184

Maori discontent about aspects of the management of Lake Waikaremoana was apparently growing. Some people felt divorced from the Maori trust boards, which were – in effect – the bodies which both owned the lakebed and were informally represented on park boards. Anger was growing, as we have seen, about a lack of authority at the lake, the management of its levels by the Electricity Department, the apparent invasion of Home Bay by exotic weeds, the pollution of the lake by sewage and other poisons, and other issues. (There was also concern in the 1980s about jet boats and DOC's boating policy for the lake, but that issue was not raised with the Tribunal.¹²⁴³) It seemed as if tourism, electricity, and visitors' rights were prevailing over the protection and preservation of the lake and its ecology, and over the Maori relationship with their ancestral taonga. This growing anger was in evidence by the time of the Electricorp consents process and DOC's attempt to establish the Aniwaniwa model. We turn next, therefore, to the fraught decade of the 1990s, when open conflict emerged about the management and control of Lake Waikaremoana.

20.10.5.3 *The Aniwaniwa model at Lake Waikaremoana: 'our relationship with DOC is getting better all the time, but of course there's still room for improvement'*

According to the evidence of Brad Coombes, changes after the Conservation Act 1987 made little difference as far as boards were concerned – the new conservation boards were advisory in nature and remained focused on a large region.¹²⁴⁴ But DOC's commitment to Treaty principles, and the appointment of a Kaupapa Atawhai manager in the 1990s, potentially improved the situation on the ground. In particular, DOC hoped for conservation partnerships with local people.¹²⁴⁵ At the same time, there still seemed to be a congruence of views about the ultimate goal of managing Lake Waikaremoana. That is, DOC's goal of restoring the Waikaremoana ecosystem 'concur[red] with Maori desires to restore parts of Te Urewera *and, in particular, the lake catchment*' (emphasis added).¹²⁴⁶ We see this as an ongoing theme: both the Crown and Maori wanted to preserve Lake Waikaremoana in its natural state. By the 1990s, 'restoration' had become an essential part of 'preservation'.

Coombes pointed to two concrete results in the 1990s: the Puketukutuku Peninsula kiwi recovery programme; and the Aniwaniwa model of 'informal joint management'.¹²⁴⁷ We have already discussed the latter in some detail in chapter 16. Here, we consider its operation at the lake.

1243. Coombes, 'Preserving a "Great National Playing Area"' (doc A133), p 381. See also page 431, where the issue was raised again by the Tuhoe-Waikaremoana Maori Trust Board during consultation on the 2003 management plan.

1244. Coombes, 'Preserving a "Great National Playing Area"' (doc A133), p 222

1245. Ibid, pp 228–229

1246. Ibid, p 243

1247. Ibid, pp 243–244

In 2002, Glenn Mitchell described the Aniwaniwa model to a DOC colleague as a ‘working party’, which was the vehicle for ‘a continuous programme of consultation with Tangata Whenua.’¹²⁴⁸ It included representatives from two local Maori bodies, the Waikaremoana Maori Committee and a Ruatahuna tribal committee. Its purpose was to ‘provide an opportunity for the tangata whenua to have an equal say in our management of the Area. They are involved in all we do, including management planning; and are part of one-off groups set up for specific projects (including Strategies) as well.’¹²⁴⁹

Another DOC description called it ‘partnership in practice.’¹²⁵⁰ According to Coombes’ analysis, the collaboration was focused on day-to-day management and decision-making, but had less of a role in strategy-making and finance, because those decisions were made higher up in the departmental chain of authority. Coombes believed that the model gave Maori greater influence on DOC management and decisions, and also had the potential for expansion (in terms of joint decision-making as well as in area).¹²⁵¹ DOC staff acknowledged that this system was ‘a major step outside common departmental practice to establish a real working partnership with tangata whenua.’¹²⁵² Coombes agreed with DOC’s assessment that a ‘high level of trust’ was developing by the time he wrote his report in 2003.¹²⁵³ Aubrey Temara, in a submission on the Te Urewera management plan in 2001, said Maori applauded this co-management but wanted to know why it was not happening in other parts of the park.¹²⁵⁴ Crown counsel acknowledged that the Aniwaniwa system had gone beyond the usual consultation practised by DOC towards ‘encouraging inclusiveness of tangata whenua in decision-making, and into creating management partnerships with tangata whenua.’¹²⁵⁵

The Aniwaniwa system was conceived and planned by Neuton Lambert and Glenn Mitchell in 1994, in response to the ‘them and us’ divisions between DOC and local Maori communities.¹²⁵⁶ According to Brad Coombes, it was created in an atmosphere of ‘enduring tensions’, and it did not suffice to prevent the lakebed occupation in 1997–98. Coombes noted that the occupation reflected ‘perceived disenfranchisement from both park and iwi management structures’ (that is, from the Maori trust boards as well as the park authorities).¹²⁵⁷ Indeed, the Aniwaniwa

1248. G Mitchell, Aniwaniwa Area Office, to V Seaton, East Coast Hawke’s Bay Conservancy, 12 March 2002 (Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 244)

1249. Ibid

1250. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 245

1251. Ibid, pp 245–247

1252. Department of Conservation, file note, ‘Partnership in practice: the Aniwaniwa area office and Tuhoe’, no date (Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 247)

1253. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 247

1254. Ibid; see also Aubrey Temara, brief of evidence, 16 February 2005 (doc K15), p 10.

1255. Crown counsel, closing submissions (doc N20), topic 33, p 8

1256. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 244

1257. Ibid, pp 244, 248

'Partnership in Practice': The Department of Conservation's Analysis of the Aniwanui System of Management

Key factors for this successful partnership:

- Honest, open-book policy – knowledge that there are no exclusions, nothing hidden.
- Standing invitation to be part of strategy planning and daily management.
- Open door policy to enable tangata whenua to sit with Glenn [Mitchell, the Area Manager] to discuss issues of concern and work through issues.
- Mutual respect.
- The department doesn't rush things; they are comfortable with the pace.
- All the Area staff and the Conservator together with tangata whenua own the structure.

Conclusions:

The partnership between the Aniwanui Area Office and tangata whenua has proved to be very successful and of real value to everyone involved. From this brief analysis, the significant factors in the development and maintenance of this partnership are:

system was new and untested at the time, and it had already begun to break down before the occupation. The report of the ministerial inquiry commented:

The submissions received from tangata whenua, and particularly the community around Lake Waikaremoana, showed that the people felt disenfranchised from the management of the leased area which they considered themselves to be the 'owners' of.

We also heard of tangata whenua representatives attending planning and monthly management meetings but then withdrawing for reasons unknown to the Department and of those representatives not being replaced. We understand these actions to be consistent with the tangata whenua perception that they were disenfranchised from the decision making process.¹²⁵⁸

In part, this was a reflection of the newness of the system, and the time and effort it would take to even begin overcoming local distrust. But there was also an ongoing concern about what was happening higher up the chain above the Aniwanui office. As DOC officials themselves noted in 1998, Waikaremoana Maori communities were excluded from national planning processes, and they were concerned about conflicts between national and local priorities, nationally

1258. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), p17

- The employment of a local person who was able to see a possible way to avoid a significant breakdown in what seemed to be a tenuous relationship.
- The Area Manager was prepared to take a major step outside common departmental practice to establish a real working partnership with tangata whenua.
- The Area Manager was prepared to be flexible, completely open and to accommodate a style of working that recognised the wishes, aspirations and principles of the tangata whenua.
- Staff and tangata whenua 'own' the partnership.
- The tangata whenua live in and on the margins of the National Park and have maintained very close links with the land (their homeland) and their culture.
- Tangata whenua have been involved in most planning undertaken by the Area since the arrangement was established.
- There is now a high level of trust between all parties.
- There is acknowledgement by both parties that the process is still evolving and growing.¹

1. Department of Conservation, 'Partnership in Practice: The Aniwanuiwa Area Office and Tuhoe', file note, [1998?] (Coombes, papers in support of 'Cultural Ecologies' (doc A121(a), pp272-273)

allocated funding, and 'strategic processes that affect the Lake but are done outside and without tangata whenua input.'¹²⁵⁹

In the 1998 ministerial inquiry, DOC argued that it was faithfully carrying out its statutory obligations, and its obligation under the lease to 'administer, control and maintain the land in accordance with the powers and provisions of the National Parks Act 1980.'¹²⁶⁰ DOC also defended itself on the grounds that it was being consultative, as required by the Conservation Act, and its management practices were 'at the leading edge of iwi involvement in conservation management.'¹²⁶¹

The ministerial inquiry was not satisfied on this point. In their report, Paki and Guthrie referred to Duncan MacIntyre's comments in 1971, as the Minister entering into the lease. MacIntyre had reminded the owners of Lake Waikaremoana that the Maori people were 'equal partners in the 33 million acres' of Crown land, and that he protected the interests of all New Zealanders in the administration of those lands, Maori and non-Maori. Guthrie and Paki found that MacIntyre's

1259. Department of Conservation, file note, 'Partnership in Practice: the Aniwanuiwa Area Office and Tuhoe', [1998] (Coombes, supporting papers to 'Making "Scenes of Nature and Sport"' and 'Preserving a "Great National Playing Area"' (doc A121(a)), pp271-273). Coombes dates this document to 1998.

1260. Department of Conservation, submission to the Lake Waikaremoana inquiry, 18 May 1998 (Coombes, 'Preserving a "Great National Playing Area"' (doc A133), p249)

1261. *Ibid*, p250

references to partnership and protection covered ‘all the elements of the Treaty relationship’:

The lease established a partnership between Maori and the Crown. While ownership of the Lake remained with Maori, the partners would work together to actively protect the lake to ensure it remained in its pristine state for the benefit of all New Zealanders.¹²⁶²

Pointing to recent developments at the time, such as the Ngai Tahu Treaty settlement, Guthrie and Paki found that more could be done to involve the tangata whenua of Lake Waikaremoana in its management. It was possible to establish ‘joint or co-management’ by statute, but that would require a specific Act or a change to the National Parks Act.¹²⁶³ Although this kind of legislative solution was not ‘immediately available’, the ministerial inquiry expressed a hope that one would soon be enacted through a Treaty settlement or through proposed changes to the national parks legislation.¹²⁶⁴ In the meantime, Paki and Guthrie thought that the present laws were sufficient to ‘facilitate co-operative approaches to conservation management of the leased area at Waikaremoana.’¹²⁶⁵ They made the following recommendation:

To achieve this we recommend that the Department, tangata whenua, and the Trust Boards agree on more inclusive and transparent ways in which the tangata whenua can participate and bring their knowledge and relationship with the Lake to bear in the Department’s duties and responsibilities both as lessee and the Crown’s manager of Te Urewera National Park. We recommend that an agreement setting out the respective duties, functions, responsibilities and ways for co-operating between the parties, be negotiated and formalised so that the expectations of all parties are clear.

We hope that with the goodwill that we have seen during the inquiry that the greater involvement of the tangata whenua in the management and decision making processes affecting the Lake can become a reality. There is no reason not to strive even further toward the achievement of partnership, acting in good faith where conservation and national park values are paramount.¹²⁶⁶

It is important to note, however, that this was seen as an interim measure. To achieve ‘joint or co-management’, the ministerial inquiry found that law changes were also needed.

These recommendations had not been carried out by the time of our hearings in 2005, and DOC witnesses explained that a deliberate decision had been made not

1262. ‘Joint Ministerial Inquiry – Lake Waikaremoana’, 27 August 1998 (doc H13), p 18

1263. Ibid

1264. Ibid, pp 18–19

1265. Ibid, p 19

1266. Ibid

to do so. According to the conservator, Peter Williamson, a formal arrangement was unnecessary:

Our Aniwaniwa project and business planning interaction involves both Waikaremoana Maori Committee and the Ruatahuna Tribal Committee.

This, while in place prior to the Inquiry, in my view gives effect to that recommendation of the Inquiry. The reaction to date from local people has to date indicated satisfaction. For example Mr [James] Waiwai in discussion with Glenn Mitchell has indicated a formal agreement is not required.

Given the expressed satisfaction we have never sought a formal memorandum of understanding.¹²⁶⁷

Dr Coombes suggested a number of reasons why DOC preferred to restore the Aniwaniwa system for managing the lake, rather than negotiating a formal co-management agreement with local hapu and the Maori trust boards:

- ▶ DOC did not want to get involved in trying to resolve the fraught situation between local Maori communities and their trust boards;
- ▶ DOC understood that the trust boards did not want to enter into discussions, and that the local communities preferred to keep the informal Aniwaniwa system;
- ▶ DOC was concerned about the budgetary implications of formal co-management, in which it might have to help fund Maori participation; and
- ▶ DOC feared how much of its authority might have to be given up in a formal co-management arrangement, and was also unsure of the legality of entering into such an arrangement.¹²⁶⁸

After examining the evidence, Coombes confirmed DOC's view that local Maori communities were also hesitant to enter into a formal agreement about the lake. They feared that:

- ▶ DOC would pick a single management partner (the trust boards) to the formal exclusion of local communities; and
- ▶ a co-management arrangement in advance of a Treaty settlement might compromise their quest for the return of land, and might unfairly legitimise what they saw as an illegitimate conservation space.¹²⁶⁹

As a result, discussions between DOC and local Waikaremoana leaders resulted in restoring the Aniwaniwa system by late 1999 or 2000.¹²⁷⁰ This was seen by some as putting off resolution of the major issues. In a 2001 submission about the new National Park management plan, the chair of the Tuhoe-Waikaremoana Maori Trust Board observed that 'meaningful engagement and better park management' could only come after conflict between Maori groups had been sorted out, and a

1267. Williamson, brief of evidence (doc L10), p 18

1268. Coombes, 'Preserving a "Great National Playing Area"' (doc A133), pp 254–256

1269. Ibid, pp 254–257

1270. Ibid, p 256

co-governance board had been established for the park. Until then, the informal Aniwanīwa system would not resolve the underlying problems that bedevilled park management for both Māori and DOC.¹²⁷¹

But it seems to be working at Lake Waikaremoana, where its focus is on local community leaders in a situation where there is a congruent goal: that the lake must be preserved in (or restored to) its natural state. In his evidence to the Tribunal, Aniwanīwa area manager Glenn Mitchell suggested that the informal joint management regime worked well between 2000 and 2005. He pointed to:

- ▶ the successful management of sewage issues, the joint DOC-hapu team to monitor the old oxidation pond and establish a new one, and the Waikaremoana Māori Committee's support for a resource consent to spray the treated effluent into a distant forest area;
- ▶ the kiwi recovery programme; and
- ▶ the development of a Waikaremoana ecosystem restoration plan.¹²⁷²

The evidence of James Waiwai and Maria Waiwai was in agreement with that of Mr Mitchell. Maria Waiwai emphasised that the system had been built by working hard on the relationship:

We have a better relationship with DOC now than ever, but this has come about as a direct result of hard work by the Ruapani families in building up a meaningful relationship with DOC.

Now, DOC consults with us first before undertaking any works up here. We can meet and discuss tikanga, we have a better understanding in achieving a goal.¹²⁷³

James Waiwai, chair of the Waikaremoana Māori Committee, agreed that the relationship with DOC was 'getting better all the time'.¹²⁷⁴ He told us that their joint work on the kiwi recovery programme at Puketukutuku Peninsula was a 'partnership model' that was being 'emulated across the country'.¹²⁷⁵ He also accepted that the Waikaremoana Māori Committee was (finally) playing a full role in managing sewage issues, and that his committee had input into forward planning and DOC activities. But he cautioned that there was still 'room for improvement'. The arrangement was still too informal, insecure, and dependent on particular individuals: outside of it, he saw DOC distrust of tangata whenua, and there were still areas of disagreement to be resolved.¹²⁷⁶

One such area was the need for a permit to handle kiwi, which caused some concern in respect of the Puketukutuku kiwi recovery programme.¹²⁷⁷ Another

1271. Coombes, 'Preserving a "Great National Playing Area"' (doc A133), pp 257–259

1272. Mitchell, brief of evidence (doc L9), pp 4–30

1273. Waiwai, brief of evidence (doc H18), p 23

1274. Waiwai, brief of evidence (doc H14), p 15

1275. Ibid, p 14

1276. Ibid, pp 13–14, 18–20; see also counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, p 108

1277. Waiwai, brief of evidence (doc H14), pp 16–17

area of disagreement was the use of 1080 poison. As we mentioned earlier, local Maori were worried that DOC had allowed the use of 1080 within the Waikaremoana catchment, a point which DOC denied at the 1998 ministerial inquiry.¹²⁷⁸ The lakebed occupiers were very concerned that this poison could enter the lake, with unknown effects on future generations.¹²⁷⁹ In his evidence to the Tribunal, Peter Williamson made it clear that DOC considered 1080 to pose no threat to the environment, and would be using it more extensively were it not for Maori opposition.¹²⁸⁰ In 2002, however, a proposal to use 1080 on national park land (including the Waikaremoana catchment) was put forward by the Hawke's Bay Regional Council and the Animal Health Board. Its purpose was to control the spread of bovine tuberculosis by possums. Consultation began with a hui-a-hapu at Waimako Marae in 2002, organised by the council and the Waikaremoana Maori Committee. Although the lead was taken by the regional council, DOC supported the proposal, and a number of subsequent hui between 'hapu representatives, council staff and DOC were held at the Aniwanuiwa DOC office' to discuss and agree to the details of the scheme. DOC also facilitated aerial inspection of the proposed treatment area.¹²⁸¹ In response to Maori concerns, it was agreed that no 1080 would be dropped in the lake catchment (except for 'a narrow strip at the foot of the Panekiri bluffs that was too steep for ground control').¹²⁸²

Glenn Mitchell commented:

The eventual result was that the programme proceeded [in 2004] with mixed blessings from members of the community, and employment opportunities were gained by the Lake Waikaremoana Hapu Restoration Trust for ground-based control contracts for a number of local people.¹²⁸³

Mr Mitchell did not deny that there were difficulties in making the Aniwanuiwa system work to achieve such outcomes:

Both DOC and the people of Ruatahuna and Waikaremoana over the past 10 years or more have made a genuine effort to work together. Their joint objective has been to find a way to work together in the management of this part of the Park, in a meaningful and inclusive manner. In doing so we have come to gain an understanding of each other's aims, aspirations, and responsibilities. Our path hasn't always been smooth and nor will it be in the future. However we have shown that with commitment, trust and respect for each other's viewpoint, it can be done.¹²⁸⁴

1278. 'Joint Ministerial Inquiry – Lake Waikaremoana', 27 August 1998 (doc H13), p 7

1279. Paine, brief of evidence (doc H39), pp 7–8

1280. Williamson, evidence given under cross-examination by counsel for Nga Rauru o Nga Potiki (Pou), 1 March 2005

1281. Mitchell, brief of evidence (doc L9), pp 19–20

1282. Ibid, p 19

1283. Ibid, p 20

1284. Ibid, p 30

Vernon Winitana expressed a common view when he told us that the relationship with DOC was ‘improving’ but that its successes were hard won, and sometimes seemed like ‘two steps forward and one step back.’¹²⁸⁵ The example he gave was the discovery in 2003 of a DOC rubbish dump at Kaitawa, which resulted in a squabble with DOC and the eventual closure of the dump.¹²⁸⁶ Frustration was rife among Waikaremoana witnesses at the time of our hearings, some of it still directed at DOC but much of it directed at Genesis and the Tuhoe-Waikaremoana Maori Trust Board.¹²⁸⁷ In addition, systemic national park issues not involving the lake – including hunting, wildlife, trespass on Maori land, and permits – remained grievances for Waikaremoana communities, despite improved management systems.¹²⁸⁸ DOC field staff could not manage away departmental policies or the requirements of the National Parks Act.¹²⁸⁹ In respect of permits for handling kiwi, for example, Mr Williamson stated that the department had its duties and responsibilities, and he could not ‘rapidly rearrange departmental policy nationally in relation to kiwi handling.’¹²⁹⁰

Vernon Winitana commented:

What is also clear is that contradictions abound with DOC and their role in management of the land. The relationship with Ruapani appears to be improving and we view our role as kaitiakitanga of our region seriously having formed the Lake Waikaremoana Restoration Trust.¹²⁹¹

We are conscious that there have been some very positive initiatives in recent years, including the establishment of this Lake Waikaremoana Hapu Restoration Trust. As James Waiwai explained, the kiwi recovery programme began in the early 1990s as a project involving DOC, Manaaki Whenua (Landcare Research), and local hapu. For Mr Waiwai, it had a dual goal of restoring kiwi and restoring kaitiakitanga – it was an opportunity for his people to ‘reassume our role as kaitiaki’, and to get ‘a foothold into management of our whenua, and a place at the management table.’¹²⁹² The aim was to make one of the lake’s peninsulas, Puketukutuku, a predator-free haven for kiwi. The work was divided between DOC, which cared for and monitored the birds, the hapu, who managed predator trapping and established a

1285. Winitana, brief of evidence (doc H28), pp 11–13

1286. *Ibid*, pp 11–12

1287. See, for example, Trainor Tait, brief of evidence (doc H29), pp 18–24.

1288. See, for example, Paringamai o te Tau Winitana, brief of evidence, no date (doc H24), p 12; Trainor Tait, brief of evidence (doc H29), pp 18–23; Nicky Kirikiri, brief of evidence (doc H59), pp 9–10.

1289. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 245

1290. Peter Williamson, evidence given under cross-examination by counsel for Wai 144 Ngati Ruapani, first Crown hearing, 1 March 2005

1291. Winitana, brief of evidence (doc H28), pp 12–13

1292. Waiwai, brief of evidence (doc H14), p 4; see also page 2.

kiwi chick enclosure on Te Puna reserve, and Manaaki Whenua, which carried out research on kiwi and the effectiveness of the programme. Lines of traps had to be laid across the neck of the peninsula and also around the lake shore (as predators such as stoats can swim). As a result of intensive trapping and later the ability to confine chicks in the safe area, the programme had achieved significant results by the time of our hearings.¹²⁹³ Once Puketukutuku reached carrying capacity, DOC and the local hapu planned to expand the protected area to include another of the lake's peninsulas, Whareama.¹²⁹⁴

When Manaaki Whenua completed its 10-year research programme in 2002, hapu established the Lake Waikaremoana Hapu Restoration Trust to take over and manage the kiwi programme in conjunction with DOC. The new trust, however, had a wider focus than just kiwi:

The vision of the Trust is to facilitate in the restoration of the Lake, the catchment, the surrounding lands, the waterways and the flora and fauna. The Trust is also about the restoration of our people, who had been disenfranchised and driven from the Lake.

The Trust works with other parties (DOC, Local Councils and Manaaki Whenua) to undertake research, to carry out pest and predator control work and to restore threatened species of flora and fauna in the Waikaremoana Catchment.

When the Trust started, the plan was that we would work in partnership with DOC at the beginning on the kiwi recovery program, and within five years the Trust would be in a position to manage the program outright, and DOC could move their resources elsewhere.¹²⁹⁵

Mr Waiwai explained that the trust had since obtained a possum trapping contract from the regional council (as noted above), and had established Nga Tipu a Tane, two native tree nurseries, at local schools, to help with 'restocking the ngahere'. Using the schools was also to get the next generation interested in caring for their taonga – 'another area where we're sowing the seeds for the future'.¹²⁹⁶ Many hapu members had been involved over the years, and it had become 'an important part of the community'.¹²⁹⁷ In addition to financial backing from a number of public and private sources,¹²⁹⁸ the Hapu Restoration Trust was attempting

1293. Ibid, pp 3–11

1294. Lake Waikaremoana Hapu Restoration Trust and Department of Conservation, 'Lake Waikaremoana Kiwi Project Management Plan, 2004 to 2012', October 2004 (Glenn Mitchell, comp, attachments to brief of evidence, 7 February 2005 (doc L9(a)), attachment 1)

1295. Waiwai, brief of evidence (doc H14), pp 10–11

1296. Ibid, p 11

1297. Ibid, p 5

1298. Providers of financial support included Te Puni Kokiri, the New Zealand Lottery Grants Board's Environment and Heritage Fund, the Bank of New Zealand Kiwi Recovery Trust, Manaaki Whenua, and the Eastern and Central Community Trust.

to get sponsorship from Genesis at the time Mr Waiwai gave his evidence in 2004.¹²⁹⁹ Tracey Hickman confirmed that Genesis was in the process of negotiating a ‘partnership’ agreement with the trust in 2005, to support the kiwi restoration project.¹³⁰⁰ Alongside the Waikaremoana Maori Committee, the Hapu Restoration Trust also became another forum for working with DOC – for example, in the preparation of DOC’s Waikaremoana ecosystem restoration strategy.¹³⁰¹ The original vision of 1992 – that kaitiakitanga would be restored along with kiwi – was beginning to be fulfilled.

But it was only a beginning. More was necessary. Mr Waiwai and other witnesses suggested:

- ▶ increased funding for ecosystem restoration,¹³⁰²
- ▶ DOC had to be educated in ‘our cultural beliefs and practices’ – ‘for them to see first hand how we do things and how we want things done’,¹³⁰³
- ▶ young Maori of the district needed to ‘upskill’ technically so that, as kaitiaki, they would have the necessary knowledge of ‘the ecology of our lands’,¹³⁰⁴
- ▶ secure sources of funding had to be obtained by Maori organisations, which did not compromise their independence or their ability to dissent from the objectives of such bodies as DOC or Genesis;¹³⁰⁵
- ▶ Maori had to work on sorting out their internal differences;¹³⁰⁶
- ▶ Maori had to work on relationships with other groups who asserted interests in the park;¹³⁰⁷
- ▶ although the informality of the Aniwaniwa system of management was in some ways a strength, it was also a risk because it depended on individual

1299. Waiwai, brief of evidence (doc H14), pp 12–13

1300. Hickman, brief of evidence (doc L11), p 20

1301. David King, *Waikaremoana Ecosystem Restoration Project Strategy, 2003–2013* (Gisborne: East Coast Hawke’s Bay Conservancy, Department of Conservation, 2003) (Mitchell, supporting papers to brief of evidence (doc L9(a)), doc H), executive summary, pp 8–10

1302. Peter Williamson, evidence given under cross-examination by Crown counsel, first Crown hearing, 1 March 2005. See also Williamson, evidence given under cross-examination by counsel for Nga Rauru o Nga Potiki, 1 March 2005, where he pointed out that the \$100,000 a year from Electricorp and Genesis had been spent on ecosystem restoration work that the Department of Conservation would not otherwise have been able to carry out, but that such a sum was not a large one in respect of the work needing to be done.

1303. Waiwai, brief of evidence (doc H14), p 14

1304. *Ibid*, pp 25–26. Peter Williamson also expressed this view, when asked by the presiding officer what changes could be made to make the Department of Conservation more compliant with the Treaty: that the local people ‘take over the management’, having upskilled themselves in this way – Williamson, evidence given in response to questions from the Tribunal, first Crown hearing, 1 March 2005.

1305. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 106, 202; Waiwai, brief of evidence (doc H14), pp 12–13

1306. Waiwai, brief of evidence (doc H14), pp 22–23; Aubrey Temara to C Hart, East Coast Hawke’s Bay Conservancy, 2 November 1999 (Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 257)

1307. Waiwai, brief of evidence (doc H14), p 25

staff who had gone outside departmental practice and policy, and therefore needed to be entrenched within the department;¹³⁰⁸ and

- ▶ Maori needed to be involved in decision-making at all levels, including in the governance of the park.¹³⁰⁹

20.10.5.4 Managing Lake Waikaremoana for electricity: from NZED to Genesis

The Aniwhaniwa model created a management structure for the lake which included local hapu in local decision-making. But DOC did not have sole management responsibility for Lake Waikaremoana. As we discussed earlier, the Government managed lake levels separately from the national park management structures. From 1971 to 1978, lake levels were controlled by the New Zealand Electricity Department. Then, as a result of the oil crisis in the 1970s, the department was turned into a division of the new Ministry of Energy in 1978. This allowed integrated management and control of the Government's various energy projects. The Electricity Division managed Waikaremoana lake levels until 1987, when it was turned into a State-owned enterprise, the Electricity Corporation of New Zealand (Electricorp or ECNZ).¹³¹⁰ Although the Government contemplated selling the Waikaremoana power scheme to private enterprise, it was ultimately transferred from Electricorp to another State-owned enterprise, Genesis, in 1999.

Thus, the Government has not been directly responsible for the management of lake levels since 1987. While subject to a degree of ministerial oversight and direction, it was commonly understood that Electricorp and its successors were intended to operate as independent businesses, although with a high degree of social responsibility. In other words, they were not agents of the Crown in the legal or Treaty sense, and no one argued otherwise in our inquiry.

From the evidence available to us, the Electricity Department and the Ministry of Energy never once consulted local Maori communities or the Maori trust boards about the management of lake levels. The Electricity Department did, however, negotiate the 'Gentleman's Agreement' with the park board and the Nature Conservation Council, the year before the lease was signed. The Maori owners of the lake were not consulted or included, except insofar as they could make their wishes known through the park board. At that point, there were two Maori

1308. Coombes, 'Preserving a "Great National Playing Area"' (doc A133), pp 246–247, 257–258. See also Waiwai, brief of evidence (doc H14), p 14: 'Our involvement also came down to the personal commitment of the DOC staff here in Waikaremoana. We were lucky, because the manager at the time, Glenn Mitchell (and luckily he's still there today) really wanted to get us involved at a more meaningful level. I know this, as outside of the Kiwi Recovery Programme, when I meet with other DOC staff in other capacities, they are really hesitant about giving tangata whenua as much involvement as we have in this area.'

1309. Coombes, 'Preserving a "Great National Playing Area"' (doc A133), pp 245, 257–258; Paku, brief of evidence (doc I35), para 5.3; Temara, brief of evidence (doc K15), pp 8, 10

1310. For a brief outline of the changes in Government agencies, see John Martin, *People, Politics and Power Stations: Electric Power Generation in New Zealand, 1880–1990* (Wellington: Bridget Williams Books and Electricity Corporation of New Zealand, 1991), pp 291–292.

Organisational Changes in the Management of Electricity Generation, 1911–99

- 1911** The Hydro-electric Branch of the Public Works Department was established.
- 1946** The Hydro-electric Branch was separated from Public Works and became the State Hydro-electric Department.
- 1958** In recognition of the department's broadening role in developing thermal and geothermal electricity, it was renamed the New Zealand Electricity Department.
- 1978** The Ministry of Energy was established, with an Electricity Division which replaced the former New Zealand Electricity Department.
- 1987** The Electricity Division was turned into a State-owned enterprise, the Electricity Corporation of New Zealand (Electricorp or ECNZ).
- 1988** Electricorp was divided into four trading units: Electricorp Production, Transpower, Electricorp Marketing, and Power-DesignBuild Group Ltd.
- 1990** The Ministry of Energy was abolished. It became the Energy and Resources Division in the Ministry of Commerce.
- 1994** Transpower was separated from ECNZ and became a standalone State-owned enterprise.
- 1996** ECNZ was split into two competing State-owned enterprises: ECNZ and Contact Energy.
- 1999** Contact Energy was sold to private investors. ECNZ was split into three competing State-owned enterprises: Genesis, Meridian, and Mighty River Power.

members of the board, TC Nikora and John Rangihau, but no Ngati Kahungunu representatives. In practice, as we have explained, Maori and the park board were well aligned on this issue. Common goals included tighter control of lake levels, a stable operating regime, mandatory discharge if the lake rose too high, more natural seasonal levels, and no new sealing work. Hence, as we discussed earlier, Tama Nikora, Reay Paku, and Sam Rerehe declined to provide evidence for the Hawke's Bay Catchment Board inquiry in 1980, and the Tuhoe-Waikaremoana Maori Trust Board relied on the park board's submission to 'stand for it as well' (see above).

The situation changed in the 1980s. First, the park board was replaced by an East Coast advisory board, with Lands and Survey as managers of the park. As we discussed earlier, Maori felt more distanced from and less influential in the management of the lake as a result. Secondly, the Government divested itself of the direct management and control of lake levels when it handed the Waikaremoana power scheme to Electricorp in 1987. Thirdly, DOC's consultation on the Te Urewera National Park management plan showed that restoration of more natural lake levels was a very important concern for local Maori communities. As a result, the department undertook in 1989 to negotiate with 'the appropriate catchment

authority, the Ministry of Energy and Electricorp, to seek an operating regime for Lake Waikaremoana that will minimise the effects of hydro-electric power generation on the ecology of the lake and lakeshore, shoreline stability, the interests of the Maori people and the use of the lake for boating and other public uses.¹³¹¹ From this, it would appear that DOC became the Government agency responsible for the active protection of Maori interests in lake level management, now that the Waikaremoana stations had been transferred to Electricorp. And, fourthly, the resource management law reform process intervened and stopped the 1990 review of lake levels, granting users a 10-year continuance of their existing terms of use.

All of this meant that the first real engagement with Maori on the management of lake levels took place in the mid-1990s, under the requirements of the Resource Management Act. We have already described that process earlier in the chapter, and noted that Electricorp's consultation with Maori was thorough and inclusive, and that the claimants have not challenged the process or its conduct in their submissions. The result, however, was a management regime set in stone by the resource consents for 35 years, so long as council monitoring confirmed compliance. The working party, through which local Maori organisations had been involved in deciding conditions for the consents, was then discontinued. The 1994–98 level and mechanisms of engagement fell away. This meant that – to the extent that management partnership in lake levels was possible – Maori either had to work with DOC to monitor and manage the effects, or they had to try to work directly with Electricorp (later Genesis) through some new means. Claimant counsel emphasised an incident in 2003, when DOC and Genesis dealt directly with each other over the erosion threatening the oxidation pond.¹³¹² Ms Hickman's evidence confirmed that DOC and Genesis worked together on this.¹³¹³ Peter Williamson suggested that the issue was so urgent that he felt it necessary to act immediately.¹³¹⁴ Local Maori felt excluded, and were worried that the two organisations were shuffling blame and not getting the job done.¹³¹⁵

The most obvious requirements for consultative or cooperative management were those set as conditions of the resource consents in 1998. Some of these arrangements were made solely with DOC, such as 10 years' funding for ecosystem restoration. This angered the claimants in our inquiry. In their view, such payments should have been made to – and managed by – the people whose taonga had been damaged.¹³¹⁶

From the evidence supplied to the Tribunal by Genesis, we note that Electricorp undertook to consult the two Maori trust boards (and DOC) in:

1311. Department of Conservation, *Te Urewera National Park Management Plan, 1989–1999*, p 63 (Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 223–224)

1312. Counsel for Ngati Ruapani, closing submissions (doc N19), p 66; app A, pp 98–99

1313. Hickman, brief of evidence (doc L11), p 20

1314. Williamson, brief of evidence (doc L10), p 24

1315. Waiwai, brief of evidence (doc H14), pp 20–21

1316. *Ibid.*, pp 12–13

- ▶ designing and building works to protect the lakeshore from erosion at Home Bay and Mokau Landing;
- ▶ repairing boat ramps; and
- ▶ replanting land near the intake structure and tunnels.

Genesis also undertook to inform the Maori trust boards and DOC as soon as the lake went outside the maximum or minimum levels. Further, the trust boards, the Panekire Tribal Trust Board, and the Haumapuhia Waikaremoana Authority were involved in the eel management plan (which was for the outflowing rivers, not Lake Waikaremoana itself).¹³¹⁷ From the evidence presented to us, these few requirements could not be said to amount to a management partnership.

According to the evidence of Tracey Hickman, Genesis Energy was bound by the State-Owned Enterprises Act to operate both as a commercial business and a 'good corporate citizen'. The latter required it to work 'in partnership with stakeholders' on environmental matters, and to understand, avoid, remedy, or mitigate harmful effects on the environment. To that end, we were told, Genesis wanted to 'maintain and enhance' long-term relationships with stakeholders, of whom local Maori were one.¹³¹⁸ The aim was to involve stakeholders in 'environmental decision-making' through dialogue: Genesis would find out what stakeholders wanted and try to incorporate their views in its decisions. In other words, what was on offer was consultation but not a role in decision-making, which was quite different from the more collaborative approach that had marked the Working Group between 1995 and 1998. Ms Hickman used words like 'input', 'feedback', 'dialogue', 'information', 'learn[ing] from others': these were all words to describe consultation. For those iwi and hapu who had 'energy operations located within their rohe', Genesis sought a 'dialogue to seek a better understanding of the effects of Genesis Energy's activities on tangata whenua, and to assist them to exercise kaitiakitanga'.¹³¹⁹

In practical terms, Ms Hickman told us that Genesis has held a consultation meeting once a year at Tuai (since 2001), to 'update the community' on monitoring and other activities, and to enable 'the public to ask questions and seek feedback'. Ms Hickman suggested that these annual meetings were well attended by iwi, and that Genesis had received 'considerable positive feedback from the meetings'. Environmental newsletters were also sent to stakeholders in 2001 and 2003, and information was provided on a website. Through these 'forums', Genesis 'stresses its open door approach to addressing issues or questions as they arise'. Dialogue, in other words, took the form of newsletters, an annual public meeting, and an open-door policy for one-off meetings and discussions as necessary.¹³²⁰ Dr Cant's research team commented that the 'management record' of ECNZ and Genesis had been 'fairly uneventful' since 1998. They referred to six-monthly hui between Genesis and iwi to discuss changes in the lake, such as shoreline erosion,

1317. See Hickman, supporting papers to brief of evidence (doc L11(a)), [p 24]

1318. Hickman, brief of evidence (doc L11), pp 4, 14

1319. *Ibid*, p 5

1320. *Ibid*, p 18

which Ms Hickman did not mention in her evidence.¹³²¹ They also referred to the eel management plan as a ‘co-management’ arrangement,¹³²² which suggested that – at least for particular issues – Genesis was able to enter into such arrangements.

One-off projects such as the eel management plan were capable of replication. As James Waiwai described in his evidence, the Lake Waikaremoana Hapu Restoration Trust approached Genesis about the kiwi restoration project:

we’re looking at the corporate sponsorship option. Here in Waikaremoana, Genesis is linked in with the people and the environment, so we’re looking at them as a potential partner. We’ve had initial meetings with them to put forward the idea of sponsoring the Lake Waikaremoana Hapu Restoration Trust. Genesis says that it is ‘working towards environmental excellence’ and ‘opportunities to work with tangata whenua in their kaitiaki role.’ We believe we are offering them the perfect opportunity to put into practice what they are saying.

The money is there – Genesis pays DOC mitigation money for the land they use, one million dollars over ten years. Tangata whenua aren’t seeing any of that, the money’s going to the tenants (DOC), not the landlords (Tangata whenua). DOC uses that money to pay for the kiwi workers – I guess that’s kei te pai with me, at least they’re employing some of our people in the environment, indirectly looking after our Lake, our ngahere and our kiwi.

We are saying to Genesis this is not about you owing us, it’s not about grievance, we don’t want mitigation money, this is corporate sponsorship. We want to form a partnership that is based on honesty and integrity – no baggage. We’re giving you an opportunity to back up your words and ideals. This is a straight up business proposal, ensuring that the Trust has financial security – at least for the kiwi program. It’s not about past grievances or mitigation, we’ll take care of that in the Waitangi Tribunal.¹³²³

At the time that Mr Waiwai gave his evidence in 2004, he was not optimistic about the prospect of forming such a partnership with Genesis:

So we talked with Genesis about the kind of relationship we could have, and they responded that they already give all this money to DOC. You get the feeling that they’re happier dealing with a government department rather than the kaitiaki. You can hardly blame them, this is the kind of thinking that’s been drummed into them over the years.¹³²⁴

As we noted earlier, however, Tracey Hickman reported in February 2005 that negotiations had been successful. A ‘partnership’ agreement between Genesis and

1321. Cant, Hodge, Wood, and Boulton, ‘The Impact of Environmental Changes on Lake Waikaremoana’ (doc D1), p 240

1322. Ibid

1323. Waiwai, brief of evidence (doc H14), pp 12–13

1324. Ibid, p 13

the Hapu Restoration Trust was in the process of being established, covering the kiwi recovery programme.¹³²⁵

This begged the question: could DOC have formed a management partnership with Waikaremoana Maori communities which included Genesis (when appropriate), thus covering a broader spectrum of activities at the lake? And should DOC have facilitated such a tripartite partnership? Could Electricorp's working party model have been amalgamated with DOC's Aniwanuiwa model (both were developed at the same time), to provide for inclusive management decision-making on lake levels, erosion, and other issues in common? We note Glenn Mitchell's evidence about how DOC facilitated hui at Aniwanuiwa with the Hawke's Bay Regional Council.¹³²⁶ This resulted in a relationship which James Waiwai said had 'gone from strength to strength after a shaky start.'¹³²⁷ (The shaky start was due to the nature of the council's proposal at first, which was to drop 1080 in the Waikaremoana catchment.¹³²⁸) The Aniwanuiwa system, it would seem, could be expanded where necessary, to take in regional councils and possibly Genesis.

We note a qualifying point, that the Maori trust boards had a licensing arrangement with Genesis (inherited from Electricorp), and that we have no details about the content of this licensing regime. Also, the claimants associated with the trust boards have not raised issues about Genesis or the present-day management of lake levels.

20.11 TREATY ANALYSIS AND FINDINGS

20.11.1 An overview of the contest between Maori and the Crown over the lake

From 1903 to 1971, Maori and the Crown were locked in a contest over the ownership and control of Lake Waikaremoana. It originated when the Crown established a tourism enterprise at the lake in 1903, appointed rangers to enforce acclimatisation regulations, and banned hunting for indigenous as well as imported game. In 1905, Maori attempted dialogue with the Native Minister, asserting that the Crown must accept their authority over Lake Waikaremoana and pay them for its use. When this failed, they tried petitioning Parliament in 1912, seeking to bring the lake inside the Urewera District Native Reserve. When that, too, failed, the arena for the contest shifted to the Native Land Court where it remained for the next 31 years.

From 1915 to 1918, the Crown denied Maori claims for legal ownership in the Native Land Court, and attempted to prevent the court from sitting until the issue of Crown or Maori ownership of large, navigable lakes could be settled in principle by a court comprising all the Native Land Court judges. When this attempt failed in 1917 and Judge Gilfedder made final orders in 1918, vesting the bed of

1325. Hickman, brief of evidence (doc L11), p 20

1326. Mitchell, brief of evidence (doc L9), p 19

1327. Waiwai, brief of evidence (doc H14), p 21

1328. *Ibid*

Lake Waikaremoana as freehold land in individual Maori owners, the Crown appealed the decision. While the Crown genuinely sought to prosecute its appeal in the early 1920s, it no longer did so after 1926 (having settled what it considered the more important Rotorua and Taupo lake claims). Nor did it withdraw its appeal after 1929, when Judge Acheson's Omapere decision rejected the Crown's arguments about lakes, finding that 'Maori custom and usage recognised full ownership of lakes themselves', and that the Treaty of Waitangi protected Maori ownership of lakes.¹³²⁹ Instead, the Crown negated increasingly urgent attempts by the Maori respondents and the court to have the Waikaremoana appeal heard or dismissed. Finally, in 1944, the appellate court insisted on proceeding despite a Crown application for adjournment sine die, and dismissed the Crown's appeal, giving it 'very short shrift', as the claimants put it.

During the next 10 years, the contest continued in multiple arenas: the Maori Land Court (which was stopped from completing the titles in 1950 when the Government withheld the requisite plan), the general courts, and (for a brief interlude) the realm of direct negotiations between the Prime Minister and the Maori owners. Ironically, the contest in the general courts was not actually about Lake Waikaremoana at all, since the Crown held the prospect of proceedings over the heads of its Maori owners but never actually instituted them, finally accepting at the very last minute in 1954 that they should be 'permitted to retain the benefit of their declared ownership of the bed'. From 1950 to 1954, the Government awaited the outcome of the Whanganui River commission and then its subsequent challenge to that commission in the Court of Appeal. It was mainly because this litigation did not go the Crown's way (up to the deadline for Lake Waikaremoana in 1954), and because it no longer feared any practical consequences for its hydro power scheme, that the Crown finally abandoned the option of challenging the appellate court's decision in the general courts.

After 1954, the arena for the contest shifted from the courts to the political realm of negotiations between the Crown and the Maori owners. For several years, Ministers had to chivy reluctant officials. Genuine uncertainty about how to value a lake sat alongside officials' belief that the Crown no longer needed to own the lake in order to protect its interests. They saw little incentive to negotiate (not even fairness to the owners, in light of other lake settlements, which was noted but did not weigh with officials),¹³³⁰ until a perceived risk to the national park began to have an impact in the 1960s. At the beginning of negotiations, from 1957 to 1959, Electricity Department officials convinced other departments (and persuaded Ministers) that no payment should be made for use of the lake in the Waikaremoana power scheme. This was by no means inevitable at the time, but it has remained the Crown's view ever since.

1329. Lake Omapere judgment, 1 August 1929, Bay of Islands Native Land Court, minute book 11, fols 7, 19, 24 (Waitangi Tribunal, *National Freshwater and Geothermal Resources Claim*, pp 39–41)

1330. See, for example, director-general to Commissioner of Works, 18 June 1958 (Walzl, supporting papers to 'Waikaremoana' (doc A73(b)), p 970), discussed in section 20.8.3.2.

From 1957 to 1969, Labour and National Ministers in turn sought an outright purchase of the lake for the national park, by means of a one-off lump sum payment, and for what could fairly be described as derisory or 'ludicrous' values based on fishing revenues, with a component for past use. In 1949, the owners (having had their appeals resolved in 1947) approached the Government, asking for it to settle with them 'for the future use of the Lake for hydro electric, fishing and tourist purposes'. From this point on, the owners sought Crown recognition of their ongoing relationship with their ancestral lake by means of a perpetual annuity, paid to a Waikaremoana Maori trust board, and payment for the Government's past as well as future use of the lake. The high monetary value that they put on their lake was confirmed in 1968 by the special Government valuation, which showed that the Government offers to that point had been extremely low in light of current values, let alone a component for past use. Despite the pressures of poverty and growing desperation, the Maori owners refused to give in to the Crown's insistence that they sell their lake for a low, lump-sum payment.

As we discussed in detail above, the negotiations stalled between 1961 and 1967. A breakthrough finally came with a new Minister, Duncan MacIntyre, in 1967 and again in 1969, resulting at long last in appropriate Crown concessions and an agreement in 1970, given effect by legislation in 1971. Under that agreement, the Crown leased and managed Lake Waikaremoana as part of Te Urewera National Park.

For all that time, from 1903 to 1971, the Crown had continued to use the lake without permission or payment, at first for tourism purposes and then for hydroelectricity (from 1946) and the national park (from 1954). The Crown's 1971 lease was backdated to 1967, thus paying for only four years' past use of the lake in the national park. This could not, we found, be considered a full and final settlement of all uses prior to 1967, nor for use for hydroelectricity (which was excluded from the agreement altogether). The resulting lease was fundamentally unfair to the claimants in those respects.

For the Wai 36 Tuhoe and Wai 621 Ngati Kahungunu claimants, the contest could be said to have ended in 1971, apart from the outstanding issues of hydroelectricity and payment for past use. For other claimants, however, the contest over authority and management – and, they said, ownership – continued unabated until the time of our hearings. It focused on the environmental management of Lake Waikaremoana as part of the national park, and on their grievance about the vesting of the lakebed in the trust boards as a result of the Lake Waikaremoana Act 1971.

20.11.2 The contest between Maori and the Crown over ownership of lakes, and the Crown's response to the Maori claim for legal ownership of Lake Waikaremoana

20.11.2.1 *The Crown's failure to provide for a title that recognised tribal kaitiakitanga and tino rangatiratanga over the taonga, Lake Waikaremoana*

According to the claimants, there should never have been a contest over Lake Waikaremoana in the first place. 'In terms of the Treaty,' they argued, 'the Crown

should not have been an active litigant attempting to defeat Maori title to the lake.¹³³¹ We agree with the claimants that the Crown's obligation under article 2 of the Treaty was to recognise, protect, and give legal effect (where necessary) to their tino rangatiratanga over the lake, which included their customary title and their authority over the lake and its resources. It also required the Crown to recognise, protect, and give legal effect (where necessary) to their kaitiakitanga of their taonga.

In our view, these obligations might have been met within an introduced title system; but the Crown's system failed to take adequate account of Maori relationships with their land and resources, and of the nature of Maori 'property rights'. That system, as the Tribunal has found in successive inquiries, imposed a land court which usurped Maori communities' right to determine and control their own titles, introduced a form of individualised land title which was in breach of Treaty principle, and failed to provide for collective management of Maori land. Our conclusions earlier in the report on the failure of the Crown's title system to ensure that Maori communities controlled and managed their own land apply no less in respect of waterways that are taonga.

Maori tikanga in relation to Lake Waikaremoana was and is that it is a taonga, an ancestral treasure, a water system of which the constituent parts are an indivisible whole. The claimants spoke of the central importance of the lake to their cultural, spiritual and physical well-being; they carry deeply felt responsibilities and authority as kaitiaki of Waikaremoana. And this taonga is a lake, not land covered with water, one part of which can be possessed under the Treaty and the other of which cannot. Yet those who sought to protect their rights to the lake, and to protect the lake itself, had to do so in the land court, where the introduced law, including the tenure system it established, provided only for recognition of individual rights to the lake bed. It is axiomatic, in our view, that if we are considering Maori 'possession' of a lake in accordance with tikanga, as protected by the Treaty, we cannot be talking about individual ownership. It may be the case that individuals and whanau exercised particular rights. But, as the Whanganui River Tribunal found in respect of another tribal taonga, such rights were limited by 'the proprietary right of the hapu to control use and access in the area'. Those rights in turn were subject to the collective authority of the people, in whom control and rangatiratanga ultimately vested.¹³³² Just as the Whanganui River was possessed as a whole, so also was Lake Waikaremoana. The award of title to individual owners in the land that comprised the bed of a lake was totally at odds with Maori concepts of Lake Waikaremoana and of their relationship with their taonga.

Yet, Maori titles to waterways need not have been so restricted. In our hearings, the claimants' view was that the Treaty required the Crown – as the Tribunal found in its *Te Ika Whenua Rivers Report* – to ascertain and recognise tikanga in relation to 'the Waikaremoana water system', which included a proprietary interest

1331. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 145; counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 68–69

1332. Waitangi Tribunal, *The Whanganui River Report*, pp 33–34

akin to English-style ownership. The Crown's Treaty obligation at 1840, it was argued, was to create a form of title that would recognise their rights, including the 'proprietary interest . . . that could be practically encapsulated within the legal notion of the ownership of the waters.'¹³³³ The claimants also pointed to the Privy Council decision in *Amodu Tijani*, which saw the necessity of recognising customary title (including its spiritual dimension) in the terms of indigenous, not English, law.¹³³⁴ We agree with the claimants on these key points, which the Tribunal has also upheld in its *Te Ika Whenua Rivers Report*, *Whanganui River Report*, *He Maunga Rongo: Report on Central North Island Claims*, and, most recently, *Stage 1 Report on the National Freshwater and Geothermal Resources Claim* and *Te Kahui Maunga: Report on the National Park Claims*.

The Whanganui River Tribunal, for example, considered this question of the 'interplay' of Maori and English customs, and stressed the importance of positing Maori river interests within their own social fabric, the philosophy of their own culture. Thus rivers were not 'owned' in the English sense of the term, just as land was not: 'Maori made no distinction between land and water regimes – they were all part of that which the tribe possessed.'¹³³⁵ Maori saw themselves as 'permitted users of ancestral resources'. Their rights in both land and waterways were based on usage and possession – and in post-Treaty New Zealand 'it was obvious and sensible that English "ownership" was to be equated with Maori "possession"'.¹³³⁶

The Central North Island Tribunal, expressing its agreement with the *Whanganui River Report* that waterways were and are taonga, also rejected the relevance of the common law presumption that there can be no ownership of running water:

Waters that are part of a water body such as a spring, lake, lagoon, or river were possessed by Maori. In Maori thought, the water could not be divided out, as the taonga would be meaningless without it. Our views on this matter are consistent with the *Whanganui River Report* . . . We accept that where, on the evidence, Central North Island iwi and hapu can establish their waterways and geothermal resources to be taonga, the waters cannot be divided out and must be considered a component part of that taonga. The issue in relation to water is about the holistic nature of the resources in Maori custom and the relationships of the people with those resources. It is also about possession akin to ownership and the rights to control access to the water.¹³³⁷

The Tribunal concluded that the Crown's Treaty breach in failing to provide for the grant of community titles was 'compounded when we consider that such titles might have included tribal taonga'. In its view, the legal titles available to Maori in the new system 'could not protect the full range of their resources', and Maori 'were

1333. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 68

1334. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p184

1335. Waitangi Tribunal, *The Whanganui River Report*, p 48

1336. *Ibid*, p 49

1337. Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp1251–1252

prejudicially affected by the failure to provide for a community title to important natural resources.¹³³⁸

In fact the new tenure system, as the Central North Island Tribunal noted, did not need to follow English norms; it was required to recognise differing circumstances in new colonies. In New Zealand, the Treaty was a standing qualification on the application of the common law.¹³³⁹ And we note that in the Lake Omapere decision (1929), Judge Acheson both recognised ‘differing circumstances’ – the circumstances of Maori relationships with their lakes – and also cited the protections of the Treaty for Maori ‘ownership’ of lakes.

The judge had a great deal to say about the significance to tribes of their lakes:

To the spiritually-minded and mentally-gifted Maori of every rangatira tribe, a lake was something that stirred the hidden forces in him. It was (and, it is hoped, always will be) something much more grand and noble than a mere sheet of water covering a muddy bed. To him, it was a striking landscape feature possessed of a ‘mauri’ or ‘indwelling life principle’ which bound it closely to the fortunes and the destiny of his tribe. Gazed upon from his childhood days, it grew into his affections and his whole life until he felt it to be a vital part of himself and his people. . . .

To the Maori, also, a lake was something that added rank, and dignity, and an intangible mana or prestige to his tribe and to himself. On that account alone it would be highly prized, and defended.¹³⁴⁰

A lake, in short, was a taonga. Maori custom and usage, the judge stated, ‘recognised full ownership of lakes themselves.’¹³⁴¹ And that meant that ownership of lakes was protected by the Treaty of Waitangi. The judge stated:

the parties to the Treaty certainly intended it to protect the rights of the Ngapuhis to their whole tribal territory. The Court has already shown that such territory necessarily included Lake Omapere, and that ownership of the lake necessarily included ownership of the lake-bed.¹³⁴²

Judge Acheson’s decision demonstrates judicial recognition of Maori rights to their lakes in the 1920s, and that the Treaty guarantee extended to lakes within a tribal territory. The court did not vest the lake in individual owners. By the time title to Lake Omapere was finalised, the Maori land laws allowed greater options in terms of corporate titles. After a long delay (caused by a non-prosecuted Crown appeal), the court in 1955–56 made Lake Omapere – ‘the land and the water

1338. *Ibid*, vol 2, pp 532, 534, 535

1339. *Ibid*, p 534

1340. Lake Omapere judgment, 1 August 1929, Bay of Islands Native Land Court, minute book 11, fols 8–9 (Waitangi Tribunal, *National Freshwater and Geothermal Resources Claim*, p 39)

1341. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1254

1342. Lake Omapere judgment, 1 August 1929, Bay of Islands Native Land Court, minute book 11, fol 20 (Waitangi Tribunal, *National Freshwater and Geothermal Resources Claim*, pp 40–41)

thereon' – a reservation for the general purposes of the Ngapuhi tribe, and vested it in trustees under section 438 of the Maori Affairs Act 1953.¹³⁴³

Our first finding of Treaty breach is that, in not providing for legal recognition of the relationships of the tribal owners with their taonga, Lake Waikaremoana, through a form of title that recognised their kaitiakitanga and tino rangatiratanga, the Crown was in breach of article 2, and of the principles of partnership and active protection. It failed to provide such a title when it was clear, at least by the first two decades of the twentieth century, that Maori sought legal protection for their lakes. As we have seen, the claimants in our inquiry were prejudiced in two ways: first, by the award of title only to the bed; and, secondly, by title being awarded to individuals. The award of title only to the bed enabled the Crown to ignore its obligation to pay the owners for use of the waters of the lake for hydro-electricity, particularly from 1954 to 1998, as we discuss further below. The consequence of individualised title was that descendants of some who had been awarded ownership by the court in 1918 considered they were prejudiced by the later re-vesting of ownership in the tribal trust boards. This was a prejudice that arose ultimately from the perceived arbitrary removal of property rights which the court had awarded 50 years before, and for the benefits of which these owners had waited a very long time. As we have noted earlier in this report, owners of shares – however small – awarded by the court, often the only legal recognition accorded their ancestral rights to land and resources, might defend them vigorously. We return to this point below.

20.11.2.2 *The contest for title to Lake Waikaremoana in the courts*

From the outset, the Crown opposed the claimants' attempts to secure a legal title to their taonga.

First, it refused to agree to the petition of Waikaremoana leaders in 1912, seeking to include the lake within the UDNR. Because of the changes that had occurred to the UDNR by then, however, inclusion in the UDNR would not likely have resulted in the protection envisaged by the petitioners; purchase of individual interests was about to engulf the reserve and would lead to the loss of the Waikaremoana block in the 1920s. The lake might well have suffered the same fate had it been added to the reserve.

Secondly, when the Native Affairs Committee pointed out that they had not exhausted their existing legal remedies, Waikaremoana leaders filed a claim with the Native Land Court. The Crown's response to this was remarkable, especially in light of the decision in *Tamihana Korokai v Attorney-General* that the Native Land Court had jurisdiction to decide Maori lake claims. The Government, rather than respecting the court's process, attempted (by withholding the plan) to prevent it from sitting to decide the title to Lake Waikaremoana. It was just such an interference that had led to the *Tamihana Korokai* case in the first place. We agree with the claimants that the Crown behaved improperly in trying to prevent the court

¹³⁴³ White, *Inland Waterways*, pp 242–243; Waitangi Tribunal, *National Freshwater and Geothermal Resources Claim*, p12

from sitting. We note, however, that the Government was not attempting at that time to prevent an investigation per se, but rather to have it conducted at a generic level, by a special sitting of the full bench of the Native Land Court. In any case, the Government's interference had no prejudicial effects: the court proceeded in the absence of the plan, and – when the special sitting never eventuated – it recognised Maori ownership and, in accordance with the law, made freehold orders in favour of individual Maori as the owners of Lake Waikaremoana – that is, of the bed of the lake.

The claimants were particularly critical of the sequel. The Crown did not appear or present its case at the final hearing in 1918 (as both Maori and the court had expected it would), yet lodged an appeal as soon as the court's decision was known. We do not, however, find the Crown to have been at fault for its failure to appear at the 1918 hearing. Due to some unexplained breakdown in communication, the instructing department (the Lands Department) and the Solicitor-General were evidently unaware of the 1918 hearing until after it was over. While there may have been an omission or perhaps even negligence on someone's part, there may also have been a misconception that the Solicitor-General wished to be notified after final orders had been made. Either way, there is no evidence of bad faith by the Crown in its failure to appear at the 1918 hearing.

The question then becomes this: the Maori owners having had their title confirmed by the court tasked by Parliament with that responsibility, was it consistent with Treaty principles for the Crown to have challenged that title by way of appeal? Here, we do not accept the claimants' position. There had been no opportunity (or, as it turned out, no sufficient opportunity) for the Crown to present its case in the lower court. Also, if we discount the Wairarapa case back in the 1870s, this was the first Native Land Court decision that Maori were customarily the owners of a large, inland, North Island lake. While many officials were driven by a 'nebulous (even subconscious) imperative' that the Crown should own all large, navigable lakes, so as to protect public 'rights' of fishing and navigation, the Crown Law Office had developed legal theories as to why that was so. Its advice to the Government was that such lakes must belong to the Crown because they could not belong to Maori – either because Maori customary law recognised fishing rights but not a separate ownership of lakebeds or because Maori customary law and the Treaty only had effect insofar as the Native Land Acts gave them effect, and neither the Treaty nor Parliament could have intended harm to the public by recognising Maori ownership of lakebeds. These arguments were to fail repeatedly in the courts, but that was not known in 1918. The Rotorua lakes case in the Native Land Court was abandoned in the early 1920s, in favour of negotiations, before the court came to a decision, and Lake Taupo was not put through the court. So the first authoritative Native Land Court decision on the Crown's arguments came with Lake Omapere in 1929. Given these circumstances, we do not consider that the Crown breached the Treaty by appealing the lower court's Lake Waikaremoana decision in 1918.

The next question is: ought the Crown to have persisted in its appeal after the Rotorua and Taupo settlements and the Omapere decision, and ought it to have

ensured minimal delay by prosecuting its appeal with all reasonable dispatch? In light of our extensive discussion of these issues in sections 20.6 and 20.7, we think that the Crown's behaviour in the conduct of its appeal did breach Treaty principles.

No one could have predicted in 1918 that the Crown's Waikaremoana appeal would not be heard for a quarter of a century. Yet the first time that the Crown seriously considered whether or not to proceed with its appeal did not come until 1944, when – faced with an unavoidable fixture – the Solicitor-General recommended negotiating a settlement with the Maori owners. The Crown had had many other opportunities to reconsider its position along the way. We agree with the Crown that it was serious about prosecuting its appeal in the 1920s. It made reasonable attempts to do so until 1926. After that, however, the Crown favoured the status quo (that is, leaving its appeal in abeyance). It agreed not to proceed during the Depression because the Maori owners could not afford the cost of representation. After the Depression, however, the Crown negated all attempts by the Maori respondents and the court to get the appeal heard (until 1944, when the court would no longer take 'not yet' for an answer). It is not always possible to pinpoint how the decision was made within Government – once, in the 1930s, the Prime Minister did decide to proceed but nothing actually happened.

Our findings on these matters are as follows. First, from 1926 to 1929, the Crown made no attempt to prosecute its appeal, being satisfied that it had successfully negotiated the Rotorua and Taupo lake settlements, securing the outcome it sought, and deterred – perhaps – by its loss of the Omapere case in the Native Land Court in 1929. Waikaremoana, on the other hand, was not a priority for it. Secondly, the Crown agreed to the Maori owners' request (through Ngata) not to proceed during the Depression. We accept that the Crown could not have assisted the respondents with their legal costs during such a financial and economic crisis.

Thirdly, from the early 1930s through to 1944, the Maori owners (and the court) tried to get the Crown to prosecute or abandon its appeal without success. The owners' preference was for the Crown to 'make permanent' their title to the lake, as they put it in 1938, but the Crown refused. It refused (again) in 1939 when the owners sought to have its appeal struck out for non-prosecution. The Government ignored petitions and requests from the owners. It failed to act on requests from the court that it prosecute its appeal. Crown Law Office advice at the time was that the court would not strike out the appeal for non-prosecution, and this proved to be the case. In that circumstance, the Crown was comfortable with the status quo and negated all attempts to get it to proceed with the appeal between 1933 and 1943.

This left the lake and its owners in limbo from 1918 to 1944 – while they could draw no benefit from their declared ownership of the lake, the Crown continued to use the lake and draw revenues as though it were the owner.

This situation was bad enough when attention is confined to Waikaremoana, but it was more reprehensible if we take a wider view of lake claims at the time. We agree with the claimants that the Crown acted unfairly towards them. It negotiated substantial settlements of the Rotorua and Taupo claims in the 1920s. The tribes

in those districts were receiving annual lake payments from 1921 and 1926 respectively. We see no principled reason for the Crown to have negotiated and settled those Maori lake claims on the one hand, while continuing to oppose the Lake Waikaremoana claim for many years to come.

Our view of the significance of the Lake Omapere decision, however, differs from that of the claimants. Although it would be fair to say that the Crown suffered a comprehensive defeat in the Omapere case, it had filed an appeal of the Omapere decision and there was still no authoritative appellate court judgment on a lake claim. We do not think, therefore, that the Crown was unjustified in persisting with its Waikaremoana appeal, simply because it had lost the Omapere case in the lower court. We thus do not accept the claimants' argument that the Crown proceeded in bad faith in 1944 with a case that it knew to be untenable, although we do accept that it knew it was acting inconsistently with past recognition of Maori lake claims: the Crown Law Office advised the Government in 1944 that it was acting inconsistently with the ways in which it had dealt with the Wairarapa, Tarawera, Horowhenua, Rotorua, and Taupo lake claims. Further, our view is that this inconsistency was untenable for the Crown as a Treaty partner; it should have acted fairly as between these various Maori lake claimants.

Thus, we come to our second finding of Treaty breach.

We find the Crown in breach of the principles of partnership and active protection for failing to either prosecute or abandon its appeal during the period from the early 1930s to 1943, negating the efforts of the claimants and the court to get it to do so. The Crown used the owners' lack of counsel as its excuse, when it explained its position in 1939. But justice delayed was indeed, as the claimants argued, justice denied; they were prejudicially affected because they were denied their rights as citizens to have access to the courts as a pathway for declaration of their rights. We also find the Crown in breach of the principles of active protection and equal treatment for persisting in its Waikaremoana appeal after 1926, by which time it had prioritised and negotiated settlements with Te Arawa and Ngati Tuwharetoa for the Rotorua and Taupo lakes. This was not treating Maori equally or fairly.

Some prejudice to the Maori owners could have been avoided if the Crown had taken its lawyers' advice in 1944 and negotiated a settlement (as it had for Te Arawa and Tuwharetoa) instead of proceeding with the appeal, which itself would be followed by a further long delay. In the event, the Crown chose courses of action that were prejudicial to the mana, the tino rangatiratanga, and the economic well-being of the Maori owners, denying them the status of owners, any authority over their taonga, and any economic benefit from it.

Astoundingly, this situation persisted for at least a further 10 years after 1944 because the Crown took advantage of section 51 of the Native Land Act 1931 to hold open the possibility of challenging the appellate court's decision in the general courts. The owners complained in 1957 that the Crown 'took full advantage of this section and intimated from time to time that proceedings were in contemplation to quash the order of the Appellate Court'. Prime Minister Fraser's approach (1947-49) was the correct one. Although he disagreed with the courts' decision,

he decided that the Government must accept that the decision of two courts had gone against it, and should negotiate a settlement with the Maori owners for the use of their lake. Instead, the new National Government interfered with the Maori Land Court from 1950 to 1954, withholding the plan so that the titles could not be completed, yet held off taking action in the general courts until the Whanganui River litigation came to a favourable outcome for the Crown – which it failed to do during that period.

This was not the behaviour expected of a Treaty partner. The Crown was entitled to question the title issued as a consequence of a wrong court decision, as it was perceived, but it was not entitled to subvert or delay the legal process, as we find that it did. We agree with the claimants that, if the Crown had doubts about jurisdiction such that the decisions should be quashed by the general courts, then it should have sought a judicial review in 1918 or 1944, immediately after the jurisdiction had been exercised. What followed until 1954, on the other hand, was purely expedient, neither principled in itself nor consistent with the treatment of other Maori lake claims. The Crown even withdrew its Omapere appeal in 1953, yet continued to hold out the prospect of litigation to overturn the appellate court's Waikaremoana decision until September 1954.

This brings us to our third finding of Treaty breach. As we see it, a Treaty-compliant Crown, acting in good faith, would have filed proceedings in the Supreme Court in 1944 or, when the Maori Land Court moved to complete the titles, in 1950. In our view, the Crown's conduct from 1944 to 1947 and from 1950 to 1954 did not meet the standards of active protection and scrupulous good faith required of it as a Treaty partner. Rather than actively protecting the rights of the Maori owners and negotiating a settlement with them, the Crown procrastinated during those years, actively denying them the completion and registration of their titles from 1950 to 1954, and denying them any rights as owners for the whole of the decade. We note the exception of Prime Minister Peter Fraser in the years 1947 to 1949, although even he took no action to recognise or negotiate with the Maori owners until pressed by them in 1949. For the most part, the Crown's behaviour was unprincipled. The possibility of court proceedings was used as a tactic to avoid dealing with the Maori owners. But, in reality, the Crown failed to institute proceedings because there was little likelihood of success.

The Maori owners of Lake Waikaremoana were prejudiced by the continued denial of their mana, their tino rangatiratanga, and their legal ownership of the lake. Their rights remained in limbo. They had no way of challenging the Crown or seeking compensation when it drove a tunnel through the natural dam and installed its hydro works on their lakebed. Their authority was set at nought and they received no economic return from their property, while the Crown continued to use that property without permission or payment.

In the event, only two things led the Crown in 1954 to reverse its long denial of Maori ownership of Lake Waikaremoana, and they had little to do with the Treaty: first, the statutory time limit for taking action in the Supreme Court was about to expire; and, secondly, officials had come to the view that the Crown did not actually need to own the bed of Lake Waikaremoana in order to protect its

interests. This was a complete turn-around from the view that had prevailed in the 1940s, when the Crown was advised that if it lost the case in the appellate court, it would have no choice but to buy the lakebed to secure its hydroelectricity scheme. Ironically, while this change of mind on the part of officials enabled the abandonment of further litigation in 1954, it proved problematic in its turn when Ministers then sought to negotiate an agreement with the Maori owners of Lake Waikaremoana, while officials saw little incentive for the Government to do so.

20.11.3 The negotiation of the 1971 lease

Once the Crown had accepted Maori ownership of Lake Waikaremoana in 1954, the question became: would it negotiate an agreement with the owners, or would it continue to use the lake as before (without permission or payment)? In the event, it did both.

As we discussed in detail in section 20.8, there were many obstacles in the path of Crown–Maori negotiations, resulting in a tortuous history of offer and counter-offer that ended in deadlock until 1967–70, when statesmanship on the part of the Waikaremoana Maori leaders and Duncan MacIntyre enabled a breakthrough and the negotiation of a settlement that was, in many respects, a just and fair one.

In our inquiry, the Crown's position was that the successful negotiation of an agreement in 1970–71 was a fair, full, and final settlement of all that had gone before, and that there were no Treaty breaches either in respect of the negotiations or the resultant lease agreement. The claimants' position, on the other hand, was that:

- ▶ the negotiations took far too long because of the Crown's stubborn refusal to compromise or to value their lake properly, and its consequently 'ludicrous' and unacceptable purchase offers; and
- ▶ the lease was not fair because it excluded payment for past use (earlier than 1967) and payment for hydroelectricity.

We deal with the issue of hydroelectricity in the next section (section 20.11.4).

Broadly speaking, we agree with the claimants that the long, tortuous failure of negotiations (from 1957 to 1967) was largely the Crown's responsibility. From the beginning, the Maori owners made it clear that they wanted to retain a tangible connection to their taonga by means of a perpetual annuity, and a trust board to administer it for community purposes (rather than payments to individuals), both of which the Crown had done for the Maori owners of the Rotorua and Taupo lakes. These were reasonable aspirations under article 2 of the Treaty. They also wanted the Crown to pay for its past use of their taonga. The latter point was the only common ground between Crown and claimants from 1961 to 1967 – all Crown and Maori offers and counter-offers included a payment for past use during that time. As it was explained to the owners, half of the Crown's 1961 offer, for example, was made up of a payment for past use, backdated to 1947 when the Maori owners' title was finalised after the hearing of appeals. It was this point, however, on which the Crown was to reverse its position in 1969 when it (rightly) gave way on the other points. For their part, the Maori owners had been prepared to compromise by accepting lower and lower sums for their annuity, but they considered that the

Crown had drastically under-valued their lake, and they were not prepared to compromise on other essentials.

We agree with the claimants that the Crown's insistence on absolute alienation and payment of a one-off lump sum (at an unfairly low value) prevented any progress from being made in the negotiations from 1957 to 1967. We also note the slow start to negotiations; it appears that Native Minister Corbett would not engage with the owners between 1954 and 1957. But we also observe that the Crown did not resort to coercion when faced with an intractable deadlock. It did not, as was proposed within Government, try to take the lakebed under the public works legislation. Nor did it attempt to bypass community leaders and buy individual interests. The Crown did not use coercive tactics of any kind. And, after MacIntyre agreed to a special commission in 1967 and the owners agreed to a special GV, the final negotiations in 1969 and 1970 were conducted in a fair and Treaty-consistent manner. The owners' representatives had the benefit of legal advice and they made free and informed choices. They were fully consulted about the draft lease and the validating legislation, which they played a large part in shaping and approving.

For the most part, therefore, we accept the Crown's argument that no Treaty breaches arise from the negotiation of the 1971 lease. The exception is this: unexpectedly, in 1969 and 1970, the Crown went back on its previous agreement that it should pay for past use of the lake. The fact that it took a long time for the parties to negotiate an agreement, from 1954 to 1970, would not have prejudiced the owners if payment had been backdated to the beginning of the negotiations, as they had reasonable cause to expect. After all, the Crown had continued to deny them any practical benefits from their ownership throughout this period. It continued to use the lake without permission or payment. It deliberately avoided treating them as owners – as, for example, when the Marine Department was overruled in its wish to negotiate boating regulations with the owners in late 1966.

The Crown argued in our inquiry that both sides in a negotiation must make reasonable compromises, and that the selection of 1967 for (four years of) back-payment was a reasonable compromise to which the owners' committee made a free and informed agreement. We do not accept this argument for the following reasons.

First, it is important to note that the parties were not negotiating on an even playing field. The Crown had had all the benefits of ownership since 1903 and was continuing to act as the (virtual) owner right up to 1971, whereas the real owners had received no benefit, were extremely poor, and were desperate to reach an agreement. The owners' representatives were, in fact, ready to make reasonable compromises: they were prepared to accept 5.5 per cent as the rental value instead of their negotiating position of 6 per cent; they were prepared to accept a valuation that they still considered was too low; and they were prepared to accept back-dating to 1957 instead of to 1954, when the Crown formally accepted Maori ownership, or to 1947, when their ownership had been finalised by the court, or to 1944, when the court had dismissed the Crown's appeal. These were reasonable compromises for the owners to have made, although not (in our view) completely fair to them – but a backpayment of only four years was neither reasonable nor fair.

Secondly, it is important to note that the Crown's position in the final negotiations reversed what had previously been a fixed point of agreement between the parties: that the Crown must pay for its past use of the lake. In our view, that fixed point of agreement had been correct and appropriate in Treaty terms.

This brings us to our fourth finding of Treaty breach. We find that it was not consistent with the principles of partnership and active protection for the Crown to insist that the rent would only be backdated to 1967. In doing so, it reversed the previous understanding between the Crown and the Maori owners that the Crown must pay for its past use of the lake, and it did so in a way that was fundamentally unfair to the owners. What this meant, in effect, was that the Crown had used the Maori owners' property with impunity for 13 years after it formally accepted that they, not the Crown, were its true owners. It also meant that the mana and tino rangatiratanga of the owners was infringed; they were denied any of the rights or benefits of ownership from 1954 to 1967, to their significant prejudice.

20.11.4 Hydroelectricity

The negotiation of the 1971 lease was inextricably bound up with the issue of hydroelectricity, which has been a source of major grievances for the claimants in our inquiry from 1944 to the time of our hearings. There were two main grievances:

- ▶ that the Crown failed to recognise their proprietary rights and pay them for the use of their lake and its water to generate electricity; and
- ▶ that the Crown modified and damaged their taonga in 1946, without consultation or compensation, when it permanently lowered Lake Waikaremoana by 15 feet, which has had long-term prejudicial effects for the taonga and for its kaitiaki.

We deal with these claims in turn.

20.11.4.1 *The Crown's failure to pay for the use of Lake Waikaremoana for hydroelectricity*

First, we accept the Crown's argument that it had legal authority under an Order in Council under the Public Works Act to construct its hydro works, including installing a tunnel, intake structure, and siphons on the lakebed, and to use Lake Waikaremoana for hydroelectricity. This likely included authority to construct the sealing blanket, although that is not entirely clear. Nonetheless, we agree with the claimants that the Crown's installation of its hydro works, and its use of the lake from then on for electricity (including lowering the lake and then manipulating its levels), breached their Treaty guarantee of full, exclusive, and undisturbed possession. This is so regardless of whether water can be owned.

Secondly, we accept the claimants' argument that the Crown should have paid them for the use of their taonga to generate electricity, particularly after it took active control of their taonga in 1946, modified it by permanently lowering its water levels, and commenced active manipulation of the lake. Lake Waikaremoana was a taonga to its peoples; they owned the lake. They therefore had a proprietary interest in the water akin to ownership. Earlier, we found the Crown in breach of the Treaty and its principles for failing to provide a title which recognised this.

The particular question of whether Maori should have been paid for the use of their lakes in hydroelectric schemes has been considered by the Tribunal in its central North Island and Tongariro National Park inquiries. In both cases, the Tribunal answered the question in the affirmative.¹³⁴⁴

The Central North Island Tribunal made general as well as specific findings, which we consider apply in our inquiry district:

There is a Maori property right in water resources, capable of development for profit, which was guaranteed and protected by the Treaty of Waitangi.

This development right included the right to develop the resource for hydroelectricity *or to profit from that development*.

There is a Treaty right of development in hydroelectric power today, and a right to compensation for present and past use of Maori taonga for hydroelectricity. [Emphasis added.]¹³⁴⁵

The National Park Tribunal found that ‘Maori were entitled to be paid for the use of their proprietary interests in their waterways to generate power. This would have constituted a minimum interference with their property rights, if the generation of power was essential in the national interest.’¹³⁴⁶ We agree with this finding.

The National Park Tribunal went on to say:

the owners of Lake Rotoaira, in common with all claimants whose proprietary interests have been used to generate electricity in the TPD [Tongariro power development scheme], are owed compensation for the past use of their taonga without payment. Maori have a unique property right in their waters, nga iwi o te kahui maunga have a development right in their properties (including their waters), and the Crown has breached that right in its construction and operation of the TPD. This is of concern when the public derives great benefit at the expense of the Crown’s Treaty partner, especially when the Maori Treaty partner had so few other development opportunities.¹³⁴⁷

We agree and adopt that finding in respect of Lake Waikaremoana and its Maori owners.

We note, too, that there was no foregone conclusion that the Crown would refuse to pay the Maori owners for its use of Lake Waikaremoana for hydroelectricity. As we set out in some detail in section 20.8, the Maori owners’ requests for negotiations from 1949 onwards (when they first approached Peter Fraser) sought payment for hydroelectricity. The Government took some time to decide whether

1344. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 1168–1191, vol 4, pp 1310–1326, 1330–1333, 1343–1345; Waitangi Tribunal, *Te Kahui Maunga*, vol 3, pp 1150–1167

1345. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 1219

1346. *Ibid*, p 1153

1347. *Ibid*, p 1161

or not it would include electricity in its value or price for Lake Waikaremoana. This was debated by officials and Ministers from 1957 to 1959. At that time, the Electricity Department convinced other departments (and Ministers) that the Crown did not need to compensate the owners for its hydro structures or pay them for the use of their lake for electricity. This was part of a wider pattern in which the department opposed other Maori claims to payment for the use of lakes. There was some resistance from other departments and from Ministers, who did not want to come up with the full price of Waikaremoana from their own budgets, and the Electricity Department's position on Waikaremoana was not finally accepted by the Government until 1959 (see section 20.8.3). It was revisited briefly in 1968, when the parameters for the special GV were worked out. At that time, officials' concern was focused more particularly on the ownership of water. Despite a legal opinion from the Lands and Survey office solicitor that Maori owned the water in the lake, the advice was that the Crown's statutory power to use the water for electricity precluded any need for payment. Ultimately, in both 1959 and 1968, the Government based its decision on the Crown's statutory powers under the 1903 Water Power Act and its successors; the Crown had the statutory power to use the water of Lake Waikaremoana, and – in its view – did not need to pay for it.

We agree with the claimants that the Crown's refusal to pay them for the use of their lake for hydroelectricity was a breach of Treaty principles. This breach occurred when the Crown refused to include payment for hydroelectricity in its negotiations for the 1971 lease. We also agree with the claimants that the water power and public works statutes on which the Crown relied infringed their tino rangatiratanga and their article 2 rights to the full, exclusive, and undisturbed possession of their taonga. In particular, we agree with the claimants that, if the Crown could argue 'necessity' in its use of the lake for electricity, such that 'the Crown was prepared to actively breach the [Treaty] right of undisturbed possession of the lake, . . . then it should have paid for it.'¹³⁴⁸

This brings us to our fifth finding of Treaty breach. We find that the Crown acted inconsistently with the plain meaning of article 2 and the principle of active protection in its refusal to include payment for hydroelectricity in the negotiations for the 1971 lease. We also find that the claimants have been prejudiced economically by this refusal, and that their mana and tino rangatiratanga have been infringed. Although the trust boards have since made an arrangement with Electricorp and its successor, Genesis, dating from 1998 (see section 20.9.5.2), that does not remove the prejudice arising from the long-term deprivation of recognition and economic return between 1946 and 1998.

20.11.4.2 The modification and control of Lake Waikaremoana for hydroelectricity

The next issue is the question of damage to the taonga, which arose from the permanent lowering of the lake in 1946, the 'wild' fluctuations and massive draw-downs in the 1950s and early 1960s when the Crown controlled the lake for electricity purposes, and then the ongoing manipulation of lake levels under a variety

1348. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 73

of regimes since the 'Gentleman's Agreement' in 1970. We deal with the latter issue – control of the lake since 1970 – in section 20.11.6.

First, the Crown does not deny that the hydro works were installed and the lake was lowered without consulting or obtaining the agreement of the Maori owners. The Crown maintained that it had the statutory power to do so, and emphasised its reliance on the 1943 Order in Council, but that is not a sufficient answer in Treaty terms. Even if the Crown had been found to be the owner of Lake Waikaremoana by the appellate court in 1944, it still ought to have consulted Maori about such a drastic, permanent, and harmful modification of their taonga. No compensation was ever paid, whether for modifying the lake, installing structures, or 'injurious affection'. In our view, Maori were entitled to such compensation under the Treaty, and – it seems to us – under parts of the public works legislation as well.

Secondly, the Crown accepts that the permanent lowering of the lake has had serious long-term effects, namely shoreline erosion and reduction of fisheries. But, in its view, such effects were justified by the national interest in electricity supply, and can now be managed or mitigated through RMA processes. In our view, this position is deficient in Treaty terms. Quite apart from the need to compensate the Maori owners for the *use* of their taonga, it should also have compensated them for the *damage* to it. The claimants do not dispute that the use of their lake for electricity was necessary in the national interest, but they do seek removal (or reduction, so far as that is possible) of the prejudice it has caused them and their taonga. We note, in that respect, DOC witness Peter Williamson's comment that Electricorp/Genesis' \$1 million for ecosystem restoration at the lake was not much money considering the work that had (and has) to be done (see section 20.10.5).

This brings us to our sixth finding of Treaty breach. The Crown acted inconsistently with Treaty principles when it permanently modified Lake Waikaremoana for electricity purposes in 1946 without consulting the lake's kaitiaki, and when it failed to pay compensation due them under the public works legislation. The prejudicial effects are of long standing. They include harm to the taonga, spiritual harm to its kaitiaki, the long-term reduction of littoral habitat and fisheries, and excessive, long-term shoreline erosion. Wahi tapu have been exposed, Patekaha has ceased to be an island, and the flow of water has changed. We consider impacts on the Waikaretaheke River in a later chapter. Some effects are more recently being managed and 'mitigated' under the RMA but we have no evidence as to how far (if at all) that has removed the prejudice.

We note that the lowering of the lake did give a high value to the exposed lake-bed (and thus increased its rental value considerably), but this was balanced in part by the reduction of fisheries (which affected the rental value of the submerged bed), and did not, in any case, suffice to remove the prejudice.

20.11.5 The validation of the lease by the Lake Waikaremoana Act

The 1971 lease was validated by the Lake Waikaremoana Act in December 1971. As part of the agreement between the owners' committee and the Crown, the Act provided for the registrar to make orders vesting the bed of Lake Waikaremoana in the Tuhoe-Waikaremoana and Wairoa-Waikaremoana Maori Trust Boards. We

accept the Crown's argument that no Treaty breach arises from the validating of the lease or from the passage and terms of the Lake Waikaremoana Act. We agree with the Crown that its Treaty obligation was to give effect to the express wishes of the owners' representatives, who sought – as we understand it – to restore tribal ownership and control by means of the trust boards. While we understand the hurt and anger of those who may not have realised that property rights awarded them 50 years earlier were to be removed by the Act, this is a matter for the claimants to resolve among themselves. It does not arise from any act or omission on the part of the Crown during the time of the negotiations in 1971. We do, however, consider it to be a prejudicial effect of the Crown's earlier breach in imposing its native title system, which made individualised tenure the only option in 1918 for a tribal taonga such as Lake Waikaremoana. Had a special taonga title or community title been available at that time, there would have been no occasion for the divisions and bitterness which the 1970s' reversioning has caused.

20.11.6 Management and governance of Lake Waikaremoana under the 1971 lease

In chapter 16, we found the Crown in breach of Treaty principles for its failure to provide the peoples of Te Urewera with a partnership role in the management and governance of Te Urewera National Park. We repeat that finding here, as it applies to the governance and management of Lake Waikaremoana as part of the national park. In particular, we find that the Crown could and should have provided the lake's kaitiaki with formal representation on the park's governing boards from 1971, just as Waikaremoana representatives were added to the Tuhoe-Waikaremoana and Wairoa-Waikaremoana Maori Trust Boards at that time.

We note two points in mitigation: first, the strategy adopted by Maori leaders in the 1970s of 'working in' with the park boards had some success until the 1990s, because Maori and park authorities shared an aspiration to protect and preserve the lake in its natural state; and, secondly, the development of cooperative or consultative management through the Aniwaniwa model meant that, especially from 1999 onwards, the Waikaremoana Maori komiti has begun to play something approaching a partnership role in the management of the lake.

There were limits to both of these mitigating points. Until the RMA, for example, the managers of the national park lacked the clout to enforce really tight controls on manipulation of (and fluctuations of) lake levels. Thus, there was always a two-foot buffer either side of the maximum and minimum levels until 1998, when the RMA resource consents no longer allowed it. Working in with the park boards, therefore, could only achieve so much when authority to manage lake levels rested with others. Also, Maori influence on the park boards was significantly reduced when the number of Maori members was lowered from three to two, and the Te Urewera board was replaced by a regional board with responsibility for multiple parks and reserves. There was, too, as witness Reay Paku told us, a tendency for majority views and values to prevail when there was a clash.

In terms of the Aniwaniwa model, there were weaknesses in its operation and security: it only operated at field level (not at governance level); it had no

formal entrenchment in the department and depended on particular officials; and the work it could do suffered from under-funding. Also, as claimant witnesses explained, the Maori Treaty partner needed to be well-resourced and independent, so as to participate from a position of mana and integrity. Nonetheless, the Aniwanīwa model in action showed how an issue like sewage and the oxidation pond could be resolved in partnership by DOC and local Maori leaders.

This brings us to our seventh finding of Treaty breach. We find that the Crown failed to give effect to the Treaty principles of partnership and autonomy in its governance and management of Lake Waikaremoana during its lease to the Crown for the national park. This finding of Treaty breach is mitigated in part by the establishment of the Aniwanīwa management model (more particularly in its operation after 1998). The claimants have been prejudiced by their effective exclusion from management and governance. They have had to ‘work in’ with processes controlled by others, both in the park boards and under the RMA, seeking to have influence and not always succeeding. Their values and aspirations have not had their due effect in management of their taonga. Their relationship with their taonga has been infringed and harmed as a result. They have been powerless, for example, to stop situations like pollution by sewage from Lake House and the motorcamp, which was extremely offensive to their values and was also entirely avoidable in the 1970s, yet continued uncontrolled until 1980. Although the Aniwanīwa model has improved the situation, it has weaknesses, as we discussed above, and there are no partnership mechanisms with Genesis or any other authorities which make decisions about Lake Waikaremoana.

These particular findings only apply to Nga Rauru o Nga Potiki, Ngati Ruapani, and Ngai Tamaterangi – other claimants preferred to resolve governance and management matters directly with the Crown as lessee.

It is fitting to conclude with the words of the late Sir Rodney Gallen, who had a long association with Waikaremoana kaumatua and, as a result, a deep understanding of the significance of the lake to the people, and of their often distressing history. He was, as we have noted, the last surviving member of the committee which was involved in negotiating the lease of the bed of Lake Waikaremoana. Sir Rodney concluded his evidence to us at Waikaremoana with these words: ‘The history of the relationship of the Crown to the people of Waikaremoana has been a sorry one for a very long time.’¹³⁴⁹ He expressed the view that the Crown had made some attempt, with the lease in 1971, to provide redress, but its attempt was ‘partial and inadequate’. Clearly he hoped that the Crown would meet the concerns of the people, and set things right. We share that view.

1349. Gallen, brief of evidence (doc H1), para 63