

TE UREWERA

TE UREWERA

VOLUME VII

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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 21

KA KOINGO TONU TE IHO O TE ROHE – ENVIRONMENT AND WATERWAYS

The lands are yours, the forests are yours, and the birds that flock there they are yours.

Premier Richard Seddon¹

We strongly object to the Crown taking our rivers.

Tikareti Te Iriwhiro and 175 others, 1922²

21.1 INTRODUCTION

21.1.1 The environmental claims of the peoples of Te Urewera

Since the 1890s, massive changes to the environment and the waterways of Te Urewera have taken place, and the exercise of mana motuhake, of tino rangatira-tanga by hapu and iwi over all the resources of their rohe was undermined as the authority of the Crown and its agencies reached into its heartland. In their negotiations with the Crown in 1895 – which culminated in the Urewera District Native Reserve Act 1896 – Te Urewera leaders sought protection for their lands, forests, birds, their streams and fish, and their way of life; and the Premier, Seddon, indicated his willingness to meet their wishes. We discussed the negotiations and agreement in detail in chapter 9, but left the issue of its scope in respect of natural resources to be addressed in the present chapter.

The claimants' disillusionment with the Crown's use of its authority in Te Urewera stems from soon after this watershed agreement with the Crown. They believe that the Crown broke its agreement to confirm and guarantee their customary rights to manage wildlife and other natural resources within their rohe, and failed also to grant them authority over any new species which might be introduced.

1. Premier Richard Seddon addressing delegation of Te Urewera leaders, 7 September 1895, 'Urewera Delegation, Notes of Evidence', 7 September 1895, p39 (Cathy Marr, comp, supporting papers to 'The Urewera District Native Reserve Act 1896 and Amendments 1896–1922', 2 vols, various dates (doc A21(b)), vol 2, p203

2. Tikareti Te Iriwhiro and 175 others, petition 341/1922, [circa September 1922] (SKL Campbell, comp, supporting papers to 'Land Alienation, Consolidation and Development in the Urewera, 1912–1950', 3 vols, various dates (doc A55(b)), vol 2, p219)

This chapter considers three major topics:

- ▶ Crown interventions in the environment of Te Urewera from 1895 to 1954;
- ▶ the management of Whirinaki Forest, and the extent to which Maori had influence and authority in its management; and
- ▶ the extent to which the Crown has asserted ownership, authority, and control over Te Urewera rivers.

Other important issues relating to Crown management of the lands, forests, and waterways of Te Urewera have been dealt with earlier in our report. In chapter 18, we looked at the nature and impact of land development from the 1930s on and, at about the same time, the Crown imposition of restrictions on milling timber, and the impact of those restrictions on the peoples of Te Urewera. In chapter 16, we addressed the creation and Crown administration of the park, the Crown's efforts to eradicate introduced species in the park, and the claimants' ability to access their land-related natural resources inside the park (but not their birds, rivers, or fisheries, which were left for the present chapter). And chapter 20 concerned Lake Waikaremoana, a taonga of great importance to Tuhoe, Ngati Ruapani, and Ngati Kahungunu, and the long legal battle of the claimants against the Crown to secure recognition of their title to the lake. Up until 1971, they asserted, the Crown treated the lake as its own possession, without the permission of or payment to the Maori owners.

In particular, we were anxious to meet the claimants' wish that we report on their claims about Te Urewera National Park, as they negotiated their Treaty settlements with the Crown, and to deal with the creation of the park as the culmination of a long and fraught history of land loss in the nineteenth and early twentieth century. This has meant dealing with some major environmental claims out of sequence. The present chapter should be read together with the four chapters mentioned above. Claims relating to rivers and other waterways are of great importance in their own right, and sit with those about Lake Waikaremoana. In respect of environmental claims about Ohiwa Harbour, however, we have limited jurisdiction, as we explain below. Claims about the management of Whirinaki Forest sit alongside those addressed in the national park chapter. And claims about Crown restrictions on the taking of native birds, and Crown introduction of exotic fish and animals foreshadow claims about restrictions on peoples' use of resources in the national park after its creation. There is no analytical problem, however, in dealing with the pre-1954 issues out of sequence, in this chapter. It is simply the case that the two chapters should be read together.

In the period before the national park was established in 1954 (as we discussed in chapter 16), the Crown's interventions in Te Urewera impacted on its peoples and its biota in three major ways:

- ▶ The Crown assumed full control of the environment for the purposes of water and soil conservation, deciding that forests would be reserved to protect existing low lying farmland and Lake Waikaremoana. It kept its own lands in forest, and used legislative controls to prevent Maori from milling theirs. (We have discussed this already in our report in chapters 16 and 18.)
- ▶ The Crown asserted the right to control indigenous birds, from 1895 to 1922.

In a policy move which affected Maori everywhere, the Government introduced restrictions on the taking of native birds. Initially the Government made exceptions for Te Urewera, though (as we shall see) these soon came to an end. The taking of kereru, tui, and other birds, and the storage of huahua for gifting and for hakari – central to the way of life in Te Urewera – were criminalised. Up till 1930, Maori customary law still controlled the hunting of birds in practice, but after that Parliament's law began to be enforced in the former heartlands of Te Urewera, and kereru ceased to be a major food source for Te Urewera peoples.

- ▶ In the wake of the Urewera District Native Reserve (UDNR) agreement the Crown either introduced or facilitated the introduction of exotic species to Te Urewera. Seddon and Crown officials had begun to see the possibilities of the district as a tourist attraction. From the late 1890s, trout, deer, and possums were introduced into the rohe – with very destructive results for forests, plants, native birds, and fish. With the deer came new game reserves at Waikaremoana and Rangitaiki, and new regulations on who could hunt there. There were some compensatory benefits (deer, for instance, became an important food especially by the 1930s–50s, as the Crown began to prosecute those who broke its laws prohibiting the taking of kereru, and the fines proved a very effective deterrent).

What was inexplicable to the claimants, in all of these policies, was that a distant Government with little or no knowledge of an environment which was their home and on which they depended for food, healing, weaving, building, and carving, should make and enforce policies which took no account of their way of life. Above all, the new policies took no account of their kinship, their whanaungatanga, with their physical and spiritual world, or of tikanga, the customary law which until that time had regulated sustainable takes of birds, eels, fish, and plants, and their distribution within the community. It was as if their specialised knowledge, built up over generations, their own conservation practices, and the obligations of kaitiakitanga did not exist. Over the years that followed, Te Urewera leaders were not consulted about changes to the law, or acclimatisation of new species. The attempts of Maori members of Parliament to explain to their fellow politicians, for instance, why laws regulating the taking of kereru were badly framed, and why it was unjust to impose on Maori, who depended on birds for food, laws designed for the hunting practices of settlers who shot birds only for sport and recreation, made some headway. But the policy was not changed. Many years later, the Crown's restrictions on any customary take of kereru in Te Urewera, and its failure to justify such restrictions by showing that they are necessary to maintain the viability of the kereru population, remain a deeply felt grievance.

In our inquiry, the Crown has denied that its policies related to the taking of indigenous species within Te Urewera were or are in breach of Treaty principles; rather they are a 'reasonable exercise of the Crown's authority under Article 1 to balance competing interests, and govern to conserve natural resources.'³ Nor have

3. Crown counsel, closing submissions, June 2005 (doc N20), topic 29, p 3

Crown policies relating to exotic species been in breach of Treaty principles; to the extent that they have caused damage in Te Urewera, the Crown has since the 1930s taken ‘timely steps . . . to ameliorate and control that.’⁴ But the Crown did concede that the introduction of brown and rainbow trout into Te Urewera, which the Crown facilitated, has damaged native fish populations.⁵

This chapter also examines the deep political and cultural conflict over managing the forests and waterways that slowly played out in Te Urewera over generations. In chapter 16 we have already seen how that conflict gathered momentum after the establishment of Te Urewera National Park in the heart of the rohe in 1954, when the Crown decided to preserve the watersheds, protect the low-lying Bay of Plenty farmlands, and the unique scenic ‘wilderness’ of the district. Conflict became increasingly bitter over the next 50 years, as Maori found their access to customary food gathering within the park restricted in ways they had not expected, their authority ignored, and their input into management decisions confined to informal minority representation on the park board. From 1980, their influence was further diluted as new Government structures were introduced for the management of national parks.

In this chapter, we consider the parallel history of Whirinaki Forest. Like the national park land, the Whirinaki lands had been secured by the Crown through means of which we have been highly critical in earlier chapters. But this land and its valuable timber – totara, miro, rimu, matai, kahikatea, and tawa – was destined for commercial use. The Crown established a State forest there in 1932, and began milling soon afterwards. The forest provided badly needed employment for local people, who became skilled foresters, though over the decades that followed they were not, they claim, consulted about or involved in management of the milling of the forest. They have raised concerns about their marginalisation as kaitiaki, the destruction of wahi tapu, and the survival of native bird populations.

By the 1970s, in response to growing public opinion against native timber milling, the Forest Service switched from clear felling to selective logging, in a move which the Whirinaki people and the workers of Minginui village supported. Conservationists hoped to add the remaining forest to Te Urewera National Park – a move the Maori forest workers as well as the Forest Service opposed, and successfully prevented. Local residents accused conservationists of ‘attempting to exterminate our lifestyle and our very existence within this forest.’⁶ But native logging was stopped altogether in 1982, the State forest was transformed into the Whirinaki Forest Park in 1984, and the Crown’s original plan of replacing native milling with exotic timber milling was jettisoned. Seventy years after

4. Crown counsel, closing submissions, June 2005 (doc N20), topic 29, p 3

5. Ibid, topic 30, p 2

6. 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 239

the unsuccessful attempts of Maori to preserve their rights to take native birds for food, there was still a deep gulf between local realities and distant attempts to impose ways of dealing with the Te Urewera environment. Here we consider the claimants' issues (in particular those of Ngati Whare), which focused on the Crown's lack of consultation with them about the management of Whirinaki Forest, and about restricting and then stopping native logging in the forest.

We consider the Crown's response too. In respect of past policies and practice, it conceded that it did not always consult with Ngati Whare over changes to native logging activities; and it accepted that the Forest Service damaged or destroyed archaeological sites in the Whirinaki Forest during logging activities. But it argued that Crown bodies had subsequently improved their practices, and that currently there was legislative protection for wahi tapu, and for tangata whenua involvement in their management. It did not accept that hapu were currently excluded from management of and employment in the Whirinaki Forest Park.

The third topic covered in this chapter is the claims about the curtailing of the exercise of tino rangatiratanga over rivers, streams, and other waterways in Te Urewera, which has been a long-standing grievance of the claimants.

Here we consider their claims, arising from: the application of introduced common law relating to ownership of riverbeds; statute law such as the Coal-mines Act Amendment Act 1903 which deemed the beds of navigable rivers always to have been vested in the Crown; and the special circumstances of the Urewera Consolidation Scheme (UCS). In the course of the scheme (as we saw in chapter 14) the Crown acquired a huge block of land representing thousands of small shares in many UDNR blocks that it had purchased in an aggressive campaign over a number of years. The claimants allege that their rivers were wrongly acquired in the consolidation scheme that followed (the UCS), as the Crown later claimed ownership of adjoining riverbeds by application of the *ad medium filum* rule, and in addition laid out extensive marginal strips or river bank reserves, thus extending its claims to further lengthy stretches of riverbed. No payment was made for riverbeds acquired in these ways. The Crown, however, did not concede that it had wrongly acquired riverbeds, or that it should have paid for them. To the peoples of Te Urewera, presumptions of the common law – which they said were foreign to them, and were not explained – have been used simply to deny their ownership of rivers and any say in the management of them. It is uncertain how the Coal-mines legislation actually applied in Te Urewera. It is uncertain whether the Crown did acquire ownership of rivers and streams in its consolidated block, Urewera A, particularly since Te Urewera leaders protested at the time, and were assured that the Crown had not acquired rights to rivers within its award.

The claimants argued that there is no evidence that any rivers in the inquiry district have been alienated from Maori to the Crown in a manner consistent with the Treaty – that is, by mutual and informed agreement. In their view, the Crown has either wrongfully acquired title to their rivers, or has left the state of ownership of rivers in utter confusion – no one knows which riverbeds belong to the

Crown and which do not. We consider their claim, and the Crown's response that riverbed ownership is a question of law which could be determined by the Maori Land Court and the High Court. The Crown did concede that tangata whenua 'are likely to hold title to the beds of a number of non-navigable rivers.'⁷ It did not, however, address the effects of the Coal-mines legislation on river ownership.⁸

The Crown's overall position was that, '[s]ubject to submissions on confiscation and consolidation', there is no evidence of any particular Crown acquisition of any riverbed in the inquiry district that is contrary to the principles of the Treaty.⁹

The claimants were also critical of what they considered was the Crown's assumption of exclusive authority over their rivers by statute, and what they considered was its poor management of them. Maori owners were directly affected by the Crown's inadequate management of gravel extraction from riverbeds, erosion and flood protection, and pollution. Claimants pointed to the Crown's assertion of control over natural water by water and soil legislation, and by the Resource Management Act 1991, which established a new system of administration of natural resources. Despite the RMA's acknowledgement of Treaty obligations and of the rights of tangata whenua, they said, the new regime has left the peoples of Te Urewera powerless in respect of decision-making and management of their own waterways and customary fisheries. The Crown conceded that consultation on some river issues was inadequate before 1991, but was confident that the resource management regime now provides for tangata whenua interests in management of the environment, and for consultation with them.

This was unacceptable to the claimants, who were particularly disappointed that the Crown did not address 'the uncertainty of rights of ownership and management of rivers arising from the legal regime applying to rivers.'¹⁰

We address these major issues below.

21.1.2 Ohiwa Harbour

Claims in relation to Ohiwa Harbour, which mostly related to environmental management, would ordinarily have been addressed in this chapter. We have, however, limited jurisdiction in respect of Ohiwa Harbour.¹¹ The harbour is inside the eastern Bay of Plenty confiscation district, reported on by the Tribunal in the *Ngati Awa Raupatu Report* (1999). We received several claims concerning the harbour, in particular Wai 1012 (Hohepa Kereopa and others on behalf of Ngati Raka, Te Hapu Oneone, and Tamakaimoana, within the Nga Rauru grouping), Wai 339 Te Upokorehe, and Wai 36 Tuhoe. The claims were the basis of a separate topic in

7. Crown counsel, closing submissions (doc N20), topic 30, p 2

8. *Ibid*, p 17

9. *Ibid*, p 2

10. Counsel for Wai 36 Tuhoe, submissions by way of reply, 9 July 2005 (doc N31), p 44

11. The Tribunal set out its jurisdiction in memorandum and directions, 14 March 2002 (paper 2.15), p 4.

our statement of issues. We explain here why we are unable to make findings on most of the issues.

We can comment briefly on issues raised about Crown recognition of Tuhoe customary issues since the raupatu, and on the extent to which any role was provided for Tuhoe hapu and Te Upokorehe in the administration and management of the Ohiwa Harbour under the legislation in place before 1991. The harbour was first actively managed by the Opotiki County Council with the power of a harbour board (under section 11 of the Harbours Act 1923) from 1925–57. The Whakatane Harbour Board gained control of the eastern side of the harbour in 1966 after constructing a new wharf at Port Ohope. The Opotiki County Council retained harbour powers on the western side.¹² Until the mid-1980s, there was no provision or recognition of the specific or unique interests and rights of Maori in Ohiwa whatsoever. But after increased Maori protest during the 1980s things began to change. From 1989 an advisory committee on the harbour to the Whakatane and Opotiki District Councils was formed, with council representatives alongside Tuhoe, Ngati Awa, and Whakatohea. Councils then delegated their powers to the committee in 1990.¹³

We are limited in what we can conclude about issues raised for the Resource Management Act era as to the extent of consultation with the claimants about planning for the future administration and management of Ohiwa Harbour, and the administration of reserves by the Department of Conservation. Ewan Johnston, who wrote a historical report on Ohiwa issues, found some attempts to consult with tangata whenua from the mid-1990s.¹⁴ Tuhoe seem to have been consistently recognised alongside other iwi by Environment Bay of Plenty as having an interest in the management of the harbour.¹⁵ The Ministry of Fisheries has recognised Tuhoe as having a customary non-commercial interest in the fishery.¹⁶ As of 1997, DOC administered more than 20 reserves in the Ohiwa Harbour area. As at 2003, there was little evidence of particular iwi/hapu roles in this or in the management of resources by DOC in the area. The Crown, in closing submissions, pointed however to DOC's *Conservation Management Strategy for Bay of Plenty Conservancy, 1997–2007* and its acknowledgement that consultation with tangata whenua is an important aspect of conservation management. The strategy stressed the commitment of DOC to the practical expression of the principles of the Treaty of Waitangi.¹⁷

12. Ewan Johnston, 'Ohiwa Harbour' (commissioned research report, Wellington: Waitangi Tribunal, 2003) (doc A116), pp 269–271

13. Ibid, pp 273–274

14. Ewan Johnston, summary of report and responses to questions, 12 December 2004 (doc J2), p 10 (counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), p 267)

15. See, for example, BN Hughes, *Draft Ohiwa Harbour and Catchment Scoping Report* (Whakatane: Environment BOP, 2002); Johnston, 'Ohiwa Harbour' (doc A116), p 15 n 2.

16. Terry Lynch, brief of evidence, 4 April 2005 (doc M14), pp 16–17

17. Crown counsel, closing submissions (doc N20), topic 35, p 11

Overall, we lack sufficient evidence covering the period post-1991 to be able to draw any conclusions with confidence.

In respect of non-environmental issues, we have already considered the impact of raupatu on the customary interests of the peoples of Te Urewera in and around Ohiwa Harbour (see chapter 4).

We note two remaining issues. We are unable to resolve the issue of the interests of the Mokomoko whanau lands confiscated at Ohiwa, as it draws in wider Whakatohea interests on which we do not have sufficient evidence.

We are also unable to inquire into the issue of Crown offers to Ngati Awa in 2002 regarding cultural redress in the Ohiwa Harbour. As we signalled in our statement of issues, the Tribunal has already issued the Ngati Awa Settlement Cross-Claims Report, finding that there was no breach in respect of the Crown's cultural redress. The matters that remain are matters for Tuhoe and Te Upokorehe who alone, as we indicated in chapter 4 of our report, 'are in a position to describe their relationship'.¹⁸

We turn next to set out the specific issues for consideration in this chapter.

21.2 ISSUES FOR TRIBUNAL DETERMINATION

After evaluating the evidence and submissions, we have determined that the following issues are essential for us to determine before we can make our Treaty findings:

- ▶ What is the relationship of the peoples of Te Urewera with their environment and waterways, and how have they exercised authority over resources and waterways under customary law?
- ▶ To what extent did the UDNR agreement recognise the authority of Te Urewera peoples over the environment of Te Urewera and its waterways?
- ▶ What were the Crown's major interventions in the environment of Te Urewera before the establishment of the national park in 1954? Were those interventions conducted with the agreement of, or with due regard to the interests of, the peoples of Te Urewera?
- ▶ What influence and authority have Maori had in the management of Whirinaki Forest?
- ▶ How has the Crown exercised authority and control over Te Urewera rivers, and has it taken due account of the rights and interests of the peoples of Te Urewera?

18. Charles Aramoana, brief of evidence, 14 January 2005 (doc J46); Tamati Kruger, claimant translation of transcript of oral evidence, 17 January 2005, Taurarau Marae, Ruatoki (doc J48(a)), pt 1, p7; J W Milroy, S Melbourne, and T R Nikora, 'The Bay of Plenty Confiscation and the Tuhoe Tribal Boundary' (commissioned research report, Rotorua: Tuhoe-Waikaremoana Maori Trust Board, 1995) (doc A123), p7; Jeffrey Sissons, 'Waimana Kaaku: A History of the Waimana Block' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A24), pp 8–10

21.3 WHAT IS THE RELATIONSHIP OF THE PEOPLES OF TE UREWERA WITH THEIR ENVIRONMENT AND WATERWAYS AND HOW HAVE THEY EXERCISED AUTHORITY OVER RESOURCES AND WATERWAYS UNDER CUSTOMARY LAW?

SUMMARY ANSWER: The peoples of Te Urewera express their relationship with their environment, with their whenua, their maunga, ngahere, awa, and roto, in terms of whanaungatanga or kinship, and whakapapa. The environment is inhabited by animate and inanimate beings, each infused with mauri (a living essence or spirit), and to all of whom people are related by a web of common descent, commencing ultimately from the coupling of Ranginui and Papatuanuku. People's sense of tribal identity, of turangawaewae, is closely shaped by the history of their ancestral relationships over many generations with their whenua, their maunga, their awa. Relationships with the awa, roto, and ngahere are also integral to their life and culture – renowned for their rich resources, especially fish and birds. Some relationships, those with taonga species, have been particularly important. Tuna and kereru are two such species, and the tikanga for catching, preserving, distributing, and consuming them reflect the respect in which they are held. They are valued as prized foods, and as upholding the mana of hapu who place them before their manuhiri, or gift them on important occasions. The responsibilities of kaitiakitanga, which fall on the whole tribal community, extend to caring for and conserving the mauri of all living beings. Whanau, hapu, and iwi have exercised authority over the land and its resources in accordance with established rights. The harvesting of many species of birds, and gathering of bush and river resources, was managed by rangatira within a framework of customary law and practice. The practice of rahui ensured that food resources were conserved. Waterways and their resources were – and are – of immense importance to the peoples of Te Urewera. Hapu and iwi exercised mana over rivers and waterways, the arteries of life in the region, which provided resources important both in their economy and to their identity. Thus tributaries and streams were also important both to eel fisheries, and for catches of raumahehe (known elsewhere as koaro), kokopu, and inanga, all important foods. Customary practices were developed and applied to imported species such as pigs, deer, trout, and morihana (carp). New technologies might be used, or introduced species might simply be taken by traditional methods.

21.3.1 Introduction

In chapter 2, where we gave an overview of the tribal histories of the peoples of Te Urewera, we also considered their relationships with the natural world, with land, forests, and waterways. We looked at how Te Urewera communities developed ways of protecting the resources of the land and waters, and of protecting their rights to those resources. That discussion was based on the extensive evidence we received from the claimants themselves.

Here, we draw on and expand our discussion, as context for the key issues examined in this chapter: the extent to which the Crown recognised the customary authority of Te Urewera peoples over resources of land and waterways; and the

nature and impact of the Crown's early interventions, following the UDNR agreement of 1895–96, in the natural world and the Te Urewera environment.

The two questions we address in this section are:

- ▶ What is the relationship of the peoples of Te Urewera with their environment and waterways?
- ▶ How have the peoples of Te Urewera exercised authority over resources and waterways under customary law?

21.3.2 What is the relationship of the peoples of Te Urewera with their environment and waterways?

21.3.2.1 *Whenua, turangawaewae*

<i>Hiki ake te kohu e</i>	<i>The mist lifts</i>
<i>Ko Hinepukohurangi</i>	<i>It is Hinepukohurangi</i>
<i>Tapapa ana ki nga koawa</i>	<i>Lying in the valleys</i>
<i>Hei kakahu mo Papatuanuku</i>	<i>As clothing for the earth</i>
<i>Ka hora nei te moenga</i>	<i>The bed is laid</i>
<i>Mo te tipua nei a Te Maunga</i>	<i>For this tipua Te Maunga</i>
<i>Ki runga o Onini e</i>	<i>At Onini</i>
<i>Ka hono ki a Hinepukohurangi</i>	<i>And he joins with Hinepukohurangi</i>
<i>Huraina nga rarauhe</i>	<i>Lift up the bracken fern</i>
<i>Kia puta ko Nga Potiki</i>	<i>To reveal the children of Potiki</i>
<i>Nga uri o Te Maunga</i>	<i>The descendants of Te Maunga</i>
<i>Nga tamariki o te kohu</i>	<i>The Children of the Mist</i> ¹⁹

In our hearings, the peoples of Te Urewera spoke of their relationship with the environment, their whenua, their maunga, ngahere, awa, and roto, in terms of whanaungatanga or kinship. The Ruatahuna people, for example, expressed their identity with the land in terms of their descent from their mountains and the mist:

if you know where those mountains come from then that is where we come from.

If you can trace where the mist comes from and if you can age it then you have discovered how long we have been here and where we come from. . . . we are the descendants of these mountains and the mist. . . . We are this land and we are the face of the land.²⁰

Hinepukohurangi and Te Maunga came together at Onini to have their son Potiki I, from whom Nga Potiki and thus Tuhoe trace their descent. And, as the Tuawhenua researchers explained, 'The names of these original tipuna embody

19. Tuawhenua Research Team, 'Ruatahuna: Te Manawa o te Ika, Part One: A History of the Mana of Ruatahuna from Early Origins to Contact and Conflict with the Crown' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc B4(a)), p 5; adapted from a translation by Kaa Williams. Onini, the claimants told us, is near the present Ruatahuna village.

20. Tamati Kruger, summary of evidence concerning 'Ruatahuna: Te Manawa o te Ika, Part One', 11 May 2004 (doc D28), pp 4–5

the mist and the mountains of the Urewera, thus connecting Potiki I and his descendants symbolically but directly with their natural land and environment.’²¹

Tamati Kruger, speaking at Ruatahuna of Te Manawa o te Whenua, reminded us that if the tail of the fish that Maui pulled from the sea is at Ngapuhi, and the head is with Te Ati Awa at Poneke, the heart of the fish is at Ruatahuna. He told us:

The people came from the land, the mist and the natural elements. Without the land people would never survive. . . . The people’s mana is drawn from the land, the heart of Te Ika a Maui.

Te whenua refers to the earth, the land, and the placenta all that nurtures the beginning and existence of life. Regarding ‘te ewe o te whenua’, when a child is born that (te ewe) is at the end of its umbilical cord joining it to its mother, for feeding it. Without this nourishment, one cannot live. Likewise without the land, humankind cannot survive. Our ancestors have told us, ‘The land is the life-blood of people.’²²

These traditions reflect powerfully the generations-old relationship between people and the environment inhabited by animate and inanimate beings, each infused with mauri (a living essence or spirit), and to all of whom they are related by whakapapa, a web of common descent.

People’s long history of identity with the land and waterways through their tipuna has been carefully preserved, updated, and passed on to younger kin through whakapapa, pepeha, whaikorero, waiata, whakairo, place names; and that knowledge was crucial to the sense of identity of whanau, hapu, iwi. Te Hue Rangi of Ruatoki stressed the importance of waiata to Tuhoe:

Ko te waiata tawhito te whakaaroa o te ngakau ki te whenua ano ki te tangata. Ko te waiata tawhito he korero i te tohu whenua, he korero i te tohu Mana motuhake o te tangata ki te whenua . . . Me timata mai au i roto i nga waiata whenua. Na te mea, koineni te mea nui ki a Ngai Tuhoe, ko te whenua. Na tetahi pepeha e whakaatu ki a koe. Anei ‘he pukenga maunga, he pukenga wai, he pukenga tangata, he rerenga korero’.

The waiata of Tuhoe are the symbols of love and connections to the land and to people. The waiata tawhito of Tuhoe are statements expressing links to the land and the mana of a person over the land . . . I shall commence [discussion] in the waiatas pertaining to the lands because this is the thing most precious of all to Tuhoe and I shall show by this saying: a gathering of mountains, a gathering of water, a gathering of people, and there will be debate and intellect.’²³

The importance of turangawaewae to identity, of belonging to a tribe, a region, and marae, was underlined by Stokes, Milroy, and Melbourne. In whaikorero,

21. Tuawhenua Research Team, ‘Te Manawa o te Ika, Part One’ (doc B4(a)), p 7

22. Kruger, summary of evidence concerning ‘Te Manawa o te Ika, Part One’ (doc D28), p 2

23. Te Hue Rangi, oral evidence (simultaneous translation), Taurau Marae, Ruatoki, 21 January 2005



Robert Pouwhare

Te Hue Rangī of Ruatoki. At the Tribunal hearing, Mr Rangī gave evidence about the significance of the waiata tawhito of Tuhoe.

especially during tangihanga, tribal allusions which identify the speaker with his tribe and region are essential. John Rangihau explained why:

If they are strangers then they indicate where they come from. They indicate by telling the local people of their sacred mountains, of their tribes, of their rivers and their lakes, and each of these has a meaning for the local people. As the person recites the lake or the river or the mountain the old men shake their heads wisely. They are not doing this for effect. They are shaking their heads and associating themselves with the visitor because the Maori gives a life-force, a life-style to his mountains and to his rivers; and for the host people, as they look around and see their own mountains shrouded in mist or with the sun playing on them, immediately there is conjured up within them all that their own people have told them as part of their own history.

This is why our place names are so precious to us. . . . it is history because it is part and parcel of our living, something which has an emotive force of its own which pulls at the person who is listening. And for me and for others the mountains seem to look down . . . sometimes benignly . . . sometimes with anger . . . You feel the different moods of the very hills that surround you because it is part of you.²⁴

24. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 11

This deep and fundamental sense of belonging to a tribal people, their land, and their place begins with the creation whakapapa, commencing with the coupling of Ranginui and Papatuanuku, and the acts of their offspring. The late Hohepa Kereopa of Tuhoë spoke of Tane, who separated his parents and created his world:

Wood, trees, insects, birds, animals and other things . . . For each thing that Tane created, [he] imposed the mana, authority, sanctity on that thing so that those things would have godly aspects within them, and Tane would remain as the parent of all these creations.

Ka hanga a Tane tana ao, rakau, ngarara, manu, kararehe, aha ake, aha ake, aha ake . . . Mo ia kaupapa i hangaia e Tane, ka whakanoahia e Tane, he mana, he mauri, he tapu kia noho ratou, he atua ano kia ratou ano, ka noho a Tane hei matua ora mo nga manu atua.²⁵

Mr Hohepa spoke also of Te Miina o Papatuanuku, the cleansing waters of Papatuanuku, which begin with the mists, rising from her warmth. Then,

When it is nightfall the dew begins to fall on the surface of the earth . . . All the rivers converge together from the valleys which follows the descent of the waterfalls forming into the miina or the cleansing waters whose role is to gather all the impurities together [from the body of Papatuanuku] and carry them to the river mouth.²⁶

Thus the rivers flowed down the valleys of Papatuanuku to the sea, 'to that other ancestor of ours, to Tangaroa and his families of fish, food.'²⁷ Finally, as a 'cleansing for the children of Tangaroa, the crest of the moon is lifted creating the mist and clouds, allowing the process to begin again.'²⁸

And counsel for Nga Rauru o Nga Potiki stated:

The land, sea and sky are all part of the united environment, all having a spiritual source. It is by divine favour that the fruits from these resources become theirs to use. As Nga Roimata a Ranginui [the tears of Ranginui] descend to settle on Papatuanuku, they gather in the many rivulets of her form, flowing through her and over her . . . The waters of the heavens mingle with those of the earth, and it is from this union that fertility is maintained.²⁹

25. Hohepa Kereopa, oral evidence (simultaneous translation), Tataiahape Marae, Waimana, 26 November 2003

26. Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wellington: Legislation Direct, 2012), p 35

27. Kereopa, transcription of evidence (simultaneous translation), Tataiahape Marae, Waimana, 26 November 2003

28. Waitangi Tribunal, *National Freshwater and Geothermal Resources Claim*, p 35

29. Counsel for Nga Rauru o Nga Potiki, opening submissions, 16 August 2004 (doc F37), para 9

Ani Te Whatanga Hare of Ngati Haka Patuheuheu spoke of Maori relationships with the land, and with the mountains and waterways in these words:

I ahu mai te tangata i a ‘Papatuanuku’, i roto i nga korero tuku iho, a te Maori, . . .

He aronganui, motuhake, to te Maori, ki tona whenua, ki tona turangawaewae. Ko te ‘whenua’ he ‘oranga wairua’, he ‘oranga tinana’, he ‘oranga hinengaro’ no te tangata.

Ko nga ‘Whakaheteri’, ko ‘Nga-Whaka-A-Rohe’, ‘Pou Rahui’, i nga whenua Maori, ko nga Pae Maunga, Ko nga Awa, Ko nga Toka, ko nga Koawaawa, ko nga Pari Tahataha, ko nga Wairere, ko nga Ngahere, ko nga Roto, ko nga Moana. . . .

Ma te ‘Whenua’, ka herea nga kawai whakapapa, o te tangata, ki tena Hapu, ki tena Iwi, ki tena Waka. [Emphasis in original.]³⁰

Man comes from Papatuanuku according to the Maori traditional stories, . . .

Maori have a distinct understanding of their land, of their place. The land, the whenua, is a spiritual sustenance, it’s a physical sustenance and it’s a sustenance for the mind of the man.

The sentinels over the Maori lands are the mountain ranges, the streams, and rivers and rocks. . . . The streams, the cliffs, the banks of the rivers, and the waterfalls, the forests, the lakes and the seas . . .

It is through the land that genealogy ties people to their hapu, to iwi and to waka.³¹

The peoples of Te Urewera thus have ancestral relationships also with their maunga, rivers, and other waterways. For Tuhoe, Maungapohatu is the ‘identifying landmark’. The rangatira Tukuaterangi explained over a century ago that ‘Maori mana, identity and prestige are embodied in that whole mountain . . . All our ancestral mana from time immemorial is enshrined in that mountain.’³² Colin Pake Te Pou of Tuhoe, speaking at our Waimana hearing, named ‘the hills that are boundless, according to the elders’, and explained that the hills of Te Urewera, ‘according to our ancestors, are travelling places for the spirits in the old times, from those times, and . . . is still current today.’³³

We turn next to consider the relationship with rivers and other waterways in more detail.

30. Ani Te Whatanga Hare, brief of evidence, 8 December 2003 (doc B27), pp 12–13

31. Ani Te Whatanga Hare, oral evidence (simultaneous translation), Tataiahape Marae, Waimana, 11 December 2003

32. Tukuaterangi was giving evidence to the Urewera commissioners in 1899 (translation by Stokes, Milroy, and Melbourne): Urewera minute book 3, 28 March 1899, fol 182 (Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 12).

33. Colin Bruce Pake Te Pou, oral evidence (simultaneous translation), Tataiahape Marae, Waimana, 10 December 2003

21.3.2.2 Rivers and other waterways

For the purposes of our discussion in this chapter, the people's relationships with their rivers are of particular importance.

Huka Williams of Ruatoki spoke of the significance of the Ohinemataroa River to Tuhoe, beginning with the whakapapa of Hinemataroa from Wainui, a child of Rangi and Papa. Wainui, she said, is the god of the waters, and Tangaroa the god of foods within the water.³⁴

Hakeke McGarvey also talked of the Ohinemataroa River:

All of us of Tuhoe are descendants of Hine-mata-roa of Nga Potiki. Our ancestral claim is from this source to ourselves, and to our continuing occupation and trusteeship . . . The Ohinemataroa has always belonged to Tuhoe mai ra ano, and the people belong to the river. In terms of ownership the river doesn't belong to any one individual but to us all. All of Tuhoe can whakapapa to our tupuna, Hinemataroa and the river belongs to all of Tuhoe.³⁵

The river 'is a taonga . . . which carries its own separate mauri (life force) and is guarded by the taniwha that inhabit it.'³⁶ The taniwha in Ohinemataroa River, among them Waerore at Waikirikiri, Tauke at Otenuku, and Marie at Te Rewarewa, are also Tuhoe tipuna.³⁷

Mr McGarvey explained the spiritual significance of Ohinemataroa for Tuhoe; people are still baptised in its waters, and traditional healing and cleansing takes place there:

I recall as a child having to assist an elderly aunty to the river when she was unwell. She was bathed with the waters and karakia were said to cleanse her of her illness. This practice has continued and I, myself, have been in sports teams who have stopped at the river and cleansed ourselves and used the appropriate karakia for strength and it has worked.

The use of the river in this way reaffirms our connections to our tupuna Hine-mataroa and provides a continuity with all our tupuna. Because all Tuhoe share that whakapapa, the river is a taonga that connects us all to each other.³⁸

Huka Williams told us about the significance of the streams (nga koawa) of the Ohinemataroa River, and the associations of tupuna with places by the streams.

34. Irene Huka Williams, oral evidence (simultaneous translation), Taurau Marae, Ruatoki, 20 January 2005

35. Hakeke Jack McGarvey, brief of evidence, 2005 (doc J33), pp 1–2

36. Counsel for Ruatoki claimants, amended consolidated particularised statement of claim, 8 October 2004 (claim 1.2.8(b), SOC FF), p 123

37. For further discussion of these taniwha, see chapter 2.

38. Hakeke Jack McGarvey, statement of evidence, 2005 (doc J33), p 3



The Ohinemataroa River. All Tuhoe claim descent from the tupuna Hinemataroa and have a strong kinship association with the river.

Among them was Oheu, which ‘was a place for sacred ceremonies, of coming of age,’ where the tohunga would also take people for healing.³⁹

Ngati Whare kaumatua explained the whakapapa relationship between their maunga, their river, and its streams, beginning with the relationships among their maunga: ‘Tuwatawata married Moerangi and begat Maungataniwha, to the south, Mapouriki to the east, Otohi, Tikorangi to the west, Titokorangi, Rangiahua and Tawhiuau. These are some of the sacred landmarks of Te Whaiti-nui-a-Toi. They (the mountains) are all male.’ The maunga have a close relationship with the tapu river of Ngati Whare, Whirinaki, and the stream and tributaries to which the river gave birth; ‘these streams are the children and grandchildren of Whirinaki,’ and they meet at Te Whaiti-nui-a-Toi (‘the Narrowing of the Great Canyon of Toi’), in the valley. The streams, he told us,

represent the tears of Tuwatawata and Moerangi who weep for their children who are living on this side of the river, namely, Tikorangi, Maungataniwha and Mapouriki, they are all males. They married the female mountains up the Okahu river and begat Otamapotiki, Pokapoka, Tapiri, Kopuatoto descending down to the Mangawiri river and out to Putakotare. These are the sacred landmarks of Te Whaiti-nui-a-Toi. These rivers represent the tears of Tuwatawata and Moerangi who weep for their children.⁴⁰

Waterways are also of great importance to Ngati Ruapani. We have already discussed the immense significance of Lake Waikaremoana to hapu and iwi in chapter 20. But there were also rivers and wetlands. Maria Waiwai gave korero tuku iho

39. Irene Huka Williams, oral evidence (simultaneous interpretation), Tauarau Marae, Ruatoki, 20 January 2005

40. Jack Tapui Ohlson, brief of evidence, September 2004 (doc G30), pp 4–5, 6



Huka Williams. In January 2005, Ms Williams spoke to the Tribunal about the mauri of the Ohinemataroa River and the relationship of Tuhoe with the river through whakapapa.

for the Kahui Tangaroa Stream that flowed into the Waikaretaheke River, and the species that lived within it:

Kahui Tangaroa is our river. The name comes from the legend of Haumapuhia, who found the outlet and was caught there when dawn broke. We believe the taniwha that formed Lake Waikaremoana was Haumapuhia. She was unsuccessful in reaching the sea before dawn, so she made herself comfortable in Waikaretaheke River, an outlet from Te Wharawhara Waikaremoana. As time went by, her grandfather Mahu felt sorry for Haumapuhia, so he prayed to Tangaroa the sea god to send some kai for her. Eels, crayfish, shellfish and other creatures came up the waterways for Haumapuhia's survival.⁴¹

James Waiwai spoke of the people's relationship with the eels of the wetlands near the river, before the Whakamarino Lake was constructed in the course of the hydro scheme:

Before the Whakamarino Lake was built, there used to be a swamp on the far side. It was a rich eeling place, a swamp which was fed by Kahui Tangaroa, the gathering

41. Maria Whakatiki Tahu Waiwai, brief of evidence, no date (doc H18), p 5



Whirinaki, the tapu river of Ngati Whare. Its streams represent the tears of the maunga Tuwatawata and Moerangi for the children from whom they have been separated, Tikorangi, Maungataniwha, and Mapouriki.

place of the children of Tangaroa. In the evenings, you could see the fires where people were eeling. They'd eel in the evenings, sleep by the fires and in the mornings they would return to their marae with the eels they'd caught.⁴²

Speakers for Ngai Tamaterangi told us of their spiritual relationship with the Waiau River. Charles Manahi Cotter remembered a story from one of his uncles about when there was a flood. The waka went missing and was found in the middle of the Waiau River on its way to the Wairoa River: 'My uncle called out to it "*Wai te kauri – hoki mai*". According to [him] the waka then turned around on its own against the current and came to him. . . . This is significant and is an indication of our mana and relationship with the Waiau.'⁴³ There were prized puna (springs) and ngawha (hot springs) that were spiritually important too. Lorna Taylor told us that the water from their puna on the papakainga at Waimako Pa is 'sacred and is essential to our wellbeing'. It is used for 'karakia, rongoa, kai and cleansing and has been since time immemorial'.⁴⁴ Tei Ruawai Hema, giving evidence for Ngai Tamaterangi, spoke of a 'beautiful fresh water spring on Tukurangi'. This spring is 'not known by many people', but Ngai Tamaterangi would 'stop to rest at the spring on hunting trips'.⁴⁵ Such hunting expeditions are one of the primary ways through which the people maintain relationships with their taonga today.

42. James Anthony Waiwai, brief of evidence, no date (doc H14), p 24

43. Charles Manahi Cotter, brief of evidence, no date (doc 125), pp 11–12

44. Lorna Taylor, brief of evidence, 18 October 2004 (doc H17), p 10

45. Tei Ruawai Hema, brief of evidence, 29 November 2004 (doc 127), para 2.2

And the Waikokopu ngawha (hot springs), as we outlined in chapter 15, was a taonga of Ngati Haka Patuheuheu and of Tuhoe. Ani Hare of Ngati Haka Patuheuheu gave the korero tuku iho for the ngawha. She recalled a karakia sent by Ngatoro-i-Rangi to his tipuna in Hawaiki, and the arrival of the fire guardians, Te Pupu and Te Hoata, who ‘left a trail of volcanic fire or mineral springs’ on their journey inland from Whakaari (White Island). She also spoke of the importance of the ngawha for medicinal and healing purposes.⁴⁶

21.3.2.3 *Ngahere*

Relationships with the ngahere (forests) are also of great importance. The forests of Te Urewera have preserved much of the ancestral landscape in our inquiry district in a way that is now very rare. Stokes, Milroy, and Melbourne stated:

The forest (ngahere) was and still is an integral part of Tuhoe life and culture. It is called te wao nui a Tane, the great forest of Tane, te wao tapu a Tane, the sacred forest of Tane Mahuta, the child of Ranginui the Sky Father and Papatuanuku, the Earth Mother. It was Tane Mahuta who heaved his parents apart to let in light so that all beings could flourish on earth. Papatuanuku supports the growth of the forest, the trees reaching toward the sky, and Rangi sheds tears, rain, in his grief for Papatuanuku and so helps nourish the forest growth.⁴⁷

The importance of these relationships was and is evident in the significance attached to the spiritual powers of tipua trees. Taneatua, in his travels inland generations ago, came upon a hinau tree at Te Kohuru, near Ohaua-te-rangi, and chanted a karakia to ‘cause children to be conceived’;⁴⁸ Wharekiri Biddle explained that the tree, named Te Iho-o-Kataka, had assisted many previously barren couples over the years.⁴⁹ At Ruatoki, there were two named trees at Owihakatoro: Te Whanau a Kuramihirangi, representing shelter for the offspring of Kuramihirangi; and Whangai Manuhiri, symbolising the fertility of the area, and visited by people to revitalise their mauri.⁵⁰

Individual berry trees prized for the birds they attracted, or for their timber, were named too. Best wrote of miro trees:

every tree of this species is well known by the subtribes on whose land it stands, and most of such trees are known by distinct names, as also are any trees of other species – kahikatea, matai, rata etc – that were much resorted to by birds, and were for that reason favourite snaring-trees.⁵¹

46. Anitewhatanga Hare, brief of evidence, 15 March 2004 (doc C17(a)), pp 29–31

47. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 22

48. Paitini Tapeka (Elsdon Best, QMS [178], Alexander Turnbull Library (Tuawhenua Research Team, ‘Te Manawa o te Ika, Part One’ (doc B4(a)), p 36)

49. Tuawhenua Research Team, ‘Te Manawa o te Ika, Part One’ (doc B4(a)), p 36

50. Tamati Kruger, ‘Ruatoki: “Te Whenua i Puritia, Te Whenua i Tawhia”’, appendix to brief of evidence, 10 January 2005 (doc J29(a)), p 63

51. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 26

The bush in the Ruatahuna region ‘was renowned for its bounty and was referred to as te roi a Ruatahuna.’⁵² The kahikatea forest at Kiritahi was famous as a place where koko were snared, and Te Weraiti and Te Tukuroa were other well ‘famed areas for hunting birds.’⁵³ Forests were rich in a range of resources. The old people caught kiore (native rats) in traps made from supplejack after fattening them up; in fact, the phrase Mr Ohlson used was ‘[i] whakatipu kiore nga pakeke i Tarapounamu’; ‘[m]y elders cultivated the native rat at Tarapounamu’. The people ‘used to chew upon the tawa berries and mash the hinau berries which they then fed to the . . . rats.’⁵⁴ And the forest also provided different varieties of ti kouka (cabbage tree), aruhe (fern root), pikopiko (fern fronds), watercress, puha, tohetaka (native dandelions), and the berries and leaves of kotukutuku, tutu, karamuramu, hinau, and makomako trees.⁵⁵ Miriama Howden, in her evidence for the Tuawhenua claim, spoke of the importance of the forest for food and rongoa:

When we would go to the bush we would gather huhu grubs which were a delicacy for us. We would gather pikopiko . . . which were and still are a special food for us. You would pick them only in season. We would gather karamuramu for medicine, and tataramoa for tonics and other things too . . . For every illness at that time, a plant or tree could be found as a medicine, as an ointment, or for bathing – the bush would provide for all these things.⁵⁶

21.3.2.4 *Taonga species*

Relationships with taonga species are particularly important. The Wai 262 Tribunal, considering the nature of such species, suggested that they have ‘matauranga Maori in relation to them’, that they have ‘whakapapa able to be recited by tohunga’, and that ‘[c]ertain iwi or hapu will say that they are kaitiaki in respect of the species’ – ‘In essence, a taonga species will have korero tuku iho, or inherited learnings.’⁵⁷ Some taonga species, the Tribunal added, ‘are emblematic of community or cultural identity’, often with mystical or spiritual functions. They act as ‘spiritual guardians (kaitiaki in a different sense of that word) of the iwi or hapu in question.’⁵⁸

In Te Urewera, there is a range of relationships with taonga species. We discuss two in particular.

52. Rehita Taputu, brief of evidence, 11 May 2004 (doc D25), p 2

53. Kruger, summary of evidence concerning ‘Te Manawa o te Ika, Part One’ (doc D28), p 26

54. Ohlson, brief of evidence (doc G30), p 10

55. Robert Wiri, *The Ngati Whare Mana Whenua Report: The Lands of Te Whaiti Nui-a-Toi* (commissioned research report, Wellington: Crown Forestry Rental Trust, 2000) (doc A29), p 140

56. Miriama Howden, brief of evidence, 11 May 2004 (doc D26), p 4

57. Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims concerning New Zealand Law and Policy Affecting Maori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, pp 114–115

58. *Ibid.*, p 117

21.3.2.4.1 KAITIAKI

First, there are particular birds which are tipua or kaitiaki, and therefore of great significance to the peoples whose spiritual guardians they are. Jack Tapui Ohlson told us of Hineruarangi, kaitiaki (protector) of Ngati Whare, a ‘woman from ancient times’, a tipua, who takes the form of a shag, a ‘completely white’ bird; when she flies ‘it is a sign that a chief within the Ngati Whare district has died.’⁵⁹

We heard also of two white owls, Kahu and Kau, who were ‘predictive birds’ (tipua, that is, with mystical powers). For the people of Ruatoki, these tipua foretold whether the coming season would be a good one for taking birds. If they appeared when birds had been killed and were being cooked, it was a good sign for the coming season; and when the first birds were being prepared for preservation, if the owls did not appear, or returned and then flew away, a poor season would follow.⁶⁰

The kawau (black shags) are a taonga for nga iwi o Waikaremoana, revered for their importance as kaitiaki.⁶¹ The ruru (morepork) is one of several whanau kaitiaki of Ngai Tamaterangi, each of whom has a particular role.⁶² And the kaahu (native hawk) is important to Ngati Manawa and to Ngati Whare.⁶³ Wiremu Bird, discussing the Ngati Manawa ancestral house Apa Hapai Taketake, explained that the kaahu adorned the ama on the taranui of the whare: ‘in our mythology [the kaahu] levelled the plain of Kaingaroa.’⁶⁴ Jack Ohlson of Ngati Whare said that Kaingaroa was known as Te Kainga o te Kahu; ‘[t]he kahu is the kaitiaki of Kaingaroa.’⁶⁵

21.3.2.4.2 TUNA AND KERERU

Secondly, there are species which are taonga because of their great importance as food sources, and as ‘kai rangatira’, the prized foods that uphold the mana of a people who are famed for serving them to manuhiri and for exchanging them in trade with other iwi. We refer here to two such species, tuna and kereru, which are of particular importance in this chapter.

Tuna (eels) are a taonga for Ngati Manawa. Hapimana Higgins told us that Murupara, the township, is named after the taniwha Murupara, who was a tuna. Ngati Manawa, he said, ‘has always had an important relationship with the tuna’:

59. Ohlson, brief of evidence (doc G30), pp 5–6; Mr Ohlson sourced his account of Hineruarangi to Pahiri Matekuare; Hiwawa Whatanui, Elsdon Best papers, Maori notebook 1, qMS-0178, Alexander Turnbull Library (Wiri, *The Lands of Te Whaiti Nui-a-Toi* (doc A29), p105).

60. Evidence of Tamarau Makarini, Urewera minute book 4, 8–10 March 1900, fols 2–17 (Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 23). The interpretation of tipua is as given in Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 22.

61. Counsel for Nga Rauru o Nga Potiki, amended consolidated particularised statement of claim, 16 April 2004 (claim 1.2.1(a), SOC IV), p 134

62. Charles Manahi Cotter, brief of evidence, 11 December 2003 (doc I25(a)), p 25

63. Wiremu Bird, brief of evidence, 11 August 2004 (doc F33), p 11; Jack Tapui Ohlson, brief of evidence, September 2004 (doc G36), para 19

64. Bird, brief of evidence (doc F33), p 11

65. Ohlson, brief of evidence (doc G36), para 19

Our tribal identity is closely linked to our relationship with the tuna, our rivers, and our natural resources . . .

Ngati Manawa is famous for its tuna, and this reputation is expressed to us when we travel to other tribal groups. . . . In this way it is important to the mana of Ngati Manawa.⁶⁶

Mr Higgins, whose evidence we have quoted in detail in chapter 2, stressed that knowledge of hinaki and of eeling places in local rivers and creeks was shared within whanau, ‘right down to the young ones’. His family had two hinaki. One was named Rawiri ‘after our tupuna’, and Rawiri ‘had a reputation of filling itself overnight when set by people who had knowledge of the river’. Tuna were also caught by torchlight, ‘replicating an old style of eeling’ by their tipuna, who carried flame torches at night; and by threading worms on a flax webbing to entrap the tuna by its teeth. Mr Higgins explained how he had been taught to set a hinaki, looking for the right conditions in the river waters, for logs or great trees in the water where eels might rest, the care needed in baiting, and also the importance of choosing the right weather conditions and the right phase of the moon.⁶⁷

Karakia before going eeling, and eeling in accordance with tikanga, was important: ‘My father believed that the karakia was not to encourage the eel to come into your hinaki, but rather to ensure you were doing it for the right reasons.’⁶⁸ And it was also important how your catch was distributed:

What was also a way of life was the tikanga of sharing. Dave [Emery, renowned for his ability to catch large eels] was one of those gentlemen who would eat one, give you one, and then give one away. That is an important tikanga passed down to us; because we all learnt from those examples that that was how you were expected to conduct yourself and that’s how he was.⁶⁹

We had evidence too of Ngati Manawa gathering each March at Rangipo in the Kaingaroa area to farewell the eels with appropriate karakia, as they departed on their migration to the ocean to spawn.⁷⁰ The life cycle of the tuna was, and is, well known, and the knowledge has been handed down to the present generations.

Noera Tamiana explained that eeling was ‘not a simple matter’. At Ruatahuna, preparatory work began during the day, including the gathering of torches for the night-time fishing. These consisted of weathered, ‘gummy wood’ called mapara. The mapara were then distributed along the river or stream ‘so we would have a continuous supply along our fishing expedition’. Early in the morning, the young people would also dig for worms. Then, flax was scraped ‘in a special way’ to

66. Hapimana Albert Higgins, brief of evidence, 11 August 2004 (doc F31), p 2

67. Ibid, pp 3–6

68. Ibid, p 8

69. Ibid, pp 2, 8, 9

70. Merata Kawharu and Rapata Wiri, ‘Te Mana Whenua o Ngati Manawa’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc C11), p 39; Te Runanga o Ngati Manawa, site visit booklet (doc F38), p 8

prepare strands of hitau, which were attached to a manuka stick (with the worms threaded through as bait). Later at night, from about 8.30 to 10 pm, this particular tool was used to fish for eels in the rivers. After that time, the eels slept in the shallows and were caught using another tool, a wooden spear with ‘a thin bit of steel cut into a comb with prongs on it’. Finally, very late at night, the eels began their run and were caught by ‘gaffing them, using a hook and swinging them out of the water.’⁷¹ Mr Tamiana added: ‘The skills and traditional tools we have are skills that everyone here knows. These things are part of our life, self-sufficiency and sustainability.’⁷² Tuna are a taonga of Ngati Ruapani also. As such, there are important tikanga associated with them. Maria Waiwai told us that when she caught eels with her kuia, and learned to clean and cook them, ‘[t]he para and the bones were buried to prevent the dogs from desecrating them, a mark of respect for that food resource.’⁷³ Neuton Lambert of Ngati Ruapani and Tuhoe told us how well the old people knew the eel species: ‘They knew the science of each [type of] eel; and respected that. Their tikanga accounted for all aspects of the eel life cycle, so that our relationship with the eels was harmonious.’⁷⁴ Many kaumatua spoke to us of tikanga in relation to catching foods of the forest and the waterways, and of the importance of conserving foods, of taking only what was needed, and of returning the first catch to the water. Mr Cotter of Ngai Tamaterangi stated that some of the catch from the Waiau River was returned for the taniwha Haumapuhia.⁷⁵ And James Doherty of Ngati Tawhaki told us that when eels were caught in the Okahu River, ‘you kill it, rub the slime onto leaves and return . . . [them] to the hole. This will ensure the tuna will come back.’⁷⁶

Kereru and kaka, Tuhoe stated, are taonga species for them. These birds sustained them physically and also sustained their mana, providing ‘the lavish hospitality for which [they] are renowned.’⁷⁷ Dr Coombes quoted Wharekiri Biddle as stating that kereru were ‘sacred to Tuhoe’, who harvested them on a seasonal and controlled basis.⁷⁸ During the nineteenth century, huahua (the delicacy prepared by boning the birds and preserving them in their own fat) was often gifted, or served on special occasions. The Tuawhenua researchers noted that ‘Te huahua was often stored and presented in taha, ornamentally carved and decorated, symbolically representing the mana of the hapu or chief.’⁷⁹ Rehita Taputu called

71. Noera Tamiana, brief of evidence, 10 May 2004 (doc D15), pp 5–6

72. Ibid, p 7

73. Waiwai, brief of evidence (doc H18), p 4

74. Neuton Lambert, brief of evidence, 11 October 2004 (doc H57), p 6

75. Cotter, brief of evidence (doc I25), p 25

76. James Edward Doherty, brief of evidence, 11 May 2004 (doc D27), p 3

77. Counsel for Wai 36 Tuhoe, particularised statement of claim, 4 March 2003 (claim 1.2.2, soc 2), p 228

78. 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), pp 137–138

79. Tuawhenua Research Team, ‘Ruatahuna: 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 232

te huahua ‘a food of aristocrats.’⁸⁰ And huahua was also in high demand for trade with other tribes; by the 1860s, kaka formed the ‘base of a roaring trade’ and ‘commanded huge returns of European goods.’⁸¹

Kereru were taken in various ways. Te Kurapa of Ngati Tawhaki, a fighting chief, was also renowned as a great fowler, and his prowess is depicted on the rafter of the great whareniui at Mataatua, Ruatahuna, high up on miro trees, spearing kereru.⁸² Rehita Taputu, giving evidence for the Tuawhenua claim, told us:

My ancestors would know the times of year that the foods of the birds were ready, and therefore where to put the troughs for catching the birds. The troughs would be hung up, the nooses attached and then they were filled with water.

On other trees the long spears (tao) would be hung up. Some in front, others to the sides and behind. You were ready then for spearing birds landing from any direction.⁸³

Tuhoe informants told Elsdon Best that such spears were about 25 feet long.⁸⁴ An account of a whare whapiko rau huka by Tamarau Waiari of Tuhoe is given by Best. This was a hut erected and set apart solely for the making of bird snares, undertaken by men who were fowlers.⁸⁵

Pahiri Matekuare of Ngati Whare described the making of the traps known as waka kereru or pigeon troughs. Kereru feed on miro berries during the winter; the birds become thirsty and were caught when they drank at waka kereru.⁸⁶ They were only allowed to be caught during winter.⁸⁷ Jack Ohlson, referring to Ngati Whare’s use of waka (troughs) and snares in the old days, added that these traditional catching methods were lost in the early part of the twentieth century. But the waka remained, and the pigeons still landed on them, and they could then be shot.⁸⁸

The taking, preserving, and consuming of kereru was strictly controlled by tikanga. Dr Wiri cited Te Mauniko Eparaima of Te Kuha Pa of Waikaremoana, who gave an account of the role of women in lifting the tapu of the kereru when the first catch of the season was killed:

When those birds were cooked the women were given a bird each to eat. Only after the women had finished eating were the men permitted to eat. Because of the sanctity

80. Taputu, brief of evidence (doc D25), p 3

81. Tuawhenua Research Team, ‘Te Manawa o te Ika, Part One’ (doc B4(a)), p 172

82. Ibid, pp 134–135

83. Taputu, brief of evidence (doc D25), pp 2–3

84. Elsdon Best, *Forest Lore of the Maori: With Methods of Snaring, Trapping, and Preserving Birds and Rat, Uses of Berries, Roots, Fern-root, and Forest Products, with Mythological Notes on Origins, Karakia Used, Etc* (1942; repr Wellington: Government Printer, 1977), p 156

85. Ibid, pp 149, 408

86. Wiri, ‘Lands of Te Whaiti-Nui-a-Toi’ (doc A29), p 134

87. Doherty, brief of evidence (doc D27), p 7

88. Ohlson, brief of evidence (doc G36), para 14

Unknown (ATL PACOLL-4249-06)



A waka kereru, used to trap native wood pigeons, Ruatahuna, 1899

(of the wood-pigeon) men were prohibited from eating the first birds that were caught in the bush. It was the role of the women to clear the way.⁸⁹

Ngati Whare tikanga was similar. Mr Ohlson told us, ‘When the kereru were fat, our tikanga was that only the women would get the fat kereru, or would at least get it first.’ He explained:

Kereru was a form of medicine for Ngati Whare women, especially when the women were hapu [pregnant]. If they ate kereru while they were hapu, they’d have no troubles giving birth, there would be no birth pains, and the baby would come through the birth canal easily.⁹⁰

Hohepa Kereopa of Tamakaimoana stated that, when the first birds were caught and were placed in the sacred fires, they were for the home people. The men bit into the head, ‘so that the spirit of that bird will not know where it’s going’; then the legs were eaten ‘so that the bird cannot walk’. The bird was broken up then,

89. Wiri, ‘Lands of Te Whaiti-Nui-a-Toi’ (doc A29), p135

90. Ohlson, brief of evidence (doc G36), paras 12–13

and the rear-end given to the women to eat; the men got only the bones. But the preserved kereru were intended above all for manuhiri. They were brought onto the marae ceremonially before a feast, during a haka; that, Mr Kereopa said, is the prayer for the manu. When the birds were offered onto the table, the guests would 'grab the oil, the grease from the Kereru and rub it on their hands so that the life essence of the mauri has been absorbed into the people': 'Koira te karakia o te manu, kua hora nga kai ki nga manuhiri ki runga i te tepu, kua haere nga mea matau, nga mea matau. Kua karo atu i te hinu o te kereru, kua pani ki nga ringa, kua te mahunga. Kua whakahoki te mauri ki runga tonu i a ratou.'⁹¹ Maria Waiwai emphasised 'there was never any waste, every part of the bird had an important use'. The meat was eaten, the claws used for colouring and makeup, and the feathers for cloaks.⁹² And James Doherty said that, after the birds were brought home, his grandmother Heeni Moetu Kawana would 'pluck them and separate the feathers, those for making Korowai and the rest went to making pillows.'⁹³

Te Whenuanui Te Kurapa of Tuhoe, giving evidence for the Tuawhenua claim, spoke of catching pigeons, tui, and other birds with his father, and bringing them back to where his father was waiting. 'From the first birds,' he said, 'we would pluck the tail feathers and stick them in the ground to return the life force of the bird back to the earth.' He added:

With everything we did in the bush, collecting medicines, gathering foods, hunting, fishing, eeling, and travelling through the bush, there were traditions and rules that we had to have regard for. These have been important practices for me and my family to follow, to protect us, and to provide for us. These things are all traditions that were handed from my father to me.⁹⁴

As we shall discuss later in the chapter, the tikanga for taking kereru and other birds was well known to the Crown because it was described often in Parliament. Back in 1900, for example, Sir James Carroll explained:

the Natives never kill birds out of the proper season; they never shoot a bird unless it is fat, and fit for the pot. They bag properly and do not wound birds by loose and reckless killing. They preserved all their bushes under their old laws, and no one was allowed to transgress. Their old game-laws were strict enough, I tell you, and until the particular day arrived for opening, and when the proper ceremony had been performed and the ban removed no one was allowed to go out into the bush and kill except at the risk of his life.⁹⁵

91. Hohepa Kereopa, oral evidence (simultaneous interpretation), Tataiahape Marae, Waimana, 26 November 2003

92. Waiwai, brief of evidence (doc H18), p 16

93. Doherty, brief of evidence (doc D27), p 8

94. Te Whenuanui Te Kurapa, brief of evidence, 11 May 2004 (doc D21), pp 4–5

95. James Carroll, 16 August 1900, NZPD, vol 113, p 36 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 153)

We will discuss these aspects of tikanga further in the next section of our chapter. Here, we simply note that tribal leaders in Te Urewera used rahui to control the times and places for hunting, so that the birds were taken with the maximum benefit for the well-being of the people and the mana of the hapu, and for the conservation of the resource. This was a duty of those whose task it was to care for the community and for the resource, and who assumed the responsibility of kaitiaki of the kereru.

21.3.2.5 *Kaitiakitanga*

The conservation of prized resources was but one of the important responsibilities entailed by kaitiakitanga, which in turn was shaped by the fundamental relationship between the people and their turangawaewae. As Hohepa Kereopa put it:

You have all heard the words spoken today: I am Te Urewera . . . and my task in this world is to care for Te Urewera, and all aspects pertaining to us all today . . . as a guardian. Who on earth said I [would] be a chief over my ancestor Papatuanuku? Who said I would be in control of the traditions of my ancestors? But the thing for me is to care for Papatuanuku . . .⁹⁶

As we noted in chapter 2, it was not only the physical environment and its life-forms that had to be protected: their mauri had to be cared for and conserved also, for the survival and well-being of all. And we cited Poai Raymond Burne:

Ka hoki aku whakaaro ki te wa i nga koroua i manaaki ana te ngahere. Tino mohio ratou ki te titiro i te ahuatanga o te rakau ki mua i te turakitanga. Kaore e patu rakau noa iho. Ko te mea nui te tatai whakapapa; te wairua o te manaakitanga kia ora ai tatou katoa nga tamariki o Papatuanuku hei tirohanga ma te kanohi.

My thoughts reach back in time when my koroua was responsible for protecting the forest. They had a deep understanding pertaining to the rituals before cutting trees: the spiritual aspects, the genealogy so that we would find sustenance, the children of Papatuanuku.⁹⁷

Te Okoro Joe Runga stated: 'All waterways contain and are conduits of Mauri, which our kaumatua understood well. Any practical use of waterways was guided by our recognition of the mauri within it and flowing through it.'⁹⁸

These relationships are evident in the respect in which other living beings – each with their own mauri – were held. Dr Rose Pere expressed it in these words:

96. Hohepa Kereopa, oral evidence (simultaneous interpretation), Tataiahape Marae, Te Waimana, 26 November 2003

97. Poai Raymond Burne, oral evidence (simultaneous interpretation), Murumurunga Marae, Te Whaiti, 16 September 2004; see also Poai Raymond Nelson Burne, brief of evidence (doc G18), p 12.

98. Te Okoro Joe Runga, amended brief of evidence, 30 November 2004 (doc I19), p 6

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.⁹⁹

Rehita Taputu of Ruatahuna spoke also of practices for collecting and preparing rongoa:

First of all there was karakia, and those on the expedition to gather medicines would not partake of food. For some medicines, you only pick the leaves on which the sun shines. You also have regard for the fact that it has both male and female elements. Some medicines you have to dig up as they are under the soil.

Thus the collecting of foods and medicines was not a simple matter. But this was how our people kept good health and flourished – by carefully using and managing the resources of Ruatahuna provided by the bush, by the land.¹⁰⁰

All of these statements embody the value of kaitiakitanga – the obligation, as the Wai 262 Tribunal put it, arising from the kin relationship in te ao Maori between ‘all the myriad elements of creation’, to nurture or care for a person or thing. ‘It has a spiritual aspect, encompassing . . . an obligation to care for and nurture not only physical well-being but also mauri.’¹⁰¹ The Tribunal found a close, reciprocal relationship between mana and kaitiakitanga:

In the human realm, those who have mana (authority) must exercise it in accordance with the values of kaitiakitanga – acting unselfishly, with right mind and heart, and using correct procedure. Kaitiakitanga is an obligation not just of individuals but of the community as well.¹⁰²

We turn now to consider the exercise of authority over resources and waterways in Te Urewera.

21.3.3 How did the peoples of Te Urewera exercise authority over resources and waterways under customary law?

Tamati Kruger, giving evidence for Tuhoe, emphasised the significance of the korero we had heard on the peoples’ absolute right to take food from the bush and from rivers:

99. Rangimarie Turuki Rose Pere, brief of evidence, 18 October 2004 (doc H41(a)), p 5

100. Taputu, brief of evidence (doc D25), p 3

101. Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims concerning New Zealand Law and Policy Affecting Maori Culture and Identity, Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), p 17

102. *Ibid*, p 38

A, ka nui te mihi, tena tetahi ki te patai he aha hoki te kiko o wera korero, e tu ake nei te hunga i te wa e tipu ana ratau nga kai i tangohia e ratau mai te Ngahere, mai te awa, e korero ana mo te whakatipu kai. Tena te tangata e patai, 'He aha te kikokiko o wera korero ki ta tatau hui?' Ko taku whakautu, 'Koina te kanohi o te Mana Motuhake'. Koina tona kanohi. Koina te ohonga mai i te ata i runga i te mohio kai a koe te mana. Kai tou whanau, kai tou hapu, kai tou iwi. Kare koe e haere ki wahi ke ki te inoi, ki te patai, tena, ka ahei koe ki te haere ki te tango kai mai tetahi wahi. Tena ka ahei koe, a, ki te haere ki te tiki rongoa mai te ngahere.

I am very pleased if somebody was to ask what was the purpose of those talks those people who stood up to talk about the period they were growing up, the foods they extracted from the bush, from the river, they were talking about growing food. If a man was to ask what [was] the purpose of those talks to our meeting, my reply will be, 'that is the face of Mana Motuhake. That is its face.' That is its awakening in the morning, knowing that you have the mana. It belongs to your family, it belongs to your sub-tribe, it belongs to your tribe. You don't have to go somewhere to beg to ask for permission to pick food from a place, if you are allowed to get medicine from the bush.¹⁰³

That is an unequivocal statement of the rights of whanau, hapu, and iwi to exercise authority over resources and waterways. In chapter 2, we discussed the origin of rights to the land and its resources in ancestral relationships with the land (take tipuna), in discovery (take kite hou), sometimes in conquest (raupatu), and always with long established 'occupation' (ahi ka or ahi ka roa).

We cited the evidence of many speakers from the various claimant groups in our inquiry, and we noted that that evidence related to a complex body of knowledge required for the forest economy and society of Te Urewera to work. It reflected Maori philosophies – understandings of the relationships between people and the natural world, respect for the mauri of all things.

Mana whenua (authority over the land – or, as Tuhoe explained it, economic power), we concluded, depended on various factors:

- ▶ the knowledge accumulated over generations of the movements and habits of birds, kiore, tuna, and other species which were so important in the economy, and of the most effective methods of their capture; and
- ▶ the exercise of authority by rangatira to ensure successful takes of available resources in season, through organisation at whanau and hapu level, and through setting of rahui to protect resources.

Here, in the context of mana whenua, we consider first the exercise of authority over resources.

103. Tamati Kruger, transcript of additional evidence at hearing week 4 (Maori) (doc D44), pt1, pp 1–2; Tamati Kruger, transcript of additional evidence at hearing week 4 (English), 17 May 2004 (doc D44(a), pt1, p1

Tuhoe, their counsel stated, ‘has exercised rangatiratanga over the natural resources of Te Urewera since time immemorial’. They had both exercised and defended their rights to manage their natural resources.¹⁰⁴

The Tuawhenua claimants expressed the relationship between the exercise of authority and the use of resources in these words:

Until intervention by the Crown from the 1860s, they enjoyed several centuries of uninterrupted authority over their lands, resources and destiny. . . . Te mana motuhake is the distinctive authority of the hapu of the Tuawhenua, attuned to their environment in the Urewera and their Nga Potiki and Tuhoe culture, that created laws to regulate the exercise of power, relationships between individuals and groups, the allocation of and access to resources and, broadly, the ways in which [the] people lived.¹⁰⁵

Rangatira, in other words, had to manage whanau and hapu relationships as well as the customary economy. And, as the Tuawhenua researchers emphasised, careful management was necessary to ensure the Te Urewera bush (‘a massive farm for Tuhoe’) produced food and other resources sustainably: ‘The taking and utilisation of bush resources were strictly controlled by season, rahui and tikanga.’¹⁰⁶

Rehita Taputu, in his korero about Te Wao Tapu Nui a Tane, stated that when the forest still stood everywhere:

each hapu and whanau [of the Ruatahuna Valley] knew where their areas were for obtaining food, and how to conserve these foods. Thus the mana motuhake of our ancestors worked in a way to not only protect our food resources, but also to ensure that every one got a fair share. Our ancestors thrived.

The gathering of most foods ‘was controlled by certain practices and rules’ – which applied particularly in the case of fowling, since the birds of the bush were ‘treasured foods.’¹⁰⁷

For Ngati Whare, the food sources provided by the ancient podocarp forest at Whirinaki included the many species of birds who fed there, whether on berries, nectar, worms, or insects: kereru, kaka, koko, kiwi, kakariki (native parakeet), koekoea (long-tailed cuckoo), pipiwharauoa (shining cuckoo). Weka, and whio and parera (ducks), were also taken.¹⁰⁸

As we mentioned above, bird harvesting ‘was managed within a framework of customary law and practice’, which included the use of rahui or placing a tapu on particular species.¹⁰⁹ The start of the hunting season was based on the signs of the

104. Counsel for Wai 36 Tuhoe, closing submissions, 30 May 2005 (doc N8(a)), p150

105. Counsel for Tuawhenua, amended statement of claim, 3 March 2003 (claim 1.2.12, SOC 12), p 4

106. Tuawhenua Research Team, ‘Te Manawa o te Ika, Part One’ (doc B4(a)), p169

107. Taputu, brief of evidence (doc D25), p 2

108. Counsel for Ngati Whare, closing submissions, 9 June 2005 (doc N16); Ohlson, brief of evidence (doc G30), pp 8–9; Ohlson, brief of evidence (doc G36), pp [4]-[6]; Wiri, ‘Lands of Te Whaiti-Nui-a-Toi’ (doc A29), pp 128, 134–137

109. Counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), p283

maramataka (seasonal calendar), which the old people carefully observed, including the arrival of the migratory birds such as the long-tailed cuckoo, and the blossoming of the rata trees whose nectar birds like the kaka flocked to.¹¹⁰ The role of a rangatira in respect of bird hunting was to organise the harvest and storage, selecting those who would be involved, and setting the limits for the catch.¹¹¹

Jack Ohlson of Ngati Whare talked of earlier times when whanau and hapu moved around their rohe, visiting ‘food producing forests’, to ‘follow . . . the food supply through the seasons.’¹¹² They occupied areas beside the rivers like Whirinaki, Mangamate, and Otuwairua.¹¹³ Ngati Whare gave evidence of many mahinga kai sites visited seasonally in a cycle called te takina nekeneke, and of large numbers of pa, kainga, mahinga manu (bird hunting sites), awaawa mahinga kai (water resource sites), and wahi tapu situated throughout Te Whaiti-nui-a-Toi – reflective of their customary rights and interests.¹¹⁴ Mr Ohlson gave a whaka-*tauki* about the bird hunting cycle: ‘He whenua pua, ko te puawai o te kai. He whenua puehu, ka kore tatau e kaha ki te tiaki i wenei whenua, ana ka puehu.’ As he explained it, ‘the land which is frequented by birds, this refers to the abundance of the food resources. The land which turns to dust, if we are not careful in conserving our land, the result will be that it will turn to dust.’ Thus, when bird-hunting was finished, ‘they placed prohibitions upon those hunting grounds so that the food resources would not be abused and depleted. It was left for the high-priest [tohunga] to place prohibitions upon those areas so that the food-resources could be conserved.’¹¹⁵ Ngati Whare, Mr Ohlson said, ‘practised rahui a lot to protect all of our resources’; it was ‘our own form of conservation.’ And it was long practised. He instanced a hui in the late 1960s, when the Maungapohatu people asked Ngati Whare to provide kereru for a hui which the Minister of Forestry was to attend. Ngati Whare put a rahui on a certain part of the forest where kereru were plentiful, so that others would not take the birds there. Rahui were also put on Horomanga Stream for that purpose, ‘so that only one iwi could take eels from there.’¹¹⁶ In short, ‘Ngati Whare . . . regulated access to resources since the time of [their tupuna] Wharepakau to ensure the sustainability of the environment through mechanisms such as rahui.’¹¹⁷

Customary rights, law, and practices also applied to imported species and technologies. New species in Te Urewera led to new crops, pig and deer hunting, harvesting of waxeyes, and, as we discuss later in the chapter, trout fishing. New or adapted technologies encompassed the use of guns, wire eeling spears, and hinaki

110. Ohlson, brief of evidence (doc G30), pp 11–13

111. Rongonui Tahī, notes in English, 22 June 2004 (doc E26), p 2; Taputu, brief of evidence (doc D25), pp 2–3

112. Ohlson, brief of evidence (doc G36), para 10; Ohlson, brief of evidence (doc G30), p 8

113. Ohlson, brief of evidence (doc G30), pp 7–8

114. Ngati Whare map book, September 2004 (doc G33); Wiri, ‘Lands of Te Whaiti-Nui-a-Toi’ (doc A29), fig 6.7

115. Ohlson, brief of evidence (doc G30), pp 8, 12

116. Ohlson, brief of evidence (doc G36), paras 18, 20

117. Counsel for Ngati Whare, closing submissions (doc N16), p 101

made from chaff sacks and wire. Custom is not static, and new crops, food animals, birds, and fish were managed in the customary economy to serve Maori purposes. Jack Doherty described the taking of waxeyes (silver eyes) from a small shelter, where the fowler imitated the bird's distress call using a special flax, to attract them to sit on a hand-held manuka rod, and then struck them down with a similar rod held in the other hand.¹¹⁸

Stokes, Milroy, and Melbourne pointed out that potatoes and pigs 'have been an integral part of the forest economy since the 1840s', and horses have been a vital means of transport since the 1860s. Introduced animals, plants, and technology were 'absorbed into an ongoing social and economic organisation among the clans of Tuhoe'.¹¹⁹ While potatoes and pork were the most important new food sources, there were also other useful crops. The traditional forest economy was modified by the introduction (notably by the missionary James Preece at Te Whaiti) of maize, fruit trees, and vegetables.¹²⁰ Nor was the adaptation of the customary economy confined to the nineteenth century. Deer were introduced to Te Urewera at the end of that century and were well established by the 1920s. For many decades, deer have been an important source of food for local Maori communities.¹²¹

It is clear, too, both that care was taken to assist pigs with foraging, and that pig and deer hunting was carried out in accordance with tikanga. By 1900, the people of Te Whaiti and Ruatahuna were cultivating productive grounds for pig-hunting, firing undergrowth to destroy patches of bush so that pigs would be attracted in numbers to feed on the roots of the fern that grew after burn-offs. Among Tuhoe, this became a tradition.¹²² In the period before hunting became a means of 'pest' control, and therefore a source of income, the sustainable hunting of pigs and deer was important to the conservation of the food source. Korotau Tamiana of Ruatahuna explained:

At that time, you would be told off if you had shot say four deer, or caught three pigs, you might think you were neat, but when you got home you would be told off. They would say how on earth are we supposed to eat all this, you should [have] let some go. That's how the families lived at Ohau. Pakitu [Wharekiri] would have a mark, and each one would have a mark. When it came to the time to let the pigs go, because they couldn't be eaten, they would be marked . . . When the pigs were caught later, sometimes a year later, you would see who had marked the pig.¹²³

In his evidence to us, Mr Tamiana added that the limit for deer was 'roughly not more than two', and that pigs that were let go for catching later were first castrated:

118. Doherty, brief of evidence (doc D27), p 7

119. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 28

120. *Ibid*, pp 26–27

121. *Ibid*, p 355

122. Tuawhenua Research Team, 'Ruatahuna, Part 2' (doc D2), p 232

123. *Ibid*, p 389

‘It was frowned upon if you caught more than you needed, or more than you could give away to other families.’¹²⁴

Evidence was given also about the importance of observing ownership of whanau and hapu lands when paying clients were first accepted by whanau for hunting and fishing expeditions. Rongonui Tahī had been told stories by his grandfather and elders of such expeditions in the 1940s in the upper reaches of the Whakatane River – places like Pukareao, Hanamahihi, Waikarewhenua, and Ohaua, which could only be reached by trekking or by horse:

Each family made contact with a client and a longterm rapport was established for up to 10 years in some cases. The client was taken to the family patch or territory and there he carries out his activities. Our elders were particular about boundaries of operation and kept strictly to Maori protocol on land issues. This was the basis of the establishment of these enterprises.¹²⁵

We must also consider the question of the extent of hapu and tribal authority over rivers – and, beyond that, over other waterways. The importance of waterways to the peoples of Te Urewera can hardly be overstated. They were the arteries of life in the region, a source of food – both in the water and on the river flats – of plants, and drinking water, and the centre of eel cultures; they were where people lived, they were where transport and commerce between kainga took place. Waterways are associated with the rhythm of life, and controlled by rahui and by taniwha. They are also symbols of identity and unity.¹²⁶

Claimants in our inquiry spoke of waterways in different ways. Kaumatua Charles Cotter of Ngai Tamaterangi stated that ‘All of our rivers are taonga tuku iho.’ One of the major rivers, the Waiau, ‘is identified with the collective of Ngai Tamaterangi’, though each whanau ‘have their localised rivers.’¹²⁷ Ngai Tamaterangi, he said, ‘exercised mana over our rivers and waterways within our rohe including but not limited to the Waiau, Waikaretaheke, Mangaaruhe, Ruakituri and Hangaroa Rivers.’ In respect of the Waiau River,

My Uncle Rongo Hema was the tohunga for the river. He was the expert in relation to it. We could not only get eels including blind eels (peharau) but also kakahi . . . , panoko (small fish), white bait, fresh water flounders and the like. It would all depend upon the signs and the seasons and waiting until certain months in the year. This is where people such as my Uncle Rongo exhibited their expertise.¹²⁸

124. Korotau Tamiana, brief of evidence, 10 May 2004 (doc D20), p 6

125. Rongonui Tahī, brief of evidence (English), 22 June 2004 (doc E27)

126. Suzanne Doig, ‘Te Urewera Waterways and Freshwater Fisheries’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A75), p 23

127. Cotter, brief of evidence (doc 125), p 10

128. *Ibid.*, pp 10–11

Mr Cotter thus spoke in the same breath of rivers as taonga, the exercise of mana, and the specialised knowledge developed to take river resources sustainably.

Ngati Whare, naming the rivers and streams within their rohe, stated that

These rivers and waterways and the fisheries and other natural resources that they sustain are taonga and of extreme cultural significance to the iwi and hapu of Ngati Whare. There are a number of important awaawa mahinga kai (water resource) sites within Ngati Whare's rohe where kokopu (native trout), koura (freshwater crayfish), tuna (eel), whio (blue mountain duck) and parera (native duck) were caught.¹²⁹

Te Okoro Joe Runga, who brought a Ngati Kahungunu claim about the southern rivers, spoke of mana awa in relation to the river system, including the whole of the waterways:

Mana awa is the unrelinquished tino rangatiratanga over estates of the Kahungunu Iwi. In the Urewera the estate pivots from Te Pae o Huiarau . . . [which] sheds for us nga wai to sustain and imbue the intricate and extensive river system and Lake Waikaremoana . . .

Thus the springs, aquifers, streams, tributaries, rivers, lakes, lagoons, watersheds and catchments of Te Pae o Huiarau are the dominion of Kahungunu that culminates in the significant rivers of the Waiau, the Waikaretaheke, the Ruakituri, the Waipaoa stream, the Mangaruhe and many others.¹³⁰

Mr Runga underlined his korero on the interconnectedness of the whole system of waters and waterways by reference to Tangaroa, 'as there is no division between moana, roto or awa in terms of his domain.'¹³¹

But customary rights in a large water system might not necessarily be exclusive to any particular group of closely related peoples. Ngati Ruapani, their counsel stated, 'had tino rangatiratanga of the waters and resources of Lake Waikaremoana, Lake Waikareiti and the river network within their rohe'. The 'cultural relationship of the Waikaremoana hapu with the rivers and waterways in the region is an integral part of their being [and] ought not to be in doubt'.¹³² Yet Ruapani do not claim exclusive rights to the whole water system:

the proprietary rights are both exclusive and non-exclusive in nature. Near kainga and marae the rights to take water and/or fish has an exclusionary component. However, the whole water system was vital to all Maori residents in Te Urewera. Interference

129. Wiri, 'Lands of Te Whaiti-Nui-a-Toi' (doc A29), pp131, 137-141 (counsel for Ngati Whare, closing submissions (doc N16), pp119-120)

130. Runga, brief of evidence (doc I19), p5. For clarification of the nature of Mr Runga's claim to southern waterways for and on behalf of Ngati Kahungunu, see counsel for Te Okoro Joe Runga, opening submissions, 2 December 2004 (doc I46), p2.

131. Runga, brief of evidence (doc I19), p5

132. Counsel for Wai 144 Ngati Ruapani, closing submissions, 3 June 2005 (doc N19), p63

with part of the water system at its source, for example at Lake Waikaremoana causes prejudice to all right holders.¹³³

Rights to fish and the control of fishing were particularly important in demonstrating who had authority to care for, manage, and harvest in waterways. Mr Runga described mahinga kai as ‘an undisturbed estate of Maori’, which the people had continued to use despite assaults on, and denial of, their mana over waterways. Mahinga kai, in other words, was an expression of tino rangatiratanga. And he also emphasised mana wai: ‘We . . . always held dominion and control over water and its uses within our tribal areas.’¹³⁴

Some speakers referred to particular waterways, tributaries, or streams, often emphasising their importance to the prized eel fisheries. James Doherty, in his evidence for the Tuawhenua claim, told us that the Okahu River, a major tributary of the Whirinaki, ‘is responsible for providing smaller streams with eels and fish.’¹³⁵ Hakeke McGarvey stated that people used to have eel weirs at Patutahuna, where the Kawekawe Stream entered the Ohinemataroa River. ‘They also used hinaki particularly in the tributaries.’¹³⁶

Jack Ohlson said that Ngati Whare mahinga kai included areas to catch kokopu, of which there were different species; and there were also koura. That, he said, was why the eels ‘would come up our rivers and streams, to eat the koura.’¹³⁷ Robert Wiri’s list of Ngati Whare awaawa mahinga kai features a number of streams (Oruiwaka, Mangawiri, Tangitu, Waimurupuha, Mangakirikiri) and a well-known lagoon, called Arohaki, abundant with kokopu and other fish, and ducks.¹³⁸ Noera Tamiana mentioned that as well as catching eels, they caught raumahehe, ‘a native fish that lived in the bush creeks . . . about 8–9 inches long.’¹³⁹

Dr Suzanne Doig also stressed the importance of ‘smaller side streams’ as a major source of food. Tunakapakapa (the name means writhing eels) was an ‘ancient ditch’ or channel near Minginui, which linked the Tunakapakapa stream to the Whirinaki River; the waters of the stream were diverted into the ditch during the main eeling season, then back into the stream, leaving the eels stranded.¹⁴⁰ Wiri states that the name arose from an incident when Ngati Mahanga cut the channel from a bend in the stream to the river.¹⁴¹

Inanga were caught, in their two major annual migrations, in pools in the rivers and in side streams; kokopu, important to the Ruatahuna people, were mostly caught in side streams rather than in the main river channels. They were also a major food source in the Whirinaki River, and lower down in the Rangitaiki River

133. Ibid, p 67

134. Runga, brief of evidence (doc 119), p 6

135. Doherty, brief of evidence (doc D27), p 3

136. McGarvey, brief of evidence (doc J33), p 3

137. Ohlson, brief of evidence (doc G36), para 27

138. Wiri, ‘Lands of Te Whaiti-Nui-a-Toi’ (doc A29), pp 138–139

139. Tamiana, brief of evidence (doc D15), p 5

140. Doig, ‘Te Urewera Waterways’ (doc A75), pp 15–16

141. Wiri, ‘Lands of Te Whaiti-Nui-a-Toi’ (doc A29), p 139

and many of its side streams, as well as in tributaries of the Tauranga River and Waiti Stream. And raumahehe (known as koaro elsewhere) – an important part of the traditional Tuhoe diet – was also taken mostly from small side streams, and in Waikareiti. Doig adds that it was a particular delicacy at Ruatahuna, where it was described as a ‘special’ fish.¹⁴²

We add that there is evidence that whanau and hapu assumed that their authority over streams and rivers extended to introduced fish. Dr Doig, in her study of rivers and fisheries in the catchments of the Rangitaiki and Whakatane Rivers, and the western Wairoa River catchment, noted that new fish such as trout and morihana (carp) were often taken by traditional methods. Morihana, for instance, were caught by driving them down the Whakatane River into waiting nets, just as other small, shoaling, indigenous fish were caught.¹⁴³ And the ‘traditional retireti board, designed especially to catch trout . . . [was] used for many years in Te Urewera, until it was banned (as not being in keeping with the spirit of sport fishing).¹⁴⁴ The retireti (board) is a customary fishing device made from timber, to which hooks or lures are attached; the board is cast into a river or stream by a line attached to it, and works its way against the current to the opposite side of the waterway, allowing people to fish both sides.¹⁴⁵ In Te Urewera, we were told, many people catch trout as food fish; ‘very few Urewera Maori are interested in the sports aspect of trout fishing.’¹⁴⁶ Some Tuhoe, indeed, catch the trout as part of their traditional fisheries using preferred traditional methods. And there is a feeling that, since the trout have been in the rivers for so long, ‘they have become a part of the Urewera fisheries resources and should be able to be caught freely.’¹⁴⁷

Tuhoe for their part claimed ‘customary ownership and rights to all rivers and waterways’ within Te Urewera as ‘an integral part of Tuhoe life and culture.’¹⁴⁸ And we note in particular how the Ruatoki claimants explained their hapu and iwi rights. They stated that ‘Nga Hapu o Ruatoki and Ngai Tuhoe had mana and tino rangatiratanga to all rivers and waterways within their tribal territories.’¹⁴⁹ For the peoples of Ruatoki, ‘rivers are steeped in tribal lore and history’. But, they added, their ‘Traditional waiata and oriari confirm that the resources of the waterways (water, fish, ducks and plants) were vital not only to their physical sustenance and survival, but also to their identity as a constituent people of a much wider collective.’¹⁵⁰ The major rivers also provided ‘important access routes’ well into the

142. Doig, ‘Te Urewera Waterways’ (doc A75), pp 17–19. Doig’s informants about the raumahehe were Whare and Margaret Biddle, and Basil Tamiana.

143. Ibid, p 20

144. Ibid, p 147

145. Waitangi Tribunal, *Te Ika Whenua Rivers Report* (Wellington: Legislation Direct, 1998), p 112

146. Doig, ‘Te Urewera Waterways’ (doc A75), p 147. Doig’s informants were Whare and Margaret Biddle, Ruatahuna, and representatives of the Ngati Whare runanga, Murupara (2001).

147. Doig, ‘Te Urewera Waterways’ (doc A75), pp 147–148

148. Counsel for Wai 36 Tuhoe, first amended particularised statement of claim, 27 April 2004 (claim 1.2.2(a), SO C IX), p 198

149. Counsel for Ruatoki claimants, amended consolidated particularised statement of claim (claim 1.2.8(b), SO C FF), p 119; see also page 123

150. Ibid, pp 124–125

twentieth century;¹⁵¹ control of the rivers for transport and communications was thus an important feature of tribal tino rangatiratanga.

The peoples of Te Urewera thus spoke of their waterways in terms of their ancestral relationships with them, their respect, their obligation to care for them, and their authority over them. They spoke of mana motuhake and of tino rangatiratanga over waterways within their rohe.

In summary, the peoples of Te Urewera relate to their land, their mountains, their rivers, and their forests through whakapapa. Ultimately, their deep sense of whanaungatanga within the universe stems from the creation whakapapa, beginning with the coupling of Ranginui and Papatuanuku, and the creation by their offspring Tane of his world, with its trees, insects, and birds. The history of people's identity with their tribe, their land, their maunga, and waterways through generations of their tupuna has been carefully preserved – and passed on to younger kin – in whakapapa, pepeha, whaikorero, waiata, place names; and that knowledge was essential to their identity as whanau, hapu, iwi. Their environment was rich in resources – birds, eels, fish, trees, plants. They had particularly important relationships with taonga species, notably kereru and tuna, highly prized foods which were conserved, caught, preserved, distributed, and consumed in accordance with tikanga.

Whanau, hapu, and iwi exercised authority over their whenua, their forests, and waterways. The obligations of kaitiakitanga of taonga and taonga species fell on tribal communities, and the responsibilities of exercising authority in accordance with those obligations fell to rangatira. It was their duty also to protect community rights to resources, to manage their sustainable harvesting, and thus to regulate the allocation of resources and their seasonal takes. This was the exercise of mana motuhake, of tino rangatiratanga.

All these things, in our view, were reserved to the peoples of Te Urewera when the Urewera District Native Reserve Act was passed in 1896, embodying the agreement negotiated between the Crown and Te Urewera leaders the year before. We turn next to discuss the claimants' allegations that the Crown breached the agreement and the Treaty of Waitangi when it intervened to control and transform parts of the Te Urewera environment in the first half of the twentieth century.

21.4 KEY FACTS: CROWN INTERVENTIONS IN THE ENVIRONMENT OF TE UREWERA BEFORE 1954

21.4.1 The negotiation of the UDNR agreement

The facts in respect of the negotiation of the UDNR agreement are set out in chapter 9. Here, we provide a brief summary of the matters relevant to this chapter.

In 1894, the Liberal Premier, Richard Seddon, toured Te Urewera with James Carroll, the Minister in Cabinet representing the 'Native race'. During this tour, Tuhoe and other iwi considered the Government's request that they place themselves and their lands under the Queen's protection, accept the Queen's law, and

151. Ibid, p 125

have their remaining lands surveyed and put through the Native Land Court. In response, Tuhoe asked the Crown to recognise their self-government in the form of a central committee for their Rohe Potae. Further negotiations were planned for 1895 but were at first prevented by clashes over the trig survey of Te Urewera and the Government's decision to push ahead with building roads. Seddon sent troops to force through the survey and road building, but he also sent Carroll, who negotiated a new agreement that Te Urewera leaders would allow the trig survey and roads to proceed, and would come to Wellington to arrange a more comprehensive agreement with the Premier. Most of the troops were then withdrawn.

A delegation of Te Urewera leaders had come to Wellington by early August 1895, although the exact time of their arrival is unknown. It consisted of important chiefs, and is known to have included Tuhoe, Ngati Whare, and Ngati Manawa leaders. The delegation held discussions with Carroll (attended by Maori parliamentarians Wi Pere and Hone Heke) from early August to September 1895, of which we have no record. Near the beginning of these discussions, a Bill was before the House to amend the Animals Protection Act 1880. While the House was in committee on this Bill, Liberal member RM Houston moved an amendment on 2 August 1895 to ban the taking or killing of native pigeons (kereru) in 1896, and every sixth year from then on. Seddon successfully moved the addition of a proviso: 'Provided that the Governor may, on the recommendation of the Colonial Secretary, by notification in the *New Zealand Gazette*, exclude the Urewera Country, and other Native districts in the North and South Islands, from the operation of this section.'¹⁵² The Animals Protection Act Amendment Act 1895 became law on 30 August 1895. The six-yearly ban on hunting kereru, and Seddon's proviso for exempting Te Urewera, were contained in section 7 of the Act.

A week later, on 7 September 1895, the delegation met with Seddon for the first time. At that meeting, Carroll presented the Premier with a series of proposals which had been worked out between himself and the delegation. In brief, the Te Urewera leaders proposed the setting aside of a self-governing native reserve, in which their forests, birds, and way of life would be protected; a proposal with which the Premier agreed. Roads, tourism, economic development, and social assistance to the peoples of Te Urewera were all discussed. The full content of those of the delegation's proposals which are relevant to this chapter, and of Seddon's responses to them, is set out in section 21.6.3.

On 23 September 1895, there was a further meeting between Seddon and the delegation at which additional proposals were presented to the Premier. The delegation also asked for a draft Bill or heads of agreement to take back to their people for consultation. Of relevance to this chapter, Wi Pere (speaking on behalf of the delegation) sought a Maori-controlled process of acclimatising English fish and birds in the proposed reserve. The discussion of this proposal, as recorded somewhat briefly in the press, will be set out in section 21.6.3.

152. Seddon, 2 August 1895, NZPD, vol 88, p 407

On 25 September 1895, Seddon drafted a memorandum setting out what he understood to be each of the delegation's proposals, and his undertakings in respect of them. It was understood between the Premier and Te Urewera leaders that they were in broad agreement. In brief, Seddon stated that the delegation had sought the introduction of exotic fish and birds for the dual purpose of promoting tourism and augmenting their food supplies, and that he would arrange for trout to be delivered to them for release, along with information as to how to manage the trout fishery. The contents of the memorandum will be discussed in more detail in section 21.6.3.

In 1896, the Urewera District Native Reserve Bill was introduced to Parliament, debated in both Houses, and became law on 12 October 1896. Seddon's 25 September 1895 memorandum was made a schedule of the Act. In section 24, the Governor was given power to make regulations to give effect to anything in the Act or to 'give full effect to this Act', and to give effect to Seddon's memorandum.

21.4.2 The Crown's restrictions on the customary management and harvesting of native birds in Te Urewera, especially kereru, after the UDNR agreement

The Crown's restrictions on the customary management and harvesting of native birds were legislative in form. The questions of whether, when, and to what extent the legislation was actually enforced were contested by the parties, and will be addressed in section 21.7.3.4. Here, we provide a brief timeline of the major legislative restrictions and their application to Te Urewera.

- ▶ The Animals Protection Act 1880 was in force at the time the UDNR agreement was negotiated. Its long title was: 'An Act to consolidate the Law for the Protection of Animals and for the Encouragement of Acclimatisation Societies.' Key provisions included:
 - no native game could be taken or killed in any district the Governor notified under the Act, except during a season of up to four months in any year, which would be notified by the Governor from time to time (section 17), whereas the season for imported game was set for (up to) three months between 1 May and 31 July each year (section 3);
 - no game or native game could be sold more than seven days after the expiry of the season (section 22); and
 - no game could be taken or killed by traps or snares (the provision did not extend to native game at this point) (section 5).
- ▶ The Animals Protection Act 1880 Amendment Act 1886 provided for the Governor to prohibit 'absolutely or for such time as he may think fit the destruction of any bird indigenous to the colony' (section 3).
- ▶ The Animals Protection Act Amendment Act 1895 imposed a year-long closed season for kereru every sixth year from 1896, with the proviso that the Governor, on the recommendation of the colonial secretary, could 'exclude the Urewera Country and other Native districts' from the operation of this section (section 7).
- ▶ The Animals Protection Acts Amendment Act 1900:

- provided that no native game (including kereru) could be ‘held in possession’ for more than seven days after the close of the season, whether frozen or chilled or not, which had the effect of making huahua illegal (section 3); and
 - from 1901, imposed a closed season for kereru, kaka, and pukeko every third year, with the same proviso as section 7 of the 1895 Act (that is, that the Governor could exempt Te Urewera and other ‘native districts’ from this closed season, on the recommendation of the colonial secretary) (section 4).
- ▶ The Animals Protection Amendment Act 1903 brought in only one important amendment in 1903 for our purposes: the institution of a uniform open season nationwide for both native and imported game, running from 1 May to 31 July each year.
- ▶ The Animals Protection Act 1907 repealed and replaced all the previous Animals Protection Acts. It:
 - continued to impose a single open season for native and imported game throughout New Zealand, beginning on 1 May and closing on 31 July (section 3);
 - extended the prohibition of traps and snares to include the catching of native as well as imported game, allowing only ‘hunting or shooting’ (section 6);
 - empowered the Governor to prohibit absolutely or for ‘such time as he thinks fit’ the taking of any native birds (section 20);
 - declared 1910, and every third year after it, a closed season for imported and native game – with the proviso that the Governor could, on the recommendation of the Minister of Internal Affairs, ‘exclude the Urewera country and other Native districts’ from the operation of this section (in respect of native game only) (section 26); and
 - continued the prohibition on holding imported and native game, whether frozen, chilled, or otherwise, for more than seven days after the close of the season (section 30).
- ▶ The Animals Protection Act 1908 was the product of a major project to consolidate New Zealand’s statute law. In the case of the Animals Protection Acts, a major new Act had only just been passed the year before, so the 1908 Act consolidated only two pieces of legislation: the Animals Protection Act 1907 and the Homing-pigeons Protection Act 1898.
- ▶ The Animals Protection Amendment Act 1910 made two relevant changes:
 - it added a proviso that the ban on holding native game for more than seven days after the close of the season did not ‘affect the right of Natives to hold preserved game known as *huahua*’ (section 4(2)); and
 - it made it illegal to take any native birds or their eggs, with the proviso that the Governor could suspend the operation of this section for any species for ‘such period in any [one] year as he thinks fit’, and with the added proviso that the power to exempt Te Urewera and native districts was now made subject to this section (that is, any exemption for Te

Urewera would now have to be for named species in a specified period of a particular year, with a new exemption required every year) (section 10).

- ▶ The Animals Protection and Game Act 1921–22 came into force on 1 April 1922. It repealed and replaced the previous Animals Protection Acts, and:
- ▶ absolutely prohibited the taking of kereru, kaka, tui, pukeko, and many other species of native birds (section 3); but
- ▶ provided that the Governor could, by warrant, remove a species from the schedule of absolutely protected animals and either declare it imported or native game or declare it no longer subject to the Act (sections 3, 5).

21.4.3 The acclimatisation of exotic species in Te Urewera

After the arrival of Pakeha, the peoples of Te Urewera chose to grow several new crops, particularly potatoes. By the late nineteenth century, the potato was the food on which they were most reliant. They also grew maize in significant quantities in some parts of the inquiry district, as well as various vegetables and fruit trees.¹⁵³ Pigs, originally liberated by James Cook at Cape Kidnappers in 1773, are likely to have colonised most of Te Urewera by the 1840s.¹⁵⁴ By the 1890s, the peoples of Te Urewera hunted pigs extensively, and they had become another very important food. By that time, the European rat had decimated the kiore population, and some indigenous birds had also fallen in numbers, or disappeared altogether from the area, as in the case of the titi (muttonbird). Kereru, however, were still an important food. From the 1860s, horses were an important means of transport in Te Urewera.¹⁵⁵

By the 1890s, then, traditional indigenous foods were still important in Te Urewera, but the introduced flora and fauna had also significantly changed the diet and, to some extent, the lifestyle of the peoples of Te Urewera. Until that point, however, the extent to which these changes occurred was primarily the result of decisions by the peoples of Te Urewera. Only in the 1890s did developments related to acclimatisation (that had affected most of New Zealand from the 1860s) begin to impact significantly on Maori communities in Te Urewera.

Dr Brad Coombes defined acclimatisation as ‘the managed process of introducing, liberating, and maintaining populations of introduced plants and animals.’¹⁵⁶

153. Judith Binney, ‘Encircled Lands, Part 2: A History of the Urewera 1878–1912’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A15), pp 275, 284, 287; Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 26–28; 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 295–297, 306–307

154. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 13

155. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 27–28; Binney, ‘Encircled Lands, Part 2’ (doc A15), p 204; Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), p 306; Elsdon Best, ‘Maori Forest Lore: Being Some Account of Native Forest Lore and Woodcraft, as also of Many Myths, Rites, Customs, and Superstitions Connected with the Flora and Fauna of the Tuhoe or Urewera District – Part II’, *Transactions and Proceedings of the New Zealand Institute*, vol 41 (1908), p 282

156. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 11

Early introductions of exotic flora and fauna to New Zealand, such as that of the potato and the pig, were unregulated. The Duties of Customs Ordinance 1846 allowed animals and plants into New Zealand duty free and did not provide for any powers of refusal or inspection.¹⁵⁷ Introductions of exotic species to New Zealand up to 1867 were haphazard, undertaken without legislative backing in an uncoordinated manner by private individuals or provincial governments.¹⁵⁸

During the 1860s, this situation began to change as the Crown began to concern itself with issues related to acclimatisation. The Protection of Certain Animals Act 1861 began the provision of protection for some exotic species. Much legislation protecting exotic animals followed, including the Protection of Animals Act 1867.¹⁵⁹ This Act brought in measures to encourage and delegate authority to organisations known as ‘acclimatisation societies’ (the precursors of the Fish and Game Councils), a few of which had already been founded earlier in the decade. The legislation gave the societies quasi-property rights in introduced animals. This enabled them to profit from licensing the hunting of such animals. The societies gained wide powers to control species until they were well established in New Zealand, and to redistribute introduced species around the country. Members of the acclimatisation societies were often influential colonists, including important politicians. A system for approving the introduction of exotic species by the Crown was only set up in 1895, but even then the societies retained sweeping statutory powers relating to exotic animals.¹⁶⁰

Te Urewera was included in the network of acclimatisation districts that emerged after the passage of the 1867 Act. The boundaries of these districts changed frequently. At different times from 1867, counties comprising parts of the inquiry district were variously within the Auckland, Hawke’s Bay, Tauranga, Opotiki, and, from the early twentieth century, the Wairoa and Rotorua Acclimatisation Districts.¹⁶¹ It seems, however, that the inclusion of the inquiry district within the acclimatisation districts was, until the late 1890s, essentially a theoretical matter: with one exception, releases of exotic species by the various societies apparently did not affect Te Urewera before then, and the societies did not attempt to enforce their authority within the district at that stage. The exception was the release of animals such as weasels by the Hawke’s Bay Acclimatisation Society, in an effort to control the threat posed by a rapidly growing rabbit population to Hawke’s Bay farmers. These animals apparently rapidly spread to Te Urewera. With this exception, it seems that acclimatisation societies impacted minimally on our inquiry district before 1896.¹⁶²

By the late 1890s, the Crown took the view that Te Urewera had restricted potential for farming (a view which later changed in the 1910s and 1920s, as we explained

157. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 16

158. Ibid, p 17

159. Ibid, pp 17, 142

160. Ibid, pp 17–18; Cathy Marr, Robin Hodge, and Ben White, *Crown Laws, Policies, and Practices in Relation to Flora and Fauna, 1840–1912* (Wellington: Waitangi Tribunal, 2001), pp 229–232

161. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 30

162. Ibid, pp 14, 23–29, 33, 34, 37–39

in chapter 13). To Pakeha eyes, Te Urewera often appeared to be a large area lacking an economic use. Seddon and other Pakeha politicians and Crown officials began to see Te Urewera as a promising destination for tourists. Discussions in 1895–96 focused on indigenous flora and fauna and on acclimatisation of game fish and birds for their tourist potential as well as for their value as food to the peoples of Te Urewera. The Department of Tourist and Health Resorts, set up in 1901, almost immediately took a particular interest in Te Urewera, especially the Waikaremoana area, seeing this as a promising tourist attraction in terms of its scenery and its potential as a venue for hunting and shooting, activities that contemporaries referred to as ‘sport’.¹⁶³

Successful acclimatisation of exotic animals in Te Urewera began in the late 1890s. Trout were first liberated successfully in 1896, deer in 1897, and possums in 1898. Game reserves for imported game were created at Waikaremoana and Rangitaiki in 1898. The Wellington Acclimatisation Society, the Crown, and private individuals were responsible for the initial releases.¹⁶⁴ From the early twentieth century, the Crown’s role in acclimatisation of exotic species in Te Urewera for sporting, tourism, and economic purposes was unusually prominent. By 1909, the whole of Te Urewera had been incorporated into the Rotorua Acclimatisation District, which had been taken over and was administered directly by the Department of Tourist and Health Resorts.¹⁶⁵ As we shall see, it then took well into the twentieth century for the Crown to recognise and to try to control the adverse impacts of deer, possums, weasels and related animals, and other exotic animals on the Te Urewera environment.

We turn next to consider the essence of the difference between the parties’ positions on these matters.

21.5 THE ESSENCE OF THE DIFFERENCE BETWEEN THE PARTIES

21.5.1 Introduction

In this section, we provide a brief summary of the main points of difference between the parties with regard to:

- ▶ the meaning and effect of the UDNR agreement in respect of ‘biological resources’;
- ▶ the Crown’s restrictions on the customary management and harvesting of native birds, more particularly the kereru; and
- ▶ the introduction (whether directly by the Crown or with its assistance) of deer, trout, possums, and other exotic species to Te Urewera, and the management of those species after they were released.

We summarise the parties’ submissions about the Whirinaki Forest and about rivers separately in later sections of this chapter.

163. *Ibid*, pp 44, 48, 53–54, 92–98

164. *Ibid*, pp 36, 79–83, 86–87; 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), pp 63–64

165. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), pp 30, 96

21.5.2 The ‘ecological logic’ of the UDNR negotiations and agreement

The parties did not agree on the ‘ecological logic’ of the UDNR negotiations and agreement of 1895. We summarise the main points of difference here.

Relying on the evidence of Dr Brad Coombes, claimant counsel argued that the UDNR Act 1896 ‘included the recognition of tangata whenua rights to manage their forests and guarantees to continued access to forest resources, guarantees which were soon to be disregarded within a few years of the development of the compact between the respective parties.’¹⁶⁶ These guarantees, the claimants argue, specifically included their rights to cultural harvest of kereru and other birds.¹⁶⁷ This was evidenced by the Animals Protection Act Amendment Act 1895, which the claimants see as integrated with the UDNR negotiations of that year. In their view, the provision in the Act to exempt Te Urewera from restrictions on the taking of native birds was part and parcel of the UDNR agreement.¹⁶⁸ Further, the claimants submitted that there is evidence that, in the decade following the enactment of the UDNR Act 1896, both Ministers and officials ‘accepted that the Act provided certain wildlife rights to tangata whenua.’¹⁶⁹

The Crown, however, denied that any aspects of the UDNR agreement amounted to a ‘biological treaty’ or ‘ecological compact’, which was how Cecilia Edwards had characterised Dr Coombes’ position.¹⁷⁰ In the Crown’s view, the peoples of Te Urewera were to be subject to mainstream legislation, including the Animals Protection Acts. The 1895 exemption was for other native districts as well as Te Urewera. It was introduced independently of the UDNR negotiations and was not part of the agreement.¹⁷¹ While accepting that there was some discussion in 1895 of protecting forests and birds, and of introducing new species for tourism and food supplies, the Crown’s view is that there was nothing sufficiently detailed to bind the Crown to any particular terms or forms of protection. Nor, in the Crown’s view, did the agreement or the UDNR Act 1896 guarantee any Maori rights in respect of cultural harvesting or management of wildlife.¹⁷² In Crown counsel’s submission, the Premier likely intended the General Committee to take on a management role in implementing legislation like the Animals Protection Acts, but ‘this was not developed further.’¹⁷³ The claimants argue that further discussions were anticipated in order to flesh out this part of the agreement, which the Crown denies.¹⁷⁴

In respect of the introduction of exotic animals to the UDNR, the Crown accepts that Seddon made a specific statement that trout would be introduced (for tourism

166. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p144

167. *Ibid*, pp144–146; counsel for Wai 36 Tuhoë, closing submissions, pt B (doc N8(a)), pp151–155; counsel for Tuawhenua, closing submissions (doc N9), p285

168. Counsel for Wai 36 Tuhoë, closing submissions, pt B (doc N8(a)), pp152, 155

169. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p146

170. Crown counsel, closing submissions (doc N20), topic 29, p8

171. *Ibid*, pp3, 8, 10–11

172. *Ibid*, pp3, 8–11

173. *Ibid*, p10

174. Counsel for Wai 36 Tuhoë, closing submissions, pt B (doc N8(a)), p151; Crown counsel, closing submissions (doc N20), topic 29, p10

and as a food source), and argues that this was carried out as promised. Otherwise, while the UDNR Act 1896 allowed for regulations to give effect to Seddon's 1895 memorandum, 'arguably there was nothing to give effect to in respect of exotic species'.¹⁷⁵ Deer, possums, and other animals do not appear to have been discussed, but Crown counsel submits: 'It is possible, though not certain, that the parties could have taken away a general understanding that species could be liberated that might serve as food sources or to attract tourism, however, there can be no certainty on this point.'¹⁷⁶

There was some difference between the claimants on this issue. While the claimants agree that the UDNR negotiations and Act did not constitute permission for the Crown to introduce deer or possums, they are not in agreement as to trout. Counsel for Wai 36 Tuhoe accepts that Tuhoe requested the introduction of exotic fish, and that there was specific agreement to introduce trout in 1895.¹⁷⁷ Counsel for Nga Rauru o Nga Potiki, however, note oral evidence to the contrary (recorded by researchers in this inquiry), and submit: 'Because the written and oral evidence conflicts, it is not possible to decide conclusively on whose decision it was to release trout, and therefore on whether the Crown's action was consistent with the property and Treaty rights of the owners.'¹⁷⁸ Nonetheless, the claimants agree that the Crown was committed to a promise in the UDNR agreement that Tuhoe would manage the introduction of trout and 'the subsequent fishery', and that this promise was not kept.¹⁷⁹

In the claimants' view, the Crown also failed to honour its guarantees of their rights to manage and harvest native birds, their right to govern themselves and their reserve, and their right to manage all wildlife in their reserve according to their customary conservation ethic. Rather, the Crown's actions had the effect of outlawing their customary management of wildlife, an outcome so at variance with the UDNR agreement that some claimants felt they had been misled and deceived in the negotiations that led up to it.¹⁸⁰ The Crown, on the other hand, denies that there were in fact any specific or substantive agreements at all about 'biological resources' (Dr Coombes' term¹⁸¹) or environmental management in 1895; there was nothing for it to have breached. Also, the Crown argues that its introduction of exotic species and its restrictions on the cultural harvest of native birds were good faith actions, which balanced competing interests appropriately.¹⁸²

We turn next to consider the gradual imposition of legislative restrictions on the hunting of native birds, and the differences between the Crown and claimants on that issue.

175. Crown counsel, closing submissions (doc N20), topic 29, p10

176. *Ibid*, pp 9–10

177. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 151–152

178. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 234

179. *Ibid*; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 151–153

180. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 145–148

181. See, for example, Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 1.

182. Crown counsel, closing submissions (doc N20), topic 29, pp 3, 8–11, 13–14, 18, 19

21.5.3 The Crown's restrictions on the customary management and harvesting of native birds, especially kereru

The parties in our inquiry agreed that the protection of native birds from their evident decline and possible extinction was of vital importance. This was especially so for kereru, which is a taonga species for the peoples of Te Urewera, and very highly valued more generally by both Pakeha and Maori. Parties also agree that it was appropriate for the Crown to impose legislative restrictions on sporting and commercial hunting of native birds as a protective measure. There was, however, one exception to these two points of agreement. The Crown did not protect all native birds; it categorised certain species, notably kawau (black shags), as 'vermin' and actively culled them, as well as encouraging hunters to shoot them in the Waikaremoana sanctuary. The claimants do not agree with the Crown's view that it balanced competing interests appropriately when it decided that 'tourism and the opportunities for a trout fishery outweighed the significance of the[se] birds'.¹⁸³ The claimants question the Crown's 'conservation ethic' during the time that it was restricting the hunting of some native birds to preserve them while simultaneously 'funding the extermination of [this] indigenous species'.¹⁸⁴

More generally, the claimants' view is that the ethic of mainstream conservationists has increasingly resulted in the limitation of human activities in the biodiversity-rich Te Urewera, through 'expropriation of resources and the legal restraint of traditional practice'.¹⁸⁵ Claimant counsel submit that 'the Tribunal should recognise the vastly different perceptions of conservation which are at play here'.¹⁸⁶ Maori methods of hunting were outlawed, then huahua was criminalised, and finally the peoples of Te Urewera were banned altogether from carrying out their traditional management and harvesting of kereru and other birds. The hardship that this would impose on the peoples of Te Urewera was fully known to the Crown at the time it made these decisions.¹⁸⁷

In terms of specifics, claimant counsel submitted that:

- ▶ from 1896 to 1910, customary harvesting of kereru and other birds was increasingly restricted, without consultation with the peoples of Te Urewera and without adequate notification of provisions to exempt the peoples of Te Urewera from such restrictions;¹⁸⁸

183. Crown counsel, closing submissions (doc N20), topic 29, p 49; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 172; 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 58; counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 43

184. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 154

185. *Ibid*, p 142

186. *Ibid*, p 167

187. *Ibid*, pp 146–148

188. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 155; counsel for Tuawhenua, closing submissions (doc N9), pp 284–285; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 146–147; counsel for Ngati Whare, closing submissions (doc N16), p 108; counsel for Wai 621 Ngati Kahungunu, addition to second amended statement of claim, pt M, environmental pleadings, 12 April 2004 (claim 1.2.6(a), soc 11), pp 5–6; counsel for Ngai Tama Te Rangī, second

- ▶ after 1911 the Crown has refused to allow the customary harvest of kereru by the peoples of Te Urewera, without consultation with the peoples of Te Urewera and despite petitions from Te Urewera leaders and requests for pua manu reserves;¹⁸⁹
- ▶ the Crown has failed to support the customary conservation strategies of the peoples of Te Urewera but instead has unfairly exaggerated their ‘poaching’ of indigenous game, while sometimes failing adequately to publicise laws and policies, and while also failing to remedy the effects of competition and predation by introduced species, and of loss of the habitat of indigenous species;¹⁹⁰ and
- ▶ the Crown has not implemented any strategy to reinstate customary bird harvests by the peoples of Te Urewera.¹⁹¹

Crown counsel conceded that the peoples of Te Urewera ‘could have received a greater management role’. Nonetheless, the Crown argued that its conservation measures were enacted in good faith to protect species in decline, ‘while also giving some measure of recognition to the interests of Urewera Maori in those resources.’¹⁹² Crown counsel submitted, for example, that for many years it was possible to obtain exemptions from the legislative restrictions on customary management and harvesting.¹⁹³ By means of these exemptions, ‘the legislation provided for some continued exercise of kaitiakitanga, albeit necessarily limited.’¹⁹⁴ Although it appears that the only Te Urewera exemption occurred in 1911, this must partly be explained, counsel said, by the Crown’s ‘[m]inimal enforcement’ of the law: the first prosecutions did not take place until the 1930s.¹⁹⁵ Once prosecutions did begin, the Crown’s view is that there is ‘no evidence of unfair targeting or victimisation of Urewera Maori’ regarding poaching of indigenous birds.¹⁹⁶

amended statement of claim, 15 August 2003 (claim 1.2.4, SOC 4), p 43; counsel for Wai 144 Ngati Ruapani, amended statement of claim, 5 October 2004 (claim 1.2.15(b), SOC LL), pp 102–105

189. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 153–156; counsel for Tuawhenua, closing submissions (doc N9), pp 285–288; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 147; counsel for Ngati Whare, closing submissions (doc N16), p 109; counsel for Wai 621 Ngati Kahungunu, addition to second amended statement of claim, pt M (claim 1.2.6(a), SOC 11), p 8; counsel for Ngai Tama Te Rangi, second amended statement of claim (claim 1.2.4, SOC 4), pp 42–44; counsel for Wai 144 Ngati Ruapani, amended statement of claim (claim 1.2.15(b), SOC LL), pp 106–108

190. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 157–160; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 147–148; counsel for Ngati Whare, closing submissions (doc N16), pp 109–110; counsel for Wai 621 Ngati Kahungunu, addition to second amended statement of claim, pt M (claim 1.2.6(a), SOC 11), p 7; counsel for Ngai Tama Te Rangi, second amended statement of claim (claim 1.2.4, SOC 4), pp 42, 44; counsel for Wai 144 Ngati Ruapani, amended statement of claim (claim 1.2.15(b), SOC LL), p 108

191. Counsel for Ngati Whare, closing submissions (doc N16), pp 105, 110

192. Crown counsel, closing submissions (doc N20), topic 29, p 13

193. *Ibid*, p 3

194. *Ibid*, pp 15–16

195. *Ibid*, pp 15–17

196. *Ibid*, p 17

The Crown also submits that the negative effects of commercial and recreational hunters could not be controlled by customary means, and so some form of legislative restriction was essential. Also, in its view, customary harvesting had contributed to the decline of kereru and thus had to be restricted as well.¹⁹⁷ In enacting such restrictions, the Crown was mindful of its kawanatanga responsibilities to balance the competing interests concerned, and ‘govern to conserve natural resources’.¹⁹⁸ In its balancing of interests, the Crown argues that it was sufficiently informed by the Maori members of Parliament as to Maori interests in kereru. In the Crown’s submission, therefore, specific consultation with the peoples of Te Urewera was unnecessary,¹⁹⁹ and the ‘legislation restricting traditional management and harvesting of resources was a reasonable and responsible exercise of kawanatanga.’²⁰⁰

In the claimants’s submission, however, the Crown’s failure to consult them about ‘absolute prohibition as a conservation measure’ denied them ‘the opportunity to identify less “extreme” approaches to conservation that may have preserved both the natural resources of Te Urewera and Tuhoe’s tino rangatiratanga.’²⁰¹ The claimants also deny that their cultural harvesting contributed to the decline of kereru and other birds. In counsel for Wai 36 Tuhoe’s submission, the Crown provides no evidence that this harvesting caused the kereru population to fall. In their view, the ‘evidence on the record is clearly to the contrary.’²⁰²

21.5.4 Acclimatisation, management, and control of exotic species

There were some points of agreement between the parties in respect of the acclimatisation of exotic species. No one disputed that introductions such as deer, possums, weasels, and stoats have had serious harmful effects. The Crown also conceded that trout caused significant damage to indigenous fisheries. Further, the parties agreed that some kind of management role in respect of these species was or ought to have been possible for the peoples of Te Urewera.

There were, however, some significant points of disagreement.

In the claimants’ submission:

- ▶ the Crown’s acclimatisation policies failed to apply the precautionary principle²⁰³ (which required the Crown to take action if serious harm or degradation to the environment was a risk, even if full scientific information was not yet conclusive as to the risk);
- ▶ the Crown’s acclimatisation policies did not respect the values of the peoples of Te Urewera and, apart from the negotiations between the peoples of

197. Crown counsel, closing submissions (doc N20), topic 29, p14

198. Ibid, p18

199. Ibid, p16

200. Ibid, p3

201. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p199

202. Crown counsel, closing submissions (doc N20), topic 29, p14; counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p35

203. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p162; counsel for Nga Potiki o Nga Rauru, closing submissions (doc N14), pp151–155

Te Urewera and Seddon in 1895, there is no recorded consultation regarding acclimatisation within Te Urewera;²⁰⁴

- ▶ in particular, contrary to Seddon's 1895 memorandum, Maori did not manage the introduction of trout and the resultant fishery, and the only involvement of Maori with trout fishery management was with the hatchery at Waimako Pa from 1926 to 1929, which was relocated over the issue of rent or free fishing licences for a Waikaremoana community;²⁰⁵
- ▶ the Crown's introduction of deer was solely for the purpose of benefiting tourism and not the peoples of Te Urewera, as evidenced by the denial of their hunting rights in the game reserves,²⁰⁶ although the Tuawhenua claimants submit that deer did become a food source from the 1920s, and that the ability to hunt deer for food was an important right put at risk by the establishment of the national park;²⁰⁷ and
- ▶ the Crown was unduly slow to act to control exotic species that had harmful effects on the flora, fauna, and land of Te Urewera, and on the peoples of Te Urewera, and its belated actions were also ineffective.²⁰⁸

Crown counsel submits that while discussion relating to the release of deer, possums, or other land animals is not recorded, it is 'possible, though not certain', that the parties involved in the UDNR negotiations 'could have taken away a general understanding that species could be liberated that might serve as food sources or to attract tourism.'²⁰⁹ It is also the Crown's view that deer were introduced for the dual purpose of tourism and augmenting Maori food supplies, and not solely or primarily to benefit tourism interests.²¹⁰ In respect of the tourism game reserves, Crown counsel submits that, although it seems that the reserves set up in 1898 were established without specific consultation with the peoples of Te Urewera, they were established at a time when Seddon and Carroll were meeting with Te Urewera leaders. In the Crown's view, there was a considerable amount of interaction and thus opportunity for those leaders to object to the establishment of the reserves (and the game released there) if they wished to do so.²¹¹

In respect of the admitted harm that introduced species have caused, the Crown argues that the precautionary principle has only recently emerged from a growth of scientific knowledge. It should not be applied retrospectively to Crown actions

204. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 161–163; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 149–150, 152; counsel for Wai 36 Tuhoe, closing submissions, pt A, overview, 31 May 2005 (doc N8), p 75

205. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 234–235; counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, pp 85–86, 120

206. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 162, 164

207. Counsel for Tuawhenua, closing submissions (doc N9), p 295

208. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 161–163, 166; counsel for Tuawhenua, closing submissions (doc N9), p 288; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 152–154

209. Crown counsel, closing submissions (doc N20), topic 29, pp 9–10

210. *Ibid*, p 22

211. *Ibid*, p 27

which took place before it was even developed.²¹² Crown counsel also submits that the Crown could not reasonably have foreseen significant detrimental effects from acclimatisation in Te Urewera. In so far as damage has occurred, the Crown's view is that it has acted in a timely way since the 1930s to ameliorate and control such damage.²¹³

This question of timely action is the most contested issue in respect of exotic species. The Crown and claimants dispute the facts as to the degree of scientific knowledge available to the Crown on each of the species, and the time at which the Crown ought to have known to take firm action against each species.²¹⁴ In the Crown's submission, there needed to be time for the scientific community to reach agreement as to the effects of any particular species, followed by an inevitable 'lag' before this consensus could be expected to influence Government policy.²¹⁵ The claimants, on the other hand, argued that the Crown ought to have applied the precautionary principle and acted much earlier and more effectively than it did. Also, the claimants argue that Government departments were in fact aware of the need to act – against deer, for example, by 1922 – but failed to do so because the interests of sport and tourism were prioritised over the interests of Maori and the environment.²¹⁶

We turn next to assess the claims that the UDNR agreement of 1895–96 had an important ecological and resource management dimension, which the Crown agreed to at the time but has since failed to carry out.

21.6 TO WHAT EXTENT DID THE UDNR AGREEMENT RECOGNISE THE AUTHORITY OF TE UREWERA PEOPLES OVER THE ENVIRONMENT OF TE UREWERA AND ITS WATERWAYS?

SUMMARY ANSWER: The UDNR agreement comprised the documentation and results of the 7 September 1895 meeting between a delegation of Te Urewera leaders and Premier Seddon in Wellington, the further meeting of 23 September, and Seddon's 25 September memorandum setting out what he understood to be the delegation's several proposals, and his undertakings in respect of them. This memorandum was appended as a schedule to the Urewera District Native Reserve Act 1896. Section 24 of the Act empowered the Governor to make regulations to give effect not only to anything in the Act, but also to Seddon's memorandum. There was an 'ecological logic' to this agreement. The forests, birds, rivers, and fish of Te Urewera were to be protected from environmental degradation for the

212. Crown counsel, closing submissions (doc N20), topic 29, pp 23–24

213. *Ibid*, p 3, 29

214. *Ibid*, pp 19–26; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 152–154; counsel for Tuawhenua, closing submissions (doc N9), p 288

215. Crown counsel, closing submissions (doc N20), topic 29, pp 23–24

216. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 162–164, 166, 168; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 152–154

benefit of their owners – the peoples of Te Urewera – and for the enjoyment of visitors. Protection was to be achieved through the legislative establishment of a permanent, inalienable native reserve in which Maori communities would be defined as owners, and would continue to live according to their customs. This included their right to ‘kill game for food’. Self-government would be exercised via hapu committees and a General Committee. Issues between the Crown and the peoples of Te Urewera would be resolved by dialogue between the Government and the General Committee. Food supplies were to be augmented, and the people were not to be excluded from their traditional foods. They would in fact be exempted from the operation of aspects of mainstream law for ownership and management of indigenous and exotic species of birds and fish in Te Urewera, including restrictions on the hunting of native birds. This was what Seddon intended the 1895 arrangements and the 1896 Urewera District Native Reserve Act to achieve. Rights and authority with respect to the introduction and management of exotic fauna were the least defined aspect of the arrangements. But the Urewera leaders’ delegation requested exotic birds and fish, and Seddon accepted this and specifically undertook to supply trout for the people to release and manage. Deer may have been contemplated in 1895 (they would have met the dual purpose of tourism and food), but further discussion was needed as to how iwi would access this new source of food and how it would be managed. The release of possums was not within the spirit of the agreement. Many of the details of the overall agreement in respect of environmental management and resource use had yet to be worked out but the Crown had made a commitment to a framework that respected mana motuhake and customary rights.

21.6.1 Introduction

We have already discussed the negotiation of the UDNR agreement in chapter 9 of our report. We found that the documentation and results of the 7 September 1895 meeting, the 23 September meeting, and Seddon’s 25 September memorandum together comprised the UDNR agreement. The agreement cannot be confined to the contents of the Premier’s memorandum (as the Crown suggested) or the 7 September discussions (as the Tuawhenua claimants suggested).

From our analysis in chapter 9, we identified seven core principles of the agreement, of which five are relevant to the question of control and authority over the environment and its resources:

- ▶ The first principle was that an inalienable reserve was to be established to provide permanent protection for the Maori peoples of Te Urewera; their lands; their forests, birds, and taonga; and their customs and way of life.
- ▶ The fourth principle was that the peoples of Te Urewera would be self-governing by means of hapu committees to manage their lands and tribal affairs, and a General Committee that would have ‘local government’ powers.
- ▶ The fifth principle was that the peoples of Te Urewera acknowledged the Queen and the Government, and would obey the law.

- ▶ The sixth principle was that the Government would protect the people and promote their 'welfare' in all matters, and it would provide a 'package' of social and economic assistance. The details of the package had not been agreed and were to be worked out in the future by further negotiations, in which the people would be represented by the General Committee.
- ▶ The seventh principle was that development should take place in the Reserve, although (as we understand it) in a manner in keeping with the primary nature of the Reserve. This development included roads, tourism, gold mining (if gold was discovered), and some farming.

These core principles of the agreement were reflected in the parliamentary debates of 1896 as the Bill passed through both Houses, and in the contents of the Urewera District Native Reserve Act 1896. Seddon's 25 September 1895 memorandum was made part of the Act in the form of a schedule, and there was provision to give effect to it by regulation.

In chapter 9, however, we did not address the environmental aspects of the agreement, which were reserved for specific treatment in the present chapter of our report. We did note that the reservation of the forests and birds of Te Urewera for their Maori owners was a key element in the Act's creation of a native reserve; a reserve which was also for the people to continue their customs and way of life. Economic development, it was envisaged, would allow for farming in the Reserve but might mainly consist of tourism and mining. The Maori owners of the Reserve and the people of New Zealand were both supposed to benefit from these outcomes (see chapter 9).

In this chapter, we assess the claimants' argument that the 1895 agreement was part of an 'integrated package' which confirmed and guaranteed 'their customary rights to manage wildlife and other natural resources.'²¹⁷ In their view, the Crown later broke the agreement and 'failed to affirm and protect Tuhoe's authority over and interests in the natural environment of Te Urewera including its natural flora and fauna and cultural sites, and failed to grant Tuhoe authority over introduced bird and fish species.'²¹⁸ The Crown, as we have seen, did not accept this claim:

The events of 1895 and the resulting Act of 1896, do not constitute a 'package' that guaranteed Urewera Maori certain rights and confirmed Treaty guarantees, especially in respect of the ecology and wildlife of Te Urewera. Neither can the 1895 discussions and 1896 Act be interpreted as a kind of biolog[ical] treaty, or ecological compact.²¹⁹

We turn first to consider the evidence as to what was actually agreed between the Crown and the Te Urewera delegation in 1895, leading up to the enactment of the UDNR Act 1896.

217. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 152–153

218. Counsel for Wai 36 Tuhoe, closing submissions, pt C, schedule of primary findings and recommendations sought, 1 June 2005 (doc N8(b)), pp 6–7

219. Crown counsel, closing submissions (doc N20), topic 29, p 8

21.6.2 The debate between the historians

21.6.2.1 *The claimants' environmental historian*

In evidence for the claimants, Dr Brad Coombes argued that 'The debates which led to the Urewera District Native Reserve Act . . . included recognition of tangata whenua rights to manage their forests and guarantees to continued access to forest resources.'²²⁰

In Coombes' view, there were two relevant aspects to what he called the 'ecological logic' of the 1895 agreement. The first was a reciprocal recognition of rights:

The failure of the Crown to implement the administrative logic of the UDNR represents an obvious source of grievance, but it also failed to implement fairly the *ecological* logic which was negotiated in these exchanges. Intertwined with the issues of governance, land and communications [roads] was another bargain: the Crown would be permitted to introduce exotic game for tourism, and Tuhoe would retain the right to harvest kereru: and both native and exotic game would be 'additional sources of food'. [Emphasis in original.]²²¹

Coombes argued that this aspect of the agreement was part of an 'integrated package' with the Animals Protection Act Amendment Act 1895, in which Seddon had arranged for the peoples of Te Urewera to obtain exemption from national restrictions on the taking of kereru.²²²

The second relevant aspect of the agreement was the Crown's recognition of Maori authority in respect of environmental management. The Premier recognised 'Tuhoe guardianship over forests and birds', which reflected (and was a part of) the promised self-government arrangements for the native reserve.²²³ 'The [committee] provisions for self-administration', argued Dr Coombes, 'clearly extended to resource and wildlife management as well as hapu management.'²²⁴ The Government guaranteed 'Tuhoe's rights to maintain traditional use of forest and bird resources'; these traditional use rights would be self-regulated, with Tuhoe exempt from national restrictions.²²⁵ The Crown's right under the agreement to introduce acclimatised species and promote 'game management for tourism' would need to be balanced with Tuhoe's authority and 'traditional use of the same forest space.'²²⁶ After all, the agreement envisaged Tuhoe management of exotic species in Te Urewera once they had been introduced by the Crown. From Dr Coombes' evidence, the vehicle for Tuhoe authority was expected to be the General Committee, which would raise issues and negotiate with the Government where rights and authority overlapped. The Crown was accustomed to devolving

220. Brad Coombes, summary of evidence for 'Making "Scenes of Nature and Sport"', no date (doc H3), pp 1–2

221. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 72

222. *Ibid*, pp 69–72

223. *Ibid*, p 51

224. Coombes, summary of evidence (doc H3), p 5

225. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 1

226. *Ibid*

authority over species and the environment to acclimatisation societies,²²⁷ although there was no specific intention to give the General Committee the powers of an acclimatisation society; this was rarely done for local government bodies.²²⁸

21.6.2.2 *The Crown's historian*

Cecilia Edwards, in her evidence for the Crown, denied that there was a 'biological treaty' or 'ecological compact', terms which she used to 'encapsulate the position advanced by Dr Brad Coombes that the 1895 agreement and 1896 Act provided a guarantee for Tuhoe to retain their "biological resources" in exchange for the Crown being allowed to survey in the Urewera, construct roads, and develop the area for European tourism.'²²⁹ In Edwards' view, this argument 'attributes a certain degree of design and intention on the part of Seddon and Carroll' which simply was not present.²³⁰ Also, tourism and the idea of protecting forests, birds, water courses, and fish 'played a relatively minor role in the discussions' at the 7 September meeting.²³¹ In Ms Edwards' opinion, we should confine our consideration to the Premier's 'formal response' to the 'series of [Tuhoe] requests', as recorded in his 25 September memorandum. His specific commitments amounted to nothing more than a 'broad statement that forests and birds would be protected' and that an attempt would be made to stock Te Urewera waterways with trout (and the Government would 'pay in part for the services of an expert to show Urewera people how to manage the fish').²³²

In Ms Edwards' view, therefore, the evidence does not support a position that

the Crown acknowledged and affirmed 'the right of Tuhoe to biological resources and cultural harvests within their own forests' . . . In my view neither Seddon nor Carroll appear to have turned their minds greatly to the elements that might comprise a biological treaty or ecological compact. The 1895 discussions and the 1896 Act represented a milestone of a kind but the future directions were not spelt out in great detail.²³³

Ms Edwards also argued that, for the biological treaty argument to work, it would have been necessary for the Government to agree in 1895 to set Te Urewera aside from the mainstream operation of the law. She accepted that some special arrangements were deemed necessary because of what she called the 'difficulties' in 1893 and 1895 (see chapter 9 for an account of the 'small war' over surveys). Hence, special arrangements were in fact made to except Te Urewera from the 'mainstream' law in respect of matters like roading, survey requirements, and Native Land Court

227. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 16

228. *Ibid*, p 56

229. Cecilia Edwards, summary of 'The Urewera District Native Reserve Act 1896, Part 1: Prior Agreements and the Legislation', 20 January 2005 (doc L2), pp 21, 23

230. *Ibid*, p 21

231. *Ibid*, p 22

232. *Ibid*, p 23

233. *Ibid*

titles. Yet, in Ms Edwards' view, we should not accept the Animals Protection Act Amendment Act exemption in 1895 as a similar, exceptional arrangement and an 'integrated' part of the 1895 UDNR negotiations. The Te Urewera delegation was likely present in Wellington and had met with Carroll at the time the Animals Protection Bill was going through Parliament in early August 1895. Discussions had probably been held, and Carroll would have briefed Seddon. Nonetheless, the Premier had not met with the delegation or agreed anything with it at the time he moved the amendment to the Bill on 2 August 1895. His amendment was not part of the negotiations per se but likely arose from Seddon's awareness 'of the impact of such a restriction [to the hunting of kereru] in districts where subsistence economies were being practised'. Nonetheless, Ms Edwards accepted that discussions with the delegation may have influenced the insertion of the exemption clause. It may have been intended as a show of good faith 'and to acknowledge the mana of the Urewera people'. But it was not, she argued, a companion piece of legislation to the 1896 UDNR Act.²³⁴

Ms Edwards' argument had two caveats. She agreed with Dr Coombes up to a point:

While I agree that Seddon appeared to suggest the introduction of some kind of an exceptions system (from mainstream legislation) for ownership and management of indigenous and exotic species of birds and fish in Te Urewera, this was not developed further, and certainly not outside the mainstream legislative mechanisms.

Ms Edwards also noted that, if the UDNR Act 1896 and prior discussions are *not* 'construed as a biological treaty', then she was unsure how to account for the Government's apparent belief that it could gazette a game sanctuary over part of the customary lands in the UDNR, and liberate species there, including deer.²³⁵

21.6.3 Our analysis of the documentation surrounding the UDNR agreement

As we found in chapter 9, our view of the UDNR agreement of 1895 is that it cannot be limited to any one set of discussions or document. Rather, it was the culmination of the discussions at the 7 September and 23 September meetings, and Seddon's memorandum in response to the delegation on 25 September. The documentation in relation to all three constitutes the record of the 1895 agreement. Here, we need to analyse that documentation in respect of the arguments advanced by the claimants, the Crown, and their respective historians as to a 'biological treaty', and we also need to consider whether a fourth component should be added to the record of the agreement: the documentation surrounding the enactment of section 7 of the Animals Protection Act Amendment Act in August 1895.

We begin with the minutes of the 7 September meeting, which Cathy Marr provided in her evidence for the Tribunal. As we discussed in chapter 9, Carroll negotiated with the delegation of Te Urewera leaders and then presented an agreed

234. Ibid, pp 24–25

235. Ibid, p 26

set of requests to the Premier on 7 September 1895, to which Seddon responded verbally at the meeting. Cecilia Edwards stressed that only seven of 58 pages of recorded discussion are ‘relevant to the idea of a “biological treaty”’, arguing that tourism and the protection of forests and birds in a native reserve received scant attention.²³⁶ In our view, however, there can be no strict correlation between the significance of an issue and the number of pages of recorded discussion about it.

Carroll, speaking on behalf of the delegation, told the Premier:

My wish was that the whole of the Tuhoe boundary should be reserved as a reserve for the Native people, a place wherein the Native people could develop itself and that its mountains and its forests be reserved as a resort for tourists in the future; the Native Birds of the Island would be preserved there as they are being driven out of other parts owing to the advance of civilization. That roads would be made through the country and thus enable tourists from other parts of the world to visit the place and see the Maoris in their natural state and their land and all that they placed on it. Because in my opinion I consider that the Tuhoe Country is a part of New Zealand where the natural curiosities of the Country exist in their natural beauty. . . . You are aware Sir that the Country is not suited for agriculture and farming operations or for settlement purposes but in the estimation of the native race it is a country very suitable to their requirements; they think a great deal of it.²³⁷

Carroll added that it would be for the Government to bring in legislation for the achievement of these objects, and to assist the peoples of Te Urewera with ‘improved methods of cultivation.’²³⁸ Although gold mining and improved cultivation were mentioned, Carroll noted on behalf of Te Urewera leaders:

I should point out that this is the last tract of native country in its natural state left in New Zealand. And it would be a district in which the natives, the remnants of the name Maori, could gather themselves together. That is why I ask that this District be reserved, made sacred, to preserve this name of the Maori people, preserve the Maori and the forest and all connected with the people in this particular spot situated in the interior of this Island.²³⁹

Seddon responded that he fully appreciated the people’s ‘great anxiety as regards your lands and it is well that in dealing with this question that every care should be exercised so that you may not be deprived of that by which you must live.’²⁴⁰ In response to their request for an inalienable reserve in which their forests, birds, and way of life would be protected, he told the delegation:

236. Edwards, summary of ‘The Urewera District Native Reserve Act 1896, Part 1’ (doc L2), p 22

237. ‘Urewera Deputation, Notes of Evidence’, 7 September 1895, pp 2–4 (Marr, supporting papers to ‘The Urewera District Native Reserve Act 1896 and Amendments 1896–1922’ (doc A21(b)), pp 166–168)

238. *Ibid*, p 5 (p 169)

239. *Ibid*, pp 5–6 (pp 169–170)

240. *Ibid*, p 15 (p 179)

You then asked that once the boundary is defined that this land shall be kept intact, that your forests may continue to exist, that your wild birds which are very few now may flock there, so that you may live and shall be undisturbed. A people, only a remnant, it is true, of the native race. That is your request. You ask that your streams may be allowed to flow as at present, the waters to remain unpolluted so that the fishes may live; they are also to you a source of food. Both these requests are reasonable and they are in accordance with what I believe to be in your interest and in the interests of the Country. But you say that you desire roads may be made through this Country which will be for convenience of travel to yourselves and which will be utilised to a very large extent by tourists from all parts of the world who will come to see you and to see your Country.²⁴¹

The Premier later elaborated on the nature of the risks to the environment in Te Urewera, which might be defeated by protecting both land and people in a native reserve. First, he singled out exotic briars that were invading the 'ancient forest', and urged the people to eradicate them if possible.²⁴² Then he referred to habitat destruction elsewhere, making the obvious connection between that point and the destruction of native birds. He also pointed to the creation of an island sanctuary on Little Barrier Island, in which the land had to be obtained from Maori, with the payment of compensation, so as to exclude all people (and predators). Te Urewera, as Dr Coombes noted, was to be the antithesis of Little Barrier. Seddon envisaged the people continuing to live there and use the forests in the ways of their forefathers, with the whole country set to benefit from tourists visiting the district:

I was forcibly struck with the request that your lands should be left as the last tract of native country that it should be a last resource for the native race, that there they may enjoy the freedom that their forefathers enjoyed for ages. That the birds might flock there as a last resort there to feel protected against the encroaches of Civilization [that is, habitat destruction] and their destruction. It was a fervent appeal to the heart. . . . Only a short time ago with the almost unanimous consent of the Legislature a large sum of money was expended in the purchase of the Barrier Island and the purpose of that purchase was to preserve the native birds, the fauna and the flora. Granting your request costs the State nothing the lands are yours, the forests are yours, and the birds that flock there they are yours. There is therefore a pleasure in granting – in acceding to your wishes and it is also a very great pleasure to me to know that you have not asked to conserve to yourselves wholly and solely these beauties; you have asked that roads may be made and that people from all parts of the world may visit you[,] go over your country, admire the grandeur of your scenery, your mountain scenery, your forests, your Rivers, and that they would see here the last remnants of the beautiful birds that originally inhabited this Island.²⁴³

241. Ibid, p 22 (p186)

242. Ibid, pp 23–24 (pp 187–188)

243. Ibid, pp 38–40 (pp 202–204)

Nothing was said about the acclimatisation of exotic fauna at this meeting. Discussion of the acknowledged need to augment Tuhoe's food supplies seems to have focused on assistance with cultivation and the protection of existing food resources, both birds and fish. It was not until the next recorded meeting, on 23 September, that exotic species were raised by the delegation through Wi Pere, their member of Parliament, who spoke on their behalf at that meeting. According to the newspaper account, Wi Pere 'suggested that round the shores of Lake Waikaremoana a fish breeding establishment might be erected, and the Natives taught how to manage it, and that breeding places for birds should be constructed, so that desirable imported game might be bred'.²⁴⁴

In response to the delegation's various representations through Wi Pere, Seddon said that the proposed General Committee would have 'extended powers, and in matters that arose between the Government and the Tuhoe the central committee would act as the medium of communication. In fact, the Government proposed to give the Tuhoe local government'.²⁴⁵ The Premier would 'lend them assistance in regard to the acclimatisation of fishes and birds in their country, and would write to Mr Rutherford [see below] on the matter'.²⁴⁶ There was no mention at this meeting of having to work through or consult acclimatisation societies. In the memorandum which followed it, acclimatisation of exotic species was represented as a matter to be dealt with by the Government and Tuhoe directly.²⁴⁷

The 23 September meeting was followed by the Premier's memorandum of 25 September, which later became the second schedule of the Urewera District Native Reserve Act 1896. Seddon characterised his memorandum to Tuhoe as 'an answer to the matters brought before me', so as to 'acquaint you with the decision of the Government thereon'. Two passages addressed matters relevant to the question of an 'ecological compact'.

First, the Premier responded to what he characterised as a request for additional food supplies and additional tourist attractions: the acclimatisation of exotic fish and birds:

As you feel that it would be desirable to provide an additional attraction to European tourists, and at the same time provide you with additional sources of food, you have asked that arrangements may be made for the introduction of English birds, and by stocking the rivers with English fish. By such means you Maoris will be benefited, and the rest of the colony as well. I will place myself in communication with the Curator of the fish-ponds at Masterton [Mr Rutherford, referred to above], and ascertain whether there are any English trout that can be supplied to you this year; and I will also ask to be furnished with full directions to be furnished to you, so that you

244. 'The Urewera Tribe', *New Zealand Times*, 24 September 1895 (Marr, supporting papers to 'The Urewera District Native Reserve Act 1896 and Amendments' (doc A21(b)), p 267)

245. *Ibid*, p 268

246. *Ibid*

247. Seddon to 'the persons who came hither to represent Tuhoe', 25 September 1895, Urewera District Native Reserve Act 1896, sch 2.

may know which are the most suitable places in which to place the fish in the rivers and lakes of your country, and how to look after them.²⁴⁸

The claimants emphasised Seddon's promise that Maori communities would release the trout and manage the fishery as a model for how species should be acclimatised under the 1895 agreement, and as Government acceptance of their authority and management in such matters.

The second relevant section of the memorandum was the Premier's response on the matter of forests, birds, and rivers, which he connected with both the benefits of tourism and Tuhoe's agreement to honour and obey the Queen's laws:

With regard to your request that your forests and birds should be suitably protected, it gives me much pleasure to assent to this request of yours. I am also very much pleased to learn from you that you have opened your land to tourists, who will now have an opportunity of seeing the wonders of your country, and the extent of your forests, with its lakes and its rivers. It is a cause of gratification to the Governor, and to me also, to hear that you acknowledge that the Queen's mana is over all, and that you will honour and obey her laws.²⁴⁹

The issue of what Seddon meant by 'suitably protected' was much debated in our inquiry. Dr Coombes posed the question:

Did Seddon refer to the *level* and *scope* of protection, or to the *cultural appropriateness* of protection? If the former, then the Crown's subsequent adoption of policies which restricted cultural take of native avifauna might appear justified; if the latter, then the restrictions on indigenous harvest and management of native species would have been unfounded. [Emphasis in original.]²⁵⁰

According to the claimants, the promise of 'suitable protection' can only be understood in light of the Animals Protection Bill earlier in the year, and the Premier's introduction of an exemption for Te Urewera from the operation of its restrictions on hunting kereru.²⁵¹ Counsel for Wai 36 Tuhoe submitted: 'In the context of Te Urewera in 1895 it is inconceivable that Tuhoe or Seddon would have contemplated any restriction on customary harvest as being suitable or appropriate.'²⁵² We agree.

The Animals Protection Act Amendment Bill was originally designed to introduce 'a minor, procedural amendment.'²⁵³ During its passage through the House, however, Mr Houston (a Government member) moved an amendment to ban all

248. Ibid

249. Ibid

250. Coombes, summary of evidence (doc H3), p 3

251. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 152, 155

252. Ibid, p 152

253. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 69

hunting of kereru every sixth year, starting in 1896. This amendment was accepted without debate, but Seddon at once moved a proviso: 'Provided that the Governor may, on the recommendation of the Colonial Secretary, by notification in the Gazette, exclude the Urewera Country and other Native districts in the North and South Islands from the operation of this section.'²⁵⁴ Ms Edwards accepted that the Te Urewera delegation was almost certainly in Wellington at the time of this amendment and had likely begun discussions with Carroll or Pere or both. Carroll would have briefed Seddon.²⁵⁵ In our view, it defies belief that the explicit mention of Te Urewera in the legislation was unrelated to the subsequent negotiations with Te Urewera leaders. But was it part of a 'package' to be read together with, and inform the undertakings made in respect of, the UDNR Act?

In our view, light is shed on this subject by the debate over the UDNR Bill in Parliament in 1896, and by statements from the Minister who had been most central to the negotiations, James Carroll.

The UDNR Bill 1896 was introduced by Carroll, who explained to the House that the district was being reserved because it was 'not fit . . . for settlement in any shape whatever':

it is land full of natural beauties; it is land that will form a strong attraction for tourists; it is also a convenient abiding-place for the Native owners. They live there within their own conditions congenial to their habits and welfare. They have their cultivations, the produce of the rivers and creeks, and little bends here and there where the wash from the hills has formed a little soil serves them for special gardening. They have lived there for centuries and ages; and it is their earnest desire, seeing, of course, that it is fit for no other use than for benefiting themselves – seeing that it is not adapted for being cut up for settlement purposes – it is their ardent wish that this land should be preserved to them. Sir, in agreement with their views on this subject, the Government considered the matter, and the result of that consideration is the Bill now before the House. In order to carry into effect the agreement between the Government and the Natives in a practical way, we have to seek legislation in this direction.²⁵⁶

Hone Heke, member for Northern Maori, explored the nature and extent of protection offered. Relying on Seddon's speech to the delegation on 7 September 1895, Heke said that the Premier had been 'willing to grant to them [Tuhoe] the full rights conferred upon them by the Treaty of Waitangi'. In particular, 'he told them that the forests, birds, and everything else within the Urewera district belong to the Natives themselves, and then he quoted the Treaty of Waitangi as his authority'. Heke also stressed the Premier's reference to Little Barrier Island and the Government's intention to achieve somewhat similar ends by very different means in Te Urewera, where Maori would remain the owners. Heke was concerned,

254. Animals Protection Act Amendment Act 1895, s7; Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 70–71

255. Edwards, summary of 'Urewera District Native Reserve Act 1896, Part 1' (doc L2), p 25

256. James Carroll, 24 September 1896, NZPD, vol 96, p 157

however, at the way in which power to regulate was reserved for the Governor in Council, and he proposed that more should be done in the substance of the Bill itself to give effect to the agreement. He would move an amendment 'to substantiate the statements made by the Ministers before the Urewera people regarding their rights, as conferred upon them by the Treaty of Waitangi'.²⁵⁷

Wi Pere, who – as with Heke – had been present at all meetings between the delegation and the Premier, told the House that the Bill was intended to carry out the wish of the Maori people and make their country a 'permanent reserve . . . where the Native race may live in their primitive state – where their customs and the native birds may be preserved'.²⁵⁸ We agree with Dr Coombes that the only meaning Pere could have in coupling Maori customs and native birds in this way was, at the least, an expectation that customs in respect of birds and birding were to be protected as part of the legislation.²⁵⁹

Houston, who had moved the original amendment to restrict the taking of kereru in 1895, spoke against Heke's proposed amendment, which Heke had already tried to insert when the Bill was before the select committee. Birds and fisheries, said Houston, should not be reserved 'exclusively for the Natives'. In his view, it was dangerous to recognise the Maori owners as having exclusive rights, especially to fisheries. It would prevent tourists and travellers from fishing without permission.²⁶⁰

Ropata Te Ao, the member for Western Maori, responded to Houston by pointing out that the Bill proposed not to alienate but to preserve 'the land for the Tuhoe people, and for the purpose of preserving their birds and their fisheries' – and permanently so.²⁶¹

Seddon's response was similar: he reminded the House that the district was not fit for settlement nor in fact needed for settlement in any case. Instead, it would be reserved for the Tuhoe people, who would 'govern themselves in accordance with their own traditions'. In particular, he noted the dependence of this self-governing people on their forests and birds for sustenance and survival:

But in the wilds of the Urewera Country the forests provide the feed for the birds; upon which the Native live, the lakes and rivers provide the fish necessary for their existence, and the little flatland they have is sufficient for them to cultivate the potatoes and other food they require, kumaras, and so on.²⁶²

Thus, birds and fish 'upon which the Natives live' and which were 'necessary for their existence', along with the forests, lakes, and rivers which sustained these food sources, were – in the Premier's view – what the Bill would reserve to the self-governing Maori communities of Te Urewera.

257. Hone Heke, 24 September 1896, NZPD, vol 96, p 163

258. Wi Pere, 24 September 1896, NZPD, vol 96, p 164

259. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 59

260. R M Houston, 24 September 1896, NZPD, vol 96, p 165

261. Ropata Te Ao, 24 September 1896, NZPD, vol 96, p 166

262. R Seddon, 24 September 1896, NZPD, vol 96, p 166

Thomas Mackenzie also linked the preservation of forests and birds with the preservation of the 'Natives in their own original mode of life.'²⁶³ Reading the speeches together, it seems that the point was well understood. Preservation of an entire district, its forests, birds, waterways, and fish, was for multiple purposes: for the sake of its natural beauties (given that the district was not suitable for close settlement, and native forests were fast disappearing from other parts of the colony); for the sake of the Maori people who lived there and would retain their way of life, their natural food sources, and the 'freedom of their forefathers' to govern themselves; and for the sake of the economic development of Maori and the colony in the form of tourism and mining.

But would Maori rights to their resources be exclusive? In committee, Heke moved to add the following words to the preamble:

and for preserving to the Native owners the full enjoyment of their rights to the lands within the said district, and to the forests, fisheries, and other properties which they may collectively or individually possess, as provided by the second article of the Treaty of Waitangi.²⁶⁴

Heke's amendment was negated without need for a vote. From Houston's earlier speech, we take it that Parliament was concerned not to explicitly recognise what they saw as Treaty rights to *exclusive* use of the forests, fisheries, and other Maori properties in Te Urewera. The claimants' view that 'tourists would be permitted entry [under the agreement] on a non-consumptive basis'²⁶⁵ was not the view that prevailed in Parliament.

Dr Coombes concluded:

To some extent, the UDNR was a nature reserve, but not one for the inviolable preservation of native species, but rather for the preservation of Maori rights to cultural harvesting and management of forest resources. Before Parliament, Seddon celebrated the fact that 'in the wilds of the Urewera Country the forests provide the feed for the birds; upon which the Natives live'. Given this celebration, there should be no suggestion that Seddon wanted to extinguish birding practices. Along with other members of Parliament, he assured that the UDNR would be the antithesis of Little Barrier Island, which had shortly before that time been established as an exclusionary nature preserve.²⁶⁶

In our view, one further piece of evidence is decisive. Coombes noted:

James Carroll's understanding was that 'one of the conditions upon which the Urewera Reserves Act was passed was that we should augment their food supply and

263. Thomas Mackenzie, 24 September 1896, NZPD, vol 96, p 171

264. Hone Heke, 24 September 1896, NZPD, vol 96, p 178

265. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 152

266. Coombes, summary of evidence (doc H3), p 5

not exclude their rights to taking [*sic*] game for food'. Of all Crown agents, Carroll was probably best situated to articulate the intent of the UDNR, so this is an important affirmation of the resource rights which the Reserve was intended to bestow.²⁶⁷

We agree with Dr Coombes' conclusion here. Carroll's view was recorded in 1902, when his opinion was sought by officials of the Tourist Department as to whether Maori should be exempted from a ban on killing native birds in the Waikaremoana sanctuary. We referred to this issue briefly in chapter 20, and will discuss it in more detail when we explore the Crown's restrictions on birding later in this chapter. Here, we note that Carroll's response revealed his recollection of one of the core aspects of the UDNR agreement:

I believe in protecting both imported and native game in the 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 rights to kill game for food.* I can however regulate them under their own Act which will serve the purpose just the same [that is, the purpose of exempting them from the Order in Council banning all hunting of native birds in the sanctuary]. [Emphasis added.]²⁶⁸

This was an internal memorandum, not a document crafted for public consumption. Its purpose was to remind Tourist Department officials and their Minister what the Government had agreed to, and it is all the more persuasive for it.

21.6.4 Our conclusion about the 'ecological logic' of the UDNR agreement

The 1895 exemption for Te Urewera in the Animals Protection Act, the record of discussions at the 7 and 23 September 1895 meetings, the text of the Premier's 25 September memorandum, the parliamentary debate over the UDNR Bill in 1896, and Carroll's recollection in 1902 together substantiate that there was an 'ecological logic' to the UDNR agreement. We summarise it as follows.

The forests, birds, rivers, and fish of Te Urewera were to be protected from environmental degradation for their owners, the peoples of Te Urewera, and for the enjoyment of (paying) visitors. Rivers were not to have their courses diverted or their waters polluted. The land was to be protected from deforestation to provide a secure habitat for native birds, and to protect the customary way of life and resource-use of the peoples of Te Urewera. The mode of protection was to be the legislative establishment of a permanent, inalienable native reserve in which Maori

267. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 68

268. Native Minister, minute, 23 September 1902, on TE Donne, Superintendent, to Minister in Charge Tourist Department, 15 September 1902 (Tony Walzl, 'Waikaremoana: Tourism, Conservation and Hydro-Electricity (1870–1970)' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A73), p 102); Crown Law Office, 'Lake Waikaremoana: History of Surrounding Lands, no date, p 22 (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)

communities would be defined as owners and would continue to live according to their customs. This included their ‘right to kill game for food’, which was recognised. Self-government would be exercised via hapu committees and a General Committee. Issues between the Crown and the peoples of Te Urewera would be resolved by dialogue between the Government and the General Committee. Food supplies were to be augmented, and the people were not to be excluded from their traditional foods. Rather, the peoples of Te Urewera were to be exempt from the operations of aspects of the mainstream law, including restrictions on the hunting of native birds (whether the exemption was through legislation, as with section 7 of the 1895 Amendment Act, or by Order in Council, as Carroll planned for Waikaremoana in 1902).

This was the clear commitment of the Crown to the peoples of Te Urewera in 1895–96, to a framework that respected mana motuhake and customary rights. Rights and authority with respect to the introduction and management of exotic fauna were, perhaps, the least defined of this set of prospective arrangements.

We stress the prospective nature of the agreement; many of the details had yet to be worked out. Cecilia Edwards agreed with Dr Coombes that ‘Seddon appeared to suggest the introduction of some kind of an exceptions system (from mainstream legislation) for ownership and management of indigenous and exotic species of birds and fish in Te Urewera.’²⁶⁹ We agree. That is exactly what he did, and what the 1895 arrangements and 1896 Act were intended to achieve. One way of working out the details was to be by regulation under the 1896 Act. But, commented Ms Edwards, Seddon’s intention was ‘not developed further, and certainly not outside the mainstream legislative mechanisms.’²⁷⁰

Crown counsel argued that the broad statements about natural resources at the 1895 meetings did not constitute a formal agreement to a specific type of protection, let alone to specific terms.²⁷¹ We do not agree. The intent of the UDNR agreement was to create a very specific form of protection: a self-governing and inalienable native reserve. We do agree, however, that much of the detail or specific terms in respect of environmental management and resource use were left out of the discussions and the Act that followed. The claimants agreed that there was insufficient detail about how the ‘suitable protection’ of forests and birds was to work in practice. Relying on the evidence of Cathy Marr and Cecilia Edwards, claimant counsel submitted that the detail was supposed to be fleshed out and agreed in future by further negotiations, which never happened. In particular, the General Committee was to have played a pivotal role.²⁷²

Crown counsel conceded that Seddon may have intended some role for the General Committee in implementing relevant environmental legislation. A key point for the Crown, however, was that the UDNR Act did not override ‘mainstream’ legislation on environmental matters, which it could have done if that had

269. Edwards, summary of ‘Urewera District Native Reserve Act 1896, Part 1’ (doc L2), p 26

270. Ibid

271. Crown counsel, closing submissions (doc N20), topic 29, p 9

272. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 151–155

been intended; by contrast, its terms did specifically exclude the jurisdiction of the native land laws from the Reserve. Thus, in the Crown's view, the 1896 Act did not intersect with the Animals Protection Acts to guarantee certain or specified rights over natural resources in the Reserve. Nor was the application of future environmental policy or legislation in the Reserve to be negotiated with the General Committee. Rather, the Crown's view was that Seddon 'saw this aspect of his engagements with Tuhoe as something for him to arrange, informing him[self] of their views'.²⁷³

As we found in chapter 9, Seddon made a very clear statement of his intentions at the 23 September 1895 meeting. He told Te Urewera leaders that 'in matters that arose between the Government and the Tuhoe the central committee would act as the medium of communication'.²⁷⁴ We see no reason why this would not apply to the negotiation of future exemptions from mainstream environmental legislation, including any further restrictions that Parliament might impose on the harvest of native birds.

21.6.5 The issue of exotic fauna

The issue of exotic fauna requires further comment. According to Dr Coombes, the 1895 UDNR agreement included the following 'bargain': 'the Crown would be permitted to introduce exotic game for tourism, and Tuhoe would retain the right to harvest kereru; and both native and exotic game would be "additional sources of food"'.²⁷⁵ Ms Edwards admitted that if such a bargain had not in fact been made, then it was difficult to account for 'the Government's later actions (in gazetting a game sanctuary over part of the customary lands subject to the UDNR, and liberating other species, including deer)'.²⁷⁶ Given the Government's release of deer in Te Urewera in 1897, so soon after negotiating the UDNR agreement, Edwards suggested that 'the parties could have taken away a general understanding that no further consultation over the release of other species was required'. Alternatively, Carroll may have assumed that no further consultation was needed to release additional species, or he may have conducted informal (unrecorded) consultation with Te Urewera leaders. In Ms Edwards' view, there can be 'no certainty on this point'.²⁷⁷

From the records of the 1895 meetings and Seddon's memorandum, it is clear that augmenting the food supplies of the peoples of Te Urewera was an objective for both parties. It also appears that both parties were interested in tourism and its economic benefits. According to the newspaper account of the 23 September meeting, it was the Te Urewera delegation which asked for the introduction of exotic birds and fish to their district. But the delegation's request was not couched in passive terms. They wanted to control and carry out the work of acclimatisation

273. Crown counsel, closing submissions (doc N20), topic 29, p 10

274. 'The Urewera Tribe', *New Zealand Times*, 24 September 1895 (Marr, supporting papers to 'The Urewera District Native Reserve Act 1896 and Amendments' (doc A21(b)), p 268)

275. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 72

276. Edwards, summary of 'Urewera District Native Reserve Act 1896, Part 1' (doc L2), p 26

277. *Ibid*, p 24

themselves. As we noted above, Wi Pere, speaking on behalf of the delegation, 'suggested that round the shores of Lake Waikaremoana a fish breeding establishment might be erected, and the Natives taught how to manage it, and that breeding places for birds should be constructed, so that desirable imported game might be bred'.²⁷⁸ In other words, the peoples of Te Urewera would breed, establish, and manage the exotic species, both fish and birds. The newspaper article did not suggest any particular motivation for this request, but it did record the Premier's response that he would 'lend them assistance in regard to the acclimatisation of fishes and birds in their country'.²⁷⁹

Subsequently, in his memorandum of 25 September 1895, Seddon expanded on what he understood to be the reasons for the request, and how he would lend assistance. Tuhoe wanted more attractions for foreign tourists. Hunting and fishing for sport was a primary aspect of tourism at the time. Tuhoe leaders also wanted 'additional sources of food' for their communities. The Premier believed that both Maori and the colony would benefit, and so he agreed to the request in the terms in which it was made; specifically, he promised to obtain trout and 'full directions' as to the best places to release them and how to manage the resource, so that they could do both themselves.²⁸⁰ The Crown emphasised in our inquiry that Seddon's specific undertaking was limited to trout,²⁸¹ but we consider that a more general understanding had been reached, at least as regards future intentions about the introduction of new fish and bird species.

There were, however, three complicating factors:

- ▶ the general agreement as to the introduction of exotic fish and birds was included in the 1896 Act by way of the second schedule, but no additional detail was provided and it remained for the Crown to give effect to the schedule by regulations;
- ▶ there was a question as to whether the agreement to acclimatise fish and birds represented a general licence for the Crown to introduce other kinds of animals, particularly deer, without further consultation and agreement; and
- ▶ some claimant groups query whether the delegation did in fact request the introduction of trout to their lakes and rivers, based on oral traditions to the contrary.

We will deal with the first point later in the chapter, when we consider the extent to which the 1895 agreement was given effect after the passage of the UDNR Act in 1896. Here, we address the questions of whether the delegation really did ask for trout with which to stock their waterways, and whether an agreement to introduce birds and fish extended – implicitly or explicitly – to an agreement to introduce other forms of wildlife to the protected reserve.

278. 'The Urewera Tribe', *New Zealand Times*, 24 September 1895 (Marr, supporting papers to 'The Urewera District Native Reserve Act 1896 and Amendments' (doc A21(b)), p 267)

279. *Ibid*, p 268

280. Seddon to 'the persons who came hither to represent Tuhoe', 25 September 1895, Urewera District Native Reserve Act 1896, second schedule

281. Crown counsel, closing submissions (doc N20), topic 29, p 10

Counsel for Wai 621 Ngati Kahungunu submitted that Ngati Kahungunu were not involved in the UDNR negotiations, and that trout were introduced into their waterways without consultation or agreement.²⁸² We confirmed in chapter 9 that Ngati Kahungunu and Ngai Tamaterangi were not a party to the 1895 negotiations. As far as we are aware, there was no consultation with Waikaremoana leaders about the introduction of trout (other than the request to Seddon during the 1895 negotiations).²⁸³ Reay Paku, a Ngati Kahungunu kaumatua who was interviewed by Professor Garth Cant's research team, shared the tribe's view that the local people had not sought the introduction of trout:

No, that was just a tale that originated just to suit the purpose of the day. The truth of it is that this person had brought trout across over to Waikaremoana for release into the waters of Waikaremoana and one specific area called Waitangi where possibly the purest steel-head trout of today are to be found. The Maoris did not ask for trout, they didn't even know what trout [were].²⁸⁴

Tama Nikora, interviewed by researcher Suzanne Doig, said that Tuhoe had not requested the introduction of trout either.²⁸⁵ We received no oral evidence on this point from Mr Nikora or any other claimants at our hearings, though counsel for Wai 36 Tuhoe stated that 'Tuhoe requested exotic fish and birds which Seddon understood would form a supplementary food source.'²⁸⁶

Counsel for Nga Rauru o Nga Potiki submitted: 'Because the written and oral evidence conflicts, it is not possible to decide conclusively on whose decision it was to release trout, and therefore on whether the Crown's action was consistent with the property and Treaty rights of the owners.'²⁸⁷ Counsel argued that the Tribunal should nonetheless accept that Seddon had promised trout as a tourist attraction and an extra food source for Tuhoe, and that Tuhoe were supposed to manage trout as part of their customary fisheries, but his promise was not kept.²⁸⁸ Thus, while there is doubt as to whether Te Urewera leaders really did ask for trout, these claimants' position is that the Premier – having decided to introduce it – was still accountable for his undertakings to provide additional food and to enable Tuhoe management of the natural resources in their reserve, including trout.

On the issue of mammals and marsupials – namely deer and possums – we have already noted Ms Edwards' suggestion of three possibilities arising from the UDNR agreement in 1895:

282. Counsel for Wai 621 Ngati Kahungunu, closing submissions, 30 May 2005 (doc N1), pp 22, 162, 166

283. Walzl, 'Waikaremoana' (doc A73), pp 60–62

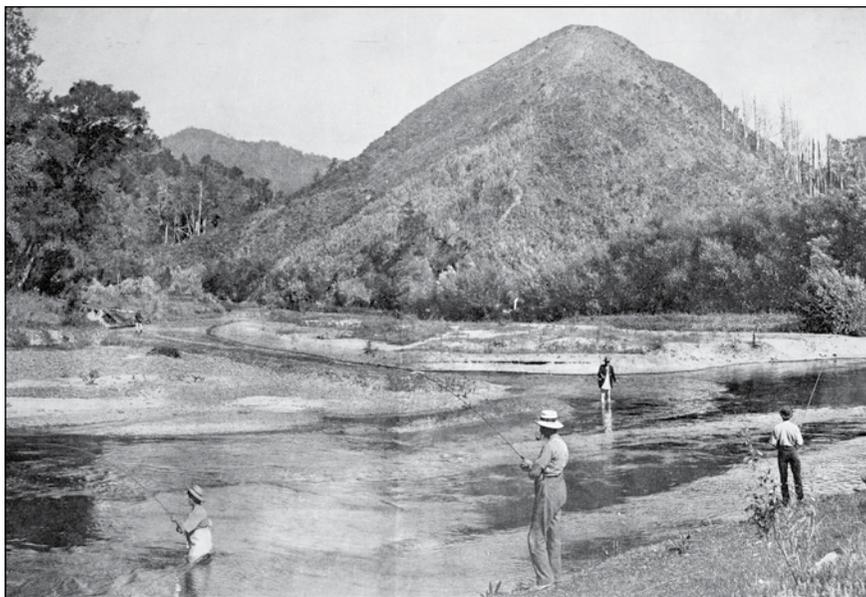
284. Reay Paku, interview, 11 November 2003 (Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana and Lake Waikareiti' (doc D1), p 70)

285. Doig, 'Te Urewera Waterways' (doc A75), p 59

286. Counsel for Wai 36 Tuhoe, closing submissions (doc N8(a)), p 151

287. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 234

288. Ibid



Auckland Weekly News (5ccsc, Auckland Libraries, A WNS-19090121-3-1)

Anglers fishing for trout on the Whirinaki River, Te Whaiti, 1906. The Crown generally prioritised Pakeha sporting values and tourism over Urewera Maori concerns to maintain native fish stocks. Te Urewera was incorporated by stages into the Rotorua Acclimatisation District by 1909, with the same licensing arrangements for trout as the rest of New Zealand.

- ▶ both of the parties to the 1895 agreement ‘could have taken away a general understanding . . . that no further consultation over the release of other species was required’;
- ▶ the Crown may simply have assumed that no further consultation was needed before species other than birds and fish could be released into the Reserve; or
- ▶ Carroll (later Native Minister) may in fact have consulted informally with Te Urewera leaders before the introduction of additional species.²⁸⁹

Dr Coombes considered that the Crown gained a general right to ‘release exotic game animals within the inquiry district as a basis for its tourism projects at Waikaremoana’, in return for recognising ‘Tuhoē’s right to maintain traditional use of forest and bird resources.’²⁹⁰ In his view, the Crown’s right would have covered the release of deer but not possums, because possums were not introduced for tourism purposes or as a source of food. Relying on Seddon’s memorandum, he also suggested that the delegation’s request for new species was ‘tempered by the suggestion that tangata whenua would administer the new wildlife resources.’²⁹¹ In other words, if the agreement was to be understood as a reciprocal recognition

289. Edwards, summary of ‘Urewera District Native Reserve Act 1896, Part 1’ (doc L2), p 24

290. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 1; see also p 15.

291. Coombes, summary of evidence (doc H3), p 3

of rights, then this was a qualification of the Crown's right: once released, new species were to be managed inside their reserve by the peoples of Te Urewera.

We will address the issue of post-1896 possibilities – that is, that Carroll may have consulted ‘informally’ before introducing animals that had not been discussed and agreed to – later in the chapter. We will discuss mustelids in a later section too. Here, we are concerned with the contention that either the Crown or both parties viewed the 1895 agreement as licence for the Crown to introduce mammals or marsupials (rather than birds or fish) into the Reserve. Edwards suggested that the Crown may have acquired such a right and Coombes asserted that it did, although Coombes' argument was qualified by his suggestion that new species had to be for tourism and food supply purposes, and subject to the Maori administration of the Reserve.

In our view, it is stretching matters too far to suggest the Te Urewera delegation had agreed that any animals whatsoever could be released in their reserve, even if understood to be useful for tourism or the increase of food supplies. They asked for birds and fish, and that is what Seddon agreed to. On the other hand, we accept that Tuhoe agreed in 1895 to development in the Reserve for tourism. Discussion of the tourism aspects of the agreement mostly focused on roads, but we accept that the parties reached a general understanding that new species would be introduced for the purposes of tourism and food supplies. Much would depend on future dialogue between the Crown and the leaders of Te Urewera as to how these general commitments would be carried out in practice.

Although we have no record of any specific discussion of deer in 1895, we are not surprised that the Government considered it could go ahead with plans to develop deer stalking as an attraction (and as a source of food for the peoples of Te Urewera). Further discussion was necessary, however, as to how Tuhoe and other iwi would access this food supply, how it would be regulated, and who would manage it. We agree with Dr Coombes that the 1895 agreement could not be considered justification for introducing possums for the quite different purpose of establishing a fur industry.

21.6.6 Our conclusion about the agreement as to exotic fauna

As we see it, the documentation surrounding the UDNR agreement makes it clear that the Te Urewera delegation requested the acclimatisation of exotic fish and birds on 23 September 1895, for the dual purpose of increasing their food supplies and attracting tourists. The delegation was in no doubt as to who would control and manage the process of acclimatisation. Their request was that the Crown would assist them with expertise, technology, and stock: it would provide the fish and birds, a hatchery and breeding structures (for birds), and instruction as to how the fauna should be released and managed. The Premier seems to have agreed to this request in the spirit in which it was made. The first mention of trout came in his memorandum of 25 September. His specific undertaking was to obtain trout for the peoples of Te Urewera to release and manage, as well as the necessary instruction for them to be able to do so. We note the claimants' position that there is some doubt as to whether the delegation did ask specifically for trout,

and that a conclusive answer is not possible. We accept that Ngati Kahungunu did not request trout, as they were not part of the Te Urewera delegation, and there does not appear to have been any consultation with local communities at Waikaremoana before trout were released in 1896. With regard to Tuhoe, however, we have one source (Tama Nikora, interviewed by Suzanne Doig) but no oral evidence was presented to the Tribunal on the question. We do not consider that there is a sufficient basis for questioning the documentation surrounding the 1895 agreement.

Seddon's memorandum, which accepted the delegation's general request with regard to exotic birds and fish and made the specific undertaking to supply trout for the people to release and manage, was given the force of law as a schedule to the UDNR Act. The Governor in Council was empowered to make regulations to give effect to the schedule. Thus, the question of how exactly this aspect of the agreement would be carried out was left for the future.

But we do not see how an agreement to acclimatise fish and birds in the Reserve could be extended to include any and all 'mammalian or marsupial creatures',²⁹² even if they might augment Maori food supplies and attract tourists, without further consultation and agreement with the owners and kaitiaki of the Reserve. Deer were likely in contemplation in 1895 and certainly met the dual purpose of tourism and food, but further discussion was needed as to how iwi would access this new source of food, and how it would be managed inside the Reserve. The Crown's relationship with the peoples of Te Urewera was to be a continuing one, however, and Seddon's undertakings about the introduction of exotic birds and fish had laid the basis for further arrangements.

21.7 WHAT WERE THE CROWN'S MAJOR INTERVENTIONS IN THE ENVIRONMENT OF TE UREWERA BEFORE THE ESTABLISHMENT OF THE NATIONAL PARK IN 1954? WERE THOSE INTERVENTIONS CONDUCTED WITH THE AGREEMENT OF, OR WITH DUE REGARD TO THE INTERESTS OF, THE PEOPLES OF TE UREWERA?

SUMMARY ANSWER: The Crown's three major interventions in the environment of Te Urewera before 1954 were:

- ▶ its assertion (and then assumption) of control of Te Urewera land-use (first, by the 1930s, by informally reserving Te Urewera forests, later by legislative controls for soil and water conservation);
- ▶ its assertion (and then assumption) of control of indigenous birds in Te Urewera, by gradual restrictions on the harvesting of birds; and
- ▶ the deliberate introduction of exotic species – trout, deer, possums, and mustelids – either directly by the Crown, or facilitated by it after the UDNR agreement.

By 1909, new Crown policies for control of land-use in Te Urewera were taking shape, as the 1895 agreement was 'forgotten'. Liberal Government commitment to

292. Edwards, summary of 'Urewera District Native Reserve Act 1896, Part 1' (doc L2), p 26

total protection of the UDNR for its people and their forests, birds, and fish was replaced by its vision of acquiring more than one-third of the Reserve for close settlement (that is, small settler family farms)– a proportion which soon grew to well over a half. During the 1910s, the Crown's purchase programme accelerated; the General Committee was bypassed as great numbers of individual shares were purchased by predatory tactics. During the 1920s, officials began to scale down the proposed clearances for settlement, but it was not until the 1930s that water and soil conservation became the predominant Government policy for Te Urewera. Whirinaki Valley was destined for milling and was proclaimed a State forest, while the rest of the Crown's vast block awarded it in the consolidation scheme by virtue of its individual share purchases in many blocks of the Reserve was to be preserved in its 'natural' state to prevent what was feared might be an environmental disaster in lower lying farmlands.

At the same time, the Crown restricted milling on Maori land, other than at Whirinaki and Te Whaiti and some parts of the 'rim' blocks. In the early 1950s, the Minister of Maori Affairs, EB Corbett, decided to reserve the Crown's land as a national park (thus affording it the highest possible protection), while responding to Tuhoe pleas for employment for their people with a land-use classification project to ensure controlled milling on Maori land, which would not pose environmental risks in terms of erosion. By 1954, the Crown had assumed complete control of the Te Urewera environment for soil and water conservation purposes.

A critical element of the Crown's assumption of control of the Te Urewera environment before 1954 was its intervention in the control and management of wildlife. In respect of native birds, this took the form of the gradual imposition of restrictions on hunting of kereru and other species until hunting was banned in 1922. All Maori communities in Te Urewera hunted kereru; it was a treasured part of their food supply in the nineteenth and early twentieth century, while the presentation of preserved birds to manuhiri upheld hapu and tribal mana. Kereru was a taonga species, and the Crown has acknowledged their spiritual importance to the peoples of Te Urewera. Despite the harvest of birds in Te Urewera being strictly controlled by customary law, and despite the Crown's recognition in the UDNR agreement that Maori there were living by their own 'customs and habits', a clash between customary law and statutory law loomed because the Crown had already established a system of control of native birds in 'native districts' elsewhere in the country. Animal protection legislation, which had long laid down rules for hunting native birds, reflected the preoccupation of Pakeha hunters with sport and recreation.

However, by the 1890s there was among Pakeha a new nationalistic pride in indigenous birds and bush, and a concern with their preservation and thus absolute protection. At first there was a specific exemption for Te Urewera from new nationwide restrictions imposed in 1900 on the hunting of kereru, pukeko, and kaka, with closed seasons every third year, and prohibitions on preserved game – which made huahua illegal. In 1903, a single standard season for native game was introduced, despite strong objections from Maori members of Parliament, who stressed that Maori had their own hunting seasons, but they were flexible to take

account of seasonal variations in berry ripening across the country – and thus the timing of birds reaching peak condition for eating and preserving. Nor did the members' attempts to defend Maori hunting techniques (including traps and snares) succeed; Pakeha parliamentarians wanted to make the taking of kereru more sporting. By 1910, there was a permanent ban on killing native birds, with provision for the peoples of Te Urewera and 'native districts' to apply, now, for an annual exemption. The only open season under the 1910 Act was however declared in 1911. From 1912 on, it was unlawful for Maori in Te Urewera to hunt restricted bird species, including kereru. No more exemptions would be granted, according to the Minister of Internal Affairs – despite the petitions he received from Te Urewera. In 1922, the Government legislated accordingly: the Animals Protection and Game Act 1921–22 made kereru, kiwi, tui, and kaka 'absolutely protected'. Yet Maori continued their customary take of birds in the years that followed, and there was no – or no effective – interference from rangers. During the Urewera Consolidation Scheme, Te Urewera leaders asked the commissioners to set aside pua manu (forested areas for the hunting of kereru and other birds), evidently still considering the people fully entitled to hunt as they always had done. Change did not come till 1931, when two people from Te Whaiti were prosecuted for poaching, and fined. There were immediate shock waves in Te Urewera, and petitions to Wellington seeking the reinstatement of customary rights, and Treaty rights. But despite Ngata's support for the petitioners at Cabinet level, there were no law or policy changes. By the end of the 1930s, hunting declined drastically as the reality of the cost of fines hit home hard – though kereru continued for some time to be taken for the old people, or served on important occasions where the mana of the hosts was at stake.

At the time, there were alternatives proposed to the restriction and the prohibition of the customary harvest of native birds. These included making forest reserves, to tackle the issue of habitat destruction, or at least the strategic reservation of berry trees or stands of indigenous forest; reserving sufficient miro and hinau trees within State forests; active eradication of predators and pests; and continuing district-specific exemptions policy for Maori, depending on local circumstances. But the Crown rejected all proposals that sustainable harvests were feasible in Te Urewera, and stuck with its law prohibiting the killing of birds. Nor did it consider carefully the people's circumstances, the hardship that resulted from banning the take of an important food, or the provision of an alternative food supply as compensation.

Some introduced fauna, however, did augment wild food supplies, as promised in the 1895 agreement. Trout, deer, and possums were the most significant acclimatisations that took place in Te Urewera in the late nineteenth and early twentieth centuries. Trout were introduced with marked success just before the UDNR Act 1896 was passed. Trout fry were released at Waikaremoana in 1896 and became well established over the next few years, and local Pakeha residents successfully released brown trout into the Rangitaiki and Whirinaki rivers. Te Urewera was incorporated by stages into the Rotorua Acclimatisation District, which was taken over by the Tourist and Health Resorts Department in 1908. The

Department of Internal Affairs took over the administration of freshwater fisheries in 1914. The Te Urewera trout fishery was put under the same arrangements for licensing and regulations as the rest of New Zealand. This cannot have been what Te Urewera leaders expected when they asked in 1895 for English fish to augment their food supplies and attract tourists, nor should they have been subject to the Government's licensing regime. The Premier, in agreeing to their request, undertook to secure trout for them and information so they could manage the fishery. Trout did become a part of the customary economy; to some extent this was necessary because of the impact of exotic species in reducing the indigenous fish species. The Crown has accepted that trout did damage native fish populations. Its management of the trout fishery also involved attempts to reduce or eradicate native species which were believed to predate on trout. Tuna culling began in the 1950s, which falls outside the scope of this chapter. Kawau (black shags) were vilified because they ate trout, and campaigns against them at Waikaremoana lasted from the 1920s into the early 1950s, despite their importance to the peoples of Te Urewera. Native hawks were also targetted as pests because of their impact on Pakeha game fish and birds, and for sport. But there had been no agreement in 1895 that the Government could systematically cull any native species of bird; any such policies should have been negotiated. As with the prolonged involvement of Government departments in stocking rivers and lakes with trout (for they proved expensive and difficult to establish), this was an example of Crown policies prioritising the interests of the tourist industry and angling over those of the peoples of Te Urewera.

Deer were introduced into Te Urewera from 1897 by a local settler who was a keen acclimatiser, with help from the Wellington Acclimatisation Society. Subsequently, up till 1922, almost all other releases in Te Urewera were undertaken by the Tourist and Health Resorts department. There is no record of consultation with Maori. It seems, however, that Native Minister Sir James Carroll favoured the introduction of deer, at least in part as a food source for the peoples of Te Urewera. Carroll approved the creation of two large game reserves in the Waikaremoana and Rangitaiki areas in 1898 to protect newly released deer. But subsequently restrictions on hunting in the reserves were imposed, and elsewhere there was an expensive license fee for hunting imported game in the Rotorua acclimatisation district. Both would have served as a real barrier to Maori wishing to hunt legally. There does not appear to be evidence of consultation with Te Urewera leaders about these changes; it is not even clear whether Te Urewera communities knew about them. During the 1920s, deer populations in Te Urewera grew rapidly. As early as 1913, forestry officials were reporting on the damage deer were inflicting on indigenous forest; by 1922, as the Crown acknowledged in our inquiry, the Forest Service was certain of their destructive effects. Faced with conflicting advice from the Department of Tourist and Health Resorts, however, the Government chose to do nothing – though the speed with which Internal Affairs, successor to the Department of Tourist and Health Resorts in 1930, accepted the necessity for culling, seems to point to recognition of a major problem by this time. The Crown failed to take any real action against deer before 1931, and in fact it was 1938

before it began in earnest. Operations were then scaled back because of the war, and began again only afterwards. Moreover, throughout this period it used its own hunters and trappers, and failed to take advantage of the opportunity to employ experienced local Maori hunters in the destruction of deer, which would have provided a much-needed boost to the local economy, and could also have provided Maori with regular access to a very useful food source, alongside pigs. Deer were already a welcome additional source of meat, especially as native birds were no longer taken regularly for food.

As well as deer there were other pests that wrought long-term damage on the forests and native bird populations. The first release of possums in Te Urewera, in which the Wellington Acclimatisation Society and the Lands and Survey Department cooperated, was in 1898. Te Urewera leaders do not seem to have been consulted about this introduction, and as possums were valued for their fur, not as food, it is difficult to see how the UDNR negotiations can be seen as relevant to – or construed as providing the permission of Te Urewera leaders for – possum releases. Some eminent scientists maintained that possums were not harmful to forests, though there was widespread opposition from other organisations, and the Government was slow to adopt a consistent approach to possum control, though Internal Affairs opposed further liberations as early as 1915. Open seasons on possums were declared erratically during the 1920s and 1930s, and protection for them was not removed completely until 1947.

The Crown honoured the environmental aspects of the 1895 agreement only to a very limited extent. It failed to protect native birds for the peoples of Te Urewera; rather, it showed itself to be careless of or indifferent to Maori interests in their birds. Without consultation or agreement, it abolished a right that it had acknowledged and promised to protect in 1895–96, the right to take birds for food in accordance with their customary law. It did abandon plans envisaged in the mid-1910s to clear forest from over half the native reserve – but only for its own reasons. The Crown failed also to protect native birds by refusing to accept evidence that possums and mustelids were a major threat to birds and their habitat, or to take timely action against them. In the case of mustelids, the threat they posed had been well canvassed even before the Crown decided to bring them to New Zealand in large numbers, but the interests of pastoralists were prioritised. Trout and deer were introduced with the dual purpose of sport/tourism and to augment Maori food supplies. Legal access to them was quite restricted, but they were extensively taken for food by Maori, and by the time of the Second World War, deer had come to dominate forest hunting, alongside pigs (a much earlier arrival in which the Crown had played no part). To that extent, they proved their worth as food sources especially in the period between the 1930s and 1950s when people had to adjust to the loss of birds as an important food, and before the impact of forestry employment and the welfare state would markedly improve their general standard of living.

The cultural harvesting of kereru today is prohibited under the Wildlife Act 1953. While cultural harvesting of plants and animals is permitted in Te Urewera National Park under the National Parks Act, there is no discretion to permit

harvesting of kereru in the park (or anywhere else). We cannot know whether the size of kereru populations warrants the maintaining of an absolute prohibition of cultural harvesting in Te Urewera, whether they are in decline, or whether they are sufficiently viable to sustain a controlled cultural take. The gathering of empirical data is an important first step to any re-assessment of the policy.

21.7.1 Introduction

In this section of our chapter, we analyse and assess the Crown's three major interventions in the Te Urewera environment before the establishment of the national park in 1954:

- ▶ The Crown's assertion (and then assumption) of control of Te Urewera land-use. In the 1910s and 1920s, the Crown pursued a policy of land purchase with the eventual aim of mass forest clearance and pastoral farming over much of the UDNR. By the 1930s, when the full effect of such a policy on lower-lying farm lands was appreciated, the Crown decided that Te Urewera forests would instead be informally reserved to protect existing farmland and Lake Waikaremoana. By keeping its own lands in forest and by using legislative controls to prevent Maori from milling timber on their lands, the Crown assumed full control of the Te Urewera environment for the purpose of soil and water conservation. Because this issue has already been discussed earlier in the report, it will only be set out briefly in this chapter.
- ▶ The Crown's assertion (and then assumption) of control of indigenous birds in Te Urewera. From 1895 to 1922, the Crown gradually imposed legislative restrictions on the harvesting of native birds, culminating in a total ban on the hunting of kereru from 1912 (formalised in 1922). On the ground, however, Maori customary law continued to control the hunting of native birds in Te Urewera until 1930. After that, a direct clash occurred between Parliament's law and Maori law in the former territories of the UDNR, with the result that kereru ceased to be an available food for the peoples of Te Urewera.
- ▶ The introduction of exotic species (either directly by the Crown or facilitated by the Crown) in the wake of the UDNR agreement. From the late 1890s, trout, deer, and possums were introduced to Te Urewera (mustelids had already arrived there) with very destructive results for indigenous fish, birds, and plants. Some introductions had compensatory benefits, and the question of how such exotic species would be accessed and controlled – and for whose benefit – was both contested and controversial.

21.7.2 The Crown assumes control of the Te Urewera environment for the purposes of soil and water conservation

In 1895, the Crown and the peoples of Te Urewera forged an agreement that Te Urewera would become an inalienable native reserve, recognised and protected by Act of Parliament. For the purposes of this chapter, the key aspect of the agreement was the protection of the native forests and birds of Te Urewera from the 'encroaches of Civilization'. The forests, rivers, birds, and fish would be protected by and for their Maori owners; it was partly a nature reserve in which the peoples

of Te Urewera would continue to exercise their customary authority and way of life. The promise was enshrined in the Urewera District Native Reserve Act 1896 by way of the second schedule. The Governor in Council was empowered to make regulations for the purpose of giving effect to the schedule in which, as we discussed above, the Premier agreed to the Te Urewera delegation's request that 'your forests and birds' would be 'suitably protected'. As we also discussed above, the mode of protection was to be an inalienable, self-governing reserve in which a General Committee would exercise 'local government' powers and provide the conduit for dialogue between the Reserve's owners and the Government.

In section 21.6.3, we noted the various assurances and observations from Carroll, Seddon, and other parliamentarians that Te Urewera was not suitable for close settlement and should therefore be reserved for the preservation of its natural beauties, New Zealand's increasingly vanishing indigenous flora and fauna, and – of course – its Maori inhabitants. This remained Government policy for just over a decade after 1895. Economic development was not to be excluded altogether; Maori were to be assisted with farming their lands, and gold mining was a potential source of revenue which would have impacts on the environment.

Mining proved to be a mirage, as Te Urewera was not the hoped-for new source of gold for the colonial economy. But it was soon replaced by a new mirage. As we discussed in chapter 13, Seddon died in 1906, and by 1909 the Liberal Government was preparing to acquire more than a third of the Reserve for close settlement (that is, small settler family farms). The UDNR Act was amended in that year to facilitate land alienation. Official talk of preserving forests, birds, and the Maori way of life had given way to talk of Pakeha settlement and forest clearance. From this time on, the Crown began to claim control of the Te Urewera district and its environment, the power to make unilateral decisions that would transform that environment, and the power to impose those decisions on the peoples of Te Urewera. The 1895 agreement was forgotten.

At first, the policy change was partially obscured by the desire of some Te Urewera leaders to lease land or make strategic sales, and the Liberals' attempt to work through an appointed General Committee (see chapter 13). But after the Reform Government took office in 1912, Government policy was to buy as many individual, undivided interests in the Reserve as possible, so as to secure the bulk of the forests of Te Urewera for clearance and Pakeha farming. In 1915, the Lands Department advised that four of the UDNR blocks (Waikaremoana, Te Whaiti, Manuoha, and Paharakeke), amounting to some 182,000 acres, were not suitable for clearance and farming 'at present'. A further 100,000 acres of land was needed for its Maori owners or for scattered 'scenic and climatic' reserves. This left around 370,000 acres to be cleared and farmed by Pakeha settlers once the Crown had acquired the land. As we have seen in chapter 13, the power of Maori choice was taken away: the General Committee was bypassed and individual shares were purchased by predatory tactics, resulting in the 'bleeding' of shares in an uncontrolled and, indeed, uncontrollable fashion. This was all in service of the Crown's new vision for the transformation of Te Urewera: '350 or so struggling sheep farms'

were to be established on ‘eroding hillsides.’²⁹³ Professor Richard Boast commented, ‘No really comprehensive study of the feasibility of this had been done, however, and had this been proceeded with it would have been an environmental and ecological disaster.’²⁹⁴ Officials of the time, however, ‘seemed to take it for granted that the Crown could impose whatever land use policy it chose on the Urewera.’²⁹⁵

Even as the Crown pushed ahead with the Urewera Consolidation Scheme in the 1920s, doubts were cast on its proposed future for the Te Urewera environment. The ‘main objective of the consolidation scheme was the clearing and settlement of most of Te Urewera for sheepfarming.’²⁹⁶ But, as we saw in chapter 14, RJ Knight examined the situation at the commencement of the UCS in 1921 and down-scaled the proposed land clearances by 100,000 acres to about 250,000 acres for pastoral farming. It was considered by then that a much larger area had to be reserved to prevent flooding in lowland districts and to preserve the utility of Lake Waikaremoana for hydroelectricity. In 1922, the Government further down-scaled its estimate to 120,000 acres of land that would be cleared and farmed after consolidation.²⁹⁷ Then, in 1923, the commissioner of Crown lands and a public works engineer reported that only a maximum of 50,000 acres could be made available for settlement, due to ‘the environmental consequences of denuding steep land of bush,’ as Cleaver put it.²⁹⁸ Nonetheless, the Crown persisted with the UCS and its goal of transforming the environment of Te Urewera for pastoral farming.²⁹⁹ Perhaps the price of expensive river protection works in the future seemed worth paying.³⁰⁰ Klaus Neumann pointed out that, apart from the Waikaremoana block, ‘issues of scenery preservation and soil conservation do not seem to have played a major role in the Crown’s selection of land’ during the UCS.³⁰¹ In particular, there was no effort to secure all of the steep land that was most likely to erode if it were milled.³⁰² Maori, in turn, were promised a prosperous future of timber milling and family farms if they cooperated in the process necessary to consolidate the Crown’s award. We saw how this worked in practice in chapters 14 and 15.

It was not until the 1930s that Te Urewera’s future was formally repurposed for water and soil conservation, and this new vision for Te Urewera became

293. 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

294. *Ibid*, p 100

295. 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 56

296. Boast, ‘The Crown and Te Urewera in the 20th Century’ (doc A109), p 100

297. Philip Cleaver, ‘Urewera Rooding’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A25), p 74

298. *Ibid*, p 76

299. Boast, ‘The Crown and Te Urewera in the 20th Century’ (doc A109), p 100

300. Neumann, ‘“... That No Timber Whatsoever Be Removed”’ (doc A10), p 57

301. *Ibid*, p 49

302. *Ibid*

the predominant Government policy. As will be recalled from chapter 16, the Government had abandoned its prospective clearance and settlement project by the end of the 1920s without formally deciding whether the Crown's award would be placed under the Forest Service or would become some sort of reserve under the Lands Department. In 1934, the Lands Department decided that it was necessary to 'make a thorough exploration and survey of the whole of the Urewera to determine exactly what should be done with the country in the best interests of the State'.³⁰³ This was based on the mistaken understanding that it 'has always been contemplated' to keep the majority of the district 'in its natural state'.³⁰⁴ Galvin (Lands and Survey) and Dun (Forest Service) inspected Te Urewera in 1935. In brief, they recommended that the Whirinaki Valley could be milled but otherwise Te Urewera should be preserved for water and soil conservation, to prevent an environmental disaster in lower-lying farmlands. A number of options arose from their report. These included:

- ▶ proclaiming the Crown's award as a State forest;
- ▶ setting up a special legislative regime to be managed by multiple departments, including the Native Department (in recognition of Maori interests in the district); or
- ▶ establishing a national park, a scenic and nature reserve, or an actively managed forest sanctuary.

Maori were not consulted about any of these options, despite the presence of Maori land and communities in the district with a vital stake in the future of their rohe. Crown counsel accepted that Maori were not consulted, but submitted that there was '[d]iscreet sounding' of their views,³⁰⁵ quoting the Galvin and Dun report: 'Discreet sounding led to the conclusion that Maori were willing to cooperate in the preservation of their bush, provided that the action entailed would not be detrimental to native interests'.³⁰⁶ The inter-departmental committee eventually recommended that the Whirinaki Valley be proclaimed a State forest, and that the rest of the Crown's award be administered by the Forest Service as a special scenic and historic reserve under its own legislation. Soil and water conservation was the primary motive, although tourism, scenery preservation, and the preservation of native plants and birds were also important (see chapter 16).

In order to secure successful forest protection, the committee recommended that the goodwill of local Maori communities was vital. Thus, Galvin from the Lands Department and GP Shepherd of the Native Department were sent to Te Urewera in 1936 to secure Maori support for forest preservation measures. We

303. Under-Secretary for Lands to commissioner of Crown lands, 14 March 1934 (SKL Campbell, 'Urewera Overview, Project Four: Te Urewera National Park, 1952-75' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1999) (doc A60), p 23)

304. Under-Secretary for Lands to commissioner of Crown lands, 14 March 1934 (Campbell, 'Te Urewera National Park' (doc A60), p 23)

305. Crown counsel, closing submissions (doc N20), topic 29, p 40

306. Galvin and Dun, 'Report by Officers of the Lands & Survey Department and the State Forest Service, on the Urewera Forest', 29 April 1935 (Crown counsel, closing submissions (doc N20), topic 29, p 40)

discussed their mission in chapter 16. In brief, Galvin and Shepherd recommended the preservation of Te Urewera in its natural state for soil and water conservation, alongside Government assistance to Maori farming in the Waimana Valley and at Maungapohatu.

No formal reservation of Crown land was made in the 1930s but the policy from then on was not to mill it, with the exception of the Whirinaki State Forest. At the same time, the Crown made half-hearted attempts to acquire Maori land so as to secure it against logging, and refused permission for timber milling on a number of blocks. As we discussed in chapters 16 and 18, there was growing pressure on the Crown in the 1940s, because milling of previously inaccessible land became more of a commercial prospect. The Government's policy remained to restrict milling on Maori land, and to negotiate for purchase or exchange of forested land. We explained how Minister EB Corbett had to change this policy in the early 1950s. Corbett developed a two-pronged approach: reservation of the Crown's land under the highest possible protection as a national park, and a land-use classification project to ensure that controlled milling on Maori land in Te Urewera would not pose environmental risks in terms of erosion.

Thus, by 1954, the Crown had assumed complete control of the Te Urewera environment for soil and water conservation purposes. As the owner of by far the largest part of the district, it could virtually control the environment simply by the uses to which it put its own land. Originally, the Crown's plan was to clear 370,000 acres for pastoral farming, but it was already clear before the UCS was complete that such an outcome would prove an environmental calamity for Te Urewera and for lower-lying Pakeha farming districts. Milling was allowed at Te Whaiti, the Whirinaki lands, and in parts of the rim blocks, but the great bulk of the Crown's land was deliberately kept in its 'natural state' from 1927 onwards. By legislation, the Crown also controlled whether and how Maori would be allowed to mill timber on their remaining pieces of land. It had enforced a no-milling policy for as long as it could, but had been forced to relax it somewhat by the early 1950s. At the same time, the Crown's share of the district was about to become a national park, which would ensure its preservation for soil and water conservation, for tourism, and as a remarkable scenic treasure replete with precious native flora and fauna.

The issue of native birds had already received special attention from the Crown. Control of land-use was the main way in which the Crown controlled the environment in Te Urewera from the 1920s to the 1950s. But it had also introduced a separate system of controls on the hunting of native birds, to which we now turn.

21.7.3 The Crown's control of indigenous species

Ko Te Urewera hoki toku ao, me tiki tonu ake, ko Te Urewera ko toku ao, ko Te Urewera toku maramataka. I runga i taku matau ki tera o nga ra nei. Ko taku maramataka inaianei ko tau i ako mai i au engari kaore ano kia hangai ki taku. He aha ai? He kotahi tonu te whakaheke o tau, ko taku ma te ora hei ki mai mo ahea au haere ai ki te patu i te manu. Ka taea e tau maramataka te ki mai 'me ki', 'me ki' kaore he 'me ki' ki taku ko taku hononga tera. Ka tatari rawa ahau kia eke ki taku, e eke ai ki taku

ma taku korero ki nga kaupapa katoa, ki nga kaupapa o te Rangi kia hangai ki aku whakaaro.

Te Urewera is my world. Te Urewera denotes the times of the year for me. And . . . the calendar that you taught me . . . does not fit in easily with my own calendar. Why is that? Because your calendar has one descent. My calendar is the environment that indicates to me when the time is right to catch birds. . . . Your calendar says to me, perhaps. There is no perhaps in my calendar. That is because that is my sustenance. I wait until the time is right for me.³⁰⁷

21.7.3.1 Introduction

For the claim issues discussed in this chapter, the most important aspect of the Crown's assumption of control of the Te Urewera environment before 1954 was its intervention in the control and management of wildlife. This took two forms: the gradual imposition of restrictions on the hunting of native birds until all hunting of kereru and some other species was banned in 1922, and the introduction and management of exotic fish and animal species for sporting and tourism purposes. In this section, we examine the Crown's assumption of control of indigenous birds in Te Urewera.

21.7.3.2 Two systems of law

As we discussed in section 21.3, the harvesting of birds in Te Urewera was strictly controlled by customary law. As we will show shortly, many aspects of that law were well known to the colonial law makers in Parliament. Maori members explained many times how hunting was governed by tohunga and rangatira, how the birds were utilised as a food source, how the timing and extent of access to forest and birds was controlled by rahui and tapu, and how the species were conserved for future generations. Much of the focus in the consideration of indigenous birds in this inquiry has been on kereru, which is a taonga species. All Maori communities in Te Urewera hunted kereru.³⁰⁸ It was an essential part of their food supplies in the nineteenth and early twentieth century. As we discussed earlier in the report, these communities were living on a knife's edge by the 1890s, in the wake of the confiscation of their best arable land and the restriction of access to land in the rim blocks. The removal of any one of their key staples could literally mean starvation, as Professor Brian Murton's evidence has explained.³⁰⁹

307. Hohepa Kereopa, oral evidence (simultaneous translation), Tataiahape Marae, Waimana, 26 November 2003

308. Ohlson, brief of evidence (doc G30), p8; Tuawhenua Research Team, 'Te Manawa o te Ika, Part One' (doc B4(a)), pp169–172; Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp137–138; Charles Te Arani Kapene, brief of evidence, 29 November 2004 (doc 126), para 1.11; Gladys Colquhoun, brief of evidence, 15 October 2004 (doc H55), p4

309. Brian Murton, summary of evidence for 'The Crown and the Peoples of Te Urewera', no date (doc J1), p11; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp302–308

In this inquiry, the Crown has acknowledged the spiritual importance of kereru and other birds to the peoples of Te Urewera, and also the importance of native birds in their diet. The Crown has also accepted that before Crown laws, policies, and programmes affected Te Urewera's flora and fauna, the peoples of Te Urewera exercised 'some measure of customary management, utilisation and protection' over resources such as birds.³¹⁰

Despite the existence of this traditional system, however, the Crown moved increasingly towards a system of control of indigenous birds in 'native districts' that focused not on Maori custom but on control through legislation. The Crown's relationship with the peoples of Te Urewera was profoundly affected by this intersection of these two forms of law, customary and statutory. Before 1895, the Queen's laws did not operate inside the Rohe Potae of Tuhoe. As we discussed in chapters 8 and 9, this was a key motivation in the Crown's negotiation of the UDNR agreement in 1895. The outcome of the negotiation was a mutual recognition and partnership between the peoples of Te Urewera and the Crown. The Queen's law would henceforth apply in the specially recognised and protected Urewera District Native Reserve. But, as the Government's spokesperson explained in the legislative council, the Maori peoples of Te Urewera were still living under 'their own Native customs and habits', and the intent of the UDNR Act was to give 'legal sanction to those customs and habits by putting them into an Act of Parliament'.³¹¹ The mode of protection, as we discussed above, was the power to make regulations to give effect to the second schedule, and the self-government powers of the General Committee and hapu/block committees.

21.7.3.3 The Crown's law imposes increasing restrictions on cultural harvesting

Outside of Tuhoe's Rohe Potae, legislative restrictions relating to indigenous birds existed well before the UDNR Act. For example, the Wild Birds Protection Act 1864 laid down a fixed season for hunting kereru and native ducks, although only in areas proclaimed by the Governor. The Protection of Certain Animals Act 1865 made illegal the killing by snares or traps of any protected birds, including kereru.³¹² The Protection of Animals Act 1867 was the first legislation to define 'native game'. Kereru were among the species so defined, which were not to be shot or snared outside the official hunting season. Subsequent legislation confusingly sometimes included and sometimes excluded kereru from this controlled category. An 1889 amendment to the Animals Protection Act 1880 again threatened traditional harvesting methods by forbidding the killing of native game except with a shoulder-gun.³¹³

310. Crown counsel, closing submissions (doc N20), topic 29, p 6

311. W C Walker, 29 September 1896, NZPD, vol 96, p 262

312. James W Feldman, 'Treaty Rights and Pigeon Poaching: Alienation of Maori Access to Kereru, 1864–1960' (Wellington: Waitangi Tribunal, 2001), pp 3, 23. The ban on snares lasted only two years at this point.

313. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 142–145

The late nineteenth century was a period of quasi-control by the various acclimatisation societies. In 1887, the Hawke's Bay Acclimatisation Society established licence fees for shooting native game, applying to kereru and kaka. Technically, Maori communities in southern Te Urewera were obliged to pay these. Each individual hunter would, however, have had to travel to Wairoa to obtain a licence. Given the exclusion of the Crown's laws and officials (including rangers) from the Rohe Potae, it is unlikely that they did.³¹⁴

Animals protection legislation up to this point was dominated by the Pakeha interest in 'sport'. This continued to be a strong influence on legislation affecting indigenous birds into the early years of the twentieth century. For example, in a back-handed development in 1903, a clause extending licences to native game was struck out partly because some Pakeha members did not think that there was sufficiently worthwhile 'sport' in shooting kereru to justify a £1 licence fee.³¹⁵ It was also sporting considerations that drove the aligning of open seasons between districts and between so-called imported game and native game, in order to protect from poaching imported game seen as particularly good 'sport'.³¹⁶

This state of affairs represented a cultural misalignment: by the late nineteenth century, Pakeha mostly hunted birds for sport and recreation; Maori hunted birds for sustenance, survival, and because the presentation of preserved birds to their manuhiri upheld hapu and tribal mana and recognised the importance of reciprocal arrangements. In the late 1880s and on into the early twentieth century, the Maori members of Parliament fought to present their distinctly different cultural perspective, centring on seeing kereru as a food source. In terms of setting seasons, Maori wanted birds fat for eating, but Pakeha wanted the 'sporting' challenge of faster leaner birds. In terms of hunting methods, snares lacked challenge for Pakeha hunters but had worked as a method of catching food for generations of Maori including, as Heke pointed out in 1907, those in 'the Tuhoe district'.³¹⁷ Sporting values, however, routinely prevailed.

During the late nineteenth century, and particularly in the 1890s, a very different type of Pakeha value also began to influence animals protection legislation. Unlike the first European settlers exploiting natural resources in the battle to make a home, many colonists born in New Zealand now wished to preserve indigenous birds and bush, which became a source of nationalistic pride. The kotuku (white heron) and the kamana (crested grebe) were listed as native game that could not be taken or killed anywhere in New Zealand in 1885. A growing desire to preserve scenery helped establish the Tongariro National Park in 1894, and a growing desire to preserve indigenous birds – supported by the Governor, Lord Onslow, who submitted a memorandum to Government – led to Crown establishment of

314. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 26

315. *Ibid*, pp 166–167

316. *Ibid*, pp 151–152, 169–170

317. Feldman, 'Treaty Rights and Pigeon Poaching', pp 10–12, 25; Hone Heke, 12 November 1907, NZPD, vol 142, pp 785–786

Unknown (Nelson Provincial Museum, Tyree Studio Collection, 176893)



Pakeha hunters and their haul of kereru, circa 1900. Pakeha emphasis on the hunting of birds for sport and recreation was at odds with the Maori practice of sustainable harvesting of an important food. By the late nineteenth century, there was, however, also a strong Pakeha preservationist lobby that sought the absolute protection of native birds, which were becoming increasingly valued in an era of growing nationalist pride. The Government response was to ban all hunting of specified native birds, though it knew that the destruction of their habitat was the primary cause of their decline. It failed to consider alternatives to a nationwide ban.

three island scenic reserves and bird sanctuaries in the 1890s.³¹⁸ It is important to note, however, that this early preservationist movement was limited, in terms of its successes, to areas or types of land not considered suitable for farming.

In 1895, the conservationist perspective helped to produce a significant new legislative erosion of Maori access to kereru, by instituting the first nationwide closed season on hunting kereru. We have already noted the proviso in this legislation for exempting Te Urewera and other 'native districts'. In subsequent years, pressure from those with conservationist values mounted in Parliament. Those who adopted such values sought absolute protection of birds, contrary to the Maori perspective of conservation through sustainable harvesting. Maori members continued their long-standing reminders to Pakeha members of the use of rahui to protect birds out of season, as well as pointing to what they saw as the true cause of declining bird numbers: the destructive effects of the widespread felling of forests, which destroyed bird habitats.³¹⁹ Sometimes Pakeha members conceded the useful role of rahui, albeit in the past, and the problems caused by habitat destruction.³²⁰ Nevertheless, Maori values did not prevail. A 1900 amending Act introduced closed seasons every third year for kereru, pukeko, and kaka, as well as reducing flexibility over the timing of the seasons that remained. Section 3 of the Act also banned holding game (including native game) for more than seven days after the season closed. This effectively made huahua illegal, even though the real purpose of the provision was to stop commercial hunters from sending birds to the freezing works, so that they could be used or sold later.³²¹

The 1895 provision for possible exemption of Te Urewera and other 'native districts' from the closed season was retained in section 4 of the 1900 Act. This section, which now provided for a three-yearly, nationwide closed season, was mainly intended to control Pakeha commercial hunters. The Minister who introduced it, Sir James Carroll, signified that Maori harvesting under their own laws was not the real target (see the sidebar opposite).³²² But, as Dr Coombes noted, the effect was much the same if no exemptions were in fact granted.

In 1903, the imported game reserves at Waikaremoana and Rangitaiki were changed into absolute reserves for the protection of all game, both indigenous and exotic. This fundamental change was made by Order in Council rather than by legislation. The two reserves encompassed 16.6 per cent of the UDNR, without any

318. Feldman, 'Treaty Rights and Pigeon Poaching', pp 9–10; Walzl, 'Waikaremoana' (doc A73), p 69. Lord Onslow also took a special interest in the huia (his son, born in New Zealand in 1890, having been given the name Huia after Ngati Huia suggested it) and he secured legal protection for the species just before he left the country in 1892: Ross Galbreath, 'William Hillier Onslow', in *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, <http://www.teara.govt.nz/en/biographies/206/onslow-william-hillier>, last modified 11 December 2013.

319. Feldman, 'Treaty Rights and Pigeon Poaching', pp 11–13, 20–21, 28–29

320. See, for example, R Monk, 16 August 1900, NZPD, vol 113, p 26; R McNab, 16 August 1900, NZPD, vol 113, p 30; H Lysnar, 7 October 1921, NZPD, vol 191, p 371 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 186).

321. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 149–153; see also J Hutcheson, 16 August 1900, NZPD, vol 113, p 39; JA Millar, 16 August 1900, NZPD, vol 113, p 28.

322. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 148–156

Sir James Carroll Acknowledges Maori Customary 'Game-laws', 1900

Mr Carroll: You cannot find more correct observers in natural history than the Maoris. . . . less harm comes from the Natives on the whole than what does from Europeans. They go out only once or twice in the season, but they never start in April, May, or June. It is only in July or August, when the birds are fat and fit for killing, that you find the Maoris going out to kill; and what they kill during these times would not amount in the aggregate to what is killed by the Europeans from the 1st April to the 31st July.

Capt Russell: The Europeans kill more on the first day of the season than the Maoris in the whole of the season.

Mr Carroll: Yes, and what is more, the Natives never kill birds out of the proper season; they never shoot a bird unless it is fat, and fit for the pot. They bag properly and do not wound birds by loose and reckless killing. They preserved all their bushes under their old laws, and no one was allowed to transgress. Their old game-laws were strict enough, I tell you, and until the particular day arrived for opening, and when the proper ceremony had been performed and the ban removed no one was allowed to go out into the bush and kill except at the risk of his life.¹

1. James Carroll, 16 August 1900, NZPD, vol 113, p 36 (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 153)

consultation about their establishment in 1898 or their extension to include native species in 1903.³²³ Dr Coombes commented that when the reserves were 'restricted to imported game, this would not have been a significant imposition, but the extension of protection to native game in 1903 would have severely impacted upon subsistence resources.'³²⁴

As we discussed in chapter 20, the Tourist and Health Resorts Department specifically debated whether the new restrictions at Waikaremoana should apply to Maori hunting for their traditional foods. That department's primary objective was to preserve native birds for the enjoyment of tourists, and, at the same time, to protect the birds *from* the influx of tourists with guns. The superintendent, Thomas Donne, anticipated that the new restrictions would 'probably cause discontent amongst the Urewera natives, as it would restrict their food supplies.'³²⁵

323. Ibid, pp 80–83

324. Ibid, p 81

325. Superintendent, tourist and health resorts, to Minister, 25 September 1902 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 160)

He consulted the relevant Ministers, Sir Joseph Ward and Native Minister Carroll, as to whether local Maori communities should be exempt from the hunting ban. As noted above, Carroll pointed out that the proposal would breach the UDNR agreement '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'. The Maori owners of the Reserve would 'claim their rights to kill game for food'. Carroll, however, was of the view that Maori could be exempted by regulations under the UDNR Act.³²⁶

Ward, however, agreed to exclude Maori from the Order in Council under the Animals Protection Act 1880, extending the Waikaremoana game reserve to include native game. He approved a draft proviso:

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.³²⁷

As we noted in chapter 20, Tourist and Health Resorts Department field officials objected to this proposed exemption. The department's senior inspector, Frederick Moorhouse, acknowledged that the 'natives of this district have the right to take and kill native birds for food supplies'. In his view, however, based on an unnamed source at Waikaremoana, Maori hunting could result in there being no birds left to protect.³²⁸ Although this advice ran contrary to what had been said in Parliament by Maori and some of the Pakeha members, Donne accepted Moorhouse's report at face value and removed the exemption from the draft Order in Council, which was then published without it.³²⁹ Carroll did not follow through on his stated intention to regulate under the UDNR Act so as to protect Maori rights at Waikaremoana to their indigenous birds.

By 1903, then, Maori rights had already been significantly circumscribed by the Crown's law despite the UDNR agreement. In the case of the 1900 Act, the vital custom of preserving birds for winter food supplies, for gifts, and for honouring manuhiri at hakari had been made illegal, although that had not been Parliament's intention in passing section 3 of the Act. The hunting of kereru, kaka, and pukeko was also made illegal every third year. But a specific exemption for Te Urewera

326. Native Minister, minute, 23 September 1902, on TE Donne, superintendent, to Minister in Charge, Tourist Department, 15 September 1902 (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 61); Walzl, 'Waikaremoana' (doc A73), p102; Crown Law Office, 'Lake Waikaremoana: History of Surrounding Lands', no date, p 22 (O'Malley, supporting papers to 'The Crown's Acquisition of the Waikaremoana Block' (doc A50(c)), p 854)

327. Draft proclamation, April 1903 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p161)

328. F Moorhouse, inspector, to superintendent of tourist and health resorts, 25 April 1903 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p162)

329. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p162

and other native districts was still provided for – the peoples of those districts could apply to the colonial secretary (later Minister of Internal Affairs), who had discretion to allow them an open season. In that respect, there was a mechanism for the Crown to protect Maori rights and interests. But, in the Waikaremoana and Rangitaiki game reserves, all hunting of native birds was made illegal in 1903, without the possibility of exemption. This meant that Maori rights were denied absolutely in those two parts of the UDNR, and potentially elsewhere as well every third year, unless a lawful exemption was granted by the Government.

In the same year (1903), the animals protection legislation was amended again to standardise all open seasons for native game (which would henceforth begin everywhere on 1 May). The Bill also had a clause requiring all persons to obtain a licence for taking native game. It would have had a major impact on Te Urewera by making it illegal for Maori to take birds on land that had not passed through the Native Land Court – which was precisely the status of the UDNR – without first buying a licence. This clause was eventually cut from the Bill, mainly because Pakeha members considered there was not enough sport in shooting kereru to justify a licence fee.³³⁰ The single, standard season for native game remained in place. Hone Heke, the member for Northern Maori, strongly objected to the enforcement of a national rule instead of a ‘sliding-scale’ for when the birds were ready in different localities, pointing out that Maori experience showed that a start date of 1 May for killing of native birds throughout the colony was ‘entirely wrong.’³³¹ The Maori calendar, as Maori members of the House of Representatives pointed out, centred on taking birds when their condition was finest for food; they thus depended on the flowering time of berry trees, which could vary from season to season and district to district. And if a season started later than usual because the birds were ‘very late in getting into condition,’³³² a nationally enforced closing date that took no account of ecological circumstances would make no sense either. But such arguments were to no avail.

The animals protection laws were consolidated and amended in 1907. Two years earlier, the Tourist and Health Resorts Department urged the Government to bring in further restrictions on the hunting of native birds, especially to limit the number that could be taken by any one ‘sportsman.’ Again, commercial hunting was the primary target so exceptions were still made possible for Maori hunting for food. The triennial closed season remained in place, along with the standing proviso that Te Urewera and other Maori districts could be exempted by the Government. The prohibition on frozen, chilled, or otherwise preserved game also remained in place, which meant that huahua was still illegal.³³³ The use of traps or snares was once again banned, which ‘criminalised traditional practices and

330. Ibid, pp164–167

331. Hone Heke, 29 September 1903, NZPD, vol 126, p72 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p165)

332. Hone Heke, Tame Parata, 9 October 1899, NZPD, vol 110, p407 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p150)

333. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), pp167–169

the application of traditional technology in kereru harvests.³³⁴ And the Governor retained the power to ‘prohibit absolutely, or for such time as he thinks fit, the taking or killing of any bird indigenous to New Zealand.’³³⁵ This gave the Government discretion to impose closed seasons more often than every third year.

Hone Heke, member for Northern Maori, objected to the banning of traps and snares, arguing that it was an attempt to prevent Maori in ‘the Tuhoe district’ and other districts from capturing their traditional foods. For generations, he said, Maori had looked upon these birds as ‘their food-supply’, which was strictly governed by their own, customary ‘preserve seasons’. But the banning of Maori hunting techniques was aimed at making the capture of birds more sporting, following the ‘custom of the pakeha . . . that birds are only for the purposes of sport.’³³⁶ This objection fell on deaf ears, as did Ngata’s opposition to the uniform native game season. The Minister, Carroll, responded to Ngata that an earlier season for native game ran the risk of hunters shooting imported game at the same time, and so could not be allowed for that reason.³³⁷

There was some sympathy for Maori members’ objections about protecting Maori rights to native game.³³⁸ One Pakeha member accepted that the Treaty entitled Maori to fish and take birds ‘without the restrictions we put upon them’, so long as the right was confined to ‘the fish [and birds] that were here when the treaty was made.’³³⁹ Thomas Mackenzie, on the other hand, maintained that ‘notwithstanding the Treaty of Waitangi, we have reached that stage in this country that if the Natives will not assist in protecting that which is so beautiful, then the laws of the country will have to do so.’³⁴⁰ In other words, the Treaty would have to be abrogated. Heke responded that customary harvesting was being targeted whereas Maori traditionally did and do protect the birds, and deforestation was the real culprit in their decline³⁴¹ – a point to which we will return later in the chapter.

The situation from 1907 was that the Maori communities of Te Urewera were not lawfully permitted to catch birds using traditional methods, or preserve birds in their own fat in the traditional way, but could still shoot in the closed seasons if they obtained an exemption from the Government. Between 1907 and 1910, conservationists remained concerned about commercial hunting of kereru and the

334. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 168

335. Animals Protection Act 1907, s20

336. Hone Heke, 12 November 1907, NZPD, vol 142, p 786 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), pp 169–170)

337. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 170

338. *Ibid*, p 171

339. T Wilford, 12 November 1907, NZPD, vol 142, p 789 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 171)

340. Thomas Mackenzie, 12 November 1907, NZPD, vol 142, p 790 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 172)

341. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 172

mass ‘slaughter’ it entailed. In 1908, they pushed for an absolute ban on all hunting of kereru.³⁴² It was unsporting, proclaimed Christchurch member Harry Ell, and there was no longer ‘any part of New Zealand where the few remaining pigeons were required for food.’³⁴³ Parliament did not agree and no changes were made. Pakeha members who had Maori populations in their electorates pointed out Maori did in fact rely on the birds for food.³⁴⁴ Also, ‘it would be interfering with the rights of the Natives’ if an absolute ban was imposed.³⁴⁵ A leading Opposition member, WH Herries, urged stronger controls on the sale of birds, but noted:

It would be impossible to check pigeon-shooting altogether, because the Maoris must be allowed to shoot the pigeons for food. . . . It was, in his opinion, doubtful whether the Maoris could be prevented from shooting the pigeons for food, close season or not, as in the Treaty of Waitangi they were guaranteed that right.³⁴⁶

Ell was brought to accept that Maori still needed access to kereru for their food supplies, and ‘there was conditional support for Maori harvesting rights’, with ‘some recognition that these rights were grounded in the Treaty of Waitangi.’³⁴⁷ No change was made to the law. But deforestation was again identified as the real threat, and no action was taken on that issue either. We will explore the alternatives available to the Government at the time later in this section.

Legislation that would spell the end of lawful kereru harvests was introduced in 1910, 15 years after the UDNR agreement, and just as the Crown was preparing to purchase vast areas of the Reserve and transform it from a habitat for birds to a habitat for sheep. Ironically, the Maori members had appeared to win a major victory in this Act (the Animals Protection Amendment Act 1910). Maori members made the (by now) usual arguments about the timing of seasons, Maori customary law and practices in managing sustainable harvests, the cultural disconnect between Pakeha hunting for sport and Maori hunting for food, and the pointlessness of attacking harvesting while allowing or even promoting deforestation.³⁴⁸ Te Rangihiroa, who had replaced Heke as member for Northern Maori, led the attack on the banning of huahua. He maintained that the present Act (and the proposed amendments) took away one of the ‘rights and privileges of the Native race’: ‘I strongly protest on behalf of the Maori people that anything should be done under

342. Ibid, pp 172–173

343. Harry Ell, 11 September 1908, NZPD, vol 145, p 62 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 173)

344. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), pp 173–174

345. A E Remington, 11 September 1908, NZPD, vol 145, p 62 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 173)

346. WH Herries, 11 September 1908, NZPD, vol 145, p 66 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 173)

347. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 174

348. Ibid, pp 176–181

this Bill to prevent the Maoris from preserving native game for food-supplies.' He named Te Urewera as one of the districts where 'food-supplies are not so plentiful and not so easy to obtain', and where 'the imposing of this law would inflict a distinct hardship on the people.'³⁴⁹

Henare Kaihau, the member for Western Maori, supported ending the closed seasons and the prohibitions on huahua. The people of his district, he said, were 'under the impression that they still possess the right conferred by – and held by them since – the Treaty of Waitangi to kill and take, for the purpose of food, native game and fish throughout the Dominion.'³⁵⁰ Wi Parata, member for Southern Maori, added that the Maori people had not been consulted about the Bill (or earlier animals protection legislation).³⁵¹

In response, Harry Ell pointed out that the Bill did not change the provision for exempting Te Urewera and other Maori districts 'from the special provisions restricting Europeans from taking native birds.'³⁵² The law, he said, would not interfere with Maori in districts where the birds were both plentiful and still required for food. Also, the Minister of Internal Affairs agreed that the law should now make an exception for huahua.³⁵³ A proviso was duly added to the Act, to the effect that its restriction on holding birds for longer than seven days after shooting did not apply to huahua.³⁵⁴ As Dr Coombes noted, this triumph recognised 'the cultural and social dimensions of kereru harvests.'³⁵⁵

Yet this very Act in 1910 allowed 'the Crown to, in effect, end cultural harvests only two years later.'³⁵⁶ When the Bill came back to the House from the legislative council, it had been amended to change the three-yearly closed seasons to a permanent ban on the killing of native birds. The amendment still allowed for the peoples of Te Urewera and 'native districts' to apply for an exemption, but now they would have to do so every year.³⁵⁷ According to Dr Coombes, the council's amendments came late in the session and the Maori members had already left.³⁵⁸ The House welcomed the opportunity provided in the council's amendments for the Government to declare some native species open for hunting, as a means to target 'nuisances' to farming such as hawks.³⁵⁹ The only comment on Maori interests came from the member for Patea, who 'complimented the Council' on making

349. Te Rangihira, 2 September 1910, NZPD, vol 151, p 258 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p179)

350. Henare Kaihau, 2 September 1910, NZPD, vol 151, p 260 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p180)

351. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 180

352. Harry Ell, 2 September 1910, NZPD, vol 151, pp 262–263 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p180)

353. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 180–181

354. Animals Protection Amendment Act 1910, s 4(2)

355. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p181

356. *Ibid*

357. *Ibid*, pp 182–183

358. Coombes, summary of evidence (doc H3), p 8

359. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p183



Kereru on a kawakawa branch. Kereru are a taonga species to the peoples of Te Urewera; they were a treasured part of the food supply of all communities, and the presentation of preserved birds to manuhiri upheld hapu and tribal mana. The harvesting of kereru was strictly controlled by customary law for centuries before Parliament outlawed the practice in 1910, initially with an exemption for Te Urewera. But, from 1912, it became unlawful for Maori in Te Urewera to hunt restricted bird species, despite the Urewera District Native Reserve agreement that Te Urewera would be totally protected for its peoples and their forests, birds, and fish.

it 'possible to protect pigeons from the depredations of the Natives'.³⁶⁰ The result, Dr Coombes told us, was a 'legal absurdity': 'henceforth, it would be legal to possess huahua but illegal to harvest its ingredients'.³⁶¹

The only open season under the 1910 Act was declared in 1911. From 1912 onwards, it was unlawful for Maori in Te Urewera to hunt restricted native bird species, including kereru. By 1914, the Minister of Internal Affairs and his officials had made it clear that no more exemptions would be granted for Maori to hunt kereru.³⁶² GW Russell, former Minister of Internal Affairs, protested against this policy in 1914 during a further amendment of the Animals Protection Acts. He reminded the Government that it had the power to allow hunting in Te Urewera

360. G Pearce, 27 October 1910, NZPD, vol 153, p116 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p184)

361. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p184

362. Ibid, pp184-185

and other districts for vitally needed food. If it refused to exercise that power, then it was inflicting great hardship on the Maori people.³⁶³

Instead of changing its policy, the Government removed its power to exempt Te Urewera altogether in 1922. The Animals Protection and Game Act 1921–22 made kereru, kiwi, tui, and kaka ‘absolutely protected’. Open seasons could no longer be declared in Te Urewera or anywhere else, although Dr Coombes pointed out that, in reality, there had already been no open seasons for a decade.³⁶⁴ There was provision in the new Act (section 3) for the Governor ‘by Warrant’ to remove a species from the schedule of absolutely protected birds. The Governor could also impose a partially protected status on animals that were not already protected; that is, they might by warrant be protected in specified parts of New Zealand, though such warrant might also be revoked (section 4). For birds such as kereru, the Act gave the Governor discretion to do one of three things: to maintain absolute protection; to declare the species native game (that is, they might be killed during an open season declared by the Minister, but not by snaring or trapping, or exceeding daily set limits); or to declare the species no longer subject to the Act at all (section 5); certainly the option of exempting Te Urewera and other native districts had been repealed.³⁶⁵

Dr Coombes commented:

all harvesting of kereru after 1911 was in effect criminalised, and there were no exceptions made for Te Urewera. In that year, the game reserves were opened for the shooting of deer: the Crown’s benefit from the 1895 compact was fully realised in the same year that the wildlife advantages for Maori in that compact were fully and finally annulled.³⁶⁶

We will return to the question of deer and tourism later in the chapter. We turn next to examine which law, customary or statutory, was actually enforced and governed the taking of native birds in Te Urewera, before looking at whether restricting customary harvests was the only or best means available to the Crown for protecting native birds.

21.7.3.4 Enforcing which law?

As we explained in section 21.3, the peoples of Te Urewera harvested birds and other forest resources under their own customary laws and practices. This system continued to operate unchanged in the 1890s and early 1900s. New methods of hunting, particularly the use of firearms, had been adopted alongside traditional snares and traps, but were used towards the same ends of killing for food when the birds were fattest, without waste or damage to the resource. The Animals

363. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), pp185–186

364. *Ibid*, p186

365. Animals Protection and Game Act 1921–22, ss 3–5. The third schedule to the Act, which listed ‘native game’, was a short one, mostly comprising waterfowl or sea birds.

366. Coombes, summary of evidence (doc H3), p 9

Protection Act Amendment Act 1895 established the first closed season for the hunting of kereru in 1896. At this point, however, the Queen's law was still not accepted in Te Urewera, and the 1895 UDNR agreement was not given force until the UDNR Act became law on 12 October 1896. It is not surprising, therefore, that Te Urewera leaders did not apply for an exemption in 1896. The next closed season under the 1896 Act was not due until 1902, but the law was changed in 1900 to declare a closed season in 1901 and every third year after that. There was no consultation with Maori about this law change, as Wi Parata pointed out and condemned in Parliament.³⁶⁷ Parata predicted that many Maori would never hear of it, and Dr Coombes suggested:

It is likely that communities within Te Urewera only heard of the 1900 Act when it was implemented, if at all, and this contributes to an explanation for why they were again unable to obtain an exemption in 1901, the first closed year for kereru under the new provisions.³⁶⁸

The possibility of seeking an exemption from the triennial closed seasons was poorly notified (if at all) in Te Urewera, and there was neither an application nor an exemption in 1901, 1904, or 1907. We agree with Dr Coombes that dialogue between the Government and Te Urewera leaders on this matter, and the negotiation of exemptions, would have been facilitated 'if the General Committee of the UDNR had been formed.'³⁶⁹ As we explained in chapter 13, the Crown has conceded its responsibility for the failure to give effect to the self-government arrangements of the UDNR agreement. In our view, the growing disjunction between customary law as it operated in the Reserve, and the statutory law imposing restrictions on hunting native birds, was one of the consequences of that failure.

By 1907, Te Urewera leaders were becoming aware of the disjunction. The first request for an exemption came from Ngati Whare in 1907.³⁷⁰ Wharepapa Whatanui wrote on behalf of the tribe to the Minister for Public Works to ask that the people be allowed 'pigeon shooting for our maintenance, for we are very short of food . . . all our potatoes perished with the blight'.³⁷¹ We have no information as to why no exemption was granted in response to this request. Then, before the next closed season (1910), Te Urewera leaders appealed to the Native Department for an exemption, once again noting the terrible effects of potato blight. Ngata supported their application. The Government approved a formal exemption for Te Urewera in that year, so that kereru and kaka could be hunted for food, except in the game reserves (Rangitaiki and Waikaremoana).³⁷² Also, in the wake of the 1910

367. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 155

368. *Ibid*, p 156

369. *Ibid*, p 157

370. John Hutton and Klaus Neumann, 'Ngati Whare and the Crown, 1880-1999' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2001) (doc A28), p 786

371. W Whatanui to Minister for Public Works, [May 1907] (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 786)

372. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 175

amendment, huahua was decriminalised and could once again be kept lawfully. Thus, the year 1910 seemed a promising improvement: the two systems were once again in alignment, with the peoples of Te Urewera and the Government both in agreement that kereru could be hunted and preserved for food in the traditional way. This apparent alignment continued in 1911, after the law had been changed to make every year a closed season. In this year, too, an exemption was granted for Te Urewera (although not for the game reserves). This was the final exemption until the law was changed in 1922.³⁷³

According to Dr Coombes, Te Urewera leaders sought further exemptions in the years immediately after 1911 but were refused by the Government. The years 1913–14 were ‘a focal point for contestation of these prohibitions’ nationally, with Te Urewera ‘a principal source of petitions.’³⁷⁴ In 1913, for example, the owners of Heruiwi 4 block, one of the Te Urewera rim blocks, wrote to the Native Minister from Ruatoki, stressing the connection between the berries of their trees coming into season, and the condition of the birds on which the people depended:

We desire to inform you that the months in which the Maori birds, such as pigeons, kaka, and Tui, are fattest are March to April, May to June–July, and January to February. During those Months our birds feed on the Mako, Tawa, Miro, Hinau, Rimu, Kahika, Rata, and Maire. These fatten our Maori birds. We therefore ask you to authorise those Months as Months in which we can take these birds, because we understand these matters quite well. Let the law protect the birds only in their breeding seasons, and in very bad weather.³⁷⁵

By the end of 1914, it was clear that the new Reform Government would not grant any exemptions under the 1910 Act. Coombes found two responses from the Internal Affairs Department to Te Urewera applicants in 1914, both declaring that exemptions for Te Urewera would no longer be considered by the Government.³⁷⁶ A former Minister from the previous Liberal Government, GW Russell, queried the legality of this position:

I notice that the Minister of Internal Affairs has stated that he intended to allow no pigeons to be shot in the country. I am not sure that there is power in the law for such a total prohibition as that to be brought about. There is power given in section 26 of the Act of 1908 for the Governor, on the recommendation of the Minister, to exclude the Urewera country and other Native districts in New Zealand from the operation of the section dealing with the close season – in other words, allowing the Maoris to

373. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p184

374. Ibid

375. Te Waaka Paraone Teranui and others to Native Minister, 13 January 1913 (Paula Berghan, comp, supporting papers to ‘Block Research Narratives of the Urewera, 1870–1930’, 18 vols, various dates (doc A86(m)), vol 13, p 4351; see also page 4353.)

376. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p185

shoot every year if the Government thought it desirable to allow that privilege. I may say that in some of the districts where pigeons are exceedingly numerous it is felt by the Natives to be a great hardship that even during the close season they should be prevented from securing what is the natural food. Of course, honourable members will know that during the shooting season the Maoris shoot a considerable number. They then put the birds that are cooked down in fat, and it provides a large portion of the food of the Maoris, many of whom are not able to purchase meat in the ordinary way for the purposes of sustenance. During the short period I was Minister of Internal Affairs a number of deputations waited upon me, particularly at Rotorua, on this point. . . . I do not think it would lead to the slightest injury of the bird-life of the country if a reasonable amount of shooting were permitted, provided the Minister exercised the power he undoubtedly has to limit the number of birds that might be shot by the one gun either in the day or, if necessary, for the season.³⁷⁷

It is notable, however, that when Russell became Minister again the following year, he did not in fact alter the policy during his tenure (1915–18).³⁷⁸ It thus remained Internal Affairs policy to refuse applications for open seasons until even the possibility was taken away by the new Animals Protection and Game Act 1921–22. Coombes commented that the Liberal Government had not intended the 1910 amendments to introduce a total ban ‘but that is what the policy had become.’³⁷⁹

Did this actually stop the hunting of birds in Te Urewera at the customary times and in the customary ways? The evidence available to us suggests that it did not. In theory, a total ban was in place at Waikaremoana from 1903 onwards, but the evidence from that district – where a small amount of ranging activity had begun to penetrate Te Urewera by 1910 – was that local Maori communities hunted birds for food regardless. As we described in chapter 20, the Waikaremoana ranger, WA Neale, was incensed at local Maori, who, he said, ‘recognise no Law, save that that nature gave them, viz, the stomach – and when that calls season or no season all is kai.’³⁸⁰ Hence, he reported, Maori shot pigeons and ducks at Waikaremoana for food, regardless of the Queen’s law. Neale, unlike some other Pakeha in the district, seems to have been totally unaware of how customary law governed the number of birds taken and the season in which hunting was allowed. In any case, his superiors would not allow any prosecutions in 1910. It was an important fact of law enforcement at the time that – regardless of the letter of the law – Government policy was not to prosecute Maori under the animals protection legislation unless the Native Minister approved.³⁸¹ At the beginning of the 1910s, the Government was anxious not to alienate the peoples of Te Urewera as it planned large-scale

377. G W Russell, 7 October 1914, NZPD, vol 170, p 484 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), pp 185–186)

378. Feldman, ‘Treaty Rights and Pigeon Poaching’, p 37

379. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 186

380. Neale to Robieson, 9 June 1910 (Walzl, ‘Waikaremoana’ (doc A73), p 105)

381. Walzl, ‘Waikaremoana’ (doc A73), pp 105–107

A Crown Law Office Opinion as to the Application of the Treaty, 1917: Native Pigeons and the Treaty of Waitangi

The provisions of the Animals Protection Act 1908 are general in their terms and apply to all persons whatsoever. If therefore any person fails to observe any of the provisions of the Act or commits any breach thereof he is liable to the penalty provided for such failure or breach. There is no exception with respect to Maoris or half-castes and anything contained in the Treaty of Waitangi cannot affect this position. Whatever force or effect that Treaty may have nothing therein can override the direct provisions of a statute. I am of opinion, therefore, that if a Maori or half-caste shoots Native pigeons during the close season for Native game he commits an offence against the provisions of the Act.

The Treaty of Waitangi has been discussed in a number of cases, the latest being *Waipapakura v Hempton* (33 NZLR 1065). In that case the appellant, who was fishing in the tidal waters of the Waitara River, claimed that she was using the nets in exercise of a Maori fishing-right. The Full Supreme Court held that the right of Maoris to fish in the sea or tidal waters is the same as the right of Europeans, and is governed by the Fisheries Act 1908, and the regulations made thereunder. In delivering the judgment of the Court Stout CJ said 'In the tidal waters – and the fishing in this case was in this area – all can fish unless a specially defined right has been given to some of the King's subjects which excludes others. It may be, to put the case the strongest possible way for the Maoris, that the Treaty of Waitangi meant to give such an exclusive right to the Maoris, but if it meant to do so no legislation has been passed conferring the right, and in the absence of such both

purchases in the UDNR. As Dr Coombes noted, cultural harvests continued until the Crown 'eventually decided to police its own rules.'³⁸² This did not occur in the 1910s, when the emphasis was on persuasion rather than enforcement.³⁸³

Nationwide, the acclimatisation societies' rangers were uncertain as to whether *they* could or should initiate prosecutions. They were baffled by Maori hunters who claimed that their right to take birds was guaranteed by the Treaty of Waitangi, and were unsure of whether they could win in court.³⁸⁴ In 1917, the Crown Law Office provided the Department of Internal Affairs with a legal opinion, in response to a request from the Auckland Acclimatisation Society (see the sidebar above for the full text of the opinion). Crown solicitor Ernest Redward advised that the provisions of the Animals Protection Acts were 'general in their terms and apply to all persons whatsoever'. In his view: 'There is no exception with respect to Maoris

382. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p187

383. *Ibid*, pp189–193

384. Feldman, 'Treaty Rights and Pigeon Poaching', p37

Wi Parata v The Bishop of Wellington and *Nireaha Tamaki v Baker* are authorities for saying that until given by statute no such right can be enforced. An Act alone can confer such a right.' And again later 'Therefore, so far as sea-fisheries are concerned – and the question of fishing-rights on inland rivers adjoining Maori land is not before the Court – there must, in our opinion, be some legislative provision made before the Court can recognize the private rights, if any, of Maoris to fish in the sea or tidal waters'. The Court it will be noticed did not deal with fishing in inland rivers, but the statement that there must be some legislative provision made before the Court can recognize private rights, if any, of Maori applies equally, in my opinion, to the taking or killing of game or native game. The position is stronger against Maoris with regard to Native game than it is with regard to fish because 'fisheries' are referred to in Article 2 of the Treaty of Waitangi, while there is no reference to Native game or other food supplies in the Treaty.

With reference to the letter of the 23rd August last from the Secretary to the Auckland Acclimatisation Society I do not think that any Society should be given a copy of a Law Officer's opinion either for themselves or for their Rangers to produce in Court. The opinion is given to the Department and the Society should only be informed of the general effect thereof. Such an opinion is not binding on the Court and in the present confused state of the Animals Protection law it is not advisable to say more than is absolutely necessary.¹

1. E Redward, 'Native Pigeons and the Treaty of Waitangi', 27 September 1917 (James Feldman, comp, supporting papers to *Treaty Rights and Pigeon Poaching*, various dates (Wai 262 R01, doc B8(a)), pp 43–45)

or half-castes and anything contained in the Treaty of Waitangi cannot affect this position. Whatever force or effect that the Treaty may have nothing therein can override the direct provisions of a statute.³⁸⁵ Redward relied on *Waipapakura v Hempton* for authority that Maori had no claim to tidal fisheries because 'no legislation had given them that right'.³⁸⁶ Similarly, he argued, the animals protection legislation provided no exception for Maori but rather imposed restrictions on access to kereru by both Maori and Pakeha. Presumably, therefore, Redward discounted the particular, exceptional arrangements for Te Urewera and other 'native districts'. Redward did consider that the position was 'stronger against Maoris with regard to native game than it is with regard to fish because "fisheries" are referred to in Article 2 of the Treaty of Waitangi while there is no reference to Native game or other food supplies in the Treaty'. But Redward concluded with the reservation

385. Ernest Redward, 'Native Pigeons and the Treaty of Waitangi', 27 September 1917 (Feldman, 'Treaty Rights and Pigeon Poaching', p 38)

386. *Waipapakura v Hempton* (1914) 33 NZLR 1065 (sc)

that his opinion could not be binding and should not be distributed to the acclimatisation societies for use in court; ‘in the present confused state of the Animals Protection law it is not advisable to say more than is absolutely necessary’.³⁸⁷

In any case, there were no prosecutions in Te Urewera. By 1921, there had not been an open season since 1911, and kereru, kaka, and pukeko had just been made absolutely protected species. Nonetheless, tangata whenua requested pua manu reserves in 1923, during the sittings of the Urewera consolidation commissioners (see chapter 14). These reserves were forested areas which the people asked to be set aside for the hunting of pigeons and other birds. According to one Ruatahuna elder, Ngata had promised pigeon reserves in the Kohuru–Tukuroa block (in 1921). Another request was also clearly for forested land to be preserved in their ownership specifically for pigeon hunting.³⁸⁸ The consolidation commissioners referred three requests for pua manu (which they called ‘forest reserves’) to the Government for decision. As we discussed in chapter 14, the response was:

These areas are now Crown lands and the Natives have been paid for them. As Crown lands they are unsuitable for settlement and will become Forest or Climatic Reservations. . . . A right could be given these Natives to hunt and shoot in areas 1, 2, 3 [the requested pua manu reserves]. No title to be given them but permission to hunt only.³⁸⁹

No hunting rights were in fact accorded, and the shooting of kereru was by then illegal without the possibility of exemptions. What this shows, however, is that Ruatahuna leaders clearly still hunted for kereru in 1923 as a matter of course, and considered themselves fully entitled to do so. Maori law still governed the taking and conservation of native birds in the former UDNR at that time, and the Crown had taken no steps to enforce its contrary view of the law. The peoples of Te Urewera emerged from the UCS with the understanding that they had reserved some of their lands specifically for pigeon shooting. In 1927, Waikaremoana leader Matamua Whakamoe wrote to the Government, requesting the right to take kereru as they had retained certain lands in the UCS for that very purpose, ‘to supply us the game which our ancestors partook’.³⁹⁰ They had done this, seemingly unaware that the law had changed in 1922, that kereru was now absolutely protected, and that the Minister of Internal Affairs no longer had discretion to declare open seasons in Te Urewera. Matamua Whakamoe wrote to the Minister in 1927:

387. Ernest Redward, ‘Native Pigeons and the Treaty of Waitangi’, 27 September 1917 (James Feldman, comp, supporting papers to ‘Treaty Rights and Pigeon Poaching’ (Wellington: Waitangi Tribunal, 2001) (Wai 262 RO1, doc B8(a)), pp 43–45)

388. Tuawhenua Research Team, ‘Ruatahuna, Part 2’ (doc D2), p 181

389. Handwritten annotations, evidently by JB Thompson, Under-Secretary for Lands, on Knight and Carr to Guthrie and Coates, 6 August 1923 (Crown Law Office, comp, supporting papers on Urewera consolidation and roading, 2 vols, various dates (doc M31(a)), vol 2, p 1457)

390. M Whakamoe and others to R Bollard, [circa April–May 1927] (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 194)

This is an application to you . . . to open the season for shooting wild pigeons at Waikaremoana for the following reasons:

The season for shooting wild pigeons at Waikaremoana District has been closed for the last ten years.

Parts of this district have been sold to the Crown and parts we retained to supply us with the game which our ancestors partook.

Season for shooting birds and wild game acclimatised by the Crown is opened every year.

For that reason we ask that an open season for wild pigeons at Waikaremoana be granted as from the 1st June, 1927 to 31st July 1927.³⁹¹

The Minister of Internal Affairs ‘summarily declined the request.’³⁹² He informed Whakamoe and the Waikaremoana people that open seasons for kereru could no longer be declared under the 1921–22 Act. He also urged them to help the Government protect this ‘rare and beautiful bird’ for future generations: ‘surely the Maoris do not desire that the Kereru should disappear from New Zealand.’³⁹³ Thus, each side was aware of the position of the other going into the 1930s, when the Government tried to enforce its law in Te Urewera for the first time.

In the 1920s, customary harvests continued without any – or any effective – interference from rangers.³⁹⁴ Dr Coombes commented that the Crown ‘did not implement its policy or [land] ownership status for some time, but then it abruptly expected Tuhoe and other iwi to obey its law on biological resources.’³⁹⁵ The new approach began in 1931 on the western borders of Te Urewera, where two local Maori from Te Whaiti were prosecuted for poaching. The two young men were fined £15 each. This caused surprise and consternation across the former territories of the UDNR, and resulted in two petitions to the Crown.³⁹⁶

In June 1932, Pera Te Horowai and 67 others from Te Whaiti and for the hapu ‘e hono nei i roto i te rohe potae o Tuhoe’ petitioned Parliament.³⁹⁷ The official translation stated:

We the undersigned petitioners representatives of the Tuhoe Tribe respectfully pray,

- (1) That your Honourable House would duly consider an unfortunate matter which has been brought against the young members of our tribe namely their shooting of pigeon on our own native areas.

391. M Whakamoe and others to R Bollard, [circa April–May 1927], ACGO 8333 IA1/1585 25/12, pt 1, Archives New Zealand, Wellington

392. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 194

393. R Bollard, Minister of Internal Affairs, to Matamua Whakamoe, 18 May 1927, ACGO 8333 IA1/1585 25/12, pt 1, Archives New Zealand, Wellington

394. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), pp 205–206

395. Ibid, p 223

396. Ibid, pp 223–226

397. Ibid, p 224

- (2) That the Government has never provided work for your petitioners – all the available work going to the Europeans alone.
- (3) That the pigeon has always been one of the staple foods of our ancestors right down to us the present generation. Your petitioners would commit to your favourable consideration the question of lifting the ban off shooting pigeons in the Tuhoe District especially in view of the scarcity of work to provide food for your petitioners and their dependents.
- (4) That the magistrate imposed on the younger members of our tribe who were defendants the sum of £15 each. It would have been more humane if he imposed imprisonment as there is no money available for paying fines.
- (5) The law should be amended so as to correspond with the laws existing with respect to trout in our streams. The owners should be the only ones allowed to shoot pigeon without a license. With regard to others a license is necessary.
- (6) Your petitioners are of the opinion that the shooting of pigeons should be left open to them but the outside people Maoris and Pakehas should be fined if they break this law.
- (7) That the law as it now stands contravenes the section 4 [2] of the Treaty of Waitangi granting to the Natives right to the oysters, fish, eels, and birds obtainable on their lands.
- (8) If the prayer of your petitioners is not answered then trouble will always arise. It is the first time that this law has been enforced in our territory for 500 years. Your petitioners are aware of the season for the pigeons and would vouch that they will never disappear altogether.³⁹⁸

On 7 July 1932, a second petition was sent to the Native Minister, Apirana Ngata, from Dan Manihera and 56 others, including 25 from Ruatahuna and 20 from Murupara.³⁹⁹ The official translation stated:

Your humble petitioners respectfully pray

- (1) That the law relating to the preservation of pigeons be suspended and your petitioners allowed the privilege of securing same.
- (2) That such suspension operate only on the areas owned by your petitioners for a definite period – one season in every two years.
- (3) That the methods used for killing pigeons should be those employed by our ancestors that is by snaring. The use of the gun to be prohibited because of the waste of birds involved by this method.
- (4) That the Matatua Maori Council be vested with such powers as may be deemed necessary to carry out what is involved in this petition.⁴⁰⁰

398. Pera Te Horowai and others, petition, 30 June 1932 [translation] (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 224–225)

399. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 225

400. Dan Manihera and others to Sir Apirana Ngata, 1 July 1932 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 225)

Thus, the petitioners sought the Crown's agreement to amend the animals protection laws, to give effect to their claimed Treaty right to hunt pigeons for food on their own lands. The petitioners also sought Government sanction for traditional methods of hunting and management, which, they said, would conserve the kereru. One petition also offered to institute a closed season every second year. Also, now that the UDNR Act had been repealed, the petitioners hoped to govern these matters through the Matatua Maori Council.

Ngata's view was that the absolute prohibition in the 1921–22 Act was unnecessary. He saw Te Urewera as a district where Maori should be able to take native game 'for food in some years under strict regulations'.⁴⁰¹ If accepted, this would have meant a return to the pre-1922 exemptions regime. As Native Minister, Ngata recommended this to the Minister of Internal Affairs, who was responsible for administering the animals protection laws and would need to support any legislative change.

Internal Affairs officials advised their Minister not to agree with Ngata's position or allow any hunting of kereru. In respect of the Treaty, the Crown Law Office had 'previously advised that the provisions of the Animals Protection and Game Act are general in their terms and apply to all persons, there being no exception with respect to Maoris or half-castes and anything contained in the Treaty of Waitangi cannot affect this position'.⁴⁰² This had been Internal Affairs' position since 1908, when the department held that 'the Treaty of Waitangi has been modified by Acts passed by Parliament in which there are representatives of the Maoris', and that 'the Animals Protection Act 1907 makes no distinction between Europeans and Maoris'.⁴⁰³ The irony of this position, of course, was that the Animals Protection Act in 1907 did explicitly provide for different and appropriate treatment of Maori, whose circumstances in Te Urewera and other 'native districts' differed from those of others, whether Maori or Pakeha.

In any case, the Minister of Internal Affairs, Adam Hamilton, accepted his officials' advice that the Treaty could not prevail over legislation and was of no effect in this case. He also accepted their advice that Ngata's recommendation about the petitions should be rejected. Hamilton responded formally to the Native Minister on 5 August 1932. He admitted that the question of 'allowing the taking of native pigeons by the natives of the Urewera and Taupo districts is an old one'. Hamilton noted that open seasons had been possible in legislation between 1907 and 1922 but had seldom been allowed during those years because 'full protection' was seen as the only way to save the kereru. The public interest in preserving native pigeons

401. Ngata to Minister of Internal Affairs, 27 July 1932, marginalised memorandum (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 226)

402. Under-Secretary for Internal Affairs to Minister of Internal Affairs, 2 August 1932 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 226). This appears to be a reference to the 1917 legal opinion discussed above, even though the Under-Secretary cited the new 1921 legislation, and not the legislation in respect of which the opinion was given.

403. H Pollen, Internal Affairs Department, marginal note, 11 May 1908 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 174)

was high, and the necessity for it was ‘generally accepted’ – except by poachers. Since 1913 and ‘on numerous occasions later’, approaches from Te Urewera leaders had always been met with the response that ‘the birds must be protected’ and ‘surely the natives do not wish the pigeon to disappear’. It would certainly be possible to now amend the Act to licence kereru hunters or allow shooting on private Maori land, with some closed seasons, or even to remove protections altogether. Such amendments, however, would arouse a ‘storm’ of public protest, and undo all the work and expense of past protection.⁴⁰⁴

In respect of the Treaty, Hamilton told Ngata:

As far as the reference to the Treaty of Waitangi is concerned, the Crown Law Office has advised my Department that the provisions of the Animals Protection and Game Act are general in their terms and apply to all persons, there being no exception with respect to Maoris or half-castes and anything contained in the Treaty of Waitangi cannot affect this position.⁴⁰⁵

Finally, the Minister offered to have the question settled by Cabinet if Ngata still disagreed. The Native Minister persisted and so the matter was discussed in Cabinet, which rejected Ngata’s position and resolved that there would be no law or policy changes.⁴⁰⁶

Ngata’s sympathy with the petitioners’ cause, however, may have become known in Te Urewera. There was a further prosecution in 1934, at which the defendant claimed ‘the Native Minister had given authority to Natives in the Te Whaiti district to shoot pigeons over a certain area.’⁴⁰⁷ The case was adjourned so that the magistrate could inquire as to whether Ngata had made any ‘commitments to local Maori’. Ngata responded, ‘They were given to understand and every one of them understood that until the prohibition was removed by Parliament it was against the law to shoot or kill pigeons.’ Even so, counsel for the defendant argued in court that the hunting of kereru had been going on in Te Urewera for years ‘and this was the first time any steps had been taken to stop it’. This was substantially correct, apart from the prosecutions in 1931. The magistrate accepted that local Maori might have misunderstood the position, and only fined the defendant £2.⁴⁰⁸

The early and mid-1930s were a time of want, ‘periodic food shortages’, and sometimes ‘semi-starvation’ in Te Urewera.⁴⁰⁹ The people remained vulnerable to any disruption of their potato crops. In January 1935, an official from the Rotorua Employment Bureau noted that the new policy of prosecutions had had an

404. A Hamilton, Minister of Internal Affairs, to Sir Apirana Ngata, 5 August 1932 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 227)

405. Ibid

406. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 228

407. ‘Native Pigeons Shot – Prosecution of Maori – Minister Refutes Statement’, *New Zealand Herald*, 17 August 1934 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 228)

408. Ibid, pp 228–229

409. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), pp 551–556, 1045–1060

impact. The people at Ruatahuna were trying to survive on wild pork and venison. 'I understand', he wrote, 'that up to quite recently, wild pigeons were their staple article of diet, but owing to a recent prosecution, they no longer hunt the pigeons, which are absolutely protected birds.'⁴¹⁰ At Maungapohatu, the community was struggling to survive on store-bought flour and sugar, with very few native birds taken (and other customary foods in short supply).⁴¹¹ Regular inspections at Waikaremoana in 1935 found no trace of pigeon hunting.⁴¹² Galvin and Dun, who inspected the former UDNR lands later in the year, reported that native birds (including kereru) were numerous. They urged active protection for 'these little feathered inhabitants of early New Zealand' and 'vigorous penalties for their wanton destruction'. But these officials also reported that 'the Natives have been forced by necessity to shoot pigeons regularly'. Pakeha visitors to the district, however, should be prosecuted – especially commercial hunters. Galvin and Dun also suggested that, if Maori were to be restricted from using the bush on their own lands, then they deserved 'something in return'⁴¹³ – a point that Dr Coombes suggested also applied to the prohibition of hunting in their bush for an important food.⁴¹⁴

The under-secretary for Internal Affairs, Joseph Heenan, was concerned at the implication that the Government should turn a blind eye to Maori hunting in Te Urewera and only prosecute Pakeha poachers. In response to Galvin and Dun's report, he told the head of the Lands and Survey Department:

I note with some concern the statement that it is recognised that the natives have been shooting pigeons regularly. . . . My own view is that no indication should at any time be given to the natives that the Government is prepared to countenance their shooting of pigeons. It would be far better, if the present practice is necessitated by actual hardship, for the Government to make other provision for food supplied for the natives of the Urewera.⁴¹⁵

These statements echoed themes explored during the negotiation of the UDNR agreement, when the Crown promised suitable protection for forest and birds but recognised the right of the peoples of Te Urewera to hunt birds for food, and promised to augment their food supplies. By the 1930s, hunting certain species for food had long been criminalised. The idea of specific redress to augment their

410. Certifying officer to commissioner of unemployment, 29 January 1935 (Tuawhenua Research Team, 'Ruatahuna, Part 2' (doc D2), p 275)

411. Judith Binney, 'Maungapohatu Revisited: Or, How the Government Underdeveloped a Maori Community', *Journal of the Polynesian Society*, 92(3), September 1983 (doc A128), p 375

412. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 235

413. Galvin and Dun, 'Report by Officers of the Lands & Survey Department and the State Forest Service, on the Urewera Forest', 29 April 1935 (John Hutton and Klaus Neumann, comps, supporting papers to 'Ngati Whare and the Crown, 1880-1999', 2 vols, various dates (doc A28(a)), vol 1, pp 14-15, 22-23)

414. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 232

415. Under-Secretary for Internal Affairs to Under-Secretary for Lands, 28 April 1936 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 232)

food supplies was proposed by the under-secretary for Internal Affairs in 1936 but without much enthusiasm or any follow-through. Particular crises could result in food distributions, as at Waikaremoana in 1934,⁴¹⁶ but there was no systematic attempt to compensate for depriving the peoples of Te Urewera of a treasured food. This was particularly disappointing, given the situation of necessity reported by Galvin and Dun in 1935.

Evidence from the 1930s suggests that the hunting of kereru and other protected birds continued despite prosecutions in 1931 and 1934, because of ‘necessity’. Towards the end of the decade, however, it appears that hunting had declined drastically, although kereru continued to be a culturally important food; that is, it was still vital for the peoples of Te Urewera to be able to provide kereru at major hui and tangi. This dramatic change had been brought about in less than a decade by the Crown’s decision to enforce the law and the very real threat of further prosecutions, resulting in fines that Maori communities simply had no way of paying.

In 1938, in response to officials’ recognition that cultural harvesting was still going on for important ceremonial events, the Minister of Internal Affairs held an interdepartmental conference at Rotorua to discuss the issue. The Forest and Bird Protection Society and acclimatisation societies participated alongside representatives from Maori Affairs, Internal Affairs, Lands and Survey, and the Forest Service, but no iwi representatives took part.⁴¹⁷ It was acknowledged that the Maori people of Te Urewera continued to believe that ‘under the Treaty (evidently of Waitangi) they were allowed to shoot pigeons’. The ‘older Maoris’ lived by the ‘principle of hospitality’, which required tribal members to provide ‘a quantity of pigeon preserved in oil’ for feasts and hui. Magistrates would inflict ‘a fairly good fine’ if any such cases ended up in court. But Pakeha were also shooting pigeons without ‘the excuse the Maoris had’. Two different options were considered. The first was to hand over management of kereru to Maori, who would be permitted to shoot for food as needed, while Pakeha would remain prohibited from hunting; ‘in all probability they themselves would take steps to see that even for food and for ceremonial feasts the bird was killed only in such numbers as would not deplete too seriously the stock’. The second option, by contrast, was to establish a national park in Te Urewera and ensure the absolute protection of the birds.⁴¹⁸ The Minister’s decision was that neither option would be adopted. Kereru would remain protected and the rangers should ‘use their commonsense’ in the special circumstances affecting Maori, rather than – as Coombes put it – ‘to stridently enforce the law’.⁴¹⁹ There was official recognition, in other words, of the cultural importance of kereru to Maori, and of the fact that Maori would themselves restrict their taking of the birds; but there was still no political will to accommodate Maori within the law by allowing them to manage their own cultural harvest.

416. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), pp 553–554

417. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), pp 229–230

418. Minutes of Rotorua Conference, 8 June 1938 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), pp 230–231)

419. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 231

Shortly after this conference, there was something of a scandal when ‘a vast concourse of natives from all over the North Island’ gathered in Wairoa for the opening of the Sir James Carroll Memorial House. The manuhiri were served ‘many scores of pigeons’ brought out from Te Urewera.⁴²⁰ Internal Affairs’ response was swift, and took little note of the cultural imperatives that had been acknowledged at the Rotorua conference earlier in the month. Under-secretary Heenan recommended that the time had come to increase the number of rangers and crack down on customary harvesting:

There is no doubt that the Urewera is providing the main source of supply of pigeon for Maori hui, and in view of the decision to declare a large tract of this country as a national reserve, it is evident that the position as regards the taking of native pigeons and other protected birds will have to be definitely faced.⁴²¹

By this point, there was also a plan to cull deer so the two imperatives were combined: the number of rangers and their inspections of Te Urewera were increased, and deer hunters were used as rangers to combat Maori harvesting of native birds. A ranger was stationed at Ruatahuna. Although the ‘raids’ and other ranger activities must have had some effect as a deterrent, cultural harvesting continued for important ceremonial occasions; kereru were served at the opening of the district nurse’s house at Murupara. Nonetheless, increased monitoring in the early 1940s suggested that pigeon hunting was no longer common for the Maori communities of Te Urewera.⁴²²

At the same time, poaching by outsiders was on the rise near Minginui and the hydro works at Waikaremoana, as an influx of workers began shooting kereru in Te Urewera.⁴²³ Also, increasing evidence was found that introduced predators were killing the birds.⁴²⁴ In this context, Maori leaders, including Te Urewera leaders, made one final attempt to secure a change in Government policy. After the outbreak of the Second World War, they sought agreement to harvesting kereru for dispatch to the Maori Battalion overseas. The Prime Minister promised to consider the request, which, according to Internal Affairs, had produced a public ‘clamour’ of opposition.⁴²⁵ The department advised:

any question of removal of the present absolute protection on native pigeon should not only not be considered, but the Government should make public its firm determination to protect this beautiful native bird. At various times in the past, the latest

420. ‘Great Maori Hui at Wairoa’, *Dominion*, 18 June 1938 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 229)

421. Under-Secretary to Minister of Internal Affairs, 22 June 1938 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 232)

422. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), pp 234, 236–240

423. *Ibid*, p 240

424. *Ibid*, p 241

425. *Ibid*, p 243

being away back in 1932 [the Te Urewera petitions discussed above], Maoris have raised the question of removal of protection, but the Government has always been adamant.⁴²⁶

Officials also considered this request had been made ‘with their tongues in the cheeks’, because the Maori peoples of Te Urewera, Rotorua, and the East Coast were taking kereru anyway and serving it on important occasions, such as the opening of the centennial meeting houses at which the request to the Prime Minister was made.⁴²⁷ The question of whether the Crown should change the law so that Maori could once again take kereru lawfully, perhaps limited to important cultural events, was not really considered. Officials believed that Maori communities in the 1940s had departed from ‘the old days’ when ‘the Maori . . . was probably the world’s best conservationist of his food supply’. Any official relaxation of restrictions so that kereru could be sent to the Maori Battalion would only be seen as Government complacency in ‘their slaughtering of the pigeon’. Also, Internal Affairs officials thought that relaxing restrictions so that Maori could hunt kereru would result in increased hunting of other protected species, such as tui. For all these reasons, the department advised against granting the request.⁴²⁸ The Minister agreed with this advice, and even announced that there would be increased rangers to prevent poaching. If the Maori Battalion needed greater food supplies, ‘the remedy obviously would be in other directions.’⁴²⁹ There was, however, no corresponding gesture towards increasing the food supplies of the home communities, which had briefly been contemplated in the 1930s but not carried out.

This formal approach to the Crown in the 1940s was the final occasion on which the peoples of Te Urewera attempted to get Government agreement to a lawful taking of kereru before the establishment of the national park. By this time, as the Tuawhenua researchers explained, Maori had to rely on other foods to replace native birds as staples. Wild cattle, deer, pigs, pheasants, and quail began to supplement the Tuhoe diet in the early decades of the twentieth century; thus the focus of traditional hunting shifted from native birds to exotic birds and animals.⁴³⁰ By the 1940s, eels, wild pork, venison, and berries supplemented food from gardening, but native birds were still eaten at times. Harvesting of these birds was still conducted under strict traditional controls.⁴³¹ Rahui continued to protect the birds out of season.⁴³² Jack Tapui Ohlson, who grew up at Te Whaiti in the 1930s and 1940s, explained that native birds, including the kereru, were still prized

426. Under-Secretary to Minister of Internal Affairs, 18 June 1943 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 243)

427. Ibid, pp 243–244

428. Ibid, pp 244–245

429. W Parry, Minister of Internal Affairs, ‘Native Pigeons: Protection Not to be Removed or Modified’, press release, no date (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 245)

430. Tuawhenua Research Team, ‘Ruatahuna, Part 2’ (doc D2), pp 233, 388–390

431. Ibid, pp 388–390

432. Klaus Neumann, summary of evidence from ‘Ngati Whare and the Crown, 1880–1999’ and response to relevant issues, August 2004 (doc G2), p 19

and hunted at that time. Guns had replaced traditional methods of trapping, but increasingly the birds were only taken for the old people or important ceremonial occasions.⁴³³ Harata Williams recalled that her grandfather still hunted kereru at Ruatoki in the 1940s.⁴³⁴ But cultural harvesting of kereru was becoming uncommon. At the same time, the influx of large working populations meant that more outsiders (Pakeha and Maori) had begun hunting in the 1940s without regard to traditional seasons or conservation of the resource.⁴³⁵ This must have caused concern to local Maori leaders in Te Urewera, as these outsiders were not controlled by customary law.

By the 1950s, when the national park was established, Government restrictions meant that kereru were already no longer a ‘source of food’ for Maori communities in Te Urewera. This, at least, was the observation of the Maori welfare officer who visited Ruatahuna regularly in that decade, and who gave evidence in our inquiry.⁴³⁶ Maria Waiwai, who grew up at Waikaremoana before the power station was built in the 1940s, recalled that all regular use of the kereru and kaka had ceased ‘about 50 years ago’; that is, by the 1950s.⁴³⁷ Other claimant evidence suggests that any customary harvesting which continued after that was still strictly governed by Maori law, and was mostly for exceptional, ceremonial occasions, or to give a taste to ‘the old people.’⁴³⁸ One of the 1932 petitions observed that ‘the pigeon has always been one of the staple foods of our ancestors right down to us the present generation,’ and criticised the law for contravening the Treaty of Waitangi.⁴³⁹ That situation had been reversed in less than a decade, once the Crown began active enforcement of its law in Te Urewera.

21.7.3.5 What alternatives were available to the Crown?

Was it inevitable that the protection of native birds would take the form of restricting and then prohibiting customary harvesting? Were there other alternatives available to the Crown, equally or even more likely to be effective, and less harmful to the peoples of Te Urewera? And was it within the bounds of possibility that the peoples of Te Urewera could have received some kind of redress or compensation for the Government depriving them of an important food?

21.7.3.5.1 ALTERNATIVE WAYS OF PROTECTING NATIVE BIRDS

In 1917, the Minister of Internal Affairs suggested that the Crown’s policy for the protection of native birds was essentially futile. In refusing to declare an open season under the 1910 Act, he told an acclimatisation society:

433. Ohlson, brief of evidence (doc G36), paras 12–20
 434. Harata Williams, brief of evidence, 10 January 2005 (doc J31), p 4
 435. Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 787
 436. Anne Anituatua Delamere, brief of evidence, 21 June 2004 (doc E15), p 3
 437. Waiwai, brief of evidence (doc H18), p 16
 438. Ohlson, brief of evidence (doc G36), paras 12–23
 439. Pera Te Horowai and others, petition (translation), 30 June 1932 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 224)

Doubtless you are aware that the native pigeon is a bird endemic to New Zealand and it is well known that with the gradual destruction of the bush the native pigeon will eventually become extinct, and in view of this it must, I think, be admitted that it is most undesirable to in any way help to facilitate the extinction of this magnificent bird.⁴⁴⁰

At that time, Internal Affairs had recently advised the peoples of Te Urewera that no more open seasons would be declared in their district, despite provision for this in the law. And yet, in that very decade, the Crown was planning to destroy some 370,000 acres of indigenous forest in Te Urewera for pastoral farming, which would have repeated the consequences elsewhere of removing native birds' habitat. There was thus a vast gulf between two aspects of Crown policy: efforts to preserve native birds, which took the form of restricting hunting; and deliberate destruction of the birds' habitat with its inevitable results. Although the Minister of Internal Affairs was somewhat fatalistic about the outcome, others were far from accepting it.

Dr Coombes summarised the debate as follows:

the Maori members of Parliament steadfastly resisted the abrogations of cultural harvesting rights. They argued that the most significant threats to native avifauna were commercial hunters, those who killed for sport rather than subsistence, introduced predators and habitat destruction. Notably, most of the Pakeha politicians appeared to agree with them. Ironically, amendments to Animals Protection legislation in that first decade [of the twentieth century] singularly failed to regulate the real threats to native avifauna, while criminalising the one mechanism that most members of parliament agreed was a bulwark to further decline – that being, the forest conservation incentives which were inherent to cultural harvests. Even such notoriously conservative politicians as Captain Russell accepted that 'Europeans kill more [native birds] on the first day of the season than the Maoris in the whole of the season.' Such truisms were not incorporated into the logic of Crown policy, which punished Maori harvesters but retained the unfettered dominion of those who destroyed bird habitat.⁴⁴¹

The 'unfettered dominion of those who destroyed bird habitat' seemed politically unbeatable in the first half of the twentieth century, despite the rise of conservationist sentiments in the electorate. It was only the logic that pastoral farming in the Bay of Plenty would be significantly harmed if forests were cleared in Te Urewera that saved it from mass deforestation in the 1930s. Within that political context, however, there were still alternatives to the milling of all the berry trees, miro and hinau, which were essential for kereru, or the prohibition of all cultural harvesting.

440. GW Russell, Minister of Internal Affairs, to AF Lowe, 30 May 1917 (Feldman, 'Treaty Rights and Pigeon Poaching', pp 34–35)

441. Coombes, summary of evidence (doc H3), p 8

The following alternatives were proposed at the time:

- ▶ *Forest reserves*: The Maori members of Parliament frequently pointed to deforestation as the fundamental cause of kereru decline, a point which the Pakeha members sometimes acknowledged. But habitat destruction for the purposes of pastoral farming was the cornerstone of colonialism in the nineteenth century, and it remained the predominant policy in the early decades of the twentieth century.

There was a fundamental disjunction between Maori pleas that habitat destruction be stopped, and the Crown's determination to see every farm-able acre of New Zealand in pasture. By mid-century, also, it was held that if marginal forest land was not even remotely capable of being farmed, it should be milled and converted to exotic forests. What was feasible in those circumstances, however, was the strategic reservation of sufficient berry trees or stands of indigenous forest to enable the survival of native birds. Hence, the Maori members pushed for pua manu, or forest reserves for birds, to be set aside during the process of converting forest to farmland.⁴⁴² This objective was of great importance to the peoples of Te Urewera. As we have seen, the preservation of their forests and forest culture was a primary reason for negotiating the UDNR agreement in 1895. They also sought to establish pua manu during the UCS in the 1920s, and, as the petition of Waikaremoana peoples showed in 1927, believed that the law should accommodate them in the use of their retained lands for that essential purpose.

From the 1890s onwards, acclimatisation societies also called for the preservation of key native bush habitats, as well as the active creation of new habitat by planting trees that would provide food for kereru.⁴⁴³

- ▶ *Miro and hinau reserves within State forests*: A closely related possibility was the reservation of sufficient miro and hinau trees within State forests for native bird habitat. By the 1950s, Internal Affairs had begun pressing for this to be done. But, according to the evidence of John Hutton and Klaus Neumann, the Forest Service refused to exempt hinau and miro from logging. The Rotorua conservator's view was that 'growing stock strips were left' and thus 'sufficient provision is already being made in State Forest Management areas', including the Whirinaki State Forest. But, it was admitted, more could be done to exempt clumps of miro and hinau (in among non-millable species) from logging.⁴⁴⁴ From the 1950s, the new Wildlife Branch tried but made little headway against the Forest Service. Although the berry-bearing trees had little economic value as timber, the service maintained that it was doing enough and that preserving more miro and hinau was neither efficient

442. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p180

443. New Zealand Conservation Authority, *Maori Customary Use of Native Birds, Plants, and Other Traditional Materials: Interim Report and Discussion Paper* (Wellington: New Zealand Conservation Authority, 1997), p106

444. Hutton and Neumann, 'The Crown and Ngati Whare' (doc A28), pp790-794

An Exchange during the Debate on the Animals Protection Bill 1907

Mr T Mackenzie: I appeal to the members of the Native race to give us all the support they can. . . . What is desired to enlist is the sympathy of the natives of this country . . .

Mr Heke:—What about the freeholders who want to get the land in order to knock the bush down?

Mr T Mackenzie: . . . I say that notwithstanding the Treaty of Waitangi, we have reached that stage in this country that if the Natives will not assist in protecting that which is so beautiful [native birds], then the laws of the country will have to do so.

Mr Heke:—The Natives are the only ones who do do it.

Mr T Mackenzie:—The Natives in some parts protect the birds, but in other parts they destroy them . . .

Mr Heke:—What is the area of bush country that has been knocked down by the settlers?

Mr T Mackenzie:—We will not discuss the area that has been knocked down.¹

1. T Mackenzie, H Heke, 12 November 1907, NZPD, vol 142, p 790 (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 72). T Mackenzie was the Liberal member for Waikouaiti, and Hone Heke was the member for Northern Maori.

nor practical forestry. While the Wildlife Branch disagreed, it had little power within Government vis-à-vis the Forest Service.⁴⁴⁵

- ▶ *Active eradication of predators and pests:* Even if more strategic forest reserves had been created, if State forests had preserved more miro and hinau, and if all human hunting and consumption had been prevented, introduced predators and pests would still have damaged forests and destroyed adult birds, chicks, and eggs. As the twentieth century progressed and habitat destruction was eventually curtailed, the impact of browsing animals and predators continued. The question of how this came about, and whether the Crown did enough to combat a situation it had in part created, will be addressed in the next section. Here, we simply note that predator eradication was called for in the early twentieth century at the same time that cultural harvests were being criminalised.

445. Feldman, 'Treaty Rights and Pigeon Poaching', pp 55–57; Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 265–269

- ▶ *Continuing the district-specific exemptions policy for Maori, depending on local circumstances, including the viability of bird populations and sustainability of harvesting:* For a quarter of a century, from 1895 to 1922, the law allowed the Government to exempt the peoples of Te Urewera from restrictions against hunting native birds. In the 1930s and 1940s, Maori pushed for what they saw as their Treaty right to be restored (by way of the exemption). Both the Crown and Maori wanted to see the forests and birds of Te Urewera protected for future generations. The question was whether the national policy of no hunting could still allow for exemptions in districts such as Te Urewera. In evaluating this question, we have to look past the Crown's refusal to halt its active destruction of bird habitat to consider whether the surviving forests and bird populations of remote areas such as Te Urewera could permit of sustainable harvesting. As we have seen, the Government refused to grant exemptions after 1911, but we have little evidence that the particular circumstances of Te Urewera and its people received careful consideration. The Native Minister, Ngata, advocated for the exemptions policy to be restored in 1932, in response to petitions from Te Urewera, but Cabinet's decision went against him. The Rotorua conference also considered the possibility in 1938, but again the decision was to retain the absolute ban on hunting in all parts of New Zealand.

According to Dr Coombes, the influence of conservationists accounts for this blanket policy.⁴⁴⁶ On the one hand, the Government would not agree to stop clearing land for farming – indeed, as we saw in chapter 18, the mid-twentieth century was a time when concerted efforts were made to bring more marginal lands into production throughout the country. But, on the other hand, the Government feared the ‘storm’ of public protest that would be aroused by permitting the killing of native birds, especially by the 1940s.⁴⁴⁷

It is worth considering the contrary view, as put at the Rotorua conference in 1938, that the Government might in fact recognise and provide for cultural difference and might safely hand back the management of kereru to Maori for sustainable harvesting, while prohibiting Pakeha from shooting them:

MR DICKINSON made the suggestion that probably if the pigeon and its preservation was more or less handed over to the Maori it might result in the Maori taking steps to see that it was preserved. For instance, the pigeon might be allowed as food for the Maori but absolutely prohibited to the pakeha by whom it would be a punishable offence if a pigeon were shot. If the Maoris were fully informed of the desirability of protecting and preserving their native pigeon, in all probability they themselves would take steps to see that even for food and for ceremonial feasts the bird was killed only in such numbers as would not deplete too seriously the stock.⁴⁴⁸

446. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), pp 208–211, 234, 236–239

447. *Ibid*, pp 234, 243–245

448. Minutes of Rotorua Conference, 8 June 1938 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 230)

Ultimately, the Crown rejected all proposals that sustainable harvests were feasible in Te Urewera, even if limited to special events of great cultural significance (such as the request to be able to send preserved birds overseas for the Maori Battalion). The Maori communities of the time, as Jack Tapui Ohlson and others explained, believed that kereru and other birds could safely be harvested, subject to strict customary constraints. Against this view, which was supported by Ngata, Internal Affairs had no scientific studies of the bird populations of Te Urewera to offer. Rather, public opinion, along with a sincere belief on the part of Internal Affairs officials that no birds should be killed, was the decisive factor in the Crown's rejection of this option.

Thus, the focus of Crown management and control to 1954 was on directly preventing the killing of kereru. Dr Coombes argued strongly that much of the enforcement effort was focused on Maori.⁴⁴⁹ Subsequently, DS Main, the field officer based at Murupara responsible for wildlife in Te Urewera in the late 1950s and early 1960s, expressed concern about what he saw as a definitely declining population of kereru and tui. While he was aware of predator damage and some illegal shooting, he regarded the milling of miro and hinau as 'one of the biggest factors.'⁴⁵⁰ He considered 'the Maori to be an enemy of the pigeon, but not to the same degree as the Pakeha and his virtual destruction of the forest.'⁴⁵¹

In the 1950s, Internal Affairs produced a pamphlet to advertise the plight of the kereru and the punishments for poaching. The pamphlet proclaimed:

If he were dull to look at and tasted like boot leather, if he were hard to shoot, wary of people, and fathered ten youngsters a brood, absolute protection would hardly be necessary. But handsome, conspicuous, delicious to eat, easy to shoot, and tame as a chicken, rearing only a single chick each brood, and a great sower of tree seeds, he must be protected from those who can see no further than their stomachs.⁴⁵²

But this was simply untrue. Internal Affairs documentation from the time shows that officials were aware of Maori conservation methods and sustainable harvesting, and that habitat destruction and introduced predators were primary causes of the decline of kereru. The question facing the Government was whether it would or could do anything about these other factors.

Dr Klaus Neumann described Main as 'simply ahead of his time.'⁴⁵³ Nevertheless, the insights he expressed had been available since the time that the policy of

449. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 189–193

450. DS Main to conservator of wildlife, 9 October 1958 (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 791)

451. DS Main to conservator of wildlife, 19 January 1959 (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 794)

452. Department of Internal Affairs, 'This is Your Pigeon', no date (Feldman, supporting papers to 'Treaty Rights and Pigeon Poaching' (Wai 262 RO1, doc B8(a)), pp 61–62); Hutton and Neumann, 'The Crown and Ngati Whare' (doc A28), pp 790–794; Feldman, 'Treaty Rights and Pigeon Poaching', pp 51–52, 55–57; Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 139–140, 265–269

453. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 792

increasingly stringent controls on customary harvesting of kereru began. We have already seen that Maori and some Pakeha parliamentarians understood the importance of habitat for indigenous birds in the early twentieth century. The Crown was also, as we shall see, largely responsible for the introduction of browsing animals and predators that adversely affected indigenous birds. Yet, despite this, the Crown adopted a narrow approach to preserving kereru and other indigenous birds that ignored these problems.

21.7.3.5.2 COMPENSATING FOR THE LOSS

Importantly, the idea of compensating the peoples of Te Urewera for criminalising one of their treasured foods was almost never considered. This seems remarkable to us, given the poverty and endemic food shortages in Te Urewera at the time, and the context of the Crown's promise in 1895 to respect their rights and augment their food supplies. As we have seen, the issue was raised in 1935, very soon after the Crown began to enforce its restrictions in Te Urewera. Galvin and Dun reported that Maori were still shooting birds out of 'necessity'. The Department of Internal Affairs' response was that, if it was true that there was 'actual hardship', it would be 'far better . . . for the Government to make other provision for food supplied for the natives of the Urewera'.⁴⁵⁴ In our view, the department's suggestion in 1936 that the Government could match its restrictions on taking kereru with the specific provision of an alternative food supply was an obvious means of compensating for the loss. This never happened. Assistance in the form of eating and seed potatoes or of maize, for example, would have been feasible and the 'cheapest method of aiding these people'.⁴⁵⁵ Regular assistance of this kind could have done much to combat what was known to be a situation of widespread malnutrition in Te Urewera.

Nonetheless, some introduced species did augment wild food supplies at the time, as initially promised in 1895. We turn next to consider the Crown's introduction and management of exotic species in Te Urewera.

21.7.4 The Crown's introduction and management of exotic species

21.7.4.1 Introduction

In our inquiry, the Crown and claimants agreed that introduced species, such as deer and possums, have had a very harmful effect on the environment. They also agreed that some kind of management role in respect of these species was or ought to have been possible for the peoples of Te Urewera. The parties disagreed, however, about:

- ▶ the degree of Crown responsibility for the introductions;
- ▶ whether the introductions were partly for the benefit of Maori or solely for the benefit of tourism, sport, and recreational hunting;

454. Under-Secretary for Internal Affairs to Under-Secretary for Lands, 28 April 1936 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 232)

455. A T Carroll, welfare officer, to registrar, Native Land Court, 10 August 1934 (Brian Murton, comp, supporting papers to 'The Peoples of Te Urewera and the Crown, 1860–2000: The Economic and Social Experience of a People', various dates (doc H12(a)(1)), pp 130–131)

- ▶ whether the Crown could or should have been aware of the harmful effects sooner or even at the time of introduction;
- ▶ whether the Crown should have applied the ‘precautionary principle’; and
- ▶ whether the Crown took timely action against introduced pests once their harmful effects were known (or proven).

We begin our analysis with a discussion of the precautionary principle. If this principle had been applied by the Crown, then it would have affected the introductions of all exotic species. We examine the significance principle, and whether it had any relevance before the late twentieth century. After that discussion, we assess the circumstances of each introduction of a new species (which took place at different times, for various reasons, and with variable effects).

21.7.4.2 *The precautionary principle*

In his evidence for the claimants, Dr Coombes introduced the concept of a ‘precautionary principle’ in acclimatisation, although he did not define it.⁴⁵⁶ As a concrete example, he cited the failure of the Forest Service to take action to control possums in Te Urewera State forests, because of scientific uncertainty as to the exact nature of the threat.⁴⁵⁷ The principle was expanded upon by Crown witness Jonathan Coakley of the Ministry for the Environment. He explained that the precautionary principle ‘in a true sense’ was not adopted until the World Summit at Rio de Janeiro in 1992.⁴⁵⁸ In his view, modern incidents such as the use of the poison DDT, which everyone had thought was safe, encouraged the development of a more precautionary approach.⁴⁵⁹

Mr Coakley gave evidence that the Ministry for the Environment defined the principle in 2002 in these terms:

Where there is a threat of serious or irreversible damage, lack of full scientific certainty should not be a reason for postponing cost-effective measures to prevent environmental degradation or potential adverse health effects.

Where decision-makers have limited information or understanding of the possible effects of an activity, and there are significant risks or uncertainties, a precautionary approach should be taken. [Emphasis in original.]⁴⁶⁰

Under cross-examination by counsel for Nga Rauru o Nga Potiki, Dr Coombes stated that this modern principle should not be applied retrospectively: ‘I would hate to . . . ascribe modern environmental values on the past’. Nonetheless, he suggested that a commonsense approach to acclimatisation should have prevailed

456. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 16

457. Ibid, pp 363–365

458. Jonathan Coakley, under cross-examination by counsel for Nga Rauru o Nga Potiki, Taneatua School, Taneatua, 15 April 2005 (transcript 4.16(a), p 545)

459. Ibid, pp 545–547

460. Ministry for the Environment, *The New Zealand Waste Strategy: Towards Zero Waste and a Sustainable New Zealand* (Wellington: Ministry for the Environment, 2002), p 20 (Jonathan Coakley, comp, papers in support of brief of evidence (doc M8(a)), attachment M)

anyway, since the Crown was fully aware that introducing exotic species had gone wrong in other parts of the world. A 'cautious' approach, therefore, would only have been sensible, regardless of the full state of scientific knowledge about any particular species or its likely effects at any one particular time.⁴⁶¹

Crown counsel submitted that the precautionary principle is a 'concept that emerged only recently from the growth of scientific knowledge . . . and should not be imputed as appropriate for Crown actors in the early 20th century'. The Crown cautioned the Tribunal against a presentist approach, and proposed that 'We must examine the knowledge that was either held at the time or was reasonably available to the Crown, and also whether Maori communicated any concerns to the Crown.'⁴⁶² We agree with this approach and have adopted it accordingly.

But the Crown went further in its submission, and argued that it was not appropriate for the Crown to take action until scientific research had been validated and accepted by the scientific community as a whole, and even then that a 'time lag' was allowable before Government policy caught up with scientific knowledge.⁴⁶³ In our view, this submission is more relevant to the period before 1895. For the twentieth century, it takes too little account of the scientific debate *within* Government and the advice that was coming from official sources; in some cases, as we shall see, Government departments disputed each other's scientific findings in order to promote the sometimes conflicting interests they served, whether it be sport and tourism, forestry, or wildlife preservation. The Forest Service, for example, saw the harm that deer caused and wanted them out of its forests, whereas the Tourist and Health Resorts Department (and acclimatisation societies) queried whether deer were really so harmful, in order to protect tourism and recreational hunting. This adds quite a different dimension to the question of when or whether the Crown should have accepted scientific data as proven and as requiring Government action. Claimant counsel submitted that officials capitalised on scientific uncertainty to prioritise the interests of nationally important industries, such as tourism, over the interests of the peoples of Te Urewera.⁴⁶⁴ In other words, it was not a question of scientific knowledge but of which interests would be prioritised. There is some truth to this assertion, as we shall see below.

In sum, the full precautionary principle, as developed in the 1990s, cannot be used retrospectively to assess Crown policy and actions. We agree with the Crown on that point. We also agree that the Tribunal must examine 'the knowledge that was either held at the time or was reasonably available to the Crown.'⁴⁶⁵ In doing so, we focus mostly on the scientific debate and advice coming from within Government, which Ministers and officials had to respond to in some way, and the decisions which they made as a result of that knowledge and advice.

461. Brad Coombes, under cross-examination by counsel for Nga Rauru o Nga Potiki, Rangiahua Marae, Frasertown, 2 December 2004 (transcript 4.12, p 235)

462. Crown counsel, closing submissions (doc N20), topic 29, p 23

463. *Ibid*, pp 23–24

464. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 152–154

465. Crown counsel, closing submissions (doc N20), topic 29, p 23

21.7.4.3 Acclimatisation before the UDNR Act 1896

Before we turn to the successful introduction of various types of fauna that began in 1896 and the years immediately following, we note some of the activities of acclimatisation societies whose districts included part of Te Urewera before that point. Most of these activities were unsuccessful. Back in 1883, the Hawke's Bay Acclimatisation Society had unsuccessfully liberated brown trout at Waikaremoana.⁴⁶⁶ During the 1880s, the Tauranga Acclimatisation Society had released trout ova in several rivers, including the Whakatane and the Waimana, but again this was apparently unsuccessful.⁴⁶⁷ In the same decade, the Tauranga and Hawke's Bay Acclimatisation Societies had both liberated deer, as had private individuals, but it is unlikely that the resultant herds had colonised Te Urewera. In any event, the societies were utterly unable to police Te Urewera in the period leading up to the UDNR Act 1896, when even the Queen's writ did not run in the Tuhoe Rohe Potae.⁴⁶⁸

The desire to introduce deer and trout into the area around Te Urewera in the years before the UDNR Act was essentially driven by factors related to sport and tourism. For instance, in 1886, the liberation of trout ova into the upper Whakatane River was described in the *Bay of Plenty Times* as heralding a day when 'we shall be able to add another inducement to outsiders to visit us, when we can offer them good fishing'.⁴⁶⁹ Again, in 1895, the news that the efforts of the Hawke's Bay Acclimatisation Society to acclimatise deer had been sufficiently successful for the issue of deer stalking licences to be contemplated brought an excited comment in the *Daily Telegraph* that there was 'every indication that at no very distant date Hawke's Bay will become one of the best hunting grounds for the pursuit of deer stalking, the most fashionable of all sport'.⁴⁷⁰

The one acclimatisation that did have a significant long-term impact on Te Urewera before 1896 was not, however, linked to sport or tourism. Weasels and related species were not introduced directly into Te Urewera, but spread there from southern Hawke's Bay.⁴⁷¹ The introduction of these animals was a response to the spread of rabbits, another introduced animal that became a serious threat to the sustainability of livestock numbers in Hawke's Bay and some other areas of New Zealand during the 1870s. Consequently, some private individuals began importing stoats, weasels, and ferrets to try to protect pastoral farming. This was expensive, and there were therefore calls for the Crown to import the animals. During the 1880s, the pressure from farmers to solve the rabbit problem grew stronger, and the Crown eventually succumbed to it. Since these animals initially

466. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 63

467. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 33

468. *Ibid.*, pp 26, 34, 88

469. *Bay of Plenty Times*, 30 September 1886 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 38)

470. *Daily Telegraph*, 15 June 1895 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 88–89)

471. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 26–29

succeeded in some places in reducing rabbit numbers, some acclimatisation societies supported further liberations. In 1886, the Hawke's Bay Acclimatisation Society asked Parliament to import these animals for rabbit control, and the society subsequently distributed Government stock in its area. Within a few short years, weasels had arrived at the boundaries of Te Urewera.⁴⁷²

As early as 1876, however, legislation to prevent the importation of various animals including weasels, stoats, and polecats was introduced. Several members clearly warned Parliament that these animals would gravely threaten birds, including indigenous birds, and that their ability to control rabbits was questionable.⁴⁷³ Nevertheless, pastoral interests prevented the legislation from passing. In 1876, the eminent ornithologist Walter Buller cited a prominent English zoologist who warned of the enormous danger to New Zealand birds posed by the polecat, noting that the ferret was a domestic polecat. Buller argued that such 'predaceous vermin' should not be introduced.⁴⁷⁴ Despite this, and subsequent warnings from the scientific community in the mid-1880s, the Crown brought in thousands of stoats, weasels, and ferrets, and actively supported their distribution. As we have noted, they soon moved from Hawke's Bay into Te Urewera.⁴⁷⁵

Crown counsel submitted:

While some concern was expressed at the time regarding the effect of mustelids on native birds, it is clear that these views were not widely accepted or sufficiently persuasive at the time. Farmers saw them as a solution to the problem of rabbit plagues, at a time when powerful economic forces also drove the decision to introduce them.⁴⁷⁶

The Crown relied on scholar Carolyn King, who commented in 1984:

Nowadays we know rather more about the ecology of animals than the early pioneers did and we may wonder at the naivety of those who saw the introduction of mustelids as the solution to the rabbit problem. But do not forget that in those days it was a simple matter of survival; there was an economic depression on, and those farmers were struggling for their lives.⁴⁷⁷

In our view, it was not a question of knowledge but of prioritising of interests. The likely effect of 'a shipload of known murderers to be let loose on your peaceful

472. Ibid

473. G Grey, 12 October 1876, NZPD, vol 23, pp 273–274; Mantell, Whitmore, Nurse, Robinson, 25 October 1876, NZPD, vol 23, pp 609–614

474. WL Buller, 'On the Proposed Introduction of the Polecat into New Zealand', *Transactions and Proceedings of the New Zealand Institute*, vol 9 (1876), pp 634–635; Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 26–27

475. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 27–29

476. Crown counsel, closing submissions (doc N20), topic 29, p 22

477. Carolyn King, *Immigrant Killers: Introduced Predators and the Conservation of Birds in New Zealand* (Auckland: Oxford University Press, 1984), p 90 (Crown counsel, closing submissions (doc N20), topic 29, p 22)



The stoat (*Mustela erminea*), also known as the short-tailed weasel. From 1886, the Government helped the Hawke's Bay Acclimatisation Society to introduce stoats, weasels, and ferrets to help control rabbit numbers, which were threatening pastoral farming. It was not long before these animals reached Te Urewera. The Government ignored widespread warnings about the danger the mustelids would pose to native birds and, even when it became clear that this impact had not been exaggerated, it failed to act quickly to eradicate them.

shores' was anticipated.⁴⁷⁸ But in a contest between pastoral interests and other farming interests, and between pastoral interests and conservation interests, the pastoralists won.⁴⁷⁹ By 1900, numerous members, Maori and Pakeha, were in a position to tell Parliament what enormous damage had been done to indigenous birds by weasels and stoats. Nonetheless, their protection under section 28 of the Rabbit Nuisance Act 1882 was left untouched.⁴⁸⁰ Soon after, section 6 of the Animals Protection Amendment Act 1903 allowed the gazetting of areas within which weasels and stoats could be killed. Then, in 1910, section 7 of a new Animals Protection Amendment Act made their destruction legal everywhere, except within any areas in which the Governor in Council suspended its operation. From 1931, most acclimatisation societies paid bounties on the tails of these animals, but

478. Professor J Newton, cited in Buller, 'On the Proposed Introduction of the Polecat into New Zealand', p 634 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 27); Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 26–29

479. Peter Holland, Kevin O'Connor, and Alexander Wearing, 'Remaking the Grasslands of the Open Country', in *Environmental Histories of New Zealand*, ed Eric Pawson and Tom Brooking (Melbourne: Oxford University Press, 2002), p 80

480. NZPD, vol 113, pp 25–31, 33–34, 37–38, 41–42, 47

this development came far too late.⁴⁸¹ We consider that, given the warnings available before the widespread acclimatisation of weasels and stoats, the Crown acted unwisely in allowing this. And, despite the fact that the impact of these animals was clearly recognised relatively early, Dr Coombes observed that they did not receive much attention from the Crown until the creation of the Department of Conservation in 1987.⁴⁸²

21.7.4.4 Trout

Trout were only acclimatised in Te Urewera with marked success just before the passage of the UDNR Act 1896. Despite this, there was no specific consultation with local Maori communities about the first successful release of trout at Waikaremoana. As will be recalled from section 21.6, Seddon's undertaking – which was given the force of law by the 1896 Act – was to supply them with trout and information so that they could release and manage this species. In September 1896, FW Rutherford, brother of the chairman of the Wellington Acclimatisation Society, AJ Rutherford, transported a small number of trout fry to the lake. With assistance from local Maori, Rutherford deposited fry in streams in the area. Maori involvement in this release appears to have been essentially fortuitous. Nevertheless, AJ Rutherford subsequently informed the colonial secretary that these trout had been sent 'in part fulfilment of promises made by the Hon the Premier in his letter embodied in "The Urewera Native Reserve Act 1896"'.⁴⁸³ AJ Rutherford and Lake Ayson, curator at the Masterton Hatchery, were involved in a further trout release and construction of a hatchery near Waikaremoana.⁴⁸⁴ The Wairoa Acclimatisation Society later bought trout fry from the hatchery. Trout were apparently well established in the lake by 1903. In addition, local (Pakeha) residents successfully released brown trout into the upper Rangitaiki and Whirinaki Rivers.⁴⁸⁵

Te Urewera was incorporated by stages into the Rotorua Acclimatisation District, which was taken over by the Tourist and Health Resorts Department in 1908. Initially, both freshwater fisheries and game were managed by the Tourist and Health Resorts Department, so from this time trout were particularly the responsibility of a Government department. This continued to be the case when the Department of Internal Affairs took over the administration of freshwater fisheries in 1914. Subsequently, the Crown was heavily involved in trout releases at Waikaremoana and Waikareiti, the main focus of such liberations in the inquiry district. There was, however, acclimatisation society involvement in releases over

481. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p155

482. Brad Coombes, under questioning by presiding officer, Rangiahua Marae, Frasertown, 2 December 2004 (transcript 4.12, p 240)

483. AJ Rutherford to colonial secretary, 7 October 1896 (Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 63–64)

484. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 64

485. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 33

several decades into the Waikaretaheke, Hangaroa, Waiau, and Ruakituri Rivers, as well as various streams and Lake Kaitawa.⁴⁸⁶

Dr Doig has noted that Te Urewera was, in practical terms, beyond the Crown's control in the late nineteenth century when the Crown was passing a 'barrage of legislation' relating to waterways.⁴⁸⁷ Nevertheless, once trout were established, Maori were legally bound by the Salmon and Trout Act 1867 and subsequent legislation and regulations. The 1867 Act had given introduced game fish precedence in New Zealand over indigenous fish, and protected trout through closed seasons. From 1892, angling licences were also used to protect trout.⁴⁸⁸ As early as 1895, the Hawke's Bay Acclimatisation Society began to issue notices in te reo Maori warning about trout poaching penalties.⁴⁸⁹

The introduction of trout, according to Seddon's memorandum, was partly intended to supplement the food supplies of the peoples of Te Urewera, and he apparently anticipated them managing the trout. Nevertheless, the Te Urewera trout fishery was put under the same arrangements for licensing and regulations as the rest of New Zealand. As we discussed in chapter 20, local Waikaremoana leaders objected to Pakeha fishing at Waikaremoana without paying the lake's owners, and considered themselves entitled to fish for trout in the lake.⁴⁹⁰ Possibly local Maori had not expected significant numbers of tourists to access the trout fishery, but they certainly were not prepared to give up control of their lake to the new Tourist and Health Resorts Department. In 1908, Rua Kenana complained that fishing licences were required within the UDNR. At this time, there were reports of Waikaremoana Maori communities catching trout throughout the year. From their perspective, it is likely that they were using the resource as promised by Seddon. To Pakeha, on the other hand, their fishing was considered both illegal and 'unsportsmanlike'.⁴⁹¹

From 1926, a rebuilt trout hatchery was located on land at Waimako Pa, but in 1929, after the local people sought either rent or a number of free fishing licences for use of the site, the Tourist and Health Resorts Department moved it to Government reserve land.⁴⁹² This seems to have been the sole and very short-lived example of significant Maori involvement in management of trout. The rangatira Mahaki had facilitated the establishment of the hatchery and helped look after

486. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 65–68; Bruce Stirling, 'Southern Te Urewera Waterways and Fisheries' (commissioned research report, Wellington: HistoryWorks Ltd, 2004) (doc 19), pp 6–7

487. Doig, 'Te Urewera Waterways' (doc A75), p 141

488. Ibid, p 144; Wendy Pond, *The Land With All Woods and Waters*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), p 88

489. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 24

490. Walz, 'Waikaremoana' (doc A73), pp 93–98

491. Doig, 'Te Urewera Waterways' (doc A75), pp 143–144, 148; Walz, 'Waikaremoana' (doc A73), pp 87–90; Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 70–71

492. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 76–79

and repair it.⁴⁹³ This was not, however, the only request for free fishing licences. In 1932, Waikaremoana leader Waipatu Winitana requested 50 free trout fishing licences, because no compensation had been paid for the Crown's use of the lake (see chapter 20). Tony Walzl commented:

Considering at this time, Waimako Maori could not afford £3 for a water tank, it is unlikely that trout fishing licences were affordable and therefore grants of licences were the only way that local Maori could access the fishery legally. To do so illegally would risk fines that also could ill be afforded. If this was the situation by 1930, then the conditional permission that Waikaremoana Maori had given 35 years earlier to allow trout to be introduced so that there might be an extra food source available had been breached. At a time when the food that trout could have provided was needed the most, Maori were restricted from gaining access.⁴⁹⁴

The question of whether trout did in fact augment Maori food supplies is a complicated one. There are three key considerations:

- ▶ first, legal access to the trout fishery was conditional upon payment of a fishing licence fee, and the extent to which Maori fished without such licences is virtually impossible to discover;
- ▶ secondly, trout had the invidious effect of reducing indigenous fish species, on which the local people depended; and
- ▶ thirdly, the Crown's management of fisheries privileged trout over indigenous species, including policies for the deliberate reduction of tuna (eels) and certain native birds (especially kawau (shags)).

We discuss each of these points in turn.

On the first point, we note that Te Urewera leaders are understood to have asked in 1895 for English fish to augment their food supplies and attract (presumably paying) tourists. The Premier agreed to this request but only made one specific undertaking: to secure trout for them and information so that they could manage the fishery effectively. We consider it virtually impossible that the leaders could have taken from this that they would be asked to pay licence fees, or that the fishery would be administered by the Government from outside the Reserve. Nor was the undertaking in respect of trout an isolated one; there was a broader intention to augment food supplies, of which the introduction of trout was only one aspect. We note, however, that trout proved difficult and expensive to establish in Te Urewera, with constant releases of ova required over many years. Licence fees were necessary to help fund this continuous process of replenishing the fishery. Tourist fishing licences probably sustained this work. Maori could not afford licences and thus are unlikely to have contributed much to financing the fishery.

Yet, trout became a common food for those who exercised their customary rights to fish in their rivers and lakes, regardless of whether they paid a licence fee. Professor Murton suggested:

493. Walzl, 'Waikaremoana' (doc A73), pp 270–274

494. *Ibid.*, p 274



Whakatane District Museum and Gallery Collection (E933-1)

Maori fishing for trout, Murupara, 1903. Trout were introduced to Te Urewera (initially to Lake Waikaremoana) in 1896 as part of Premier Seddon's agreement in the Urewera District Native Reserve negotiations to supplement food supplies in the region. Pakeha residents and acclimatisation societies were also involved in releases into Te Urewera waterways. Trout quickly depleted indigenous fish stocks, and thus soon became an important food source for many Te Urewera Maori.

Of course, it is difficult to gauge from the materials available to what extent they abided by it [the legislation]. In fact, the records tell very little about hunting and gathering by the peoples of Te Urewera, unless officials thought that regulations had been broken. There is little question that tangata whenua, surrounded by the bounty of their forests, including the new animals as well as trout, made use of this bounty in order to survive. The exact impact of the animal protection legislation, therefore, is difficult to assess in economic terms.⁴⁹⁵

We have already mentioned in section 21.3 that trout became a part of the customary economy. Although we lack comprehensive evidence on the point, witnesses told us that trout fishing was important to them in the early decades of the twentieth century. In chapter 20, we cited the evidence of Lorna Taylor, Rangi Paku, and Kuini Te Iwa Beattie about the importance of trout in the diet of their whanau growing up at Waikaremoana. Indeed, Rangi Paku, who grew up at Tuai in the 1940s and early 1950s, said that her whanau ate ‘trout by the galore.’⁴⁹⁶ Elsewhere in the inquiry district, Rongonui Tahu, who grew up at Ohaua in the Ruatahuna district in the 1940s and early 1950s, told us of hunting and fishing there with his grandparents. Potatoes and vegetables from the garden were the staple foods, with trout and wild pork to ‘complement the larder.’⁴⁹⁷ Miriama Howden confirmed that trout became part of the Ruatahuna traditional economy, along with eels, communally worked gardens, and plants gathered from the bush.⁴⁹⁸ Ngati Manawa also incorporated trout in the customary economy. Rano (Bert) Messent grew up near Murupara beside the Rangitaiki River in the late 1920s and 1930s. He explained that trout fishing was done with a retireti board, which we described above in section 21.3; ‘a board which was illegal by Pakeha law’. Ngati Manawa ‘could still live off the land’ at that time, he told us, fishing for trout as well as eels, growing potatoes and vegetables, and hunting for wild pigs.⁴⁹⁹ Sarah Hohua confirmed the role of trout in living ‘off the land’ for Ngati Manawa in the 1940s.⁵⁰⁰ Also, Basil Tamiana informed researcher Suzanne Doig that trout have been in the rivers so long that they are considered part of the tribal fishery resources and ‘poached’ without licences throughout Te Urewera.⁵⁰¹ This was easier in some places than others – the ‘popular Whirinaki River fishery’ was well policed and the rules enforced.⁵⁰²

To some extent, fishing for trout was necessary because of the way in which this exotic species had reduced the supply of indigenous fish. Trout eat indigenous fish,

495. Murton, summary of evidence (doc J1), p 24

496. Rangi Paku, brief of evidence, 18 October 2004 (doc H37), p 3

497. Rongonui Tahu, brief of evidence, 11 May 2004 (doc D23), pp 4–5

498. Howden, brief of evidence (doc D26), pp 2–4

499. Rano (Bert) Messent, brief of evidence, 9 August 2004 (doc F12), pp 3–4

500. Sarah Hohua, brief of evidence, 11 August 2004 (doc F32), pp 3–4

501. Doig, ‘Te Urewera Waterways’ (doc A75), p 147

502. Murton, ‘The Peoples of Te Urewera and the Crown’ (doc H12), p 911

as well as competing for their food supply and for the food supply of whio and other native ducks.⁵⁰³ Claimant witnesses were very aware of the impact of trout on their ability to take traditional foods. Jack Tapui Ohlson of Ngati Whare told us: 'When European trout were introduced it ate the kokopu in our area. There are still some around now, but very few.'⁵⁰⁴ Robin Hodge was cross-examined regarding how long it would have taken for trout to affect the populations of fish such as kokopu. She responded:

Ecological studies were really just starting overseas at about that time [1896] and so that there was no ecological studies about how long it would have taken but because trout are known to predate all sorts of other fish presumably it wouldn't have taken all that long, given the vast numbers of trout which are introduced year on year, for indigenous fish stocks to be greatly reduced.⁵⁰⁵

From the 1890s, the damaging impact of trout on indigenous fish entered public discussion.⁵⁰⁶ By the early twentieth century, Parliament was hearing frequently about the negative impact of trout on indigenous fish. In its report *He Maunga Rongo*, the Central North Island Tribunal explained that the matter was discussed in Parliament during several fisheries debates. Maori Treaty rights were part of the discussion. Pakeha members acknowledged the destructive effects of trout on native fish species, and sometimes agreed with the Maori members that steps should be taken to reduce those destructive effects, or to legalise Maori fishing for free for introduced species and by customary methods.⁵⁰⁷

As well as petitions from Maori, the Stout–Ngata commission drew attention to the seriousness of the problem for Rotorua peoples. Free licences were at first secured for Te Arawa as a result of these representations from the commission, and later formed part of the negotiated Crown–Maori agreements over Lakes Taupo and Rotorua. Otherwise, after two or three decades of admissions and abortive proposals to do something, virtually nothing had actually been done to protect indigenous fisheries or to recognise and protect Maori fishing rights.⁵⁰⁸ Instead, indigenous fish only really attracted attention from successive governments because of the alleged tendency of tuna to eat trout which, as game fish, were the true focus of attention of those managing freshwater fisheries.

The Central North Island Tribunal concluded:

We find that the Crown was fully aware of the Treaty rights of Taupo Maori with regard to their fisheries, that it knew of the destructive impact of trout on those

503. Doig, 'Te Urewera Waterways' (doc A75), p 146

504. Ohlson, brief of evidence (doc G36), para 27

505. Robin Hodge, under cross-examination by counsel for Nga Rauru o Nga Potiki, Waimako Marae, Tuai, 20 October 2004 (transcript 4.11, p 138)

506. Pond, *The Land With All Woods and Waters*, pp 124–125, 136–137

507. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 4, pp 1291–1295

508. *Ibid*, pp 1291–1330

fisheries, and that it was made aware of the prejudice suffered by Maori as a result. Proposals were made, especially by the Maori members of Parliament, for the Government to act on the Treaty guarantees, to do something to conserve native fish in the face of predation by introduced species, and to recognise Maori fishing rights by reserving them free fishing for all species in all waterways. . . . Governments chose to prioritise and protect trout and anglers over indigenous fish and Taupo Maori.⁵⁰⁹

We need not consider this matter in more detail here, as the Crown has conceded that the introduction of trout in Te Urewera, ‘which the Crown facilitated, has damaged native fish populations.’⁵¹⁰ We note, however, that the Crown did more than simply *facilitate* the stocking of rivers and lakes with trout; in Te Urewera, much of this work was done by Government departments over many years. This is an example of sporting values and tourism being prioritised over Maori interests, although – as noted above – trout did become an important food source for the peoples of Te Urewera. It is not possible to know the extent to which the inclusion of trout in the local diet compensated for the accompanying reduction of traditional fishing. The cultural loss – no longer being able to take valued native fish species – would have been significant regardless. We noted earlier that the Government turned down requests from Waikaremoana leaders for free fishing licences in 1929 and 1932. These requests show that local Maori would have preferred to fish for trout lawfully, but they had little choice in the matter if they were to survive.

Since trout had been introduced at least in part to fulfil a Crown promise to augment Maori food supplies, we do not think it reasonable that the peoples of Te Urewera should have been subject to the Government’s licensing regime. The long delayed establishment of the UDNR General Committee, and its shortlived existence, meant that it could not take on a role in managing the introduced fishery or negotiating with the Government about licensing arrangements. In the claimants’ view, rather than a ‘quasi property right’ being bestowed on acclimatisation societies, which could then charge licence fees, ‘it is arguable that Tuhoe were entitled to be granted a quasi property interest in the exotic species to be introduced by the Seddon Government and to have their customary harvesting rights affirmed by legislation.’⁵¹¹ We agree, especially in respect of trout, which was the subject of specific negotiation in 1895 and of a specific indication that it would be managed by Maori as a food source and for tourism.

Finally, we note that the Crown’s management of the trout fishery involved attempts to reduce or eradicate native species which were believed to predate on trout. Tuna are the most important indigenous fishery in Te Urewera, and formed a staple in the pre-contact diet (alongside fernroot and native birds). The Government’s approach to the eel fishery ranged from a failure to protect the species to active culling of it for the stated purpose of protecting trout. From Dr Doig’s

509. Ibid, p1295

510. Crown counsel, closing submissions (doc N20), topic 30, p 2

511. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 163



David Burgess

The New Zealand longfin eel (*Anguilla dieffenbachii*). Eels are a taonga species in Te Urewera; the tikanga for catching, preserving, distributing, and consuming them reflects the respect in which they are held. However, from the 1950s Wildlife Service Officers culled them in local rivers, and from the 1960s the Government promoted their commercial harvesting because it was believed that they preyed on trout.

evidence, it appears that culling in Te Urewera rivers began in the 1950s, and that the encouragement of commercial eeling (for the same purpose of reducing eels) occurred from the 1960s.⁵¹² Thus, the Crown's active attempts to reduce the tuna population of Te Urewera fall largely outside the period considered in this section.

While kereru and many other indigenous birds were absolutely protected from 1922, kawai were vilified and shot in the first half of the twentieth century. The Crown has admitted this, while also noting at our hearings that it has now come to

512. Doig, 'Te Urewera Waterways' (doc A75), pp 147, 159

understand how important kawau are to the peoples of Te Urewera.⁵¹³ Dr Coombes summarised the Crown's campaign against the kawau as follows:

Soon after the inquiry district became part of the Rotorua Acclimatisation District [which came under the Tourist and Health Resorts Department], a widespread extermination campaign commenced. In the 1920s, the Department of Internal Affairs employed a culler to eliminate shags from Waikaremoana and its tributaries. These campaigns lasted until the early 1950s, despite the fact that the kawau was an important species for local hapu at the Lake. The line between protected and slaughtered native birds was both contradictory and arbitrary: shags were in far smaller populations than were kereru.⁵¹⁴

The Crown facilitated the killing of kawau because they ate trout.⁵¹⁵ Native hawks were also targeted as 'pests' because of their impact on Pakeha 'game fish and birds' and for 'sport'.⁵¹⁶ Tuhoe revered some kawau colonies at Waikaremoana and Waikareiti because of their 'guardian-like activities', and the young birds of other colonies were sometimes a food source. Crown agencies ignored the customary significance of kawau because they valued the sport involved in trout fishing so highly. Consequently, at various times from 1906 through to the early 1950s, officials and even Ministers of the Crown, along with some private individuals, shot kawau in the Waikaremoana game reserve, later the game sanctuary. In 1922, the Solicitor-General considered the legality of shooting kawau in the Reserve if it was a sanctuary. His argument that section 32 of the Animals Protection and Game Act 1921–22 justified such shooting hinged on interpreting trout as property.⁵¹⁷ Section 32 allowed the Minister to authorise an owner or occupier of land, or an acclimatisation society, to kill any animal damaging or likely to damage 'any land', even if the land was a sanctuary, and the solicitor general's view was that 'land' in this case 'must . . . be held to include all property [including] fish in the Lake'. There was no provision in the section for killing a species for doing damage to another species.

Were kawau really a threat to the valuable trout fishery, which would justify consultation with the peoples of Te Urewera as to whether they could be culled? Crown counsel noted that kawau were shot because they were 'perceived as a threat to introduced species'.⁵¹⁸ It was put this way because the belief that kawau 'preyed extensively on trout' was simply not true.⁵¹⁹ The Crown did not consult

513. Crown counsel, closing submissions (doc N20), topic 29, pp 5, 48–49

514. Coombes, summary of evidence (doc H3), p 24

515. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 75–76

516. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 25–26, 183, 215, 217

517. Ibid, pp 215–218; Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 75–76; Robin Hodge, under questioning by the Tribunal, Waimako Marae, Tuai, 20 October 2004 (transcript 4.11, p 137)

518. Crown counsel, closing submissions (doc N20), topic 29, p 5

519. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 215



Zeila Wells (ATL, K-09152-F)

Men holding dead kawau (shags), Lake Rotoehu, circa 1940. Because kawau were believed to prey on trout, the Crown facilitated the extermination of large numbers of them in Te Urewera, employing a culler at Waikaremoana from the 1920s. The culling continued until the 1950s, and the customary significance of kawau to Tuhoe was ignored.

Waikaremoana peoples before (or during) campaigns to exterminate the shag. Nor, however, is there any evidence of protest or disagreement from local Maori communities.⁵²⁰ Dr Coombes found protests from the Forest and Bird Protection Society on file but none from Maori.⁵²¹

As we have explained, the Crown and Maori agreed from 1895 that the native birds of Te Urewera should be protected. Maori members of Parliament always supported protection of birds during the debates on the animal protection laws, but differed from the Government as to the mode of protection and the role of Maori in it. There was certainly no agreement that any species could be hunted to extinction. The peoples of Te Urewera valued their indigenous birds enormously but believed that sustainable harvests, controlled by customary law, were both feasible and appropriate. That is a far cry from the Crown's decision that shags and hawks were 'vermin' and should be exterminated. In our view, this departure from

520. Crown counsel, closing submissions (doc N20), topic 29, p 49

521. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 217

the generally agreed position between the peoples of Te Urewera and the Crown since 1895, that native birds should be protected, required specific negotiation and agreement before it could be carried out in our inquiry district.

In the Crown's submission, it balanced the interest in preserving native bird species against the interest in preserving the trout fishery, and did so appropriately. In this instance, 'tourism and the opportunities for a trout fishery outweighed the significance of the [native] birds', especially because (the Crown says) it was not aware of the importance of the kawau to Maori at Waikaremoana.⁵²² As we see it, this was in fact just one example of a marked pattern of the Crown prioritising the interests of the tourism industry and angling in its Te Urewera policies.

We turn next to consider the introduction of deer into the inquiry district, and evaluate the Crown's balancing of interests in that case.

21.7.4.5 Deer

The introduction of deer to Te Urewera was significant in terms of provision of both a large new potential food source for Maori communities and an attraction for New Zealand sportsmen and foreign tourists. It thus met two of the objects of the 1895 agreement.

We have no direct evidence that Maori food supplies were in fact considered by Ministers or officials when the decision was made to release deer in Te Urewera. It was certainly the case that some officials were later staunchly opposed to Maori hunting for deer (in the game reserves). In 1910, W A Neale, who had been appointed a ranger, warned his superior officers: 'I cannot prove as yet that they have taken on venison, but when once the taste is acquired, if it is not already, they will have a splendid larder to operate on.'⁵²³ But it was Carroll who was the key figure in Government policy, as far as the 1895 commitments were concerned. The head of the Tourist and Health Resorts Department later commented, 'Sir James Carroll, as representative of the Maori race, strongly favoured the introduction of game animals to his native land.'⁵²⁴ Carroll also supported the ban on hunting introduced animals in the game reserves, which was necessary for the deer population to become properly established.⁵²⁵

This can be contrasted with his approach to the introduction of goats, which were not intended for sport or tourism but 'in the hope that they might become a fibre and food source' for Tuhoë.⁵²⁶ T E Donne and historian James Cowan both recorded how Carroll, as Native Minister, personally delivered a herd of goats to Tuhoë in 1904, a year of 'intense famine' in Te Urewera.⁵²⁷ Carroll presented the

522. Crown counsel, closing submissions (doc N20), topic 29, p 49

523. W A Neale to C Robieson, THR, 9 June 1910 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 191)

524. T E Donne, *The Game Animals of New Zealand* (London: John Murray, 1924) (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 76)

525. Walzl, 'Waikaremoana' (doc A73), pp 64–65

526. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 76

527. Ibid

goats 'on behalf of the Government to the tribesfolk of the Urewera.'⁵²⁸ Tuhoē leaders were gathered for a tangi and formally welcomed the Minister (and his goats), imposing a rahui so that the goats would not be killed until they had a chance to get established.⁵²⁹

On balance, we think it likely that Carroll gave his support as Native Minister to the introduction of deer, at least in part as a food source for the peoples of Te Urewera. In any case, it is necessary to keep in mind the dual significance of deer (as a food source as well as for tourism and recreation) when considering the recategorisation of deer as 'pests' from the 1930s.

The first deer liberation in Te Urewera occurred at Galatea in 1897. It was apparently the result of action by James Grant, manager of Galatea Station, a keen acclimatiser; the Wellington Acclimatisation Society, which provided the deer; and either the Department of Lands and Survey or the Tauranga Acclimatisation Society. Dr Coombes argued that, given the inactive state of the Tauranga society at that time, it is likely that it was the Government department that transported the deer.⁵³⁰ For the first liberation at Waikaremoana in 1899, the Wellington society provided the animals, Lands and Survey arranged transport, and roading gangs released the deer at Waikaremoana.⁵³¹ As with trout, however, the extent of Crown involvement increased significantly thereafter. Dr Coombes' research indicates that in the period up to 1922 inclusive, almost all the other releases of deer within Te Urewera, or in adjacent forests from which animals colonised Te Urewera, were undertaken by the Tourist and Health Resorts Department.⁵³² No records of consultation with Maori in relation to any of these releases have been located.

Furthermore, significant restrictions were imposed on Maori land in the Waikaremoana and Rangitaiki areas in conjunction with the release of deer at Waikaremoana and, slightly earlier, at Galatea. Forest reserves had been established in 1891 and 1895 on land acquired earlier by the Crown on the eastern and southern shores of Waikaremoana.⁵³³ Game reserves were created in 1898 to protect newly released deer and facilitate control of fish and game; these were approved by James Carroll. The game reserves not only incorporated almost all of the forest reserves, but also large areas within the UDNR. Much of the land in these reserves, therefore, was Maori land. The Waikaremoana reserve had a total area of 37,498 hectares. Of this, 23,088 hectares was Maori land within the UDNR, 127 hectares was the Whareama reserve, and 4,989 hectares was the Waikaremoana lakebed. In all, then, 75.2 per cent of this reserve was Maori land, while the balance was Crown forest reserve or other Crown land. At Rangitaiki, 39.5 per cent of the 40,301-hectare reserve was Maori land within the UDNR, while the remainder was

528. J Cowan, 'The Illustrious Goats of Ruatoki: A Story of the Urewera Tribe', in *Tales of the Maori Bush* (Dunedin: Reed, 1934), p 76; Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 77

529. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 76–77

530. Ibid, p 36

531. Ibid, p 89

532. Ibid, p 91

533. Ibid, pp 78–79

Unknown (ATL PA1-F015-41)



The Governor-General, Lord Bledisloe, with a deer taken in Te Urewera, early 1930s. Following their introduction to the region in 1897, deer became both a significant attraction to Pakeha sportsmen and, over time, an important food source for Maori, despite the fact that legal access to them was quite restricted. The Government continued to prioritise sport and tourism for a number of years after the Forest Service warned of the destructive effects of deer on the forest.

non-Maori land outside the UDNR. Dr Coombes was unable to locate any records of communication with tangata whenua about this reservation.⁵³⁴

The Crown conceded that the game reserves were apparently ‘established without specific consultation with Urewera Maori about their creation, rules, boundaries or administration’, but suggested that it is ‘likely that Urewera Maori supported this type of reserve.’⁵³⁵ Yet the *Gazette* notice notified that ‘imported game shall not be taken or killed’ within this reserve.⁵³⁶ Consequently, the creation of these reserves made it impossible for local Maori communities to benefit legally from any additional food source in the form of introduced game. Furthermore, in 1909, regulations under the Tourist and Health Resorts Control Act 1908 forbade anyone from carrying or using a firearm, or using a dog to catch ‘any bird or animal’ within the forest reserves without the written permission of the Minister or the general manager of the Tourist and Health Resorts Department.⁵³⁷ Dr Coombes has not located evidence of consultation with Maori about the transfer of both the forest reserves and the administration of the Rotorua Acclimatisation District to that department. The required permission made it very difficult to hunt legally in these reserves, once deer were no longer absolutely protected.

The licence fee for hunting imported game elsewhere in the acclimatisation district would have been prohibitively expensive for many local Maori.⁵³⁸ The law did allow an occupier, an occupier’s child, or another designated person to hunt without a licence in season on their own land⁵³⁹ – always provided a reserve or sanctuary designation did not affect this. Given the low incomes and marked subsistence needs of many Te Urewera Maori communities in the early twentieth century, the cost of licence fees may have been a real deterrent to those who wished to hunt legally in Te Urewera in places where a licence was required.

Yet, the justification for introducing deer into the Urewera District Native Reserve, without further consultation with Te Urewera leaders, presumably lay in its provision of an additional food supply at least as much as in its provision of sport for tourists. Despite this, a campaign against ‘poaching’ deer began in 1910 and intensified in the 1920s. From 1912, increasingly wide areas were opened for deer shooting, including most of the inquiry district. The regulations focused on sport, rather than an additional Maori food source. Licence fees for short seasons with restricted ‘bags’ were set at sums such as £2 or £3. In 1903, David Buddo, the member for Kaiapoi, told the House that a £1 fee for a fishing licence ‘would make fishing for trout . . . a close monopoly only to be enjoyed by those of leisure and

534. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), pp 80–83

535. Crown counsel, closing submissions (doc N20), topic 29, p 27

536. ‘Animals Protection Act – Declaring Reserves for Imported Game, Waikaremoana and Rangitaiki’, 17 June 1898, *New Zealand Gazette*, 1898, no 46, p 1016

537. ‘Regulations under “The Tourist and Health Resorts Control Act 1908”’, 23 August 1909, *New Zealand Gazette*, 1909, no 72, pp 2242–2245

538. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), pp 110–112

539. Animals Protection Act 1880, s 7; Animals Protection Act 1908, s 23; Animals Protection and Game Act 1921–22, s 14(3)

means'. The significantly higher fees charged for licences to shoot deer were almost certainly beyond the means of most Maori communities in Te Urewera.⁵⁴⁰ The local people may, however, have been unaware of these matters. The forest reserve regulations gazetted in 1909 were only comprehensively notified in Te Urewera in 1919, and the Tourist and Health Resorts Department's first publicity about the rules of the game reserves also occurred in 1919.⁵⁴¹ The Waikaremoana people did not believe that the restrictions applied to them as late as 1950, when they protested against rangers' attempts to stop them from shooting pigs and deer for food on their own land (the UCS reserves).⁵⁴² It was not until June 1950 that Turi Carroll found out he 'could not hunt on the Timi Taihoa Reserve, which he owned, without a special license, which he would have to enter a ballot to try and obtain'.⁵⁴³

In a review following the 1921–22 Act, the Rangitaiki game reserve was revoked, but the Waikaremoana reserve was given a formal sanctuary designation in 1925. Its new, smaller boundaries facilitated deer and possum hunting outside the sanctuary but, in effect, given section 32 of the 1921–22 Act, permitted only hunting of animals proved to be causing damage to land within the sanctuary. This made any further hunting for subsistence purposes in the sanctuary illegal. Despite the Crown's submission that informal consultation with Maori may have occurred, we have not received any evidence of consultation with Te Urewera leaders or communities about these changes.⁵⁴⁴

Dr Coombes pointed to an 1893 article in the widely circulated *Transactions and Proceedings of the New Zealand Institute* arguing for the destructive effect of deer on forests as indicating that it was likely that Crown agents knew how deer affected forests before their release in Te Urewera.⁵⁴⁵ Deer populations in the inquiry district grew very rapidly in the 1920s.⁵⁴⁶ In 1914, however, the inspector of scenic reserves had reported on a need for 'sufficient shooting' of deer at Waikaremoana. The inspector quoted a recent royal commission on forestry as having demonstrated the 'extremely detrimental' way in which deer affected indigenous forest.⁵⁴⁷ Dr Neumann put great stress on this 1913 royal commission's report, which, he argued, predated the Crown's main initiative to establish deer in Te Urewera (which he said took place from 1913 to 1921).⁵⁴⁸

540. D Buddo, 26 October 1903, NZPD, vol 127, p 5; Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 134, 137, 187–189

541. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 197–200

542. Campbell, 'Te Urewera National Park' (doc A60), p 149

543. Secretary for Maori Affairs to Turi Carroll, 22 June 1950 (Campbell, 'Te Urewera National Park' (doc A60), p 149)

544. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 83, 200–203; Crown counsel, closing submissions (doc N20), topic 29, p 48

545. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 89

546. *Ibid*, pp 117, 188–189

547. 'Report of the Inspector of Scenic Reserves', AJHR, 1914, C-6, p 7 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 294)

548. Klaus Neumann, answers to Crown questions of clarification, September 2004 (doc G20), p[4]

Crown counsel asked Dr Neumann: ‘Did Government understand the effect of the deer at the time they were introduced?’⁵⁴⁹ In response, Neumann quoted the 1913 forestry commission:

Should it be a fact that the presence of deer in great numbers is detrimental to the undergrowth of the forest, then it is clear that steps should be taken to either do away with them altogether or to restrict them to defined areas where they can do the minimum amount of damage. In order to ascertain what part the deer played in the economy of the upland forests, on the one hand, we examined such witnesses in every centre as seemed likely to afford information of moment. Especially did we seek to get a clear expression of opinion from the side of the sportsman, and, with this end in view, took evidence from the chairman and secretary of various acclimatisation societies; and, taking that evidence alone, we fail to see that deer are not harmful in a forest, or that the monetary gain to the country can in any way counterbalance the damage they must eventually do to the climatic reserves. Taking the evidence of the non-sportsman, and considering the damage done by deer not only to the forests . . . but also to the plantations, orchards, and crops, our opinion as to their harmfulness is much strengthened. We therefore advise that measures be taken to restrict deer to limited areas, sufficient for sport, which may be proclaimed deer parks, where they can do the smallest possible damage.⁵⁵⁰

Nevertheless, alongside predictable opposition to deer from the Forest and Bird Protection Society and support for them from acclimatisation societies, considerable debate between Government departments as to whether deer did indeed damage indigenous forests continued through the 1920s until at least 1931.⁵⁵¹

Putting aside the 1913 recommendations of the royal commission and the 1914 recommendation of the scenic reserves inspector, the Crown acknowledged in our inquiry that the Forest Service was certain about the destructive effects of deer by 1922.⁵⁵² Crown counsel referred to an official Forest Service report of that year, which ‘concluded that large deer populations could cause significant damage.’⁵⁵³ Against this conclusion, the Crown noted two points: the first was that the report did not specifically ‘refer to any damage that may have been done in Te Urewera’; and the second was that the Tourist and Health Resorts Department continued to express ‘varying views . . . regarding whether or not deer caused damage to native

549. Klaus Neumann, answers to Crown questions of clarification, September 2004 (doc G20), p [2]

550. ‘Report of the Royal Commission on Forestry’, AJHR, 1913, C-12, p xv (Neumann, answers to Crown questions of clarification (doc G20), p [4])

551. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), pp 89, 188–189, 294–299, 311–317

552. Crown counsel, closing submissions (doc N20), topic 29, p 24

553. ‘Deer in New Zealand: Report on the Damage Done by Deer in the Forests and Plantations in New Zealand’, AJHR, 1922, C-3A, pp 4–5 (Crown counsel, closing submissions (doc N20), topic 29, p 24)

flora and fauna.⁵⁵⁴ In 1923, a ranger of that department denied that deer were causing any damage to the Waikaremoana forests.⁵⁵⁵

Essentially, though, the Tourist and Health Resorts Department (which controlled the release and hunting of deer) prioritised tourism. T E Donne, head of department at the time, 'admitted that deer had a negative effect on native flora', but held the view that this was 'acceptable because of the purported benefits of game tourism.'⁵⁵⁶ Dr Coombes quoted Donne, writing in 1924:

It is, of course, known that deer browse on shrubs and plants, but their destructiveness to forests is infinitesimal in comparison with that caused by fire . . . It might be pointedly asked, how many travellers visit New Zealand to view shrubs and plants as against those who are attracted there by sport? In any case there are more trees, shrubs and plants than a man could look at in a hundred years.⁵⁵⁷

As the claimants have argued, when decisions were made, it was only partly a matter of scientific knowledge; the underlying question was which interests would be prioritised.⁵⁵⁸ Dr Coombes suggested that 'Probably because of the inter-departmental competition, agency views of these browsing animals became polarised around particular political objectives.'⁵⁵⁹ The Forest Service was supported by the Forest and Bird Protection Society, while the Tourist and Health Resorts Department was supported by Internal Affairs and the acclimatisation societies. The departments were, as Coombes put it, 'politically motivated to deny the impact of deer on native forests.'⁵⁶⁰

At this time, the Tourist and Health Resorts Department held the whip-hand over the Forest Service because it had statutory control of deer. Ministerial intervention was required for the Forest Service's view to prevail, and it was not forthcoming. In 1929, the Minister of Forests threatened to take control of deer by amending the Forests Act 1921–22 but nothing came of this.⁵⁶¹ Instead, the Tourist and Health Resorts Department and the Forest Service continued to battle each other in the 1920s, each relying on the observations of its field staff, acclimatisation societies, or Pakeha visitors to the district. Maori were not consulted. In 1925, for example, Forest Service staff reported that pigs and deer had caused serious 'although as yet not extensive' damage to Waikaremoana forests, and that action should be taken before large areas of forest were affected. A departmental

554. Crown counsel, closing submissions (doc N20), topic 29, p 24

555. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 296–297

556. *Ibid*, p 297

557. Donne, *Game Animals of New Zealand*, p 284 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 297)

558. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 150–153

559. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 295

560. *Ibid*

561. *Ibid*, pp 211, 311–312

ranger visited the area in response and denied the reports of damage, recommending against increased shooting of deer.⁵⁶² From 1923, the Government did agree that the absolute protection of deer should be lifted, but the departments were to work with each acclimatisation society to determine the districts where protection should be lifted.⁵⁶³ For Te Urewera, of course, the acclimatisation society was in fact the Tourist and Health Resorts Department until 1930, when this responsibility was transferred to Internal Affairs. Within a year, according to Dr Coombes, Internal Affairs had accepted the necessity of culling deer to reduce their number.⁵⁶⁴

As a result, the Government took no action to control deer in Te Urewera until 1931, some 10 years after the State Forest Service was convinced of the need to do so. It is true that the reports it received up to that point were contradictory, but we find it difficult to believe that the Government did not hear the alarm bells ringing through the conflicting positions taken by the Tourist and Health Resorts Department and the Forest Service. The Minister of Forests might have acted in 1929, as he threatened, but evidently failed to follow through. The speed with which Internal Affairs, the successor to the Tourist and Health Resorts Department in 1930, accepted the necessity for culling seems to point to recognition of a major problem by this time.

The question then becomes, as Crown counsel noted, ‘whether the Crown acted promptly once it became aware of the detrimental impacts, and whether the actions it took were effective.’⁵⁶⁵ The Crown says that account must be taken of competing environmental priorities nationally (although it provided no details), resource constraints, and the inexact scientific knowledge at various times. The Crown’s submission is that its agents acted reasonably in the circumstances.⁵⁶⁶ Even so, the Crown conceded that deer control did not begin ‘in earnest’ in Te Urewera until 1938,⁵⁶⁷ which was 16 years after the Forest Service was certain of the need for action.

One way to reduce the deer population was to use private hunters. We have already seen that factors such as the need to pay high licence fees sometimes hampered Maori from hunting legally when and where this was permitted. Encouragement of private hunters for deer control purposes only occurred occasionally before the 1950s. During the 1930s, there was a limited ammunition subsidy for hunters who were landowners.⁵⁶⁸ From 1939, safety reasons served as a reason to refuse shooting permits to both Maori and Pakeha hunters when Internal Affairs deer control officers were working, other than for some ‘sporting’

562. Acting officer in charge, ‘Destruction of Pigs and Deer – Waikaremoana – H Tapper’, 6 June 1925 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 298)

563. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), pp 298–299

564. *Ibid*, pp 313, 315–317

565. Crown counsel, closing submissions (doc N20), topic 29, p 24

566. *Ibid*

567. *Ibid*, pp 25–26

568. Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 320

hunting. The peoples of Te Urewera were not consulted about this, despite overlap between deer control areas and traditional hunting grounds. During the Second World War, because of Crown labour shortages, private hunting of deer, pigs, and wild cattle was permitted. In the early post-war years, almost all such hunting was banned. The few exceptions were not necessarily for the local hunters.⁵⁶⁹ This was despite a 1937 Native Department report urging the Government to employ Tuhoe to hunt deer, to provide them with an economic opportunity and to take advantage of their significant hunting skills and knowledge of Te Urewera.⁵⁷⁰

Instead, the Crown's preferred way of controlling damaging exotic species was to use its own hunters and trappers. A small-scale pilot deer control scheme began in the early 1930s using Government deer destruction teams, but soon ceased because of financial constraints and labour shortages. Internal Affairs finally began permanent operations in the area in 1938, but these were soon scaled down because of the Second World War. Government culling gained impetus only slowly after the war ended. Dr Coombes argued that even during the 1950s, Government culling operations in the Te Urewera highlands were insufficiently intensive to reduce the deer population appropriately.⁵⁷¹

Thus, in the period covered by this section of our chapter, the Crown failed to take advantage of an acknowledged opportunity to employ experienced local Maori hunters in the destruction of deer. This could have provided a much-needed boost to the Te Urewera economy from the 1930s to the 1950s, once deer were finally acknowledged as a threat to the forest. It could have provided Maori with both income and regular access to a very useful food source. It would also have boosted attempts to control and reduce deer, which we can only describe as dilatory and ineffective during this period. By the Crown's own admission, a serious attempt to control deer in Te Urewera did not begin until 1938. This attempt was short-lived. While we accept that there was a labour shortage during the war, local Maori could have been encouraged to cull deer by paid hunting on at least a part-time basis. Deer had returned to their 1938 levels by the end of the war.⁵⁷² What this meant was that the Crown did not really begin serious and sustained action against deer in Te Urewera until long after the Forest Service was certain of the serious nature of the threat.

Nonetheless, we must ask whether – in a practical sense – the establishment of a large deer population met the spirit of the 1895 agreement by successfully augmenting local Maori food supplies. Officially, of course, it did not because, for much of the period under review, hunting deer for food was either banned (at places and times) or illegal without a licence except for landowners, Maori and Pakeha, on their own land. As Professor Murton pointed out, detailed information is difficult to obtain from archival or published sources for precisely that reason.

569. *Ibid*, pp 222–223, 246–247, 326

570. Tuawhenua Research Team, 'Ruatahuna, Part 2' (doc D2), pp 292–293

571. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 293, 305, 314–319, 324–328

572. *Ibid*, p 293

Because the hunting practices ‘were criminalised, the practitioners kept silent about them.’⁵⁷³ If Carroll did indeed give his support years earlier for the introduction of deer, we doubt this was what he had had in mind.

Kaumatua and kuia told us that venison was an important part of their diet during the period from 1930 to 1954 (and beyond). The Tuawhenua researchers reported that wild game, including deer, which were ‘released or gained entry into the Urewera supplanted, to some extent, the traditional dependence on native birds.’⁵⁷⁴ In the 1930s, when prosecutions for taking kereru caused a significant change in Maori subsistence hunting, the supply of ‘wild pigs and deer’ began to be depleted, ‘making the meat much harder to obtain.’⁵⁷⁵ Maori communities struggled to survive, even with the addition of venison to the food supplies.⁵⁷⁶ Wild pigs and deer were hunted and conserved as part of the people’s resources and according to customary controls.⁵⁷⁷ For Rua Kenana’s community at Maungapohatu, wild cattle and deer were the principal sources of meat.⁵⁷⁸

In respect of the Ruatahuna district in the 1940s, Korotau Tamiana explained to the Tuawhenua researchers that the ‘main foods’ were ‘preserved meat, dried eels, wild pork and venison. Our mother would preserve the venison.’⁵⁷⁹ Instead of preserving kereru in its own fat in carved taha, Maori communities were now preserving venison cooked in pork fat in old tins. Survival at Murupara in the 1940s depended on wild venison and pork, fishing for eels and trout, and communal gardening.⁵⁸⁰

By the 1950s, the staples at Ruatahuna were potatoes, venison, and mutton (from the development scheme), supplemented by poultry and ‘some kereru.’⁵⁸¹ In the Whirinaki district, too, Ngati Whare were ‘dependent on pigs and deer for food.’⁵⁸² By the beginning of the 1960s, the Maungapohatu, Ruatahuna, and Waimana communities were described to the commissioner of Crown lands as having ‘come to depend on pork and venison.’⁵⁸³

Mrs Paku told us that venison was also a part of the diet at Tuai in the 1940s and 1950s, along with trout, pikopiko, wild pork, puha, eels, and kanga pirau (rotten corn).⁵⁸⁴ Des Renata explained that food was ‘the main topic of conversation in the community’, and the ability to ‘grow, catch, and preserve food was the most

573. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), p1708

574. Tuawhenua Research Team, ‘Ruatahuna, Part 2’ (doc D2), p 233

575. Certifying officer to commissioner of unemployment, 29 January 1935 (Tuawhenua Research Team, ‘Ruatahuna, Part 2’ (doc D2), p 275)

576. Tuawhenua Research Team, ‘Ruatahuna, Part 2’ (doc D2), p 275

577. *Ibid*, p 389

578. Binney, ‘Maungapohatu Revisited’ (doc A128), p 363

579. Korotau Tamiana, 18 February 2002 (Tuawhenua Research Team, ‘Ruatahuna, Part 2’ (doc D2), pp 388–389)

580. Hohua, brief of evidence (doc F32), p 4

581. Tuawhenua Research Team, ‘Ruatahuna, Part 2’ (doc D2), p 385

582. Douglas Rewi, brief of evidence, September 2004 (doc G37), p 5

583. MC Bollinger to commissioner of Crown lands, Hamilton, 11 January 1962 (Campbell, ‘Te Urewera National Park’ (doc A60), pp 140–141)

584. Paku, brief of evidence (doc H37), pp 3, 10

Report of MC Bollinger to the Commissioner of Crown Lands, 1962

In a report to the Hamilton commissioner of Crown lands, MC Bollinger described how the Maori communities of Te Urewera had come to depend on venison by the 1950s, and how the move to serious culling of deer as pests was thus seen as a threat to their interests:

I have drawn the attention of the Forestry Service to the need for better public relations with the Maori residents regarding the deer extermination campaign, and I would like to put the same point to you.

The three families at Maungapohatu, many of the people at Ruatahuna, and the people in the Waimana Valley have come to depend on pork and venison, and the sale of deer skins as part of their livelihood. They see the building of huts [to accommodate professional cullers] as the beginning of a campaign to deprive them of these things, and resent it fiercely. . . . I feel you cannot just ignore the Maori people in this, and while I agree wholeheartedly with the extermination policy regarding deer, I would urge that you make allies of the local folk as far as possible before doing anything to alienate their good will.¹

1. MC Bollinger to commissioner of Crown lands, Hamilton, 11 January 1962 (SKL Campbell, comp, supporting papers to 'Urewera Overview, Project Four: Te Urewera National Park, 1952-75', 2 vols, various dates (doc A60(b)), vol 2, p265)

important subject that was impressed upon me'. Growing up at Waikaremoana in the 1940s, hunting for pigs and deer was 'our livelihood'.⁵⁸⁵

It seems clear, therefore, that the introduction of deer did augment the food supplies of the peoples of Te Urewera in a very significant way, despite the Crown's restrictions on hunting. Under the heading 'survival', Noera Tamiana explained that development scheme farming at Ruatahuna in the 1940s and 1950s had to be supplemented by hunting: his father would go twice a week for pigs and deer, and his mother would fish the river for eels, without which the whanau could not survive.⁵⁸⁶ Thus, when outsiders began culling deer in the inquiry district, it seemed that a new threat to the food supply had materialised.⁵⁸⁷

Hutton and Neumann, however, add a note of caution, arguing that the addition of deer to the food supply was of 'dubious value' because, 'while providing an

585. Desmond Renata, brief of evidence, 22 November 2004 (doc 124), p6

586. Tamiana, brief of evidence (doc D15), p5

587. Rewi, brief of evidence (doc G37), p5; Colquhoun, brief of evidence (doc H55), pp3-4; Campbell, 'Te Urewera National Park' (doc A60), p140

additional source of protein, [it] had devastating effects on the forest ecosystem.⁵⁸⁸ In their view,

once Maori harvesting rights were curtailed, Maori such as [those of] Te Urewera, who had depended on kereru as a food source, suffered the consequences. The Crown made no attempt to provide an alternative food source specifically to replace kereru (the liberation of deer can hardly be construed as a compensatory measure!)⁵⁸⁹

As we saw in chapter 16, deer certainly became a major threat to the environment of Te Urewera in the second half of the twentieth century. Yet, as Stokes, Milroy, and Melbourne observed, deer were a ‘welcome additional source of meat.’⁵⁹⁰ Along with horses, pigs, and dogs, deer were ‘incorporated into the culture and life style of Te Urewera people’ to such an extent that, ‘by virtue of time [they] can be included as “traditional” elements of modern Te Urewera culture.’⁵⁹¹ As we discussed in section 21.3, rules were soon developed for the communities’ conservation and use of these wild resources. At Murupara in the 1940s, the produce from deer stalking and pig hunting was shared around the community, which also took a communal approach to the planting and use of gardens.⁵⁹² At Ruatahuna in the 1940s and 1950s:

We did these things to be able to survive. But we were all conservationists. You were still only allowed to shoot what you were able to use, that was roughly not more than 2 deer. With wild pigs, we had a policy that if you caught more than you needed you could mark them, castrate them and let them go to catch next time. We had no storage like a refrigerator anyway. It was frowned upon if you caught more than you needed, or more than you could give away to other families. The old lady was an expert at preserving meat, miti tahu, which we kept in tins for leaner times. All the other families at Ohau did these things too to survive.⁵⁹³

One advantage of deer in this respect was that they were not customarily restricted to particular seasons but could be hunted all year round.⁵⁹⁴

Maori and the Crown faced a dilemma by the 1940s. Recently deprived of all regular use of the native birds which had formed such a staple food, the peoples of Te Urewera came to depend on introduced animals – which then turned out to be very harmful to the forest (and thus even more intolerable in the new national park after 1954). The Crown could have made this dilemma less painful by entrusting the culling of deer to the local peoples, so that at least they obtained some benefit from the systematic reduction of their newest food supply. This places

588. Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 31

589. Ibid, p 804

590. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 355

591. Ibid, p 350

592. Hohua, brief of evidence (doc F32), p 4

593. Tamiana, brief of evidence (doc D20), p 6

594. Doherty, brief of evidence (doc D27), p 7

significant importance on the Crown's decision, for much of the period from the 1930s to the 1950s, to pay outsiders to cull deer. Given that the Native Department had urged the employment of Tuhoe for this work, and given that a new centre for deer control was established at Ruatahuna by the end of 1938 (which the Department evidently had difficulty staffing) we have to ask why the Government did not act on this advice, and why there is no evidence that any attempt was made to consult with tangata whenua.⁵⁹⁵ Witnesses agree that the Crown made little headway in reducing the deer population before 1954, so that we might conclude that the impact of the dilemma was therefore fairly muted before the establishment of the national park. But Tuhoe hunters might well have made a significant difference to the success of the culling programme earlier. We have already dealt with the post-1954 consequences of introducing (and then seeking to eradicate) deer in chapter 16, and the economic opportunity that hunting deer for that purpose provided Maori during the national park era. Tuhoe began to see deer as harmful pests more than as a food source,⁵⁹⁶ although venison is still an important part of the diet for some whanau.

21.7.4.6 *Possums*

The first confirmed release of possums in Te Urewera occurred in 1898. The Wellington Acclimatisation Society supplied the animals, Lands and Survey organised their storage, transit, and release, and roadworkers undertook the actual liberation of the animals. James Carroll was involved in making arrangements for this liberation. It is possible that Carroll was motivated by a desire to provide a fur industry to assist the peoples of Te Urewera, but Dr Coombes has not found evidence of consultation with Te Urewera leaders over the introduction.⁵⁹⁷ As Sonny Biddle told us, Tuhoe see possums as 'uninvited pests.'⁵⁹⁸ Subsequent confirmed possum liberations in or near Te Urewera were predominantly the work of the Tourist and Health Resorts Department.⁵⁹⁹ As possums were valued for their fur, not as food, it is difficult to see any way in which the UDNR negotiations could be seen as relevant to – or permission for – these releases.

The colonial secretary had had inquiries made about possums in Australia a few years before their introduction to Te Urewera, following complaints of possum damage to orchards. The replies did not indicate a need for serious concern, though the New Zealand situation lacked comparable predators. There was 'no vociferous opposition' to liberating possums in nineteenth- and early twentieth-century New Zealand.⁶⁰⁰ The opposition of orchardists, however, continued. From 1912, protection of possums was inconsistently removed and reimposed. Internal Affairs officially opposed further liberations from 1915. Subsequently, the

595. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 325–326

596. Korotau Basil Tamiana, brief of evidence, 21 June 2004 (doc E11), p 3; Jack Te Piki Hemi Kanuehi Te Waara, brief of evidence, 21 June 2004 (doc E23(a)), pp 2, 4

597. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 86–88

598. Te Kiato Sonny Biddle, brief of evidence, 10 December 2003 (doc B25), p 2

599. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 86–88

600. Ibid, pp 85–86; Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 796



Possum with a kereru egg. Possums were likely first released in Te Urewera in 1898 through the Wellington Acclimatisation Society and the Department of Lands and Survey. Subsequently, the Tourist and Health Resorts Department was mainly responsible for liberations. Despite the damage possums wrought on the forest environment and birdlife in Te Urewera, their protected status was not completely removed until 1947.

Forest and Bird Protection Society, the New Zealand Fruitgrowers' Federation, the Auckland Institute and Museum, the New Zealand Horticultural Society, the New Zealand Forestry League, and the Royal Society of New Zealand criticised possums as environmentally harmful. Some acclimatisation societies, however, wanted them protected. They were seen as a source of fur and employment for trappers.⁶⁰¹

The Government departments involved were slow to adopt a whole-hearted and consistent opposition to the possum. The Forest Service long concurred with the view of Dr Leonard Cockayne, a key departmental scientist, that possums did negligible damage to forests. After the Internal Affairs Department called for research, Professor HB Kirk undertook it through the New Zealand Institute. His results were generally favourable towards the possum. This seems to have made more impression on Internal Affairs than his one reservation, which related to the effect of the possum as a competitor with some indigenous birds. He therefore recommended that possums be exterminated from bird sanctuaries. The department relied on his studies as support for its opposition to further possum importations,

601. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 124–128, 299–300, 302

but did not see them as justifying a policy of reducing possum numbers.⁶⁰² Kirk's recommendation, if applied to the Waikaremoana sanctuary, might have produced useful reductions in the possum population in Te Urewera. Nevertheless, given the positions of Kirk and Cockayne, it is understandable, if highly regrettable in hindsight, that the Crown did not take large-scale, decisive action earlier against the possum.

Instead, open seasons on possums under the Animals Protection and Game Act 1921–22 were declared only erratically in the 1920s and 1930s, although more consistently after 1933. It was only in the 1940s that a full interdepartmental consensus appeared on the need for firm action against possums, over and above fostering the fur industry that had led to the trapping of some possums in the area. Government deer destruction teams gave some attention to possum control from 1940, but on a very small scale. Protection for possums was not completely removed until 1947.⁶⁰³ During the 1950s, a possum bounty scheme operated. It was more successful in remote areas because skins did not have to be recovered, but Maori participation was hampered by a lack of publicity and the preference given to full-time trappers. The scheme ceased in 1961, partly for financial reasons, but also because Internal Affairs and Forest Service scientists considered that the primary way to control possums was to control the deer population. This turned out to be fallacious, and demonstrates how insufficient attention to research related to management and control of introduced fauna has caused significant problems in Te Urewera.⁶⁰⁴

21.7.4.7 *Other introduced food sources*

Trout, deer, and possums were the most significant acclimatisations that took place in Te Urewera in the late nineteenth and early twentieth centuries. There were, however, some others. Seddon's memorandum also mentioned the possible introduction of 'English birds'. Birds, however, were only introduced on a minor scale, and we lack evidence that they supplemented Maori food supplies to any appreciable degree.⁶⁰⁵ James Cowan stated that Maori initially welcomed the arrival of the flock of goats delivered by Carroll around 1905 as a source of fibre and food, but were later suspicious about these.⁶⁰⁶ Goats, a less significant introduction, had 'staunch supporters and staunch opponents' in Te Urewera.⁶⁰⁷ There is a good deal of evidence about Maori food supplies in the crucial period when consumption of kereru declined (the 1930s onwards), some of it from kaumatua and kuia who gave evidence in our inquiry. None of the evidence refers to goat meat as part of

602. Ibid, pp 300–302

603. Ibid, pp 302–310

604. Ibid, pp 331–336; Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 798

605. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 66; Doig, 'Te Urewera Waterways' (doc A75), p 144

606. J Cowan, 'The Illustrious Goats of Ruatoki', pp 74, 76, 80 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 76–77)

607. Brad Coombes, under cross-examination by counsel for Nga Rauru o Nga Potiki, Rangiahua Marae, Frasertown, 2 December 2004 (transcript 4.12, pp 235–236)

the food supply. It is, therefore, unlikely that either introduced birds or wild goats supplemented Maori food supplies in a significant way.

21.7.4.8 What was the impact of introduced species?

One type of impact that Crown control and management of exotic species has had on the peoples of Te Urewera is indirect, although very significant. This is the damage that has been inflicted on forests and on fauna in the forests and waterways by the various introduced animals. Introduced mammals have reduced the forest biomass and forest biodiversity. Deer are more markedly present in the upland parts of the inquiry district, while possums are spread more widely in the forests of Te Urewera. Both deer and possums, however, have affected a large number of species through their browsing, while deer have done further damage by antler rubbing and bark-chewing. Deer also spread ragwort seeds. Some plant species have been affected more than others, and this has changed the pattern of prevalence of species. Other introduced species that have done some damage to Te Urewera forests are goats, pigs, and cattle.⁶⁰⁸

The activities of all these animals have adversely affected the habitat and food sources of indigenous birds. Furthermore, possums sometimes eat eggs, nestlings, and adults from a range of bird species, including kiwi, fantail, kokako, and kahu.⁶⁰⁹ Cats and (European) rats eat indigenous birds. Stoats, weasels, and ferrets also eat indigenous birds, chicks in nests, and eggs.⁶¹⁰ Trout have caused great damage to indigenous fisheries, as the Crown has conceded (see above).⁶¹¹

The need to keep forest cover to prevent erosion and flooding downstream has been presented to Te Urewera communities for many years as an important reason to curtail their rights to remove headwater forest (see chapter 18). While there is some debate as to the extent to which habitat changes caused by introduced browsing mammals have contributed to the development of severe erosion, there is much less debate that the activities of browsing animals accelerate erosion, and prolong it by delaying the recovery of the forest cover.⁶¹²

This range of effects of introduced animals over many decades has effectively reduced the population of various indigenous birds and fish, making it more difficult for the peoples of Te Urewera to access them. The introduction of legislation designed to foster the interests of Pakeha sportspeople, tourists, and those committed to conservation in the form of absolute preservation has created further difficulties for the peoples of Te Urewera. Not only have they been deprived of significant sources of food and materials for arts such as weaving, they have also lost access to species needed to provide prized foods to honour manuhiri in the traditional way, and to the knowledge that goes with customary harvesting.

608. Walzl, 'Waikaremoana' (doc A73), p 279; Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 11, 284–289, 296, 312, 315–316, 328

609. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 285

610. Ibid, pp 11, 235, 265, 292

611. Doig, 'Te Urewera Waterways' (doc A75), p 146

612. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), pp 285–289

21.7.5 Did the Crown honour the 1895 agreement?

21.7.5.1 Did the Crown give effect to the 'ecological logic' of the 1895 agreement?

Having assessed the evidence and issues in respect of native and introduced species, we are now in a position to determine whether the Crown honoured the 1895 agreement.

As Dr Coombes set out in his evidence, there was an 'ecological logic' to the 1895 agreement. The Crown promised that the forests and birds of Te Urewera peoples would be 'suitably protected',⁶¹³ and recognised 'their rights to taking game [native birds] for food'.⁶¹⁴ The form of protection was to be a self-governing Maori reserve, set aside and protected by an Act of Parliament. Powers of local self-government were to be exercised by hapu committees, with a General Committee to determine matters for the Reserve at a central level, and to act as an organ for dialogue with the Government. At the same time, the Crown undertook to augment the food supplies of the peoples of Te Urewera. As part of this general undertaking, it was understood that English birds and fish would be introduced to the Reserve, but the only specific undertaking was to provide trout for the peoples of Te Urewera to release and manage.

In respect of the forests and the birds, the Crown acknowledged Maori possession of both, and promised to protect both. That, in our view, was appropriate. To the peoples of Te Urewera, the forest was a living forest, the world that Tane Mahuta created, with its trees, insects, birds, and animals, each with its own mauri. Their old people were responsible for protecting the forest, for managing it in accordance with tikanga, based on the kaitiakitanga relationship. Just as rivers sustained their fisheries, so the forests sustained their birds. The Crown's undertaking to protect the customary laws and practices of the Reserve's peoples in relation to the forest and its birds was also appropriate. It included the right to continue taking birds for food. Nationally, the Crown became determined to carry out two mutually exclusive policies: the clearance of as much land as possible for farming, no matter how marginal; and the preservation of (almost) all native bird species. Unwilling or unable to stop deforestation, the Crown's chosen policy was to restrict and finally ban the hunting of native birds instead. Nonetheless, for a quarter of a century (from 1895 to 1921), the law gave the Government discretion to allow Maori to hunt kereru in Te Urewera and other 'native districts'. Although this discretion was available in theory, it was seldom exercised (and never after 1911).

It is simply impossible for us to judge retrospectively whether or how seriously the native bird populations were declining in Te Urewera before 1954, or whether Maori hunting for food was a factor in any decline. We noted that the Government had other alternatives available to it for the preservation of native birds:

613. See Seddon to 'the persons who came hither to represent Tuhoē', 25 September 1895, Urewera District Native Reserve Act 1896, sch 2

614. J Carroll, margin comments on T Donne to Minister, Tourist Department, 15 September 1902 (Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p 68)

- ▶ strategic forest reserves to preserve a minimum of the habitat necessary for native birds;
- ▶ reservation of more berry-bearing trees in State forests, which the Wildlife Branch believed was feasible; and
- ▶ continuing to ban Pakeha sport but allowing Maori harvests in districts where it was shown to be sustainable (which was officially the policy until 1922).

It is difficult for us to sympathise today with the Crown's choice to ban all hunting, when the governments of the day clearly knew that destruction of habitat was the primary cause of the decline of native birds. We noted earlier the fatalistic position of the Internal Affairs Minister in 1917, that birds should be preserved in the meantime until all their forest habitat was gone. Not only did the Crown not halt deforestation, it actively promoted it, even where land was marginal for farming at best. Only the prospect of catastrophic erosion and flooding saved the Te Urewera forests from clearance. Further, the Crown's criminalising of such a culturally important product as huahua (from 1903 to 1910) and of customary trapping methods shows how little real influence Maori were able to wield in Parliament. Neither of these things had really been the target of the legislation concerned, yet Maori were unable to reverse the prohibition on huahua until 1910, ironically the year before the final legal harvest of kereru was permitted in Te Urewera. The Crown was careless of or indifferent to Maori interests in their native birds and traditional foods, even when its intention had been to retain the discretion to allow cultural harvests in Te Urewera.

In one sense, it could be argued that the Crown's restriction and then absolute prohibition of hunting was a response to Te Urewera leaders' request that their birds be 'suitably protected', if it saved the birds from extinction. Similarly, the decision in the 1930s to preserve Te Urewera forests for soil and water conservation, even though it was mainly to protect lower lying farmland, offered a form of protection. There is some truth to this perspective. As we have said, there is no way for us to judge the sustainability of harvesting in Te Urewera at the time.

Banning Pakeha hunting of native birds was certainly consistent with the 1895 agreement, since it did not seriously interfere with the promised tourism. But the peoples of Te Urewera, with their intimate knowledge of the district and its bird life, did not believe that their own hunting – strictly controlled by customary law – was a threat to kereru or other species. Customary law, moreover, provided for rapid local response to changing situations, such as a bad season. They sought exemptions, as allowed by the law, but were denied them after 1911 because the Department of Internal Affairs adopted a blanket approach of refusing all exemptions. From 1922, the whole system of exemptions was abolished and all harvesting of kereru, kaka, and pukeko was criminalised. All of the changes to the law – banning the making and storage of huahua, banning traditional trapping methods, and finally banning hunting altogether – were enacted without consultation with Maori generally, let alone with Te Urewera leaders. This was especially important

when the specific Te Urewera exemption was removed from the Animals Protection Acts in 1922, without either the consultation of or the agreement of the peoples of Te Urewera.

Thus, without consultation or agreement, the Crown abolished a right that it had acknowledged and promised to protect in 1895–96: the right of the peoples of Te Urewera to take native birds for food, in accordance with their customary law and within their protected Native Reserve. Carroll had reminded his colleagues of this acknowledged right and the need to respect it in 1902 (though without actually taking effective action to do so in the Waikaremoana game reserve). By 1922, however, Carroll was no longer in office, the UDNR had been destroyed by Crown purchasing of individual interests, and the Government was planning a mass clearance of forest (and birds) in Te Urewera for pastoral farming. The year 1922, with its repeal of the UDNR Act, represented a nadir in Crown–Maori relations in the former Native Reserve.

In 1902, Carroll had couched his objection to restricting Maori hunting rights in the following terms: ‘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 rights to kill game for food.’⁶¹⁵ A key issue, therefore, is whether the Crown kept this ‘condition’ of the 1895 agreement. The condition as stated by Carroll had two parts. Clearly, as we have just shown, the Crown failed to keep the second part: that the Government would ‘not exclude it [their food supply] from them.’ Arguably, the Crown’s justification for this by the 1920s – the preservation of native birds from extinction – would have carried more weight if the Crown had also done more to reserve strategic forest habitats (and miro trees within forests) from destruction. As we have seen, it did not do so in the State forests which dominated some of the Te Urewera rim blocks before 1954. But it did abandon plans to clear 370,000 acres of UDNR forest, which would have had an incredibly destructive effect on the native birds of the district. At the same time, as we discussed in chapter 18, the Crown tried very hard before 1954 to prevent the peoples of Te Urewera from clearing their own, scattered pieces of land for farming or exotic forestry, so as to protect Lake Waikaremoana and Bay of Plenty farmlands.

Thus, the peoples of Te Urewera continued to live in a forest environment, despite the purchase of so much land by the Crown. As Rose Pere observed, this was very important to them:

A conservationist at heart, I am very grateful that the Urewera bush, the ancestral home of the Tuhoe people, is still intact. The bush clad ranges, the mist, the smell of the undergrowth, the company of birds and insects, Panekire – the majestic bluff that

615. Native Minister, minute on memorandum of 15 September 1902 to Minister of Tourist and Health Resorts (Walzl, ‘Waikaremoana’ (doc A73), p102)

stands sentinel over the tranquil or sometimes turbulent waters of Waikaremoana – all give me a strong sense of identity and purpose to life.⁶¹⁶

The next question is whether the Crown acted as promised to keep the first part of the condition as stated by Carroll above. Did it augment the food supply of the peoples of Te Urewera, and provide them with new or increased sources of food in their forests? This would have been expected under the agreement, even if the Crown had not acted to criminalise the use of an important food (native birds) and thus actively *decreased* the food supply.

As we have seen, goats were the only animals introduced by the Crown solely for the purpose of augmenting Maori food supplies. From the evidence available to us, which included the oral evidence of kaumatua and kuia who grew up in Te Urewera from the 1920s to the 1950s, goats did not figure as a food source. Trout and deer were introduced with the dual purpose of sport/tourism and to augment the food supply. As we have seen, *legal* access to these species was quite restricted but they were extensively taken for food regardless. Deer was probably the most important in terms of staples (as well as pigs, which were established in Te Urewera many decades earlier), but there is evidence to show that trout was a significant source of food as well. Both of these new food species came with drawbacks. As discussed, trout had the most negative effect on Maori food supplies. These exotic fish reduced the supply of native fish. Even tuna, the most vital indigenous fish for consumption and for feeding manuhiri, were affected once the Crown began culling them in the 1950s to protect trout.

Nonetheless, the Crown's introduction of deer and trout did provide new food sources, as promised. Without 'liv[ing] off the land' in the 1940s, Sarah Hohua told us, namely without access to wild pork, venison, tuna, and trout, 'we would starve.'⁶¹⁷ By the time of the Second World War, when native birds could no longer be utilised as an important food source, introduced species had come to dominate forest hunting. Plant foods were still gathered, and maara kai (gardens) provided the other staple food, the potato.⁶¹⁸

The only other direct Government assistance in respect of food supplies was the farm development schemes, which we described in chapter 18. These did not really get under way until the 1930s, long after the 1895 agreement. They provided much-needed income for communities during their establishment phase before the Second World War, and for unit occupiers after that. Development scheme loans had to be repaid, of course, and the income was not enough for unit occupiers to farm full-time (see chapter 18). Korotau Tamiana farmed with his father at Ohaua, near Ruatahuna, during the 1940s and 1950s. He explained:

616. Rangimarie Rose Pere, 'Taku Taha Maori: My Maoriness', in *He Matapuna – A Source: Some Maori Perspectives* (Wellington: New Zealand Planning Council, 1979), pp 23–25 (Ngahua Te Awekotuku and Linda Waimarie Nikora, 'Nga Taonga o Te Urewera' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc B6), p 24)

617. Hohua, brief of evidence (doc F32), p 4

618. *Ibid*

Living at Ohau was hard but we never starved. Mum and Dad were good providers, they taught you the basics of survival as soon as you could walk. Food was the basis of survival. We had to hunt to survive. We would go eeling and hunt pigs and deer. We also had the berries of the bush and kotukutuku (cherry laurel) trees growing there, and our fruit trees. We also raised pigs for our own use, as did others at Ohau.⁶¹⁹

The farm schemes did occasionally provide mutton and beef for consumption but this source of meat was never anywhere near as important as wild pork and venison. When there was income from part-time farming, seasonal work outside the rohe, and early forestry work, it was spent on tea, flour, and other provisions. Flour became a staple (when it could be obtained) and was used for making bread and damper. It was not until the second half of the twentieth century, however, that store-bought food became the main component of the diet of Maori communities in Te Urewera.

As we discussed earlier, the value of the introduced food species has been seen as 'dubious' because of their environmental impacts on the forests and waterways of Te Urewera. Also, it is impossible to determine the extent to which a species like trout increased food supplies overall, given its reduction of native fisheries. The importance of adding deer as a food source, however, is beyond dispute. If deer had been introduced without banning access to native birds, it would certainly have augmented the food supply overall. As it was, the timing was fortuitous. Deer populations increased in the 1920s to the point where venison could help fill the gap once hunting of native birds was greatly reduced in practice from the 1930s. Quantification is impossible, of course, but there was still hunger and poverty in Te Urewera by 1950. It is not clear whether the addition of venison and trout, with the subtraction of native birds and of some indigenous fish, increased the food supply overall. It is impossible to be certain. One worrying aspect was that Maori at Maungapohatu, Ruatahuna, and in the Waimana Valley had 'come to depend on pork and venison' and the sale of deer skins by the early 1960s, as a report to the commissioner of Crown lands at Hamilton stated,⁶²⁰ and these very food sources were themselves about to come under serious attack after the establishment of the national park.

This brings us to an important, related issue: how these species were managed, and who made the decisions about them.

As we found in chapter 13, the Crown failed to give effect to its promise of tribal self-government in the UDNR. In respect of the 'mainstream' laws that governed wildlife, the Crown conceded in our inquiry that Seddon may have intended the General Committee to have 'some role within the Reserve in terms of implementing mainstream legislation, but this was not developed further.'⁶²¹ The failure to

619. Tamiana, brief of evidence (doc D20), p 6

620. MC Bollinger to commissioner of Crown lands, Hamilton, 11 January 1962 (Campbell, 'Te Urewera National Park' (doc A60), p 140)

621. Crown counsel, closing submissions (doc N20), topic 29, p 10

establish the General Committee in a timely or effective fashion dealt a serious blow to the ability of the peoples of Te Urewera to establish formal licensing arrangements for indigenous or introduced species, or to negotiate with the Government about birding restrictions and other vital matters. As a result, there was no institutional structure to bridge the two systems of law that now operated in the Reserve. The two systems continued side by side, occasionally intersecting – usually in the prosecution of ‘poachers’ in the courts, which began in the 1930s.

As we have seen, the Crown criminalised all hunting of kereru from 1912 onwards but did not really attempt to enforce its law in Te Urewera until 1931. Up until that time, the customary system of hunting seems to have continued, relying on its traditional mechanisms to conserve the bird resource. In 1932, Te Urewera leaders protested the Crown’s law by way of petitions, without success. The option of handing over the management of kereru to Te Urewera leaders for sustainable harvest was raised again after 1922 but not seriously considered by the Crown.

Introduced species were incorporated in the customary economy, and the peoples of Te Urewera managed their own use of these species according to traditional conservation methods, adapted to the new circumstances. Before the establishment of the national park, the Crown did not regulate the hunting of wild pigs. Others’ use of deer and trout was managed by the Crown’s rules for sport and tourism, involving payment for hunting and fishing licences. Legally, these same rules applied to the peoples of Te Urewera, but the law seems to have been irregularly enforced before the establishment of the national park. Outside of the game reserves, once deer were no longer protected Maori communities could hunt deer on their own lands without a licence. In essence, the peoples of Te Urewera managed their own use of the introduced species with infrequent interference from the Crown, but this system came under serious threat once the national park was established in 1954.

21.7.5.2 What was the impact of the Crown’s failure to honour the 1895 agreement?

In his evidence for the claimants, Professor Murton introduced the concept of ‘biological poverty’, which relates to ‘the nutritional requirements of survival and work efficiency, and which involves absolute deprivation, starvation, hunger and related diseases.’⁶²² The most direct cause of this form of poverty was the denial of access to biological resources, which was one effect of ‘legislatively curtailing Tuhoë access to indigenous birds’. Hunting was a matter of survival at the time, and birds were a significant food.⁶²³

In chapter 23, we will explore the socio-economic conditions of the peoples of Te Urewera in this period, and examine the causes and effects of their poverty. Here, we note that the Crown directly deprived the peoples of Te Urewera of a prized and important food in the national interest, and without agreement or compensation. The full effects were delayed until after 1930, when the Crown began

622. Murton, summary of evidence (doc H1), p 2

623. Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), pp 866–873

to enforce the Animals Protection and Game Act 1921–22. This had the effect of drastically reducing the role that native birds played in Maori communities' food supplies. While some birds continued to be taken for important cultural events, this was relatively small in scale.

The introduction of trout did not help matters much because it reduced supplies of native fish species. Fortunately, deer were present in sufficient numbers to become a new staple in the 1930s to 1950s, alongside wild pork, tuna, and potatoes. But survival, we were told, and the staving off of starvation, now depended on species which harmed the biodiversity of Te Urewera. These very species were about to come under serious attack as pests after the establishment of the national park in 1954. This was an invidious situation for the peoples of Te Urewera.

The Crown's actions had mixed effects on the conservation of native birds, which both parties agreed was a vital object. Legislation brought an end to commercial hunting and the shooting of birds by outsiders (to the extent that outside poachers did not defy the law). In our view, this ban on hunting must have helped preserve these highly valuable indigenous species although, as we have said, we lack specific evidence as to whether cultural harvesting was sustainable in Te Urewera in the period under review. We note, however, that it continued until the 1930s without obvious ill effects. In 1935, for example, Galvin and Dun had reported that kereru were still 'numerous' in Te Urewera.⁶²⁴ Other evidence supports their observations.

Where the Crown failed most, perhaps, in respect of native birds, was its refusal to accept evidence that possums, stoats, and other introduced animals were a significant threat to native birds and their habitat, or take timely action against them. We came to the conclusion that, though very regrettable, there was sufficient doubt among the experts to explain some of the delays that occurred. In the case of stoats and deer, this is harder to accept. There was plenty of settler opposition before the fact to the introduction of mustelids to New Zealand, on the grounds of the damage they would inflict on native birds. There were plenty of settler complaints in the years immediately following their release, about the damage that had been inflicted. And there was enough evidence in the case of deer – even if it was not unanimously accepted by departments – that the Government should have been considerably more active in embarking on pre-emptive measures to limit their population spread. Dr Coombes conceded that possums and possibly deer would have colonised Te Urewera if the Crown had not introduced them (or facilitated their introduction). But, he said, it would have been significantly later and with 'effects which may have been more manageable.'⁶²⁵

Overall, the effect of the Crown's actions was to deprive the peoples of Te Urewera of a significant food at a time when Maori communities throughout the district were struggling to survive. Poverty and hunger were exacerbated, and cultural survival (in terms of customary practices and knowledge) put at risk. The

624. Galvin and Dun, 'Report . . . on the Urewera Forest', 29 April 1935 (Hutton and Neumann, supporting papers to 'Ngati Whare and the Crown' (doc A28(a)), p 15)

625. Brad Coombes, responses to questions in writing from Crown counsel, no date (doc 136), p 2

new food sources supplied by the Crown were of doubtful utility, certainly from a long-term perspective. Trout reduced indigenous fish supplies. Deer became a new and much-needed staple but did great damage to the forest.

We need to consider the post-1954 situation briefly in order to assess the degree of prejudice. By the time the national park was established in 1954, Maori communities were known to have become dependent on introduced 'pests' for food, especially deer and wild pigs. The reoriented customary economy thus came under a new and significant threat while the people were still adjusting to the prohibition on hunting of native birds.

We addressed the post-1954 situation in the national park in chapter 16, and we consider the socio-economic position further in chapter 23. We note here that, from the evidence of Professor Murton, the 'food crises' of the 'late nineteenth century and first half of the twentieth century', in which 'many people suffered from under-nutrition and malnutrition, at times even starvation', were not repeated in the second half of the twentieth century. Forestry employment, the welfare state, and other factors meant that less food needed to be grown, hunted, or gathered. According to Professor Murton, the dependence on wild foods was replaced to a significant extent by store-bought food.⁶²⁶ This is important context for our findings below. The Crown's introduction of deer thus proved a well-timed buffer for food supplies in the crucial decades of the 1930s to the 1950s, before the serious culling of deer commenced and the Maori dependence on wild foods coincidentally declined. We cannot, however, avoid the conclusion that, purely from a point of view of survival, the peoples of Te Urewera would have fared better in those decades if they had had venison *as well as*, not *instead of*, kereru and other birds to rely on.

21.7.6 Post-script: should cultural harvesting of kereru be decriminalised?

21.7.6.1 Introduction

In chapter 16, we addressed matters particular to Te Urewera National Park, as governed by the National Parks Act. At the time of writing, cultural harvesting was permitted in Te Urewera National Park under that legislation, at the Crown's discretion, provided that the plants or animals were not protected under other legislation and the demands were not 'excessive'. We did not consider the cultural harvesting of kereru, which is prohibited under a different Act altogether: the Wildlife Act 1953. There was no discretion to permit cultural harvesting in the national park (or anywhere else). In their submissions to us, the claimants pointed to the alternative arrangements adopted in the South Island for titi, and argued that the time had come to re-examine the necessity of the absolute prohibition on the hunting of kereru in Te Urewera. The Crown, however, argued that current kereru populations were not strong enough to permit the resumption of harvesting at this stage.

626. Murton, summary of evidence (doc 11), p 46

21.7.6.2 *The claimants' position*

In the claimants' view, 'the Crown's failure to recognise Tuhoe's right to cultural harvests is inconsistent with the Treaty guarantees contained [in] Article 2.'⁶²⁷ Counsel for Wai 36 Tuhoe submitted that the Crown's sovereignty is not absolute but is qualified by the requirement for it to protect the rights guaranteed in article 2. The Crown may breach those rights only where:

- ▶ the action is 'taken in exceptional circumstances and as a last resort in the National interest';
- ▶ the Crown has first consulted Tuhoe to ensure that their interests are not harmed more than is absolutely necessary to protect the resource.⁶²⁸

In the claimants' view, this test cannot be met simply because a proposed Crown action is in the public interest, or is justified by 'reasons of convenience or economy'.⁶²⁹

The Crown, they said, has provided no evidence that the prohibition on the harvesting of kereru meets this Treaty test. Rather, the DOC witnesses conceded that the Crown 'has no current data on kereru numbers within Te Urewera', but, on the basis of DOC's observations, a harvest of one bird per year could be sustained 'without adverse effect'.⁶³⁰ In claimant counsel's submissions, this means that the Crown itself accepts that an absolute prohibition is no longer required in principle, even if (in the absence of research data) DOC believes that the size of the harvest would be very small. In addition, there has been no consultation with Tuhoe on this matter.

Counsel concluded that the Crown now needs to re-evaluate both its current position and its past behaviour:

The Crown has not presented any biological evidence that justifies the continuation of any interference with Tuhoe's cultural harvests within Te Urewera. The Crown's failure to consult Tuhoe in respect of absolute prohibition as a conservation measure is a continuing one; Tuhoe continue to be denied the opportunity to identify less 'extreme' approaches to conservation that may have preserved both the natural resources of Te Urewera and Tuhoe's tino rangatiratanga.⁶³¹

21.7.6.3 *The Crown's position*

The Crown interpreted the evidence of the DOC witnesses quite differently. In the Crown's view, the absolute prohibition on harvesting was still appropriate for Te Urewera. Crown counsel pointed to three pieces of evidence in support of this proposition:

- ▶ the New Zealand Conservation Authority's review of the issue in the

627. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 198

628. Ibid, pp 198–199

629. Ibid, p 199

630. Ibid

631. Ibid

mid-1990s, which concluded that kereru populations were not strong enough to allow for cultural harvesting;

- ▶ Mr Williamson's confirmation of this point under cross-examination; and
- ▶ Dr Coombes' research, which showed that Maori spokespeople interviewed by him 'recognised this [point] to some extent'.⁶³²

The Crown concluded that it would be in breach of its obligation to 'conserve natural resources in the interests of all New Zealanders', and of its duty to actively protect the natural resources important to the peoples of Te Urewera, if it allowed cultural harvesting to resume. In respect of consultation, the Crown submitted: 'If matters change, Urewera Maori will clearly be amongst those consulted', as having a greater interest than that of the general public.⁶³³

In respect of *how* matters might change, Crown counsel submitted:

The Crown is required to manage natural resources in the national interest, and must achieve a balance between use and preservation. If information and evidence indicates that sustainable use of specific resources is justifiable, the Crown may review its current policies. Kereru and other birds remain endangered, and no change is envisaged in the short term.⁶³⁴

21.7.6.4 *The claimants' reply to the Crown*

In reply submissions, counsel for Wai 36 Tuhoe disagreed with the Crown's evidence that the kereru population in Te Urewera was not strong enough to allow cultural harvesting. In respect of the New Zealand Conservation Authority's 1997 report, counsel submits that:

- ▶ the report is not on the record of inquiry and so the Tribunal should attach little weight to it, as there has been no opportunity to cross-examine the authors of 'the major evidential plank in the Crown's argument for the current prohibitions';
- ▶ the review is an interim report and discussion paper, not a final report or a 'statement of any fixed or final position of the NZCA on this issue';
- ▶ the review is based on a starting assumption that there is a continuing decline of indigenous birds, but no empirical evidence is provided, nor is this assumption tested;
- ▶ no empirical evidence is actually provided in support of the conclusion that there is no prospect of sustainable use for the foreseeable future; and
- ▶ the review 'is essentially a discussion of contemporary views in respect of customary harvests and is not evidence of kereru populations in Te Urewera or elsewhere'.⁶³⁵

Further, DOC witnesses conceded they had no current data on kereru populations within Te Urewera, and that there was no specific programme in place for

632. Crown counsel, closing submissions (doc N20), topic 29, p17

633. Ibid

634. Ibid, topic 40, p13

635. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), pp 36–37

the protection of kereru. From that evidence, counsel suggested that this 'lack of specific focus on kereru is strong evidence that populations (within Te Urewera) are no longer in decline.'⁶³⁶

21.7.6.5 Our view of the matter

As we see it, neither party had empirical evidence at the time of our hearings as to whether a cultural harvest of kereru was sustainable in Te Urewera. Nonetheless, the parties were not actually far apart at all in theory, regardless of how great the gulf may have been in practice.

The Crown conceded that the absolute prohibition on cultural harvests was not an end in itself; rather, it was the approach necessary at the time to balance use and preservation of the taonga. But the Crown also conceded that 'If information and evidence indicates that sustainable use of specific resources is justifiable, the Crown may review its current policies.' The claimants did not have such 'information and evidence' to hand in 2005, and neither did the Crown. We accept the claimants' submissions that the Crown lacked empirical data about the size of kereru populations in Te Urewera, whether those populations were in decline, and whether the populations were viable enough to sustain a cultural harvest (either small or large). DOC did not have that information, and nor did the Conservation Authority when it reviewed the issue in the mid-1990s. In the absence of such information, neither the claimants nor the Crown could be sure whether any kind or degree of cultural harvesting was sustainable.

It seems to us that obtaining the 'information and evidence' required by the Crown before it could review its policies was the obvious first step to making an informed decision. Without taking that step, in consultation with the peoples of Te Urewera, the Crown cannot be said to have made an informed decision to maintain its absolute prohibition of cultural harvesting in Te Urewera.

21.8 TREATY ANALYSIS, FINDINGS, AND RECOMMENDATION

21.8.1 The UDNR agreement

The 1895–96 UDNR agreement was no ordinary agreement. As we found in chapter 9, the negotiation of this agreement marked the true beginning of the Treaty relationship between the Crown and the peoples of Te Urewera, and was the point from which *each* partner owed Treaty duties to the other. Previously, the Treaty had taken effect from 1840 as a unilateral set of promises, binding on the Crown.

In 1895, the Crown and Maori agreed that the forests and birds of Te Urewera would be 'suitably protected'. But the form of protection agreed upon – a Maori-controlled reserve – was undermined and then destroyed by the Crown, which ultimately replaced it with a Pakeha-controlled park. This outcome was not consistent with any of the principles of the Treaty.

In particular, the promise of Maori self-government within the Reserve was broken. The ability of the peoples of Te Urewera to protect their lands, waterways, and

636. Ibid, p37

resources was drastically undermined. The right to take game for food (especially kereru), which was recognised in the 1895 agreement, was outlawed. The undertaking to augment Maori food supplies was only partly fulfilled. The understanding that Maori would have access to and management of new food species, beginning with exotic fish and birds, was neither fleshed out nor given proper effect. More generally, Maori law and authority in the governance of natural resources in the Reserve, and of its forest environment, was suppressed by that of the Crown. This was a bitter sequel to the promises of 1895.

We turn next to our more specific findings.

21.8.2 Cultural harvest of kereru

21.8.2.1 Was there a Treaty right?

As we have seen, Maori generally (including Te Urewera leaders) asserted their Treaty right to hunt kereru for food and to meet cultural obligations. The Crown gradually imposed legislative restrictions on this right from 1895 to 1922, when the right was outlawed altogether. Concerned that a Treaty defence might succeed in court, acclimatisation societies and the Internal Affairs Department sought a legal opinion from the Crown Law Office in 1917 as to the applicability of the Treaty. As discussed earlier, the Crown's lawyer argued that:

- ▶ the Animals Protection Act prevailed over the Treaty;
- ▶ a Treaty right had no force unless it was embodied in statute;
- ▶ the Animals Protection Act did not differentiate between Maori and Pakeha (and all were bound by it); and,
- ▶ in any case, the Treaty did not mention birds or hunting (unlike fisheries).

To this advice, Internal Affairs added its own interpretation that the 'Treaty of Waitangi has been modified by acts passed by Parliament in which there are representatives of the Maoris', and that 'the Animals Protection Act 1907 makes no distinction between Europeans and Maoris.'⁶³⁷ Governments relied explicitly on this position (and the legal opinion) to justify their ban on the cultural harvesting of kereru from the 1910s through to at least the 1930s.

We find the Crown Law Office's opinion in 1917 problematic for a number of reasons.

First, the animals protection laws acknowledged Maori and non-Maori as having different needs and interests until 1922, which meant that Maori rights could be protected and given effect under the exemption for Te Urewera and other 'native districts'. We do not think it is correct, therefore, to argue that all were treated equally and fairly once the exemption was removed and the law made no more distinctions between Pakeha and Maori. Nor was it fair to suggest that no Treaty breach could arise given this apparently equal treatment of both peoples.

Secondly, a Treaty right is binding on the honour of the Crown, regardless of whether it is embodied in statute. To rely on the fact that the Crown had not

637. H Pollen, Internal Affairs Department, memorandum, 13 June 1908, attached to Hapareta Rore Pukekohatu to James Carroll, Native Minister, 16 May 1908 (Feldman, supporting papers to 'Treaty Rights and Pigeon Poaching' (Wai 262 ROI, doc B8(a)), p 28)

legislated to protect the right, as a reason for disregarding that very right, was hardly consistent with the honour of the Crown.

On the question of whether a Treaty right did in fact exist, the Crown in 1917 relied solely on the English text of article 2, and considered that bird hunting was not included in the ‘full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties’. We cannot agree. Hunting for birds in their forests was a Maori customary right, akin to a property right, and its centrality to the Maori way of life was well known at the time the Treaty was made. Hunting was controlled by hapu as exclusively as rights to fishing or other resources in a tribal territory, and was a vital component of the forest resource that Maori possessed in 1840. The Treaty guarantee of possession of their forests must have included all those creatures within it – unless the forests were to fall silent, deprived of their communities of birds and insects whose habitat they provided. It must have included the authority that Maori customarily exercised over their forest. And the Maori text of the Treaty, which promised that the Crown would recognise and respect *te tino rangatiratanga o o ratou taonga katoa* must, in our view, have included a taonga of such importance as *kereru*, and Maori authority over how that taonga was to be managed and used.

We agree with the Chatham Islands Tribunal, which found:

Customary hunting practices are cognisable as rights in law. They are also cognisable under Treaty principles. The Maori Treaty text acknowledged that Maori had authority over all their prized possessions, unless that authority was freely relinquished. Moreover, the Treaty does not restrict users to traditional implements and craft. As with all people, there is a developmental right.⁶³⁸

Because, historically, the Treaty right to take birds had been so important to both physical and cultural survival and well-being, any restrictions were naturally of great concern in Treaty terms.⁶³⁹ Nonetheless, the Tribunal added: ‘We acknowledge a Treaty right to take, but equally we acknowledge that the Crown has a Treaty duty to preserve.’⁶⁴⁰

We turn next to the question of how the Treaty right to take *kereru* in Te Urewera was balanced against the Crown’s Treaty duty to conserve endangered species.

21.8.2.2 Has the Treaty right been breached?

In our inquiry, the Crown argued that its actions in restricting and then banning the hunting of *kereru* were undertaken in good faith, for the purpose of conserving the resource.⁶⁴¹ Crown counsel submitted:

638. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), p 264

639. *Ibid*, pp 264–273

640. *Ibid*, p 10

641. Crown counsel, closing submissions (doc N20), topic 29, pp 3, 13, 14

Crown policies relating to the taking of indigenous species within Te Urewera were and are not in breach of Treaty principles . . . They are a reasonable exercise of the Crown's authority under Article 1 to balance competing interests, and govern to conserve natural resources.⁶⁴²

The Crown also emphasised that exemptions were possible for many years, and argued that 'the Crown acted in good faith in the context of species that were in decline, while also giving some measure of recognition to the interests of Urewera Maori in those resources'.⁶⁴³

Relying on the Tribunal's *Report on Claims concerning the Allocation of Radio Frequencies* and the *Ngawha Geothermal Resource Report*, the Crown suggested that the Tribunal has identified a

hierarchy of interests in respect of natural resources based on kawanatanga and tino rangatiratanga. The first interest is the Crown's obligation or duty to control and manage those resources in the interests of conservation and in the wider public interest. Then comes the tribal interest in the resource, ahead of the rest of the public.⁶⁴⁴

Further, in the *Mohaka ki Ahuriri Report*, the Tribunal found that the kawanatanga duty and 'the duty to protect the rights of Maori to exercise rangatiratanga could sometimes be in conflict – and an example given by the Tribunal is where native species had become endangered'.⁶⁴⁵ In Crown counsel's submission, the Mohaka ki Ahuriri Tribunal noted that, above all, 'consultation is needed between Treaty partners "even though the responsible exercise of kawanatanga might ultimately require the Crown to make the final decision"'.⁶⁴⁶ On the issue of consultation, Crown counsel submitted that modern standards for consultation were not applicable at the time of the animals protection legislation in the 1910s and 1920s, and that the Crown was in any case well informed of Maori views and interests due to the Maori members' contributions in Parliament. Separate consultation with Tuhoe, it was argued, was unnecessary, and the Crown had balanced interests fairly and consistently with its Treaty obligations.⁶⁴⁷

The claimants, on the other hand, saw what the Crown called the 'hierarchy of interests' rather differently. They argued that the role the Crown has assumed in Te Urewera is 'all encompassing', entailing its absolute control of all resources. The effect of the Crown's 'exclusive environmental management within Te Urewera is that the tino rangatiratanga of Tuhoe is disregarded'.⁶⁴⁸ The claimants accepted that 'the Crown does have a power and a duty to manage natural resources in the

642. Crown counsel, closing submissions (doc N20), topic 29, p 18

643. Ibid, p 13

644. Ibid, p 12

645. Ibid, p 13

646. Ibid

647. Ibid, pp 14–16

648. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 153

interests of conservation but that these rights are qualified by the tribe's *te tino rangatiratanga*.⁶⁴⁹ The claimants emphasised that, in the Crown's admitted right to enact laws for conservation, there is a standing qualification on the Crown's right to govern; the Crown must recognise, protect, and give effect to their *te tino rangatiratanga* over their *taonga*.⁶⁵⁰ In the claimants' view, the Crown failed in this duty when it banned customary harvests after 1911, despite 'numerous petitions by Tuhoe and despite the decline in *kereru* being attributed to sports people and harvesting for commercial purposes, not to traditional harvesting'.⁶⁵¹

The claimants do agree with the Crown that it was well informed when it made its decision to prohibit harvesting, to the extent that Maori members (and others) made Parliament very aware of the hardship that would be inflicted on Tuhoe.⁶⁵² Yet, in the claimants' view, this awareness did not result in any kind of appropriate balancing of interests: sporting interests were preferred at first, resulting in the inappropriate ban of Maori hunting methods; and, then, Maori cultural harvesting was wrongly banned altogether when other factors were responsible for the admitted decline in bird numbers.⁶⁵³

Both the claimants and the Crown are correct: the Crown has a duty to govern in the interests of all New Zealanders, and to conserve resources for future generations. In particular, the Crown has a Treaty duty to protect *taonga*. But the extent and form of protection necessary is something that a Treaty-compliant Crown must decide in partnership with Maori, especially where a *taonga* is concerned. The Crown's right to govern is qualified by the need to respect and protect *te tino rangatiratanga* of the peoples of Te Urewera.

The Crown was certainly informed of the Maori interests that were at issue, the nature of those interests – physical and cultural survival and well-being for the peoples of Te Urewera in the circumstances of that time – and the hardship that would surely follow if it criminalised one of their most culturally important foods. In our view, this awareness highlighted the need for consultation, rather than, as the Crown argued, making it unnecessary. Also, we agree with counsel for Wai 36 Tuhoe, who identified that a range of factors had contributed to the decline of *kereru*, and submitted that the Crown's failure to consult Tuhoe about 'absolute prohibition as a conservation measure' denied them 'the opportunity to identify less "extreme" approaches to conservation that may have preserved both the natural resources of Te Urewera and Tuhoe's *te tino rangatiratanga*'.⁶⁵⁴ Some local harvesting, perhaps limited to important cultural events, could perhaps have been permitted. It is impossible to be certain on this point. Ngata certainly thought

649. *Ibid*

650. *Ibid*, pp 198–199; counsel for Ngati Whare, closing submissions (doc N16), p 17; counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), pp 8–9; counsel for Ngai Tamaterangi, closing submissions, 30 May 2005 (doc N2), pp 69–71

651. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 153–154

652. *Ibid*, p 154

653. *Ibid*, pp 153–159; counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 35

654. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 199

that harvesting could and should be permitted in the 1930s, in response to Tuhoe's petitions about it, but the Government was not even willing to consider the matter because public opinion was believed to be against it. In our view, that was not an appropriate balancing of interests.

We agree with the Crown that it provided for Maori interests – at least on paper – until 1922, because of the lawful exemptions that could be granted to Te Urewera before that year. We also agree with the claimants, however, that all customary harvesting was in fact banned from 1912. This situation was formalised by the 1922 Act, which criminalised not just a key food source but also a Treaty right, without consultation, consent, or compensation. This right had previously been acknowledged and affirmed in the UDNR agreement of 1895, as Native Minister James Carroll confirmed. Maori rights to govern themselves and to continue their own internal laws and way of life, including their 'rights to kill game for food',⁶⁵⁵ were supposed to have been guaranteed and protected by the agreement and the Urewera District Native Reserve Act 1896 which followed it. By 1922, that Act had just been repealed, Maori self-government had been defeated, the inalienable reserve for Maori had been dismantled, the promise to protect their forests and birds had been broken and – as a final blow – their right to take birds on which they were dependent for food was now also being taken away. Further, the Crown's action in 1922 criminalised a system of law and authority which had managed and regulated access to kereru for centuries, and which continued to operate until forcibly suppressed by criminal trials in the 1930s. Even then, Maori law and authority continued to govern access to kereru for important cultural events, but on a greatly reduced scale (hidden as far as possible from the Crown).

Relying on previous Tribunal reports, the claimants have submitted that 'if the Crown is ever to be justified in exercising its right to govern in a manner that overrides tino rangatiratanga, then it should only be in exceptional circumstances and as a last resort in the national interest.'⁶⁵⁶ Counsel for Wai 36 Tuhoe also submitted that the Crown must first have consulted its Treaty partner to ensure that their interests are not harmed more than is absolutely necessary to protect the resource. Public interest, convenience, or reasons of economy are not justifications that can meet these tests.⁶⁵⁷ Counsel for Wai 144 Ngati Ruapani submitted that if infringement of Treaty rights is necessary, then that necessity 'must be justified on nominate grounds and must be undertaken in a manner that has the least impact on the mana and rangatiratanga of Ruapani.'⁶⁵⁸

In our view, the Treaty right to take birds in Te Urewera was so central to the physical and cultural survival and well-being of the peoples of Te Urewera that the

655. Native Minister, minute on memorandum to Minister of Tourist and Health Resorts, 15 September 1902 (Walzl, 'Waikaremoana' (doc A73), p102)

656. Counsel for Ngati Whare, closing submissions (doc N16), pp17–18; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p198

657. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p199

658. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p9

Crown could not be justified in outlawing that right – except in the most extreme circumstances – without first obtaining their consent, and never without payment of compensation or ensuring they had access to an alternative food source.

Also, to determine if it was in fact necessary to completely abrogate the right rather than restricting it (as had been the case for the previous 25 years), the Crown had to at least consult the peoples of Te Urewera and satisfy itself that a total ban was truly unavoidable in their district.

We accept that the conservation of kereru, a taonga species, was essential in the national interest. It is difficult, however, not to hold the Crown guilty of some hypocrisy, given its promotion of deforestation and habitat destruction at the same time as it was banning Maori hunting. We are reminded of the Minister's words in 1917, when he said that it was 'well known that with the gradual destruction of the bush the native pigeon will eventually become extinct'; his Government's ban on hunting was supposed to do no more than delay the inevitable 'extinction of this magnificent bird', an extinction that the Crown knew could be halted if less native forest was converted to pasture or exotic forest.⁶⁵⁹ Also, suggestions by Ngata in 1932 and by the Rotorua conference of officials and agencies in 1938 that Maori in Te Urewera should be allowed to manage and conserve kereru while permitting a limited take were not really investigated. Alternatives available at the time were not properly considered, which was not consistent with the fair and scrupulous treatment to which the peoples of Te Urewera were entitled under the Treaty.

From the evidence available to us, we do not know whether banning all cultural harvests of kereru in Te Urewera was a necessary or unavoidable step in 1912 (when the ban became absolute) or 1922 (when the absolute ban was reflected in legislation). As we have shown, other alternatives did exist, including banning hunting for commercial and sporting purposes alongside reserving more forest, especially berry-bearing trees. Nonetheless, we cannot say for certain that cultural harvests could have continued in Te Urewera after the 1930s – when such harvests became greatly reduced – without harming the taonga. That in itself is a measure of the Crown's failure to demonstrate that its ban was justified.

In Treaty terms, consent and compensation were both necessary. Even if, as a final resort, consent had to be overridden, compensation was still essential.

In the 1930s and 1940s, after the Crown began to enforce its animals protection law in Te Urewera, Maori leaders protested by way of petition, without success. They pointed out that kereru was an important food, that their rights to kereru were protected by the Treaty, and that they could manage the take of kereru in a way that would protect and conserve the resource; all to no avail. They were not given a fair hearing, and their interests were not adequately considered or protected. A Government report of the time, that Maori were taking kereru still because of absolute need, was met with this response: if 'the present practice' was

659. G W Russell, Minister of Internal Affairs, to A F Lowe, 30 May 1917 (Feldman, 'Treaty Rights and Pigeon Poaching', p 35)

‘necessitated by actual hardship’ the Government should ‘make other provision for food supplied for the natives of the Urewera.’⁶⁶⁰ Yet even this way of compensating for the loss was never carried out.

In conclusion, we find the Crown in breach of the Treaty principles of partnership and active protection, and of the plain meaning of article 2, for prohibiting the exercise of the Treaty right to take kereru, without:

- ▶ consulting the peoples of Te Urewera and seeking their consent;
- ▶ determining whether the prohibition was truly necessary;
- ▶ providing compensation;
- ▶ regularly reviewing the need for the prohibition, and investigating or responding adequately to complaints; and
- ▶ being prepared to investigate or adopt alternative means of meeting the shared goal of ensuring the kereru population is protected.

The right had been guaranteed as recently as 1895. Its abrogation did significant harm to the peoples of Te Urewera.

Before 1930, the Crown’s restrictions, including the ban on hunting methods and huahua, had not been enforced in Te Urewera. After 1930, the restrictions were enforced and the food supply of the peoples of Te Urewera was reduced at a time of critical need. In the period covered by this part of our chapter, it was known that the Maori communities of Te Urewera *could not survive* without adequate access to wild foods. The loss of a crucial food source was a very serious matter for them. We referred earlier to a state of ‘biological poverty’, in which Te Urewera communities were malnourished and lived precariously, pushed into serious deprivation if any one food resource failed in any particular year. The permanent removal of an entire food source – a range of bird species – had significant consequences, and contributed directly to the state of biological poverty in the first half of the twentieth century.

Further, the ability of Te Urewera communities to meet their cultural obligations, by providing manuhiri with a food for which they were renowned, exchanging kereru for the prized foods of other iwi, or taking huahua to important cultural events outside their rohe, was impaired. Their mana was infringed as a result. The ability to transmit tikanga and matauranga relating to fowling to succeeding generations was reduced when customary practices in respect of kereru could no longer be carried out and passed on to mokopuna. These prejudicial effects were of a serious nature. From the 1960s, the sheer physical survival of the peoples of Te Urewera no longer depended on their wild food supplies, but the cultural losses were cumulative with each generation.

On the positive side, the Crown’s introduction of deer to our inquiry district, and the growth of a large deer population in the 1920s, provided a new food source at the time it was most needed (the 1930s to the 1950s). Deer was not an unalloyed success, of course, because of its environmental impacts, but venison did go some

660. Under-Secretary for Internal Affairs to Under-Secretary for Lands, 28 April 1936 (Coombes, ‘Making “Scenes of Nature and Sport”’ (doc A121), p 232)

way to filling the gap created by the removal of kereru from the diet. As we have said, however, the introduction of trout did not boost food supplies overall, given its swift reduction of native fish stocks.

We accept that the prejudicial effects were beginning to diminish by the end of the 1950s. Malnutrition was still being reported at Ruatahuna in 1950,⁶⁶¹ but by the early 1960s this problem was less evident.⁶⁶² Dependence on wild foods for *survival* declined in the second half of the twentieth century, when store-bought food became a principal source of supply.

Nonetheless, the Crown did not keep its 1895 promise to Te Urewera leaders that food sources would be augmented; the introduction of venison barely made up for the loss of kereru and other bird species in the crucial decades. Deer could not, of course, redress the cultural loss. We find the Crown's failure to honour the 1895 agreement a breach of the principles of partnership and active protection.

21.8.2.3 Was the Crown still in breach of this Treaty right at the time of our hearings?

At the time of our hearings, the prohibition on the hunting of kereru was likely justified in the national interest, but no one had any certain information on the point. We agree that the Crown should apply the precautionary principle. If cultural harvesting in Te Urewera would risk the conservation of the kereru there, then the Crown must continue to prohibit it. That is its duty under the Treaty. We also agree with the Wai 262 Tribunal that 'Protecting the kaitiaki interest and conserving indigenous flora and fauna are two sides of the same coin.'⁶⁶³ The claimants made it clear to us that they wish to conserve kereru, a taonga species, for future generations. But there had been no dialogue with the Crown on this issue; in other words, there was no partnership.

The Crown relied on the terms of the Wildlife Act 1953, under which the kereru has been an absolutely protected species for more than half a century, and had not conducted any research or scientific investigation of kereru populations in Te Urewera, or the sustainability of a very limited cultural take of even one bird per annum. We agree with the claimants that the 1997 Conservation Authority paper, which the Crown used as its authority that cultural harvest could not be sustained, provided no scientific data and was not intended for that purpose. It may be that the DOC witnesses were correct in their impression that a harvest was not sustainable. But Crown counsel accepted in closing that, if this were not the case, then it would need to consult the claimants on the matter and consider changing its policy.

We were concerned, as were the claimants, that the Crown appeared to have no programmes at all in respect of kereru in Te Urewera – no monitoring of kereru and no measures for predator reduction or habitat enhancement other than those under way for other species (from which, we were told, kereru also benefit).

661. Tuawhenua Research Team, 'Ruatahuna, Part 2' (doc D2), p 384

662. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 1716–1718

663. Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, vol 1, p 197

In our view, the Crown remained in breach of Treaty principles at the time of our hearings because it had failed to enter into a dialogue with the claimants or to monitor the situation and ensure that its denial of a Treaty right was still necessary in the national interest.

We note, however, the extraordinarily difficult circumstances under which DOC was working at that time. The Wai 262 Tribunal, considering the position in 2005 from more extensive evidence than we were able to receive, found:

Much of DOC's work is designed to protect, and support the recovery of, endangered species. The department told us that it was undertaking specific management of 176 species, which is only a fraction of the 2,400 species assessed as threatened in some way. Put another way, DOC's budget allowed it in 2005 to provide intensive management over only 2.7 per cent of its total holdings. An additional 32 per cent of the land received limited management, and 'about 55% of the lands administered by DOC where management would also be beneficial received only limited or no management'.⁶⁶⁴

In this circumstance, Te Urewera benefited from its status as a national park and the efforts to control pests in the park: kereru numbers 'can improve significantly simply as a result of controlling possums and rats which eat both the young in their nests and the flowers and fruit the birds depend on for food'.⁶⁶⁵

While the Crown must rationalise and prioritise the resources at its disposal, the claimants' evidence was that the kereru was and is extremely important to them; it is a taonga. In our view, the Treaty required a specific dialogue between the parties on:

- ▶ the question of how kaitiakitanga of the kereru would be respected and given effect to;
- ▶ the viability of the present kereru population in Te Urewera;
- ▶ strategies for the protection and enhancement of that population; and
- ▶ the question of whether a limited customary take was sustainable.

In the absence of that dialogue, the Crown was at the time of our hearings in breach of the partnership principle, and its duty actively to protect the taonga and the Treaty right to take (and to manage the conserving and taking of) kereru where such harvesting is sustainable.

21.8.2.4 Recommendation

We acknowledge that we have no jurisdiction to make recommendations in respect of historical Treaty claims already settled by legislation. We therefore confine our recommendation to refer only to claimants before us who have not settled.

664. Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, vol 1, p309

665. Doris Johnston, brief of evidence on behalf of Department of Conservation, 21 November 2006 (Wai 262 RO1, doc R8), p29 (Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, vol 1, p310)

Recognising that the Crown and the appropriate claimants regard conservation of the kereru as paramount, we recommend that they design and implement strategies, in partnership, for the protection and enhancement of the kereru population.

We recommend that the Crown and appropriate claimants assess the present kereru population in Te Urewera, and monitor it over a period of time to establish its viability.

If the viability of the kereru population is established we recommend that the Crown enter into dialogue with the appropriate claimants with a view to their deciding together whether a culturally appropriate and limited take might be sustainable.

21.8.3 Treaty analysis: Introduced species

In our analysis earlier, we concluded that the Crown was not acting unwisely when it introduced deer and possums to Te Urewera given the state of the information available to it at the time.

We find, however, that Governments were relatively slow to take any effective action once these two species were known to be harmful to the environment. In the case of possums, it took many years before the Crown was convinced that they were a serious threat. It was strongly influenced, however, by the views of two eminent scientists, Dr Leonard Cockayne and Professor HB Kirk, who were not convinced that possums were a threat to native forests – though Kirk recommended that they be exterminated from native bird sanctuaries. The Department of Internal Affairs evidently did not proceed even with this limited action. The Crown acted unwisely in delaying a response, and its actions had long-term detrimental effects on the forest environment and the birdlife of Te Urewera, but failure to act wisely is not indicative of a lack of good faith, nor is it a Treaty breach.

In the case of deer, the Forest Service was convinced of the need to act from at least 1922, but other departments were not similarly persuaded until 1931. In part, the delay was attributable to rivalry between departments, which meant that contradictory reports about the impacts of deer were produced. But the delay was most clearly an outcome of the prioritisation of sport and tourism over forest interests. The Crown failed to act until agreement was finally reached between the Forest Service and Internal Affairs in 1931, soon after the Tourist and Health Resorts Department ceased to be the acclimatisation society in Te Urewera, and Internal Affairs took over the responsibility. Unfortunately, no effective deer control measures were introduced until 1938, and even then the effects were negated when hunting capacity was reduced during the Second World War. But the alarms sounded by the Forest Service and its certainty about the destructive effects of deer by 1922 should have led the Crown to reassess its policy before 1931. The price of delay is evident, given that insufficient funding during the Depression (especially in the North Island), and then the war resulted in an effective reprieve for deer over a number of years – with a brief exception from 1938. Thus, by the late 1940s, the deer population in Te Urewera had recovered to its 1938 level. By then it was some 25 years since the Forest Service warnings. We consider that the Crown's

failure to act once it was clear how destructive deer were of forests was in breach of the principle of active protection. This omission caused catastrophic damage to forests guaranteed to Maori by article 2 of the Treaty and by Premier Seddon in the 1895 agreement. His promise to Te Urewera leaders was that their 'forests and birds should be suitably protected'. The Crown's duty was to deliver on that promise when there was sufficient evidence before it that deer were endangering the forests.

The Crown was also at fault in Treaty terms when it rejected the Native Department's suggestion in the late 1930s that local Maori be employed to cull deer. This recommendation, if followed, would have mitigated the impact of the culling of an animal which had become an important food, together with pigs, for Te Urewera communities. It would have provided both a regular food supply and a welcome source of income. Further, we note that though one reason why deer were introduced was to augment Maori food supplies the Crown soon lost sight of that purpose. The peoples of Te Urewera should not have had to pay for hunting licences, and should have had a greater say in the management of 'their' food resource. The Crown admits that Maori should have had a management role. Its omission to provide for these matters was inconsistent with the Treaty partnership and the principle of active protection.

As with deer, the introduction of trout was for the dual purpose of feeding Maori and attracting tourists. The peoples of Te Urewera should not have had to pay for fishing licences either, which they simply could not afford. It was a specific part of the 1895 agreement, as understood by the Crown, that trout would be an important and, necessarily, an *accessible* new food source for Maori, and also that trout would be managed by Maori inside the UDNR. The Crown provided for neither of these things, in breach of its partnership obligations and the principle of active protection. Prejudice is difficult to determine, as Maori appear to have fished for trout regardless; trout came to form an important component of Te Urewera food supplies.

Once trout were established and proven to be a serious threat to indigenous fish species, the Crown took no action to manage the fishery in such a way as to maintain a balance between exotic and indigenous fish. This was in breach of the principle of active protection. The Crown even went so far as to cull tuna in the 1950s, though it was a taonga species, thus also reducing another staple and culturally important food source, and it culled kawau at Waikaremoana with the intention of exterminating them. Kawau were a taonga for the Waikaremoana peoples, and the Crown's action against this important native species was entirely unsanctioned by the peoples of Te Urewera. This was not consistent with the Crown's Treaty obligations of partnership and active protection of taonga. It was also in violation of the 1895 agreement that native birds would be protected.

In our view, the culling of kawau was symptomatic of the way the Crown prioritised sport fishing above Maori interests, including its failure to provide for a better balance between exotic and indigenous species in its fisheries management. The harm to indigenous fisheries caused by trout, which the Crown admitted in our inquiry, was a prejudicial effect of the Crown's Treaty breach.

Ultimately, as we have seen earlier in the report, the Crown failed to keep almost all of its 1895 undertakings. Here, we find that Maori leaders were not given the authority to manage their new, exotic food species – birds, fish, or, by logical extension, deer – either autonomously through their General Committee or in partnership with Government agencies. This was inconsistent with Treaty principles, and prejudiced the peoples of Te Urewera because they were unable to ensure that the new species were sufficiently accessible and affordable for their use as food, or managed for the conservation of resources and the environment. Maori communities in Te Urewera, as we have shown, managed their own harvesting of wild foods in accordance with tikanga, so as to conserve the resource and ensure it was shared communally, but they could not control the hunting of outsiders or the numbers of trout released continually into their waters.

As we found earlier, the introduction of possums was not within the spirit of the 1895 agreement, since possums were not intended either for food or for attracting tourists. We hesitate to find this a Treaty breach, however, since the negative effect of possums on a forest environment was not anticipated, and the Crown hoped that Maori (as well as other trappers) would benefit from a fur industry.

Mustelids, of course, had been introduced into New Zealand before the 1895 agreement; they may already have reached Te Urewera by then. They were not introduced into the district by the Crown, but were imported from overseas in large numbers by the Crown, released in Hawke's Bay, and from there found their way quickly inland. Their arrival in Te Urewera was a by-product of the Government's determination to meet the concerns of pastoralists across the country to deal with the rabbit menace. The disastrous impact of mustelids on native birds everywhere was predicted, both in and outside Parliament. But it does not seem that the importance of birds to Maori was considered at all at the time. Warnings about the impact of mustelids on birds were rapidly shown to have been justified – so much so that the first measures to provide for the destruction of stoats and weasels throughout the country were quickly introduced. But they were not introduced on a national scale until 1936. Predators on the ground had a head start of several decades on any systematic attempt to eradicate them. Mustelids remain today 'one of the principal threats' to native birds in the inquiry district.⁶⁶⁶

We find the Crown in breach of the principle of active protection for failing to consider the importance of native birds to Maori when mustelids were introduced into New Zealand, and for failing to act quickly and decisively to eradicate them when it became clear very quickly that their impact on birds was as damaging as had been predicted.

In sum, we consider that a number of the Crown's actions in relation to exotic species were in breach of the Treaty. The failure to provide for free Maori access to and management of new food species was in violation of the 1895 agreement, and was a Treaty breach with prejudicial effects. The Crown was slow to act against harmful species. Its delay in proceeding with deer culling once the Forest Service

666. Coombes, 'Making "Scenes of Nature and Sport"' (doc A121), p27

was convinced of the need to do so, and its failure to maintain a sustained programme even when it did start – allowing deer populations to flourish – was also in breach of Treaty principles. Possums, which were introduced directly into Te Urewera, and mustelids, which were not, became pests which have wreaked havoc on the Te Urewera forest environment. The damage caused by possums, however, was not attributable to Treaty breaches in the period under review here (before the establishment of the national park). But the Crown’s introduction of stoats, weasels, and ferrets to New Zealand in large numbers, known to be a grave threat to native birds, and without consideration of the importance of birds to Maori, was. A further breach was its failure to move more quickly to eradicate them at a national level.

We turn next to consider the Crown’s management of the environment in the Whirinaki Forest, about which the claimants have alleged several Treaty breaches.

21.9 KEY FACTS: WHIRINAKI FOREST

The Whirinaki Valley is the ancestral heartland of Ngati Whare. The area is also of great significance to Ngati Manawa and to Tuhoe. For the close relationships between these groups, and the tribal histories the people presented in the hearings, embodying their own understandings of their past, we refer the reader to chapter 2. There are wahi tapu, pa, other archaeological sites, and mahinga kai (food gathering places) throughout the valley.⁶⁶⁷ Before logging began in the early twentieth century, most of the valley was covered with native forest, which was an important source of food, medicine, and other resources for local hapu and iwi.⁶⁶⁸ Jack Ohlson told us about his tipuna’s traditional kaitiakitanga, or resource conservation practices, such as tohunga placing prohibitions on hunting areas so that the birds could recover.⁶⁶⁹

The forest’s trees, including totara, miro, rimu, kahikatea, and tawa, were highly prized for their timber, both by Maori and by Europeans. From the late 1920s, the valley became the centre of the Te Urewera timber industry. Logging and sawmilling was initially carried out by private companies on Maori land, with a few small operations active in the early 1920s and a larger sawmill opening at Te Whaiti in 1928.⁶⁷⁰ More mills opened at Te Whaiti and Minginui in the 1930s, one of which was said to be the fourth-largest sawmill in New Zealand at the time.⁶⁷¹ The mill operators were criticised at the time by the State Forest Service, Native Minister

667. See Ngati Whare map book (doc G33), maps 5B, 5C; Kawharu and Wiri, ‘Te Mana Whenua o Ngati Manawa’ (doc C11), pp 41–42; Brad Coombes, ‘Preserving a “Great National Playing Area” – Conservation Conflicts and Contradictions in Te Urewera’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A133), p 151

668. Meriana Taputu, brief of evidence, September 2004 (doc G28), pp 3–4; Edward Charles Rewi, brief of evidence, September 2004 (doc G35), p 3

669. Ohlson, brief of evidence (doc G30), pp 7–8

670. Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 307

671. *Ibid*, pp 311, 325–326

Apirana Ngata, and others, for wasting good timber and paying the Maori land owners low prices.⁶⁷²

Although the Crown had purchased land in the Whirinaki Valley with the intention that it would be developed for farming, it eventually decided that the area was best used for forestry. The Crown had become a major owner of totara and rimu-matai-hardwoods forest in various blocks in the Whirinaki Valley as a result of policies and practices which we have found to be in breach of the Treaty. In all of them, the Crown bought up individual interests: in the rim blocks Whirinaki 1 and 2, which had been made inalienable, it did so in defiance of the legal restrictions; even in Heruiwi 4, where much of the land was sold on the basis of group decisions, the Crown subsequently secured more through purchase of individual interests; and in the Te Whaiti blocks, as with other UDNR blocks, its purchase of individual interests before 1916 was likewise illegal until legalised retrospectively, and the timber on Te Whaiti was very substantially undervalued by the Crown. Later, through the Urewera Consolidation Scheme, it secured the valuable land it wanted within the enormous Urewera A block that was its award (see chapters 13, 14, and section 15.3.7.1).⁶⁷³ The Crown's subsequent acts and omissions in respect of the forest have to be seen against that backdrop (see section 10.7.3.1.1). In 1932, land from the Crown-owned parts of the Te Whaiti, Whirinaki, and Heruiwi blocks was gazetted as State Forest 58, and milling began in 1938.⁶⁷⁴ At this stage, the Forest Service's long-term plan was to replant milled areas with plantation timber, such as pine. Once the plantation trees were ready, the plan went, the Whirinaki timber industry could switch from native to non-native milling.⁶⁷⁵ As we discuss in detail in chapter 23, the Crown's involvement in the timber industry – both its own operations and its support for private milling – meant that in the middle of the century Maori in the Whirinaki Valley enjoyed full employment, and a much higher standard of living than in previous decades. The Forest Service also provided housing for its workers and took a close interest in the welfare of the timber towns and their residents, especially Minginui.

From around the mid-1960s, increasing numbers of New Zealanders became more aware, and more critical, of the ecological costs of development. Reducing or ending native logging soon became one of the major aims of New Zealand environmentalists. In response to a Government plan to mill South Island lowland beech forests, the Beech Forest Action Committee was formed, later becoming

672. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp313, 327

673. Moka Apiti, 'Wai 894 – Te Urewera: Inquiry District Overview Map Book, Part 3' (commissioned map book, Wellington: Crown Forestry Rental Trust, 2003) (doc A132), map 27; Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp11, 201; Campbell, 'Te Urewera National Park' (doc A60), map 2; see also Tracy Tulloch, 'Heruiwi 1–4' (commissioned research report, Wellington: Waitangi Tribunal, 2001) (doc A1), pp9, 77–79, 84–85; Tracy Tulloch, 'Whirinaki' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A9), pp37–41, 48–53

674. Boast, 'The Crown and Te Urewera in the 20th Century' (doc A109), p203; Tulloch, 'Whirinaki' (doc A9), p123; Renee Rewi and John Hutton, Ngati Whare site visit booklet, 12 September 2004 (doc G32), p13; Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p344; 'Annual Report: State Forest Service', 1 July 1939, AJHR, 1939, C-3, p14

675. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p503



Wilson's number 3 Mill, Te Whaiti. Wilson Timber Mills was a private company which received its timber from the Forest Service. Its milling practices and timber wastage were criticised in the war years by both the National Service Department's Manpower Division and the Labour Department, and its working and living conditions for its employees and their families, many of whom were Maori, were notorious.

the Native Forests Action Council. The council put together the 1975 'Maruia Declaration': six principles which would guide activism on native forest preservation.⁶⁷⁶ These included the need for native forests 'wherever they remain' to have legal protection, that 'the logging of virgin forests (with certain exceptions) should be phased out by 1978', and that 'our remaining publicly owned native forests should be placed in the hands of an organisation that has a clear and undivided responsibility to protect them.'⁶⁷⁷ The declaration was later circulated as a petition, and gained more than 340,000 signatures.⁶⁷⁸

In response to growing public antagonism towards native logging, clear felling in Whirinaki was replaced by selective logging, which focused on felling trees near the end of their natural lives, and replacing them with native saplings.⁶⁷⁹ This did not reduce the quantity of native timber being milled, and so in the late 1970s en-

676. Simon Nathan, 'Conservation - A History - Environmental Activism, 1966-1987', *Te Ara - the Encyclopedia of New Zealand*, updated 5 May 2015, <http://www.teara.govt.nz/en/conservation-a-history/page-8>; Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 644-645

677. 'Maruia Declaration', in Simon Nathan, 'Conservation - A History - Environmental Activism, 1966-1987', *Te Ara - the Encyclopedia of New Zealand*, updated 8 July 2013, <http://www.teara.govt.nz/en/document/13938/the-maruia-declaration-petition>; Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 644-645

678. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 645

679. Ibid, pp 635-639; Coombes, 'Preserving a "Great National Playing Area"' (doc A133), p 303



William Raine (Museum of New Zealand Te Papa Tongarewa, B.012825)

Workers in the Te Whaiti Sawmill, circa 1930–50. The Whirinaki Valley became the centre of Te Urewera's logging and sawmilling industry from the 1920s, with mills constructed at Minginui and Te Whaiti. The milling of native timber supported a relatively high standard of living for the valley's residents by the middle of the century. However, forestry workers in western Te Urewera were hit both by the Government's decision to cease native logging and, far more seriously, by its speedy corporatisation of the State Forest Service in the late 1980s, which had devastating economic and social consequences.

Environmentalists and the Te Urewera National Park Board began lobbying for the Whirinaki State Forest to be incorporated into the national park. This idea was strongly opposed by the Forest Service and Whirinaki residents, and was rejected by Cabinet in 1979.⁶⁸⁰ However, the amount of native timber to be taken from the forest was heavily reduced, from 30,000 cubic metres in 1978 to just 5,000 cubic metres in 1981.⁶⁸¹ In 1982, native logging in Whirinaki was limited to salvaging wind-thrown trees.⁶⁸² Finally, following the election of the fourth Labour Government in 1984, the taking of native timber from Whirinaki was halted completely, except for dead standing totara 'for specific Maori cultural purposes'.⁶⁸³

In March 1984, the Whirinaki State Forest was gazetted as Whirinaki State Forest Park under section 63B of the Forests Act 1949, which made greater allowance for

680. Coombes, 'Preserving a "Great National Playing Area"' (doc A133), pp 319–330

681. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 501; Coombes, 'Preserving a "Great National Playing Area"' (doc A133), p 334

682. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 698

683. Ibid

recreational use of the forest in conjunction with continued forestry operations.⁶⁸⁴ Under section 63F of the Act, an advisory committee was created, with members chosen by the Minister of Forests.⁶⁸⁵ Hera (Sarah) Harris and Tony Winiata Herewini were the only two Maori members of the 10-person committee.⁶⁸⁶

As part of a wider restructuring of the public sector, the Forest Service was disestablished in 1987, with the commercial elements now being run by a new Forestry Corporation, and the conservation side being run by a new Department of Conservation (DOC).⁶⁸⁷ The native forest in Whirinaki Forest Park was transferred to DOC, while the exotic plantation forest was transferred to the Forestry Corporation, which also took over the Crown forestry leases on Maori land.⁶⁸⁸ The Whirinaki Forest Park, along with Te Urewera National Park, was in DOC's Eastern Region, which was run from Rotorua and included large areas outside of Te Urewera.⁶⁸⁹ Another administrative change came in 1990 when the Government established conservation boards, each overseeing a particular area. The conservation boards replaced local advisory committees, including the Whirinaki Forest Park advisory committee, which was abolished. The following year, Whirinaki became part of DOC's Bay of Plenty conservancy while Te Urewera National Park was in the East Coast conservancy. The two parks remained in separate areas until at least 2003, despite another reorganisation in 1998.⁶⁹⁰

21.10 THE ESSENCE OF THE DIFFERENCE BETWEEN THE PARTIES

Much of the disagreement between the claimants and the Crown over the Whirinaki Forest involves the extent to which tangata whenua were consulted or involved in the management of the forest and its resources. The claimants said that the Crown had repeatedly failed to consult them over changes to native timber milling and to park management, did not allow them adequate involvement in the management of the forest, its resources, and wahi tapu within the forest, and had allowed wahi tapu and forest ecosystems to be damaged by forestry operations. We focus below on three questions:

- ▶ Did the Crown's management of Whirinaki Forest, before and after the creation of the Department of Conservation, involve partnership and consultation with tangata whenua of the area?

684. 'State Forest Land Set Apart as a State Forest Park to be Known as Whirinaki State Forest Park - Rotorua Conservancy', 28 February 1984, *New Zealand Gazette*, 1984, no 35, p 643. The park is sometimes referred to as the Whirinaki Conservation Park, but it appears from the *Gazette* notice that its official name was always Whirinaki State Forest Park. Since 2012, following the Ngati Whare settlement, the park has been officially called Whirinaki Te Pua-a-Tane Conservation Park.

685. Coombes, 'Preserving a "Great National Playing Area"' (doc A133), p 332

686. *Ibid.*, pp 332-333

687. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 710

688. Ngati Whare and the Crown, *Deed of Settlement of Historical Claims* (Wellington: Office of Treaty Settlements, 2009), p 14

689. Coombes, 'Preserving a "Great National Playing Area"' (doc A133), p 225

690. *Ibid.*, p 210; Rewi, brief of evidence (doc G37), pp 15-16

- ▶ Why did the Crown restrict and then stop native logging in Whirinaki Forest? Did it consult with tangata whenua, or manage the cessation of logging in such a way as to minimise detrimental effects on tangata whenua?
- ▶ What has the Crown done to protect wahi tapu in Whirinaki?

The only claimants to make substantial formal submissions specific to Whirinaki on these issues were Ngati Whare; this means that the essence of difference below is, in effect, a conversation between Ngati Whare and the Crown. As the Ngati Whare claimants point out, the Whirinaki Forest Park occupies ‘a very large area within the heart of their rohe’.⁶⁹¹ However we note that other iwi, particularly Ngati Manawa and Tuhoe, also have interests in Whirinaki and in the issues we discuss here, and that their witnesses discussed those topics during our hearings.

21.10.1 Did the Crown’s management of Whirinaki Forest, before and after the creation of the Department of Conservation, involve partnership and consultation with tangata whenua of the area?

Counsel for Ngati Whare submitted:

At the heart of Ngati Whare’s grievances in relation to their environment is the fact that the Crown has assumed the exclusive role of management of the environment within Ngati Whare’s rohe contrary to Ngati Whare’s customary rights and interests and without the consent of Ngati Whare.⁶⁹²

The Ngati Whare claimants said that the Crown established Whirinaki Forest Park without consulting adequately with them, or recognising fully their interests and rights in the land and resources within the park.⁶⁹³ Once the park was established, the Crown ‘failed to make any or any adequate provision for Ngati Whare’s active involvement and representation in the operation and management’ of the park.⁶⁹⁴ It also failed to ‘adequately recognise and provide for Ngati Whare’s role as kaitiaki in respect of land and resources in the Park’.⁶⁹⁵ In general, the claimants said, the Crown has failed to ‘adopt any partnership approach’ with them in relation to the forest park, not only in terms of management but also employment within the park.⁶⁹⁶ They said that the Crown has failed to recognise or allow for their traditional reliance on the Whirinaki forest and its resources for food, medicine, and other purposes.⁶⁹⁷ The Ngati Whare claimants also said that the Crown ‘has failed to ensure that Ngati Whare are able to exercise their customary use rights within the Whirinaki State Forest Park in relation to the harvest of particular resources

691. Counsel for Ngati Whare, closing submissions (doc N16), p 113

692. Ibid, p 103

693. Counsel for Ngati Whare, fourth amended statement of claim, 22 April 2004 (claim 1.8(d)), p 129

694. Counsel for Ngati Whare, closing submissions (doc N16), p 105

695. Counsel for Ngati Whare, fourth amended statement of claim (claim 1.8(d)), p 130

696. Counsel for Ngati Whare, closing submissions (doc N16), p 112

697. Ibid, pp 101–103, 106

in accordance with their tikanga.⁶⁹⁸ The Crown has also ‘damaged, depleted and polluted the lands and resources’ through practices including milling indigenous forests, planting exotic forests, and general mismanagement.⁶⁹⁹

The Crown responded that there was ‘insufficient evidence that nga hapu o te Urewera are currently excluded’ from management of and employment in the Whirinaki Forest Park. It noted that there were two tangata whenua representatives on the Whirinaki State Forest Advisory Committee.⁷⁰⁰ It also said that DOC appointments were made on an equal opportunities basis, with involvement from kaumatua. It also has a training programme ‘to raise awareness of tikanga Maori and to ensure Treaty obligations are understood by all staff’.⁷⁰¹ The Crown acknowledged that Whirinaki tangata whenua traditionally used and managed natural resources, and that there was a ‘spiritual aspect’ to these taonga.⁷⁰² Its submissions on traditional use of natural resources focused almost entirely on native birds, which we deal with elsewhere in this chapter.

21.10.2 Why did the Crown restrict and then stop native logging in Whirinaki Forest? Did it consult with tangata whenua, or manage the cessation of logging in such a way as to minimise detrimental effects on tangata whenua?

The Ngati Whare claimants submitted that the Crown failed to consult with them over restricting native logging in the Whirinaki Valley, or before halting native logging altogether. They argued that this was part of a wider pattern of arrogant behaviour in relation to native forests on the part of the Forest Service and the Crown more generally. In relation to the management of the Whirinaki State Forest, the Ngati Whare claimants said that the Forest Service exploited ‘the last substantial native timber reserves in the North Island’ without seeking a full understanding of the forest and whether it could be regenerated. They said that this ‘left little room for the trial of alternative management practices which may have allowed for the harvesting of native timber in perpetuity’.⁷⁰³ There is no evidence that the Forest Service consulted with Ngati Whare or other tangata whenua groups on forest management. As a result, the claimants said, the Crown alone ‘is to blame for the mismanagement of native forests that lead ultimately to cessation of indigenous logging from 1982’.⁷⁰⁴

Nor did the Crown adequately consult with Ngati Whare or other Maori on any of the changes to indigenous logging practices.⁷⁰⁵ The Ngati Whare claimants acknowledged that the Crown, particularly the Forest Service, sometimes referred to Ngati Whare socio-economic interests, but said this was generally only when

698. Counsel for Ngati Whare, fourth amended statement of claim (claim 1.8(d)), p 130

699. Counsel for Ngati Whare, closing submissions (doc N16), p 106

700. Crown counsel, closing submissions (doc N20), topic 40, p 4

701. Ibid, p 4

702. Ibid, topic 29, p 6

703. Counsel for Ngati Whare, supplementary closing submissions on corporatisation and Minginui, 3 June 2005 (doc N16(a)), p 31

704. Ibid

705. Counsel for Ngati Whare, fourth amended statement of claim (claim 1.8(d)), pp 105, 107, 131

they could be used in support of the Forest Service.⁷⁰⁶ They said that the Forest Service's 'understanding of the interests of Maori, including Ngati Whare, in local forests was patronising and insensitive', and not all of the service's staff wholeheartedly supported 'the interests of Ngati Whare and other Urewera Maori'.⁷⁰⁷ Other Crown departments and bodies opposed native logging at Whirinaki without regard to or understanding of the support Ngati Whare and other Maori had for logging.⁷⁰⁸ When native logging was stopped, the Crown failed to manage the process in a way which minimised the detrimental impact on Ngati Whare and the Minginui Maori community.⁷⁰⁹

The Crown conceded that it did not always consult with Ngati Whare over changes to native logging activities, but did say that it consulted the Whirinaki Forest Park Advisory Committee over the formulation of the 1979 forest management plan.⁷¹⁰ It denied that the Forest Service was patronising and insensitive, and that the Forest Service only promoted Maori interests in support of its own arguments.⁷¹¹ The Crown acknowledged 'the impact of the cessation of [native] logging on those communities who derived their primary income from this activity'.⁷¹² Crown counsel also stated, however, that Government policy attempted to balance conservation with 'production needs for the national good'.⁷¹³

21.10.3 What has the Crown done to protect wahi tapu in Whirinaki?

The Ngati Whare claimants said that the Crown has failed to prevent or adequately remedy the disturbance and destruction of archaeological sites by the Forest Service, or prevent disturbance of sites by users of the forest park.⁷¹⁴ They stated that 'many of Ngati Whare's sites of significance' have been damaged for forestry activity, including some which were planted over in pine and eucalyptus.⁷¹⁵ Since the indigenous parts of the forest came under DOC control, the claimants said that DOC has a responsibility to protect and manage wahi tapu on land it controls, but has failed to adequately do so.⁷¹⁶ They also said that the Crown has failed to protect details of wahi tapu and other sites of significance in the Whirinaki Forest Park from 'inappropriate publication'.⁷¹⁷

The Crown accepted that the Forest Service damaged or destroyed archaeological sites in the Whirinaki Forest during logging activities, and that Te Tapiri was damaged by forestry contractors in 1988 and 1992. Crown counsel stated that

706. Counsel for Ngati Whare, fourth amended statement of claim (claim 1.8(d)), p 131

707. *Ibid*

708. *Ibid*, pp 131–132

709. *Ibid*, p 105

710. Crown counsel, closing submissions (doc N20), topic 31, p 21

711. *Ibid*

712. *Ibid*

713. *Ibid*, p 22

714. Counsel for Ngati Whare, fourth amended statement of claim (claim 1.8(d)), pp 147, 149–150

715. Counsel for Ngati Whare, closing submissions (doc N16), p 112

716. Counsel for Ngati Whare, fourth amended statement of claim (claim 1.8(d)), p 147

717. *Ibid*, p 149

the Crown viewed this ‘with concern.’⁷¹⁸ They also stated that the Forest Service and other Crown bodies subsequently improved their practices, for example, to exclude pa sites and other wahi tapu from active forestry zones.⁷¹⁹

The Crown submitted that, at the time of our hearings, policy and practice provided adequate legislative protection for wahi tapu, and that tangata whenua were actively involved in the management of wahi tapu.⁷²⁰ It cited the Historic Places Act 1993, in particular its processes for registering wahi tapu, and sections of the Act which made it unlawful to damage, destroy, or modify an archaeological site (registered or otherwise) without the permission of the Historic Places Trust.⁷²¹ The Crown also stated that DOC has a duty to protect wahi tapu and that

DOC’s vision for protection and management of wahi tapu includes tangata whenua participation and control in the protection and management of wahi tapu in areas administered by the Department. One of the goals is to provide for the exercise of kaitiakitanga by tangata whenua by ‘providing for control by tangata whenua of discrete wahi tapu sites where appropriate.’⁷²²

In the Crown’s submission, DOC works with tangata whenua to make sure that new developments and activities do not impact on wahi tapu.⁷²³ Crown counsel also stated, however, that there was no evidence that the Crown had specifically undertaken to protect wahi tapu such as Te Tapiri Pa.⁷²⁴ Nonetheless, Crown counsel suggested that its systems did not and could not guarantee that wahi tapu were protected in practice. This was because some of the necessary factors were outside the Crown’s control, although the Crown also conceded that its systems were inadequately funded:

Again, the Crown does not claim that this system guarantees practical protection, and it cannot reasonably be expected to provide that. For example, adequate funding is required for effective monitoring and prosecuting in respect of sites, and community participation is needed to identify sites of significance to Maori through district plans and the Historic Places Register. These are difficulties that governance in many areas encounters.⁷²⁵

The Crown denied that its agencies had inappropriately published details of wahi tapu, although it admitted that some sites had been shown in early maps of the national park. It submitted that ‘endeavours are now made to no longer

718. Crown counsel, closing submissions (doc N20), topic 40, p 14

719. Ibid

720. Ibid, p 11

721. Ibid, pp 9–10

722. Ibid, p 10

723. Ibid, pp 10–11

724. Ibid, p 14

725. Ibid, p 11

publish such information.⁷²⁶ Counsel conceded that, at the time of our hearings, DOC maps still identified some wahi tapu sites, but said that DOC would ensure that they were removed when the maps were reprinted.⁷²⁷

21.11 WHAT INFLUENCE AND AUTHORITY HAVE MAORI HAD IN THE MANAGEMENT OF WHIRINAKI FOREST?

SUMMARY ANSWER: At the start of the twentieth century, most of the Whirinaki Valley was covered in totara, miro, rimu, matai, kahikatea, and tawa. The Crown gazetted its land in the valley as a State forest in 1932, and later in the decade its Forest Service began milling. In the mid-twentieth century, its long-term plan for the valley was to mill most of the native timber and replace it with plantations of faster-growing exotic trees such as pine. At this point there was no opportunity for tangata whenua to be involved in the management of the forest. Scientists were regarded as the sole experts on the forest; Maori were marginalised and their knowledge went unrecognised. One of the results was that tangata whenua were unable to protect wahi tapu from damage caused by forestry operations. Nor, in the absence of consultation, were they able to protect native birds from wholesale destruction of their habitat.

From the 1960s, the general public became increasingly opposed to native timber milling, particularly clear felling. In response, in the mid-1970s the Forest Service switched from clear felling to selective logging in Whirinaki. Any reduction in the timber industry was strongly opposed by Whirinaki residents, particularly the people of Minginui, but they supported the change to selective, sustainable logging. Despite this, native logging was stopped altogether in 1982, and the removal of dead trees (except for totara for cultural purposes) was stopped in 1984–85. Although the new techniques had shown promise, it was by no means certain that the Forest Service had developed a means of sustainably logging a New Zealand native forest of such high environmental and cultural value to local Maori peoples and the nation. In 1984, this value was to some extent recognised when the Whirinaki State Forest was designated a forest park, with an advisory committee with some Maori representation. The end to all native logging was opposed by tangata whenua, but – on its own – the impacts would have been relatively small if the Crown had kept its undertaking that exotic forestry would become a viable alternative. We explore the timber industry crisis and the corporatisation of State forestry further in chapter 23.

In 1987, the Forest Service was disestablished, with the indigenous parts of Whirinaki State Forest becoming the responsibility of the newly created Department of Conservation (DOC). After this change, the park's specific advisory committee was replaced by a more distant conservation board with – inevitably – less local representation. Nonetheless, DOC has attempted to consult and work

726. Crown counsel, closing submissions (doc N20), topic 40, pp 8–9

727. *Ibid*, p 11

with tangata whenua. Some claimants saw this engagement as token and insincere. The plantation parts of the forest have mostly been milled by contractors, who at times have inadvertently damaged wahi tapu.

21.11.1 Introduction

In the second half of the twentieth century, there was a fundamental conflict over the Whirinaki Forest, between economic imperatives on the one hand, and environmental, cultural, and spiritual values on the other. We have already referred to that conflict more generally in chapter 18, where we discussed the Government's decision to halt all logging of native trees on Maori land. Here, we discuss it more specifically in respect of the Whirinaki State Forest, which was transformed into the Whirinaki Forest Park in 1984, followed by a ban on all felling of indigenous timber. To put it simply, the Whirinaki peoples were financially dependent on the timber industry, and therefore supported it despite the damage it was doing to their forest. Several claimants acknowledged this tension. Jack Ohlson told us that the timber industry 'created work for our people, but it also created disharmony for the bird life, which was our kai resource'.⁷²⁸ Meriana Taputu had a ready answer for those who questioned how her people could have respected the forest so much and yet helped to cut it down:

Easy . . . 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.⁷²⁹

The Maori communities of Whirinaki were effectively faced with the choice between poverty and participating in the degradation of their whenua.

It was clear to us that the claimants and their whanau wanted a balance between the two sides: to make a living from their lands and forests in a sustainable way, to preserve the forests, birds, and wahi tapu while also preserving their own ability to live in the valley and maintain a reasonable standard of living. Many felt that this could only be achieved if the local people regained some degree of control over their forest.

In this section, we analyse the extent to which the Crown has allowed the tangata whenua of Whirinaki to have influence or control over the forest, its resources, and its wahi tapu. We look first at the overall management of the forest, under the Forest Service and then under DOC. We then analyse the end of the native timber industry, and whether the Crown sought or acted on the views of Whirinaki tangata whenua when it restricted and then ended native logging. Finally, we ask what the Crown has done to protect wahi tapu in the Whirinaki Forest, and to what extent tangata whenua were involved.

728. Ohlson, brief of evidence (doc G36), para 35

729. Taputu, brief of evidence (doc G28), p 4

21.11.2 Did the Crown's management of Whirinaki Forest, before and after the creation of the Department of Conservation, involve partnership and consultation with tangata whenua of the area?

The management of the Whirinaki Forest can be divided into two eras, with the turning point coming in 1987, with the creation of the Department of Conservation. Prior to this, the forest was managed by the Forest Service, with an advisory committee from 1984. Tangata whenua seem to have been more involved in the forest and its management from 1987, although claimants continued to feel that the Crown did not allow them to fully participate in the management of the forest.

We did not receive much evidence on Maori involvement in forest management before the creation of the Whirinaki Forest Park in 1984, and it seems clear to us that this was because Maori were not involved. As we discuss below, in our discussion of native logging, Maori were rarely consulted on changes to the management of the forest. As kaitiaki of the forest, Ngati Whare and other tangata whenua should have had at least an advisory role. However, Klaus Neumann said during cross examination that the Forest Service paid little regard to Maori knowledge of the forest, with Forest Service scientists regarding themselves – and being regarded by forest management – as the ‘sole experts’ on the forest.⁷³⁰ This attitude not only marginalised Maori but also cut the Forest Service off from valuable information which could have assisted its work. Had the Forest Service recognised this knowledge, it might have avoided some of the problems with native timber and with wahi tapu which we discuss below.

A partnership with local Maori may also have reduced the harm done to native birds in the forests.⁷³¹ As we discussed earlier (section 21.7.3), Maori had maintained since the early twentieth century that it was wrong of the Crown to restrict or ban the hunting and trapping of kereru, while at the same time allowing the forests on which the kereru depended to be destroyed.⁷³² In 1958, Te Urewera wildlife officer DS Main told the conservator of wildlife that milling of miro and hinau was ‘one of the biggest factors’ behind the decline of the kereru and tui populations, with illegal hunting being a relatively minor factor.⁷³³ Despite this, the Forest Service paid little attention to habitat preservation, arguing that the remaining stands of bush were enough to sustain native bird life.⁷³⁴ It did not carry out any research on the impact of logging on native bird populations until the late 1970s.⁷³⁵ The Maori view that miro and hinau should be planted to increase kereru habitat

730. Klaus Neumann, under questioning by the Tribunal, Murumurunga Marae, Te Whaiti, 15 September 2004 (transcript 4.10, pp 63–64)

731. Ohlson, brief of evidence (doc g36), para 18; Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 793

732. Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 791 n

733. DS Main to conservator of wildlife, 9 October 1958 (Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 791)

734. Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), pp 791–792

735. *Ibid*, pp 699, 792

was articulated by Stokes, Milroy, and Melbourne in their survey of Te Urewera in the 1980s, and could have been acted upon earlier by the Forest Service if it had consulted Maori about its management of Whirinaki Forest.⁷³⁶

One instance in which the Crown did pay attention to the views of Whirinaki Maori was in response to a late 1970s proposal to incorporate the State forest into Te Urewera National Park. As a part of their wider efforts to end native logging in Whirinaki, conservationists were campaigning for the conversion of Whirinaki from a State forest to a part of the national park. This plan was also supported by Te Urewera National Park Board, but strongly opposed by both the Forest Service and local Maori.⁷³⁷ Forest Service staff and Mingingui residents worked together to oppose the national park plan, and generally present a united front against the conservationists who were trying to end native logging in Whirinaki.⁷³⁸ Residents including Ngati Whare kuia Ngaki Kingi and Pakeha shopkeeper George MacMillan gave media interviews, explaining that the traditional harvest of rakau from the Whirinaki Forest would end if it became part of the national park, and accusing conservationists of ‘attempting to exterminate our lifestyle and our very existence within this forest.’⁷³⁹ In the end, Cabinet decided in 1979 that although Whirinaki met the criteria for a national park, it should remain as it was, because transferring it to Te Urewera National Park would have adverse social and economic effects on the Mingingui community, and because the management proposals for the forest already provided for an acceptable degree of preservation.⁷⁴⁰ The joint opposition of the Forest Service and Whirinaki locals to native logging restrictions will be discussed in more detail in the next section.

Early in 1984, the National Government announced that Whirinaki State Forest would become a forest park. Under section 63B of the Forests Amendment Act 1976, forest parks were intended for ‘the purpose of facilitating public recreation and the enjoyment by the public of any area of State forest land in conjunction with the other purposes for which it is managed’. This was not a major alteration to the forest’s purpose, since State forests had always been managed under multi-use principles, and locals were able to gather plants and hunt in the State forest well before it became a forest park.⁷⁴¹ Environmental management researcher Brad Coombes described the redesignation as ‘a token gesture’, presumably to placate conservationists by emphasising the recreational aspects of the forest.⁷⁴² It may have been an attempt by the National Government to please both forestry workers and environmentalists, in contrast to Labour Party policy which tended to be on the side of the environmentalists. A contemporary news report stated:

736. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 352

737. Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 649

738. *Ibid*, p 662

739. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 457; Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 239

740. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 330

741. *Ibid*, p 483; Rewi, brief of evidence (doc G37), p 5

742. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 331

Announcing the decision, Forests Minister Jonathan Elworthy said the change in status would not affect the way the forest was run. However, as a state forest the only opportunity for public involvement in its management was through reviews of the management plan every 10 years. As a state forest park it would have an advisory committee, ensuring constant public participation.⁷⁴³

The advisory committee was not required to include tangata whenua, or any Maori representation. Members could be nominated by anyone, but seem to have been chosen by the Minister of Forests.⁷⁴⁴ Nominees included Makarini Temara, the deputy chair of the Tuhoe-Waikaremoana Maori Trust Board (TWMTB) and a former member of this Tribunal; Tony Winiata Herewini, a TWMTB member; RS Paku, a Ngati Kahungunu representative on the East Coast National Parks and Reserves Board; and Sarah Harris of Ngati Whare, a leading advocate for Minginui and its native timber industry. Only Harris and Herewini were chosen, for a committee with a total membership of 10.⁷⁴⁵ The Crown claimed in this inquiry that it consulted with the advisory committee over the formulation of the 1979 forest management plan.⁷⁴⁶ As we can see, Crown counsel was in error, since the committee was not formed until the park was created in 1984. Nonetheless, the Forest Service did consult and obtain local Maori approval for its 1979 management plan as part of their joint campaign against transfer to the national park.

Meanwhile, senior Forest Service officials were concerned that forest management did not know enough about what the people of Minginui wanted, and stressed that management ‘must be careful not to overlook the locals in developing resources for our visitors.’⁷⁴⁷ However, there was also significant external pressure from the Whirinaki Promotion Trust, a conservation group with a largely Auckland-based membership. Coombes stated that the trust had ‘some success at the expense of local Maori’, such as minimising the amount of totara taken from the park for cultural purposes.⁷⁴⁸ We received little information on how the forest park was managed between its creation and the overhaul of conservation law and practice in 1987, or how much influence the advisory committee had.

A major change in the administration of the forest park came in 1987, with the disestablishment of the Forest Service. One of the main conservationist criticisms of the service was that no organisation could be both a protector of forest ecosystems and a commercial timber miller.⁷⁴⁹ In response, Cabinet had voted in September 1985 to split the service in two, with the commercial side being

743. ‘New Status for Forest’, *Waikato Times*, 24 December 1983 (Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 332)

744. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 332

745. *Ibid*, pp 332–333

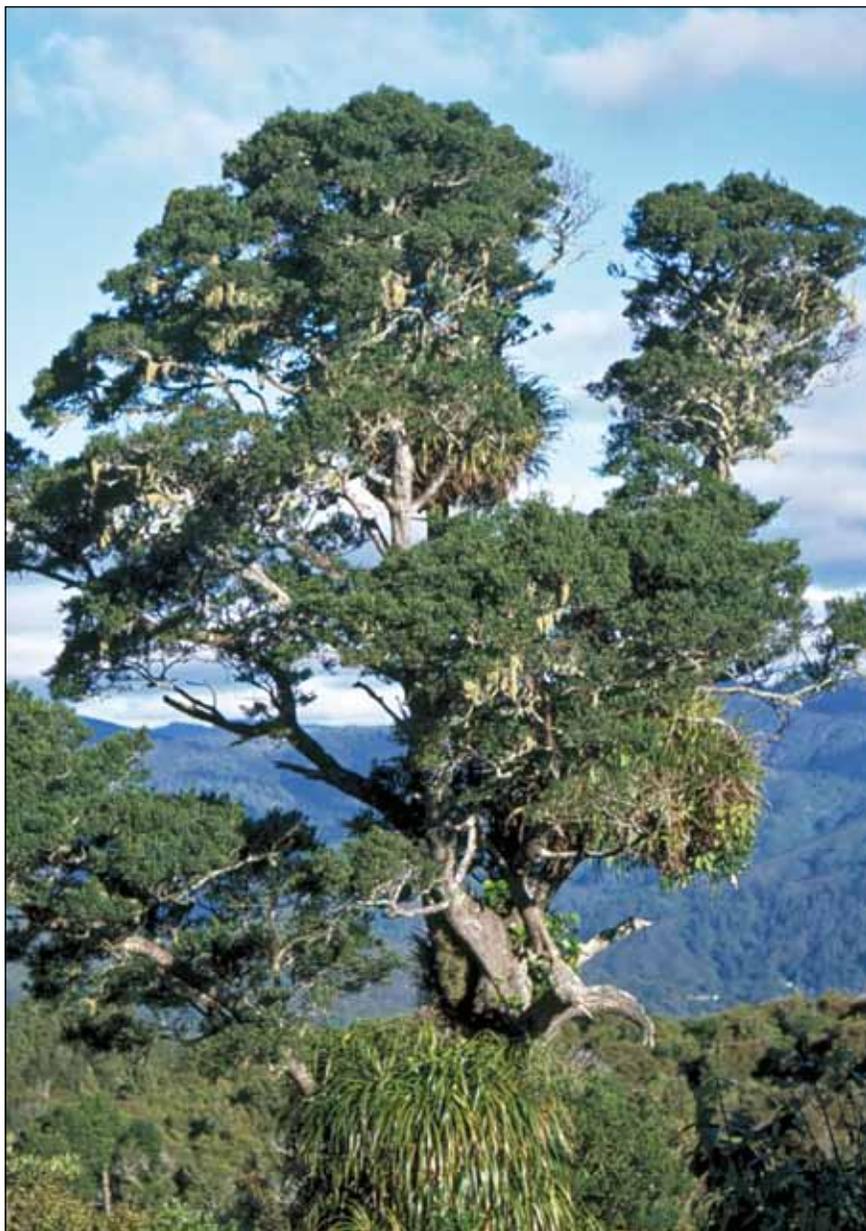
746. Crown counsel, closing submissions (doc N20), topic 31, p 21

747. K Marwick for Conservator of Forests, to A Griffiths, ‘ROPS Meeting Whirinaki Forest Park’, 24 May 1985 (Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), p 333)

748. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), pp 333–334

749. Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), pp 709–710

Jeremy Rolfe



Miro tree. The peoples of Te Urewera prized the miro for the birdlife – especially kereru – that its berries attracted. Many of the trees were individually named by the hapu within whose rohe they stood. During the logging of Whirinaki Forest by the Forest Service in the mid-twentieth century, no steps were taken to preserve the habitat of native birds. Maori had long urged the preservation of the habitat of kereru (rather than banning their hunting), but Maori forestry workers were not consulted about forest management and were unable to protect birds from the wholesale destruction of their habitat.

run by a new forestry corporation, and the conservation side being run by a new Department of Conservation.⁷⁵⁰ When this took effect, the native forest in Whirinaki Forest Park was transferred to DOC, while the exotic plantation forest was transferred to the forestry corporation, which also took over the Crown forestry leases on Maori land.⁷⁵¹ As we discuss in detail in chapter 23, the forestry corporation dramatically reduced employee numbers in Whirinaki and elsewhere. Some jobs were created by DOC, but these were few in number, and generally did not involve skills transferable from forestry.⁷⁵²

In chapter 16, on the national park, we found that since 1987 the tangata whenua of Te Urewera have been recognised as kaitiaki of the taonga of the area and were included in park planning processes and the administration of certain initiatives. There was a shift in the wording of policy and planning documents – both at the national level and for Te Urewera National Park – to recognise the relationship of Maori with Te Urewera National Park, and there was more, and better quality, consultation about certain park management issues. However, we also found that the changes had been essentially procedural, rather than substantive, as the National Parks Act did not mention tangata whenua interests. Our finding was similar to that of the Wai 262 Tribunal, which found that the Conservation Act 1987 imposed extremely strong Treaty obligations on DOC, which made significant efforts to involve tangata whenua in its work. It also found that DOC must go further than this, and ‘incorporate the principle of partnership into all of its work.’⁷⁵³ The Wairarapa ki Tararua Tribunal found:

DOC has sought to address past problems in its relationships with iwi by improving Maori participation in its work, better providing for Maori interests in its plans and policies, and consulting Maori on significant management decisions affecting protected areas or species. However, at the end of the day, DOC is the decision-maker, and the Crown owns and manages conservation lands and protected species.⁷⁵⁴

It appears that this was also true in regard to the Whirinaki Forest Park by the time of our hearings.

In 1990, the Conservation Act was amended to create conservation boards, each of which oversaw one of the country’s conservancies (conservation board districts); by 2006 there were 13 of these.⁷⁵⁵ As part of this amendment, forest park advisory committees were abolished. As with the abolition of the local Te Urewera National Park Board, discussed in chapter 16, the result was a shift in

750. Hutton and Neumann, ‘Ngati Whare and the Crown’ (doc A28), p 710

751. Ngati Whare and the Crown, *Deed of Settlement*, p 14

752. Rewi, brief of evidence (doc G37), p 13

753. Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, vol 1, pp 324, 343, 346

754. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 3, p 931

755. Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, vol 1, p 326; Conservation Law Reform Act 1990, pt 2A

policy-making and the advisory role to more distant entities with responsibility for multiple parks and conservation lands. Each conservation board has up to 12 members, appointed by the Minister of Conservation after a public nomination process. In appointing members, the Minister was required to have regard to 'the local community including the tangata whenua of the area', but there was no general requirement that any of the members be Maori or represent tangata whenua.⁷⁵⁶ Replacing a body of 10 locals – including two tangata whenua members – with this very different kind of board would inevitably have reduced the usefulness of this mechanism for claimant communities' input to the management of Whirinaki Forest Park. Douglas Rewi told us that trying to stay engaged with the different DOC conservancies, as well as the entities managing leased forestry land and other private land, was a major challenge for Te Runanga o Ngati Whare Iwi Trust, particularly given their lack of resources.⁷⁵⁷

We did not receive detailed evidence on how DOC's management of the Whirinaki Forest Park worked in practice, but Hutton and Neumann found that from the 1990s, DOC regularly consulted with Ngati Whare over its management of the park. The evidence shows that DOC representatives 'have talked to Ngati Whare kaumatua, outlined their plans for public scrutiny at hui in Te Whaiti, and, more recently, held discussions with the Ngati Whare runanga.'⁷⁵⁸ This was an improvement on earlier decades, but Whirinaki tangata whenua said that they needed a more meaningful relationship with DOC. Meriana Taputu, for example, stated that DOC paid only lip service to consultation with Ngati Whare, which in reality consisted of telling the iwi about decisions which had already been made. She told us that this seemed to be merely 'a box ticking exercise, not a genuine attempt to involve Ngati Whare in the development or ongoing management of policies in the Whirinaki.'⁷⁵⁹ She concluded:

I would like to see DOC and Ngati Whare enter into a conscious, meaningful engagement based on both Kaitiakitanga (guardianship) and continued sustainability of the Whirinaki. I know that this relationship would in fact add value to DOC as an organisation rather than be detrimental to it.⁷⁶⁰

Hutton and Neumann meanwhile reported that DOC's attitude in relation to possum control was seen by Ngati Whare as 'still marked by the arrogance of those who always [think that they] know best.'⁷⁶¹

756. Conservation Law Reform Act 1990, s6P(2). As of November 2015, the Conservation Act had been amended several more times, but there was still no requirement for Maori or tangata whenua membership of the boards.

757. Rewi, brief of evidence (doc G37), pp15-16

758. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p781

759. Taputu, brief of evidence (doc G28), p6

760. Ibid, p9

761. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p804

We received even less information on the management of the plantation timber parts of Whirinaki forest after the disestablishment of the Forest Service, apart from that relating to the corporatisation programme of the 1980s. As we discuss below, wahi tapu on forestry land were not always protected, and it appears that there were also ecological problems. Coombes stated that the Crown did not actively manage habitats on its non-conservation lands until the passage of the Resource Management Act in 1991, and attributed the continued decline of endangered species to this neglect.⁷⁶²

Overall, Dr Neumann observed:

In the cases of the Te Urewera National Park and the Whirinaki Forest Park, the Crown recognised Maori custodianship by according some Maori representatives an advisory role. The Crown did not recognise that custodianship in the case of the State forests: at no stage were the previous Maori owners consulted over the management of State forests in the Urewera.⁷⁶³

This was certainly true, even in the case of the 1979 management plan, to which Maori had no input outside of the general public submissions process. This was despite the congruence of interests between the Forest Service and local Maori at that time, as they sought to prevent a total ban on the logging of indigenous timber. We turn to consider that issue in detail next.

21.11.3 Why did the Crown restrict and then stop native logging in Whirinaki Forest? Did it consult with tangata whenua, or manage the cessation of logging in such a way as to minimise detrimental effects on tangata whenua?

The Crown's policy and practice on native logging changed dramatically over the 1970s and 1980s, in response to increasing public opposition to the destruction of native forests. Clear felling was replaced with selective logging in the mid-1970s. In the early 1980s, the amount of native timber taken from the forest was reduced, and then native logging in Whirinaki was halted completely and permanently in the mid-1980s. The Forest Service often worked with Maori and non-Maori residents of the Whirinaki timber towns to counter environmentalist lobbying. However, we saw no evidence that the Forest Service or any other Crown entity undertook serious consultation with tangata whenua, or made any real effort to minimise negative effects of the native logging ban.

The Crown began logging in Whirinaki in 1938, but did not develop a working plan for the forest until 1951.⁷⁶⁴ In the first decade of milling the amount of timber taken was 'far higher than had [originally] been intended.'⁷⁶⁵ The first working plan was an attempt to manage milling so that there would still be some native timber left in the future, the existing operations would be long term, and 'saw-

762. Coombes, 'Preserving a "Great National Playing Area"' (doc A133), p 234

763. Klaus Neumann, summary of evidence from "... That No Timber Whatsoever Be Removed" and response to relevant issues, September 2004 (doc G1), p 25

764. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 344, 503

765. Ibid, p 500

mill communities will be permanent rather than transitory.⁷⁶⁶ In the 1940s, Ngati Whare were assured that there would be forestry jobs in the valley for at least 40 years.⁷⁶⁷

It is clear that in the mid-twentieth century the Forest Service wanted its Whirinaki forestry operations to be long term and, ideally, sustainable, in terms of the communities as well as the trees. At this point it was not interested in simply removing all the good timber and then leaving. However, the Forest Service consistently regarded native forest regeneration as too slow and difficult to be commercially viable.⁷⁶⁸ This conclusion seems to have been based partly on some experimental planting, but mostly on knowledge of the slow growth rates of the native trees used for timber.⁷⁶⁹ The apparent non-viability of commercial native forest regeneration meant that forestry in Whirinaki and elsewhere could ultimately be sustained only by clear-felling much of the native forest and replacing it with exotic (non-native) plantation trees such as pine. The Forest Service estimated in 1951 that, by 1990, about 60 per cent of the remaining accessible native forest (about 97 million cubic feet) would have been felled and replaced with exotic plantation forest.⁷⁷⁰

It was inevitable that growing public antagonism towards native logging would affect the Whirinaki forest industry. Initially, the changes were positive for both the environment and for forestry workers. From 1975, clear felling was replaced with selective logging, which focused on felling trees near the end of their natural lives, and replacing them with native saplings.⁷⁷¹ The claimants, as kaitiaki of the forest, agreed that this change was necessary and strongly supported the move to sustainable forestry.⁷⁷² Selective logging required a much higher level of skill and care than clear-felling, and inexperienced workers initially damaged the trees left standing.⁷⁷³ However, they gained mastery of the difficult techniques, which was a source of great pride to their whanau.⁷⁷⁴ Sarah Harris told us:

I remember seeing Tihema Ruri take out three trees in an area where there were many other trees nearby. Looking at it even I couldn't believe that those trees could be cut down without hitting and damaging the surrounding trees. However, after sizing up the job, Tihema cut down the three trees with perfect precision and ensured that they fell exactly between the other trees in the forest. The precision of his work was amazing and these were the skills that were held by men throughout the forest at Minginui.⁷⁷⁵

766. New Zealand Forest Service, 'Working Plan for Whirinaki Production Working Cycle Rotorua Conservancy', 1951, p1 (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p503)

767. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p505

768. *Ibid*, pp 346–347, 353, 503–506, 640

769. *Ibid*, pp 504–505, 640

770. *Ibid*, p503

771. *Ibid*, pp 635–639; Coombes, 'Preserving a "Great National Playing Area"' (doc A133), p303

772. Sarah Harris, brief of evidence, September 2004 (doc G39), p7

773. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p642

774. Harris, brief of evidence (doc G39), p8

775. *Ibid*

Selective felling was also more labour intensive than clear-felling, which meant that there was more work available.⁷⁷⁶ The native planting programme was a source of new jobs for women, who had not previously worked in the forest except during the Second World War, when men were absent.⁷⁷⁷

It is important to note, however, that the long-term viability of sustainable logging in New Zealand's native forests was untested. It is by no means certain that the methods and strategies developed by the Forest Service would succeed in preserving the indigenous parts of the Whirinaki State Forest. By the late 1970s, in the view of Hutton and Neumann, 'Forest Service staff were not so much refining a proven practice as still trying to identify appropriate methods of logging and regeneration in the first place.'⁷⁷⁸ The shift to selective felling did not reduce the overall amount of native timber taken from Whirinaki. In 1978, the Forest Service was still committed to supplying 30,000 cubic metres of native timber a year to the Minginui sawmills; Hutton and Neumann estimated that this was at least as much as was annually extracted from the State forest before the shift to selective logging.⁷⁷⁹ Also, the lowland part of the forest, where logging operations were concentrated, was described as 'extremely rare, impressively beautiful, and scientifically little-understood', whereas the higher altitude forest was not merchantable in any case.⁷⁸⁰ Conservationists continued to lobby for an end to native logging in Whirinaki, which led to conflicts between environmentalists and residents of Minginui. In June 1978, a group of visiting environmentalists trying to visit the forest were blockaded by nearly the entire population of Minginui, who made it clear that they wanted native logging to continue.⁷⁸¹

As we noted earlier, the Forest Service and its staff often worked with local residents, including tangata whenua, to oppose attempts to end native logging. At times, the Forest Service highlighted the potential effects of a native logging ban on local Maori, or encouraged residents to lobby the Government. Pro-logging activism was frequently led or directed by Bob Collins, the Forest Service's district ranger. Researchers John Hutton and Klaus Neumann wrote:

[this] was evidence of the fact that for forty years the Forest Service had not consulted the tangata whenua about the management of the Whirinaki forest. But it had also provided for them – at least for those Ngati Whare who lived in Minginui. . . .

For forty years, senior Forest Service staff had presumed to know best what to do with the forest and how to run the village [Minginui] – now that the very

776. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 641–642; Coombes, 'Preserving a "Great National Playing Area"' (doc A133), p 335

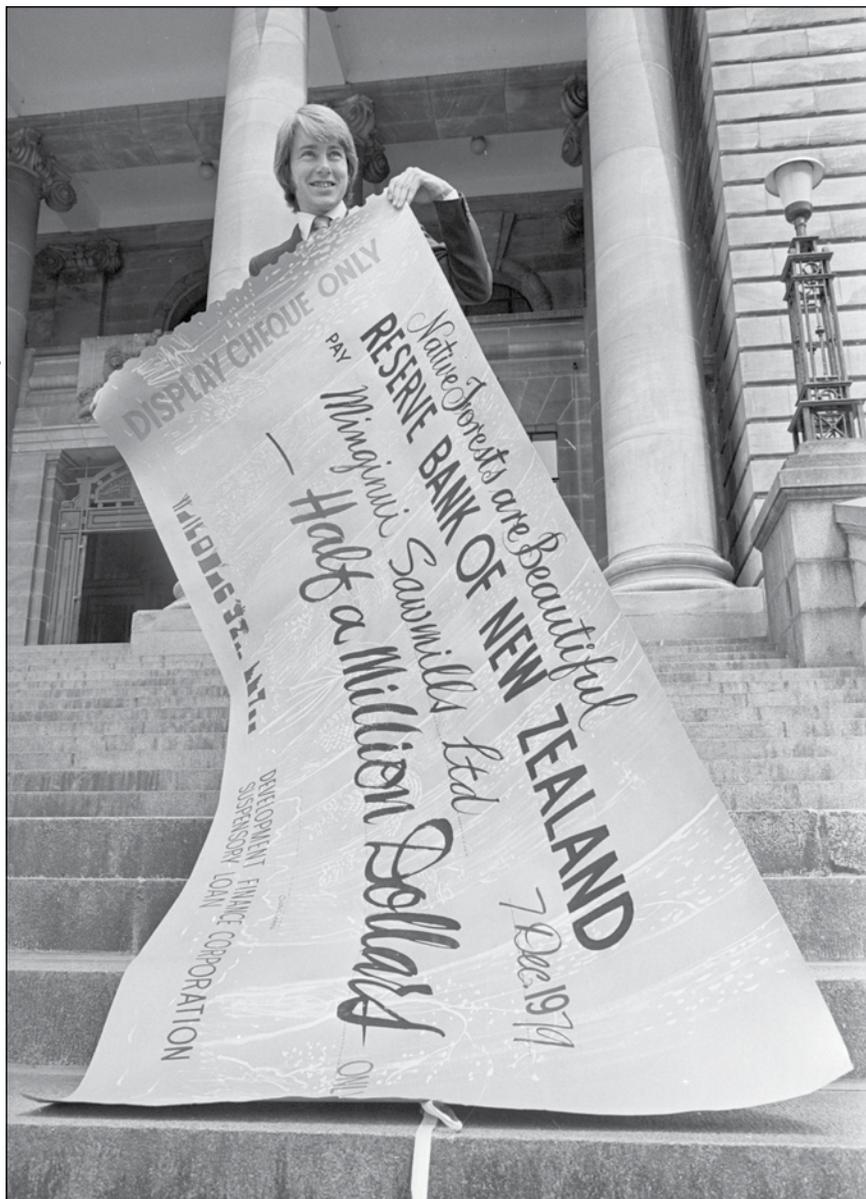
777. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 642

778. Ibid, p 667

779. Ibid, p 501

780. J Ogden, letter to the editor, 'Whirinaki Forest', *Daily Post*, 7 June 1984 (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 667)

781. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 649–656



Guy Salmon, forestry spokesman for environment and conservation organisations, with a giant cheque made out to Minginui Sawmills Ltd, 1979. These conservation organisations petitioned the Government to loan \$500,000 to the Minginui mill for the purchase of equipment that would allow it to process exotic pine. This would have enabled the milling of native timber to be halted while ensuring the continued employment of Minginui forestry workers. The Government had planned to replace native logging by exotic plantation forestry, but in the end native logging was phased out too quickly. By the mid-1980s, the entire forest industry was in serious economic difficulties.

existence of Minginui was threatened, it made little sense to question a long-established authority.⁷⁸²

According to Brad Coombes, the Forest Service's advocacy for the Minginui community was 'both strategic and cynically applied'.⁷⁸³ He noted that a social scientist from Otago University proposed a study on the social impacts on Maori of any cessation of logging, but this was turned down by the Forest Service because it was 'rather irrelevant to [the] major decision'.⁷⁸⁴ The service was more open to research by 1983, undertaking with the Department of Lands and Survey a joint land-use survey of Whirinaki and all other Crown forests in the eastern Bay of Plenty.⁷⁸⁵ One of the products of this survey was a report on the people and communities of Te Urewera by Evelyn Stokes, Wharehuia Milroy, and Hirini Melbourne which has proved immensely useful to us and to researchers in this inquiry. Despite the high quality of the report, it was largely rejected by senior Crown officials, particularly its criticisms of the national park, as we discussed more fully in chapter 16.⁷⁸⁶ According to Dr Coombes, other parts of the survey were subject to political interference:

For instance, a conservation biologist was commissioned to determine the habitat significance of indigenous forest throughout the Raukumara-Urewera-Whirinaki forest tract. When he concluded that 97% of those forests were 'significant,' NZFS [Forest Service] staff attempted to have his conclusions deleted or altered, presumably because of their potential impact on public perceptions of indigenous timber milling and on potential transfer of Whirinaki forests to Te UNP.⁷⁸⁷

Only the Stokes, Milroy, and Melbourne report involved any systematic engagement with tangata whenua.⁷⁸⁸

In response to public pressure, native logging was reduced in the early 1980s, and then stopped completely following the election of the fourth Labour Government in 1984. The Labour Party's environment policy leading up to the 1984 general election included a pledge that native logging in Whirinaki would cease, except for small quantities of totara felled 'for traditional Maori cultural purposes'. The party also pledged that '[s]awmill employment at Minginui will be safeguarded using the State's available exotic timber resources, and Labour will guarantee the future of the forest work force'.⁷⁸⁹ Salvage operations were halted in December

782. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 663

783. Coombes, 'Preserving a "Great National Playing Area"' (doc A133), p 314

784. Marginal comment on memorandum to Conservator of Forests, 'Suggested Minginui Social Study', 4 October 1979 (Coombes, 'Preserving a "Great National Playing Area"' (doc A133), p 314)

785. Coombes, 'Preserving a "Great National Playing Area"' (doc A133), p 335

786. *Ibid.*, pp 335, 345-357

787. *Ibid.*, p 336

788. *Ibid.*, p 341

789. New Zealand Labour Party, 'Environment Policy: Basic Principles/Native Forests/National Parks', [1984] (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 695)

1984, following Labour's electoral victory in July that year, although Cabinet did not actually confirm the logging ban until the following year.⁷⁹⁰ As expected, the new Labour Cabinet decided in 1985:

no native trees were to be felled except dead standing totara for specific Maori cultural purposes, that no further roading was to be carried out in the predominantly indigenous parts of the park, and that all virgin high density podocarp forest areas were to be put into ecological reserves.⁷⁹¹

The decision was made despite a petition from Minginui residents, who praised the Forest Service's 'wise' management of the native forest and its provision of employment.⁷⁹² The Conservator of Forests had also argued for continued selective logging, on the grounds that its 'environmental impact is minimal'.⁷⁹³

Even so, the Forest Service had already limited itself in 1982 to the salvage of 'windthrown podocarps' in the Whirinaki Forest.⁷⁹⁴ This meant that active logging had already ceased. The main impact of Labour's new policy, therefore, was to further restrict the harvesting of dead trees, which had cultural ramifications for Ngati Whare and Ngati Manawa, and to confirm that a resumption of sustainable logging would not be permitted. As we noted earlier, it was by no means certain that the indigenous parts of the Whirinaki Forest *could* be logged sustainably. The Maori view at the time was that the experiment should be tried; ultimately, the Crown decided that it should not.

In any case, as Ms Harris pointed out to us, when native logging ended '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'.⁷⁹⁵ This was what Labour had specifically promised in the lead-up to the 1984 election, and, even before native logging became controversial, it had always been planned that native forestry would eventually be replaced by exotic plantation forestry. The problem was that, by the 1980s, the entire timber industry was in serious economic difficulty. Wakeley Matekuare told us that in the early 1980s many timber workers began to realise that their future was uncertain. Management 'started telling us that production was too low, and we had to work longer hours for no extra money. . . . some people decided to leave . . . because they could see that the industry was going to stop'.⁷⁹⁶

The end of native logging would not have strongly affected the timber towns if the Crown had stuck to its original plan of replacing native timber milling with exotic timber milling. Part of the reason it failed to do this may have been that native milling was phased out far more quickly than had been planned, and

790. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 698

791. *Ibid*

792. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 257

793. DA Elliott, Conservator of Forests, Rotorua, to Michael Cullen, 17 May 1984 (Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 699)

794. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 698

795. Harris, brief of evidence (doc G39), p 8

796. Wakeley Matekuare, brief of evidence, September 2004 (doc G40), p 3

in later years the extracted native trees were replaced with new native planting rather than exotics. The end of native logging was ultimately just a small part of the Forest Service's problems, however. By the mid-1980s, the service was making huge financial losses, and was thus an obvious target for the reforming and cost-cutting zeal of the fourth Labour Government. We discuss the subsequent corporatisation of the Forest Service in detail in chapter 23, where we show that it led to widespread redundancies in and around Whirinaki, with devastating economic and social effects for the Maori communities of western Te Urewera. Here, we note that native logging in Whirinaki was ended against the wishes of local Maori communities, but that this decision on its own would have done them relatively little harm, while ensuring the preservation of their forest taonga for future generations. Pondering on this history, Meriana Taputu said to us, 'In hindsight, I am glad that Whirinaki is protected, but what of the future of my people?'⁷⁹⁷

21.11.4 What has the Crown done to protect wahi tapu in Whirinaki?

There are numerous wahi tapu, including pa sites and urupa, throughout the Whirinaki Forest. We heard that forestry work resulted in damage to such wahi tapu under both the Forest Service and its successors. In recent decades, there have been better attempts to protect sacred places in the forest, but damage has still occurred due to a lack of knowledge and a degree of carelessness.

During the Forest Service era, damage to wahi tapu occurred on Maori land under forestry leases and on Crown land. For example, former forest worker Jack Tapui Ohlson told us that two Ngati Whare wahi tapu on Te Whaiti-nui-a-Toi Trust land were planted over. He said that the Forest Service was supposed to 'leave the waahi tapu sites of Ngati Whare alone, but they didn't, they planted right over them, and destroyed them in the process. Ngati Whare was supposed to have advisory power, but they weren't bound to listen to us and didn't.'⁷⁹⁸ Rangi Anderson also told us that the Forest Service planted over wahi tapu in various places.⁷⁹⁹ He described the Forest Service as a 'non-cultural organisation' which made no attempt to recognise Maori culture, saying that there was 'a regime of pure ignorance while I was in the Forest Service towards the importance and significance of wahi tapu in general.'⁸⁰⁰

Mr Ohlson and another forestry worker, Maurice Toetoe, told us that some Maori forestry workers refused to work on wahi tapu, but said that this only meant the work was done by other crews.⁸⁰¹ In response to questions from the Tribunal, Mr Toetoe said that it would have been difficult to raise such issues, and so Maori workers tended to simply stay at home when they were assigned to an area which

797. Taputu, brief of evidence (doc G28), p 4

798. Ohlson, brief of evidence (doc G36), paras 32–33

799. Rangi Anderson, brief of evidence, 18 August 2004 (doc F29), p 6

800. Ibid

801. Ohlson, brief of evidence (doc G36), para 34; Maurice Toetoe, brief of evidence, 9 August 2004 (doc F11), p 3. Mr Toetoe's evidence seems to relate to the Kaingaroa Logging Company; it is not clear whether Mr Ohlson's evidence relates to the Forest Service or a private company.

they knew to be wahi tapu. He told us that many ‘were subsequently labelled as lazy by forestry companies who assumed they were not willing to work.’⁸⁰²

From the early 1970s, the Forest Service made some effort to protect identified pa sites and other wahi tapu.⁸⁰³ However, this did not always translate to actual protection. For example, gum trees were sometimes planted on wahi tapu, supposedly to protect them after the bush around them was milled, but also to test the growth rate of the trees.⁸⁰⁴ By 1979, archaeological surveys had been carried out in the valley, but not in the areas which were being logged at that time.⁸⁰⁵ Probably because of the Crown’s poor record of protection, tangata whenua seem to have been reluctant to provide information about wahi tapu locations.⁸⁰⁶ In the early 1980s, they did allow a register of archaeological sites to be compiled, but would not allow a map to be made in case this led to ‘fossicking and other abuses.’⁸⁰⁷

From 1980, the Historic Places Act provided legal protections for archaeologically significant sites, although, like earlier protections, it was not always effective.⁸⁰⁸ We received little information on damage to wahi tapu after the Forest Service was disestablished, but we did hear that one of the pa sites damaged by the Service has been cleared of pines and the site protected.⁸⁰⁹ However, we also heard that Te Tapiri, a nineteenth-century pa site and a wahi tapu of Ngati Manawa and Ngati Whare on the western side of the forest park, was damaged by contractors on two separate occasions.⁸¹⁰ (For a history of Te Tapiri, see chapters 4 and 5.) In 1988, a burn-off near the pa got out of control, and a temporary fire break was made across the pa site, doing some damage. Four years later, following miscommunication with his supervisor, another contractor inadvertently bulldozed a track through the site. In both cases, Douglas Rewi told us:

There were no physical checks of Te Tapiri Pa site prior to the operations commencing nor was there any consultation with Ngati Manawa or Ngati Whare nor any attempt to discover if there were any waahi tapu which might be damaged or destroyed. This was typical of the approach throughout the whole of the Ngati Manawa rohe.⁸¹¹

802. Toetoe, brief of evidence (doc F11), p 3; Maurice Toetoe, under questioning by the Tribunal, Rangitahi Marae, Murupara, 18 August 2004 (transcript 4.9, p 68)

803. Coombes, ‘Preserving a “Great National Playing Area”’ (doc A133), pp 150–151

804. *Ibid*, p 150

805. *Ibid*, p 317

806. *Ibid*, p 147

807. *Ibid*

808. Damage caused by unauthorised works to archaeological sites could, for example, result in fines of \$25,000 or \$500 per day while unrectified: Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 330–332, 336–338. Later, the Historic Places Act 1993 (section 97) set the fine for damage as up to \$100,000, if convicted; the 1993 Act was repealed by the Heritage New Zealand Pouhere Taonga Act 2014, which did not stipulate the amount of fines.

809. Rewi and Hutton, Ngati Whare site visit booklet (doc G32), p 11

810. *Ibid*, p 10

811. Douglas Rewi, brief of evidence, 9 August 2004 (doc F18), p 15

Although it was part of official procedure that all contractors be provided with maps, this was not done in either of the instances in which damage occurred.⁸¹²

Mr Rewi and Mr Toetoe both told us that ‘strange’ or ‘unexplainable’ events sometimes occurred when forestry crews were working on and around wahi tapu. Mr Rewi said that these events included continual equipment breakdowns, ‘people experienced the chills, workers becoming sick and behaving in an abnormal or unusual way.’⁸¹³ Mr Toetoe explained:

We had an incident in my own crew, up the Whirinaki Block, where – how can I put it – strange things were happening . . . Where we had to get kaumatua in to bless the place. I had lost men, through these funny things happening. . . . Other places where we’ve logged around waahi tapu there’ve been horrific accidents where people from out of the rohe have come and asked our kaumatua to bless these places. As I say, I’ve seen some accidents happening in places of significance to Ngati Manawa, and things that happened in my crew were happening to people not from here. They were happening to people from out of the area.⁸¹⁴

Mr Toetoe said he believed that these incidents happened ‘because of the desecration and ignorance’ affecting wahi tapu.⁸¹⁵

In sum, there was no formal protection of wahi tapu in the Whirinaki Forest until the 1970s. Local Maori, including some forest workers, were well aware of the locations of sacred places in the forest, but generally felt unable to raise the matter with management. Because there was no formal way of alerting the Forest Service or timber companies to the location of wahi tapu, tangata whenua had little choice other than to stand by as pa sites and other wahi tapu were bulldozed or planted over. Some chose to absent themselves, and were then stigmatised as lazy by managers who did not understand why they were not at work.

From the 1970s, the Forest Service made some efforts to protect identified pa sites and other wahi tapu. Nonetheless, sites continued to be damaged – for example, by the planting of exotic trees on them. The Historic Places Act 1980 provided some legislative protection, but in practice this was not always effective, particularly in areas which were still being logged. We have seen that Te Tapiri was seriously damaged twice in the 1980s and 1990s. Both of these incidents were accidental, but in both cases there was a failure to supply contractors with maps which would have allowed them to avoid the pa site. This carelessness was, again, the Crown’s responsibility.

The Crown has argued that it cannot guarantee ‘practical’ protection of wahi tapu, saying such protection is contingent on factors such as adequate funding for site monitoring, Maori identifying their sites, and decision-making by

812. Rewi, brief of evidence (doc F18), p 15

813. Ibid, pp 15–16

814. Maurice Toetoe, under questioning by the Tribunal, Rangitahi Marae, Murupara, 18 August 2004 (transcript 4.9, p 69)

815. Ibid

Government. We acknowledge that there are financial constraints in ensuring protection of wahi tapu, and that direction from tangata whenua is vital, but we do think that the Crown has an obligation to do what it reasonably can to protect wahi tapu. In particular, it needs to follow its own procedures and ensure that forest workers are given enough information to allow them to avoid wahi tapu.

21.12 TREATY ANALYSIS AND FINDINGS (WHIRINAKI FOREST)

The Wai 262 ('flora and fauna') Tribunal dealt extensively with the Treaty's requirements of a management system for the natural environment. We endorse its conclusion that the Treaty guarantee of tino rangatiratanga obliges the Crown to 'actively protect the continuing obligations of kaitiaki towards the environment, as one of the key components of te ao Maori.'⁸¹⁶ As the Tribunal explained, kaitiakitanga is 'the obligation side of rangatiratanga' and it does not require ownership. While the English text of the Treaty guarantees rights in the nature of ownership, 'the Maori text uses the language of control – tino rangatiratanga'. Thus 'the kaitiakitanga debate is not about who owns the taonga, but who exercises control over it.'⁸¹⁷ The kaitiaki relationship with the environment is 'founded in whanaungatanga'; it 'is permanent and mandatory, binding both individuals and communities over generations and enduring as long as the community endures.'⁸¹⁸ The community leaders who are entrusted with the responsibilities of kaitiaki will be expert in matauranga Maori because 'kaitiaki must act unselfishly, and with right mind and heart, using correct procedure.'⁸¹⁹ And that is so even if they have other interests in the resource in question: 'they may run businesses, or have recreational interests', for example.⁸²⁰

Of course there are interests in the environment other than those of kaitiaki: the interests of other people, and of the environment itself, must also be weighed in an environmental management system. Sometimes all the various interests will be reasonably aligned, sometimes there will be significant divergences. The particular circumstances should determine exactly how kaitiaki and other interests are to be balanced: the kaitiaki interest 'is not a trump card.'⁸²¹ And not all environmental taonga warrant the same degree of protection by their kaitiaki: 'some may be more important to iwi or hapu identity than others, as evidenced by the body of matauranga associated with them, and some may be more deserving of protection than others because they are in more fragile health.'⁸²² The Whirinaki Forest – its trees, plants, and birds – has long provided food and other material resources to its customary owners. For some 50 years from the 1920s, it was the main source

816. Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, vol 1, p 269

817. *Ibid*, p 270

818. *Ibid*, pp 267, 269

819. *Ibid*, p 116

820. *Ibid*, p 272

821. *Ibid*

822. *Ibid*

of employment to the local peoples – including in State Forest 58, where logging began in 1938. By then, the Crown was the legal owner of the forest land. But such ownership did not negate the continuing obligations of kaitiaki towards the environment. As Ngati Whare put it,

The Crown failed to recognise Urewera Maori's status as previous owners of the Urewera forests in cases in which the Crown acquired these forests. In the case of Ngati Whare the issue is not limited to the Crown's responsibility to consult with Ngati Whare over the management of the Whirinaki Forest Park or of the Te Urewera National Park, but extends to the Crown's historical responsibility to consult with Ngati Whare over the management of State Forest 58.

The question is how, in the circumstances, kaitiaki interests should be accommodated. The Wai 262 Tribunal provided this description of the relative weight that a Treaty-consistent environmental management system would accord the kaitiaki interest in particular taonga:

Where, in the balancing process, it is found that kaitiaki should be entitled to priority, the system ought to deliver kaitiaki *control* over the taonga in question. Where that process finds kaitiaki should have a say in decision-making but more than one voice should be heard, it should deliver *partnership* for the control of the taonga, whether with the Crown or with wider community interests. In all areas of environmental management, the system must provide for kaitiaki to effectively *influence* decisions that are made by others, and for the kaitiaki interest to be afforded an appropriate level of priority. And the system must be transparent and fully accountable to kaitiaki and the wider community in delivering these outcomes. [Emphasis in original.]⁸²³

In terms of the Wai 262 Tribunal's Treaty analysis, the kaitiaki interest in the forest warrants a partnership role in decisions affecting it or, at the very least, an influential role in that decision-making. The evidence shows, however, that until 1984 the Crown provided no opportunities for kaitiaki involvement in management decisions affecting the forest. One consequence was that for the entire period that logging was conducted, no effective system was established to identify and protect the many wahi tapu in the forest. Nor did the Forest Service take any steps to preserve the habitat of native birds, though the destruction of miro and hinau had been identified as a major factor in the decline of kereru and tui populations – food greatly prized by local Maori – as early as 1958. A further consequence was the minimal protective impetus to key decisions about the extent of logging to be conducted and the effort to be invested in developing sustainable or less extensive logging practices. Instead, the community leaders were not accorded any formal role in the decisions made by Crown officers, first, to clear-fell then selectively log the forest and, finally, to cease logging altogether.

823. Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, vol 1, p 272

We are clear that the strong tangata whenua support for forestry, including for continued logging of native timber in Whirinaki after 1970, was not evidence of kaitiaki involvement and influence in forest policy. Rather, it was a pragmatic response from the local communities, driven by the need to retain their major source of employment in the rohe. Tangata whenua had become economically dependent on forestry because there were so few other options in their rohe, and at a time when the industry's long-term effects on native forests were not fully appreciated. The timber towns of Te Urewera, most notably Minginui, were thus built – quite literally – on the back of forestry policy which was fatal for native forests but which, for as long as it lasted, provided economic security for tangata whenua. Once it was apparent that experimental regeneration efforts had been unsuccessful, the forest's kaitiaki had to choose, in effect, between its further destruction or the destruction of their people's livelihood and communities. At that time, tangata whenua calls for further efforts to develop sustainable logging went unheeded. And the comfort they drew from the policy of selective logging – which seemed more consistent with kaitiaki interests than clear felling – was short-lived. In terms of the Treaty's requirements, we are certain that the Crown's failure to recognise that kaitiaki interests in Whirinaki Forest must be influential, at the very least, in management decisions, is in breach of the principles of active protection of tino rangatiratanga and of partnership.

The advent of the Whirinaki Forest Park advisory committee in 1984 represented a very limited opportunity for tangata whenua involvement in the new forest park's management: there was no provision for Maori membership, the committee's role was merely advisory, and it was replaced in 1990 by a conservation board with responsibilities for an entire region. Meantime, the Conservation Act 1987, with its reference to the Treaty of Waitangi, set the agenda for the forest park's management. It was too late to protect the forest and the wahi tapu that had already been destroyed, but the limited evidence we have for the years to 2005 reveals that some positive changes occurred in that period. For example, DOC staff and management adopted a more inclusive, consultative relationship with the forest's kaitiaki, perhaps paving the way for their far more extensive, Treaty-consistent involvement in the setting and implementation of policy.

To summarise our Treaty analysis to this point, we find the Crown to be in breach of its Treaty duty actively to protect tino rangatiratanga by excluding the forest's kaitiaki from any formal role in the management of the Whirinaki Forest through to the mid-1980s. The resulting prejudice includes the destruction of wahi tapu and, we consider, the excessive destruction of the forest, including its native bird population.

The Government's decision to cease logging in Whirinaki Forest had severe effects on the local peoples. But that decision was made in the context of a substantial reorganisation of State assets and their administration. In chapter 23 we examine that larger policy context and analyse its effects on the peoples of Te Urewera. For present purposes, our conclusion on the issue of the Crown's management of its decision to cease logging native timber in Whirinaki is that the Crown's conduct failed to minimise the effects on tangata whenua, but by far the

more serious socio-economic impacts were caused by the corporatisation of State assets. As we have noted, the original Crown plan was to replace the logging of native trees with plantation forestry and, had that plan been implemented, forestry would have continued to sustain the local communities. But the Government's decision to withdraw from unprofitable State enterprises, including the subsidised plantation forest industry, put an end to that plan and was primarily responsible for the devastating effects on the timber towns in Te Urewera. Our conclusions about the consistency with Treaty principles of the corporatisation policy and the manner in which it was implemented in Te Urewera are presented in chapter 23.

21.13 RIVERS: INTRODUCTION

The claims of the peoples of Te Urewera in relation to their rivers, their streams, and their customary fisheries were a major issue in our inquiry. At each of our hearings, kaumatua and kuia spoke of their ancestral relationships with their own rivers, their taonga, and the mauri of each of their waterways. They told us of their awaawa mahinga kai (water resource) sites where they took kokopu and koura, kakahi, inanga, ducks – and above all tuna, a taonga species and a prized food in Te Urewera. Hapu and whanau had for generations exercised authority over their waters and waterways, and controlled fishing rights. And they exercised that authority in accordance with tikanga and with the values of kaitiakitanga, to respect and conserve their waterways and all the beings within them.

At the heart of the waterways and customary fisheries claims before the Tribunal was the disquiet of the claimants that they should have been dispossessed of their rivers by a principle of English common law (the *ad medium filum* presumption) of which they were not aware. They did not knowingly or willingly alienate their rivers to the Crown when their land, or undivided interests in their land, was purchased. New Zealand legislation had also expropriated their ownership and management rights in their rivers. The Coal-mines Act Amendment Act 1903 had confiscated their navigable rivers, the claimants say, yet they are still not sure which rivers or stretches of rivers the Crown believes it took under the legislation. And by later legislation the Crown has assumed exclusive control over rivers, disregarding their tino rangatiratanga, and then has managed them badly. Their indigenous fisheries, including tuna, were sacrificed to introduced trout, and to hydroelectric development. The Resource Management regime introduced in 1991, according to the claimants, has yet to deliver effective recognition of hapu and iwi as owners and kaitiaki of their rivers.

Claims relating to the mana and tino rangatiratanga of the hapu of Te Ika Whenua (Te Runanganui o Te Ika Whenua) over the Rangitaiki, Wheao, and Whirinaki Rivers and their tributaries, in the western part of our present inquiry district, have already been investigated and reported on by the Tribunal in 1998. Ngati Manawa, Ngati Whare, and Ngati Haka Patuheuheu (all represented by Te Ika Whenua in that inquiry) asked us to adopt the Tribunal's findings in respect of those rivers. We do so in large part, and discuss our position more fully, in section 21.16.2, when we consider the Crown's acquisition of western rim blocks

between the 1870s and 1920s. We also consider the application of those findings to other claimants in this inquiry.

Our chapter considers the evidence brought about all these claims, and concludes with findings and a recommendation to the Crown.

21.14 RIVERS: KEY FACTS

21.14.1 The rivers of the Te Urewera inquiry district

The rivers and streams of Te Urewera fall into three major catchments (see map 21.2):

- ▶ The Ohinemataroa (Whakatane) River catchment drains the northern slopes of the Huiarau Range, and is joined on its way to Whakatane in the Bay of Plenty by the Waikare and Tauranga (Waimana) Rivers.
- ▶ The Rangitaiki River catchment drains the Ikawhenua Range to the east, and the Kaingaroa Plains to the west, and also flows into the Bay of Plenty. It is joined on its way north by the Wheao, Whirinaki, and Horomanga Rivers.
- ▶ The Wairoa River catchment flows south from the Huiarau Range, into Hawke's Bay. The Wairoa River is fed by the Waiiau, Waikaretaheke, Ruakituri, and Hangaroa Rivers.

Te Urewera also contains two significant lakes: Lake Waikaremoana, which is drained by the Waikaretaheke River and is dealt with in chapter 20, and Lake Waikareiti, which is located in the Waipaoa block and is discussed in chapter 10. The Hopuruahine River, the Mokau Stream, and other streams empty into the northern shore of Lake Waikaremoana.

The inquiry district contains many other streams and smaller waterways. Nga Rauru o Nga Potiki, for example, produced a map of 40 named tributaries of the Ohinemataroa (Whakatane) and Tauranga (Waimana) Rivers.⁸²⁴ Most of the land is broken and mountainous, and so river flats were principal sites of occupation for the peoples of Te Urewera, and they were heavily dependent on the foods available in the waterways and forests. It would be difficult to over-emphasise the importance of rivers to the claimants. We have already described their customary relationships with and uses of their waterways in section 21.3.

21.14.2 The law

The claim issues in respect of rivers are dominated by questions of law and its interpretation. In this section, we give a brief factual introduction to the legal terms, statutes, and cases that are discussed more fully in later sections.

21.14.2.1 *Usque ad medium filum aquae*

The common law rule *usque ad medium filum aquae*, 'up to the middle line of the water', is a presumption of conveyancing law. The holder of a Crown grant is presumed to own the bed of a boundary river or stream up to an imaginary

824. 'Nga Rauru o Nga Potiki Te Urewera Inquiry District Map Book', December 2003 (doc B24(a)), map 16: Te Miina a Papatuanuku

line running along the centre of the bed. The presumption can be rebutted by the terms of the grant or by surrounding circumstances. The presumption does not apply if the survey plan has a fixed point or 'right-line' boundary marked on it, rather than having the river or stream as the boundary. If a block is bounded by a river or stream, the boundary moves with the river if the change to its course is slow and gradual.

With regard to the claim issues before us, the leading historical cases about the *ad medium filum* rule are *Mueller* (1900) and *Wanganui River* (1962). The leading modern case is *Paki (No 2)* (2014).

- ▶ *Mueller: Mueller v Taupiri Coal-Mines Ltd* raised an issue of such importance that the case was moved from the High Court to the Court of Appeal.⁸²⁵ It concerned the mining of coal under the bed of the Waikato River. The river was confiscated from Maori by the Crown in the 1860s. The question before the court was whether, when riparian land was granted to settlers by the Crown, it carried with it ownership of the riverbed to the mid-point. All five judges of the Court of Appeal agreed that the *ad medium filum* rule applied unless rebutted. Four judges held that the presumption was rebutted by the circumstances of the grant. The chief justice held that it was not. The case was also significant because it influenced the statutory vesting, in 1903, of the beds of navigable rivers in the Crown. It is discussed further later in this chapter.
- ▶ *Wanganui River*: The 1962 Court of Appeal decision in *Re the Bed of the Wanganui River* marked the end of litigation in the general courts that began in 1950.⁸²⁶ It was preceded by litigation in the Maori Land Court, in which the Whanganui tribe sought to obtain freehold orders for the bed of the river. The issue in the general courts was whether compensation was due to Maori because they had owned the bed of the river before the beds of all navigable rivers were vested in the Crown by statute in 1903. In brief, the final outcome was that the Court of Appeal held that Maori had already lost ownership before 1903. This was because the court held there was no separate tribal title to the river in custom and the bed of the river had belonged *ad medium filum* to those individuals who had received awards of riparian land from the Native Land Court before 1903 and to the purchasers of these riparian lands.
- ▶ *Paki No 2*: The *Paki* case concerned the bed of the Waikato River adjacent to the Pouakani lands. The former Maori owners of those lands brought a case in which the parties agreed that, if the river was not navigable, the Crown obtained the bed *ad medium filum* by purchase from the riparian owners. But the Maori owners maintained that they had not known of the mid-point rule, had not knowingly or willingly alienated the riverbed, and that the Crown therefore owned it under a constructive trust for them. In terms of the application of the *ad medium filum* rule, the key decision is the Supreme Court's

825. *Mueller v Taupiri Coal-Mines Ltd* [1900] 20 NZLR 89 (CA)

826. *In re the Bed of the Wanganui River* [1962] NZLR 600 (CA)

2014 judgment *Paki v Attorney-General (No 2)*.⁸²⁷ In brief, all four judges held that the parties' agreement that the riverbed had transferred *ad medium filum* could not be accepted without inquiry as to the facts. The 1962 *Wanganui River* decision was held to be 'questionable', and an inquiry as to specific Maori custom in respect of the Waikato River was essential before it could be certain that the *ad medium filum* presumption applied. The judges' reasoning is set out in more detail in section 21.16.1.

21.14.2.2 *The doctrine of aboriginal title*

The doctrine of aboriginal or native or customary title is a common law doctrine. Under this doctrine, the Crown obtained 'imperium' (territorial authority) when it obtained sovereignty over New Zealand in 1840. This carried with it a 'radical' or 'root' title to all lands and waters. It did not include 'dominium' or ownership. The Crown's radical title is 'burdened' by pre-existing Maori customary rights. Those rights endure until or unless they are extinguished, which can only happen by consent and in accordance with New Zealand law (although it is held that statutes, if sufficiently explicit in their language, can extinguish customary title without consent). Aboriginal or native title does not depend on, and should not be characterised by, the incidents of English law. Aboriginal title must be conceptualised in its own terms.⁸²⁸

21.14.2.3 *Navigable rivers and the coal mines legislation*

Section 14 of the Coal-mines Act Amendment Act 1903 vested the beds of all navigable rivers in the Crown. This vesting was perpetuated in each succeeding Coal Mines Act until 1991, when the relevant section was repealed (by the Crown Minerals Act), but its effect was saved by section 354 of the Resource Management Act 1991, as if it had not been repealed.

The origins of section 14 of the Coal-mines Act Amendment Act 1903 are set out in some detail in section 21.16.3. Section 14 began with a saving clause – 'save where the bed of a river is or has been granted by the Crown'. After this, the section stated that the beds of navigable rivers 'shall remain and shall be deemed to have always been vested in the Crown'. A navigable river was defined as a river 'continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public for the purpose of navigation by boats, barges, punts, or rafts'. In section 206 of the Coal-mines Act 1925, this definition was changed to: 'a river of sufficient width and depth (whether at all times so or not) to be used for the purpose of navigation by boats, barges, punts, or rafts'.

827. *Paki v Attorney-General (No 2)* [2014] NZSC 118; *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (sc)

828. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), pp 45–46

The meaning and scope of the saving clause, the definition of navigability, and the question of whether this statutory language was sufficiently explicit to extinguish Maori customary title are all questions that have been debated in the courts. Here, we provide a brief introduction to cases that are dealt with later in the chapter:

- ▶ *Leighton* (1955): In *Attorney-General v Leighton*, Mrs Leighton sought to alter her title to include what she claimed was an accretion adjacent to the Waiwhetu Stream, which she argued that she owned *ad medium filum*.⁸²⁹ The Hutt River Board sought to establish that the ‘accretion’ was the product of work carried out by the board and belonged to it. The Attorney-General sought a declaration that the Waiwhetu Stream was a navigable river, and its bed was vested in the Crown. The High Court found in favour of Mrs Leighton. On appeal, the Court of Appeal declined to make the declaration sought by the Attorney-General, after significant discussion and obiter dicta (non-binding judicial comments) about the application of the coal mines legislation and the definition of navigability, on which the judges disagreed.
- ▶ *Tait-Jamieson* (1983): In *Tait-Jamieson v G C Smith Metal Contractors Ltd*, the defendant company had been removing shingle from the bed of the Manawatu River, and dairy farmers with riparian lands accused it of trespass.⁸³⁰ The company claimed the river was navigable and the bed belonged to the Crown. The High Court (agreeing with Justice Adams in *Leighton*), found that section 261 of the Coal Mines Act 1979 was not a statutory rebuttal of the *ad medium filum* presumption, and that the river was likely not navigable either. For both reasons, the bed vested *ad medium filum* in the dairy farmers. The decision was not appealed.
- ▶ *Paki* (No 1): The circumstances of the *Paki* case have been set out above. In its first decision (2012), the Supreme Court found that the riverbed was not vested in the Crown because that particular stretch had not been navigable in 1903 when the Act was passed.⁸³¹ It overturned the decision of the High Court and Court of Appeal, which had found that the whole of a substantially navigable river vested in the Crown. Having decided this part of the appeal, the Supreme Court then held further hearings to determine the remaining issues (which resulted in the *Paki* (No 2) judgment in 2014).

21.14.2.4 Legislation for the management of rivers

The Crown’s assumption of control over the rivers of Te Urewera began in the 1940s (apart from the specific issue of hydroelectric development), after the consolidation scheme and the Crown’s decision to redesignate most of Te Urewera for water

829. *Attorney-General, ex relatione Hutt River Board, and Hutt River Board v Leighton* [1955] NZLR 750 (CA)

830. *Tait-Jamieson v G C Smith Metal Contractors Ltd* [1984] 2 NZLR 513

831. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC)

and soil conservation. Legislation by which rights to control and manage rivers and waterways were transferred to the Crown included the Soil Conservation and Rivers Control Act 1941, the Water and Soil Conservation Act 1967, and the Resource Management Act 1991. A brief introduction to key provisions of these Acts follows.

21.14.2.4.1 SOIL CONSERVATION AND RIVERS CONTROL ACT 1941

The Soil Conservation and Rivers Control Act 1941 empowered the Crown to control and manage rivers so as to minimise and prevent erosion and protect property from flooding. It provided for:

- ▶ the establishment of a Soil Conservation and Rivers Control Council, consisting of senior officials of the Public Works and Lands Departments, representatives of local authorities, and one representative of agricultural and pastoral interests (section 3), with a range of functions to carry out the purposes of the Act;
- ▶ the establishment of catchment boards under the supervision and control of the council (section 11(1)(j) and (k)); every board was required to submit to the Minister of Public Works and the council a general plan for preventing and minimising damage within its district by floods and erosion (section 128); and
- ▶ all or some rivers, streams, and channels within a district, by direction of the Governor-General in Council, to come under the control and management of the board, which could also be charged with repairing, improving, or reconstructing them, with funding assistance from local authorities, drainage boards, and river boards as the Governor-General directed (section 130).

21.14.2.4.2 WATER AND SOIL CONSERVATION ACT 1967

The Water and Soil Conservation Act 1967 vested all rights to natural water in the Crown and modified the common law regime of riparian rights. Its purpose, as set out in its preamble, was to promote a national policy in respect of natural water, and to make better provision for the conservation, allocation, use, and quality of natural water, and for promoting soil conservation and preventing damage by flood and erosion, and for promoting and controlling multiple uses of natural water and the drainage of land, and for ensuring that adequate account is taken of the needs of primary and secondary industry, water supplies of local authorities, fisheries, wildlife habitats, and all recreational uses of water.

The Water and Soil Conservation Act:

- ▶ created a National Water and Soil Conservation Authority, chaired by the Minister of Works, with six other appointed members: one appointed on the advice of the Minister, one each representing the Soil Conservation and Rivers Control Council, the Pollution Advisory Council, and the Water Allocation Council, one appointed after consultation with the executive committee of the Municipal Association of New Zealand Incorporated, and one appointed after consultation with the executive committee of the New Zealand Counties Association Incorporated (section 5(1));

- ▶ created a Water Allocation Council, consisting of 11 members appointed on advice of the Minister, chaired by a member who was not in Government service, and comprising one officer each of the Department of Agriculture, the Department of Internal Affairs, the New Zealand Electricity Department, the Ministry of Works, and the Department of Health, plus three members to represent local authorities, plus one appointed after consultation with Federated Farmers of New Zealand Incorporated 'to represent the interests of primary industry in natural water', and one appointed after consultation with the New Zealand Manufacturers' Federation 'to represent manufacturing interests in natural water' (section 8(1));
- ▶ deemed catchment boards and catchment commissions constituted under the Soil Conservation and Rivers Control Act 1941 to be regional water boards, for the purposes of the Act (section 19(1));
- ▶ provided that the new National Water and Soil Conservation Authority should (among many other powers) control the system of allocating natural water rights, and the damming, diversion, taking, and use of water, and discharges into natural water (section 14(3)(a) and (g));
- ▶ provided that the authority should delegate certain powers to the three councils which, with itself, comprised the National Water and Soil Conservation Organisation as follows: matters of water and soil conservation to the Soil Conservation and Rivers Control Council; matters of pollution and quality of natural water and other water to the Pollution Advisory Council; and 'matters of allocation of natural water, and matters of co-operation with and between local authorities and suppliers of natural water in solving problems of distribution and economy of use of natural water and other water' to the Water Allocation Council; while the authority retained control of national policy, and general supervision of the administration of natural water (section 15);
- ▶ subject to any contrary legislative provision, vested 'the sole right to dam any river or stream, or to divert or take natural water, or discharge natural water or waste into any natural water, or to use natural water' in the Crown, except that it was lawful for persons to take or use natural water for domestic needs, and for their animals or for firefighting needs (section 21); and
- ▶ provided that all other uses of water would henceforth require consent from a regional water board (sections 21, 22, 24).

21.14.2.4.3 RESOURCE MANAGEMENT ACT 1991

A new regime, the culmination of many years of policy development, was introduced in 1991 to 'restate and reform the law relating to the use of land, air, and water'.

The part 11 provisions of the Resource Management Act 1991 are most relevant to the issues before us.

Section 5 sets out the Act's purpose as: 'to promote the sustainable management of natural and physical resources'. Sustainable management is defined as managing the use, development, and protection of resources in such a way as to enable

people and their communities to provide for their social, economic, and cultural well-being).

In giving effect to the Act's purpose, all people who exercise powers and functions under it (mainly local authorities) have to consider the matters set out in sections 6, 7, and 8 (section 5):

- ▶ Particularly important are the seven 'matters of national importance' listed in section 6, which decision makers have to recognise and provide for. These include 'the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga', and 'the protection of protected customary rights' (section 6(g)). Section 6 was amended in 2003 to add the protection of 'historic heritage' as a matter of national importance; this includes 'sites of significance to Maori, including wahi tapu'.
- ▶ Under section 7, decision makers exercising powers under the RMA must also have 'particular regard' to a number of other listed matters, including 'kaitiakitanga' and the ethic of stewardship.
- ▶ Under section 8, decision makers exercising powers under the Act, in relation to managing the use, development, and protection of natural and physical resources, shall 'take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)'.

Regional councils are to give effect to the Act in their region. They control water and water bodies, and the principal management documents for rivers (and the other matters for which regional councils are responsible) are 'regional policy statements and plans', which the councils prepare (sections 30, 59). When preparing or changing these management documents, councils must 'consult tangata whenua' of the area who may be affected (sections 60(1), 73(1), first schedule, part 1, clause 3(1)(d)) and must 'have regard to' any relevant planning document recognised by an iwi authority (sections 62(2A)(a)(ii)).

The Act also regulates the taking of gravel from any river; this is controlled by local authorities. Section 13(1)(b) provides that no person may excavate or disturb the bed of a lake or river unless expressly permitted by a rule in a national environmental standard, regional plan, proposed regional plan, or a resource consent. Local authorities are required to consider tangata whenua values when making decisions about gravel extraction.

Under section 33(1) a local authority may transfer one or more of its functions, powers, and duties under the Act to another public authority; section 33(2) specifies that a public authority includes 'an iwi authority'. Section 2 defines iwi authority to mean 'the authority which represents an iwi and which is recognised by that iwi as having authority to do so'. Since 2003, when the original section 33(1) was repealed and replaced, the power of transfer has included the power to approve a policy statement or plan.

21.14.3 Land alienation in the inquiry district

Because of the connection in New Zealand law between land ownership and riverbeds, it is necessary to provide a brief recapitulation of the ways in which Maori

customary tenure has been converted to Crown-derived titles, and the manner in which land has been transferred out of Maori ownership.

21.14.3.1 *The Native Land Court and the rim blocks*

As we discussed in chapters 7, 8, and 10, blocks of land encircling the future Urewera District Native Reserve were passed through the Native Land Court from the mid-1870s to the 1890s. The court's orders converted Maori customary tenure into a form of Crown-derived title known as Maori freehold land. The tenure conversion process and the new titles comprised a separate Maori title system, governed by the native land laws and administered by the Native Land Court.

In our inquiry district, the process began in the early 1870s with the four southern blocks, located south-east of Lake Waikaremoana. As set out in chapter 7, the Crown's purchase of the four southern blocks from Tuhoe, Ngati Ruapani, and Ngati Kahungunu in 1875 was conducted in a coercive, unfair manner that breached Treaty principles.

On the western side of the inquiry district, the rim blocks were: Matahina; Waiohau; Kuhawaea; Heruiwi 1–3; and Heruiwi 4. These blocks were mostly sold to the Crown through a purchase system in which the Crown imposed monopolies and subverted community control by picking off individual interests, partitioning and acquiring more land for survey costs, and then resuming purchase of the interests of non-sellers. There is a full account of these matters in chapter 10.

On the eastern side of the inquiry district, the Waipaoa block to the south and the huge Tahora 2 block in the north were passed through the court in the late 1880s and early 1890s. Part of Tahora 2 was acquired for survey costs but much of the block ended up in the East Coast trust (see chapter 12). The Waipaoa block was the subject of a particularly coercive and ruthless Crown purchasing campaign, as we explained in chapter 10.

The northern rim blocks were the Tuararangaia, Ruatoki, and Waimana blocks. The history of these three blocks was rather different. Tuhoe interests in Tuararangaia were gifted to the Crown in the twentieth century. Ruatoki passed through the court, was then placed in the Urewera District Native Reserve, and was mostly retained in Maori ownership following a consolidation scheme in the 1930s. Waimana was not the subject of Crown purchasing. Private purchasing and a process of serial partitioning resulted in the alienation of significant parts of the block, creating a patchwork of small, often uneconomic Maori blocks.

21.14.3.2 *The Urewera District Native Reserve and Urewera Consolidation Scheme*

As we discussed earlier in the chapter, Premier Seddon and Te Urewera leaders negotiated an agreement in 1895. The result was the creation of the inalienable Urewera District Native Reserve. Title to the lands in the Reserve was to be determined through a unique form of tenure conversion, in which a commission (with two Pakeha and five Tuhoe commissioners) would list the individual owners of hapu blocks. Although the UDNR Act 1896 was a promising resolution of decades of struggle between the peoples of Te Urewera and the Crown, it, like

the rim blocks, was subverted by the Crown's purchase of individual interests in the 1910s and early 1920s. By then, the Crown had acquired about half of the Reserve, but no one knew where its interests were actually located (see chapter 13). Ultimately, rather than partition each of the UDNR blocks between Maori and the Crown, creating a patchwork of interests, both parties preferred a consolidation scheme involving their respective interests within the entire Reserve by the time the Crown was willing to stop its purchasing (at least for the meantime).

The Urewera Consolidation Scheme was a complex and unique set of arrangements. The principles and outline of the scheme, as well as much of the disposition of the land, was negotiated between the Crown and Maori owners at the Tauarau hui in August 1921. The scheme was then given legislative force by the Urewera Lands Act 1921–22. Government officials representing the Lands and Survey Department and the Native Department were appointed as consolidation commissioners to implement the scheme. Their task was to set boundaries and awards on the ground, and to issue title orders for those awards. This process took several years, and the scheme was finally completed in 1927 (see chapter 14). As part of the scheme, the Crown acquired the Waikaremoana block, despite the fact that it had not actually purchased any interests there. Given the Government's determination to secure the block, evident in its plan to obtain it by a mix of compulsory public works takings and individual purchasing, Tuhoe insisted on relocating their interests from the Waikaremoana block into northern blocks in which they already had substantial interests, as part of the consolidation scheme. The Crown then purchased the remainder of the block from Ngati Ruapani and Ngati Kahungunu, based on agreements negotiated via local member of the House of Representatives Apirana Ngata in 1921.

Having briefly outlined the main forms of tenure conversion and land alienation, we turn next to examine the difference between the parties' positions on river issues.

21.15 THE ESSENCE OF THE DIFFERENCE BETWEEN THE PARTIES IN RESPECT OF RIVERS

21.15.1 The *ad medium filum* presumption and the issue of knowing, willing sales of rivers

In the Crown's view, no riverbeds were acquired in Te Urewera in circumstances that breached the Treaty, except in the cases of raupatu and consolidation.⁸³² Crown counsel submitted:

Neither the *ad medium filum aquae* presumption itself nor its application was in breach of Treaty principles. The presumption was not a principle designed to disentitle anyone of property rights. It was merely a principle of interpretation, a method of resolving any ambiguity as to boundaries when a sale of land bordered a river.⁸³³

832. Crown counsel, closing submissions (doc N20), topic 30, p 12

833. Ibid, p 2

This argument was based on the Crown's view that the *ad medium filum* presumption equated to Maori custom. According to Crown counsel, customary ownership of rivers went with ownership of adjoining lands. Transfer of the land would automatically include transfer of the river. Unless a Native Land Court investigation or a sale specifically excluded a river, Maori custom and the English common law would both presume that the riverbed was included to the centre line.⁸³⁴

On that reasoning, there was no need for Native Land Court judges or Crown purchase agents to mention or explain the *ad medium filum* presumption, or to explicitly include a river in title investigations or land sales. Maori and the Crown would both know that rivers went with the land, unless the presumption was rebutted by a specific arrangement at the time of sale. In the Crown's view, this must be assumed to be the case for all land sales in Te Urewera.⁸³⁵ The Tribunal, we were told, could only depart from this assumption by examining the 'understandings of each vendor and purchaser in each sale transaction . . . on a case-by-case basis' before it could 'arrive at any conclusion that Urewera Maori had a different understanding as to what was being sold.'⁸³⁶ There is no evidence, Crown counsel added, that Maori sought to specifically exclude rivers from a sale, or protested trespass on riverbeds as if they had not intended to sell their rivers.⁸³⁷

The claimants' view of the *ad medium filum* presumption was very different. It is *not* their custom, they told us.⁸³⁸ Rather, the presumption has been used to deny hapu 'the rewards of river ownership' and any say in the management of their rivers. Relying on Dr Doig's evidence, the claimants argued that the presumption was never explained to the peoples of Te Urewera: not in the proceedings of the Native Land Court or the two Urewera commissions, and not by purchase agents in land sales. Thus, a principle of English law, of which they had no knowledge, was used to dispossess them of their rivers. Further, Crown agents never offered to purchase rivers or said that rivers were included in a sale. Tuhoe, we were told, 'had no grounds to believe that their rangatiratanga over the waterways was diminished' by land sales. Since the Crown did not actively assert ownership till much later, in the second half of the twentieth century, it is not surprising that there were no protests about the loss of river ownership for a long time after the sales.⁸³⁹

Counsel for Ngati Kahungunu claimants used the four southern blocks as a prime example of how the *ad medium filum* presumption 'worked covertly' to alienate property rights, and diminished the mana and rangatiratanga guaranteed by the Treaty in respect of very significant taonga.⁸⁴⁰ In the claimants' submission,

834. Ibid, pp 9–11

835. Ibid

836. Ibid, p 11

837. Ibid

838. Counsel for Wai 687 claimant, submissions by way of reply, 13 July 2005 (doc N32), p 6

839. Counsel for Tuawhenua, appendix to closing submissions, no date (doc N9(a)), pp 110–114, 116–117

840. Counsel for Wai 687 claimant, closing submissions, 30 May 2005 (doc N4), p 8; see also counsel for Wai 687 claimant, submissions by way of reply (doc N32), p 6

English common law rules about the ownership of riparian land, and the effect of this on ownership of adjoining rivers, were not known or apparent to Maori at the time of sale in 1875. Under the doctrine of aboriginal title, Maori custom needed to be lawfully extinguished before English title rules could apply. In claimant counsel's submission, this did not happen with the rivers of the four southern blocks. The tribal groups did not knowingly or willingly sell these rivers. The rivers were not mentioned in the negotiations or the deeds, and the *contra proferentem* rule holds that ambiguities in deeds should be construed against the drafter. Further, the *ad medium filum* presumption should (within its own terms as part of English law) be considered as rebutted. This is because the transaction did not specifically include any waterways and Maori continued to use the rivers in the customary way after the sales. In those circumstances, and since there is no evidence that Maori understood the *ad medium filum* rule, the presumption should be considered to have been rebutted.⁸⁴¹ Further, the claimants argued that the Crown had a positive obligation under the Treaty to ensure that Maori properly understood land transactions, including any implications for river ownership.⁸⁴²

Instead of Maori losing title by a presumption of English common law, the Crown's title system should have 'conferred on them in 1840 a proprietary interest in the rivers that could be practically encapsulated within the legal notion of the ownership of the waters.'⁸⁴³ This, the claimants pointed out, was the Tribunal's finding in the *Te Ika Whenua Rivers Report*.⁸⁴⁴

21.15.2 The coal mines legislation and navigable rivers

The claimants argued that no justifications of 'good governance' were available for the 'confiscation' of their navigable rivers by statute in 1903. In their submission, there was simply no need for this degree of interference with their property rights and their tino rangatiratanga over rivers. The 1903 Act expropriated the beds of navigable rivers, even though the evidence shows that the Act was only supposed to deal with the ownership of coal in response to the *Mueller* case. In its final form, the 1903 Act had 'far wider ramifications' and breached Treaty guarantees. Further, the claimants' view is that the statute was enacted without due care for Maori interests, given the uncertainty that has persisted in the meaning of 'navigability', and of what was being saved in the word 'granted' (discussed further below).⁸⁴⁵

In the claimants' submission, the evidence also highlights that 'the Crown passed this expropriatory legislation without any consultation or agreement by Maori; or monetary compensation.'⁸⁴⁶ The Crown failed to live up to its own common law standards when it paid no compensation: 'At common law, it is always

841. Counsel for Wai 687 claimant, closing submissions (doc N4), pp 6–8, 16, 19–25

842. Counsel for Wai 687 claimant, submissions by way of reply (doc N32), pp 3–4

843. Counsel for Tuawhenua, appendix to closing submissions (doc N9(a)), p 111

844. Ibid

845. Counsel for Wai 687 claimant, closing submissions (doc N4), p 9

846. Ibid

presumed that extinction of private property rights by statute entails an obligation to pay compensation, and this applies to aboriginal title rights.⁸⁴⁷

In the claimants' view, no Treaty justification was (or can) be made for expropriating the beds of navigable rivers in the inquiry district in this way, or for treating the Treaty-guaranteed possession of navigable and non-navigable rivers differently. The claimants also noted the Court of Appeal's view in the 1994 *Te Ika Whenua* case that the 1903 legislation may not have been 'sufficiently explicit to override or dispose of the concept of a river as a taonga',⁸⁴⁸ but this issue, they pointed out, has not been decided authoritatively. In the meantime, there is no evidence that any rivers in the inquiry district have been alienated from Maori to the Crown in a manner consistent with the Treaty.⁸⁴⁹

The Crown's response to these arguments was that the peoples of Te Urewera had never expressed any dissatisfaction with the vesting of the beds of navigable rivers in the Crown before the present claims. First, there was no evidence to show that they had not been consulted about the coal mines legislation before it was passed. Secondly, there was no evidence that the peoples of Te Urewera had ever protested against the legislation or its effects. Thirdly, there was no evidence that they had ever 'sought compensation for any lost rights' following the enactment of the legislation. In those circumstances, the Crown concluded, 'there is no evidence adduced of any particular Crown acquisition of any riverbed in the inquiry district that is contrary to the principles of the Treaty.'⁸⁵⁰

The claimants responded that one of their concerns was the uncertainty about how the coal mines legislation actually applied in Te Urewera (which we discuss further below).⁸⁵¹ They also reaffirmed their position that 'the Coal-mines Amendment Act 1903 was clearly confiscatory and a breach of the principles of the Treaty.'⁸⁵² Counsel for Ngati Manawa added that it was 'fantastic to imagine . . . that there was any kind of consultation with Urewera Maori, Maori elsewhere, or indeed anyone, regarding the enactment of an obscure amendment to the Coal Mines Act in 1903.'⁸⁵³ The Crown, in the claimants' view, had 'chided' them for not protesting or seeking compensation, whereas the legislation and its implications were not explained by the Crown, and did not become clear in the inquiry district until much later. Indeed, one of the claimants' main concerns is that they are still not really sure which rivers or stretches of river the Crown has confiscated under the legislation.⁸⁵⁴

847. Counsel for Ngati Manawa, closing submissions, 2 June 2005 (doc N12), p 63

848. *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA), 26 (counsel for Wai 687 claimant, closing submissions (doc N4), p 9); counsel for Ngati Manawa, closing submissions (doc N12), pp 61–62

849. Counsel for Wai 687 claimant, closing submissions (doc N4), p 10

850. Crown counsel, closing submissions (doc N20), topic 30, pp 11–12

851. Counsel for Ngati Manawa, submissions by way of reply, 8 July 2005 (doc N26), pp 6–7

852. *Ibid*, p 7

853. *Ibid*

854. *Ibid*, pp 7–8

21.15.3 The special circumstances of the Urewera Consolidation Scheme

The claimants argued that the Crown had ‘wrongly acquired’ their rivers as part of the Urewera Consolidation Scheme, even though the peoples of Te Urewera never knowingly or willingly sold their rivers to the Crown.⁸⁵⁵ Purchase agents only acquired undefined, unlocated shares in land, and the UDNR deeds made no mention of rivers. Thus, the Crown never paid for any riverbeds that it ended up acquiring through the Urewera Consolidation Scheme. Nor did it obtain any riverbeds by consent as part of that scheme. At no stage, in the claimants’ submission, did the consolidation commissioners ever explain the *ad medium filum* rule or that the Crown would end up the owner of riverbeds adjoining the riparian land that it was awarded. Indeed, it is not clear that the commissioners themselves expected the presumption to apply to their awards. They very occasionally awarded interests in the actual beds of rivers to Maori, though never to the Crown.⁸⁵⁶

Tuhoe protested by petition in 1922, fearing that the Crown was gaining ownership of their rivers through the scheme, which was something they had never agreed to: ‘It is clear that Tuhoe were unwilling to alienate their rivers under the UCS, which was unsurprising given that the issue hadn’t been negotiated with them.’⁸⁵⁷ In the claimants’ submission, the Crown’s response in 1924 that the rivers were not part of its award should have been the end of the matter, but it was actually ambiguous because it did not rule out the application of the *ad medium filum* rule to the Crown’s award. Since then, the Crown has claimed ownership of adjoining riverbeds under this common law doctrine, which the claimants believe is a Treaty breach.⁸⁵⁸ Also, the Crown has obtained riverbed ownership through creating river bank reserves or marginal strips, the ‘deemed effects’ of which include title to the riverbed *ad medium filum aquae*.⁸⁵⁹

The Crown took a very different view of the effects of the UDNR purchases and the consolidation scheme.

First, the Crown argued that its creation of marginal strips or river bank reserves as part of the consolidation scheme had been well intentioned. Based on Dr Doig’s evidence, Crown counsel argued that there had been no deliberate attempt to deprive hapu of riverbed ownership.⁸⁶⁰

Secondly, the Crown noted that in cross-examination, Dr Doig had accepted that rivers running inside blocks (rather than bounding them) would have been understood as alienated with the land.⁸⁶¹

855. Counsel for Wai 36 Tuhoe, closing submissions, pt c (doc N8(b)), p 15; counsel for Wai 36 Tuhoe, closing submissions, pt b (doc N8(a)), pp 173–175

856. Counsel for Wai 36 Tuhoe, closing submissions, pt b (doc N8(a)), pp 173–175

857. *Ibid*, p 174

858. *Ibid*, pp 174–175; counsel for Tuawhenua, appendix to closing submissions (doc N9(a)), pp 115–116

859. Counsel for Ngati Manawa, closing submissions (doc N12), p 58

860. Crown counsel, closing submissions (doc N20), topic 30, p 12; see also Suzanne Doig, summary of ‘Te Urewera Waterways’, no date (doc F6), pp 4–5

861. Crown counsel, closing submissions (doc N20), topic 30, p 10

Thirdly, the Crown argued that UDNR purchases were the same as all others, in the sense that where boundaries were rivers, those rivers would automatically transfer with the land – and Maori would have understood that to have been the case. Again, proof to the contrary would be needed in every case before the Tribunal could find that Maori had not understood themselves to be selling their rivers along with their land.⁸⁶²

Fourthly, the Crown argued that, because rivers went with the land, no extra payment was required for rivers. Dr Doig had maintained that the Maori owners who sold land and those who were relocated as part of the consolidation scheme received no compensation for rivers over and above the price paid by the Crown for the value of their *land*. Crown counsel submitted, ‘This point assumes that compensation for rivers would necessarily be a separate part of any negotiation of price.’ The Crown’s view is that rivers were included as part of the sale of land, and so the purchase price ‘necessarily’ included payment for those rivers.⁸⁶³ Crown counsel did add that ‘In the case of consolidation, the purchase of shares provided a different context.’⁸⁶⁴ No explanation was offered, however, as to how the context differed or what significance the difference had for the Crown’s argument about the UDNR purchases.

Also, Crown counsel submitted, as noted above, that ‘there is no evidence adduced of any particular Crown acquisition of any riverbed in the inquiry district that is contrary to the principles of the Treaty.’ But this submission was ‘subject to two important qualifications,’ one of which was *raupatu*, and the other of which was the Urewera Consolidation Scheme.⁸⁶⁵ Yet the Crown made no other submission about how or why the consolidation scheme was an exception in respect of its acquisition of rivers.⁸⁶⁶

21.15.4 What riverbeds does the Crown claim to own, and is the law in respect of ownership unclear?

The Wai 36 Tuhoe claimants argued that the Crown has ‘wrongly acquired by legislation or by operation of the UDNR and UCS title to Tuhoe’s rivers within Te Urewera, *or has left the state of ownership of rivers in confusion*’ (emphasis added).⁸⁶⁷ This was because:

the UCS did not expressly address the question of rivers. As a result the question of title to rivers remains in substantial doubt. We argue that the rivers have not been willingly ceded by Tuhoe to the Crown and the presumption remains that they belong in Tuhoe ownership. However, this is the matter that the Crown must clarify for the

862. Ibid, pp 9–11

863. Ibid, p 10

864. Ibid, p 11

865. Ibid, pp 11–12

866. Ibid, topics 18–26

867. Counsel for Wai 36 Tuhoe, closing submissions, pt c (doc N8(b)), p 15

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The Rangitaiki River, 1891. The river lies in the boundary zone between Te Urewera to the east and the Kaingaroa Forest to the west, and it forms part of the Urewera inquiry district's western border. The river is of great significance to Ngāti Manawa, Ngāti Haka Patuheuheu, and Tuhoë.

future. So also, Tuhoë title to its rivers, where navigable, needs to be confirmed as they too have never been acquired from Tuhoë.⁸⁶⁸

Counsel for Ngati Manawa submitted that ‘The real problem with the issue of title to river beds seems to be that neither the Crown nor anyone else has any clear idea as to which river beds belong to the Crown and which do not.’⁸⁶⁹

For Ngati Manawa, the main problem was the poor drafting of the coal mines legislation, with its circular definition of a navigable river as a river that can be used for navigation, and the Crown’s long-standing refusal to correct the ambiguities because they favoured the Crown’s interests. In the claimants’ view, the Crown has been enabled to assert ownership of riverbeds on flimsy grounds, including that of rivers which were navigable by jetboats, though these had not been invented in 1903. Then, the Crown has not necessarily pressed its claims to rivers after acquiring what it wanted (usually valuable gravel). Another flaw in the 1903 Act, we were told, was that it included no mechanism to formally declare a river navigable, nor any due process or means of appealing such a decision. Given the confiscatory nature of the legislation, the claimants’ view was that there needed to be a careful, formal appraisal of navigability and an explicit Crown claim of ownership, which could then be contested as necessary. Instead, the law is unclear and Government departments have claimed rivers from time to time with significant inconsistency.⁸⁷⁰ Because the Crown has sometimes asserted ownership of the Rangitaiki as navigable, and at other times not, the claimants today still do not know which stretches of the Rangitaiki are claimed by the Crown.⁸⁷¹

The Crown responded that ‘Riverbed ownership depends not on Crown recognition but on the legal system’s recognition of rights and interests.’ The ‘question of who holds title to riverbeds within the inquiry district today is a question of law that could be determined by the Maori Land Court and High Court.’⁸⁷² Crown counsel submitted that it was ‘likely’ that title to the beds of navigable rivers in Te Urewera ‘will be held . . . by the Crown.’ For non-navigable rivers, it was ‘likely’ that the adjoining landowner would own half of the riverbed, in accordance with the *ad medium filum* presumption.⁸⁷³ Tangata whenua, Crown counsel submitted, were ‘likely to hold title to some riverbeds’ under this presumption, but the presumption was rebuttable. They ‘may still and, in places, are quite likely to, hold title to beds of non-navigable rivers’ where they owned adjacent or surrounding land. The Crown noted that surviving pockets of Maori land in the national park were mostly on rivers; it would be quite wrong, therefore, to assume that tangata whenua have lost ownership of all riverbeds. Block-by-block evidence was needed: ‘It is not an issue that admits of easy, generic answers in the abstract.’⁸⁷⁴

868. Counsel for Wai 36 Tuhoë, closing submissions, pt A (doc N8), p 60

869. Counsel for Ngati Manawa, submissions by way of reply (doc N26), p 6

870. Counsel for Ngati Manawa, closing submissions (doc N12), pp 59–60, 63

871. Ibid, p 60; counsel for Ngati Manawa, submissions by way of reply (doc N26), p 7

872. Crown counsel, closing submissions (doc N20), topic 30, p 8

873. Ibid

874. Ibid, pp 8–9

Thus, the Crown argued that the owners of riparian Maori land may still own riverbeds to the mid-point unless that presumption has been rebutted. But Crown counsel made no submissions about the meaning or effects of the coal mines legislation, other than to note that Government departments had extracted gravel from time to time in the bona fide belief that the riverbeds concerned were Crown-owned. This could include a ‘belief that the river was navigable.’⁸⁷⁵ Crown counsel gave no explanation as to why it was only ‘likely’ that the Crown had title to the beds of navigable rivers in Te Urewera.

In reply to the Crown’s submissions, counsel for Wai 36 Tuhoe submitted that ‘It is particularly disappointing that the Crown has not addressed the uncertainty of rights of ownership and management of rivers arising from the legal regime applying to rivers.’⁸⁷⁶

Counsel for Ngati Manawa agreed, arguing that the Crown was correct that there were no ‘easy, generic answers in the abstract’, and that Maori may still own some riverbeds or stretches of riverbeds.⁸⁷⁷ The problem, in the claimants’ view, is that no one knows for sure – even in respect of such a major river as the Rangitaiki:

one would expect that in the case of major waterways such as the Rangitaiki river (a river of great significance to Ngati Manawa) the Crown would have some idea as to what stretches of the river it actually lays claim to and on what basis. Without knowing the basis for Crown claims to ownership in any given case it is hard to know whether any such claim is well-founded or not – even in the ordinary law, quite apart from any consideration of Treaty breach. Until the Crown deigns to inform the claimants as to what waterways it believes it owns and why the matter is indeed ‘in the abstract.’⁸⁷⁸

It is submitted that the Crown cannot tell us what stretches of the Rangitaiki river it owns (and the Wheao and Whirinaki for that matter) because it – or rather, its officials – do not themselves have any idea, and indeed cannot do so given that the law relating to riverbed ownership is in such a state of hopeless ambiguity, uncertainty and confusion.⁸⁷⁹

Thus, the parties agreed that there were no ‘easy, generic answers in the abstract’ about the ownership of particular rivers, or stretches of them, but disagreed as to whether that meant the law governing ownership was unclear. The claimants argued that the law itself was uncertain in its application to every major river in Te Urewera.

875. Crown counsel, closing submissions (doc N20), topic 30, p 17

876. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 44

877. Counsel for Ngati Manawa, submissions by way of reply (doc N26), p 6

878. Ibid

879. Ibid, p 7

21.15.5 How has the Crown asserted authority and control over rivers and customary fisheries, and with what effects?

The claimants asserted that the Crown has assumed 'exclusive environmental management' within Te Urewera. Counsel for Tuhoe submitted that the effect of this was that the tino rangatiratanga of Tuhoe 'is disregarded'.⁸⁸⁰ The Crown denied that it had assumed exclusive management – which would assume that it had ignored its Treaty partner completely, 'in a relationship where neither party can have monopoly rights over a resource'. It denied also the suggestion that it had 'somehow excluded Maori from the broader group that it governs'.⁸⁸¹ Counsel pointed to Tribunal reports referring to a hierarchy of interests in respect of natural resources based on kawatanga and tino rangatiratanga, and noted that the first interest is the Crown's obligation to control and manage those resources 'in the interests of conservation and in the wider public interest'; then comes 'the tribal interest in the resource, ahead of the rest of the public'.⁸⁸² The management of natural resources 'is an exercise of reasonable and good governance'.⁸⁸³

Claimants and the Crown dispute the degree of authority the Crown has assumed in respect of rivers. The claimants' key concern has been the Crown's assumption of exclusive control by statute, disregarding both their tino rangatiratanga and their obligations as kaitiaki, and its subsequent bad management of rivers. The result has been erosion, pollution, and habitat destruction – with serious damage to customary fisheries.

The Crown made two concessions in response: it had until 'relatively recently' conducted 'limited consultation' in respect of river management issues on gravel extraction and flood control,⁸⁸⁴ and it had 'facilitated' the introduction of trout, which had damaged indigenous fisheries.⁸⁸⁵ Otherwise, counsel pointed to the Resource Management Act 1991, submitting that tangata whenua interests are 'taken into account' through the Act in terms of how the natural environment is managed, and through the fisheries regime. The Crown stated that there was 'insufficient evidence' before the Tribunal to make any finding of Treaty breach.⁸⁸⁶

As we have seen, the claimants expressed concern that the Crown has appropriated the profits of gravel extraction by claiming ownership of their rivers. In their view, gravel extraction has been poorly administered and monitored; the result has been erosion and degradation of rivers and riparian lands in Te Urewera. The Crown conceded that consultation before 1991 was limited. But the RMA currently regulates the taking of gravel from any river, and local authorities are required to consider tangata whenua values when making decisions about gravel extraction.⁸⁸⁷

880. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 153

881. Crown counsel, closing submissions (doc N20), topic 29, p 12

882. *Ibid*

883. *Ibid*, p 45

884. *Ibid*, topic 37, p 3

885. *Ibid*, topic 30, p 2

886. *Ibid*, p 14

887. *Ibid*, p 17

The management and control of customary fisheries is an important issue for the claimants. Claimants and the Crown were not in agreement about the impact of the post-1991 regime for managing customary fishing, and the management of indigenous fish species and their habitats. The claimants argued that the modern fisheries management regime was ‘insufficient’ to ensure that fish stocks – especially tuna – remained at a level suitable for customary harvest.⁸⁸⁸ The Crown, as we have noted, submitted that tangata whenua interests ‘are taken into account . . . through the fisheries regime.’⁸⁸⁹ In our analysis we consider the Crown’s position that tangata whenua played an important role in regulating customary fishing in rivers, in accordance with the Fisheries (Kaimoana Customary Fishing) Regulations 1998 negotiated under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.⁸⁹⁰

The claimants made no submissions about the suitability of fishing regulations. Their principal concern was the decline of their eel fishery, and the impact on it of hydro dams, commercial fishing, and habitat degradation.⁸⁹¹ The claimants submitted, in respect of the Waikaremoana power scheme, that they had not been consulted about the scheme, and that it had had significant detrimental effects on them, their rivers, and their fisheries.⁸⁹² The Crown acknowledged the impacts of the hydro scheme on customary fishing activities, and on eel migration, but stated that resource consents for the scheme are now required by law and that there has been considerable consultation between ECNZ and local Maori groups.⁸⁹³

Crown counsel, while conceding the damage to native fish populations in Te Urewera rivers caused by the introduction of brown and rainbow trout, pointed to Mr Lynch’s evidence that little or no commercial fishing was now taking place in Te Urewera as a ‘circumstance’ that should be considered in this context.⁸⁹⁴ But the claimants did not consider that the Crown’s remedial measures (including a moratorium on new commercial licences, and allocation of quota to tangata whenua) were adequate to ensure the health of the customary eel fishery. Tuna stocks were low because of previous over-fishing and hydro development, and the commercial fishermen themselves had chosen to stay away.⁸⁹⁵

In respect of post-1991 river management, the claimants accepted that the Resource Management Act was an improvement on the previous resource management regime. Counsel for Tuawhenua, for instance, had expressed concern about the Water and Soil Conservation Act 1967, under which the Crown’s powers in respect of rivers were further entrenched; since then, she said, ‘anyone wishing

888. Counsel for Wai 687 claimant, submissions by way of reply (doc N32), p 4

889. Crown counsel, closing submissions (doc N20), topic 30, p 14

890. *Ibid*, p 13

891. The claimants set out this concern in a number of briefs of evidence and submissions: see, for example, counsel for Wai 687 claimant, submissions by way of reply (doc N32), p 4.

892. See, for instance, Maria Waiwai, brief of evidence (doc H18), pp 4–6; James Waiwai, brief of evidence (doc H14), pp 23–24; counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 65

893. Crown counsel, closing submissions (doc N20), topic 28, pp 16–17

894. *Ibid*, topic 30, p 16

895. Counsel for Wai 687 claimant, submissions by way of reply (doc N32), p 4

to use [natural] water has been required to obtain the Crown's consent.⁸⁹⁶ Counsel for Nga Rauru o Nga Potiki considered the RMA was 'well intentioned'.⁸⁹⁷ Claimant submissions generally were brief, and were critical of various aspects of the Act, or of the Crown's river management regimes. Counsel for 144 Ngati Ruapani submitted that the Crown's environmental protection regimes 'have not recognised or provided for the traditional fisheries and other activities of Maori with regard to their rivers, and have failed to give Maori the consultative and management role they are entitled to by the Treaty'. Counsel were critical of post-1991 river management because tangata whenua, in her view, were seldom consulted over management; if they were consulted at all. Nor had the delegation of management functions from centralised Crown agencies to local government been satisfactory.⁸⁹⁸ Counsel for Wai 36 Tuhoe agreed that the Act fell short of what was required by the Treaty because it vested river management in regional councils, and 'Tuhoe have no recognised legal role' to manage their rivers.⁸⁹⁹

The Crown's response to post-1991 claimant concerns about river management and consultation was consistently couched in terms of the Resource Management Act; issues such as gravel extraction, pollution, hydro dams, flood control, and the permissibility of certain river activities are now managed appropriately through the Act.⁹⁰⁰

21.16 HOW HAS THE CROWN EXERCISED AUTHORITY AND CONTROL OVER TE UREWERA RIVERS AND HAS IT TAKEN DUE ACCOUNT OF THE RIGHTS AND INTERESTS OF THE PEOPLES OF TE UREWERA?

SUMMARY ANSWER: New Zealand law about rivers – both common law and legislation – is complex and confusing. The application of both in Te Urewera has created great uncertainty about the legal ownership and management of its rivers.

- ▶ *The common law:* Under the English common law, rivers are conceptualised as land – the riverbed – (which can be owned) and water (which cannot). For tidal rivers, the bed of the tidal reaches is vested in the Crown. The beds of non-tidal rivers can be privately owned. There is no public right of navigation or fishing in these privately owned rivers. Where access to the river can be controlled or prevented, there is little practical difference between ownership of a riverbed and ownership of a whole river, including its water and other resources. Legally, however, the water cannot be owned until abstracted and captured. Ownership of the bed of a non-tidal river is presumed to lie with the owner of the land adjoining it, to the centre line of the stream (*ad medium filum aquae*), though the presumption might be rebutted by the terms of the

896. Counsel for Tuawhenua, closing submissions, app (doc N9(a)), pp 117–118

897. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 268

898. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, pp 114, 117

899. Counsel for Wai 36 Tuhoe, thematic submissions for Ruatoki hearing, 17 January 2005 (doc 143), p 4

900. Crown counsel, closing submissions (doc N20), topic 30, pp 2–3, 13–18

land owner's grant. The English common law was imported to New Zealand in 1840. The English Laws Act 1858, however, added an important qualification: the laws of England were deemed to be in force 'so far as applicable to the circumstances of . . . New Zealand'. Relevant circumstances in New Zealand include Maori customary law and the rights recognised and guaranteed by the Treaty of Waitangi. The common law in New Zealand also incorporates the doctrine of aboriginal title or customary title, which states that the Crown's radical or underlying title, acquired with sovereignty, is subject to pre-existing Maori customary rights. Those rights can only be extinguished with the free consent of Maori or by clear statutory wording.

The Native Land Court was statutorily charged with ascertaining ownership according to Maori custom; but in the general courts, from 1877 on, Maori customary property rights were found to be unenforceable. In the leading case at the time of our hearings, the 1962 Court of Appeal decision *In re the Bed of the Wanganui River*, the court held that there was no separate tribal title to the riverbed, and that investigation and granting of title to blocks of land by the land court extinguished the customary title *ad medium filum aquae*. But the idea that separation of riverbeds from their waters and the mid-point presumption equate with Maori custom has faced serious criticism since at least the 1990s, notably by the Waitangi Tribunal, which has found that such rules are not relevant to the way Maori understand, rivers, or what Maori agreed to sell as part of a land transaction. The leading modern case is *Paki (No 2)* (2014). All four Supreme Court judges considered that the *Wanganui River* decision about the applicability of the *ad medium filum* presumption was at best of doubtful authority, that an investigation of local Maori custom was required, and that if local Maori custom involved separate ownership of a river from the adjoining land, then the *ad medium filum* presumption would not apply to a Native Land Court title or its subsequent conveyance.

The Crown first asserted its control and authority over Te Urewera rivers in the Eastern Bay of Plenty confiscation, under the New Zealand Settlements Act 1863. The confiscation included the beds of rivers. Later assumptions of Crown authority over rivers arise from Crown purchases of the four southern blocks (1875); its purchases of the rim blocks defined by the Native Land Court, which encircle the Tuhoe Rohe Potae, from the mid-1870s on; and from the statutory conversion of the titles of UDNR blocks (originally decided by the Urewera commissioners, not the Native Land Court, so that legally the UDNR land remained in customary title) to orders of the Native Land Court in 1909.

The evidence of tangata whenua before us in this inquiry did not support a view that mana over land and adjacent rivers is identical, or that rivers were customarily considered part and parcel of an adjoining piece of land; rather, rivers have a separate identity from the surrounding lands as awa tupuna, with their own mauri. In considering the effect of land alienations on rivers, we note the key difference between the position of the Crown and that of

Chief Justice Elias in *Paki (No 2)*. The Crown submitted to us that the peoples of Te Urewera sold their rights to the rivers when they sold their lands, unless the rivers were specifically excluded. That is, the Crown wants the matter to be viewed in the context of English custom (common law). The Supreme Court in *Paki* has said that the matter is to be viewed objectively in the context of Maori custom and usage in relation to the river in question.

In the case of the four southern blocks, there is no evidence that rivers formed part of the negotiation for the blocks, and the sketch maps accompanying the deeds of sale show the shaded boundaries as running alongside the rivers but not including them. The claimants moreover gave evidence of their communities' continued, widespread use of water resources south of the lake until at least the 1940s. It cannot be shown that the Maori vendors knowingly and willingly alienated their rivers in (and bounding) the four blocks, and their continued exercise of customary rights in the rivers shows that they considered ownership remained with them. For the western rim blocks we adopt the relevant findings of the Te Ika Whenua Rivers Tribunal, namely that there was no evidence that the Rangitaiki, Whirinaki, or Wheao Rivers were included as part of the sale of riparian land. The Tribunal did accept that smaller tributaries and streams, where located inside the boundaries of a sold block, were not necessarily taonga, and that tino rangatiratanga over these waterways may not have been retained. But it considered that the onus rested with the Crown to prove that Maori willingly gave up the wish to retain their rivers. Title may have passed to the Crown by virtue of the *ad medium filum* rule, but this was hardly a voluntary relinquishment of tino rangatiratanga. The Treaty promised Maori full, exclusive, and undisturbed possession of their taonga, and this included water; the ownership rights of hapu equated to full rights of use and control of the waters within their rohe. In respect of the eastern rim blocks, Tahora 2 and Waipaoa, there is no evidence available to us from which to draw conclusions about whether rivers were alienated knowingly and willingly in land transactions. There are no records indicating that the Crown would acquire the riverbed of the Ruakituri River, the eastern boundary of the Waipaoa block, when it acquired land with frontage to the river for survey costs. The Crown obtained the whole of the riparian land abutting the Waipaoa Stream and most of the riparian land adjoining the Ruakituri River, but there is no evidence that the owners knowingly or willingly sold either waterway, and significant evidence to the contrary. In the northern rim blocks, the Ruatoki owners secured legal ownership of their small riparian sections by the Ohinemataroa River as a result of the Ruatoki–Waiohau consolidation scheme. The wider community, however, continued to exercise customary rights over the river, maintaining their customary relationship with it. The Crown emerged from this consolidation scheme as the owner of a significant stretch of the Rangitaiki River – but it had purchased no land there; it acquired the land as a result of purchases at Ruatoki. Thus, there is no evidence that the Waiohau owners willingly agreed to transfer this stretch of the river to the Crown. At Waimana, the position is highly confused

because surveyors sometimes used fixed (right-line) boundaries, some by the banks and others in the middle of the riverbed, especially when many small partitions of the block were created. This was probably because of the constantly changing course of the river. The *ad medium filum* presumption did not apply to these boundaries.

- ▶ *Legislation:* The importance of the Coal-mines Act Amendment Act 1903 has been far-reaching. Section 14 of the Act vested the beds of navigable rivers in the Crown, and deemed them always to have been vested in the Crown (except in case of a Crown grant). The Government's aim in inserting the clause initially was to obtain more certain ownership of the coal under the beds of New Zealand's larger rivers. But concerns were raised about interference with the rights of private property owners. At the third reading, the clause about navigability was inserted to circumvent this difficulty, vesting not just coal in the Crown, but riverbeds and all minerals in them. It is clear that Maori rights were given no consideration, nor were the special circumstances of Te Urewera (as a native reserve with its own unique titles system). And the peoples of Te Urewera could not have been consulted in the few days before the new clause was inserted at the third reading of the Bill. In the general courts, the question has been debated whether the effect of the Act was to expropriate (confiscate) Maori rights or merely to declare the prior legal position. In the *Te Ika Whenua* case (1994), the Court of Appeal suggested that the language of section 14 might not be sufficiently clear to expropriate a river that is a taonga – a 'whole and indivisible entity, not separated into bed, banks and waters.' The question has not yet been tested and decided by the courts. In the meantime, we consider that the Crown's claim of riverbeds in our inquiry district on the basis of the Act was expropriatory. Either the Crown is acting unlawfully or the Act is expropriatory.

There are particular difficulties with the statutory definition of navigability, which has no root in Maori custom; Maori were not concerned with the ownership of riverbeds. The higher courts have been uncertain how to interpret navigability. Judges have disagreed, for instance, about whether the Act should be interpreted as vesting in the Crown the whole bed of a river that is navigable 'in substantial part', or whether navigation has to be for a commercial purpose. There have been official initiatives since the mid-1960s to consider how to clarify the law, or whether to set up a mechanism to decide which rivers are navigable, and to what point, operated by the Lands and Survey Department. There was a proposal in 1985 to state a case to the Court of Appeal to clarify the meaning of the relevant section (section 261 of the Coal Mines Act 1979, the effect of which has been preserved by section 354 of the Resource Management Act 1991); the Minister approved it, but it was not carried out. The law relating to ownership of the beds of navigable rivers seems not to have been reconsidered by the time of our hearings in 2005.

- ▶ *The special circumstances of the Urewera District Native Reserve and the Urewera Consolidation Scheme:* The ordinary native land laws did not apply to the UDNR in 1903 when the Coal-mines Act Amendment Act was passed.

The Premier and the Native Minister had both acknowledged that the rivers in the Reserve belonged to Maori. In the hearings of the Urewera commission, set up to divide the district into hapu blocks, investigate their ownership, and make block orders, the ownership of rivers was almost never discussed, nor is it clear how Tuhoe saw their land titles as affecting their rivers. The work of the Urewera commission had not changed the fact that the UDNR was still in customary title, but section 3 of the UDNR Amendment Act stated that all orders made under the 1896 Act should be deemed to have had the same operation as a freehold order made by the Native Land Court (the Government hoped it would assist the purchase of reserve land for settlement). It is our view, however, that it was highly unlikely that rivers were included *ad medium filum* in the orders of the Urewera commissioners, and therefore it was equally unlikely that when the orders were deemed to have had the 'same operation' as Native Land Court orders, this vested riverbeds in riparian owners *ad medium filum*. The Crown's purchases were later treated as if both had happened. But the Crown bought only undefined interests in UDNR blocks; it never managed to buy the whole of any block. So many kainga and cultivations were near rivers, it seems these would be the last places given up once interests were finally located on the ground. The deeds and transfer documents for the UDNR purchases do not mention rivers at all. It cannot be shown in fact that Tuhoe, Ngati Manawa, or Ngati Whare knowingly or willingly sold any of their rivers to the Crown in these transactions, and there is significant evidence that they did not. In the case of the Waikaremoana block, the Crown purchased no interests at all, so Tuhoe, Ngati Ruapani, and Ngati Kahungunu did not knowingly or willingly alienate any rivers or waterways in that block.

The Urewera Consolidation Scheme followed the intense years of Crown purchasing in the UDNR blocks. Maori owners would negotiate the location of their awards on the ground with Crown officials. Consolidation commissioners would subsequently finalise awards on the ground, and settle boundaries. Maori were not represented on the commission and, because rivers and streams were used extensively as boundaries, the decision as to how much river bank land the Crown and Maori would get was solely a matter for the Crown. From notes of the consolidation hui we know that the commissioners did not discuss the potential implications of the consolidation scheme and reorganisation of the titles for legal ownership of the rivers or riverbeds at any point during the proceedings. The Crown assumed later that it was self evident that control and use of waterways was dependent on the *ad medium filum* presumption (so that this required no explanation at all). On the other hand, it also acquired riparian strips or reserves, generally one chain (20 metres) wide, adding to the uncertainty as to what rights it had acquired over riverbeds. It thus took ownership of the banks of almost the entire Tauranga River and some of its major tributaries, though the land in question was not Crown land. It is not entirely clear why some of these reserves were made under the authority of the Land Acts. Other reserve strips were located along

streams in both the Whakatane and Waimana catchments. It is not clear whether these marginal strips made the Crown owner of these waterways *ad medium filum*. What is clear is that when the Crown began to lay off river bank reserves, a large Tuhoe petition was sent to Parliament in 1922; the petitioners stated their strong objection to the Crown 'taking our rivers'. The commissioners, to whom the petition was referred, responded in 1924 that 'The rivers are not included in any of the Crown awards'. Thus the peoples of Te Urewera were entitled to assume that their authority and control over rivers continued as before – and as it had during the time of the UDNR. The question also arises whether, if the Crown did acquire any property rights in rivers through the acquisition of riparian land during the UCS, it did so without the payment of any compensation to Maori sellers or non-sellers. The land had not been partitioned, with a defined purchase of riparian land. Instead, the Crown's consolidated award equalled the monetary value of what it had paid in its purchases for undefined shares. It must be the case therefore that the Crown never paid for the land under the rivers. It is not clear how much riparian land the Crown obtained through separate roading and survey deductions, though it would be surprising if no river and stream frontages at all were included in the 71,500 acres awarded to the Crown for this purpose. In respect of the Waikaremoana block, we note that there was no explicit offer by the Crown to Ngati Ruapani and Ngati Kahungunu to buy rivers, or agreement to sell them; it seems also that the Crown sought to separate Maori from any ownership of river banks in the block by inserting foreshore reserves between Ngati Ruapani reserves and the Hopuruahine River – perhaps because of its preoccupation with watershed protection. By the end of this period it appeared that the Crown had ownership of virtually all the waterways south-east of the Huiarau Range. Maori, on the other hand, were still largely unaware that the Crown might claim ownership of their rivers. It may be added that Tuhoe and Ngati Whare processes of amalgamating many of the UCS titles and vesting them in new tribal trusts in the late 1960s and early 1970s further complicated the situation. But there is no evidence that these processes had any effect on tribal ownership of the Ohinemataroa (Whakatane) River, regardless of who owned the riparian lands. It was the intrusion of the Crown's claims as a new owner of massive amounts of riparian land that was the most important change in respect of rivers.

- ▶ *Crown claims of ownership of Te Urewera riverbeds*: The Crown has asserted its ownership of riverbeds in a variety of ways. The most far-reaching assertion came in the 1950s, when long stretches of riverbed were made part of the national park, mostly made up of the Crown's Urewera A block which it had obtained through the UCS. It maximised its claim to riverbeds in the park by also including many of the river bank reserves created during the consolidation scheme. All beds and waters in the Urewera A block had been included in the national park by the end of 1957. Outside the national park, assertions of riverbed ownership were mostly made in relation to gravel extraction, because the Crown could charge extractors royalties for Crown-owned

rivers. It also arose when the Government had to decide whether or not to claim dry riverbed when a water course had changed. But the basis on which the Crown claimed to own particular stretches of riverbed was often unclear. It has claimed various beds or parts of beds from time to time, through different agencies – sometimes by licensing local bodies – and has also apparently abandoned claims or changed the basis of the claim from navigability to the *ad medium filum* presumption. The Rangitaiki, Whirinaki, Ohinemataroa (Whakatane), and Tauranga (Waimana) Rivers were all declared navigable in 1977 for the purpose of gravel extraction, but it is not at all clear on what basis. Lands and Survey, for instance, could find no evidence in 1994 of the Crown ever claiming to own the Rangitaiki.

There remain many points of doubt as to who owns the riverbeds of Te Urewera. It is uncertain whether Maori customary title has survived the various points at which it might have been extinguished by law. It is uncertain whether any rivers or parts of rivers are ‘navigable’ within the meaning of the coal mines legislation, and which rivers or parts of rivers are claimed by the Crown. Yet it is over 100 years since the 1903 Act was passed. A third major area of uncertainty is whether the *ad medium filum* presumption may be rebutted at the time of sale (of riparian lands) to the Crown. Riverbed ownership, once the national park was established, seems to have been of little interest to the Crown – perhaps because so many powers of control over rivers were vested in it by statute in the second half of the twentieth century.

- ▶ *Crown assertions of authority and control over rivers and customary fisheries:* The Crown introduced laws to control aspects of river management, especially those related to assisting Pakeha settlement, from the earliest colonial period. Tribal authority and ownership of waterways was barely considered in the enactment of these statutes. In Te Urewera, Pakeha settlement was limited to the fringes of the inquiry district, and most of the area was kept for catchment preservation of forestry. As a result, many of the nineteenth century statutes were not of relevance in Te Urewera. Crown assumption of control over the rivers of Te Urewera began in the 1940s (with the exception of its use of the Water-power Act 1903 and its successors for hydro development at Lake Waikaremoana and the southern waterways). Foremost among statutes by which control has been asserted was the Water and Soil Conservation Act 1967, which established a Water and Soil Conservation Authority to oversee a national system of allocating water rights. Maori rights and interests were neither considered nor provided for in the Act. An amendment in 1981 did not improve matters. Historically, Crown management issues which directly affected Maori owners included gravel extraction, flood protection, and pollution. The Crown conceded that its consultation on gravel extraction and flood control had been limited ‘until relatively recently’. It appears that there was poor monitoring of gravel extraction, and that this contributed to erosion before the RMA. Local bodies took little or no interest in flood protection for Te Urewera Maori communities before the 1960s because until 1964 there was a general rating exemption for former UDNR lands. The land Maori

owners retained was generally not very productive or was too small in individual parcel size to allow their effective participation in decision-making around funding for erosion protection. They could not bring financial pressure to bear on catchment boards and regional councils. Maori riparian land was particularly vulnerable to erosion and flooding. Most was still left out of the major works constructed in the 1960s and 1970s, though Ruatoki, Waimana, and other areas did get some benefit. There is little evidence about pollution of particular rivers before the RMA, though it is clear that it occurred due to fertiliser runoff, pest control poisons, farm effluent, and leaching from riverside dumps around townships. Hydro development also impacted on rivers in the inquiry area. We accept the findings of the *Te Ika Whenua Rivers Report* in respect of the Matahina, Aniwhenua, and Wheao power schemes. The Waikaremoana scheme, which had major effects on the river system to the south-east of the lake, resulted in loss of habitat and mahinga kai, and it was the late 1990s before a programme was instituted to try to reverse the harm to the migration cycle of eels. The claimants were not compensated for the use of their taonga, their water bodies, to generate electricity for the national benefit, nor for the harm to their waterways and fisheries.

A further area of Crown river management concerns customary fisheries. The importance of customary fisheries to Maori had often been acknowledged since the early decades of the twentieth century, but the Government had taken little action to protect them. The biggest single threat to the customary fisheries of Te Urewera has been the introduction of trout, which predate on native fish and compete with them for food supplies. Trout have devastated the indigenous fisheries of Te Urewera, with the exception of tuna. In the first half of the twentieth century, the Government managed the fisheries for the benefit of Pakeha sportspeople, and were indifferent to most indigenous species except eels, which were seen as a threat to trout. The first attempt to protect indigenous fish for Maori is found in 1951 regulations, but it was 1977 before some protection was extended to eels. The lack of provision for tangata whenua input into decision-making over customary fisheries has made the taonga of the tuna fishery vulnerable to damage by competing interests within the Crown-controlled and regulated regime. The fishery has been damaged by habitat depletion, hydroelectricity production, and barriers to migration and, from the late 1960s, a great expansion of commercial fishing which spiked in the early 1980s and then remained stable. In the RMA era, post-1991, the Crown has undertaken some remedial measures, but at the time of our hearings tuna stocks were still low, and there was still no provision at any of the hydroelectricity projects for eel migration in both directions. Maori customary fishing rights have received some recognition in DOC's management of Te Urewera National Park, including recognition of tuna fishing as a permitted activity. But Maori were still shut out of any management role for their customary fisheries in the park before the 2003 management plan, which at least provided for negotiation of joint management

for customary tuna fishing. Outside the park, customary fishing was still controlled by amateur fishing regulations at the time of our hearings, which gave Maori comparatively little control over their own customary fishing.

With the advent of the RMA regime in 1991, the stated purpose of which is provision for sustainable management of natural and physical resources, there is recognition of the relationship of Maori and their culture and traditions with their ancestral lands and water, for protection of recognised customary activities; and Treaty principles are to be taken into account. Regional councils are to prepare regional policy statements and plans, and consult with tangata whenua. At the time of our hearings it was not clear how the tribal relationship with Environment Bay of Plenty worked in practice, or whether river issues such as gravel extraction, pollution, hydro dams, and flood control are managed appropriately through the RMA. The Act is a significant improvement on the pre-1991 regime for management of rivers. But no management powers in respect of any rivers in Te Urewera had been transferred to Tuhoe or other iwi at the time of our hearings, though there is provision in the RMA for powers exercised by local authorities to be transferred to iwi authorities.

Crown recognition of the rights and interests of the peoples of Te Urewera in their rivers has, historically, been minimal, and been overridden by preoccupation with the demands of settlement, sports fishing, and hydro development. The Crown's failure to recognise Maori authority, the importance of their relationships with rivers, and tuna, their taonga, and Maori reliance on clean rivers and river foods has led to environmental damage and damage to the tuna fishery throughout Te Urewera.

21.16.1 The common law

Under the English common law, rivers were divided into land (which could be owned) and water (which could not). For tidal rivers, the bed of the tidal reaches was vested in the Crown. The beds of non-tidal rivers could be privately owned. Such ownership carried with it exclusive rights to control and use the fisheries and the water in the river, as long as the rights of downstream owners were not infringed. There was no public right of navigation or fishing in these privately owned rivers; such rights, where they could be invoked, 'depended upon immemorial user or dedication by a riparian landowner'.⁹⁰¹ Thus, where access to the river could be controlled or prevented, there was little practical difference between ownership of a riverbed and ownership of a whole river, including its water and other resources.⁹⁰² Legally, however, the water could not be owned until abstracted and captured. And the abstraction or use of water for agriculture, industry, and

901. Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), pp 16-17

902. *Ibid*, p xv

other purposes could not infringe the rights of other owners to 'receive the unimpeded flow of stream water unaltered in volume or quality'.⁹⁰³

Ownership of the beds of non-tidal rivers was presumed to lie with the owner of the land adjoining the river. This was a presumption of conveyancing law, expressed in the maxim *ad medium filum aquae* (to the middle point of the water). Where land is bounded by a non-tidal river, 'the presumption is that the boundary is the centre line of the stream; but this presumption may be rebutted by the terms of the grant or by the surrounding circumstances'.⁹⁰⁴

The English common law was imported to New Zealand in 1840. The English Laws Act 1858 states in section 1:

The laws of England as existing on the 14th day of January 1840, shall, so far as applicable to the circumstances of the said Colony of New Zealand, be deemed and taken to have been in force therein on and after that day, and shall continue to be therein applied in the administration of Justice accordingly.

The key phrase in this section was 'so far as applicable to the circumstances of the said Colony of New Zealand'. Relevant circumstances in New Zealand included Maori customary law and the rights recognised and guaranteed by the Treaty of Waitangi. This was especially relevant in respect of rights to, and concepts of, 'property'. The common law in New Zealand and other colonies incorporates what is called the doctrine of aboriginal title or customary title, which we described briefly in the Key Facts section above. As the Tribunal in the Te Kahui Maunga Report explained, the doctrine of customary title

identifies Maori as the original inhabitants of the country and acknowledges that they 'held all land in New Zealand according to their customs and usages' . . . The doctrine seeks to protect these rights by recognising that although the Crown acquired radical title upon its assumption of sovereignty, this is held 'subject to Maori customary usages or native title until the Maori customary interest had been extinguished'.⁹⁰⁵

The nature and importance of customary title has been set out in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*:

Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation. On the acquisition of the territory, whether by settlement, cession, or annexation, the colonising power acquires a radical or underlying title which goes

903. G W Hinde, D W McMorland, and P B A Sim, *Introduction to Land Law*, 2nd ed (Wellington: Butterworths, 1986), sec 12.011 (Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 83)

904. Hinde, McMorland, and Sim, *Introduction to Land Law*, sec 2.201 (Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 83). After 1903, the presumption no longer applied in New Zealand law to non-tidal but navigable rivers.

905. Waitangi Tribunal, *Te Kahui Maunga: The National Park District Inquiry Report*, 3 vols (Wellington: Legislation Direct, 2013), vol 3, p 998

with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights. They are usually, although not invariably, communal or collective. It has been authoritatively said that they cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statutes.⁹⁰⁶

In the early period of New Zealand's colonial history, this position was acknowledged by both the British Government and the New Zealand courts. The Tribunal has noted a number of instances over the years. The best known is the 1847 case *R v Symonds*, in which Justice Chapman stated:

Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice anything new and unsettled.⁹⁰⁷

The need to conceptualise native title in its own terms was also known, although not always respected. From 1840, the British Government assumed that Maori territorial rights were circumscribed, and did not extend over the whole country. From 1844, there was a move afoot (finally abandoned by 1847) to seize all Maori land that was not directly occupied by way of houses or cultivations as 'unowned' by Maori and therefore the property of the Crown.⁹⁰⁸ Lord Stanley, secretary of state for the colonies until the end of 1845, opposed this move, explaining that what Maori owned depended on Maori law and custom, not English law. He told the British Parliament, in a speech that was received with acclamation:

With respect to the greater portion of New Zealand, I assert that the limits and rights of tribes are known and decided upon by native laws. I am not prepared to say what number of acres in New Zealand are so possessed; but that portion which is not so claimed and possessed by the natives, is, by the act of sovereignty, vested in the

906. *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA), 23–24

907. *R v Symonds* (1847) NZPCC 387, 390 (Waitangi Tribunal, *Te Kahui Maunga*, vol 3, p 998)

908. Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847* (Auckland: Auckland University Press, 1977), pp 179–187; Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, pp 257–261

Crown. But that is a question on which native law and custom have to be consulted. That law and that custom are well understood among the natives of the islands. By them we have agreed to be bound, and by them we must abide. These laws, these customs, and the right arising from them, on the part of the Crown, we have guaranteed when we accepted the sovereignty of the islands; and be the amount at stake, smaller or larger, so far as native title is proved, – be the land waste or occupied, barren or enjoyed, – these rights and titles the Crown of England is bound in honour to maintain, and the interpretation of the treaty of Waitangi, with regard to these rights is, that except in the case of the intelligent consent of the natives, the Crown has no right to take possession of land, and having no right to take possession of land itself, it has no right – and so long as I am a minister of the Crown, I shall not advise it to exercise the power – of making over to another party [namely, by Crown grant] that which it does not possess itself.⁹⁰⁹

Later, in the 1871 case *Re the Landon and Whitaker Claims Act*, the New Zealand Court of Appeal found: ‘The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. *Whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it.*’ (Emphasis added.)⁹¹⁰ In the general courts, this line of reasoning was later displaced by what Chief Justice Elias refers to as the “political trust” notion, which made Maori customary property rights unenforceable in the courts. This began to dominate legal proceedings after the *Wi Parata* decision in 1877.⁹¹¹ The Native Land Court, by contrast, remained statutorily charged with ascertaining ownership according to Maori custom. As we saw in chapter 20, the Native Appellate Court found in respect of Lake Waikaremoana that any consideration of the *ad medium filium* rule, and its application to the Crown’s acquisition of lands adjoining the lake, was 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.’ Maori 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 in court that it had acquired rights to the lakebed when it became the owner of riparian lands.⁹¹²

For rivers, the leading case at the time of our hearings was the 1962 Court of Appeal decision *In re the Bed of the Wanganui River*.⁹¹³ The court held that there

909. *New Zealander*, 13 December 1845 (Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, pp 295–296)

910. *Re the Landon and Whitaker Claims Act 1871* (1872) 2 NZCA 41 (CA), 49 (*Paki v Attorney-General* (No 2) [2015] 1 NZLR 67 (SC), 124)

911. *Paki v Attorney-General* (No 2) [2015] 1 NZLR 67 (SC), 93, 124–127

912. Department of Maori Affairs, ‘Lake Waikaremoana Crown Appeal’, 1944 (doc H2), pp 153–154

913. *In re the Bed of the Wanganui River* [1962] NZLR 600 (CA)

was no separate tribal title to the riverbed, and that investigation and granting of titles to blocks of land by the Native Land Court ‘extinguished the customary title *ad medium filum aquae*’.⁹¹⁴ In coming to this decision, the Court of Appeal relied mainly on the advice of the Native Appellate Court. The president of the Court of Appeal, Justice Gresson, found:

The evidence as to rights of passage over the river exercised by the whole tribe and the fact that the eel weirs and fishing devices placed by individuals or hapus were not rigidly limited to the portion of the river immediately adjacent to the bank occupied by the individuals or the hapu, does not, I think, negative the application of the medium filum rule. In regard to both matters there may well have been an express or tacit permission, and in any case it is reasonable to suppose that there would have existed some degree of ‘give and take’ between hapus in this regard. That riparian owners without let or hindrance may have permitted a right of passage or may have allowed the construction of fishing devices by others than those holding title to the riparian land does not, in my opinion, exclude the principle that the bed of the river up to the middle line was included when the banks were parcelled out among groups or hapus and common ownership was transmuted [by the Native Land Court] to ownership in severalty.

For the reasons earlier expressed, I am of opinion that when individual titles were substituted for the general communal right of the tribe, there attached to each grant by virtue of the presumption title to the bed of the river *ad medium filum*.

The other Members of the Court concurring in this view, there will be a declaration accordingly that the titles issued in respect of the riparian blocks included in each case a title *ad medium filum aquae*.⁹¹⁵

Relying in part on this case, the Crown argued in our inquiry that the *ad medium filum* presumption applied to Maori riparian lands because it was, in effect, Maori custom. As Crown counsel put it, the ‘possession of mana over land surrounding or adjacent to rivers or streams carried with it the possession of mana over those streams or rivers (or parts of them where different hapu/iwi occupied opposite banks)’. On that understanding of custom, the Crown argued that the ‘relinquishment of mana over the surrounding or adjacent land carried with it the relinquishment of mana over the rivers or streams, unless rights in relation to rivers or streams were specifically reserved’.⁹¹⁶ In making this argument, the Crown repeated its position from the Te Ika Whenua Rivers inquiry in the 1990s.⁹¹⁷ There, it was added that Maori custom was so similar to the ‘philosophy underlying the common law principles as to riparian rights’, as encapsulated in the *ad medium*

914. Counsel for Ngati Manawa, closing submissions (doc N12), p 61

915. *In re the Bed of the Wanganui River* [1962] NZLR 600 (CA)

916. Crown counsel, closing submissions (doc N20), topic 30, p 9

917. *Ibid.* Crown counsel referred us to fuller discussion of the Crown’s position in Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 93; see also pages 93–97.

filum rule, that the rule was a reliable indicator of what Maori agreed to part with – whether in post-Treaty land sales or the abandonment of territory in pre-Treaty times.⁹¹⁸

In his evidence for the Tribunal, Professor Boast explained the significance of the 1962 *Wanganui River* decision for our inquiry. The decision was primarily concerned with the effect on a riverbed when the Native Land Court investigated and awarded title to riparian blocks, and its application has not been limited to Whanganui:

The Court of Appeal found that the Native Lands Act processes of investigation of title and subsequent Crown grant had the effect of vesting title to the bed of the Wanganui *ad medium filum* in the grantees, thus extinguishing any notional customary tribal title to the river bed. The case tends to indicate, then, that Crown grants to Maori under the Native Lands Act in fact do extinguish customary title to the river bed. The 1962 decision is, however, questionable in view of the recent development of the law relating to aboriginal title in Australia, Canada and New Zealand.⁹¹⁹

In effect, the 1962 Court of Appeal decision has been treated as expressing ‘universal Maori custom’, most recently by the High Court in the *Paki* case.⁹²⁰ But the idea that separation of river beds from their waters, and the mid-point presumption equate with Maori custom has faced serious criticism since at least the 1990s. The Waitangi Tribunal’s *Mohaka River Report* found that English common law rules had little or no relevance in explaining how Maori customarily understood (and continued to understand) rivers, or what Maori had agreed to sell as part of a land transaction.⁹²¹ Relying on that report, and the *Te Ika Whenua – Energy Assets Report 1993*, the Court of Appeal in *Te Ika Whenua* suggested in 1994:

the Waitangi Tribunal have adopted the concept of a river as being taonga. One expression of the concept is ‘a whole and indivisible entity, not separated into bed, banks and waters’ . . . as the Waitangi Tribunal bring out in their *Mohaka River Report* at pp 34–38, the *ad medium filum aquae* rule applied in the 1962 case is inconsistent with the concept and may well be unreliable in determining what Maori have agreed to part with.⁹²²

This decision was followed by the Tribunal’s *Te Ika Whenua Rivers Report* in 1998 and *Whanganui River Report* in 1999. Both reports rejected the notion that the

918. Crown counsel, closing submissions, 10 October 1994 (Wai 212 ROI, doc D5), p 12 (Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 93); see also pages 93–97.

919. Boast, ‘The Crown and Te Urewera in the 20th Century’ (doc A109), p 271 n

920. This characterisation of the High Court’s decision was made in *Paki v Attorney-General* (No 2) [2015] 1 NZLR 67 (SC), 85.

921. Waitangi Tribunal, *The Mohaka River Report 1992* (Wellington: Brooker and Friend Ltd, 1992), pp 30–38, 49–50, 78

922. *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA), 26–27

mid-point presumption had anything to do with Maori custom. The *Whanganui River Report* was stringent in its criticism of the advice given by the Maori Appellate Court to the Court of Appeal, and the Court of Appeal's 1962 *Whanganui River* decision.⁹²³ The Tribunal noted, however, that the comments of President (later Lord) Cooke in the 1994 Court of Appeal decision in *Te Ika Whenua* were not binding. What was needed, the Tribunal explained, was a test case:

Whether as a matter of law the rights to rivers and waters may exist as a matter of aboriginal title or customary law and may not be overridden by . . . the *ad medium filum aquae* rule, will not be known until such time, if ever, as the issues are further tested in the High Court and Court of Appeal.⁹²⁴

Since our hearings, the reliability and applicability of *In re the Bed of the Whanganui River* was tested in the *Paki* case. Although we do not have the benefit of submissions from the parties, we cannot avoid some discussion of that case's implications for the claims before us.

As noted above, the High Court in *Paki* considered that the 1962 *Whanganui River* decision expressed a universal rule of Maori custom, that there was no separate ownership of riverbeds and adjoining land. Even if there had been, the High Court's view was that the rights were extinguished by the title orders of the Native Land Court, before any subsequent acquisition of riparian blocks by the Crown.⁹²⁵

In the Supreme Court in *Paki*, the judges delivered separate judgments. We summarise here only the points relevant to the *ad medium filum* rule.

The chief justice, Dame Sian Elias, found that the outcome of the appeal was not determined by applying the 1962 *Whanganui River* decision. The reason the appellants had put their case that way (that the Crown gained ownership *ad medium filum* by its acquisition of their riparian lands) was that they had feared that the Maori Land Court, relying on the 1962 Court of Appeal decision, would reject a claim that they still owned the riverbed.⁹²⁶ The chief justice, by contrast, considered that the 'effect and the application' of the *ad medium filum* presumption when the Native Land Court investigated and granted title was in fact a matter of 'significant controversy'.⁹²⁷ While the High Court in the *Paki* case had treated *Whanganui River* as 'expressing universal Maori custom', her view was that such a conclusion could not reasonably be drawn from the *Whanganui River* proceedings. Local custom was ascertainable as a matter of fact and may differ from that applying to the *Whanganui River*. Relying on the Privy Council decision in *Amodu Tijani*, which we discussed in the previous chapter, the chief justice considered that 'the study of the history of the particular community and its usages in each case' was needed.

923. Waitangi Tribunal, *Whanganui River Report*, pp 224–232, 265–266

924. *Ibid*, p 306

925. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 82, 85, 96

926. *Ibid*, pp 83–84, 94–95

927. *Ibid*, p 84

The High Court was wrong to apply *Wanganui River* without further inquiry as to the custom and usage of the Pouakani people.⁹²⁸

The chief justice then turned to the doctrine of aboriginal title. The High Court had found, and the Court of Appeal had appeared to agree, that, ‘irrespective of whether it accorded with custom’, the *ad medium filum* presumption arose ‘as a matter of New Zealand law’ when titles to riparian lands were granted by the Native Land Court. The chief justice disagreed: ‘no such presumption of ownership arose as a matter of New Zealand law on investigation of titles and . . . such a presumption of law would be inconsistent with New Zealand law and traditions, for reasons explained in *Ngati Apa*’.⁹²⁹ That is, Maori customary title was a burden on the Crown’s radical title, was not displaced by English common law rules affecting property (such as Crown ownership of tidal lands), and could not be extinguished without consent unless overridden by statute. The onus of proof of extinguishment is on the Crown.⁹³⁰

Thus, a conveyancing presumption about the riverbed could only apply if the riparian owners ‘had the bed to convey’. The presumption was not available unless the ‘riverbed land had been investigated and any customary interest extinguished’ either by sale to the Crown or ‘conversion to Maori freehold land’ after title investigation by the Native Land Court. A specific investigation and grant of title to a riverbed was necessary before the *ad medium filum* presumption could apply to new, Crown-derived titles. The chief justice noted that, in the case of small watercourses, the inference of a separate customary title might not apply, but the inference could not be excluded for significant water bodies.⁹³¹

It was also possible for the presumption – if title to the riverbed had been gained – to be rebutted. Normally, sellers of riparian land would have no interest in retaining a ‘strip of riverbed’ but, in the case of Maori vendors, the presumption can be rebutted by a ‘continuing interest by Maori riparian owners in fisheries or other resources or attributes’ of the river. Before considering whether the riparian owners could rebut the presumption, however, the earlier question had to be decided as to whether they had ever owned it *ad medium filum* in the first place.⁹³²

The chief justice then summarised her views on the 1962 *Wanganui River* decision. Because of its significance for our inquiry, we quote this passage in full:

For the reasons explained below, I do not consider that the 1962 decision in *Re the Bed of the Wanganui River* is authority for the proposition that a legal presumption of ownership to the middle of the flow attached to all Maori freehold riparian land for which title was issued on investigation in the Native Land Court, ousting any separate

928. *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 (PC), 404 (*Paki v Attorney-General* (No 2) [2015] 1 NZLR 67 (SC), 84–85)

929. *Paki v Attorney-General* (No 2) [2015] 1 NZLR 67 (SC), 86, referring to the Court of Appeal decision in *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (the Marlborough Sounds foreshore and seabed case).

930. *Paki v Attorney-General* (No 2) [2015] 1 NZLR 67 (SC), 100–101

931. *Ibid*, pp 86–87, 122

932. *Ibid*, pp 87, 100

customary interest in the bed if the riparian land has been investigated. If ownership to the middle of the flow does not accord with the custom and usage of the Pouakani riparian owners, I consider that no presumption that the riverbed was conveyed with the riparian lands applies as a matter of New Zealand law. On that basis, the status of the riverbed is undetermined and may be investigated by the Maori Land Court to establish whether it continues as unextinguished customary land.

If, contrary to the view I take, the 1962 decision in *Re the Bed of the Wanganui River* does purport to express a rule of law of general application as to ownership of riverbed land adjoining riparian Maori freehold land, I would not follow it, for reasons explained at paragraphs (142) to (145). They include the nature of land ownership in New Zealand and the institutional protections for Maori property which have always been a feature of New Zealand law. They also include the inapplicability of the justifications given by the authorities for what is a limited rule of English conveyancing practice, predicated on undoubted ownership of riverbed by riparian owners, which justifications are unconvincing in the circumstances of conversion of Maori customary land into Maori freehold land.

The 1962 decision, as is explained in paragraph (141), is difficult to reconcile with earlier decisions, such as the 1912 decision of the Court of Appeal concerning the bed of Lake Rotorua in *Tamihana Korokai v Solicitor-General* [discussed in chapter 20], and with decisions of the Native Land Court vesting the beds of lakes, such as Lake Omapere [discussed in chapter 20]. The decision has been much criticised (including by the Waitangi Tribunal in 1999 in its report on the Whanganui River) and rests in part on reasoning which was not followed by the Court of Appeal in 2003 in *Ngati Apa v Attorney-General*. I consider that the continued authority of the 1962 Court of Appeal decision in *Re the Bed of the Wanganui River* is inconsistent with the decision of the Court in *Ngati Apa* . . .⁹³³

Then, in a paragraph with which Justice Glazebrook concurred, the chief justice stated that the assumption relied on by the parties in *Paki*, that the Crown had obtained the riverbed with its purchase of riparian lands, was ‘highly contentious’. The ‘single authority relied on for it [*Wanganui River*] was ‘questionable’. Thus, it would not be responsible for the Supreme Court to accept the parties’ agreed position that the riverbed had transferred to the Crown *ad medium filum*.⁹³⁴ In the chief justice’s view, it was still open for the Maori Land Court to investigate title to the riverbed. She stated that she declined to accept the Crown’s ‘assertion of ownership’.⁹³⁵

Justice McGrath found that the appellants’ case was flawed because the question of whether the 1962 *Wanganui River* decision ‘provides a sound basis for acceptance of the parties’ common reliance on the application of the mid-point presumption in this case is a matter on which there is scope for argument’. One view is that *Wanganui River* established a generally applicable rule of law, based on a finding of

933. Ibid, pp 87–88, see also pp 120–122

934. Ibid, pp 88, 167

935. Ibid, pp 88–89

universal Maori custom, that the investigation of riparian land by the Native Land Court included the riverbed to the middle point, constituting an ‘effective barrier’ to other claims of customary title to the bed of a river. But another view is that the outcome in *Wanganui River* was determined not by the existence of any general rule of law or finding of universal custom, but rather by the particular facts, which the Court of Appeal saw as establishing that the application of the mid-point presumption was consistent with local Maori custom. On this approach, the mid-point presumption may not apply if its operation is inconsistent with Maori custom and usage in relation to the particular river concerned. Neither approach can be assured; there needed to be a contest as to the facts and the law.⁹³⁶

Justice William Young considered that ‘it is at least uncertain whether the mid-point presumption generally applied to the titles created by the Native Land Court and, if so, whether it applied in relation to the Pouakani blocks and was not displaced.’⁹³⁷ Justice Young expressed ‘reservations’ that the *ad medium filum* presumption did apply to these particular blocks, and therefore it was not clear to him that customary title to the riverbed had been lost. Given the absence of a contest, the Supreme Court could not determine whether the *ad medium filum* presumption did in fact apply, but the ‘lack of clarity’ as to whether it did or was displaced added uncertainty to the factual position.⁹³⁸ On the facts available as to the Native Land Court’s investigation of the Pouakani blocks, Justice Young thought there was a ‘reasonable case to be made’ that the riverbed was not investigated or included in the Pouakani titles.⁹³⁹ On the other hand, there was also a reasonable case to be made that, as a matter of law and on the limited facts, the mid-point presumption *did* apply to the Pouakani titles issued by the Native Land Court.⁹⁴⁰ But because the appeal was based on the assumption that the *ad medium filum* rule applied, and this assumption was ‘at least doubtful’, the appeal had to be dismissed.⁹⁴¹

As noted, Justice Glazebrook agreed with the chief justice that the assumption relied on by the parties – the Crown had obtained the riverbed with its purchase of riparian lands – was ‘highly contentious’, and the authority relied on for it (*Wanganui River*) was ‘questionable.’⁹⁴² Thus, it would not be responsible for the Supreme Court to accept the parties’ agreed position that the riverbed had transferred to the Crown *ad medium filum*, and the appeal had to be dismissed. Justice Glazebrook was also ‘inclined to agree with the Chief Justice that *Re the Bed of the Wanganui River* is not authority for the proposition that the mid-point presumption reflects universal Maori custom.’ Even if it were, the Supreme Court could depart from it, given that it ‘is not a decision of this Court’. She noted that a

936. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 131

937. *Ibid*, p139

938. *Ibid*, p140

939. *Ibid*, pp147–148

940. *Ibid*, p147

941. *Ibid*, p150

942. *Ibid*, pp88, 167

lot of research had been done since 1962 on land transactions and Maori custom, and the United Nations Declaration on the Rights of Indigenous Peoples might also be relevant. In any case, Justice Glazebrook stated that she agreed with the chief justice that the question depended on local Maori custom, which could displace the *ad medium filum* presumption. Further, whatever the local custom was, there were ‘real doubts’ that in the Pouakani case the Native Land Court process to award title ‘ever engaged with the riverbed at all.’⁹⁴³

But, in her view, it was not necessary to decide whether the *ad medium filum* presumption applied. If it *did* apply, then that was because it was Maori custom, and the Maori owners must have known their own custom (and therefore knew that the riverbed transferred with sale of the land). If it did *not* apply, then the riverbed never belonged to the riparian owners by virtue of their Native Land Court titles, and so they could not sell it to the Crown. Either way, the appeal could not be sustained.⁹⁴⁴

The issue of knowingly selling a riverbed *ad medium filum* was dealt with differently by the judges. As noted, Justice Glazebrook observed that *if* riparian landowners had title to the riverbed *ad medium filum*, it could only be because that was Maori custom. Knowing their own custom, they must have known that they were selling the bed with the adjoining land.⁹⁴⁵ Justice William Young, in a section entitled ‘What were they thinking?’, concluded that ‘there can be no certainty’ as to what the Crown, the Native Land Court, or Maori vendors thought in the late nineteenth century as to whether title to the riverbed went with the adjoining land.⁹⁴⁶

The chief justice relied on *Mueller* to emphasise the importance of surrounding circumstances rather than direct evidence of the vendors’ intentions. She stated:

Since it has been important in the reasoning of the Courts below that the intentions of the individual vendors is [*sic*] now unknowable, it should be noted that application and rebuttal of the presumption does not turn in all cases on close inquiry as to the thinking of the individuals concerned at the time. In *Mueller* no close inquiry was made of what the agents of the Crown had in mind when the land grants there in issue were made. Instead, the presumption was rebutted on objective assessment by the Court of the externalities of the grant: the importance of the Waikato River for communication, the Crown’s purpose in opening up the settlements, and so on. Similar assessment may be available in relation to the vendors of the Pouakani blocks and in relation to those who agreed to the partitions arrived at, depending on custom in relation to the river and its continued importance to the vendors. They remained on land in the District and may well have had no thought that their connection with the river would be affected. . . .⁹⁴⁷

943. Ibid, p167

944. Ibid, pp167–168

945. Ibid

946. Ibid, pp149–150

947. Ibid, p100

In their statement of claim, the plaintiffs plead that at the time of the transfers of the land to the Crown the Pouakani people had ‘no knowledge of the principle of common law that the land adjoining a non-navigable river took the ownership of and rights up to the middle of the river known as the “ad medium filum” principle’ but that the Crown ‘was aware of the operation of the ad medium filum principle’. In its statement of defence the Crown said, in response, that while it had insufficient knowledge of the understanding of the Pouakani owners (and therefore put the plaintiffs to proof of their understanding), ‘the Crown was aware that the *ad medium filum* presumption was a principle of New Zealand law that applied at the relevant times’. This admission answers any doubt that the Crown may not itself have understood the consequences, an element in the claim of unconscionable or unfair dealing. In relation to the understanding of the Pouakani riparian owners, it is not clear that an inference would not be objectively available on inquiry into the circumstances, in particular the custom and usage in relation to the River. As indicated at paragraph (23), that was the approach taken in *Mueller*, which did not rely on evidence of subjective intention.⁹⁴⁸

In the chief justice’s view, the continued use by Maori of their river and its fisheries was itself sufficient to rebut the presumption that the riverbed had transferred *ad medium filum* with a land sale.⁹⁴⁹ Her reasoning is clearly applicable in our inquiry, where similar arguments were traversed by Crown and claimants.

Thus, all four Supreme Court judges considered that the *Wanganui River* decision was at best of doubtful authority; that an investigation of local Maori custom was required; and that if local Maori custom involved separate ownership of a river from the adjoining land, then the *ad medium filum* presumption would not apply to a Native Land Court title or the subsequent conveyance of that title. The chief justice also considered that, if the riparian owners did obtain title because that was consistent with local custom, post-sale use of an important tribal waterway would rebut the presumption that title had passed *ad medium filum* with the sale of riparian land.

We turn next to consider the application of the *ad medium filum* presumption in our inquiry district, prior to the passage of legislation in 1903 that vested the beds of all navigable rivers in the Crown.

21.16.2 The application of the *ad medium filum aquae* presumption in the Te Urewera rim blocks

21.16.2.1 Introduction

The Coal-mines Act Amendment Act 1903 vested the beds of navigable rivers in the Crown. Before 1903, the Crown could not have claimed to own the riverbeds of Te Urewera except by an explicit purchase or by the operation of the *ad medium filum aquae* presumption. The exception was the riverbeds in the lands north of the confiscation line. As we discussed in chapter 3, the Crown confiscated

948. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC), 123

949. *Ibid.*, pp100, 122, 123

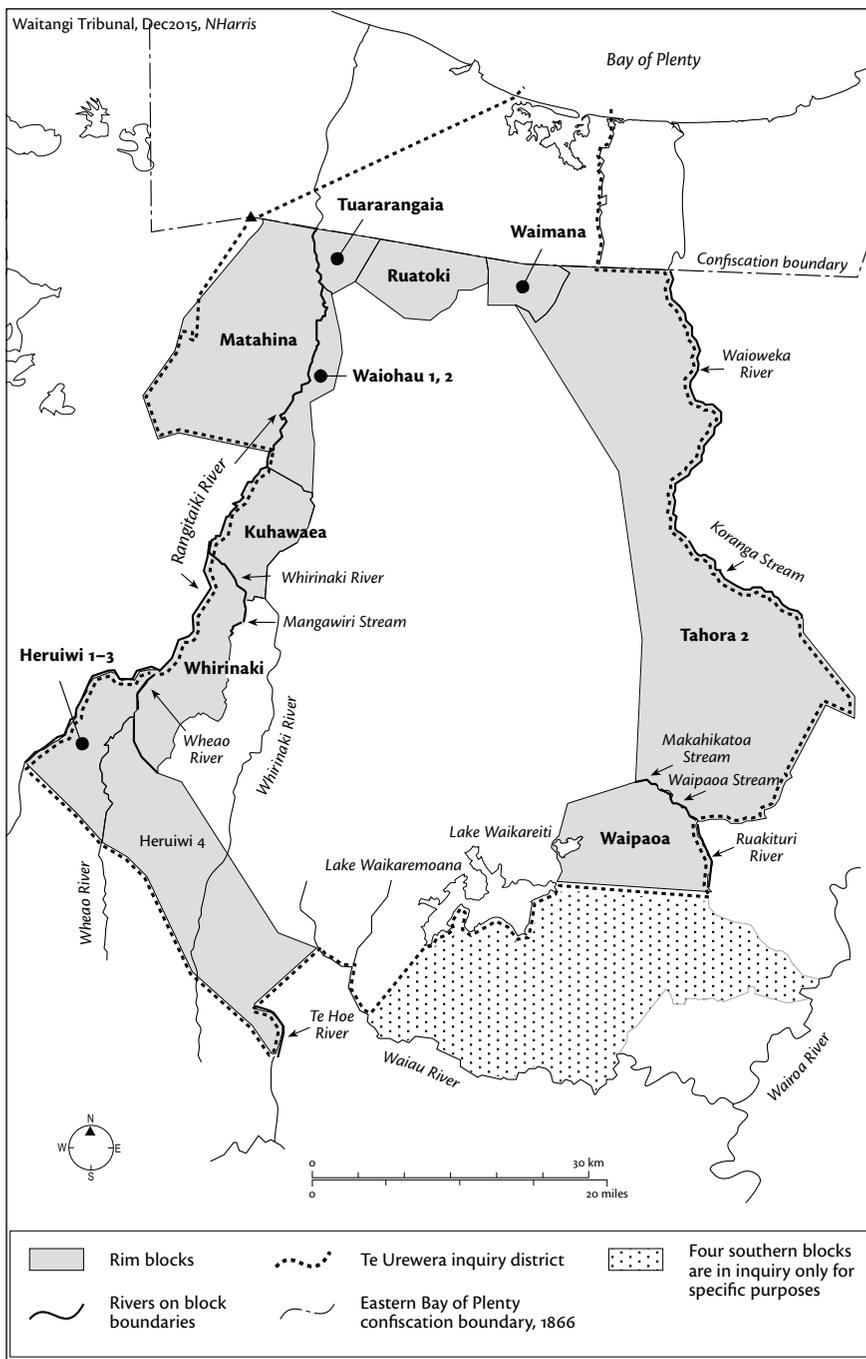
the entire Eastern Bay of Plenty district north of the line under the New Zealand Settlements Act 1863. The confiscation, which Tuhoe and other iwi would protest against as unjust, included the beds of the rivers. As we found earlier in the report, the confiscation was in breach of Treaty principles. That includes the confiscation of the rivers.

South of the confiscation line, the Tuhoe Rohe Potae was gradually encircled by a series of Native Land Court–defined blocks, all of which were created under the nineteenth-century native land laws (see chapter 7). For these encircling blocks, which we refer to as the rim blocks, the *ad medium filum* presumption could potentially have applied at three points in time. First, in land blocks with rivers as boundaries, the Native Land Court’s investigation and award of titles could have extinguished customary title to those riverbeds to the centre line, unless this presumption was rebutted. Secondly, when the blocks were sold, the sale of the land could have included the riverbed to the middle line – again, unless the presumption was rebutted. Thirdly, the beds of rivers and streams running inside a block were considered the property of the block’s owners and, similarly, were held to transfer when a block was sold. These were not necessarily small waterways. The Ohinemataroa (Whakatane) River flowed through the Ruatoki 1 block, and the Tauranga (Waimana) river across the Waimana block. When these blocks were partitioned, these rivers became partition boundaries – the *ad medium filum* presumption was held to apply to them at that point.

For the land encircled by the rim blocks, however, another statutory regime was in place from 1896 to 1922. The Urewera District Native Reserve Act 1896 created the Urewera commission(s) to decide titles, which were not Native Land Court titles. The commission’s original purpose was to establish electoral rolls by which hapu block committees and the General Committee could be elected. The committees’ role was to control and administer lands and resources inside the Reserve. Only the General Committee could alienate land, whether by lease or sale (see chapters 9 and 13 for details about the UDNR Act). As at 1903, when the coal mines legislation was amended, and took the beds of navigable rivers, the UDNR blocks were covered by orders of the commissioners and no land had been alienated. The legal view was that all land (and rivers) inside the Reserve was still in customary title at that time. From 1909, however, Parliament deemed the commissioners’ orders to have had the same effects as orders of the Native Land Court, backdated to the point at which the orders were made. The *ad medium filum* presumption was sometimes held to have applied to boundary riverbeds after that. We discuss the special circumstances of the UDNR further in section 21.16.4.

In this section, we are concerned with whether (or how) the *ad medium filum aquae* presumption might have applied in the rim blocks. We say *might have applied* because there is a great deal of uncertainty. Even the Crown submitted that it was only ‘likely’ that the rule applies to the beds of non-navigable rivers in the inquiry district.⁹⁵⁰

950. Crown counsel, closing submissions (doc N20), topic 30, pp 8–9



Map 21.3: The 'rim blocks' and boundary rivers

21.16.2.2 Did the presumption equate to Maori custom within Te Urewera, such that mana over adjoining land carried with it mana over a river to the middle line?

One of the Crown's primary arguments is that the *ad medium filum aquae* presumption did not dispossess anyone of their property, because Maori who held mana over adjoining lands also held mana over the rivers; the two were so bound up that the relinquishment of mana over land carried with it the relinquishment of mana over the adjoining river. Crown counsel did not point us to any evidence in support of this assertion. A related point for the Crown was that the *ad medium filum aquae* presumption did not have to be explained to Maori, either by the Native Land Court or Crown purchase agents, because it was actually the same as Maori custom. For every land transaction, therefore, it can be inferred that Maori understood they were selling the riverbed to the centre line unless there is explicit evidence to the contrary.⁹⁵¹

Crown counsel explained:

The *ad medium filum aquae* presumption can be said to have operated in the following way:

- (a) The possession of mana over land surrounding or adjacent to rivers or streams carried with it the possession of mana over those streams or rivers (or parts of them where different hapu/iwi occupied opposite banks).
- (b) The relinquishment of mana over the surrounding or adjacent land carried with it the relinquishment of mana over the rivers or streams, unless rights in relation to rivers or streams were specifically reserved.⁹⁵²

But was this submission correct for the claimant groups in our inquiry district?

As we discuss more fully later, we are relying on the findings of the Te Ika Whenua Rivers Tribunal for the claims of Ngati Manawa, Ngati Whare, and Ngati Haka Patuheuheu. In the *Te Ika Whenua Rivers Report*, the Tribunal accepted the evidence of those groups that the *ad medium filum* presumption was not their custom, despite Crown assertions to the contrary.⁹⁵³

For Tuhoe and Ngati Ruapani, the evidence in our inquiry suggests that there was a balance between the particular rights of hapu who lived closest to a water resource and the tribal rights and relationship with that resource. In chapter 20, we saw how the striking of that balance was strenuously debated within and between iwi when ownership of a major waterway, Lake Waikaremoana, had to be decided for the purpose of leasing it to the Crown. We cited the evidence of Professor Pou Temara, who condemned the Native Land Court's approach of vesting the lake in the occupants of its immediate environs. Professor Temara welcomed the inclusion

951. Crown counsel, closing submissions (doc N20), topic 30, pp 9, 11

952. Ibid, p 9

953. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 93–97

in 1971 of the whole tribe in the ownership of their tribal taonga.⁹⁵⁴ Without that ownership, he said,

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. . . . 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.⁹⁵⁵

This debate was clearly relevant to other major waterways, including rivers. We received a great deal of evidence about customary rights, relationships, and obligations in respect of rivers (see also section 21.3 above). For Tuhoe, Ngati Kahungunu, Ngati Ruapani, and Ngai Tamaterangi, the claimants' evidence and submissions did not support a view that mana over land and adjacent rivers was identical, or that rivers were customarily considered part and parcel of an adjoining piece of land. This is not to say, as we have noted, that hapu living in the immediate vicinity of a stretch of river did not have some special rights and responsibilities, sometimes of an exclusive nature. But the evidence is that rivers were not in the sole possession and control of those who inhabited kainga or had cultivations close to the banks. The narrower the riparian block, the less likely it would be.

Above all, rivers have a separate identity from the surrounding land as awa tupuna (ancestral rivers), and have their own mauri distinct from the land – even though there might still be a connection with the surrounding land. Huka Williams explained it in the following whakatauki, when speaking of the Ohinemataroa River:

Ko te wai te toto o te whenua

Ko te whenua te toto o te tangata.

The water is the blood of the land

*The land is the blood of the people.*⁹⁵⁶

Maori do not conceptualise a river as separate components, land and water, in which the land under the water is identical to the land beside the banks, and only the land can be possessed. The river belongs to the people, and the people belong to the river. Customarily, those who occupied kainga immediately next to a river would be a subgroup of the people with rights to and authority over that river, as indeed would likely be the case with all taonga in the territories of hapu and iwi.

As we explained in section 21.3, Hakeke McGarvey put the position in respect of the Ohinemataroa (Whakatane) River as follows:

The river is Ohine-mataroa. It was later called the Whakatane river. All of us of Tuhoe are descendants of Hine-mata-roa of Nga Potiki. Our ancestral claim is

954. William Rangiua (Pou) Temara, brief of evidence, 2004 (doc H61), paras 15–20

955. Ibid, paras 18, 20

956. Huka Williams, brief of evidence, 10 January 2005 (doc J13), p 2

from this source to ourselves, and to our continuing occupation and trusteeship [kaitiakitanga].⁹⁵⁷

Mr McGarvey gave the whakapapa for the ancestress Hine-mata-roa, and also named the three taniwha in the river, which are also ancestors. He then explained:

Ohinemataroa has always belonged to Tuhoe mai ra ano, and the people belong to the river. In terms of ownership the river doesn't belong to any one individual but to us all. All of Tuhoe can whakapapa to our tupuna, Hinemataroa and the river belongs to all of Tuhoe.

Tuhoe have always enjoyed the river as a site for everyday activities such as swimming and playing, and as a source of eel and other foods.⁹⁵⁸

Mr McGarvey gave an account of the different methods used by Tuhoe to catch the eels, including the construction of eel weirs on the river and its tributaries, and said that eel fishing continues today – albeit reduced because eel numbers have been reduced. He added that the river was also used as a source for particular types of wood for various purposes, including construction.⁹⁵⁹

In addition to these everyday, economic uses, some of which continue, Mr McGarvey emphasised:

The river also has important spiritual significance for Tuhoe. People continue to be baptised in its waters, and traditional healing and cleansing takes place at the river. . . . The use of the river in this way reaffirms our connections to our tupuna, Hinemataroa, and provides a continuity with all our tupuna. Because all Tuhoe share that whakapapa, the river is a taonga that connects us all to each other.⁹⁶⁰

Kaitiakitanga is still exercised over the river, to the extent that New Zealand law allows. At the time of our hearings, a river committee had been established, had laid out a 10-year restoration plan, and was working in partnership with Ruatoki School where a native plant nursery had been set up. The people had planted out 20,000 native plants, cleared sections of the river bank of woody weeds, and were committed to restoring and protecting the river.⁹⁶¹

Mr McGarvey emphasised the importance of the whole length of the river in tribal identity and unity, and in creating and reaffirming connections between all of Tuhoe. Hapu also had particular rights in particular stretches of this river. In the Ruatahuna district, we were told that hapu access to and use of the river was still controlled in the traditional way by rangatira up to the early 1960s. Rights were

957. McGarvey, brief of evidence (doc 133), p 1

958. Ibid, pp 1–2

959. Ibid, p 3

960. Ibid

961. Ibid, pp 3–7

specific to hapu, and hapu without rights would be ordered off. Rongonui Tahī gave evidence that Pakitu Wharekiri was the last rangatira to exercise such strict, tight control on behalf of all the hapu with rights in that part of the Whakatane River.⁹⁶²

We heard similar evidence from Ngati Kahungunu in respect of the rivers that run through or bound the four southern blocks and the eastern rim blocks (Waipaoa and Tahora 2). Te Okoro Joe Runga told us that rivers are a source of tribal identity, and ‘each hapu has its river or group of rivers’. The relationship with a tribal river begins in youth, usually by being taught the traditional fishing practices and rituals by an elder. The relationship is reinforced by the continued gathering of food later in life.⁹⁶³

Mr Runga explained that ‘mana awa’ (mana over tribal rivers) has never been and can never be given up.⁹⁶⁴ The water comes from the Huiarau Range, shed to ‘sustain and imbue’ the extensive, intricate southern river system, culminating in the ‘significant rivers of the Waiau, the Waikaretaheke, the Ruakituri, the Waipaoa Stream, the Mangaruhe, and many others’. Papatuanuku, he told us, has two domains: land (the domain of Tane) and waters (the domain of Tangaroa). Each waterway contains and is a conduit of its own mauri, and any practical use of a waterway was guided by the elders’ understanding of the mauri ‘within it and flowing through it’. Practical use of the southern waterways focused on mahinga kai (food-producing places), which were an ‘undisturbed estate’ at one time and continue to be used – ‘albeit in a more restricted fashion.’⁹⁶⁵

The centrality of the rivers to the life and livelihood of the people was illustrated, in Mr Runga’s evidence, by the fact that most pa, kainga, and marae were ‘situated on or nearby waterways’, and 21 of the 24 Kahungunu reserves created out of the four southern blocks were ‘located on rivers and waterways.’⁹⁶⁶ These rivers, Mr Runga maintained, could not be divided into beds and water for separate ownership: ‘We . . . always held dominion and control over water and its uses within our tribal areas.’ He added: ‘If there was truth in the Crown’s premise that water is not owned then the owners of [Lake] Waikaremoana have merely a hole in the ground. This is an absurdity.’⁹⁶⁷

Ngati Ruapani held the view that customary use of waterways as a food source became even more vital to the peoples of Te Urewera, especially after the confiscation of arable land in the 1860s.⁹⁶⁸ The whole Waikaremoana water system, in their submission, was an interconnected taonga. Hapu had rights in particular rivers but shared a common right in the whole water system with their relatives.⁹⁶⁹ The connected river system was also vital for travel and transport. The ‘spiritual

962. Tahī, notes in English (doc E26), pp 2–3

963. Runga, brief of evidence (doc N19), pp 6, 8

964. Ibid, pp 5–8

965. Ibid, pp 5–6

966. Ibid, p 8

967. Ibid, p 6

968. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, p [397]

969. Ibid, pp 67–68

connections between the people and the rivers were close, demonstrated by the many wahi tapu, tipua, taniwha, and tuoro in the waterways.⁹⁷⁰

Ruapani's evidence illustrated with great effect that a river is a taonga and an indivisible water resource; without the water a river is 'meaningless', as the Whanganui River Tribunal pointed out. It becomes just a piece of dry land, of no great value. That may seem obvious, yet it is not obvious to the common law, which gives ownership of a riverbed but not water or a river. Even reducing the flow can make a river less than it was, harming its mauri and reducing its vibrancy and value.

Maria Waiwai told us:

The waterways that flow through our whenua are important to the whanau here spiritually, economically and emotionally. When I was younger, the waterways were full and vibrant. Now that the power stations have taken hold, our rivers and streams are less vibrant. The waters have been diverted to meet the needs of the whole of New Zealand.

Kahui Tangaroa is our river. The name comes from the legend of Haumapuhia, who found the outlet and was caught there when dawn broke. We believe the taniwha that formed Lake Waikaremoana was Haumapuhia. She was unsuccessful in reaching the sea before dawn, so she made herself comfortable in Waikaretaheke River, an outlet from Te Wharawhara Waikaremoana. As time went by, her grandfather Mahu felt sorry for Haumapuhia, so he prayed to Tangaroa the sea god to send some kai for her. Eels, crayfish, shellfish and other creatures came up the waterways for Haumapuhia's survival.

Today Kahui Tangaroa is just a dry river bed. When Whakamarino flat was flooded and the water reserved for Piripaua Power Station, Kahui Tangaroa and another food source disappeared.

Waikaretaheke is the only flowing outlet from Lake Waikaremoana. It used to flow down the valley separating Whakamarino from the rest of the Kopani land block.

During heavy falls of rain, we would eel at Waikaretaheke during the day. We would thread worms with fibre from the flax, and then loop several strings of worms together to make a bob. The bob was tied securely to the end of the rod, a supple manuka stick about two metres long. It was exciting to see the eels coming to tug at the worm bob at the end of the rod. Once the eels caught the bob, we would flick it up quickly and toss it on to the bank. The eels were shared with the whanau who lived around the pa. The kuia and koro took part in this activity as they believed in showing the rangatahi the proper way to clean, dry and preserve the large eels to keep for when food was not plentiful.

Today, you can't eel at Waikaretaheke as the flow of water is restricted and Waikaretaheke is no longer what it used to be.

Kerehene is another river which flows downhill towards Waikaretaheke from Te Kuha. It was once like Waikaretaheke, but today it is useless and runs dry.⁹⁷¹

970. Ibid, app A, p [199]

971. Waiwai, brief of evidence (doc H18), pp 4-6

The Nga Rauru o Nga Potiki claimants pointed out that Maori views of ‘ownership’ were not the same as western-style ownership.⁹⁷² Manaakitanga, mana motuhake, kaitiakitanga, and other concepts discussed earlier in this report are critical.⁹⁷³ Most critical of all is the concept of taonga. Although Maori were forced, for example, to couch the Whanganui River claim in the courts as a claim to ownership of the bed, that was a distortion of custom.⁹⁷⁴ The claimants in our inquiry summarised their position about what they ‘owned’ by referring us to the following passage in the *Whanganui River Report*:

From our own knowledge and research of the Maori comprehension of rivers, we see the river, like other taonga, as a manifestation of the Maori physical and spiritual conception of life and life’s forces. It contains economic benefits, but it is also a giver of personal identity, tribal cohesion, social stability, empathy with ancestors, and emotional and spiritual strength.

Thus, while previous judicial findings that Atihaunui owned the [river]bed at 1840 are supported by clear fact and law, they are still partial findings, for Atihaunui owned more than a bed and more even than a river. They owned a taonga.⁹⁷⁵

The question then becomes: Did Maori knowingly and willingly give up their taonga, the rivers, when they sold land in our inquiry district?

21.16.2.3 *Our approach*

In our inquiry, the Crown submitted that the peoples of Te Urewera sold their rights to the rivers when they sold their lands, unless it can be shown that rivers were specifically excluded from the sale.⁹⁷⁶ This included boundary rivers, of which there were many, and which transferred by application of the *ad medium filum aquae* presumption. The Crown’s argument is that everyone, including the Maori vendors, knew that the rivers would transfer with land in this way, because that was Maori custom as well as English law. Thus, ‘it is wrong to assume that because neither Native Land Court judges nor the Crown explained the legal doctrine of the *ad medium filum aquae* presumption, that Maori were unaware that a riverbed was included in a sale of land.’⁹⁷⁷ In the Crown’s view, any rejection of the thesis that Maori sold their riverbeds would need to be proven for each and every transaction. The ‘understandings of each vendor and purchaser in each sale transaction would need to be considered on a case-by-case basis’ before the Tribunal could ‘arrive at any conclusion that Urewera Maori had a different understanding as to what was being sold.’⁹⁷⁸

972. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p136

973. Ibid, pp136–139

974. Waitangi Tribunal, *Whanganui River Report*, pp 280–281

975. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p135

976. Crown counsel, closing submissions (doc N20), topic 30, p11

977. Ibid

978. Ibid

This is contrary to the approach suggested by Chief Justice Elias in *Paki (No 2)*. As discussed above, the chief justice pointed out that the judges in *Mueller* knew nothing about what was in the minds of Crown officials (their ‘subjective intention’) when they granted riparian lands, as to whether the bed of the Waikato River was included in the grants. Four of the five judges in *Mueller* had held that the *ad medium filum* presumption was rebutted by the surrounding circumstances. Chief Justice Elias stressed that ‘[i]n relation to the understanding of the Pouakani riparian owners’ when they sold their land in the nineteenth century, what was needed was not evidence of their ‘subjective intention’ but an objective inquiry ‘into the circumstances, in particular the custom and usage in relation to the River.’⁹⁷⁹

It seems to us that the essence of the difference is that the Crown wants the matter to be viewed in the context of the English custom or common law – the *ad medium filum* presumption. The Supreme Court in *Paki* has said that the matter is to be viewed objectively in the context of Maori custom and usage in relation to the river in question. The Crown, the parties, and the Tribunal are bound by this decision. We turn now to consider the evidence before us relating to the four southern blocks and the rim blocks, and later to the UDNR, to determine whether there is any evidence that would show a knowing and willing Maori cession of their rivers.

21.16.2.4 *The four southern blocks*

In respect of the southern waterways, Te Okoro Joe Runga told us:

Mana awa is the unrelinquished tino rangatiratanga over estates of the Kahungunu Iwi. . . . Our interests in waterways is an unrelinquished equity. The law tries to say that that interest no longer exists and we counter that by saying we never gave it up. It is my firm belief that any law that contravenes tino rangatiratanga, customary ownership and rights, and customary mahinga kai contravenes article two of the Treaty of Waitangi.⁹⁸⁰

Historian Bruce Stirling reviewed the documentary evidence in respect of the Crown’s acquisition of the four southern blocks. He found no evidence that the rivers formed part of the negotiations for these blocks, except in their ‘use as boundary lines between each of the four blocks.’⁹⁸¹ There was nothing in the boundary descriptions that ‘seems to have made it explicit to the Maori vendors that the rivers were being alienated with the land.’⁹⁸² Suzanne Doig concurred that the rivers received little (or no) attention during the transactions, except as boundaries. She concluded that the Crown assumed it was acquiring ownership to the centre line.⁹⁸³ Stirling commented:

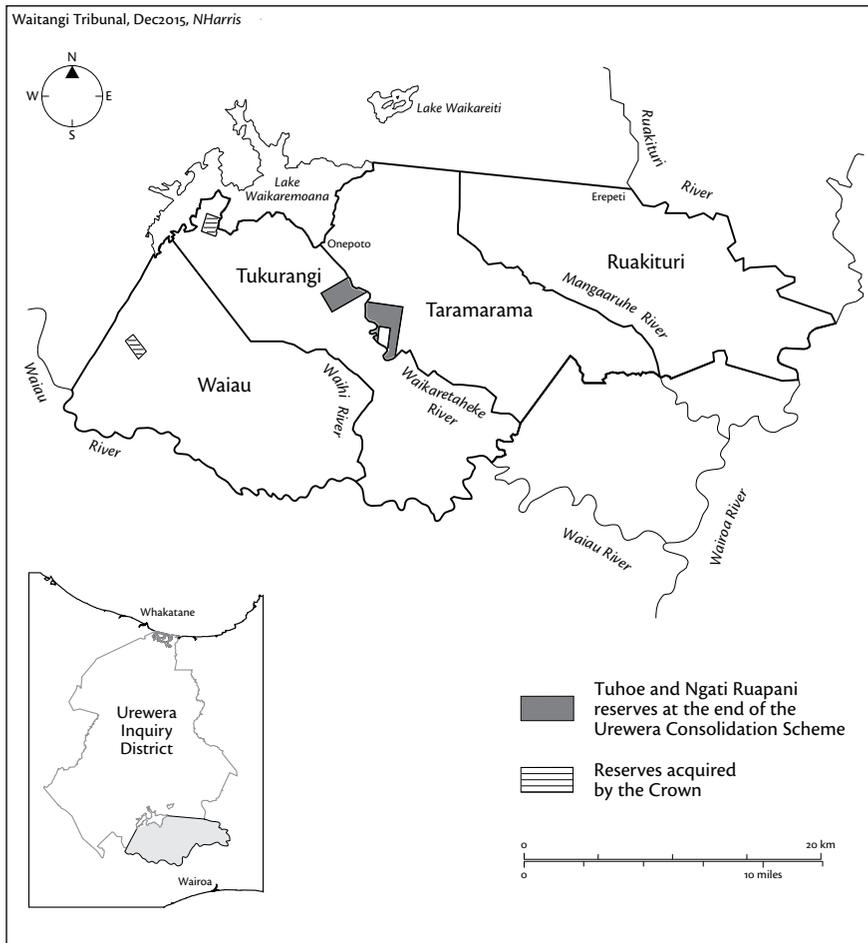
979. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (s.c), 123

980. Runga, brief of evidence (doc 119), pp 5, 6

981. Stirling, ‘Southern Te Urewera Waterways and Fisheries’ (doc 19), p 4

982. *Ibid*, p 5

983. Doig, ‘Te Urewera Waterways’ (doc A75), p 46



there is nothing in its [the Crown's] negotiations with the Maori vendors of the *land* that communicates this assumption or the arcane (to Maori) legal basis for that assumption. Indeed, what Maori understood was that the transactions involved 'to matau whenua katoa', or 'all their *land*', rather than all their rivers. The rivers are simply referred to as boundaries without reference to which bank of the river was the boundary or if the middle of the river was the operative boundary.⁹⁸⁴

Claimant counsel also noted that the sketch maps accompanying the deeds of sale showed the shaded boundaries as running alongside the rivers but not including the rivers. Legally speaking, claimant counsel submitted, this may not rebut the

984. Stirling, 'Southern Te Urewera Waterways and Fisheries' (doc 19), p 5

ad medium filum presumption but it is surely significant historical evidence as to what Maori understood themselves to be selling.⁹⁸⁵

In setting the boundaries of our inquiry district, we consulted the parties and decided not to inquire into Crown actions concerning the four southern blocks after their sale in 1875, except so far as they related to the reserves set aside for Tuhoē and Ruapani. We can still, however, consider claimant evidence about the post-1875 customary uses of the rivers, as relevant to the question whether they knowingly and willingly sold their rivers in 1875, or whether the *ad medium filum* presumption may have been rebutted in relation to the 1875 transactions (or both).

The placing of reserves on the rivers facilitated Maori 'links to and use of' the rivers after the sale.⁹⁸⁶ Doig could find no documentary evidence that 'any of the vendors believed that they retained ownership of the rivers running through the land they unwillingly sold'.⁹⁸⁷ In our inquiry, however, Maria Waiwai and others explained their communities' continued wide-ranging use of water resources south of the lake until at least the 1940s.⁹⁸⁸ The Crown's hydro scheme altered the course and nature of some of the waterways and interfered with their use. For the 50-year period between the sale and the beginning of the hydro scheme, rivers were essentially treated as unsold by many Maori who, for instance when eeling, ranged far afield from their small, riverside reserves. This exercise of customary rights continued during the 1920s and 1930s, while the scheme was under way, after which some rivers could no longer be used for fishing or other resource gathering.⁹⁸⁹

Lorna Taylor, whose whanau was based at the Waimako reserve, told us:

My brothers knew how to eel in Whakamarino [an eel-rich wetland before it became an artificial lake], Waikaretaheke, Waihi, Patunamu, Waiau, Miromiro, Potaka, the Mangaruhe stream, Tapui, Kuha, at the mouth of the Mangapapa where it joins the Waikaretaheke, and at Waikaremoana.⁹⁹⁰

Ms Taylor's grandfather's fishing trips could last for days, during which he lived off fruit growing on the river banks.⁹⁹¹

Des Renata referred to a stream near the Piripaua power station that was used regularly by Ruapani for its large number of freshwater crayfish, until it was bulldozed after the establishment of the power scheme.⁹⁹² Following on from the

985. Counsel for Wai 687 claimant, closing submissions (doc N4), p 10. For copies of the deeds and sketch maps, see Cathy Marr, comp, supporting papers to 'Crown Impacts on Customary Interests in Land in the Waikaremoana Region in the Nineteenth and Early Twentieth Century', various dates (doc A52(a)), pp 20–37.

986. Stirling, 'Southern Te Urewera Waterways and Fisheries' (doc I9), p 5

987. Doig, 'Te Urewera Waterways' (doc A75), p 46

988. Waiwai, brief of evidence (doc H18); Taylor, brief of evidence (doc H17); Renata, brief of evidence (doc I24)

989. Waiwai, brief of evidence (doc H18), pp 4–6

990. Taylor, brief of evidence (doc H17), p 7; see also Waiwai, brief of evidence (doc H14), p 24

991. Taylor, brief of evidence (doc H17), p 4

992. Renata, brief of evidence (doc I24), p 20

hydro works, water resources were still used,⁹⁹³ and some southern rivers were unaffected. As Charles Te Arani Kapene pointed out, in the absence of roads, Ngai Tamaterangi continued to use the Waiau River for transport and trade by waka well into the twentieth century.⁹⁹⁴ Maori use of this river is still controlled by rahui.⁹⁹⁵ James Waiwai described continuing exercise of customary rights in the four southern blocks' waterways across the generations, from the times before he was born (when eels were still the main source of protein) through to his niece's work for the elver recovery programme.⁹⁹⁶

Added to the weight of continued use is the consideration that Tuhoe and Ruapani could hardly be described as willing sellers, even of the land (see chapter 7). We note, too, that the Crown claimed Maori had sold Lake Waikaremoana to the centre point because it was used as a northern boundary for the four southern blocks. The Native Appellate Court dismissed this claim in 1944 (see chapter 20). We see no reason why Maori would have understood themselves to be selling their rivers any more than their lake, simply because the rivers, like the lake, were the boundaries of the purchase.

Our conclusion, therefore, is that it cannot be shown that the Maori vendors knowingly and willingly alienated their rivers in (and bounding) the four southern blocks. On the contrary, there is evidence that Maori – in continuing to exercise their customary rights in the rivers – considered that ownership remained with them.

21.16.2.5 *The western rim blocks*

The passage of the western rim blocks through the Native Land Court, and the alienation of interests in those blocks to the Crown and private purchasers, has already been fully discussed in chapter 10. The blocks concerned were Matahina, Waiohau, Kuhawaea, Heruiwi 1–3, and Heruiwi 4.

Due to the Ngati Awa Claims Settlement Act 2005 and the non-participation of certain groups in our inquiry, the Tribunal does not have jurisdiction to consider some partitions of the western blocks: Matahina A1–A6, Matahina B, and Waihou 2 (see section 10.7.3 for an explanation).

The situation of the rivers in the western rim blocks has already been investigated and reported on by the Waitangi Tribunal in its *Te Ika Whenua Rivers Report*. In our inquiry, Ngati Manawa, Ngati Whare, and Ngati Haka Patuheuheu asked us to adopt that Tribunal's findings in respect of the Rangitaiki, Whirinaki, and Wheao Rivers.⁹⁹⁷ We do so with four reservations, which we discuss later:

- ▶ the parties agreed in 1994 that the rivers were not navigable and only the

993. Waiwai, brief of evidence (doc H14), p 24

994. Kapene, brief of evidence (doc 126), paras 5.1–5.2

995. Heiariki Hazel Governor, brief of evidence, 29 November 2004 (doc 128), para 3

996. Waiwai, brief of evidence (doc H14), pp 23–25

997. Counsel for Ngati Manawa, closing submissions (doc N12), p 65; counsel for Ngati Whare, closing submissions (doc N16), pp 119–120, 147–152; counsel for Ngati Haka Patuheuheu, closing submissions, 31 May 2005 (doc N7), pp 142–144

ad medium filum rule applied, but subsequent research has cast some doubt upon this position;

- ▶ the Tribunal's findings did apply to UDNR blocks, but the special circumstances of the UDNR and the Urewera Consolidation Scheme were not fully considered by that Tribunal;
- ▶ the Tribunal commented on but was not in a position to make conclusive findings about the status of rivers flowing through (rather than bounding) the western rim blocks; and
- ▶ the Waiohau fraud was a relevant matter that was not under consideration by the Te Ika Whenua Rivers Tribunal, and we comment on it at the end of this section.

With those reservations, we adopt the relevant findings of the Te Ika Whenua Rivers Tribunal in respect of the western rim blocks, which we consider apply also to Tuhoe, Ngati Rangitihī, and Ngati Hineuru where those iwi had interests in the western rim blocks. We summarise those findings as follows.

Maori land transactions in the western rim blocks took place between the 1870s and the 1920s. The land sales had many questionable features in Treaty terms, but that was not the concern of the Rivers Tribunal. Even if Maori had willingly and knowingly sold their lands in those transactions, there was no evidence that the Rangitaiki, Whirinaki, or Wheao Rivers were included as part of the sale of riparian land. The Tribunal did, however, accept that smaller tributaries and streams – where located inside the boundaries of a sold block – were not necessarily taonga, and that tino rangatiratanga over these waterways may not have been retained when access to (and authority over them) was lost after a sale. The Tribunal considered that this was ultimately an issue for the Tribunal appointed to investigate the land alienations, not the Rivers Tribunal.⁹⁹⁸

Crown counsel took the view that more evidence was required about the land transactions, in respect of boundary rivers, but argued there was *some* evidence that such rivers were relinquished as part of the sales. The Tribunal disagreed. In its view, the evidence showed that the Crown acquired those riverbeds by a common law presumption only, and that there was no instance where the plans attached to sale documents showed the external boundaries 'extending into a river, let alone to the middle line'. Notwithstanding the Crown's argument, the Tribunal found that there was in fact 'no firm evidence that mana over rivers was ever voluntarily relinquished when riparian lands were alienated'. There was, on the other hand, firm evidence that Maori 'continued to use, occupy, and control their rivers' after land sales 'in much the same way as before', although sometimes sharing with settlers, until forestry activities restricted their exercise of customary and Treaty rights in the second half of the twentieth century. The Crown's case relied essentially on inferences drawn from the mere fact that a land sale had taken place, and this was unsustainable in the Tribunal's view.⁹⁹⁹

998. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 91–92

999. *Ibid*, p 92

There being no evidence that rivers were alienated in the deeds or transactions in any way other than by the *ad medium filum* presumption, it therefore remained for the Tribunal to test the Crown's argument that the presumption equated with Maori custom, so that Maori would have known that by selling land they were selling boundary rivers to the middle point. In examining this argument, the Tribunal accepted that occupiers of riparian lands could hold special rights to sections of a river, but that others would also have various use rights, and all such rights were controlled by the hapu.¹⁰⁰⁰ The Tribunal also found that, at the time of the land sales in the late nineteenth and early twentieth centuries, alienation of interests by individuals – unrestrained by hapu authority – was 'novel'. The absolute alienation of a river in this way, given the wider rights of the hapu, was 'generally inconceivable'.¹⁰⁰¹ The Crown had relied on evidence in Native Land Court hearings that eel fisheries and customary use of rivers were sometimes used as evidence to support a claim to the adjoining land. In the Tribunal's view, it was understandable that the use of rivers and streams would be referred to as evidence of occupation and use of nearby land. But that did not affect the custom that rivers were and are regarded differently from land: 'They have separate physical characteristics, provide distinctive resources and benefits, and possess their own mauri (life force) and spiritual being. They constitute whole and indivisible entities, not being separated into bed, banks, and waters.'¹⁰⁰²

The territory of a hapu would include land, rivers, mountains, and forests, all under the tino rangatiratanga of the hapu. But sales of land did not, as the Crown contended, 'automatically' include rivers to the middle line. Nor, because there were customary links between lands and rivers, did this mean that Maori understood or accepted the *ad medium filum* presumption. The Crown's arguments were not supported by the evidence, and, it was noted, had also been rejected by the Mohaka River Tribunal.¹⁰⁰³

Another of the Crown's arguments to the Te Ika Whenua Rivers Tribunal was that more evidence about the land sales was needed, and that – in the meantime – it was impossible for the Tribunal to be *sure* that the owners of riparian lands did *not* intend to relinquish their boundary rivers when selling lands.¹⁰⁰⁴ The Tribunal (as the National Park Tribunal was later to do) found rather that the onus rested with the Crown to prove that Maori have 'willingly given up the wish and desire to retain' their Treaty-guaranteed properties, the rivers.¹⁰⁰⁵ There were two planks to the Tribunal's position on this matter:

- ▶ Maori did not voluntarily relinquish possession of their rivers, and the Crown would have to prove that they had done so; but
- ▶ title to the beds of rivers passed to the Crown anyway by virtue of the operation of the *ad medium filum* rule, in breach of the Treaty.

1000. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 123–124

1001. *Ibid*, pp 93–94, 99–100

1002. *Ibid*, p 94

1003. *Ibid*, pp 94–95

1004. *Ibid*, p 99

1005. *Ibid*, p 100

Thus, the Tribunal did consider that title had passed to purchasers (mainly the Crown):

At least with the majority of the Te Ika Whenua land sales, the vendors would have had no idea of this law [the *ad medium filum* rule]. Although the riverbeds passed on the sale of riparian lands [accepting the position in *In re the Bed of the Wanganui River*], this could hardly be said to be a voluntary sale or relinquishment of tino rangatiratanga.¹⁰⁰⁶

Without the operation of this common law rule, titles to adjoining riverbeds would neither have been created by the Native Land Court block titles, nor passed to purchasers of those blocks. Rivers would have remained boundaries showing the limits of a transaction but not included within it, and their ownership would have stayed in Maori customary title.¹⁰⁰⁷

Having made these findings, the Tribunal also set out what should have happened, instead, under Treaty-compliant arrangements. As part of the doctrine of aboriginal title, native title must be rendered conceptually in its own terms, not terms appropriate only to English law. In light of the Treaty of Waitangi and the English Laws Act 1858, consideration should have been given – in developing a title system for the colony – not just to English and Australian law (the Torrens system) but also to a system that recognised and protected Maori customary rights. In the case of rivers, that would have required a ‘composite title’ for rivers – including the bed, banks, and water – instead of the English law system of separate components, no ownership of water, and the *ad medium filum* rule. The Crown’s failure to institute a more appropriate New Zealand title system enabled it, through the application of English law, to appropriate ‘lands [riverbeds], properties, and fisheries that belonged to Maori.’¹⁰⁰⁸

In respect of water, the Tribunal specifically found that Maori were promised full, exclusive, and undisturbed possession of their taonga. As at 1840, when creating a title system for the colony, ‘Te Ika Whenua [hapu] were entitled . . . to have conferred on them a proprietary interest in the rivers that could be practically encapsulated within the legal notion of ownership of the waters thereof’. In tikanga Maori, the rights of downstream users would be protected by the preservation of the resource. But use and control of the water rested with the hapu, and their ownership rights equated to the ‘right of full and unrestricted use and control of the waters’ while the waters were within their rohe.¹⁰⁰⁹

These findings of the Te Ika Whenua Rivers Tribunal do not cover the specific issue of Waiohau 1B. As we discussed in chapter 11, Ngati Haka Patuheuheu lost ownership of this land as a result of fraud, followed by inaction on the part of the Crown to provide an effective remedy. There was certainly no willing or knowing

1006. Ibid

1007. Ibid, p 101

1008. Ibid, pp 103–104

1009. Ibid, p 124

alienation of the stretch of the Rangitaiki River that forms the western boundary of Waiohau 1B.

21.16.2.6 *The eastern rim blocks*

The eastern rim blocks consist of the Waipaoa block in the south (adjacent to the four southern blocks) and the massive Tahora 2 block north of Waipaoa.

The Tahora 2 block never existed in a single title, but rather was partitioned upon award of title in 1889. In terms of major rivers, the Ruakituri River formed part of the eastern boundary of the Waipaoa block, and then flowed through the Tahora 2F block. The Waipaoa Stream formed part of the boundary between Tahora 2 and the Waipaoa block. The Hangaroa River flowed through the middle of the Tahora 2C block. The Kahunui Stream flowed through Tahora 2C3 section 1, and in doing so formed the boundary between 2C3(1) and Tahora 2G. The Koranga River formed part of the boundaries of 2C3(1) and 2C3(2).¹⁰¹⁰

Unfortunately, the evidence available to us does not permit any conclusions about whether rivers bounding or flowing across the Tahora 2 block were alienated knowingly or willingly in land transactions. This matter was not considered by the witnesses who covered this block in their evidence.¹⁰¹¹ Dr Doig's evidence in respect of Tahora 2 was concerned only with Tuhoe, and is as follows:

To the east, the massive Tahora 2 block was brought to the Native Land Court in 1889 following an unauthorised survey. The Tahora 2 case saw Tuhoe lose ownership of the land adjoining most of the upper Ruakituri River and upper Hangaroa River by 1896 – some to the Crown through purchase and survey lien, and some to rival claimants, although these other hapu also included Tuhoe people with legitimate interests in their lists. Tuhoe hapu did retain ownership of a small portion of the block near Waimana, over which the Waimana River flowed, although sections of the block away from the river were lost to liens. In 1896, the Crown took well over 4000 acres from Tuhoe's various riparian blocks within Tahora 2 in survey liens, to pay for an expensive survey which Tuhoe had opposed throughout.¹⁰¹²

We discussed the contentious Tahora 2 survey, and the Crown's acquisition of land as a result of it, in chapter 10. We accept here that the Crown's taking of land for survey costs in Tahora 2 could not, in any sense, represent a willing or knowing alienation of any rivers within or bounding that land. We also accept that it is likely, as submitted by claimant counsel, that the Crown wrongfully acquired riverbeds by application of the *ad medium filum aquae* rule. But we have no specific

1010. Moira Jackson and Anita Jo Foley, 'Te Urewera Overview Maps, Part 2', map book commissioned by the Crown Forestry Rental Trust, 2002 (doc A16), map 7

1011. Peter Boston and Steven Oliver, 'Tahora' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A22); Michael Macky, 'Report in respect of Tahora 2 and the East Coast Trust' (commissioned research report, Wellington: Crown Law Office, 2005) (doc L8); Brent Parker, 'Tahora No 2 Block' (commissioned research report, Wellington: Crown Law Office, 2005) (doc L7)

1012. Doig, 'Te Urewera Waterways' (doc A75), p 52

evidence for Tahora 2, other than the brief analysis supplied by Doig above. The extent to which the Crown has acquired or claimed the riverbeds in the Tahora 2 blocks is unknown.

In respect of Waipaoa, the claimants' principal concern was the way in which the Crown acquired Lake Waikareiti, one-third of which was taken for survey costs and the remaining two-thirds by way of purchasing individual interests in an unfair, coercive manner. We have addressed that issue in chapter 10.

With regard to the rivers, the eastern boundary of the Waipaoa block was formed by the Ruakituri River, a river of great significance to Ngati Kahungunu. The north-eastern boundary was the Waipaoa Stream. The Crown acquired land adjoining the Ruakituri River in the east of the block (Waipaoa 1) for survey costs. In the original survey agreement, Ngati Kahungunu leaders had agreed that the Crown should acquire land with 'frontage to the Ruakituri River' to pay for the survey. But there was nothing in the agreement which could serve as an acknowledgement that the Crown would thereby obtain the adjoining riverbed to the centre line. The sketch attached to the agreement showed the shaded block as stopping at the western bank of the river.¹⁰¹³ As Cathy Marr has noted, the Crown intended the *ad medium filum* presumption to apply to this acquisition, but the Crown's main focus was to obtain Lake Waikareiti.¹⁰¹⁴

By the process of buying individual interests, which were not located on the ground (early partitions were later simply ignored), the Crown obtained further shares that were mainly located so as to secure the west of the block, including ownership of the lake (see chapter 10). Part of the land adjoining the Ruakituri River was also secured (as the boundary of Waipaoa 3). As far as we know from the evidence before us, ownership of the Ruakituri River itself had not been investigated in the Native Land Court hearings, the *ad medium filum* presumption was never mentioned or explained, and the river itself was not the subject of specific Crown purchase.¹⁰¹⁵ Unfortunately, we were not supplied with copies of the two purchase deeds by which the Crown obtained Waipaoa 3.

1013. Agreement to pay in land for the survey of the Waipaoa and Matakuhia blocks, 21 November 1882 (Emma Stevens, 'Report on the History of the Waipaoa Block, 1882–1913' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1996) (doc A51), pp10–12). A copy of the agreement with the sketch plan is entitled 'Map 4' and is located between pages 24 and 25.

1014. 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), pp263–265

1015. See Stevens, 'Report on the History of the Waipaoa Block' (doc A51); Paula Berghan, 'Block Research Narratives of the Urewera, 1870–1930' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2001) (doc A86), pp715–732; Paula Berghan, comp, supporting papers to 'Block Research Narratives of the Urewera', 18 vols, various dates (doc A86(r), vol 18); Richard Niania, brief of evidence, 22 November 2004 (doc 138); 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); 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). The last report contains a summary of what was said at the Native Land Court hearings for the Waipaoa block.

Maori still retained most of the land abutting the river after the Crown's interests were partitioned.¹⁰¹⁶ As we explained in chapter 10, however, their land (Waipaoa 5) was taken compulsorily by the Native Minister in 1906 and vested in the Tairāwhiti Maori Land Board for leasing. The owners had no legal right to be consulted, and their agreement was not required. The board was unable to lease any of the land, and eventually it offered the whole block to the Crown for purchase. An assembled meeting of owners agreed to sell in 1910, although the number present was well short of a majority (16 per cent of owners). There was only a very limited opportunity for dissentients to have their land reserved (see chapter 10 for a full discussion of these events).

Thus the great majority of the Waipaoa 5 block was sold, carrying with it some of the frontage to the Waipaoa Stream (and the bed of the stream if the *ad medium filum* presumption applied). Again, there is no record that ownership of the river was mentioned or that the owners intended to sell the river to the Crown.¹⁰¹⁷ A second meeting of owners had to be called in 1913 because the Crown significantly reduced its price, but the owners were desperate and still agreed to the sale (see chapter 10). We concluded in chapter 10 that the whole process by which the Crown obtained Waipaoa 5B could not be described as a willing alienation by the owners. Nor, in our view, could it be described as a knowing or willing alienation of the Waipaoa Stream where that waterway adjoined Waipaoa 5B.

After this sale, as we found in chapter 10, the Crown behaved in a reprehensible manner by preventing the non-selling owners from leasing or farming their remaining lands, which adjoined significant stretches of the Ruakituri River. The land purchase department, knowing that the owners would refuse to sell at a duly called meeting of assembled owners, picked off individual interests over a number of years. It then sought a partition, obtaining Waipaoa 5A, which abutted the last outstanding stretch of the Waipaoa Stream and part of the Ruakituri River. The Crown remained part-owner in the surviving Maori sections (5A2 and 5C), making it part-owner of the banks of the Ruakituri River in those sections (see map 10.3).

Again, the riparian lands obtained by these means were not acquired from willing sellers. These stretches of the Waipaoa Stream and Ruakituri River were not knowingly or willingly sold to the Crown.

Thus, as a result of its dishonourable treatment of the owners of the Waipaoa block, the Crown obtained the whole of the riparian land abutting the Waipaoa Stream and most of the riparian land adjoining the Ruakituri River. Because its purchase of individual interests in Waipaoa 5A2 and 5C remain unpartitioned (as far as we know), the Crown also became part-owner of the rest of the land abutting the Ruakituri River.

There is no evidence that the Waipaoa owners ever knowingly or willingly sold

1016. Stevens, 'Report on the History of the Waipaoa Block' (doc A51), pp 51–52, map 11

1017. See Stevens, 'Report on the History of the Waipaoa Block' (doc A51); Niania, brief of evidence (doc 138); Berghan, 'Block Research Narratives' (doc A86); Berghan, supporting papers to 'Block Research Narratives' (doc A86(r)).

the Ruakituri River or the Waipaoa Stream to the Crown, and significant evidence to the contrary.

21.16.2.7 The northern rim blocks

The northern rim blocks, which separated the UDNR from the confiscation line, were Waimana in the east, Ruatoki in the middle, and Tuararangaia in the west. Because their histories are all very different, we deal with each block in turn.

21.16.2.7.1 RUATOKI

We have already discussed the Ruatoki block extensively in earlier chapters of our report. The Ruatoki lands were investigated by the Native Land Court in 1894 but were then included in the Urewera District Native Reserve in 1896. The Native Appellate Court heard appeals in 1897 but its decisions were annulled in 1900, and Ruatoki was reinvestigated by the two Urewera commissions. The commissioners did not change the partitions created by the Native Land Court, which meant that the Ohinemataroa (Whakatane) River ran through Ruatoki 1 rather than forming a block boundary. Thus, if it were held that ownership of a riverbed enclosed in a block goes with the land, then the Urewera commissioners' orders for Ruatoki 1 would be held to have included the river. Ruatoki 1 survived the Crown's purchasing of individual interests in the UDNR because it was one of the few UDNR blocks in which partitioning had been permitted. As we explained in chapter 13, the process of partitioning created some very small sections at Ruatoki and proved an effective barrier to Crown purchasing. Crown purchase agent Bowler was unable or unwilling to buy individual interests in Ruatoki because it was not economic for the Crown.

By the time the Crown was ready to proceed with a consolidation scheme to concentrate its interests in the former Reserve, Ruatoki lands were too valuable to include, as they would have distorted the relative shares in the scheme. Instead, as we discussed fully in chapter 19, the Ruatoki and Waiohau blocks underwent a separate consolidation scheme, designed to provide more concentrated, economically viable sections for the Maori owners. The result was that the Ohinemataroa River became a boundary for the many small sections that were created at right angles to the river on each side of it. If it were held that ownership of that stretch of the river was properly investigated and intentionally awarded as part of Ruatoki 1, then the particular individual owners of these small riparian sections became owners of the riverbed unless the *ad medium filum* presumption was rebutted. There is certainly evidence that the wider community continued to exercise customary rights over their taonga, the river, after the consolidation scheme. Hakeke Jack McGarvey, Tamaroa Nikora, and others told us that the river belongs to Tuhoe. Mr McGarvey explained how customary relationship with and rights in the river have been maintained.¹⁰¹⁸ We note that the Crown's interests were awarded some distance away from the river, on the western side of the Ruatoki block, and thus

¹⁰¹⁸ See McGarvey, brief of evidence (doc J33); Tamaroa Nikora, brief of evidence, 12 January 2005 (doc J40), p 6

the Crown had no claim to own this stretch of riverbed *ad medium filum* (see map 19.1). We discuss later in the chapter the Crown's claim that this part of the river was navigable.

In terms of the Waiohau part of this consolidation scheme, the Crown did emerge as the owner of a significant stretch of riparian land abutting the eastern bank of the Rangitaiki River, Waiohau B9.¹⁰¹⁹ We found in chapter 19 that the Crown treated the Waiohau owners differently from the Ruatoki owners in a number of ways, and that the amount of land it obtained at Waiohau (one-third of the block) was unfairly acquired. The Crown never purchased any land at Waiohau – it obtained its interests there as a result of purchases at Ruatoki. There is no evidence that the Waiohau owners knowingly and willingly agreed to transfer this stretch of the Rangitaiki River to the Crown along with the riparian land. Indeed, they had not transferred anything at all to the Crown. As occurred in the Urewera Consolidation Scheme (which we discuss below), if the Crown *did* successfully acquire the riverbed to the mid-point adjacent to Waiohau B9, then it did so without paying for it.

In terms of whether the presumption may be rebutted by continued tribal use of the river, Ani Hare told us that the Rangitaiki River opposite Waiohau was an abundant source of eels, koura, and kokopu in the 1930s, when the consolidation scheme took place. Her whanau lived on a development scheme farm, and sometimes eels from the Rangitaiki 'would be our food source for weeks on end'. The river remained a vital food source for Ngati Haka Patuheuheu, who continued to fish in the traditional ways until the supply of eels began to decline after the building of the hydro schemes.¹⁰²⁰

As noted above, we adopt the findings of the Te Ika Whenua Rivers Tribunal in respect of Waiohau and the other western rim blocks, but we add our reflections here in respect of the very specific issue – raised in our inquiry – of the riparian land obtained by the Crown as a result of the Ruatoki–Waiohau consolidation scheme.

21.16.2.7.2 TUARARANGAIA

Tuararangaia 1 was awarded to Tuhoe in 1891. Ownership of Tuararangaia 2 was obtained by Ngati Pukeko, while Tuararangaia 3 was granted to Ngati Hamua and Warahoe. The principal river at issue is the Rangitaiki River, which formed the western boundary of the Tuararangaia block until the opening of the Matahina dam in the 1960s. After that, the Rangitaiki Gorge was flooded and Lake Matahina became the western boundary.¹⁰²¹ This stretch of the Rangitaiki was used for eeling in the nineteenth century, as were smaller streams in the block.¹⁰²² From the point at which the Native Land Court awarded title, however, Tuhoe owned the

1019. Doig, 'Te Urewera Waterways' (doc A75), p 90

1020. Hare, brief of evidence (doc C17(a)), pp 23–24

1021. Peter Clayworth, 'A History of the Tuararangaia Blocks' (commissioned research report, Wellington: Waitangi Tribunal, 2001) (doc A3), p 16

1022. *Ibid*, p 20

eastern side of the block. It was the western partitions, Tuararangaia 2 and 3, which were bounded by the river (and later by Lake Matahina).¹⁰²³ As noted above, Tuararangaia 2 and 3 are not part of our inquiry, so we can make no findings in respect of the Rangitaiki River and the Tuararangaia block.

21.16.2.7.3 WAIMANA

The Waimana block features as a case study in Dr Doig's report, and demonstrates the complexity involved in ascertaining the legal ownership of riverbeds in Te Urewera. The key issue for Waimana is that the use of the Tauranga (Waimana) River as a boundary for partitions was sometimes interpreted by surveyors to require a fixed (also called right-line) boundary. With this type of boundary, river edges were 'surveyed as a succession of marked straight lines, rather than following the natural line of the river'. Sometimes the boundary points for these lines were placed in the middle of the river (as it was at the time). This took the treatment of rivers as land to a new level, displacing the *ad medium filum* presumption in favour of fixed, surveyed lines. Presumably, the river was considered too migratory for use as the actual boundary when some of the Waimana partitions were surveyed.

As we set out in chapter 10, Waimana was the first Te Urewera block to pass through the Native Land Court. An application by two Te Upokorehe individuals forced Tuhoe into court in 1878 to defend their claim. Although Tuhoe hapu won ownership of the block, the private lessee began buying up individual interests. After a rehearing in 1880, the list of owners was expanded and the piecemeal private sales continued. The court had not completed its task of defining relative shares, so tribal leaders applied for a partition shortly after the rehearing. According to anthropologist Jeffrey Sissons, this had a dual purpose to define shares and to stop the sale of individual interests. After long delays, because the people were not agreed as to partitioning, the block was eventually partitioned in 1885. Tuhoe leaders wanted a partition that would give them the land on the east bank of the Tauranga River, which flowed through the block. Private purchasers would have the land on the west bank, along with a reserve for the sellers abutting on that bank. Tamaikoha's reference to the river was that it should be the boundary between the non-sellers and the new private owners.¹⁰²⁴ From the evidence of Jeffrey Sissons and Suzanne Doig, there is no indication that ownership of the river itself was discussed or seen as part of these arrangements, or any suggestion that the private purchasers would thereby gain title to the middle line.¹⁰²⁵

Dr Doig confirmed that title to the river was also not investigated by the Native Land Court in 1878 and 1880: 'These investigations contain very few references to the Waimana River; there were passing references to fisheries, the location of kainga on the banks of the river, and boundary markers [between hapu] on and

1023. See Clayworth, 'Tuararangaia' (doc A3), p 74, map 3

1024. Sissons, 'Waimana Kaaku' (doc A24), pp 46–57

1025. Ibid, pp 51–56; Doig, 'Te Urewera Waterways' (doc A75), pp 107–110

in the river.¹⁰²⁶ In the event, the court did not agree to Tuhoē's request to hold all land on the east bank of the river. The river had not been surveyed, and Waimana was partitioned into blocks containing land on both sides, except for the sellers' reserve which was bounded by the river on the west bank.¹⁰²⁷ This reserve was surveyed with right-lined boundaries.

In order to cut land out for leasing or sale to meet survey costs or for farming, a process of further partitioning began which, over the next few decades, saw the creation of multiple small, narrow strips of land running at right angles to the river.¹⁰²⁸ In this partitioning process, the river became a boundary between multiple blocks with small river frontages. Many of these blocks had right-lined boundaries, some by the banks and others in the middle of the riverbed. Some even included the whole riverbed inside the fixed boundaries.¹⁰²⁹ It seems likely that the early twentieth century surveyors took this approach because, as one put it, '[t]his river changes its course every year.'¹⁰³⁰ The *ad medium filum* presumption did not apply to these right-lined boundaries.¹⁰³¹

The issue of the ownership of the riverbed was raised in the 1970s because the Bay of Plenty Catchment Commission had been carrying out flood protection works. The commission wanted to establish the ownership so that it could take control of the land on which its works had been constructed. It was found that the Crown had claimed ownership of exposed riverbed in the Waimana block since about 1950, leasing it to neighbouring farmers. The basis of the Crown's claim to own the riverbed was never explained. Suzanne Doig theorised that it might have been based on the idea that the Tauranga was navigable, and thus its dry riverbed belonged to the Crown. By 1969, however, the Government was considering abandoning the leases due to flooding. The catchment commission's work to stabilise the river saved the leases. In the early 1980s, the Crown decided to sell the newly stabilised land to the lessees. At that point, Lands and Survey investigated the basis of the Crown's title and concluded that it was not Crown land at all. In part, this was because officials took the view that the river was not in fact navigable in the Waimana block.¹⁰³²

As a result, the Crown had to cancel its leases in 1983, advising lessees that the land was actually 'no man's land' but could be claimed by riparian owners as accretion. This was correct where there were no right-lined boundaries, so long as the change to the river had been slow and gradual. Some owners did obtain land transfer titles to parts of dry riverbed at that point. Other Waimana blocks, with right-lined boundaries, were held to be 'virtually "no man's land" as no adjoining owner has any rights to claim ownership of it'. The department thought that the

1026. Doig, 'Te Urewera Waterways' (doc A75), pp 107–108

1027. Ibid, pp 108–109

1028. Sissons, 'Waimana Kaaku' (doc A24), pp 66–94

1029. Doig, 'Te Urewera Waterways' (doc A75), pp 110–112

1030. Note on survey plan ML 12082, October 1920 (Doig, 'Te Urewera Waterways' (doc A75), p 112)

1031. Doig, 'Te Urewera Waterways' (doc A75), p 112

1032. Ibid, pp 112–113

exposed riverbed for right-lined blocks might still belong to the ‘owners of the prior subdivided blocks’, or could ‘likely’ still be in Maori customary title.¹⁰³³

The Bay of Plenty Catchment Commission’s chief engineer responded: ‘I think it is ridiculous that the Crown should now decide that land that had previously been declared Crown land and for which the Crown has been collecting grazing tenancy for some years is now ‘no man’s land’ whatever that is.’¹⁰³⁴ Remarkably, the Crown’s response was to start leasing the land again, in a role as ‘caretaker’.¹⁰³⁵ Unfortunately, Dr Doig’s research could not uncover how this situation was finally resolved, or who eventually obtained legal title, if anyone. At the very least, Dr Doig concluded, ‘The history of the riverbed in these parts of the Waimana block highlights the legal confusion which surrounds riverbed ownership in New Zealand.’¹⁰³⁶ The Crown did not make any submission on the use of right-line boundaries or the situation at Waimana, other than to state that the *ad medium filum* presumption did not apply to fixed boundaries.¹⁰³⁷

21.16.3 The 1903 amendment Act vests the beds of navigable rivers in the Crown

In 1903, the beds of navigable rivers were vested in the Crown by the Coal-mines Act Amendment Act 1903, which was mainly concerned with pay and compensation for coal miners, the establishment of a medical fund for miners, the transfer of coal-mining leases, and the issue of leases over education endowments. This was a significant grievance for the claimants in our inquiry. In their view, the Act expropriated the beds of their navigable rivers without consultation, consent, or compensation. The Crown’s view was that there was no evidence to show that the peoples of Te Urewera were not consulted about the passage of the 1903 Act. Crown counsel also submitted there was no evidence that the peoples of Te Urewera had ever protested against its enactment or effects, nor any evidence that they had ever ‘sought compensation for any lost rights’ following its enactment. The claimants’ response to this argument rested on the uncertainty surrounding definitions of navigability in the Act, the uncertainty as to which rivers or stretches of river the Crown actually claims to own as a result of the Act, and the relative lateness of claims of Crown ownership in Te Urewera (many decades after the passage of the Act).

21.16.3.1 The words of the Act in 1903 and the amendment of 1925

Section 14 of the Coal-mines Act Amendment Act 1903 stated:

1033. Commissioner of Crown lands, Hamilton, to district field officer, Rotorua, 10 August 1983 (Doig, ‘Te Urewera Waterways’ (doc A75), pp 113–114)

1034. Chief engineer, Bay of Plenty Catchment Commission, to Hamerton and Chappell, Barristers and Solicitors, Whakatane, 29 November 1983 (Doig, ‘Te Urewera Waterways’ (doc A75), pp 114–115)

1035. M Littlejohn for commissioner of Crown lands, to Hamerton and Chappell, 1 March 1984 (Doig, ‘Te Urewera Waterways’ (doc A75), p 115)

1036. Doig, ‘Te Urewera Waterways’ (doc A75), p 115

1037. Crown counsel, closing submissions (doc N20), topic 30, p 8

14. Bed of river deemed vested in Crown—(1) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown, and, without limiting in any way the rights of the Crown thereto, all minerals, including coal, within such bed shall be the absolute property of the Crown.

(2) For the purpose of this section—

‘Bed’ means the space of land which the waters of the river cover at its fullest flow without overflowing its banks:

‘Navigable river’ means a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public for the purpose of navigation by boats, barges, punts or rafts; but nothing herein shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers.

In 1925, the definition of navigability was changed to what claimant counsel considered a ‘slightly simplified wording’: ‘a river of sufficient width and depth (whether at all times or not) to be used for the purpose of navigation by boats, barges, punts, or rafts.’¹⁰³⁸ This definition has been retained ever since, most recently by the effect of section 354 of the Resource Management Act 1991.

We will deal with the claimants’ concerns about the definition of navigability shortly. First, we consider the question of how and why the Seddon Government introduced this section into the Coal-mines Act Amendment Bill in 1903, proposing the vesting of the beds of all navigable rivers in the Crown, and whether there is sufficient evidence to be sure that the peoples of Te Urewera were not consulted about it.

21.16.3.2 *The significance of section 14’s origin*

Professor Boast gave evidence that the 1903 amendment was a response to the Court of Appeal’s 1902 decision in *Mueller v Taupiri Coal-mines Ltd.*¹⁰³⁹ This view is consistent with the view of the Supreme Court in the *Paki* case.¹⁰⁴⁰ We have already referred briefly to *Mueller*. In essence, the Crown won that case – and therefore the ownership of the coal under that stretch of the Waikato River bed – because four of the five judges considered the *ad medium filum* presumption to have been rebutted by the circumstances surrounding the Crown grants. The fifth judge, the chief justice, disagreed that the presumption had in fact been rebutted. The Crown’s goal in 1903, therefore, was to obtain a more certain ownership of the coal under the beds of New Zealand’s larger rivers. The issue of Crown use of rivers for hydroelectricity was addressed separately the same year in specific legislation for that purpose: the Water-power Act 1903.

1038. Coal-mines Act 1925, s 206

1039. Boast, ‘The Crown and Te Urewera in the 20th Century’ (doc A109), p 271

1040. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 301

The amendment to the Coal-mines Act to secure ownership of coal in riverbeds seems to have been an afterthought. A clause was not introduced into the Bill until the House was already in committee, debating and passing the Amendment Bill section by section. On 12 November 1903, the Minister moved the addition of a clause: 'It is hereby declared that all coal and lignite under any river exceeding thirty-three feet in width is vested in His Majesty.'¹⁰⁴¹ Although this clause initially passed the House, there were objections on the basis that it would interfere with private property rights. This seems to have resulted in a re-wording, which introduced a justification that the rivers were public highways: 'The Premier then moved to amend the clause so as to make it read that all such rivers navigable by small boats or steamers are declared to be highways, and the coal or lignite under such rivers are vested in His Majesty.'¹⁰⁴² This also received objections, so the specification of a 33-foot width was reinserted: 'the Premier substituted for it another amendment to provide that in respect to all rivers exceeding 33 ft in width that can be navigated by small boats or steamers, all coal or lignite under such rivers is vested in His Majesty.'¹⁰⁴³ At that point, the Leader of the Opposition succeeded in inserting a 'saving' clause, that the effects of the draft provision would be 'subject to existing rights'. An alternative wording, making it clear that the rights of riparian landowners *ad medium filum* were the rights to be saved in this way, was not adopted. After further debate, it was agreed to omit the provision altogether and the Bill passed the House without it.¹⁰⁴⁴

A few days later, on 17 November 1903, the amendment Bill received its third reading. In the meantime, the Government had come up with a replacement clause, the text of which became section 14 (as set out above). The new clause thus, for the first time, proposed to vest the riverbeds themselves in the Crown, and declared that not simply coal and lignite but all minerals under the beds were the 'absolute property' of the Crown.

Seddon advised the House that the new clause was intended to meet the Opposition's wish to 'conserve existing rights'. The Government, he said, 'did not wish in the slightest degree to disturb existing rights, but there was a difficulty as to how they should avoid that. A new clause had been drafted which he thought would meet the difficulty.'¹⁰⁴⁵

The leader of the Opposition agreed that 'the clause now proposed would remove the difficulty, and, he was sure, would be supported by the House'. Without much debate, therefore, the House inserted section 14 into the Coal-mines Act Amendment Act.¹⁰⁴⁶

This brief account, which is based on *Hansard* (and the newspapers cited in *Paki*) highlights the following points. First, as concluded by the Supreme Court

1041. James McGowan, 12 November 1903, NZPD, vol 127, pp 511–512

1042. *Evening Post*, 13 November 1903 (*Paki v Attorney-General* [2012] 3 NZLR 277 (sc), 327)

1043. *Ibid*

1044. *Otago Witness*, 2 December 1903 (*Paki v Attorney-General* [2012] 3 NZLR 277 (sc), 328)

1045. Seddon, 17 November 1903, NZPD, vol 127, p 681

1046. W Massey, 17 November 1903, NZPD, vol 127, p 681

in *Paki*, the compromise clause was intended to strike a balance between private and public rights.¹⁰⁴⁷ Secondly, Maori interests and customary rights were given no consideration. At best, such rights must have been considered identical to the *ad medium filum* rights of riparian owners (that is, land obtained from the Crown by way of a Crown grant). Thirdly, no consideration was given to the special circumstances of Te Urewera, which had its own unique status at the time as a special Maori reserve, and its own unique titles system. Fourthly, it is simply impossible that the peoples of Te Urewera could have been consulted about this section of the 1903 Act. There were at most four days between the drafting of a clause taking the beds of all navigable rivers and its adoption by the House of Representatives. We agree with claimant counsel:

The Crown suggests that there is nothing to show that the people of Te Urewera ‘were not consulted over the enactment of the Coal-mines Amendment Act 1903’. I would submit that it is fantastic to imagine that they were. Who can believe that there was any kind of consultation with Urewera Maori, Maori elsewhere, or indeed anyone, regarding the enactment of an obscure amendment to the Coal Mines Act in 1903?¹⁰⁴⁸

Tuhoe were clearly unaware of the effects of the Act five years later, when they debated the leasing of rivers for mining purposes.¹⁰⁴⁹

21.16.3.3 Was the Act expropriatory or declaratory?

Over the 100 years since the Act’s passage, the question of whether its effect was to expropriate (confiscate) Maori rights or merely to declare the prior legal position has been debated from time to time. The debate has focused on three questions:

- ▶ whether Maori had had title to navigable rivers at the time of the Treaty in 1840 (and therefore anything to lose if the beds of navigable rivers were vested in the Crown);
- ▶ whether the Act was expropriatory of riverbeds owned under the *ad medium filum* presumption; and
- ▶ whether the Act’s expropriation of one component of a river – the bed – was sufficient to expropriate a taonga, an indivisible water regime possessed by Maori under their unique form of customary title.

We begin with the first of these questions: whether Maori had title to navigable rivers in 1840, at the time of the signing of the Treaty. From the 1910s to the 1950s, Solicitors-General tried to persuade the courts that large, navigable, inland waterways, including rivers, had been owned by the Crown since 1840 under the

1047. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 301–306

1048. Counsel for Ngati Manawa, submissions by way of reply (doc N26), p 7

1049. Cecilia Edwards, ‘The Urewera District Native Reserve Act 1896, Part 3: Local Government and Land Alienation Under the Act’ (commissioned research report, Wellington: Crown Law Office, 2004) (doc D7(b)), p 59; Binney, ‘Encircled Lands, Part 2’ (doc A15), p 392; Doig, ‘Te Urewera Waterways’ (doc A75), p 60

New Zealand common law. As will be recalled from chapter 20, John Salmond developed the argument that:

- ▶ ‘small unnavigable streams, lagoons, and other waters were undoubtedly merely appurtenant to the adjoining land and subject to customary title’, and could be included in the freehold orders of the Native Land Court;
- ▶ *Mueller* was authority for the implied reservation of navigable rivers when riparian lands were granted by the Crown;
- ▶ there was no qualitative difference between that implied reservation in a Crown grant, and the implied reservation of navigable rivers in the ‘statutory grant’ that took place when the Crown entered into the Treaty of Waitangi, and gave the Treaty legislative force in respect of native title through the native land laws;
- ▶ the question for courts to decide, in respect of both lakes and rivers, was whether an inland waterway was sufficiently large and significant that it had been reserved for public navigation and fishing under the Treaty and the native land laws; or,
- ▶ alternatively, whether Maori had no greater rights than fishing rights because Maori custom did not recognise the ownership of land under water.¹⁰⁵⁰ (For a full explanation of these arguments, see chapter 20.)

This argument was refined by Crown lawyers and tested in a number of lake cases, in which it was invariably rejected by the courts (including in the Lake Waikaremoana case). For navigable rivers, its principal test came in the Whanganui River case, where it was rejected by the Native Land Court in 1939, the Native Appellate Court in 1944, the Whanganui River royal commission (former High Court judge Sir Harold Johnston) in 1950, and the Court of Appeal in 1955.¹⁰⁵¹ In the series of Whanganui River decisions, Justice Hay, in *The King v Morison* (1950), considered that the 1903 legislation was not confiscatory.¹⁰⁵² The Whanganui River commission, on the other hand, considered that the Act was expropriatory and that the Maori owners of the Whanganui River were entitled to compensation ‘in equity and good conscience.’¹⁰⁵³ Ultimately, the Court of Appeal found in 1962 that Maori customary title to the Whanganui River had already been extinguished by the award of Native Land Court titles before the passage of the Act.¹⁰⁵⁴

Turning to the second question, whether the Act was expropriatory of rights *ad medium filum*, the Court of Appeal judges in the 1955 *Leighton* case were far from united. Justice Stanton expressed no view on the matter. Justice Fair considered

1050. Solicitor-General to Under-Secretary for Lands, 11 June 1917 (Tony Walzl, comp, supporting papers to ‘Waikaremoana: Tourism, Conservation & Hydro-Electricity (1870–1970)’, 4 vols, various dates (doc A73(a)), vol 1, pp 229–234)

1051. ‘Report of the Royal Commission Appointed to Inquire into and Report on Claims Made by Certain Maoris in respect of the Wanganui River’, AJHR, 1950, G-2; *In re the Bed of the Wanganui River* [1955], NZLR 419 (CA)

1052. *The King v Morison* [1950] NZLR 247 (SC), 266–268

1053. ‘Report of the Royal Commission Appointed to Inquire into and Report on Claims Made by Certain Maoris in respect of the Wanganui River’, AJHR, 1950, G-2, pp 12–14

1054. See *In re the Bed of the Wanganui River* [1962] NZLR 600 (CA)

the Act was confiscatory.¹⁰⁵⁵ Justice Adams thought it may have been declaratory because, in his view, the saving clause in the 1903 and 1925 Acts included all Crown grants to which the *ad medium filum* presumption applied. In other words, a river had to have been expressly excluded from a grant before it could be considered to be vested in the Crown. But Justice Adams also thought it could be confiscatory in some respects, including of Maori customary rights.¹⁰⁵⁶ Justice Fair disagreed with Justice Adams that all Crown grants were included in the saving clause, because that practically nullified the section.¹⁰⁵⁷

There was debate in the 1980s as to whether a case should be taken to the Court of Appeal to determine whether the Act was confiscatory or declaratory. The Minister of Justice, Geoffrey Palmer, intended that a case would be stated under section 222 of the Land Transfer Act.¹⁰⁵⁸ The Minister noted that there was a 'difficulty in deciding whether s261 of the Coal Mines Act 1979 dealing with Crown ownership of the bed is confiscatory or declaratory. This is a central question upon which the court will be requested to rule.'¹⁰⁵⁹ In the event, no case was stated.

In *Paki* in 2012, the Supreme Court found that the 1903 amendment Act was intended by Parliament to be declaratory, not expropriatory. It was intended to balance public rights with those of the riparian owner. One example of this balance was that stretches of an otherwise navigable river that were not navigable *in fact* would not vest in the Crown. In the Supreme Court's view, section 14 was influenced by the *Mueller* case, which had noted the North American common law in respect of navigable rivers. The position in Canada and the United States, due to the circumstances particular to those colonies, was that large, navigable rivers were public highways, owned by the State.¹⁰⁶⁰

The majority in *Paki* concluded:

It [the 1903 amendment Act] allowed rivers which were potential highways (as the roads marked out on survey maps were potential highways only, until formed) to vest in the Crown, leaving intact private property in relation to non-navigable rivers which were not capable of becoming highways. There was sufficient justification in North American case law concerning the beds of navigable rivers to counter charges of expropriation of private property. Such course was of public benefit without being destructive of private property which, in relation to the beds of navigable rivers could only be regarded as precarious following *Mueller*. The Parliamentary debates which

1055. *Attorney-General, ex relatione Hutt River Board, and Hutt River Board v Leighton* [1955] NZLR 750 (CA), 768, 769

1056. *Ibid*, pp 789–793

1057. *Ibid*, p 772

1058. Geoffrey Palmer, Minister of Justice, press statement, 27 February 1985 (David Alexander, comp, supporting papers to 'Native Land Court Orders and Crown Purchases', 3 vols, various dates (doc A92(a), vol 3), p v125)

1059. Minister of Justice to planning officer, South Canterbury Catchment Board, 19 May 1986 (Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), p v127)

1060. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 301–307

preceded enactment of the 1903 Amendment Act indicate that the purpose of the legislation was to strike an appropriate balance between private and public property, based on the concept of navigability.¹⁰⁶¹

While the Coal-mines Act Amendment Act 1903 was also undoubtedly concerned with ownership of minerals in river beds, the legislative history . . . indicates concern to strike a fair balance between the rights of riparian owners and the public interest. Against the background of the common law approaches in North America, referred to in the judgments in *Mueller*, such balance was found in the concept of rivers as highways with Crown ownership of the soil beneath. The existing common law and its development in North America (in circumstances comparable to those in New Zealand) were treated as providing sufficient justification to enable the claim to be made that the effect was not expropriatory. The speeches in Parliament and the acknowledged difficulties of achieving a fair balance suggest that a principled basis for Crown ownership was where rivers were navigable in fact.¹⁰⁶²

A circumstance particular to New Zealand common law, however, was the unique Maori law and custom in respect of rivers. This brings us to the third question noted above: whether the expropriation by the Coal-mines Act Amendment Act 1903 of one element of a river – its bed – was sufficient to expropriate the taonga that is the river possessed by Maori. In 1994, the Court of Appeal in *Te Ika Whenua* suggested that the language of section 14 might not be sufficiently explicit to extinguish the Maori customary title to rivers. The president of the court, delivering the court's judgment, commented:

The Maori Affairs Act 1953, s155, enacts that except so far as may be otherwise expressly provided in any other Act the Maori customary title to land shall not be available or enforceable by proceedings in any Court or in any manner against the Crown. The provision goes back to 1909 and the draftsmanship of Sir John Salmond. It is not clear that the provision extends to water; and in their *Te Ika Whenua – Energy Assets Report* in 1993 and *Mohaka River Report* in 1992 the Waitangi Tribunal have adopted the concept of a river as being taonga. One expression of the concept is 'a whole and indivisible entity, not separated into bed, banks and waters'. *The vesting of the beds of navigable rivers in the Crown provided for by the Coal-mines Amendment Act 1903 and succeeding legislation may not be sufficiently explicit to override or dispose of that concept.* [Emphasis added.]¹⁰⁶³

In 2003, the Court of Appeal in *Ngati Apa* had to decide whether the statutory language of the Territorial Sea and Fishing Zone Act 1965 and Territorial Sea,

1061. *Ibid*, pp 301–302

1062. *Ibid*, p 306

1063. *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA), 26–27. We note that the provision referred to by the Court of Appeal, section 155 of the Maori Affairs Act 1953, was not re-enacted in *Te Ture Whenua Maori Land Act* 1993.

Contiguous Zone and Exclusive Economic Zone Act 1977 was sufficiently explicit to extinguish Maori customary title. Justices Keith and Anderson concluded that it was not. One of their reasons relied on a comparison with the statutory language of the coal mines legislation, which declared the minerals in the beds of navigable rivers to be the ‘absolute property’ of the Crown. The phrase ‘absolute property’, in the court’s decision, involved both the Crown’s radical title and the beneficial title; through this statutory language, the Crown had both.¹⁰⁶⁴ In our inquiry, counsel for Ngati Manawa pointed out that the phrase ‘absolute property’ only applied to the minerals; by contrast the riverbeds themselves were ‘vested’ in the Crown.¹⁰⁶⁵ The Tauranga Moana and Central North Island Tribunals agreed that the question of whether the coal mines legislation was sufficiently explicit to extinguish Maori customary title was still undecided after *Ngati Apa*.¹⁰⁶⁶

In *Paki*, the Supreme Court did not need to address the question of the Act’s effect. Its view that the Act was not intended to be expropriatory, therefore, should not be taken as applying to its effects on Maori customary or even Maori freehold titles. The majority stated:

Because it is not claimed that the bed of the [Waikato] river is Maori customary land or Maori freehold land, it is not necessary to consider in the present appeal whether the terms of s14 would apply to such land (an application doubted in relation to customary land by Cooke P in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*).¹⁰⁶⁷

The court did, however, speculate whether the reason why words used in a 1926 Act, which vested the beds of Lake Taupo and its tributary rivers in the Crown,¹⁰⁶⁸ were more specific than the 1903 Act was because of doubts about the efficacy of section 14. The majority commented:

It [the 1926 legislation] dealt with use of the waters of the river and cleared the land [beds] of any Maori customary title or Maori freehold title. The specific declaration of Crown ownership may have been necessary to effect an expropriation of Maori customary or Maori freehold title (if the land was in such ownership). Certainly, in *Te Ika Whenua* Cooke P expressed the view that the terms of s14 of the Coal-mines Act Amendment Act were not sufficiently explicit to achieve an expropriation of Maori customary land (a view perhaps turning on use of the word ‘remain’ and the reservation in relation to Crown grants, which could be taken to indicate that s14 is

1064. *Attorney-General v Ngati Apa* [2003] 3 NZLR 643, 687–688

1065. Counsel for Ngati Manawa, closing submissions (doc N12), p 62

1066. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 2, p 610; Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1265

1067. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 288

1068. This legislation, the Native Land Amendment and Native Land Claims Adjustment Act 1926, is discussed in depth in Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1317–1334.

effective only in respect of land obtained in ownership and subsequently granted by the Crown).¹⁰⁶⁹

Otherwise, the court did not comment further on the question as posed by President Cooke in *Te Ika Whenua*.

In *Paki (No 2)*, the Supreme Court reiterated that, in respect of section 14, ‘whether this vesting [of the beds of navigable rivers in the Crown] applied to Maori customary land was doubted by President Cooke in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* but is not in issue in this appeal’.¹⁰⁷⁰

In the Whanganui River inquiry, the Waitangi Tribunal noted both the significance of the Court of Appeal’s 1994 *Te Ika Whenua* case and that the meaning of the law would not be certain until tested and decided by the courts. In the meantime, the Crown had acted on the basis that it owned the bed of the Whanganui River as a result of the 1903 Act, and the Tribunal found that the Act expropriated Maori property rights, without consent or compensation, in serious breach of Treaty principles.¹⁰⁷¹ We, too, consider that, so far as the Crown has claimed riverbeds in our inquiry district on the basis of the Act, it was expropriatory. Given the position in *Paki*, the legal question of whether its language was sufficiently explicit to extinguish customary title is still unresolved; uncertainty as to the law remains. Either the Crown is acting unlawfully or the Act is expropriatory.

21.16.3.4 Problems with the definition of navigability

In our inquiry, the claimants were particularly critical of the statute’s definition of navigability. They say that it has created doubt and uncertainty as to who actually owns the riverbeds of Te Urewera. Part of the problem relates to how various Crown or local authorities have applied the 1903 Act (and its successors) on the ground, a question which we will address in section 21.16.7. Here, we are concerned with the words of the Act, any moves by the Crown to reform it, and how the courts have interpreted it. In doing so, the critical period for Te Urewera is the second half of the twentieth century, as the Crown appears to have made no active claims to riverbed ownership in the inquiry district before the 1950s.

According to claimant counsel, the wording of section 14 in 1903 has ‘proved problematic and the law remains unclear’.¹⁰⁷² While a ‘slightly simplified wording’ was adopted in section 206 of the Coal-mines Act 1925 (and retained ever since), the ‘poor drafting and circularity of this wording is obvious: essentially a navigable river is one that can be used for the purpose of navigation’.¹⁰⁷³ The definition reads ‘a river of sufficient width and depth (whether at all times so or not) to be used for the purpose of navigation by boats, barges, punts, or rafts’. Counsel pondered:

1069. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 297

1070. *Paki v Attorney-General (No 2)* [2014] NZSC 118, 81

1071. Waitangi Tribunal, *Whanganui River Report*, pp 306–307, 336, 339–340

1072. Counsel for Ngati Manawa, closing submissions (doc N12), p 59n

1073. *Ibid*, p 59

Did, for example, the invention of the jet-boat convert the upper Rangitaiki river into a 'navigable' river and vest it in the Crown? But there has been no move to clarify the law since 1903, presumably because the vagueness and imprecision of the law is useful to governments.¹⁰⁷⁴

In the claimants' view, one of the key deficiencies in the Act was the absence of a mechanism to apply the criteria of navigability to particular rivers and formally declare them to be navigable.¹⁰⁷⁵ They relied for this point on Dr Doig, who argued:

The legislation, however, never specified a process (such as gazetting or proclamation) for declaring any particular river to be navigable, nor did it define which departments or officials had the authority to decide which rivers were navigable. Opinion was also divided on whether a river could be considered navigable in some parts but not others. These deficiencies in the process make it difficult to discover whether the Crown has ever claimed or enforced its rights—the evidence must often be sought in relatively obscure documents dealing with the administration of rivers at a local level.¹⁰⁷⁶

We begin by noting that the test of 'navigability' applied to riverbed ownership is a statutory one, not a common law test. It also has no root in Maori custom; Maori were not concerned with the ownership of riverbeds. Rather, as we have seen, relationships with rivers through whakapapa were at whanau, hapu, and iwi level; hence the origin of rights of various kinds and the responsibilities of kaitiakitanga. The *Paki* case has demonstrated that, even until recent times, its interpretation of the statutory test of navigability has given rise to many uncertainties. The High Court found in 2009 that the law should be interpreted as vesting in the Crown the whole bed of a river that is 'navigable in substantial part'.¹⁰⁷⁷ The three judges of the Court of Appeal agreed with the High Court. In their view, the original words 'continuously or periodically' referred to stretches of the river, not the state of the river over time.¹⁰⁷⁸ The Supreme Court, however, found that the words 'continuously or periodically' referred to the 'condition of the river over time,' and that the 1925 amendment clarified this but did not change the original meaning.¹⁰⁷⁹ Thus, the Supreme Court reversed the decision of the lower courts, holding that only the parts of a river that were navigable *in fact* were vested in the Crown.¹⁰⁸⁰

While united on this point, the Supreme Court judges disagreed as to what constituted navigability. The majority took the view that the mere ability to float a boat, barge, punt, or raft does not make a river navigable. The judges emphasised

1074. Counsel for Ngati Manawa, closing submissions (doc N12), pp 59–60

1075. *Ibid*, p 60

1076. Doig, 'Te Urewera Waterways' (doc A75), p 121

1077. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 285, 298–299

1078. *Ibid*, pp 285, 295–296, 299–300

1079. *Ibid*, pp 294–297

1080. *Ibid*, pp 302–309

that the ‘purposes of navigation’ are the purposes of highway, which are concerned with connections for transport and trade. Therefore, slight or intermittent use may not be sufficient to render the river navigable. As for recreational use of a river, the majority of the judges found that it could be evidence of the capacity of the river to support navigation for the purposes of transport and trade.¹⁰⁸¹ A dissenting opinion held that regular crossing from side to side, as well as use (or potential use) for recreational boating, could make a stretch of river navigable as at 1903.¹⁰⁸² The National Park Tribunal considered that the Supreme Court’s majority decision followed existing case law: ‘what was envisaged was “something of the character of usage for commercial purposes”’.¹⁰⁸³

The Supreme Court also found in *Paki* that the actual or potential use of the river for navigation depended on the character of the river as it existed in 1903, at the time of the passing of the Act, not taking into account later changes to the river.¹⁰⁸⁴ This had also been uncertain before the *Paki* decision.

David Alexander’s research for the 1994 Te Ika Whenua Rivers Tribunal hearings found that there were efforts to reform the law relating to navigable rivers in the 1960s, and again in the 1970s to 1980s.¹⁰⁸⁵

In the mid-1960s, an interdepartmental officials’ committee was established to report on administration and law in respect of water. Its report fed into the legislative reform which produced the new Water and Soil Conservation Act 1967 (which is discussed below in section 21.16.7.2). The committee found that the definition of navigability had probably been satisfactory for dealing with the ‘limited range of problems’ in respect of coal mining back in 1903. However, its subsequent application ‘to different circumstances have revealed considerable weaknesses’. Within Government, for example, the belief had developed that each repetition in successive Acts of the phrase ‘shall remain and be deemed always to have been vested in the Crown’ meant that rivers that became navigable between 1903 and the latest Act in 1925 were vested in the Crown. The position ‘since the last re-enactment (in 1925), however, was considered ‘doubtful’.¹⁰⁸⁶

Further, the definition of what constituted navigability was ‘now extremely doubtful’. The courts had questioned it, and the most recent case at the time (the 1955 *Leighton* case) had left the Government uncertain. Officials commented that the judges had been divided on whether navigation had to be for a

1081. Ibid, pp 307–309, 317

1082. Ibid, pp 329–339

1083. Waitangi Tribunal, *Te Kahui Maunga*, vol 3, p 1002

1084. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 300–301, but see also the contrasting view of Justice William Young at page 339.

1085. David Alexander, ‘Native Land Court Orders and Crown Purchases’ (commissioned research report, Wellington: Crown Law Office, 1994) (doc A92), pp 14–21

1086. Interdepartmental Committee on Water, ‘NZ Law and Administration in Respect of Water: Confidential Report to Cabinet by the Interdepartmental Committee on Water’ (extracts), March 1965, p 23 (Alexander, supporting papers to ‘Native Land Court Orders and Crown Purchases’ (doc A92(a), vol 3), p v77)

Definitions of Navigability in *Leighton*

In the *Leighton* case, the four judges involved (one High Court and three Court of Appeal) all disagreed as to the meaning of section 206 of the Coal-mines Act 1925, and the definition of navigability in that section.

In the High Court, Justice Hutchison held that navigability required purposeful use of a river (in this case, the Waiwhetu Stream) for transport of goods and trade. Casual or recreational use of a river was insufficient to meet this standard. The judge considered whether the Waiwhetu Stream could be used for navigation, given its width and depth, both in its original state and after its modification by the Hutt River Board.¹

In the Court of Appeal, none of the three judges considered they had to determine whether the Waiwhetu Stream was navigable, but they all made observations about the meaning of section 206.

Justice Fair decided that it was unnecessary and 'undesirable' to give an 'exhaustive definition' of navigability. He considered that slight, intermittent, restricted use of a river was not enough, and that a river had to be shown to be navigable as at 1903, when the legislation was first enacted. With regard to the High Court's decision, he thought that navigation 'may' be restricted in the way that Justice Hutchison found, and that it surely did not include recreational boating or the mere transport of residents for a distance. Rather, section 206 applied to rivers 'likely' to be of 'real use for commercial, or economic, or general purposes of transport'. Further, he disagreed

1. *Attorney-General, ex relatione Hutt River Board, and Hutt River Board v Leighton* [1955] NZLR 750 (CA), 755

commercial purpose or not. Officials were also unsure as to how the law affected a river that was only navigable 'in parts'. Artificial changes (many of them made by the Government itself) to the course of a river was another point of uncertainty. Officials were not sure whether such changes could alter a river's classification and make it navigable or non-navigable and thus change its ownership. They were also unsure as to whether recent technological developments (the invention of jetboats and hovercraft) could make a river navigable within the meaning of the Act by the 'fresh possibility of river use as a highway'. The *Leighton* case in particular had left Government departments in doubt as to how to apply the law.¹⁰⁸⁷

1087. Interdepartmental Committee on Water, 'NZ Law and Administration in respect of Water', pp 23–25 (Alexander, supporting papers to 'Native Land Court Orders' (doc A92(a), vol 3), pp v77–v99)

with his Court of Appeal colleague, Justice Adams, that the saving clause applied to all Crown grants; it must be read as applying only to express grants of riverbeds.²

Justice Stanton decided it was not necessary to determine whether the river was navigable for the purpose of determining the appeal. But he expressed doubt about the High Court's definition of navigability as 'use for economic purposes'. In his view, the question was whether a river had the requisite width and depth to allow the vessels mentioned in the Act to 'pass over a sufficiently continuous length of water as to justify one in saying that the stream, or a substantial and continuous portion of it, was available for the passage of any of the craft mentioned'.³

Justice Adams also disagreed with the High Court that navigation for commercial purposes such as the transport of goods was required. Use of a river by the vessels specified in the 1925 Act was all that was necessary. The capacity to use a rowing boat, for example, would suffice. But Justice Adams also held that he was not required to determine the meaning of navigability because, in his view (dissenting from the other judges), the saving clause applied to all Crown grants to which the *ad medium filum* presumption applied, a position also later taken in *Tait-Jamieson v GC Metal Contractors Ltd*.⁴

It is not surprising, therefore, that the interdepartmental committee and the Government departments which had to apply the Act were left uncertain as to what made a river navigable, or at what point in time the test had to be applied.

2. *Ibid*, pp 769–770, 772

3. *Ibid*, p 778

4. *Ibid*, pp 789–793

The interdepartmental committee considered the possibility, suggested by the Ministry of Works, that the Crown should simply take ownership by statute of all river and stream beds. This was rejected, but an improvement in the definition of navigability was suggested to deal with the uncertainties:

If vesting in the Crown is to rest upon navigability mainly plus status as a boundary between sections [that is, *ad medium filum* for non-navigable waterways], the definition of 'navigable stream' should be improved. It should include every stream that in the past, present or future, was is or becomes capable of permitting, without trespass on adjoining lands, the passage of any kind of vessel that will float upon it with one occupant. 'Vessel' should be defined to include any jet craft, canoe, raft, or hovercraft. It should be made clear that a navigable stream will not cease to have that status even if the waters cease to flow. The bed so vested should include the flood channel, all

islands, and all parts of the stream bed downstream of the uppermost water that is navigable, whether those parts are navigable or not.¹⁰⁸⁸

In the event, the 1967 Soil and Water Conservation Act did not address ownership issues, so these far-reaching ‘improvements’ to the definition of navigability were not implemented.

As an aside, we note that the committee also recommended the codification in a new statute of common law rights to rivers as at 1840. It noted the tension between the English law characterisation of these rights and the guarantees to Maori in the Treaty of Waitangi:

The English Laws Act, 1858, (NZ) applies to New Zealand, the laws of England as they existed on 14 January 1840 and those laws included the Common Law of England ‘so far as applicable to the circumstances of New Zealand’. . . Bearing in mind the origins of the English systems of ownership of land and water on the one hand, and on the other the Treaty of Waitangi guarantee to the Maoris of the ‘full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties’, it seems difficult to be sure exactly how far the Common Law doctrines as to riverbank boundaries, lakeside boundaries, ownership of highways and rights of passage over water are ‘applicable to the circumstances of New Zealand’.¹⁰⁸⁹

Since the question of what was really applicable to the circumstances of New Zealand (the wording of the English Laws Act) was thus unclear, the committee recommended that the uncertainties be resolved by statute.¹⁰⁹⁰ This recommendation, too, was not adopted.

In respect of the issue identified by Dr Doig – the lack of a mechanism to decide which rivers are navigable – the 1965 committee debated a proposal to set up such a mechanism. The proposal was for the Lands and Survey Department to resolve conflicts between local authorities and riparian owners by fixing the point to which a river was navigable. Any ‘interested person’ would then have a right of objection, which would be heard and determined by the Land Valuation Court. This kind of mechanism was not considered seriously by the committee, which considered it flawed on ‘technical and practical grounds’.¹⁰⁹¹

Thus, the 1965 interdepartmental committee identified what it considered to be significant problems with the definition of navigability, and many points of uncertainty in the law. Nonetheless, no action was taken. If followed, the committee’s recommendations could have seen a very significant expansion in the Crown’s ownership of riverbeds. The committee itself believed that many rivers

1088. Interdepartmental Committee on Water, ‘NZ Law and Administration in Respect of Water’, p 25 (Alexander, supporting papers to ‘Native Land Court Orders’ (doc A92(a), vol 3), p v79)

1089. *Ibid*, p 22 (p v76)

1090. *Ibid*, pp 22–23, 54 (pp v76–v77, v89)

1091. *Ibid*, pp 24–25 (pp v78–v79)

had become navigable since 1903 and were therefore vested in the Crown anyway, but it was unsure.

The issues were revisited in the 1970s, when the Catchment Authorities Association asked the Government in 1976 for ‘clarification of the law of ownership of riverbeds.’¹⁰⁹² In particular, the association was concerned about the definition of navigability. The Government agreed the time was ripe to reconsider this matter.¹⁰⁹³ In 1978, the Minister of Justice referred the issue to the Property Law and Equity Reform Committee (the Law Commission’s predecessor). Before the committee could report, however, the Coal Mines Act 1979 was passed, and the 1925 definition was retained unchanged.¹⁰⁹⁴ The continued use of the definition was criticised by the committee’s background report, which considered it ‘entirely unsatisfactory’ and identified 15 areas of significant uncertainty as to its meaning.¹⁰⁹⁵ The committee then made a preliminary report to the Government in 1983, recommending that ‘express or necessarily implied grants of proprietary rights by the Crown, whether by statute or otherwise and including traditional and customary Maori rights, should be left intact and unaffected by any general statutory reform in this area.’ Otherwise, riparian rights arising ‘merely from the application of the *ad medium filum* presumption’ should be set aside, and all riverbeds wider than a specified number of metres should be vested in the Crown by statute.¹⁰⁹⁶

The committee’s view was that width should become the sole criterion for Crown ownership, and navigability should be set aside (thus returning to the original proposition in 1903). The Lands and Survey Department suggested a width of 20 metres, but the committee considered that something much narrower (maybe only three metres) might be appropriate.¹⁰⁹⁷ The committee considered that its proposal was not confiscatory because the Crown had probably become the owner of most of New Zealand’s riverbeds already, simply by the invention of modern forms of water transport, especially the jetboat.¹⁰⁹⁸ But this – and other uncertainties surrounding navigability – required clarification by a law change.

The committee also recommended a transparent process to declare that a riverbed was the property of the Crown. It would involve ‘public notification of intention; public rights of objection; an independent investigation and either a

1092. Alexander, ‘Native Land Court Orders and Crown Purchases’ (doc A92), p17

1093. Surveyor-general to all chief surveyors, 7 July 1977 (Alexander, supporting papers to ‘Native Land Court Orders and Crown Purchases’ (doc A92(a), vol 3), p v94)

1094. Coal Mines Act 1979, s 261

1095. Property Law and Equity Reform Committee, ‘Background Paper on Ownership of Riverbeds’, 10 September 1981, pp 6–8 (Alexander, supporting papers to ‘Native Land Court Orders and Crown Purchases’ (doc A92(a), vol 3), pp v107–v108)

1096. Alexander, ‘Native Land Court Orders and Crown Purchases’ (doc A92), pp18–19

1097. Property Law and Equity Reform Committee, ‘Interim Report on Law Relating to Water Courses’, 26 April 1983, p 5 (Alexander, supporting papers to ‘Native Land Court Orders and Crown Purchases’ (doc A92(a), vol 3), p v99)

1098. *Ibid*, p 9 (p v101)

recommendation or a determination by a court, local authority, or tribunal; and compensation being fixed by that body, if appropriate.¹⁰⁹⁹

The committee's proposals were put out for public discussion but the committee itself queried its recommendations, in part because of the High Court's decision in *Tait-Jamieson v GC Smith Metal Contractors Ltd.*¹¹⁰⁰ There, the High Court found that the 1903 Act and its successors only vested a riverbed in the Crown if the original Crown grant had specifically excluded the bed from the grant. This was in accord with Justice Adams' view in *Leighton*, but not with the view of Justice Fair in the same case and Justice Hay in the 1950 High Court decision *The King v Morison*. The latter two judges had held that only a Crown grant that expressly included a riverbed was covered by the saving clause. As the Law Commission pointed out in 1989, the High Court's interpretation in *Tait-Jamieson* meant that the 1903 Act had virtually no application at all.¹¹⁰¹ In *Paki*, the Supreme Court disagreed with the *Tait-Jamieson* interpretation.¹¹⁰²

In the meantime, however, the Government advised the Property Law and Equity Reform Committee not to complete its work on navigability and the ownership of riverbeds.¹¹⁰³ The committee's view was that a critical issue was public access, which might not be satisfactorily resolved by Crown ownership of the beds in any case.¹¹⁰⁴ Its president advised the Government that an authoritative Court of Appeal decision was likely required in response to *Tait-Jamieson*. The Lands and Survey Department agreed, given its difficulties in interpreting the law about ownership of the beds of navigable rivers. The Justice Department, therefore, recommended in 1985 that a case be stated to the Court of Appeal to clarify the meaning of the relevant section (section 261) of the Coal Mines Act 1979.¹¹⁰⁵ Although the Minister approved this recommendation, it does not appear to have been carried out. David Alexander suggested that the registrar-general, who had responsibility for this matter, had workload problems. As a result, the special case was lost sight of and eventually abandoned.¹¹⁰⁶

No changes were made to the law. When the Crown Minerals Act was passed in 1991, it repealed section 261 of the Coal Mines Act 1979. Section 354 of the Resource Management Act 1991, however, preserved the effect of the navigability

1099. Property Law and Equity Reform Committee, 'Interim Report on Law Relating to Water Courses', p 8 (Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), p v101)

1100. *Tait-Jamieson v GC Smith Metal Contractors Ltd* [1984] 2 NZLR 513; Property Law and Equity Reform Committee, minutes of meeting, 3 December 1984, pp 4–7 (Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), pp v116–v119)

1101. Waitangi Tribunal, *Whanganui River Report*, pp 211–212

1102. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 301

1103. Alexander, 'Native Land Court Orders and Crown Purchases' (doc A92), p 19

1104. Property Law and Equity Reform Committee, minutes of meeting, 3 December 1984, pp 4–7 (Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), pp v116–v119)

1105. Secretary for justice to Minister of Justice, 7 November 1985, pp 2–4 (Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), pp v122–v124)

1106. Alexander, 'Native Land Court Orders' (doc A92), pp 19–21

clause as it had been defined in the Coal Mines Act. Section 354 stated that the repeal of various laws, including section 261 of the Coal Mines Act 1979,

shall not affect any right, interest, or title, to any land or water acquired, accrued, established by, or vested in, the Crown before the date on which this Act [the Resource Management Act] comes into force, and every such right, interest, and title shall continue after that date as if those enactments [including section 261 of the Coal Mines Act 1979] had not been repealed.

As far as we are aware from the evidence available to us, the law relating to ownership of the beds of navigable rivers had not been reconsidered by the time of our hearings in 2005.

Before proceeding, however, to assess which rivers the Crown has actually claimed to own in Te Urewera under the 1903 Act, we must first consider the special circumstances of the Urewera District Native Reserve, and also the effects of the Urewera Consolidation Scheme on the ownership of rivers.

21.16.4 The special circumstances of the Urewera District Native Reserve and the Urewera Consolidation Scheme

21.16.4.1 The Urewera District Native Reserve

21.16.4.1.1 RIVERS IN THE UREWERA DISTRICT NATIVE RESERVE NEGOTIATIONS

For much of our inquiry district, the ordinary native land laws did not apply in 1903 when the Coal-mines Act Amendment Act was passed. As we set out in chapter 9, Tuhoe, Ngati Whare, and Ngati Manawa leaders negotiated with the Crown in 1895 to keep the Native Land Court out of their remaining lands. We have highlighted the parts of those negotiations that dealt with natural resources in section 21.6 above. During the negotiations and the debate on the UDNR Bill, rivers were mainly mentioned in passing. Both Seddon and Carroll acknowledged that the rivers in the Reserve belonged to Maori. They referred to ‘your rivers’ or ‘their rivers’ in contexts that made that clear (see section 21.6.3). But how the new reserve’s title or tenure system would work in respect of rivers was not discussed.¹¹⁰⁷

At that time, the peoples of Te Urewera were clearly aware that rivers elsewhere in the country had become polluted or had had their courses altered to suit settlers’ needs. In response to their concerns, the Premier promised that – in return for their agreement to allow and encourage tourism – ‘your streams may be allowed to flow as at present, the waters to remain unpolluted so that the fishes may live; they are also to you a source of food’. This was a ‘reasonable’ request, he said, and ‘in accordance with what I believe to be in your interest and in the interests of the Country.’¹¹⁰⁸ Also, as we discussed earlier, the Premier envisaged that Tuhoe would control the stocking of rivers and the trout fishery, although this intention was never given practical effect. On the other hand, the Government opposed Hone

1107. Doig, ‘Te Urewera Waterways’ (doc A75), p 60

1108. ‘Urewera Deputation, Notes of Evidence’, p 22 (Marr, supporting papers to ‘The Urewera District Native Reserve Act 1896 and Amendments’ (doc A21(b)), p 186)

Heke's amendment to insert a Treaty guarantee about fisheries (among other properties) into the UDNR Bill. Some parliamentarians were not prepared to accept that Maori would have exclusive control over fisheries in the Reserve (see section 21.6.3).

21.16.4.1.2 RIVERS IN THE HEARINGS AND TITLE ORDERS OF THE UREWERA COMMISSIONS

The 1895 negotiations resulted in the creation of the Urewera District Native Reserve the following year, governed by its own Act of Parliament. Under the UDNR Act 1896, the native land laws were excluded from operation in the Reserve (although later the Governor was empowered to confer jurisdiction on the Native Land Court for specific purposes). An Urewera commission was to be appointed to divide the district into hapu blocks, using sketch maps instead of full surveys, and investigate the ownership of each block 'with due regard to Native customs and usages'. The commission would then make an order for each block, listing the relative shares of every family and individual. The listed owners would elect committees to manage and control the hapu blocks. In turn, the block committees would elect a General Committee for the whole reserve. Only the General Committee could make the decision to alienate land, whether by sale or lease (see chapter 9).

Dr Doig's evidence has carefully considered the place of rivers in this scheme.¹¹⁰⁹ She noted that, to keep survey costs as low as possible, convenient natural boundaries were used as far as possible to delineate block boundaries. This included the frequent use of rivers, even though these were seldom customary boundaries between the hapu concerned.¹¹¹⁰ As we discussed in chapter 13, it was virtually impossible for the Urewera commission to create completely separate hapu blocks, and so hapu interests had to be intermingled (as they were in custom).

According to the minutes of the commission hearings, the ownership of rivers was almost never discussed. Rather, as in the Native Land Court, the focus was on the ownership of blocks of land, and the ancestors for that land. Hence, discussion of customary relationships with or uses of rivers featured mainly as evidence of who occupied a block. In particular, fishing or the regular use of fishing kainga near rivers was a sign (tohu) of occupation.¹¹¹¹ As with hapu interests more generally, the evidence also showed that hapu had fishing rights and the use of rivers that were widely separated from their land interests and so not immediately adjacent to their kainga and cultivations.¹¹¹² At other times, the same ancestor was the source of rights in both land and a waterway, and people who had rights in adjacent land clearly also had rights in the rivers. But there is little evidence to suggest that either the commission or the people considered that title to rivers was being

1109. Doig, 'Te Urewera Waterways' (doc A75), pp 55–69

1110. Ibid, pp 67–68

1111. Ibid, pp 63–67

1112. Ibid, pp 66–67

investigated or awarded.¹¹¹³ Fisheries were often ‘overlooked’ in evidence, despite their value to hapu, ‘perhaps because of the inherent land-based bias of a land title investigation, with its emphasis on permanent kainga and cultivations.’¹¹¹⁴

Dr Doig thought it possible that Tuhoe considered title to their major rivers to be part of their new land block titles.¹¹¹⁵ She seems to have based this mainly on the fact that the people still considered that they owned their rivers during and after the commissions’ award of titles.¹¹¹⁶ Dr Doig did not, however, consider the possibility that rivers simply remained uninvestigated and in customary title. The Urewera commissions were not empowered to investigate or issue titles for rivers. In our view, which accords with that of the Te Ika Whenua Rivers Tribunal,¹¹¹⁷ what was needed was a separate, ‘composite title’ for rivers, encompassing the banks, beds, and water. It was outside the powers of the Urewera commissions to award such a title. They could only deal with hapu land blocks.¹¹¹⁸ We do not believe that title to such taonga as the Ohinemataroa (Whakatane) River, the Tauranga (Waimana) River, or the Whirinaki River could have been awarded as part of titles to land blocks without any specific investigation into or discussion of their customary ownership.

Evidence is scarce as to how Tuhoe saw their new land titles as affecting their rivers. The issue was not discussed by either the commissioners or the people during the Urewera commissions’ hearings.¹¹¹⁹ The only piece of evidence we have, apart from the commissions’ minutes, is the approach taken by Te Urewera leaders at a major hui in 1908. As we discussed in chapter 13, the purpose of this hui was to elect the General Committee and to make decisions about opening the Reserve for mining (see section 13.6.4). At the hui, the committee and the people agreed that any rivers required for mining purposes would be ‘leased by the owners.’¹¹²⁰ The translation was not specific as to who was meant by ‘the owners’. Cecilia Edwards did not comment on this point.¹¹²¹ Both Professor Binney and Dr Doig understood it to mean that the leasing of rivers would be done by the General Committee, elected to represent all the owners of the Reserve.¹¹²² We note that in the original report of the hui to the Minister the point read: ‘Ko nga[awa] Wai whai tikanga me riihi ki nga tangata whaitake ki te whenua meaua awa wai.’ (The rules and

1113. Ibid, pp 63–69

1114. Ibid, p 64

1115. Ibid, pp 68–69

1116. Ibid, pp 60, 63–69

1117. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 104

1118. Urewera District Native Reserve Act 1896, ss 6–8

1119. Doig, ‘Te Urewera Waterways’ (doc A75), p 63

1120. Numia Kereru and 13 others to the Native Minister, ‘Report’, 26 March 1908 (Cecilia Edwards, comp, supporting papers to ‘The Urewera District Native Reserve Act 1896, Part 3: Local Government and Land Alienation Under the Act’, 2 vols, various dates (doc D7(b)(i), vol 2), pp 1227–1228)

1121. Edwards, ‘The Urewera District Native Reserve Act 1896, Part 3’ (doc D7(b)), p 59

1122. Binney, ‘Encircled Lands, Part 2’ (doc A15), p 392; Doig, ‘Te Urewera Waterways’ (doc A75),

regulations in relation to the waterways are that they be leased by the owners of those lands and waterways.)¹¹²³

In any case, the titles awarded under the UDNR Act were transformed the following year, as we discuss next.

21.16.4.1.3 TRANSFORMATION OF CUSTOMARY TITLE INTO MAORI FREEHOLD TITLE IN 1909

As discussed in chapter 13, the Government's main purpose in transforming customary titles in the Reserve into Maori freehold titles was to facilitate the purchase of land for settlement. The Crown Law Office had advised the Government that the UDNR was still in Maori customary title, a situation that the Urewera commissioners' orders had not changed.¹¹²⁴ Section 3 of the UDNR Act Amendment Act 1909 stated that all orders made under the 1896 Act 'shall be deemed to have had as from the date of the making thereof, the same operation as a freehold order made by the Native Land Court under the Native Land Act, 1909'. The Attorney-General told the Legislative Council that

The general purpose of the Bill is to enable the work of European settlement of large areas in the Urewera country to be proceeded with. I am not absolutely certain of the figures, but I believe I am right in saying that it is estimated that probably 100,000 acres of land will be obtained in this district for the purpose of closer settlement, and the chief service this Bill performs is to make it possible by the conversion of the existing orders [of the Urewera commission] into freehold orders, to carry out that general purpose.¹¹²⁵

According to historian Cecilia Edwards, the 'change in tenure from customary land to (Native or Maori) freehold land was symbolically important'.¹¹²⁶ If, however, the law as stated in *Wanganui River* were followed, then this amendment had more than symbolic effects. It could have had the effect of extinguishing Maori customary title to their rivers, and establishing ownership of the rivers *ad medium filum* in the owners of riparian blocks. Dr Doig noted this possibility in her report,¹¹²⁷ observing that if 'customary title to the rivers was extinguished when the adjoining land became Maori freehold land, then the presumption that *ad medium filum* applied to the rivers in the area from that time [1909] becomes much stronger' (emphasis in original).¹¹²⁸ If so, this had certainly occurred by a sidewind:

1123. Numia Kereru, *tiamana Heheo te Komiti nui o Tuhoe, Ripoata . . . ki te minita maori*, 26 Maehe 1908 (Judith Binney, comp, supporting papers to 'Encircled Lands', various dates (doc A15(a)), p 67)

1124. Doig, 'Te Urewera Waterways' (doc A75), pp 69-70

1125. Findlay, 22 December 1909, NZPD, vol 148, p 1411

1126. Edwards, 'The Urewera District Native Reserve Act, Part 3' (doc D7(b)), p 98

1127. Doig, 'Te Urewera Waterways' (doc A75), p 80

1128. *Ibid*, p 70

There was no mention of the waterways of Te Urewera in the parliamentary debate on the [1909 Amendment] Bill or in the Act itself, and there appears to be little evidence that the implications of the conversion to freehold title for the ownership of the rivers within Te Urewera was considered at all by the Crown or explained to Tuhoe.¹¹²⁹

The Supreme Court's decision in *Paki* has cast serious doubt on whether *Wanganui River* applies. In our view, it was highly unlikely that the rivers were included *ad medium filum* in the orders of the Urewera commissioners. It was equally unlikely, therefore, that, when those orders were deemed to have had the 'same operation' as Native Land Court orders from the time of their making, this vested riverbeds in riparian owners *ad medium filum*. But the Crown's purchases were later treated as though both had happened. We turn to consider these purchases next.

21.16.4.1.4 RIVERS IN THE CROWN'S PURCHASE OF INDIVIDUAL INTERESTS IN UDNR LAND BLOCKS

As we set out in chapter 13, the law change in 1909 was one of a number of measures designed to enable the Crown to purchase large parts of the supposedly inalienable Urewera District Native Reserve. The next question we need to consider is whether, in purchasing undivided, unlocated individual shares in the UDNR land blocks, the Crown purchased interests in Te Urewera rivers.

According to Crown counsel, rivers were included in its UDNR purchases, whether the river was a boundary or inside a block. Again, the Crown relied on its view that, under Maori custom, rivers were simply included as part of any sale of adjacent land, and no special explanation or recording of this was necessary. Nor, Crown counsel submitted, was any extra payment needed for the acquisition of rivers *ad medium filum* along with the land.¹¹³⁰ The claimants, on the other hand, denied that any rivers were 'willingly ceded by Tuhoe to the Crown.'¹¹³¹ They relied on Suzanne Doig's evidence to support their position.¹¹³²

In the 1920s, during the consolidation scheme that followed the Crown's purchases, the evidence is clear that Tuhoe did not consider they had sold any of their rivers to the Crown. Dr Doig explained that 'The Crown had only bought up undefined interests in blocks of land when it bought shares from the owners of Urewera District Native Reserve blocks; the deeds of sale do not mention any alienation of rivers.'¹¹³³ Because the 'individual shares were not parcelled out on the ground', it was not even certain that the Crown was 'being sold riparian interests by the Tuhoe owners, let alone interests in the rivers.'¹¹³⁴ The Crown did not manage to buy the whole of any UDNR blocks. Thus, not even Crown purchase agents could

1129. *Ibid*, p 80

1130. Crown counsel, closing submissions (doc N20), topic 30, pp 9–10

1131. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 60

1132. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 175; counsel for Tuawhenua, appendix to closing submissions (doc N9(a)), p 110

1133. Doig, 'Te Urewera Waterways' (doc A75), p 96

1134. *Ibid*, p 71

know whether they had bought any particular land in a block to which the *ad medium filum* presumption could apply. Because so many kainga and cultivations were near rivers, it seems that these would be the last places given up once interests were finally located on the ground. Since the locations of the sellers' interests were never identified (which would have happened at the time of partition by the Native Land Court), this question will never be answered. What we do know is that Tuhoe entered the Urewera Consolidation Scheme on the basis that no rivers would transfer to the Crown, as we discuss more in the next section.

As noted, Dr Doig examined the deeds and 'transfer documents' for the UDNR purchases and confirmed that they 'do not mention rivers at all'.¹¹³⁵ Further, her evidence is that 'the Crown never offered or asked to buy the rivers of Te Urewera, even though it purchased or otherwise acquired much of the land'.¹¹³⁶ As we discussed in chapter 13, the Crown deliberately circumvented the General Committee, which had been prepared to agree to the leasing of rivers for specific uses. Having removed the protection of community control, the Crown's agents, especially WH Bowler, picked off individual interests in a manner which we described in chapter 13 as unfair and coercive. In the several historical reports prepared for our inquiry, including Cecilia Edwards' lengthy report for the Crown, there is no mention of Bowler or any other agent discussing rivers or explaining the *ad medium filum aquae* rule.¹¹³⁷ We agree with the National Park Tribunal that it is 'highly questionable' that such explanations were ever given in the circumstances in which purchasing of individual interests took place.¹¹³⁸

Crown counsel cross-examined Suzanne Doig as to whether rivers located *within* blocks, rather than used as block boundaries, would transfer to the Crown as part of land sales. In that circumstance, Dr Doig considered it would depend on the context, case by case, but – 'unless there is any evidence of Maori continuing to act as though they had not transferred those interests in the river along with the land' – then 'I would say that's the case. Yes'.¹¹³⁹

We note that no river titles were created by the Urewera commissioners, no land blocks were sold in their entirety, neither the sold nor unsold interests were located on the ground, no request or offer to purchase rivers was made, and no deed or transfer documents included the sale of a river. Also, as we shall see, Tuhoe did not act as if they had transferred any rivers along with the land, either

1135. Doig, 'Te Urewera Waterways' (doc A75), p71

1136. Doig, summary of 'Te Urewera Waterways' (doc F6), p2

1137. See Edwards, 'The Urewera District Native Reserve Act 1896, Part 3' (doc D7(b)); Anita Miles, *Te Urewera*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1999) (doc A11); SKL Campbell, 'Land Alienation, Consolidation, and Development in the Urewera, 1912–1950' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1997) (doc A55); Heather Bassett and Richard Kay, 'Ruatahuna: Land Ownership and Administration c 1896–1990' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A20); Tuawhenua Research Team, 'Ruatahuna, Part 2' (doc D2).

1138. Waitangi Tribunal, *Te Kahui Maunga*, vol 3, p1013

1139. Crown counsel, closing submissions (doc N20), topic 30, p10; Suzanne Doig, under cross-examination by Crown counsel, Rangitahi Marae, Murupara, 19 August 2004 (transcript 4.9, pp145–146)

during the consolidation scheme (which followed the purchases), nor for many decades afterwards.

In our view, therefore, it cannot be shown that Tuhoe, Ngati Manawa, or Ngati Whare knowingly or willingly sold any of their rivers to the Crown when it purchased individual interests in UDNR blocks, and there is significant evidence that they did not.

For Tuhoe, Ngati Ruapani, and Ngati Kahungunu, the Crown had not purchased any interests in the Waikaremoana block, so no rivers or waterways in that block were knowingly or willingly alienated to the Crown as part of the UDNR purchases.

We turn next to consider the Urewera Consolidation Scheme, and the question of how it affected the ownership of rivers in the former UDNR.

21.16.4.2 The Urewera Consolidation Scheme

21.16.4.2.1 THE RUATOKI AGREEMENTS, MAY AND AUGUST 1921

The Urewera Consolidation Scheme was negotiated between Te Urewera leaders and the Crown at two crucial hui at Ruatoki in May and August of 1921. At the first hui in May 1921, the Native Minister and Minister of Lands obtained agreement to a scheme, which Tuhoe welcomed as the only way to stop the Crown's purchase of individual interests, obtain useable blocks, and start developing their lands for farming. At the second hui, which took place over three weeks in August 1921, Maori leaders organised their people into groups of non-sellers and negotiated the location of their awards with Crown officials. Apirana Ngata was their sole representative in these negotiations. Chapter 14 contains our detailed analysis of these hui and the consolidation scheme that resulted from them.

By 1921, the Crown had failed to buy all of the interests in any of the 44 UDNR blocks across which it had been purchasing, although it had bought the equivalent of half of the land in the Reserve. Officials refused to contemplate an outcome in which the Crown's interests would be partitioned out of each block, scattered among Maori lands as if shaken from a pepper pot. They feared the Crown might not obtain enough concentrated, usable land for a European settlement scheme, or the forested lands needed for watershed conservation. The Native Land Court's jurisdiction to partition land was therefore revoked, and a district-wide consolidation scheme proposed instead. As noted, Te Urewera leaders had their own reasons for agreeing to a scheme. There was no assurance that they could obtain all their kainga, cultivations, mahinga kai, and wahi tapu if the land court partitioned the 44 blocks. In any case, they were not allowed to go to the court for partitions. The scheme offered them instead the opportunity to organise whanau, group their interests together, and negotiate the selection of the land which – limited by the value of their surviving shares – they wished to retain. This limitation as to value was crucial, of course, because the Crown maximised its award by insisting on out-of-date, seriously flawed 'valuations', which had the effect of decreasing the amount of land the Maori owners were entitled to retain (see chapter 14).

Te Urewera leaders agreed in principle to a scheme at the Ruatoki hui in May 1921. They were assured that the Crown would look after their interests and see that

justice was done, so that both Maori and Pakeha would benefit from the scheme. Roads, valuations, concentration of lands for farming, retention of kainga and land around Maori 'settlements', a reserve for landless sellers, and other matters were canvassed. All that was agreed, however, was that there should be a scheme, the details of which were yet to be negotiated. From the documentary accounts of the hui, as recorded by Crown officials, the question of river ownership and the effects that a consolidation scheme might have on that ownership were not discussed.¹¹⁴⁰

The following August, a three-week hui was held at Taurarau Marae, Ruatoki, to settle the details of the scheme. We discussed this hui in chapter 14. We noted that Maori leaders had significant control over the areas in which their interests would be located. Four-fifths of the division of land between the Crown and Maori was effectively settled at the Taurarau hui; the remaining one-fifth was altered later during the course of the consolidation commissioners' work to finalise awards on the ground. In respect of boundaries, officials told Maori that when the blocks were surveyed, fencing lines and 'boundaries more in accord with settlement conditions [that is, with establishing farms]' would be used.¹¹⁴¹ Thus, the proposed boundaries between Crown and Maori awards were not finalised as part of the agreements reached during the Taurarau hui.

This was important for two reasons. The first is that the Maori owners were able to negotiate at Taurarau, even if they only had one adviser/representative, Apirana Ngata. The future task of deciding boundaries, however, was assigned by statute to the consolidation commissioners alone.¹¹⁴² Maori were not represented on the commission and could not appeal its decisions. Hence, as we said in chapter 14, this crucial aspect of dividing the land was profoundly unfair to the Maori owners.

The second point is that rivers and streams were used extensively as block boundaries because they were natural boundaries and their use would reduce survey costs.¹¹⁴³ This meant that the decision as to how much river bank land would be allotted to the Crown and Maori was solely in the authority of the Crown to decide. If the *ad medium filum aquae* presumption applied to the new titles, then the Crown had given itself sole power to decide who would own the riverbeds of Te Urewera.

This outcome was not explained or anticipated (at least, by Maori) at the Taurarau hui. The documentary accounts of the hui contain no mention of river ownership or how the consolidation scheme might affect rivers. Fishing was not recorded as a subject of discussion or agreements. Watershed conservation was a primary goal for the Crown but it seems to have been couched in terms of preserving the bush, especially in the Waikaremoana block. A draft Lands and Survey

1140. 'Meeting of the Representatives of the Urewera Natives with the Honourable DH Guthrie, Minister of Lands, and the Honourable JG Coates, Native Ministers, at Ruatoki on the 22 May, 1921'; Native Minister to Minister of Lands, telegram, Ruatoki, 23 May 1921 (Campbell, supporting papers to 'Land Alienation, Consolidation and Development' (doc A55(b)), pp 123–138)

1141. Balneavis to Coates, 27 August 1921 (Campbell, 'Land Alienation, Consolidation and Development' (doc A55), p 52)

1142. Urewera Lands Act 1921–22, s 5

1143. Doig, 'Te Urewera Waterways' (doc A75), p 79

Tuhoe Petition about the Consolidation Scheme (1922) and the Commissioners' Response (1924)

Tuhoe's 1922 petition to Parliament about the Consolidation Scheme read:

To the Honourable Mr Speaker and Honourable Members Assembled in the House of Parliament of the Dominion of New Zealand—

Greeting.

We your humble petitioners are aboriginal Natives and residents of that part of Aotearoa known as Tuhoe in the district of Te Urewera.

We pray to your Honourable House to investigate the injustices imposed on our lands by the Commissioners. We object to the Order made on the 31st day of October, 1921, as it did not coincide with the arrangement made at the meeting held at Ruatoki on the 1st day of August 1920. [*sic*, 1921]

1. *Grievances*

1. The Crown claims to have its interests allocated in the Whakatane and Waimana rivers; *We strongly object to the Crown taking our rivers. . .* [Emphasis added.]¹

The commissioners' official response in 1924 to each of Tuhoe's itemised grievances stated:

The Crown owned by purchase approximately $\frac{2}{3}$ of the Urewera Block and portions only of its area are in the Whakatane and Waimana basins. *The rivers are not included in any of the Crown awards.* [Emphasis added.]²

1. Tikareti Te Iriwhiro and 175 others, petition 341/22, 1922 (SKL Campbell, comp, supporting papers to 'Land Alienation, Consolidation and Development in the Urewera, 1912–1950', various dates (doc A55(b)), p 219)

2. Carr and Knight to Under-Secretary, Native Department, 10 September 1924 (Campbell, supporting papers to 'Land Alienation, Consolidation and Development' (doc A55(b)), p 220)

report did note Maori agreement that 'the Crown will take as part of its award any steep bush clad land on the banks of rivers or streams which it may be necessary to preserve for their protection.'¹¹⁴⁴ This point of agreement was not recorded in any of the other documentation about the hui, including the official report of

1144. Department of Lands and Survey, District Office, draft report to Minister of Lands and Native Minister, 3 October 1921, p 2 (Campbell, supporting papers to 'Land Alienation, Consolidation and Development' (doc A55(b)), p 161)

the scheme. Steven Webster characterised it as a Crown proposal rather an agreement.¹¹⁴⁵ We also note that no explanation of the *ad medium filum* presumption was made, and no discussion took place as to whether it would apply to the new land titles, or to any takings of land on river banks for water conservation.¹¹⁴⁶ If, as we suggested in chapter 14, the Maori owners had been properly advised by legal counsel and appropriate experts, the position of rivers in the scheme would surely have been raised and clarified.

There is no evidence, therefore, that Tuhoe emerged from the Tauarau hui in August 1921 with any reason to believe their ownership of rivers would be affected by the scheme. Further, a petition the following year shows they had in fact understood that ownership of their rivers would *not* be affected.¹¹⁴⁷ After the consolidation commission had begun its hearings, a substantial body of Tuhoe feared that the Crown was now trying to obtain ownership of rivers, contrary to what had been agreed to at Tauarau; ‘we strongly object to the Crown taking our rivers.’¹¹⁴⁸ We discuss the petition and the Crown’s response to it in more detail later.

21.16.4.2.2 THE HEARINGS AND TITLE ORDERS OF THE CONSOLIDATION COMMISSIONERS

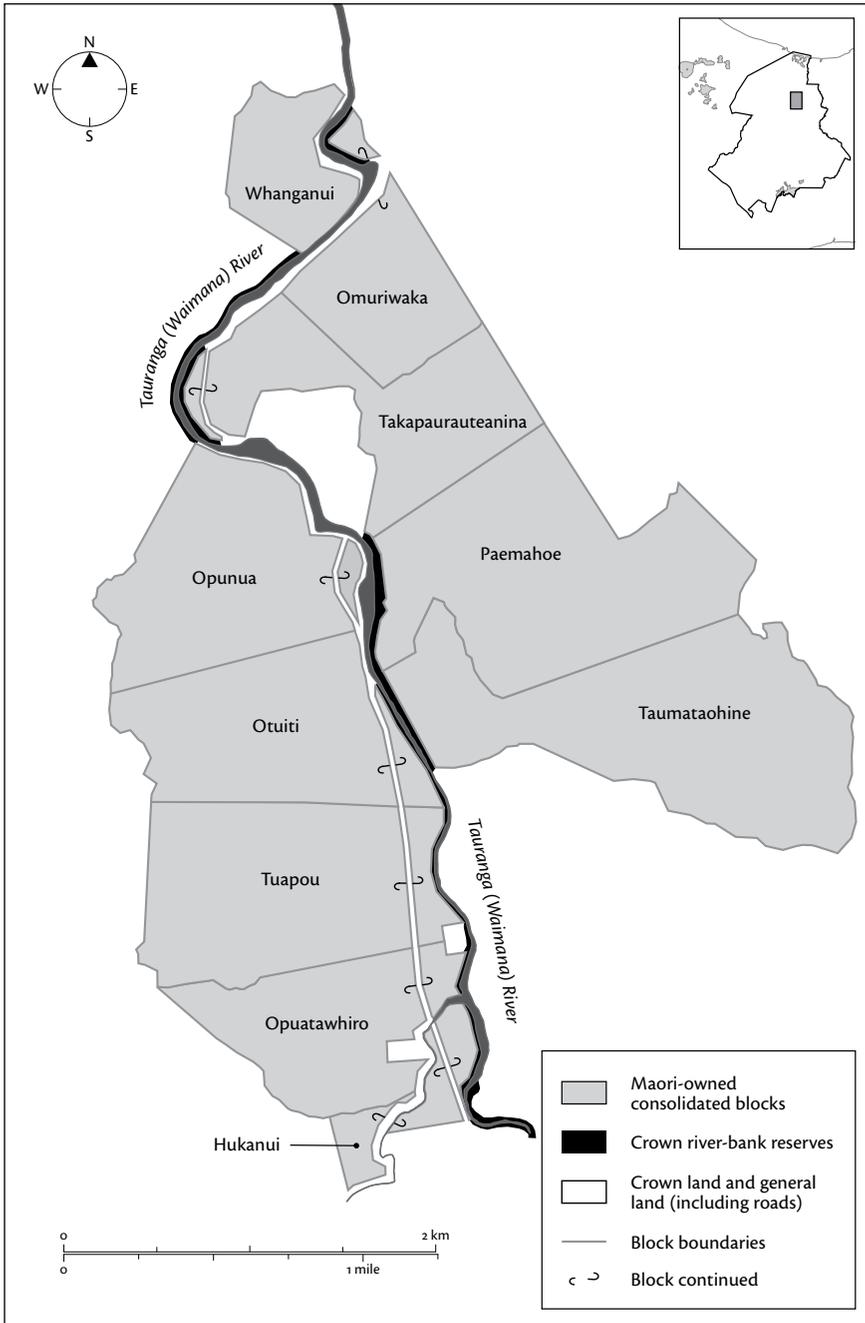
Parliament legislated for the Urewera Consolidation Scheme in the Urewera Lands Act 1921–22. A consolidation commission was established to carry out the scheme as agreed at Ruatoki in August 1921, and to finalise the location and boundaries of awards on the ground. As we discussed in chapter 14, this was not an independent commission but rather a pair of departmental officers acting under the instructions of Ministers. Tuhoe were not represented on the commission, nor could they appeal its decisions. The commissioners’ awards to Maori owners would have the status of Maori freehold land, subject to the jurisdiction of the Native Land Court. Once surveyed, it was intended that the new titles would be registered under the Land Transfer Act. Both Ministers and officials encouraged the peoples of Te Urewera to consider these new titles as a departure from the past, no longer based on ancestral rights but on the needs of a modern, farming community.

1145. Steven Webster, ‘The Urewera Consolidation Scheme: Confrontations between Tuhoe and the Crown, 1915–1925’ (commissioned research report, Wellington: Waitangi Tribunal, 2004) (doc D8), pp 253, 263

1146. The published account of the hui is Knight, Carr, and Balneavis, ‘Urewera Consolidation Scheme’, 31 October 1921, AJHR, 1921, G-7 (including AT Ngata, memorandum). Unpublished accounts include: Balneavis to Coates, 27 August 1921, pp 1–10; Department of Lands and Survey, District Office, draft report to Minister of Lands and Native Minister, 3 October 1921, pp 1–12; Balneavis to Coates, telegrams, August 1921; Carr to Coates, 20 September 1921, pp 1–5 (Campbell, supporting papers to ‘Land Alienation, Consolidation and Development’ (doc A55(b)), pp 150–199).

1147. Miles, *Te Urewera* (doc A11), pp 471–473

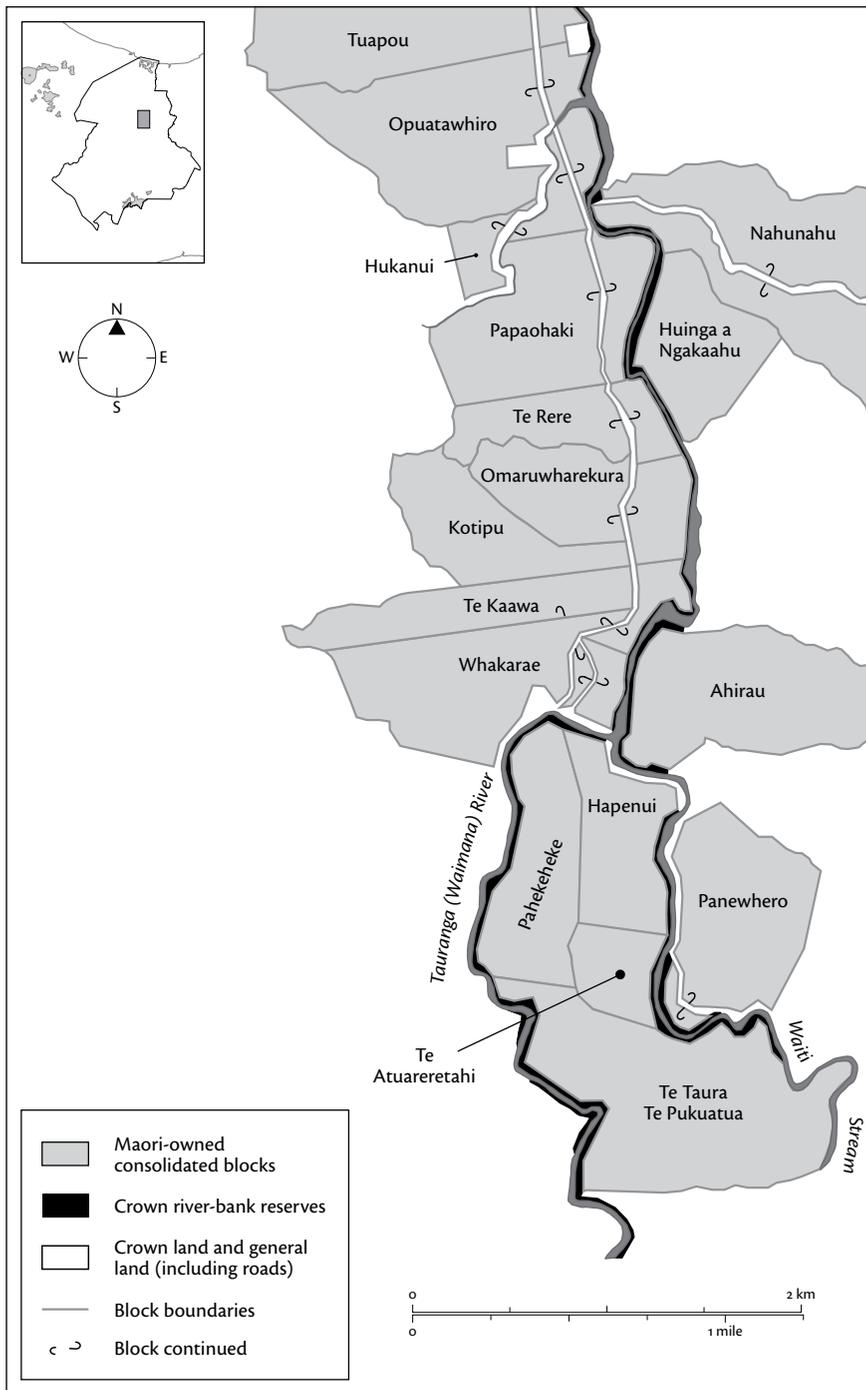
1148. Tikareti Te Iriwhiro and 175 others, petition 341/1922, circa September 1922 (Campbell, supporting papers to ‘Land Alienation, Consolidation and Development’ (doc A55(b)), p 219)



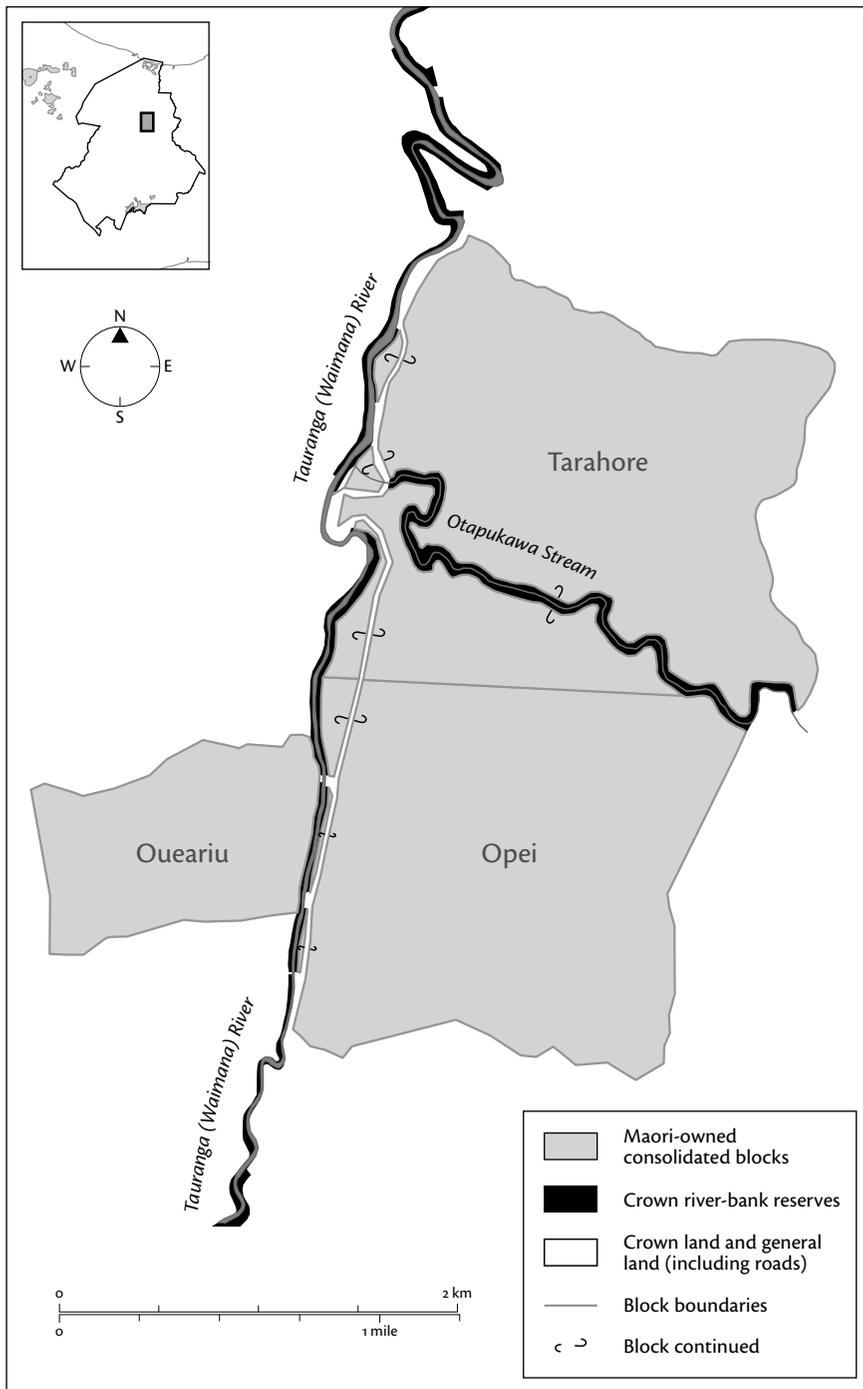
Map 21.5: Crown river-bank reserves along the Tauranga (Waimana) River

TE UREWERA

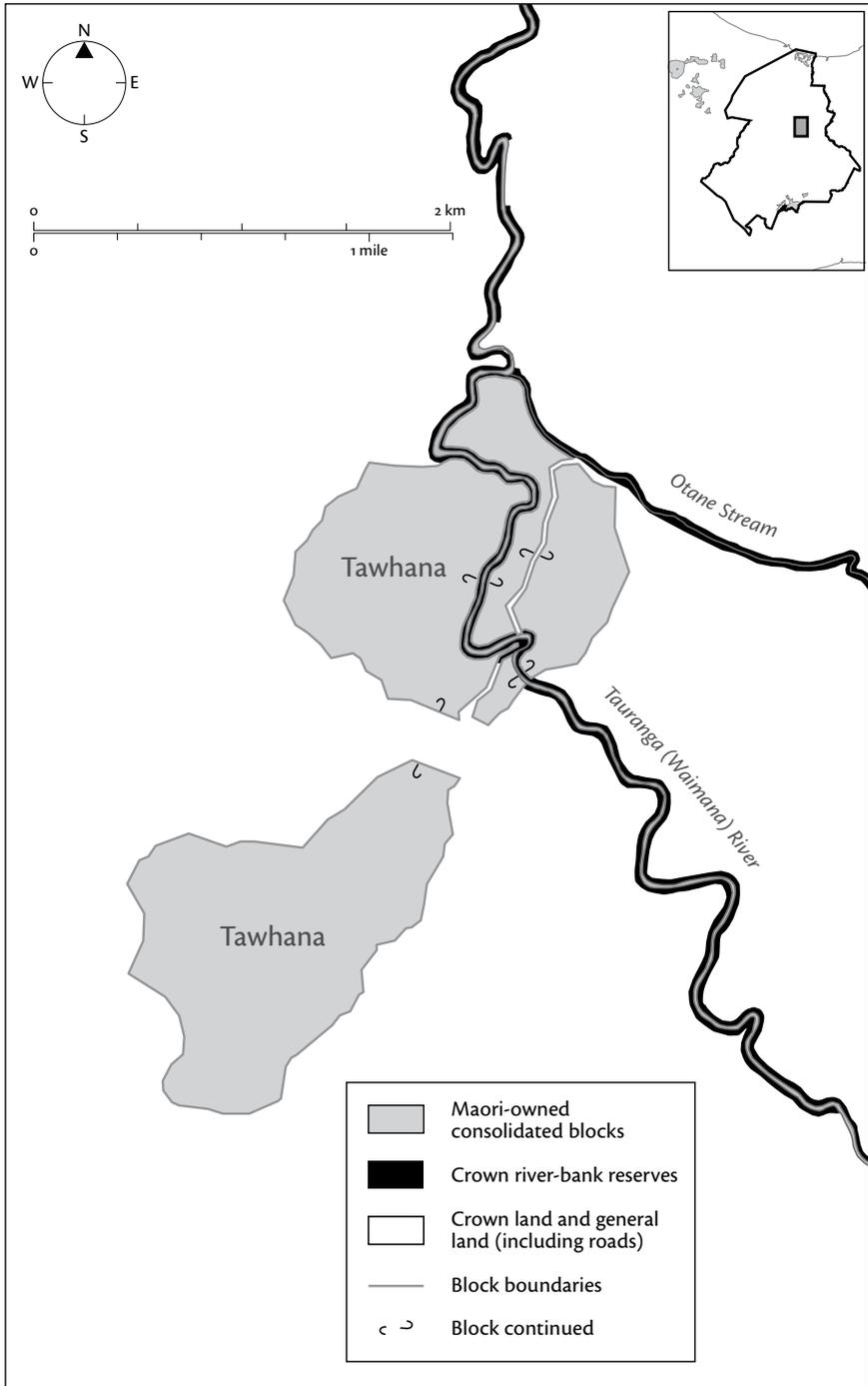
21.16.4.2.2



Map 21.6: Crown river-bank reserves along the Tauranga (Waimana) River and Waiti Stream



Map 21.7: Crown river-bank reserves along the Tauranga (Waimana) River and Otapukawa Stream



Map 21.8: Crown river-bank reserves along the Tauranga (Waimana) River and Otane Stream

Rivers were not specifically mentioned in the Urewera Lands Act 1921–22. The provisions of that Act ‘referred only to land and the mechanics of land title reorganisation’. Again, the question of statutory language and its effect on customary title is an issue. Dr Doig thought it ‘uncertain whether the operation of the Act was sufficient to affect customary Maori title to the rivers running across or adjacent to that land.’¹¹⁴⁹ We received no submissions on this point, but our view is that the Act could only have affected customary title to rivers if such title had been part and parcel of adjoining land and thus awarded *ad medium filum* by the Urewera commissioners. We have already noted, in our discussion of the claimants’ evidence about the Ohinemataroa (Whakatane) River, that this does not appear to have been the custom in Te Urewera, and that the Urewera commissioners’ block orders were unlikely to have extinguished customary title to rivers.

Nonetheless, consolidation had a significant effect on land control and use for the peoples of Te Urewera. So, too, given the considerable and extensive Crown acquisitions of riparian land, did consolidation dramatically affect control, use, and access to waterways – at least potentially. Dr Doig noted that the Crown obtained almost the entire west bank of the Tauranga River and the entire Waikaremoana/Waikaretaheke catchment.¹¹⁵⁰ With land already obtained through acquisition of the four southern blocks and Waipaoa block, this meant the land on the banks of virtually all Te Urewera rivers to the south-east of the Huiarau Range was in Crown or private ownership. The waterways the Crown gained control over in this area included the banks of most of the upper Waiiau River, all of the Hopuruahine River and other streams emptying into the northern shore of Lake Waikaremoana, and the upper Ruakituri catchment.¹¹⁵¹ The key question, as yet unanswered in the 1920s, was whether the *ad medium filum* rule gave ownership of these riverbeds to the Crown as riparian owner.

Where land ownership was confirmed with the peoples of Te Urewera, the inclusion of short stretches of riverbed into many smaller, individualised blocks of land ‘reflected the commissioners’ apparent assumption that rights to the riverbed now went with ownership of the riverbank on individual blocks, not to hapu or iwi as a whole.’¹¹⁵² The commissioners were not required to take traditional interests into account when determining the new interests of Maori owners.¹¹⁵³ The Crown later assumed that the control and use of waterways was conditional on the operation of the official land tenure system in conjunction with the *ad medium filum* presumption, and that this was so self-evident and right as to require no explicit statement, explanation, or qualification when applying it. The consolidation scheme, therefore, did have ‘a profound effect on the way the Crown perceived subsequent waterway ownership in the area.’¹¹⁵⁴

1149. Doig, ‘Te Urewera Waterways’ (doc A75), pp 73–74

1150. *Ibid*, p 76

1151. *Ibid*, p 77

1152. Doig, summary of ‘Te Urewera Waterways’ (doc F6), p 5

1153. Te Urewera Lands Act 1921–22, ss 4–7, 14–15 (Doig, ‘Te Urewera Waterways’ (doc A75), p 74)

1154. Doig, ‘Te Urewera Waterways’ (doc A75), p 74

The position of the rivers in the scheme had not been raised or settled at the Taurarau hui, and the commissioners did not clarify matters during their hearings. Suzanne Doig stated that “The commissioners did not discuss the potential implications of the consolidation scheme and reorganisation of the titles for legal ownership of the rivers or riverbeds at any time during the proceedings.”¹¹⁵⁵

We note here our discussion in chapter 14 of the standards by which the consolidation scheme should be judged. In that discussion we found ourselves in substantial agreement with the views of Tuhoe claimant Tamaroa Nikora. Mr Nikora maintained that the route to the benefits of a consolidation scheme was a careful, transparent process to which the co-owners consented – on the basis of sufficient information – at every step of the way.¹¹⁵⁶ No such process occurred in relation to waterways.

This did not mean rivers and other waterways were never discussed. As we noted above, the boundaries of the new consolidated blocks were frequently defined by rivers and streams, for reasons of surveying convenience and to make the blocks easily identifiable on the ground. One of the main purposes of consolidation was ‘to provide blocks that were suitable for farming, and so many of the new subdivisions were defined by convenient farm boundaries – rivers, streams, old trees, existing fences, “good fencing lines”, spurs and ridges.’¹¹⁵⁷ Doig highlighted a small number of cases where waterways were considered in relation to access. This appears to have been the main issue of relevance discussed in commission hearings: legal access across land to rivers, streams, and also to the new road lines.¹¹⁵⁸

For a waterway running *inside* a boundary, the commissioners ‘appear to have assumed that the owners of a consolidated block would also own the waterways included within those block boundaries.’¹¹⁵⁹ It is only an assumption because, as the Crown noted, rivers were ‘not much discussed during the consolidation proceedings.’¹¹⁶⁰ The limited discussion that Dr Doig was able to locate confirms that, in as far as any broader guiding assumptions on waterways were operative in the minds of the commissioners, the common law presumption of *ad medium filum* appears to have been taken as read and only some limited, particular cases involving access called for further consideration and decision.¹¹⁶¹

The Crown’s acquisition of riparian strips or reserves adds an extra layer of uncertainty as to what rights the Crown might have obtained over riverbeds. In addition to the larger blocks of land on the Tauranga River which passed to the Crown as part of its consolidated interests, the Crown also took ownership of the banks of almost the entire river and some of its major tributaries. This was

1155. Doig, ‘Te Urewera Waterways’ (doc A75), p 78

1156. See Tamaroa Nikora, brief of evidence, 18 June 2004 (doc E8).

1157. Doig, ‘Te Urewera Waterways’ (doc A75), p 79

1158. *Ibid*, pp 78–86

1159. *Ibid*, p 83

1160. Crown counsel, closing submissions (doc N20), topic 30, p 6

1161. Doig, ‘Te Urewera Waterways’ (doc A75), pp 78–83

achieved, Dr Doig explained, by ‘laying out “marginal strips” or “Crown river-bank reserves”, usually one chain (20 metres) wide, along the river bank, although some were only half a chain wide.’¹¹⁶² These marginal strips were marked on survey plans as Crown land reserved from sale under section 122 of the Land Act 1908 or section 129 of the Land Act 1924. As Dr Doig noted, these were the provisions used to ‘cut off marginal strips (otherwise known as the Queen’s chain) when Crown land is sold or otherwise disposed of.’¹¹⁶³ Given that the land in question was not Crown land, it is not clear why or how this legislative provision was applied to separate remaining blocks of Maori freehold land from the rivers. Tama Nikora commented: ‘The Crown appears to have been applying a survey policy as if the land was Crown land, which it was not. As a result of this sleight of hand the Crown has acquired for itself Tuhoe’s rivers.’¹¹⁶⁴ Furthermore, as Doig pointed out:

Some of the river reserves, such as those running along the Tauranga River at Omaruwharekura and nearby blocks, appear on the survey plans without any indication of what legislation they were reserved under. It would thus appear that they simply formed part of the Crown’s allotted interests under the Urewera Consolidation Scheme.¹¹⁶⁵

The Urewera Lands Act 1921–22 did not give the commissioners any authority to create reserves. If reserves were to be set aside, the commissioners had to recommend it to Ministers for separate action. As noted, some of the riparian strips were marked as created under the authority of the Land Acts. As we have said, it is not clear to us why this legislative authority applied to the making of title orders for Maori freehold land under the Urewera Lands Act 1921–22. Other marginal strips or river bank reserves seem simply to be a strip of Crown land created as part of the Crown’s award, and presumably deducted from its overall acreage (although we cannot be sure of that).¹¹⁶⁶ At the Taurau hui, the Crown had advised the people of its intention to reserve steep, forested land on river banks where it seemed necessary for water conservation. We do not know if the Maori owners agreed to this proposition at the hui (see the preceding section). The commissioners’ minutes provide almost no explanation for their insertion of marginal strips between Maori land and rivers, but on one occasion the purpose was mentioned as ‘for the better protection from erosion.’¹¹⁶⁷ Dr Doig noted that ‘It is possible that all the Tauranga River reserves were laid out as an erosion buffer zone, but this is not stated at any point in the minute books consulted.’¹¹⁶⁸ Thus, the commissioners

1162. Ibid, p 84

1163. Doig, ‘Te Urewera Waterways’ (doc A75), p 85

1164. Tamaroa Nikora, ‘Urewera Consolidation Scheme (1921–26): An Analysis’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc E7), p 29

1165. Doig, ‘Te Urewera Waterways’ (doc A75), p 85

1166. Ibid, pp 84–85

1167. Urewera minute book 1, 9 April 1922, fol 92 (Doig, ‘Te Urewera Waterways’ (doc A75), p 85)

1168. Doig, ‘Te Urewera Waterways’ (doc A75), p 85

may have sought to protect Maori owners from loss of riparian land to erosion, as well as the Crown's interest in watershed preservation.

The Crown's reserves extended into the riverbed in some places, although specific mention of riverbeds was extremely rare in the commission's minutes: 'in the region of the Opunua and Otuiti blocks, the Crown river reserve included both a one-chain strip on the river bank and an expanse of shingle in the riverbed.'¹¹⁶⁹

In the northern series of blocks, reserve strips were located along waterways as follows:

As well as extending along all banks of the Tauranga or Waimana River which had not already been taken as part of the Crown's share, marginal strips were laid out along both sides of the Otaneuri Stream, Otapukawa Stream and parts of the Ueroa Stream, and the north side of the Ohora Stream and east side of the Waiti Stream (these streams are in both the Whakatane and Waimana catchments). In many places, these marginal strips separated remaining blocks of Maori-owned land from the rivers and streams.¹¹⁷⁰

The waterway rights attached to the acquisition of these strips is unclear. As Ben White noted in his work on inland waterways (with regard to lakes), the issue is:

whether title to such marginal strips carries with it title to lake beds *ad medium filum*. If they do, the Crown would be the owner of all lakes which are subject to a marginal strip. To the present author's knowledge the principle that marginal strips include title to abutting lakes has not been recognised by statute, nor is it supported by any domestic case law.¹¹⁷¹

In our inquiry, Dr Doig was unable to trace any statute or case law that could confirm whether marginal strips alongside rivers or streams made the Crown owner of those waterways *ad medium filum aquae*. The Crown has not sought in its submissions to clarify this matter, which suggests there is no authoritative legal view here. In practice, the Crown or local bodies have acted as if the *ad medium filum* presumption applied, thus giving control and use rights to the Crown over waterways running alongside marginal strips.

Dr Doig observed: 'In the final allocations, a majority of blocks either had a frontage on to a river or major tributary, or were separated from that waterway by a narrow road line or river bank reserve.'¹¹⁷² What this meant in practice is that the consolidation commissioners did try to ensure that the owners of the new, consolidated blocks would have physical access to a river or stream, even if they had to cross a Crown reserve or a road. A road line or river bank reserve would

1169. Doig, 'Te Urewera Waterways' (doc A75), p 84

1170. Ibid, p 85

1171. Ben White, *Inland Waterways: Lakes*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1998) (doc A113), p 8

1172. Doig, 'Te Urewera Waterways' (doc A75), p 82

not prevent access for fishing or other customary uses, whereas that might not be the case should the land be able to be transferred into private ownership. Yet, the creation of road lines as well as marginal strips or reserves may have changed the legal entitlements of the Maori owners of riparian blocks, because ownership of roads was vested by statute in the Crown.¹¹⁷³ This made little practical difference because so few roads were actually built, but legally this was another device which gave ownership of river banks to the Crown, and therefore possibly of the riverbeds as well.

Alongside the ambiguity raised by the application of the *ad medium filum* presumption to river strip reserve land and roads, there is serious doubt as to whether any riverbeds were acquired by the Crown at all through the consolidation process. Soon after the commission began its work in the northern series of blocks in early 1922, which included laying off river bank reserves between Maori land and the Tauranga River, Tikareti Te Iriwhero and 175 others petitioned Parliament on behalf of all Tuhoe. Dr Doig speculated that ‘the laying out of these riverbank reserves by the Crown’s surveyors may well have seemed like a taking of the rivers to the local people.’¹¹⁷⁴ The petitioners identified seven instances in which they believed that the Crown was departing from what had been agreed at the Taurau hui in August 1921. The first of those instances was ‘The Crown claims to have its interests allocated in the Whakatane and Waimana rivers; we strongly object to the Crown taking our rivers.’¹¹⁷⁵ At first, the Government’s response was simply that the Crown’s award was as recorded in the Urewera Lands Act 1921–22, and the commissioners were to ‘follow [it] as closely as practicable’, amending it where necessary to ‘give effect to the true intent of the scheme’. In response to the objection about the Crown obtaining rivers, the Native Department stated that the ‘portion to be awarded to the Crown is shown on page 8 of [*Appendix to the Journal of the House of Representatives*] paper G7, paragraph 10.’¹¹⁷⁶ The petition was considered again in 1924, when it was referred to the consolidation commissioners for a response. Knight and Carr advised: ‘The Crown owned by purchase approximately $\frac{2}{3}$ of the Urewera Block and portions only of its area are in the Whakatane and Waimana basins. The rivers are not included in any of the Crown awards.’¹¹⁷⁷ This is significant, given that the commissioners were made sole judges of the boundaries of the Crown award by section 5(2) of the Urewera Lands Act 1921–22.

As Doig pointed out: ‘Taken wholly at face value, this would seem to be an acknowledgement that all of the rivers within the consolidation scheme remained

1173. For the effects of the Public Works Act 1876 in this respect, see *Paki v Attorney-General* [2012] 3 NZLR 277 (SC), 289, 291, 301, 326.

1174. Doig, ‘Te Urewera Waterways’ (doc A75), p 87

1175. Tikareti Te Iriwhero and 175 others, petition 341/1922, circa September 1922 (Campbell, supporting papers to ‘Land Alienation, Consolidation and Development’ (doc A55(b)), p 219)

1176. RN Jones, Under-Secretary, Native Department, to clerk, Native Affairs Committee, 4 October 1922 (Suzanne Doig, comp, supporting papers to ‘Te Urewera Waterways’, various dates (doc A75(a)), p 145)

1177. Carr and Knight to Under-Secretary, Native Department, 10 September 1924 (Campbell, supporting papers to ‘Land Alienation, Consolidation and Development’ (doc A55(b)), p 220)

in Tuhoe ownership, even where the land on both banks passed to the Crown.¹¹⁷⁸ Dr Doig carefully considered what the commissioners' reply might have meant, including that riverbeds were not expressly included in their orders because of survey conventions, or that they thought the *ad medium filum* presumption did not apply to rivers at all in the consolidation scheme. After weighing a range of options, Doig was unable to draw any definite conclusion.¹¹⁷⁹ One thing she was certain of was:

The commissioners' statement can only have led Tuhoe to believe that they continued to own all the rivers within the compass of the Urewera Consolidation Scheme. Subsequent dealings with titles set up [under] that scheme, however, indicate that the *ad medium filum* presumption was applied to both Maori- and Crown-owned blocks within the area, regardless of the intentions at the time.¹¹⁸⁰

We received detailed claimant submissions about the petition and the commissioners' response to it. The claimants emphasised that the commissioners' response may be considered a rebuttal of the *ad medium filum* rule for riparian blocks in the consolidation scheme, but admitted that there are doubts.

In respect of the petition, counsel for Wai 36 Tuhoe submitted that 'It is clear that Tuhoe were unwilling to alienate their rivers under the UCS, which was unsurprising given that the issue hadn't been negotiated with them.' The commissioners' response – that the 'rivers are not included in any of the Crown awards' – may be considered 'a rebuttal of the *ad medium* presumption within the UCS'. Counsel conceded, however, that the evidence was not certain on this point. The commissioners 'might simply have meant that the riverbeds were not expressly included in the orders they made', which was factually correct. Claimant counsel noted that the survey plans of the Crown's award 'show the boundaries of its block running along the riverbanks, not across them, even when it owned the land on both sides of the river'.¹¹⁸¹ Also, Dr Doig suggested that the commissioners may simply have not understood the *ad medium filum* presumption of 'ownership of the adjoining riverbeds when they made their orders for riparian blocks'.¹¹⁸² Hence, claimant counsel submitted, the commissioners may have considered the ownership of the beds to remain with Maori and not the Crown.¹¹⁸³ These points all indicate confusion on the Crown's side, but understandable certainty on the part of Tuhoe in light of the commissioners' response to their petition.

Given that the common law on waterways had never been discussed with the peoples of Te Urewera, we agree with the claimants that it cannot be assumed that

1178. Doig, 'Te Urewera Waterways' (doc A75), pp 87–88

1179. *Ibid*, pp 88–89

1180. *Ibid*, p 89

1181. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 174

1182. *Ibid*, p 175

1183. *Ibid*, pp 174–175

they simply took it for granted that their authority and rights to waterways following consolidation were significantly reduced. Furthermore, whatever they might have been inclined to think, the peoples of Te Urewera had major official support in 1924 for the belief that their authority and control over rivers continued as before. They had lodged a protest objecting to the Crown taking their rivers and had received official assurance that the Crown had not been awarded them. If the people believed that their authority continued as before, it was because the Crown had made no mention of any radical change to their rights in respect of rivers. They had no cause to believe that the Crown had assumed authority over their waterways. Crucially, the commissioners had ensured that they still had access to the rivers, for the most part, and so would be able to continue exercising their customary rights even if large stretches of river bank had passed into Crown ownership.

In the claimants' view, if the Crown *did* succeed in acquiring the beds of rivers *ad medium filum* as part of its award, it did so by 'sleight of hand'.¹¹⁸⁴ The key question for the claimants is not what the common law said but whether the Crown ever purchased or paid for these riverbeds.

As counsel for Wai 36 Tuhoe noted, the Crown only ever purchased 'undefined interests in blocks of land when it bought shares off Tuhoe owners'. Relying on Dr Doig's evidence, the claimants noted that 'the [UDNR purchase] deeds do not mention alienation of rivers'.¹¹⁸⁵ In the consolidation scheme which followed the purchases, the non-sellers' shares were calculated on the basis of:

a set valuation for their *land* interests, without allowing anything for their river interests. As a result, if the Crown *did* acquire property rights in rivers through the acquisition of riparian land under the consolidation scheme, it acquired them without compensation either to the sellers or the relocated non-sellers. [Emphasis in original.]¹¹⁸⁶

The Crown dismissed the matter of possible compensation for the loss of waterways as a misunderstanding of how the *ad medium filum* presumption works. The Crown critiqued Dr Doig's evidence on the matter of compensation:

Doig states that: 'Those who had sold or were relocated under the consolidation scheme of the 1920s did not receive any compensation for the loss of their river rights, on top of the price paid by the Crown for the value of their land.'

This point assumes that compensation for rivers would necessarily be a separate part of any negotiation of price. The negotiations leading to the implementation of the consolidation scheme provide the factual backdrop for this issue. Application of the *ad medium filum aquae* presumption was not a case of land being surveyed

1184. Nikora, 'Urewera Consolidation Scheme' (doc E7), p 29

1185. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 175

1186. *Ibid*

specifically to exclude an adjoining riverbed with that riverbed being taken nevertheless. It was a case of a river forming a boundary of land that was sold, with there being a presumption, in the absence of any express statement to the contrary, that half of the adjoining riverbed was included in the sale. The purchase price therefore necessarily included consideration for the sale of the riverbed. In the case of consolidation, the purchase of shares provided a different context.¹¹⁸⁷

The key problem with the Crown's argument on this point is that it did not explain how the consolidation of shares provided a 'different context'. Instead, the Crown argument is constructed as if partitions, not a consolidation scheme, had taken place. In other words, the Crown's reasoning assumes that a defined purchase of riparian land took place, after which title to that riparian land was awarded to the Crown. Then, applying the *ad medium filum* presumption, ownership of the riverbed to the mid-point came to the Crown as part of acquiring the land. That puts to one side the question of whether a waterway was economically valuable for fishing, transport, or other reasons, and thus might have increased the price in a knowing and willing sale of a river as part of a purchase of riparian land.

In the Urewera Consolidation Scheme, neither the Crown's nor the claimants' interests (for the most part) were located in the beds of rivers. It appears, therefore, that the acreages of the riverbeds were not included in the Crown's award as land that it had paid for during its UDNR purchases, or in the Maori awards as land that they had retained. Suzanne Doig's research confirms this point (with the exception of some Crown river bank reserves, which were surveyed as extending into a river).¹¹⁸⁸ The plan for Urewera A showed the Crown's award stopping on each side of a river rather than crossing the river, even where it owned the land on both sides.¹¹⁸⁹ It was later assumed that the Crown owned the riverbeds adjacent to its newly awarded lands *ad medium filum*.

As we found above, Tuhoe had never sold their rivers in the UDNR land sales. Further, the Crown's purchases were not partitioned out but rather became part of a total reorganisation of land titles, in which the Crown and Maori could receive land totally unrelated to what had been purchased on the one hand, and what had been sold on the other. The key point, however, was that the Crown's award of land would equal the monetary value of what it had paid in its purchases. What this means is that the Crown never paid for the land under the rivers, which was not calculated as part of its award; it simply claimed to own whichever riverbeds ended up adjacent to its new award, by application of the *ad medium filum aquae* presumption. Dr Doig was correct, therefore, when she stated that sellers and non-sellers alike were never paid for any riverbeds that the Crown claimed to have acquired in the Urewera Consolidation Scheme by application of this common law rule to its new land titles.¹¹⁹⁰

1187. Crown counsel, closing submissions (doc N20), topic 30, pp 10–11

1188. Doig, 'Te Urewera Waterways' (doc A75), p 84

1189. *Ibid*, p 88

1190. *Ibid*, pp 96–97

21.16.4.2.3 THE CONTRIBUTION OF LAND TO PAY FOR SURVEYS AND ROADS

At the Taurarau hui, the Crown obtained broad agreement that Tuhoe would contribute land to pay for survey costs and as a contribution towards the building of roads. We discussed these matters in detail in chapter 14.

The Maori owners' representatives agreed to the Crown's proposal in respect of survey costs because they wanted the security of land transfer titles (which were promised but not delivered). The costs were not disclosed at Taurarau, however, and the implementation phase soon saw protests about the amount of land that was being deducted from Maori awards. Further, the circumstances which made the scheme necessary – massive and illegal Crown purchasing of individual interests in a coercive manner – meant that any further costs to the Maori owners should have been as minimal as possible.

In respect of roads, we found that the Maori owners gave up a quarter of their remaining lands for the promise of arterial roads that were never built. Further, they were misled by Ministers at the May 1921 hui – there was in fact no requirement that they should help pay for these roads, which in all other districts were paid for by the Crown.

Overall, 40,000 acres of land were acquired by the Crown for roads, and 31,500 acres for surveys.

When Te Urewera leaders agreed to donate land for surveys and roads, there is no indication that they intended to give up ownership of the rivers bounding or within any land awarded to the Crown for those purposes; quite the reverse. The 1922 petition shows that Tuhoe came out of the Taurarau hui believing that ownership of their rivers would not be affected. It was inconceivable to them that the Crown might seek to take their rivers as part of the consolidation scheme, and they protested strongly in 1922 when it emerged as a possibility. The consolidation commissioners' response, as we have seen, was that no rivers had been awarded to the Crown.

Exactly how much riparian land the Crown obtained through roading and survey deductions is not known. We received no evidence or submissions on this point. We would be very surprised if there were no river or stream frontages at all in the 71,500 acres awarded to the Crown. But any claim on the part of the Crown to own the riverbeds adjacent to that land, by application of the *ad medium filum* presumption, does not arise from a knowing or willing cession of riverbeds to the Crown.

We note, too, that this point adds an extra dimension to the Crown's refusal to return the land acquired for roading in its 1958 settlement with Tuhoe (see chapter 14). The payment of monetary compensation would not have removed, and did not compensate for, any loss of ownership of riverbeds by the application of the *ad medium filum* rule to the lands acquired for roading by the Crown.

21.16.4.2.4 WAIKAREMOANA

Technically, the Waikaremoana block was only part of the consolidation scheme in respect of Tuhoe interests. The interests of Ngati Ruapani and Ngati Kahungunu in the block were purchased by the Crown in 1921 as a result of separate negotiations.

We discussed the Waikaremoana arrangements in section 14.7 of our report. In brief, the Crown advised Tuhoe that the Waikaremoana lands would not be part of the scheme, as the Crown had not purchased any interests in that block. The Crown's imperative was to acquire this land for watershed conservation, in particular to protect the water levels of Lake Waikaremoana for hydroelectricity. The plan was to take parts of the block under the public works legislation, and purchase individual interests in the rest. Tuhoe were extremely opposed to this plan, and the disagreement nearly overturned the Urewera Consolidation Scheme. Faced with the scenario put by Ministers and officials, Tuhoe preferred to transfer their interests out of the block for a greater share of land in other parts of the Reserve. Ministers were willing to agree to this compromise if it won them the Waikaremoana block. Although there were later disputes about valuation, and some opposition to giving up the Waikaremoana lands in this way, Tuhoe do seem to have seen the agreement as a cession of all their lands on the northern shores of the lake.

Did they also see it as a cession of all claims to rivers? We have virtually no information on this point. Because they retained no reserves in the block, Tuhoe essentially evacuated it. We did not receive evidence about continued use of the Hopuruahine River, or the other streams flowing into the lake, as we did for rivers in other alienated lands.

For Ngati Ruapani, there was very little that was truly voluntary in their agreement to sell their interests in the Waikaremoana lands. Tuhoe and the Crown agreed at the Tauarau hui that Ngati Ruapani were not fully represented and had to be dealt with separately. Like Tuhoe, Ruapani wanted and needed land and did not want small individual payments that would be used for immediate needs, not for development or to provide for their future. Their leaders were willing to consider giving up the forested lands in the block so long as they could retain their clearings and cultivations and ancestral sites, and on condition that the Crown provided them with development capital and desperately needed farmland south of the lake.

As we found in chapter 14, Ngati Ruapani got the worst of the deal. The Crown dictated the price and underpaid them for their lands north of the lake. Their sustainable income for the future took the form of debentures – which were poorly administered and did little to provide for their future needs. A small piece of Pakeha farmland for exchange south of the lake, however, was going to swallow almost all of the Crown's payment for their thousands of acres to the north. When that part of the deal was rejected, and Ngati Ruapani received debentures instead, they desperately tried to secure sufficient reserves on the northern shores. The end result, however, was their restriction to barely 600 acres of small, scattered pieces on the shores of the lake. A minority of owners, desperate for cash, even sold their individual interests for less than half what the Crown was paying their relatives in debentures. The whole deal was disastrous for Ngati Ruapani, but not for the Crown, which secured its forested watershed at little cost or inconvenience to itself.

Ngati Kahungunu also sold their interests in the Waikaremoana block to the Crown in exchange for a mix of cash and debentures, and (in one case) an exchange of land. We lacked evidence to determine how willing the Kahungunu owners were to enter into these arrangements, but we noted that they, too, were underpaid for their share of the Waikaremoana block. Given that the Crown had raised the possibility of compulsory acquisition, and other owners had already agreed to vacate the block, the Ngati Kahungunu owners would have had little choice but to accept the Crown's offer at its price.

Did Ngati Ruapani and Ngati Kahungunu knowingly and willingly sell their rivers in these transactions? We have little evidence on this point. The documentary information shows that, as has frequently been the case, there was no explicit offer to buy rivers or agreement to sell them. At least, in this instance, the deal was negotiated with tribal leaders and was not forced on the communities by way of picking off individual interests. Even so, Commissioner Knight purchased some individual interests when he was able to.

The crunch came when the consolidation commissioners settled the boundaries of the Ruapani reserves on the ground. Ngati Ruapani only obtained two reserves on a river, Hopuruahine West and Hopuruahine East. Here, as in the north, the commissioners inserted marginal strips between Maori land and the river. Both of these reserves were separated from the Hopuruahine River by what was marked as 'foreshore reserves' on the plan accompanying the commissioners' title orders.¹¹⁹¹ As we noted in chapter 14, Ngati Ruapani protested at the very small amount of land reserved for them at Waikaremoana. While all of their tiny reserves had lake frontages, they also wanted much more land reserved, including a larger, 300-acre fishing reserve on the Mokau Stream. The commissioners refused to allow this.¹¹⁹² Given that fact, and the insertion of 'foreshore reserves' between Maori land and the Hopuruahine River, it does seem that the commissioners sought to separate Maori from any ownership of river banks in the Waikaremoana block, presumably because the Crown's overriding goal for this region was watershed protection. We cannot be certain because no explanation was provided in the minutes.

Ngati Ruapani emerged from the consolidation commission process the poorer, in respect of legal access to rivers and riverine fisheries. The commissioners flatly refused to vary the original agreement in respect of the number and size of reserves, even though other aspects – such as the purchase of farmland to the south – had been altered (see chapter 14).

The evidence in respect of the Mokau Stream fishery is especially telling. Waipatu Winitana described the requested 300-acre reserve to the commissioners:

1191. Order conferring title, Hopuruahine West Reserve, 21 February 1925; order conferring title, Hopuruahine East Reserve, 21 February 1925, and attached plans (Craig Innes, comp, supporting papers to 'Report on the Tenure Changes affecting Waikaremoana "Purchase Reserves" in the Urewera Inquiry', 7 vols, various dates (doc A117(a)), vol 1, pp [60], [63], [67], [68])

1192. Doig, 'Te Urewera Waterways' (doc A75), pp 80–81



Russell Duncan (Hawke's Bay Museum Trust, 15774)

The Hopuruahine River, Lake Waikaremoana, 1904. Ngati Ruapani struggled to secure the reserves they wanted when the Crown purchased the Waikaremoana block in 1921, obtaining only two on a river, Hopuruahine West and Hopuruahine East. But even these were separated from the river by the consolidation commissioners, who inserted marginal strips between the Ruapani reserves and the water, making them 'foreshore reserves' on the plan.

I pointed out the boundaries for this, from Waihirere Stream up to the road for about 20 chains [400 metres], then to the Mokau Stream about 20 chains then to the Lake, these boundaries include bush which we would leave standing, without the bush the block would not be of any use to us, there are many owners in the block. The bush contains pua manu's [birding reserves], a source of food supply, 30 head of cattle are grazing there. We asked Mr Ngata to reserve this Mokau Stream for a fish supply.¹¹⁹³

As far as we are aware, this is the only instance in which reservation of a waterway itself was requested, as though in acknowledgement that waterways at Waikaremoana had otherwise been sold. The commissioners refused to grant the request, although they had occasionally included a stream inside the boundaries of other Maori-owned blocks.¹¹⁹⁴

1193. Urewera minute book 2A, 21 February 1925, fol 220 (Doig, 'Te Urewera Waterways' (doc A75), p 80)

1194. Doig, 'Te Urewera Waterways' (doc A75), pp 79–83

Ngati Ruapani had to leave the lake's northern shores soon after the sale because their reserves could not sustain them. Although they continued to visit their reserves regularly, various obstacles were placed in the way of their either living on or making economic use of these lands. While Waikaremoana was a sanctuary, they were not allowed to bring guns or dogs to hunt on their lands. Year after year, orders in council were gazetted, forbidding them from cutting down or selling cutting rights to their timber, or leasing their lands for an income (see chapter 16). We have no evidence, however, as to whether Ngati Ruapani continued to make ritual or economic use of the rivers running through the alienated Waikaremoana lands when they visited their reserves. Ngati Ruapani and Ngati Kahungunu witnesses did not speak of the Hopuruahine River and the other streams running into Lake Waikaremoana as they did of the lake itself or the waterways of the four southern blocks. It is not clear whether they continued to use or exercise rights over the rivers to the north of the lake. It appears that Ngati Ruapani may have considered the rivers as lost to them when they withdrew to Waimako and Te Kuha, although we cannot say for sure.

21.16.4.2.5 NO IMMEDIATE INTERRUPTION TO EXERCISE OF CUSTOMARY RIGHTS

As Dr Doig concluded, the Crown's acquisition of the Waikaremoana block and the four southern blocks appeared to put virtually all the waterways south-east of the Huiarau Range into Crown ownership. By purchases and survey takings in the rim blocks, the operation of the 1903 coal mines legislation, and acquisition of river banks in the Urewera Consolidation Scheme, it seems that the Crown also owned most of the riverbeds of northern Te Urewera by 1927 when the scheme was wound up. If the *ad medium filum* presumption applied and a river was not navigable, then Maori still owned stretches of riverbed adjoining their surviving riparian lands. At the time, riverbed ownership meant more than it does today because the Crown had not yet vested in itself sole rights to use the water (saving some minor domestic extractions) – this was to come later in 1967.

Maori, on the other hand, were still largely unaware that the Crown might claim ownership of their rivers. We have already commented on the 1922 petition, and how the petitioners would likely have understood the Crown's response to mean that it did not claim their rivers. Lack of settlement in the area meant that there was 'no record of any early disputes over river use which might have led to a clarification of the legal position. Likewise, until recently there were few rival Pakeha uses of the river[s] which might have led Tuhoe to inquire into the legal status of their rivers.'¹¹⁹⁵ Pakeha trout fishing does not seem to have generated the same disputes over rivers as it did over Lake Waikaremoana in the early part of the twentieth century, leading the iwi to claim ownership of their lake in the Native Land Court (see chapter 20).

Dr Doig noted:

1195. Doig, 'Te Urewera Waterways' (doc A75), p93

There has been a long time lag between the time at which riverbed ownership is supposed to have changed (through land title investigation or the passage of the navigable rivers legislation) and the time at which the Crown first claimed ownership of riverbeds within Te Urewera. These claims were not generally made until the second half of the twentieth century, when the demand for access to river resources such as hydroelectric generation and gravel increased. As a result, iwi often did not become aware of the effects of Crown actions until long afterwards. They were not advised of or consulted on matters affecting their rights in waterways, and not able to lodge any protest until well after the fact.¹¹⁹⁶

In particular, within the Urewera Consolidation Scheme lands, Tuhoe continued to use the river resources as they had always done ‘within the unoccupied portions acquired by the Crown’ from the 1920s until the first point of interruption in the 1950s: the establishment of Te Urewera National Park on the lands awarded to the Crown.¹¹⁹⁷ Even after the park was set up, the peoples of Te Urewera have continued to exercise their customary rights in respect of rivers, sometimes regardless of official restrictions.¹¹⁹⁸

21.16.4.3 Recollectivising: further tenure transformation

Before turning to the question of which rivers the Crown actually laid claim to after the consolidation scheme, we pause to mention an additional complication: in the second half of the twentieth century, the application of the *ad medium filum* presumption has been further complicated by the amalgamation of Maori-owned riparian lands and their reversioning in tribal trusts. We discussed this process in chapter 19 of our report.

In the late 1960s and early 1970s, Tuhoe and Ngati Whare leaders embarked on a process of amalgamating many of the Urewera Consolidation Scheme titles and vesting the new blocks in tribal trusts.¹¹⁹⁹ For Ngati Whare, the Te Whaiti titles were amalgamated into the Te Whaiti-nui-a-Toi block in 1974. Tuhoe owners amalgamated more than 100 blocks of forest lands into Te Manawa a Tuhoe, Te Pae o Tuhoe, and Tuhoe Kaaku in the 1970s. These three new blocks were vested in the Tuhoe-Waikaremoana Maori Trust Board as responsible trustee (see chapter 19).

As we set out in detail in chapter 19, the amalgamation of over 40 Ruatahuna blocks in the Tuhoe Tuawhenua block was ultimately rejected by the owners, who preferred to keep their original titles. They also rejected aggregation in the 1980s, which would have preserved the original block identities (including their discrete river frontages) but would have given each owner a share in all of the blocks.

1196. Doig, summary of ‘Te Urewera Waterways’ (doc F6), p17

1197. Doig, ‘Te Urewera Waterways’ (doc A75), p 97

1198. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 353–354

1199. Titles from the Ruatoki–Waiohau consolidation scheme were included as well.

Eventually, a composite trust was created for some of these blocks, in which both the original block and its ownership were retained but the blocks were administered together in a single trust.

In 1995, the original 21 blocks amalgamated as Tuhoe Kaaku were restored and then aggregated into three ownership groups, with the Tuhoe-Waikaremoana Maori Trust Board as custodial trustee, and owner representatives as the responsible trustees (see chapter 19).

Thus, many of the titles created in the Urewera Consolidation Scheme have undergone tenure transformation a third time, in order to restore tribal control as much as possible through the title options provided by the Maori land laws in the final three decades of the twentieth century. Hapu trusts, such as the Ngati Rongo trust, have also been created to aggregate various Ruatoki farming blocks.¹²⁰⁰

As Suzanne Doig commented, the amalgamated (and later aggregated) blocks contained ‘much riparian land, especially along the Whakatane River and in enclaves within Te Urewera National Park.’¹²⁰¹ We received no specific evidence or submissions about the effects of either amalgamation or aggregation on riparian ownership. It seems that customary rights were still maintained – that is, that rivers and their resources continued to be used and cared for in the customary way – so long as there was access from Maori land or unoccupied Crown land in the vicinity of a river. There is no suggestion in the evidence of Tama Nikora, for example, a witness who discussed amalgamation and aggregation at length, that these processes had any effect on tribal ownership of the Ohinemataroa (Whakatane) River. Tuhoe ownership, he believed, had survived all of the tenuous revolutions set out above.¹²⁰² Nor does the evidence of Hakeke McGarvey and other claimants suggest that the tribal relationship with and rights over this river changed, regardless of who owned the riparian lands. In part, this represents a benefit from the consolidation scheme, and the care the commissioners took to ensure that most Maori-owned blocks had physical access to rivers, even where legally separated by a marginal strip.

Perhaps the most important change in respect of rivers, therefore, was not the particular nature of the title by which Maori held riparian lands, but the intrusion of the Crown’s claims as a new owner of massive amounts of riparian land in Te Urewera.

We turn next to consider the extent to which the Crown has actually claimed ownership of riverbeds in Te Urewera in the second half of the twentieth century, and with what results.

1200. Tama Nikora, ‘Te Urewera Lands and Title Improvement Schemes’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc G19), pp 62–63

1201. Doig, ‘Te Urewera Waterways’ (doc A75), p 92

1202. See Nikora, ‘Te Urewera Lands and Title Improvement Schemes’ (doc G19); Nikora, brief of evidence (doc J40).

21.16.5 To what extent has the Crown claimed ownership of Te Urewera riverbeds as a result of applying the *ad medium filum* presumption or the coal mines legislation?

21.16.5.1 Introduction

In her evidence for the Tribunal, Suzanne Doig commented:

Since 1840, when Tuhoe and its constituent hapu (and the other hapu living within Te Urewera) had undoubted mana and rangatiratanga over the land and waterways within their rohe, much of the ownership and control of the rivers of Te Urewera appears to have passed out of Maori hands. The extent of this transfer, and the means by which it may have taken place, is by no means clear.¹²⁰³

The Rangitaiki River serves as a good introduction to our analysis of this issue. Counsel for Ngati Manawa stressed the ‘vagueness and imprecision of the law’ in respect of navigable rivers, which has been interpreted variously by the courts, and which the claimants believe Governments have left untouched because it favours the Crown. We discussed some of the difficulties of interpreting the coal mines legislation in section 21.15.2. According to the claimants, the effect of this legislation on the Rangitaiki River was and is uncertain, and ‘the Crown itself does not seem to know for certain whether it has title to the Rangitaiki or not, or if so on what basis.’¹²⁰⁴

Counsel for Ngati Manawa noted that, during the Te Ika Whenua Rivers hearings in 1994, the Crown at first claimed that the Rangitaiki (or stretches of it) was navigable. It then conceded that navigability could not be ‘conclusively established’, and the inquiry proceeded on the basis that the Crown did not claim ownership of the river under the coal mines legislation.¹²⁰⁵

The Te Ika Whenua Rivers Tribunal had inspected the rivers and thought that it would be difficult to classify any of them as ‘navigable in accordance with the provisions of English common law.’¹²⁰⁶ The Tribunal therefore sought information from the Hamilton branch of the Department of Lands and Survey, whose district manager responded:

In the case of the Rangitaiki River bed, I am unable to find relevant file evidence to support any assertion that it was navigable (in 1903). Neither can I find relevant file evidence to the contrary. Examination of the earliest available aerial photographs and relevant plans does not assist.

In the absence of persuasive evidence either way, I am bound to recommend in favour of applying the presumption of *ad medium filum aquae*.

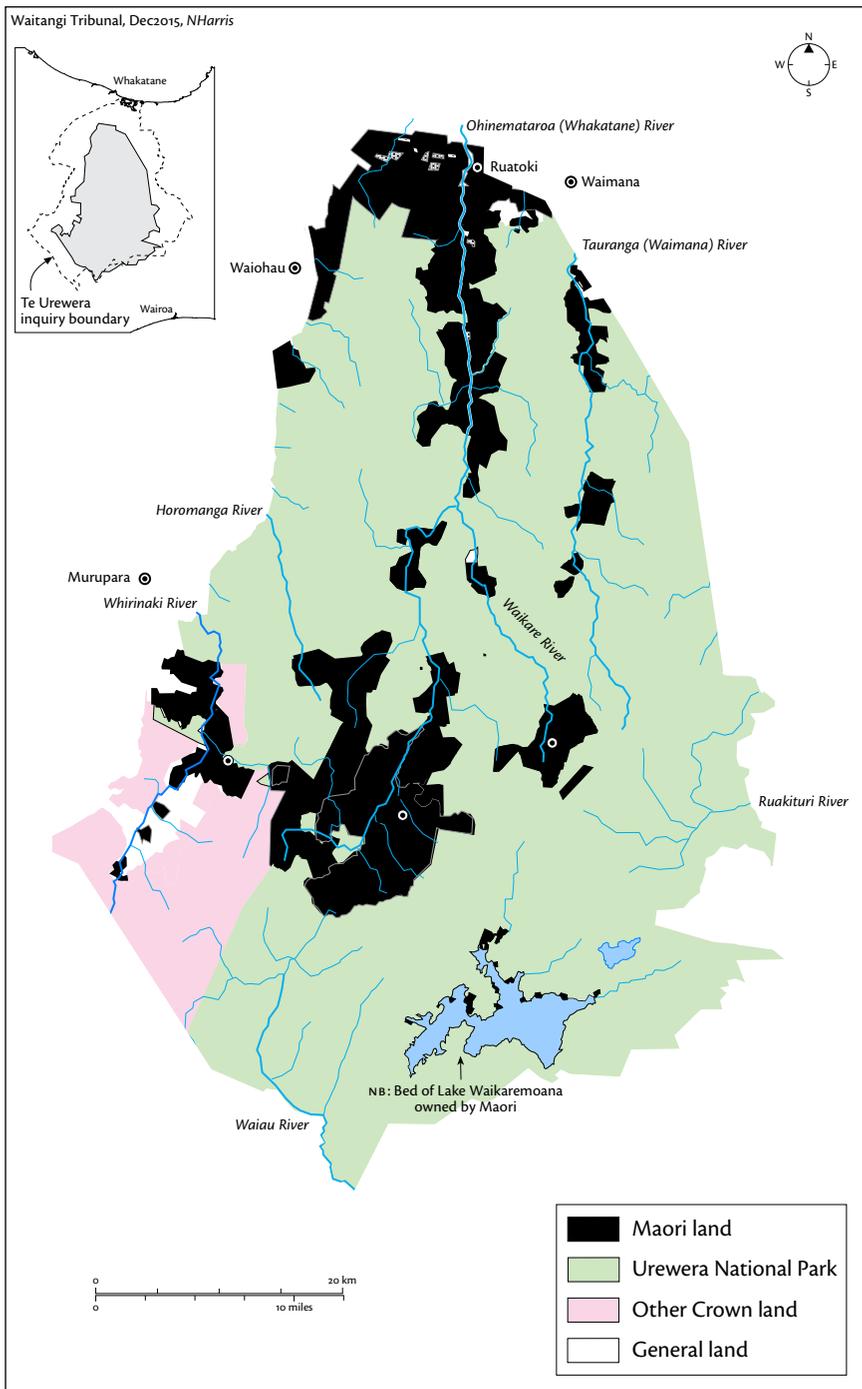
It would be wrong of the Crown to assert ownership without convincing evidence of navigability – evidence that would stand up in a Court of law.

1203. Doig, ‘Te Urewera Waterways’ (doc A75), p 39

1204. Counsel for Ngati Manawa, closing submissions (doc N12), pp 59–60

1205. Ibid, p 60

1206. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 82



Map 21.9: Land ownership and rivers in central Te Urewera

Further, I cannot identify a compelling reason for carrying out the possibly protracted and complicated research required to prove such navigability.

In the absence of instruction and funding to determine navigability I stand by my recommendation to apply the principle of presumptive ownership by adjoining owners (some of whom will be the Crown) to the middle line of the river bed.¹²⁰⁷

When the department's views were put to Crown and claimant counsel in the Te Ika Whenua Rivers inquiry,

counsel for the Crown conceded that it had not made any claim to the bed of these rivers under the Coal Mines Act 1979 or prior legislation and regarded the rivers as non-navigable with the *ad medium filum* rule applying. Counsel for the claimants accepted this proposition, and the Tribunal proceeded on the premise that it was dealing with non-navigable waterways to which the *ad medium filum* rule applied.¹²⁰⁸

But Dr Doig's evidence in our inquiry showed that the Crown has in the past claimed to own 'all or part of the Rangitaiki' on the basis of navigability.¹²⁰⁹ In the claimants' submission, this was not a theoretical claim, as it had enabled the Crown to obtain royalties for gravel extraction from the river. The end result was that the 'claimants today still do not know which stretches of the Rangitaiki are claimed by the Crown'. Citing Dr Doig, claimant counsel added that the lack of a formal process to declare navigability was a problem, and inconsistencies in the Crown's position as to whether or not it claims ownership of the Rangitaiki 'raise the question of how explicit the Crown must be in making claims to navigability, given the potentially confiscatory effects of applying the Act.'¹²¹⁰

The Crown's response to this argument, in essence, is that it does not matter what the Crown claims to own because the answer is a matter of law: 'Riverbed ownership depends not on Crown recognition but on the legal system's recognition of rights and interests.'¹²¹¹ The implication of this argument was that the Crown does not need to define what rivers or stretches of rivers that it owns – if there is a dispute or uncertainty as to how the law applies in any particular case, then it can be resolved by the courts. In the Crown's view, the 'question of who holds title to riverbeds within the inquiry district today is a question of law that could be determined by the Maori Land Court and High Court.'¹²¹² In Crown counsel's submission, it is 'likely' that title to riverbeds of navigable rivers will be held by the Crown under section 354(1)(c) of the RMA, which 'saves the Crown's title that ultimately stems from the Coal-mines Act Amendment Act 1903'. For non-navigable rivers, it

1207. District manager and chief surveyor, Department of Survey and Land Information, Hamilton, to Judge Carter, 16 March 1994 (Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 82)

1208. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 82

1209. Doig, 'Te Urewera Waterways' (doc A75), p 131 (counsel for Ngati Manawa, closing submissions (doc N12), p 60)

1210. Ibid; counsel for Ngati Manawa, submissions by way of reply (doc N26), p 7

1211. Crown counsel, closing submissions (doc N20), topic 30, p 8

1212. Ibid

is 'likely' that the adjoining landowner will own half of the riverbed, in accordance with the *ad medium filum* presumption. 'Tangata whenua' are 'likely to hold title to some riverbeds' under this presumption. But these presumptions are rebuttable.¹²¹³

Nonetheless, despite the use of the word 'likely', Crown counsel also submitted that the Crown has 'acquired title to riverbeds' in Te Urewera by means of both the coal mines legislation and the application of the *ad medium filum* presumption.¹²¹⁴ The Crown did not address any of the allegations that it has left the definition of navigability imprecise, and the authority to declare rivers navigable unclear, to advance its own interests at the expense of Maori. Nor did the Crown address the issue of whether the *ad medium filum* presumption should apply to its marginal strips or river bank reserves.

The question remains, therefore, as to what extent the Crown has actually claimed or asserted ownership of riverbeds in Te Urewera, and by what right. A related question is whether the Crown has created a title system that gives certainty as to the ownership of rivers, or whether – as the claimants argue – no one really knows who owns the riverbeds of the inquiry district. We address the first question in this section of our chapter, and the second question in the next section.

21.16.5.2 Crown assertions of ownership before the 1950s

As Suzanne Doig has argued, the Crown did not actively assert ownership of riverbeds in the inquiry district until the second half of the twentieth century. Due to the district's relative isolation, the lack of Pakeha settlement, and the relatively small amount of production forestry before the 1950s, the Crown and settlers had little use for the rivers or riverbeds of Te Urewera. There were two main exceptions.

The first was the widespread introduction of trout into the rivers of Te Urewera for sport fishing from the 1890s, but the Crown did not assert ownership of the beds in order to establish or manage the trout fishery.¹²¹⁵

The other main exception was the use and serious modification of waterways in the four southern blocks for the Waikaremoana power scheme, which took place from the 1920s to the 1940s.¹²¹⁶ As we noted earlier, we have no jurisdiction to consider post-1875 actions of the Crown in respect of the rivers in these blocks. We did note some exceptions, including Crown actions in relation to the reserves set aside for Tuhoe and Ngati Ruapani, and the 'Crown's actions in relation to all the hydro-electric structures and works in Lake Waikaremoana or near the Lake involving waters taken from it, . . . irrespective of the date of the alleged breaches.'¹²¹⁷ We consider the environmental, social and cultural impacts of the Crown's modification of the Waikaretaheke River later in the chapter. Here, we simply note

1213. Ibid

1214. Ibid, p11

1215. Doig, 'Te Urewera Waterways' (doc A75), pp 94–95, 141–145, 150–151

1216. 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), pp 15–18

1217. Waitangi Tribunal, memorandum, 12 April 2002 (paper 2.32), p 9

that the Crown's construction of works along the river was in part an assertion of ownership of the bed, except where riverbed adjacent to Maori reserves was required. We deal with the specific claims about the hydro works in respect of those reserves in chapter 22.

21.16.5.3 *The creation of Te Urewera National Park*

The Crown accepted in closing submissions that

Urewera Maori are likely to have continued their customary access to the lands and resources (held as Crown land since 1927), until the national park was created in 1954 when Urewera Maori began to experience restrictions on the use of these lands and resources.¹²¹⁸

This accorded with Dr Doig's evidence¹²¹⁹ and much of the tangata whenua evidence in our inquiry.

The Crown's most extensive and sweeping assertion of riverbed ownership in Te Urewera did in fact come in the 1950s with the creation of the national park. The nucleus of the park was established by an Order in Council of 28 July 1954. It involved an area of just over 121,000 acres in the Waikaremoana district (see chapter 16). The park's boundaries were principally lines on a map, but they did include stretches of rivers (specifying the Waiau River 'to the middle'). The Order in Council also specified that 'the beds and waters of all smaller lakes, rivers, and streams' were included in the park.¹²²⁰ Although Lake Waikaremoana was enclosed by the park's boundaries, it was not technically part of the park until it was leased to the Crown in 1971.

As will be recalled from chapter 16, the park was greatly expanded in 1957 with the addition of 330,000 acres, mostly made up of the Crown's Urewera A block, which it had obtained through the Urewera Consolidation Scheme. After its expansion, the park's boundaries abutted rivers and streams in 15 areas, to all of which the *ad medium filum* presumption potentially applied.¹²²¹ Several of these places adjoined Maori-owned blocks, which were later called 'enclaves' by park authorities, much to the irritation of the claimants. The 1957 Order in Council stated that the park included 'the beds and waters of all lakes, rivers, and streams.'¹²²² It differed from a later Order in Council adding the Manuoha and Paharakeke blocks

1218. Crown counsel, closing submissions (doc N20), topic 33, p 14

1219. Doig, 'Te Urewera Waterways' (doc A75), pp 77, 97

1220. 'Lands in South Auckland and Gisborne Land Districts Declared to be a National Park, 28 July 1954, *New Zealand Gazette*, 1954, no 46, p 1212 (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 21)

1221. The waterways which formed part of the park's boundaries in 15 separate places were: Tauranga (Waimana) River; Ruakituri River; Waiau River; Ohinemataroa (Whakatane) River; Mahakirua River; Whirinaki River; Mangamako Stream; Owaka Stream; Kanihi Stream; Ohora Stream; Otaneuri Stream; Otapuwaka Stream; Waiti Stream; and Otane Stream.

1222. 'Adding Land to the Urewera National Park', 25 November 1957, *New Zealand Gazette*, 1957, no 89, p 2217

to the park in 1962, which included ‘the beds and waters of all *internal* streams, rivers, lakes, lagoons, and pools’ (emphasis added).¹²²³ Given this particular wording, it may be that the 1954 and 1957 orders were intended to include the whole of the beds of the 15 stretches of waterway that bounded the park, and not just half (to the centre line). If so, that was confiscatory of Maori rights. The point is unclear, however, from the documentation surrounding the park and its boundaries.

The rivers which flowed through the park for part of their length are the Whakatane River, the Tauranga (Waimana) River, the Waikare River, the Horomanga River, the Whirinaki River (for a short distance), and the headwaters of the Ruakituri River.¹²²⁴

The Crown maximised its claim to ownership of riverbeds in the park by also including many of the river bank reserves created during the consolidation scheme. This meant that some marginal strips separating Maori land from the Tauranga River and its tributaries were specifically included in the park, thereby including whole stretches of riverbed by application of the *ad medium filum* presumption to the strips. This created what we might call national park ‘enclaves’ in Maori-owned blocks.

Corbett, the Minister of Maori Affairs, had assured Parliament in 1954 that no Maori land would be included in the new national park.¹²²⁵ The Lands and Survey Department wanted to preserve this position in 1957, recommending that the additions to the park should be defined as ‘excluding all Maori land but including the beds of all Rivers, Streams etc.’¹²²⁶ One way in which this was achieved was to include the ‘riverbank reserves adjoining Whanganui, Opunua, Otuiti, Tuapau, Opuatawhiro, Hukanui, Papaohaki, Te Rere, Omaruwharekura, Te Kaawa, Whakarae, Ahirau, Te Huingaangakaahu, Nahunahu, Taumataohine, Paemahoe, Takapaurauteanina, and Omuriwaka Blocks’ (see maps 21.5 to 21.8).¹²²⁷ We note that the inclusion of Hukanui seems to have been an error, as there were no marginal strips in that block. Possibly, the Hapenui block was meant. This list of blocks did leave out some river bank reserves adjoining Maori land along parts of the Tauranga River and the Otapu waka and Otane Streams. We note, however, that the Survey Office plan referred to in the order had ‘river bank reserves included’ marked next to some of them, so this may have been an oversight.¹²²⁸

Thus, by the end of 1957, the Crown had asserted ownership of all the river ‘beds and waters’ in the Urewera A block by including them in the national park, from

1223. ‘Adding Land to the Urewera National Park’, 3 October 1962, *New Zealand Gazette*, 1962, no 61, p 1614 (Campbell, supporting papers to ‘Te Urewera National Park’ (doc A60(a)), p 22)

1224. Apiti, ‘Inquiry District Overview Map Book, Part 3’ (doc A132), map 23

1225. Walzl, ‘Waikaremoana’ (doc A73), pp 373–374

1226. Chief draughtsman, Lands and Survey, Gisborne, minute, 7 October 1957, on National Parks Authority, ‘Additions to Urewera National Park’, minutes of meeting, 10 September 1957 (Campbell, supporting papers to ‘Te Urewera National Park’ (doc A60(a)), p 154)

1227. ‘Adding Land to the Urewera National Park’, 25 November 1957, *New Zealand Gazette*, 1957, no 89, p 2217

1228. so 38956; Whakatane and District Historical Society, ‘Additions to Urewera National Park’, *Historical Review* (1963) vol 11, no 1, p 47

which Maori-owned land was specifically excluded. The Crown had also maximised the extent of its explicit claim to river ownership by including many of the river bank reserves in the park, even where this inserted a strip of national park between Maori-owned blocks (consisting of up to a chain on each side of a river and thus the whole riverbed as well). This was doubly significant for Maori because the park's administration of rivers and customary fisheries would apply to these parts of the rivers, even though they appeared to be some distance from the park. Also, a large part of the upper Ruakituri catchment was added to the park in 1962 when the Crown purchased the Paharakeke and Manuoha blocks.¹²²⁹

It is very unlikely that Maori were aware of these developments at the time the orders in council were gazetted. The inclusion of river 'beds and waters' in the park was not mentioned in closing submissions by either the claimants or the Crown. This is presumably because the focus was on the Crown's claim to own these riverbeds anyway, even if they had not been included in the park, by application of the *ad medium filum* presumption.

21.16.5.4 Assertions of Crown ownership outside the national park

For the most part, assertions of Crown ownership of riverbeds outside the national park were made in relation to gravel extraction, usually to obtain a royalty for the Crown as owner. But the nature of these assertions was often vague and contradictory, both over time and as between Government departments. The basis on which the Crown claimed to own particular stretches of riverbed was often unclear.

Crown counsel told us that 'gravel was taken from riverbeds to which the Crown believed it had ownership', and that, 'generally, if the Crown believed it had ownership to such riverbeds, it would not have given compensation to Maori.'¹²³⁰ The Crown accepted, too, that it may have taken gravel from riverbeds that it did not own – but, equally, it *may* have owned them: 'One can only assume, in the absence of evidence to the contrary, that Government agencies would not have taken gravel without their *bona fide* belief that the Crown had the right to do so, eg a belief that the river was navigable.'¹²³¹ These submissions did not inspire us with confidence that the Crown's past assertions of riverbed ownership rested on secure foundations.

Dr Doig summarised her evidence on this issue as follows:

In summary, it appears that the Crown has claimed ownership of at least the lower stretches of the Whakatane River on the basis that they are navigable. These claims of ownership were made in connection with the extraction of gravel from the riverbed, and so they concerned rights of control of resources as well as ownership. The extent of the Crown's claimed interests in the Whakatane River are not clear, however, because no geographical limit was discussed in the documentation. It is possible that

1229. Doig, 'Te Urewera Waterways' (doc A75), pp 91–92

1230. Crown counsel, closing submissions (doc N20), topic 30, p 16

1231. *Ibid*, p 17

the Ministry of Transport regarded the river as navigable as far upstream as jet-boats could reach.

The various departmental files also suggest that the Crown may have claimed ownership to much more extensive parts of the rivers of Te Urewera, including all or part of the Rangitaiki, Whirinaki, and Waimana Rivers. In each of these cases, however, claims of navigability from one department are countered by statements from other government departments which state that those rivers are not (or probably are not) navigable. The 1903 Act gives no mechanism to mediate between these conflicting interpretations; but the inconsistencies do raise the question of how explicit the Crown must be in making claims to navigability, given the potentially confiscatory effects of applying the Act.

As with the earlier discussions on the applicability of *ad medium filum* to the rivers of Te Urewera, these matters were discussed solely amongst Crown and local government officials. There is no indication that Maori in Te Urewera were ever consulted on any of these matters, even where decisions to treat certain rivers as navigable would appear to have had extensive consequences for their interests in the rivers of Te Urewera.¹²³²

Dr Doig's conclusions were supported by fragments of evidence relating to particular rivers, or particular assertions of ownership from the 1960s through to the 1980s. One of the main examples was an action of the Lands and Survey Department in 1963. The department issued the Bay of Plenty Catchment Commission with a general licence to take shingle and sand from the beds of the Whakatane, Waimana, Rangitaiki, and Whirinaki Rivers, and their tributaries, 'where the beds of the rivers are in Crown ownership either because they are considered to be navigable or because there are reserves on one or both sides of the Rivers.'¹²³³ Thus, navigability and the existence of marginal strips (by operation of the *ad medium filum* presumption) were the criteria for Crown ownership, which were left to the catchment commission to interpret. The marginal strips criterion would have included those river bank reserves on the Tauranga River and its tributaries that had been left out of the national park.

We will return to the issue of navigability below. Here, we note that this general licence was based in part on the belief that riverbeds next to Crown land in Te Urewera were vested in the Crown *ad medium filum aquae*. Dr Doig found other examples of the presumption being applied by Lands and Survey to river bank reserves along the Whirinaki River in 1959 and 1983.¹²³⁴ David Alexander also identified examples of the Crown's claims to own riverbeds through application of the *ad medium filum* presumption. These included the Horomanga River in the Kuhawaea block in the 1950s, and the Whirinaki River in the 1980s. Crown claims

1232. Doig, 'Te Urewera Waterways' (doc A75), p131

1233. Head Office Committee: Land Settlement Board, General Licence to Remove Shingle, case 62/959, 27 February 1963 (Doig, 'Te Urewera Waterways' (doc A75), p105)

1234. Doig, 'Te Urewera Waterways' (doc A75), pp106, 130-131, 234

to own the Rangitaiki riverbed adjacent to the Kuhawaea block, by operation of the *ad medium filum* presumption, were also made in the 1930s and 1960s.¹²³⁵

If we were to accept the premise that the *ad medium filum* presumption did in fact apply to riverbeds adjacent to former Maori land, then its application was relatively straightforward – so long as Government agencies and local bodies respected that the presumption would also apply to Maori land along the river banks, which, in Dr Doig's evidence, they often failed to do. Maori have sometimes complained about gravel extraction, especially in more recent decades, but they also assumed on occasion that Government agencies would not be taking the gravel without a legal right to do so. Ngati Whare, for example, took this approach to extractions from the Minginui Stream.¹²³⁶ For the most part, the possibility of private (including Maori) ownership of riverbeds was basically ignored.¹²³⁷

Turning to navigability, we note that the two departments most concerned before the creation of DOC in 1987 were Lands and Survey and the Marine Department (later the Ministry of Transport). In practice, however, local authorities have often been left with the task of deciding whether a riverbed is in Crown ownership because of their role in administering gravel extraction licences. In the northern catchments of Te Urewera, the Bay of Plenty Catchment Commission assumed that most of the larger rivers were navigable and therefore in Crown ownership. The commission had authority to levy a royalty on gravel taken from Crown-owned riverbeds on behalf of either Lands and Survey or the Ministry of Transport. These Government departments did not deny the claims of extensive Crown ownership made on their behalf.¹²³⁸

In the mid-1970s, for example, problems with the definition of navigability in the Coal-mines Act 1925 became acute. As we discussed in section 21.16.3.4, the Association of Catchment Commissions asked the Government in 1976 for an authoritative ruling as to its meaning.¹²³⁹ In the 1960s, operating under a general licence, the Bay of Plenty Catchment Commission had taken the position that 'river beds are generally held in Crown ownership', either as navigable or by application of the *ad medium filum* presumption.¹²⁴⁰ An interdepartmental committee reviewed the arrangements for water in 1965 and found many problems with how the definition of navigability was or should be applied. As noted above, the committee wanted the law changed to define navigation to include:

every stream that in the past, present or future, was is or becomes capable of permitting, without trespass on adjoining lands, the passage of any kind of vessel that will float upon it with one occupant. 'Vessel' should be defined to include any jet craft, canoe, raft, or hovercraft. It should be made clear that a navigable stream will not

1235. Alexander, 'Native Land Court Orders and Crown Purchases' (doc A92), pp 24–27

1236. Doig, 'Te Urewera Waterways' (doc A75), p 128

1237. Ibid, pp 128, 132–134

1238. Ibid, pp 132–135

1239. Alexander, 'Native Land Court Orders and Crown Purchases' (doc A92), p 17

1240. Secretary, Bay of Plenty Catchment Commission, to county clerk, Whakatane County Council, 3 October 1968 (Doig, 'Te Urewera Waterways' (doc A75), p 133)

cease to have that status even if the waters cease to flow. The bed so vested should include the flood channel, all islands, and all parts of the stream bed downstream of the uppermost water that is navigable, whether those parts are navigable or not.¹²⁴¹

Even so, the committee believed that most rivers had become 'navigable' within the meaning of the Act because of changes that had taken place to the rivers and their use by the 1960s. A fairly relaxed approach was taken in that decade, with navigability assumed and the Act interpreted very widely.

In 1977, there was a legal challenge (outside of Te Urewera) to the gravel licensing system. It led the director of water and soil conservation to comment that compliance with the law was weak, and, '[u]nfortunately the term navigable is not well defined and is subject to interpretation.'¹²⁴² Based on a Crown Law Office opinion obtained by the Ministry of Transport, all catchment commissions had to prepare and submit lists of rivers 'where there is an existing or potential use by boats for commercial purposes or recreational pursuits.'¹²⁴³ The commissions would then have to apply for approval for specific gravel licences from the ministry based on their lists of navigable rivers.¹²⁴⁴

Although the ministry was acting under the Harbours Act, not the Coal Mines Act, the same licences would enable the commissions to levy a royalty for the Crown on Crown-owned riverbeds (under the Coal Mines Act).¹²⁴⁵ The use of 'recreational pursuits' in the ministry's criteria for navigability, including 'potential' use for recreation in the future, gave the catchment commissions a very wide brief. As Dr Doig noted, the Bay of Plenty Catchment Commission's list of rivers, for which it then sought licences in 1977, included the Rangitaiki, Whirinaki, Whakatane, and Waimana Rivers as navigable.¹²⁴⁶ This list must have been approved by the ministry, because the commission 'did levy royalties on the gravel taken from the beds of these rivers on the basis of that Crown ownership, and it also issued licences to take gravel on that basis.'¹²⁴⁷

Thus, in the 1960s and 1970s, the Rangitaiki, Whirinaki, Whakatane, and Waimana Rivers were all treated as navigable by local and central government, and therefore in Crown ownership, for the purposes of extracting gravel and charging a royalty for the gravel taken.

Dr Doig was critical of this state of affairs, noting that Maori were not consulted or informed about these decisions, there was no formal process for investigating or declaring that a river was navigable, and Maori had no right of appeal.

1241. Interdepartmental Committee on Water, 'NZ Law and Administration in Respect of Water', March 1965, p 25 (Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (doc A92(a), vol 3), p v79)

1242. Director of Water and Soil Conservation to all catchment authorities, 23 September 1977 (Doig, supporting papers to 'Te Urewera Waterways' (doc A75(a)), p 260)

1243. Ibid

1244. Doig, 'Te Urewera Waterways' (doc A75), p 127

1245. Ibid, pp 127-135

1246. Ibid, p 127

1247. Ibid, p 134

Their only recourse was the expensive one of judicial review in the courts. She also noted that the requirements for a navigable river were interpreted differently over time, and between departments.¹²⁴⁸

The Tauranga River, for example, was included as a navigable river by the catchment commission in 1977 because there was ‘an existing or potential use by boats for commercial purposes or recreational pursuits.’¹²⁴⁹ In 1983, however, the Lands and Survey Department applied the tighter definition adopted by the High Court and one of the Court of Appeal judges in *Leighton* (see section 21.16.3.4).¹²⁵⁰ The district draughting officer gave his opinion that the river was not navigable in the Waimana block, where the ownership of dried-up riverbed was under consideration. He wrote:

A ‘navigable’ waterway is a waterway that in 1903 (the date of the first Coal Mine Act where the bed of a navigable river was deemed to be Lands of the Crown) was navigable generally speaking on a commercial basis all year around, ie used by barges, shallow draught boats for the carriage of goods. We think of Waikato, Waipa, Waihou Rivers as navigable.¹²⁵¹

As will be recalled from section 21.16.2.7.3, the Crown had claimed exposed riverbed in the Waimana block as Crown land since the 1950s – on what basis is unknown. It had leased parts of the dry riverbed to farmers for three decades (from 1950 to 1983). It was only because the Crown had decided to sell the exposed riverbed that the Lands and Survey Department investigated the basis of the Crown’s title and decided that it had none. The river was not navigable and the land presumably belonged to riparian owners *ad medium filum*, or – in the case of right-line boundaries – was ‘no man’s land’. Until the issue of the ‘no man’s land’ could be resolved, the Crown continued to lease the riverbed to farmers as a ‘caretaker’, by what authority is not clear.¹²⁵²

The Ohinemataroa (Whakatane) River is an example of a river that has been claimed as Crown owned because of the invention of the jetboat. As we have seen, it was included in the 1977 list of navigable rivers for gravel extraction purposes. Although recreational boating does not meet the test of purposeful navigation for transport or trade, ‘some government departments seem to have regarded at least parts of the Whakatane River as navigable because they could be travelled by jetboat.’¹²⁵³ In 1968, for example, the secretary for marine pointed out that his department issued licences for removal of shingle from this river under section 146A of

1248. Doig, ‘Te Urewera Waterways’ (doc A75), pp 127–135

1249. Chief engineer, Bay of Plenty catchment commission, to regional marine officer, Ministry of Transport, Auckland, 5 October 1977 (Doig, ‘Te Urewera Waterways’ (doc A75), p 129)

1250. Doig, ‘Te Urewera Waterways’ (doc A75), p 125

1251. RJ Schwass, minute, 9 August 1983, on AF Harding, memorandum, 4 August 1983 (Doig, supporting papers to ‘Te Urewera Waterways’ (doc A75(a)), p 222)

1252. Doig, ‘Te Urewera Waterways’ (doc A75), pp 107–116

1253. *Ibid*, p 126

the Harbours Act 1950. This was because the river was navigable and therefore a ‘Crown owned river bed.’¹²⁵⁴ The Whakatane was navigable, in the department’s view, because it had waters deep enough to ‘float a jet boat at speed’. Crown ownership of the bed, however, would be limited to the ‘navigable length’ of the river.¹²⁵⁵ As Dr Doig noted, the coal mines legislation was not mentioned specifically, but it was nonetheless being invoked because the Crown could only own navigable riverbeds under that legislation.¹²⁵⁶

Back in the 1950s, however, the Ohinemataroa River at Ruatoki had not been treated as navigable. The Whakatane County Council considered that the *ad medium flum* presumption applied.¹²⁵⁷ Later, in the 1980s, the Ministry of Works was granted a licence to take gravel from the upper Whakatane River near Umuroa Marae at Ruatahuna, because the bed was ‘considered to be Crown owned’.¹²⁵⁸ In this case, however, it was not stated whether the Crown claimed ownership under the *ad medium flum* presumption or because the river was navigable. Because the ministry had to negotiate access to the river across the Ruatahuna Farm, we presume that the basis of the Crown’s claim was navigability. Then, in 1988, Maori owners of several blocks in the Waikirikiri area complained that gravel was being extracted from the Whakatane River without their consent. Again, the response was that the riverbed was Crown-owned – presumably because it was considered to be navigable, given the context of Maori-owned blocks abutting this particular stretch of the river.¹²⁵⁹

The issue of the navigability of this river was debated in our inquiry. Tama Nikora, an experienced surveyor, told us:

there is also great uncertainty about ownership of Ohinemataroa because of the operation of the Coal Mines Act which provided that if the river is navigable, then the river belongs to the Crown. If that provision does apply to the Ohinemataroa, then I believe it is contrary to Tuhoe’s rights under the Treaty. However, I do not believe the river is navigable. The whole issue of whether the river is navigable or not is a minefield. There is no one Crown agency which has determined that issue in relation to the Ohinemataroa, or in relation to any other rivers. The position remains that in legal terms the ownership of the Ohinemataroa remains in doubt, when it should not. It belongs to Tuhoe.¹²⁶⁰

Crown counsel did not make any submissions about the issue of how navigability is defined, nor did it make any specific claims in our inquiry to ownership of

1254. Secretary for marine to engineer, Bay of Plenty catchment commission, 24 May 1968 (Doig, supporting papers to ‘Te Urewera Waterways’ (doc A75(a)), pp 237–238)

1255. *Ibid*, p 238

1256. Doig, ‘Te Urewera Waterways’ (doc A75), p 126

1257. *Ibid*, pp 126, 229–231

1258. *Ibid*, p 232

1259. *Ibid*, p 235

1260. Nikora, brief of evidence (doc 140), p 7

particular rivers. Rather, the Crown's position was that it was 'likely' that navigable riverbeds in the inquiry district were vested in the Crown, and that ownership did not depend on Crown recognition but rather was a matter of law which could be decided by the courts.¹²⁶¹

Claimant counsel submitted: 'The Crown has not argued in this Inquiry that the bed of the Ohinemataroa river is Crown land, whether by application of the Coal Mines Act or otherwise, nor has it denied Tuhoe's kaitiaki status in respect of the river.'¹²⁶² After our hearings concluded in 2005, the issue of the navigability of this river at Ruatoki came before the Maori Land Court. As we saw earlier, the river was used as a boundary between many of the sections originally created in the Ruatoki–Waiohau consolidation scheme. In 2009, claimant counsel filed submissions with the Tribunal, noting that the Crown did not claim to own the riverbed in these Maori Land Court proceedings.¹²⁶³ The Crown had argued before the Maori Land Court that the river was in fact navigable, but that the Urewera commissioners' orders for the Ruatoki block predated the Coal-mines Act Amendment Act 1903. Those orders having been given the effect of Native Land Court orders by the 1909 Act, the Crown's view was that the stretch of river that ran through the middle of the Ruatoki block in 1903 had been expressly granted by the Crown and was thus exempt under the saving clause.¹²⁶⁴

The situation has been no less complicated for the Rangitaiki River. As we have seen, the Crown claimed to own the bed adjacent to the Kuhawaea block in the 1960s on the basis of the *ad medium filum* presumption. The blanket gravel licence issued by Lands and Survey in 1963 included the river, either because it was navigable or because there were river bank reserves – the exact details were not specified. In 1971, the issue of ownership arose because of a dispute in the Waiohau A1B block, where the course of the river had changed.¹²⁶⁵ Somewhat casually, the commissioner of Crown lands suggested that 'the bed is probably Crown land – I assume the Rangitaiki River hereabout is or has been used for navigation.'¹²⁶⁶ The Rotorua field officer replied:

There is nothing to suggest, and I doubt that there ever has been, any navigational use made of the Rangitaiki River in this locality. Between here and the river mouth, there are some narrow gorges, that before the Matahina Dam was built would have been impassable to [a barge or raft].¹²⁶⁷

1261. Crown counsel, closing submissions (doc N20), topic 30, p 8

1262. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 203

1263. Counsel for Nga Rauru o Nga Potiki, memorandum, 20 October 2009 (paper 2.883)

1264. Counsel for Nga Rauru o Nga Potiki, memorandum, 20 October 2009 (paper 2.883), app A: Crown counsel, memorandum seeking to withdraw from proceedings, 6 May 2009; Crown counsel, memorandum, 2 November 2009 (paper 2.884)

1265. Doig, 'Te Urewera Waterways' (doc A75), pp 127–130

1266. Commissioner of Crown lands, Hamilton, to district field officer, Rotorua, 29 April 1971 (Doig, 'Te Urewera Waterways' (doc A75), p 130)

1267. Field officer, Rotorua, to commissioner of Crown lands, 26 May 1971 (Doig, 'Te Urewera Waterways' (doc A75), p 130)

In this instance, the commissioner of Crown lands agreed that the dry riverbed was Maori land, and also that the licence to extract gravel had to be cancelled immediately.¹²⁶⁸

As we have seen, the Rangitaiki River was later classified as navigable by the catchment commission in 1977, presumably with the approval of the Ministry of Transport, so that gravel could be extracted and royalties charged. How long it was classified that way, we have no information.

In 1994, as we discussed above, the Lands and Survey Department advised the Te Ika Whenua Rivers Tribunal that it could not find ‘relevant file evidence’ to support either an assertion having been made as to navigability or any ‘evidence to the contrary’. ‘It would be wrong of the Crown,’ officials advised, ‘to assert ownership without convincing evidence of navigability – evidence that would stand up in a Court of law’. Further, the department could not see a ‘compelling reason for carrying out the possibly protracted and complicated research required to prove such navigability’. In the absence of an instruction or funding to do the work necessary to determine navigability, the department considered that the ‘principle of presumptive ownership by adjoining owners (some of whom will be the Crown)’ should apply.¹²⁶⁹

On the evidence available to us, this seems to be a rare example of the Government contemplating that the issue warranted complicated research to prove navigability to a level that would ‘stand up in a Court of law’. We saw one other example – the case of the Whirinaki River in 1984. In that instance, a Lands and Survey official advised the local council that it might not be worth the cost and difficulty of trying to prove navigability in order to secure ownership of a piece of exposed riverbed next to Whirinaki 2(1E2):

The current situation is that it is – with other land – considered to be old river bed. The Crown can only claim such to be Crown Land if the Whirinaki River were proven to be navigable. The local knowledge of your council may provide some idea as to the likelihood of its being navigable but the nature of its meandering course suggests to me that navigability would be difficult to prove. There is also the question of whether the Crown would wish to initiate such an expensive and involved procedure in order to substantiate a claim for all the old river bed.¹²⁷⁰

Suzanne Doig commented:

This statement is one of the very few indications that the Crown might have to prove that a river was navigable before claiming ownership of the bed, rather than

1268. Commissioner of Crown lands, Hamilton, to engineer, Bay of Plenty Catchment Commission, 2 July 1971 (Doig, supporting papers to ‘Te Urewera Waterways’ (doc A75(a)), p193)

1269. District manager and chief surveyor, Department of Survey and Land Information, Hamilton, to Judge Carter, 16 March 1994 (Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 82)

1270. JE Greedy for chief surveyor to general manager, Whakatane District Council, 2 November 1984 (Doig, supporting papers to ‘Te Urewera Waterways’ (doc A75(a)), p 213)

relying on an assumption of navigability, but as it comes from a relatively minor Crown official the statement may not carry much weight.

Nevertheless, the comments do reflect that officials within the Department of Lands and Survey generally showed more circumspection in claiming Crown ownership of riverbeds on the basis of navigability within Te Urewera, compared to other agencies such as the Ministry of Transport.¹²⁷¹

The examples discussed above exemplify many of the problems with 'navigability' that have been identified by the courts, the interdepartmental committee in the 1960s, and the Property Law and Equity Reform Committee in the 1980s. There were doubts as to what constituted navigability: whether commercial or recreational; whether use of the water or simply the width and depth of the water; by what kind of vessel and at what time (in relation to when the first Act was passed). There were uncertainties as to whether technology unthought of in 1903 could render a river navigable, turning in part on the use of the word 'potential' in the statute. Sometimes the whole of a river was treated as navigable, at other times only a particular stretch of river was considered.

And in all of this there was often a remarkably casual approach to declaring rivers the property of the Crown for the purposes of gravel extraction. Whole rivers could be declared Crown-owned in the vague belief that they must either be navigable or the Crown's by application of the *ad medium filum* presumption to marginal strips, as under the 1963 'blanket' licence. The Rangitaiki, Whirinaki, Ohinemataroa (Whakatane) and Tauranga (Waimana) Rivers were all declared navigable in 1977 for the purposes of gravel extraction and Crown royalties, on what factual basis can only be imagined. And yet in 1994 Lands and Survey could find no evidence as to whether the Crown had ever claimed to own the Rangitaiki, whether as a navigable river or otherwise. The department advised that a protracted and expensive process would be required to prove whether a riverbed is navigable and therefore owned by the Crown.

There is no suggestion that such a process has ever been conducted in the past for the rivers in our inquiry district. Government departments do seem to have been more cautious in asserting navigability since the 1980s. Crown counsel's submission in our inquiry was that the Crown 'likely' owned navigable riverbeds (whatever navigable might be taken to mean), and that what really mattered is that agencies extracting gravel acted in the bona fide belief that the Crown owned the river concerned – which, after all, 'may have been the case'.¹²⁷²

There is also the question of what might happen in the future, if further new technologies make rivers 'navigable' within the meaning of the now defunct coal mines legislation. Suzanne Doig commented:

The owners also face the prospect that changing technological or social circumstances, which might cause an upsurge in river use or make rivers more accessible,

1271. Doig, 'Te Urewera Waterways' (doc A75), p131

1272. Crown counsel, closing submissions (doc N20), topic 30, pp 8, 16–17

may at some point in the future lead to a loss of ownership rights in the rivers if the Crown chooses to deem the rivers navigable. This uncertainty, and the uncertainties posed by the inconsistent application of the law, make it difficult for the people of Te Urewera to manage their interests in the rivers with any confidence.¹²⁷³

In sum, the Crown has asserted its ownership of the riverbeds of the inquiry district in a variety of ways. The most far-reaching assertion came in the 1950s, when long stretches of riverbed were made part of the national park, including by way of making the consolidation scheme river bank reserves a part of the park. Outside of the national park, the issue seems to have arisen largely in respect of gravel extraction, because extractors could be charged royalties for Crown-owned rivers. To a lesser extent, it also arose when the Government had to decide whether or not to claim dry riverbed land after a water course had changed. In those instances, the Crown has claimed various beds or parts of beds from time to time, through different agencies – sometimes by licensing local bodies – and has also apparently abandoned claims or changed the basis of the claim from navigability to the *ad medium filum* presumption. Finally, the Crown has asserted ownership where pieces of riverbed have been needed for the Aniwhenua and Wheao hydro schemes, although that issue was dealt with by the Te Ika Whenua Rivers Tribunal and we say no more about it.

Given the transitory nature of Crown claims to ownership, we have the impression that riverbed ownership was really of little interest to the Crown after the establishment of the national park. This may well be because so many powers of control over rivers became vested in it by statute – quite independently of who owned the beds – in the second half of the twentieth century. We consider that issue later. Next, we turn to the crux of the claimants' argument, which is that the law in respect of ownership of riverbeds is so uncertain that their property rights are hopelessly unclear and often violated, to their serious detriment.

21.16.6 Is the law of riverbed ownership uncertain?

In previous sections, we have discussed many complex questions, including whether the *ad medium filum* presumption applied (or should have applied) in our inquiry district, whether the peoples of Te Urewera knowingly and willingly sold their rivers, whether they lost ownership of riverbeds within or that bounded consolidation scheme lands, and the extent to which the Crown has actually asserted ownership of the inquiry district's riverbeds.

Counsel for Wai 36 Tuhoe asked us to make a finding that 'the Crown has wrongfully acquired by legislation or by operation of the UDNRA and UCS title to Tuhoe's rivers within Te Urewera, or has left the state of ownership of rivers in confusion.'¹²⁷⁴

Counsel for Ngati Manawa summarised the central issue in his reply to the Crown's closing submissions:

1273. Doig, 'Te Urewera Waterways' (doc A75), p 135

1274. Counsel for Wai 36 Tuhoe, closing submissions, pt c (doc N8(b)), p 15

The real problem with the issue of title to river beds seems to be that neither the Crown nor anyone else has any clear idea as to which river beds belong to the Crown and which do not. The Crown says that ‘it would be quite wrong to assume that tangata whenua have lost ownership to all riverbeds in the inquiry district in the absence of direct block-by-block evidence’ and that this question ‘is not an issue that admits of easy, generic answers in the abstract’.

In a sense this is a fair observation. However one would expect that in the case of major waterways such as the Rangitaiki River (a river of great significance to Ngati Manawa) the Crown would have some idea as to what stretches of the river it actually lays claim to and on what basis. Without knowing the basis for Crown claims to ownership in any given case it is hard to know whether any such claim is well-founded or not – even in the ordinary law, quite apart from any consideration of Treaty breach. Until the Crown deigns to inform the claimants as to what waterways it believes it owns and why, the matter is indeed ‘in the abstract’.

Ms Doig makes this all very clear at p 137 of her excellent report:

Any attempt to state for certain which riverbeds within Te Urewera are owned by the Crown and which remain owned by Maori is riven with difficulties. Foremost amongst these difficulties is the uncertainty of the law in New Zealand with respect to ownership of riverbeds. Many commentators now doubt whether the application of common law rules such as the presumption of *ad medium filum* can override Maori customary title to rivers, but it can be difficult to distinguish if or when customary title to rivers has been extinguished.

This lack of certainty is a matter of great frustration for claimants, who believe that they are entitled to a clear and certain understanding of the extent of their ownership rights. As it stands, the Crown does not appear able to provide this without recourse to complicated and expensive legal proceedings.

It is submitted that the Crown cannot tell us what stretches of the Rangitaiki River it owns (and the Wheao and Whirinaki for that matter) because it – or rather, its officials – do not themselves have any idea, and indeed cannot do so given that the law relating to riverbed ownership is in such a state of hopeless ambiguity, uncertainty and confusion.¹²⁷⁵

Counsel for Wai 36 Tuhoe agreed, stating: ‘It is particularly disappointing that the Crown has not addressed the uncertainty of rights of ownership and management of rivers arising from the legal regime applying to rivers.’¹²⁷⁶

The Crown’s submissions must be taken as agreeing that there is at least an element of doubt, since Crown counsel was only prepared to use the word ‘likely’

1275. Counsel for Ngati Manawa, submissions by way of reply (doc N26), pp 6–7

1276. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), pp 43–44

for its ownership of riverbeds of navigable rivers in Te Urewera, although it does claim ownership of at least some (unspecified) riverbeds.¹²⁷⁷

Guidance on some points of uncertainty has been provided by the recent Supreme Court *Paki* decisions, although this guidance has come comparatively late, given how long the law has been in force. It is also notable that the High Court, the Court of Appeal, and one Supreme Court justice took a very different view about the meaning of a ‘navigable river’ from that of the majority in the Supreme Court. This underlines further the uncertainties that had existed until 2012 and were highlighted in cases such as *Leighton*. Be that as it may, the Supreme Court confirmed in 2012 that navigability requires purposeful use for transport or trade, and must be determined for each part of a substantially navigable waterway. The saving clause in the coal mines legislation only applied to express grants of a riverbed, not all Crown grants. The legislation was held to be declaratory, not expropriatory (although the question of its effects on Maori customary rights was specifically not addressed). Navigability depends on the state of a river as at 1903, not after later modifications to the water course.¹²⁷⁸ To take one of the examples discussed earlier, recreational use of the Ohinemataroa River by jetboat would not now, in light of the Supreme Court decision in *Paki*, be sufficient of itself to make a river navigable.

In light of the discussion in preceding sections, however, we have found the following areas of significant uncertainty in the law of riverbed ownership in our inquiry district:

- ▶ Whether *In re the Bed of the Wanganui River* will continue to be interpreted by the courts as authority for a universal rule of Maori custom, and as authority on the effects of tenure conversion on that custom.

This was already in doubt at the time of our hearings, but the High Court and Court of Appeal followed *Wanganui River* in *Paki* in 2009–10, after which the Supreme Court pronounced *Wanganui River* ‘questionable’.

Our view is that the *ad medium filum* presumption was not Maori custom in Te Urewera.

- ▶ Whether the various tenure conversion processes in Te Urewera (the Native Land Court, the Urewera commissions, and the 1909 Act) had the effect of extinguishing Maori customary title to rivers, after which the *ad medium filum* presumption applied to the new land titles.

Our view is that Maori customary title to rivers was not extinguished by tenure conversion in Te Urewera. From the evidence available to us, the Native Land Court and the Urewera commissions neither investigated nor awarded river titles.

- ▶ Whether the statutory language of the Coal-mines Act Amendment Act 1903 and its successors was sufficiently explicit to extinguish Maori customary title

1277. Crown counsel, closing submissions (doc N20), topic 30, pp 8, 11

1278. See *Paki v Attorney-General* [2012] 3 NZLR 277 (sc)

to rivers. The superior courts have not yet pronounced authoritatively on this point of doubt, first raised by the Court of Appeal back in 1994.

It seems to us that if the 1903 Act did succeed in extinguishing Maori customary title in Te Urewera, then it was done without consent or compensation and was expropriatory of Maori property rights.

- ▶ Whether the Crown acquired Te Urewera riverbeds by operation of the *ad medium filum* presumption when it acquired Maori freehold land by purchase or award for survey costs.

Our view is that it may have done so at law, if the courts were to follow *Wanganui River*. Nonetheless, it cannot be shown that any rivers in Te Urewera were knowingly or willingly sold to the Crown, and there is significant evidence to the contrary.

- ▶ Whether the Crown acquired Te Urewera riverbeds by operation of the *ad medium filum* presumption when it was awarded riparian lands by the consolidation commissioners.

It seems to us that it may have done so at law, if the courts were to follow *Wanganui River*. But Te Urewera leaders came out of the 1921 hui with the understanding that the consolidation scheme would not affect the ownership of rivers, which they believed they retained. When it seemed as if the Crown might be obtaining the Ohinemataroa (Whakatane) and Tauranga (Waimana) Rivers as part of its award, Tuhoe protested and the Government responded that no rivers had been awarded to the Crown. Whatever the ambiguities of the wording of that response, Tuhoe clearly did not intend to transfer ownership, and there was no knowing or willing transfer of ownership of any rivers as part of the Urewera Consolidation Scheme.

- ▶ Whether the *ad medium filum* presumption may be rebutted in Te Urewera by the surrounding circumstances, namely the continued exercise of Maori customary rights and responsibilities to their taonga, the rivers, long after land purchases by the Crown.

It seems to us that there is considerable evidence in support of such a rebuttal, if it were indeed held that the presumption had applied to Maori freehold land at the time of its transfer to the Crown.

- ▶ By what authority marginal strips or river bank reserves were inserted between Maori land and rivers by the consolidation commissioners, and whether these strips conveyed ownership of riverbeds to the Crown by operation of the *ad medium filum* presumption.
- ▶ Whether the inclusion of riverbeds in the national park by statute was sufficient to extinguish Maori customary title to those rivers, if that title had survived the coal mines legislation, the orders of the Urewera commissioners, and the orders of the consolidation commissioners. The new Te Urewera Act 2014 may have a bearing on that question, but that is not a matter for us – the Tribunal has no jurisdiction in respect of that Act.
- ▶ The remaining uncertainties about the meaning of navigability after the *Paki* decision, and whether it can reasonably be said that any of the rivers of our

inquiry district are navigable within the meaning of that legislation, or that any significant stretches of them are navigable.

- The uncertainties created by the lack of a mechanism to formally declare a river navigable, the same rivers having sometimes been treated as Crown-owned and at other times not, ultimately leaving their ownership unclear without recourse to expensive and possibly protracted legal proceedings.

Essentially, there are many points of doubt as to who owns the riverbeds of Te Urewera. The biggest uncertainty is whether Maori customary title to rivers has survived the various points at which it might have been extinguished at law. It is also very uncertain whether any rivers or parts of rivers are 'navigable' within the meaning of the coal mines legislation, and which rivers or parts of rivers are claimed as such by the Crown. We found it hard to believe that this was still completely unknown in 2005, some 100 years after the passage of the 1903 Act. A third major area of uncertainty is whether the *ad medium filum* presumption may be rebutted at the time of sale (of riparian lands) to the Crown. We have discussed that possibility at length in preceding sections.

The claimants assert that they still own the rivers, and the Crown does not; and there is evidence to support their position. The Crown's most permanent assertion of ownership was the inclusion of riverbeds in the national park (although, as noted, the situation of those rivers may now depend on the Te Urewera Act 2014). Outside the park, the Crown has asserted ownership where convenient but has never sustained a long-term claim to any riverbeds, except where it has built and maintained hydroelectric structures. In the Crown's submission, the question of who owns riverbeds is a 'question of law that could be determined by the Maori Land Court or the High Court.'¹²⁷⁹ On the one hand, this position preserves the rights of Maori (and anyone else) to have their property defined by the courts according to law. On the other hand, it appears that it could entail expensive and protracted litigation for every individual stretch of riverbed, as in the *Paki* case, before ownership is certain. We think it highly unlikely that such litigation would stop at the Maori Land Court or the High Court. The Crown also relied on the *ad medium filum* presumption as a rule of law that is intended to resolve 'any ambiguity as to the boundaries when a sale of land bordered a river.'¹²⁸⁰ Clearly, it has not had that effect in Te Urewera; quite the opposite.

As we found in chapters 10 and 14, the Crown introduced the Native Land Court and later the Urewera Consolidation Scheme with promises of certainty of title. It has failed to deliver on these promises in respect of rivers.

Ultimately, ours is a Treaty jurisdiction and we will consider later whether the Crown's title system, laws, and actions have been consistent with Treaty principles. Next, we turn to consider the question of control of rivers, which has become divorced from ownership in Te Urewera by the passage of various statutes in the twentieth century. This was of major concern to the claimants in our inquiry,

1279. Crown counsel, closing submissions (doc N20), topic 30, p 8

1280. Ibid, p 9

who argued that these statutes virtually nullified their kaitiakitanga and their tino rangatiratanga in respect of the rivers.

21.16.7 How has the Crown asserted authority and control over rivers and customary fisheries, and with what effects?

21.16.7.1 Introduction

As we discussed earlier in the chapter, the claimants believe that the Crown has assumed an ‘all-encompassing’ control of the environment in Te Urewera, including an absolute control of all resources. The effect of the Crown’s ‘exclusive environmental management within Te Urewera is that the tino rangatiratanga of Tuhoe is disregarded.’¹²⁸¹ One aspect of this control was the Crown’s ban on all hunting of native birds, which we have already discussed. We also explained earlier how the Crown took general control of the environment in Te Urewera from the 1930s onwards. It imposed a regime of forest protection in order to preserve the supply of water to Lake Waikaremoana for hydroelectricity and to prevent erosion and flooding in lower-lying farm districts. The claimants accepted that ‘the Crown does have a power and a duty to manage natural resources in the interests of conservation but that these rights are qualified by the tribe’s te tino rangatiratanga.’¹²⁸² The Crown’s view was that its control was not as absolute as the claimants argued, and was justified by its responsibilities under article 1 of the Treaty. Crown counsel submitted that, while obliged to control and manage natural resources in the interests of conservation and the national interest, it has not assumed such an exclusive role, nor has it ignored or excluded the peoples of Te Urewera.¹²⁸³

One of the disputed aspects of control over the environment has been the degree of authority the Crown has given itself in respect of rivers. The claimants’ principal concern was that the Crown has assumed exclusive control by statute, disregarding their tino rangatiratanga and their obligations as kaitiaki, and has then managed the rivers badly, resulting in erosion, pollution, and habitat destruction, which could all have been avoided. In particular, the Crown has modified and used rivers for hydroelectricity, without consent or compensation, and its actions have caused serious damage to customary fisheries. The Crown made two concessions in response: it had only conducted ‘limited consultation’ in respect of river management until ‘relatively recently’;¹²⁸⁴ and it had ‘facilitated’ the introduction of trout, which had had damaged indigenous fisheries.¹²⁸⁵ Otherwise, the Crown’s view was that rivers are now managed with an appropriate degree of Maori input through Resource Management Act (RMA) processes.¹²⁸⁶

1281. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 153

1282. Ibid

1283. Crown counsel, closing submissions (doc N20), topic 29, p 12

1284. Ibid, topic 37, p 3

1285. Ibid, topic 30, p 2

1286. Ibid, pp 13–18

We begin our analysis with a brief outline of the legislation for the control and management of rivers, before proceeding to outline the opportunities for Maori participation in the care and management of these taonga, and the effects of Crown management on rivers and fisheries.

21.16.7.2 The historical legislation for the control and management of rivers

From the earliest decades of the colony, the Crown has introduced laws to control aspects of river management, especially those related to the needs of Pakeha settlement: town water supplies, drainage, flood protection, and water rights for various agricultural or industrial uses. The latter included water rights for mining, irrigation, and hydroelectricity, each provided for in a separate statute (such as the Gold Fields Act 1862, Mines Act 1877, Public Works Act 1882, Water-supply Act 1891, and Water-power Act 1903). These, and other statutes, 'consolidated the Government's control over water, regulated potential conflict between farming, mining, and industrial interests, prevented monopolies, and assured public access or private usages.'¹²⁸⁷ Tribal authority and ownership of waterways was barely considered in the enactment of these statutes, and various pieces of legislation contained provisions that overrode Maori customary rights. For example, Acts dealing with the floating of timber down rivers and streams treated eel weirs as obstructions to the colonists' use of rivers.¹²⁸⁸ As the Whanganui River Tribunal found, the Crown's recognition that Maori had rights was largely restricted to lakes: 'While the Government made laws for the protection, reform, and acquisition of Maori customary land, specific statutory recognition of Maori interests in lands covered by water was given only in respect of lakes.'¹²⁸⁹ In Te Urewera, Pakeha settlement was mostly limited to the fringes of the inquiry district, and the great bulk of the area was kept for catchment preservation or forestry, with some allowances for Maori farming. Towns sprang up later in the twentieth century to service the timber industry, again on the outskirts of our inquiry district. As a result the nineteenth-century statutes by which the Crown assumed control of rivers were largely inoperative in Te Urewera. As Suzanne Doig put it, 'many of these [statutes] have not been of relevance in Te Urewera, because of the Crown's limited presence in the area until relatively recently.'¹²⁹⁰ The most relevant of the early statutes was the Water-power Act 1903 and its successors, under which the Crown modified Lake Waikaremoana and the waterways of the four southern blocks from the 1920s to the 1940s (see chapter 20). Hydro development was not an issue again until the

1287. Waitangi Tribunal, *Whanganui River Report*, p21; see also Michael Roche, *Land and Water: Water and Soil Conservation and Central Government in New Zealand, 1941-88* (Wellington: Department of Internal Affairs, 1994), chapter 1

1288. See Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 3, pp1112-1120, 1154-1159.

1289. Waitangi Tribunal, *Whanganui River Report*, p 20

1290. Doig, 'Te Urewera Waterways' (doc A75), p168

1970s, when the Crown granted water rights for the Aniwhenua and Wheao power schemes.¹²⁹¹

Apart from the specific issue of hydroelectric development, the Crown's assumption of control over the rivers of Te Urewera began in the 1940s, after the consolidation scheme and the Crown's decision to repurpose most of Te Urewera for water and soil conservation. Dr Doig summarised the main developments as follows:

Since the title reorganisation under the Urewera Consolidation Scheme, there has been little further alienation of riparian land within Te Urewera. Nevertheless, the rights of Urewera Maori have been eroded further in that time by the transfer of almost all rights of control and management in rivers and waterways to the Crown, through legislation such as the Soil Conservation and Rivers Control Act 1941, Water and Soil Conservation Act 1967, Conservation Act 1987, and Resource Management Act 1991. In many ways, the provisions of these Acts have made the question of riverbed ownership almost irrelevant, because they have allowed the Crown to assume extensive management rights over rivers regardless of underlying ownership.¹²⁹²

The Soil Conservation and Rivers Control Act 1941 was introduced to address some of the erosion and river control problems which were becoming more apparent in New Zealand by that time. The worsening environmental effects of 'over-extensive forest clearance in vulnerable catchments' could no longer be denied.¹²⁹³ We discussed this Act in chapter 18, where Government restrictions on timber milling in Te Urewera were the primary issue. In respect of rivers, the 1941 Act gave the Crown 'extensive and exclusive powers to control and manage all rivers and waterways regardless of who had riparian rights or riverbed ownership.'¹²⁹⁴ In particular, the Act was aimed at empowering the Crown to control and manage rivers for the prevention of flooding and erosion. The Crown established catchment boards or commissions as the means to exercise this newly acquired authority. Control of each river had to be formally vested in a board or commission by notice in the Gazette.¹²⁹⁵

According to Suzanne Doig's research, however, control of the rivers draining northwards to the Bay of Plenty was not formally vested in a catchment commission, although the Bay of Plenty commission still undertook a 'range of river control activities' – apparently without lawful authority.¹²⁹⁶ This reflected two issues: in Te Urewera, forest cover remained in place in many areas, and so flooding and erosion problems were comparatively minor; and the problems mainly affected Maori communities, which were in part dealt with under the development

1291. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 47–49

1292. Doig, 'Te Urewera Waterways' (doc A75), p 3

1293. *Ibid*, p 197

1294. *Ibid*

1295. *Ibid*, pp 197–198

1296. *Ibid*

schemes, and in part ignored by county councils (who could not collect rates from Maori until the 1960s).¹²⁹⁷

The historical statute of most concern to the claimants in respect of rivers, however, was the Water and Soil Conservation Act 1967, under which the Crown's powers were further entrenched.¹²⁹⁸ This Act preserved the ability of riparian owners to take reasonable quantities of water for domestic and fire fighting purposes and to provide for the needs of animals. Otherwise, landowners' common law rights of exclusive access and use were taken away. All uses of water, other than the domestic and pastoral uses specified above, would henceforth require consent from a regional water board. Authority was delegated to these boards by the Crown, in which was vested 'the sole right to dam any river or stream, or to divert or take natural water, or discharge natural water or waste into any natural water, or to use natural water.'¹²⁹⁹ The system of allocating water rights was placed under the ultimate control of the Water and Soil Conservation Authority. The Tribunal commented in its *Te Kahui Maunga* report that 'It soon became apparent that the Crown had effectively nationalised rights to water.'¹³⁰⁰

The Crown's view of the 1967 Act is that it was an 'exercise of reasonable and good governance' in the management of natural resources, according to a 'hierarchy of interests.'¹³⁰¹ We have already referred to this 'hierarchy of interests', as it was an argument on which the Crown also relied in respect of its management of kereru. Relying on previous Tribunal reports, the Crown submitted there is

a hierarchy of interests in respect of natural resources based on kawatanga and tino rangatiratanga. The first interest is the Crown's obligation or duty to control and manage those resources in the interests of conservation and in the wider public interest. Then comes the tribal interest in the resource, ahead of the rest of the public.¹³⁰²

In our view, Maori rights and interests were neither considered nor provided for in the Water and Soil Conservation Act 1967, certainly not ahead of the rest of the public. The Treaty was discussed briefly by the interdepartmental committee that reviewed arrangements for water in 1965, as we outlined above. But Maori values and interests were conspicuous by their absence from the Act's long title, which enumerated the interests to be balanced and protected:

An Act to promote a national policy in respect of natural water, and to make better provision for the conservation, allocation, use and quality of natural water, and for promoting soil conservation and preventing damage by flood and erosion, and for promoting and controlling multiple uses of natural water and the drainage of land,

1297. Ibid, pp 197–199, 202–204

1298. Counsel for Tuawhenua, appendix to closing submissions (doc N9(a)), pp 117–118

1299. Water and Soil Conservation Act 1967, s 21

1300. Waitangi Tribunal, *Te Kahui Maunga*, vol 3, p 1009

1301. Crown counsel, closing submissions (doc N20), topic 29, p 45

1302. Ibid, p 12

and for ensuring that adequate account is taken of the needs of primary and secondary industry, water supplies of local authorities, fisheries, wildlife habitats, and all recreational uses of natural water.

An amendment in 1981 replaced the words ‘water supplies of local authorities, fisheries, wildlife habitats, and all recreational uses of natural water’ with ‘community water supplies, all forms of water-based recreation, fisheries, and wildlife habitats, and of the preservation and protection of the wild, scenic and other natural characteristics of rivers, streams, and lakes’.¹³⁰³ The Treaty and Maori rights and interests were still not mentioned. This was despite the inclusion four years earlier, in the Town and Country Planning Act 1977, of the Maori relationship with their ancestral lands and waters (as a matter to be recognised and provided for).¹³⁰⁴ It was not until 1987, after the High Court’s decision in *Huakina Development Trust v Waikato Valley Authority*,¹³⁰⁵ that ‘consideration of Maori matters became a requirement under the Act’.¹³⁰⁶ As is well known, the 1967 Act itself was replaced soon after by the Resource Management Act in 1991.

The *Huakina* decision applied to water use rights. For water conservation orders, however, the Planning Tribunal held that the Treaty and Maori values could not be taken into account under the Water and Soil Conservation Amendment Act 1981.¹³⁰⁷ National water conservation orders were a new development in 1981, created by this amendment Act. Their purpose was to protect or preserve outstanding rivers, lakes, and streams. The criteria to be taken into account when granting water conservation orders were:

- ▶ all forms of ‘water-based recreation, fisheries, and wildlife habitats’;
- ▶ the ‘wild, scenic, or other characteristics’ of the waterway;
- ▶ the ‘needs of primary and secondary industry, and of the community’; and
- ▶ any relevant local government planning schemes.¹³⁰⁸

The legislative scheme was ‘geared towards Pakeha needs and did not give any protection to Maori interests in the rivers of Te Urewera’.¹³⁰⁹ No Te Urewera waterways were granted conservation orders. Dr Doig commented:

The whole process was an indication of some of the problems faced by Maori who wished to be involved in rivers management and protection. While a protection mechanism existed, its operation was governed almost entirely by Pakeha values and interests in the rivers. Matters of particular importance to Maori were not taken into

1303. Water and Soil Conservation Amendment Act 1981

1304. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, vol 3, p 1119

1305. *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188

1306. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 62

1307. Doig, ‘Te Urewera Waterways’ (doc A75), p185; Waitangi Tribunal, *Mohaka River Report*, pp59–60

1308. Waitangi Tribunal, *Mohaka River Report*, p 59

1309. Doig, summary of ‘Te Urewera Waterways’ (doc F6), p 11

account, and there was no consultation whatsoever with tangata whenua over the assessment of waters and the implementation of protection mechanisms.¹³¹⁰

In 1984, the Tribunal's *Report on the Kaituna River Claim* recommended that the Water and Soil Conservation Act be amended to enable proper account to be taken of Maori spiritual and cultural values.¹³¹¹ In 1985, the Tribunal's *Report on the Manukau Claim* agreed that the Act was 'monocultural legislation', and that Maori interests were treated as if they were no greater than those of the general public. The Tribunal recommended special recognition and an appropriate measure of priority for Maori Treaty fishing rights.¹³¹² The Mohaka River Tribunal also found the Act in breach of Treaty principles in 1992,¹³¹³ but by that time the 1967 legislation had been replaced by the RMA 1991.

We do not accept the Crown's submission that the 1967 Act put the Crown's interest in conservation of the resource first, the tribal interest second, and the general public third. We consider the Treaty implications in section 21.17.

21.16.7.3 *The historical control and management of rivers in Te Urewera*

21.16.7.3.1 GRAVEL EXTRACTION, EROSION, FLOOD PROTECTION, POLLUTION

As we noted earlier, the Crown has made a concession in respect of its historical management of rivers. Crown counsel accepted that the evidence showed that 'until relatively recently, the Crown conducted limited consultation in respect of river management issues on gravel extraction and flood control'.¹³¹⁴ Gravel extraction had two dimensions: the first was the issue of riverbed ownership, which we have already discussed. As we have seen, the Crown licensed gravel extraction and the levying of a royalty on the basis that rivers were navigable, had marginal strips along their banks, or belonged to the Crown *ad medium filum*. Crown counsel argued that Government agencies acted in the bona fide belief that the riverbeds were Crown-owned, although it was accepted that there were occasions on which this 'may not have been the case'. No compensation was paid to Maori riparian owners when a Government agency acted on the 'bona fide' belief of Crown ownership.¹³¹⁵ But, as we have explained, the question of riverbed ownership is riven with uncertainties, a point which was debated by the interdepartmental committee in the 1960s and by the law reform committee and Government departments in the 1980s. In particular, the Crown (and local government bodies acting on its behalf) have denied royalties to Maori riparian owners on the basis of very casual and apparently incorrect assessments of navigability. The view put forward in the

1310. Doig, 'Te Urewera Waterways' (doc A75), p 188

1311. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 33

1312. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (Wellington: Waitangi Tribunal, 1989), p 86

1313. Waitangi Tribunal, *Mohaka River Report*, p 66

1314. Crown counsel, closing submissions (doc N20), topic 37, p 3

1315. *Ibid*, topic 30, p 17



Unknown (Whakatane District Museum and Gallery, 4259)

Workers dredging shingle from the Horomanga River, 1932

1970s that the Ohinemataroa River, for example, was navigable because of recreational use by jetboats was controversial at the time. The Supreme Court's recent decision in *Paki* holds that recreational use provides only supporting evidence, not proof, that a river might be navigable.

The claimants were concerned that the Crown has appropriated the profits of gravel extraction by claiming ownership of their rivers, even where Maori landowners might have had riparian rights (let alone customary rights). Gravel extraction was very limited in the national park. Outside the park, Dr Doig's evidence showed that large quantities of gravel have been removed from Te Urewera rivers since the 1960s, mainly by local government bodies and the Ministry of Works. Considerable royalties paid to the Crown have sometimes been used to help finance river works, and at other times the Crown has waived its royalty. A 1963 investigation showed a lack of precision in authorising and monitoring gravel extraction at Ruatoki. From the evidence available to us, this situation persisted until the passage of the RMA in 1991. From one perspective, this means that there was a casual attitude towards which rivers or parts of rivers were privately owned, which parts of a river the Crown had authorised for gravel extraction, and whether royalties were owed to anyone other than the Crown. From another perspective, it also meant that the environmental impacts of gravel extraction were also treated somewhat casually.¹³¹⁶

In the claimants' view, gravel extraction has been poorly administered and monitored, resulting in erosion and degradation to rivers and riparian lands in Te Urewera. As we noted above, the Crown has conceded that consultation before 1991 was inadequate for river management, including gravel extraction and flood

1316. Doig, 'Te Urewera Waterways' (doc A75), pp 220–236

protection. As the owners of many riparian blocks, Maori in Te Urewera have been particularly vulnerable to river changes, with a corresponding need to have a significant degree of control over decisions about river management.

In 1977, the National Water and Soil Conservation Organisation wrote a damning paper about the 'fragmented' administration of gravel extraction, which had resulted in uncontrolled takings and in 'many cases' had caused erosion and flooding.¹³¹⁷ Whether or not the system was improved nationwide, Environment Bay of Plenty commented in 2001 that, prior to the RMA in 1991, both 'the licensing and control of gravel excavation was carried out on a somewhat ad-hoc basis' in this area.¹³¹⁸ There was 'very little monitoring of the amount of gravel taken, the places it was taken from, and the effects on the rivers'. As Dr Doig observed, in 1980:

The Bay of Plenty Catchment Commission could not quantify the amount of gravel taken from rivers in the area because it did not know how much was being taken under authorities issued by other government departments. Nor could it give any indication of the size of the natural resource, or provide any information on natural shingle movements in rivers.¹³¹⁹

It seems clear that poor monitoring of gravel extraction contributed to erosion before the RMA, but we can only make that finding at a general level. The claimants, for example, showed us a section of the Ohinemataroa River which, they believed, had been substantially altered in its course by gravel extraction. But we do not have detailed evidence about the impacts of the extractions on particular rivers or Maori riparian land.

Erosion, flooding, and the lack of flood protection were issues long before gravel extraction began in earnest in the early 1960s. Dr Doig's evidence focused on the former territories of the UDNR, where the rating exemption meant that local bodies took little or no interest in flood protection for Maori communities before the 1960s. Maori riparian owners, often with small, uneconomic sections, could not afford the construction of flood protection works without assistance. Nor could they move their cultivations and settlements, as they would have done before tenure conversion and massive land loss took away this customary flexibility. It was a dilemma: river access was important to cultural and economic survival, but the rivers of Te Urewera were prone to erosion. Farming, commercial forestry, and the introduction of new browsing species such as deer and possums exacerbated the problem in parts of the inquiry district.¹³²⁰

The claimants blamed the Crown for some of these causative factors, including the effects of introduced species and State forestry on rivers, but the key issue here

1317. National Water and Soil Conservation Organisation, 'Control of Sand and Gravel Extraction: Background Paper' (Doig, supporting papers to 'Te Urewera Waterways' (doc A75(a)), pp 264, 266–267)

1318. Environment Bay of Plenty, *Operative Regional River Gravel Management Plan* (Whakatane: Environment Bay of Plenty, 2001), sec 3.3 (Doig, 'Te Urewera Waterways' (doc A75), p 226)

1319. Doig, 'Te Urewera Waterways' (doc A75), pp 226–227

1320. *Ibid*, pp 192–213; Doig, summary of 'Te Urewera Waterways' (doc F6), pp 11–12

is not so much the Crown's degree of responsibility for erosion and flooding.¹³²¹ Rather it is:

- ▶ the way in which it managed the problem (having given itself exclusive powers and responsibility to do so under the 1941 and 1967 Acts); and
- ▶ the assistance it provided in the form of flood protection works.

For Maori riparian owners in Te Urewera, the only help forthcoming before the 1960s was on the development schemes. According to Dr Doig's evidence, flood protection was not a priority for the Native Department administering the schemes. The works that were done became a financial burden on the owners and unit occupiers, and they do not appear to have been very successful.¹³²²

Despite protests to the department and requests for specialist assistance in designing protection works, no action was taken, and protection against bank erosion remained a very low priority for scheme managers, 'even though large parts of some dairy units were being washed away'.¹³²³ There was confusion over responsibility as the Native Department believed it was the job of the Department of Public Works to build protection works.¹³²⁴ Damage was 'allowed to accumulate until it became virtually uneconomic to address the problem': 'When the Bay of Plenty Catchment Commission took over management, 730 acres of river flats in the upper Whakatane had become unproductive, and 460 acres on the Waimana River had been subject to erosion.'¹³²⁵ For Maori land, the Whakatane County Council did not take responsibility for bank protection works and other river management functions until about 1964. By then, as we discuss in more detail in chapter 23, the rates exemption was ended. This made the 'more developed riparian blocks' rateable. Overall responsibility for rivers in the district, however, was assumed by the Bay of Plenty Catchment Commission. It found that the large amount of Maori land on the banks of the Ohinemataroa (Whakatane) and Tauranga (Waimana) Rivers was a significant factor in the problems that had developed with erosion. Much of the erosion on these waterways was on Maori-owned land on the upper rivers (above Ruatoki), according to the commission's engineer.¹³²⁶ The quantity of Maori land 'posed a problem in considering a flood protection scheme for these rivers, because the small block sizes and fragmented titles made it difficult to raise rates on the land – many blocks were unproductive and uneconomic, or had been overexploited by lessees.'¹³²⁷ One of the ongoing problems of using bank protection works was that 'they were expensive for riparian landowners and needed to be maintained and repaired over time, often at great cost.'¹³²⁸ A capacity to contribute effectively in the struggle against erosion was dependent on having commercially

1321. Nikora, brief of evidence (doc 140), p7; McGarvey, brief of evidence (doc 133), p6; counsel for Wai 36 Tuhoë, closing submissions, pt B (doc N8(a)), p196

1322. Doig, 'Te Urewera Waterways' (doc A75), pp 202–204

1323. *Ibid*, p 203

1324. *Ibid*

1325. *Ibid*

1326. *Ibid*, p 204

1327. *Ibid*

1328. *Ibid*, p 209

viable property from which costs could be deducted to combat environmental degradation.

The land retained by Maori owners was not generally so productive or was too small in individual parcel size to allow their effective participation in decision-making around funding for erosion protection. Basically, the peoples of Te Urewera were not able to bring financial pressure to bear on the catchment boards and regional councils because their landholdings were not significant enough to have implications for funding decisions. As Dr Doig commented in relation to the process that led to this result, ‘the ongoing process of individualisation of title, either through the consolidation schemes or ordinary Native Land Court processes, made it increasingly hard for hapu or iwi to maintain their customary or Treaty rights to waterways.’¹³²⁹ We have no information as to whether the process of recollectivising in the 1970s, and the creation of tribal trusts for amalgamated or aggregated lands, made a difference in this respect. As we noted earlier, the trustee arrangements for Tuhoe Kaaku were not finalised until the 1990s, and arrangements for Ruatahuna blocks were also long-delayed and still not complete by the end of that decade.

We have general evidence, therefore, that Maori riparian land in the inquiry district was particularly vulnerable to erosion and flooding, but received limited assistance from the agencies in which the Crown had vested absolute control of river management and flood protection works. Maori were seldom consulted and had little or no power to influence decision-making. According to Dr Doig, any consultation that did occur was limited to riparian landowners, not Maori communities or tribal authorities more generally. But we do not have detailed evidence as to flood protection (or the lack of it) for particular rivers or Maori communities in Te Urewera. Dr Doig’s evidence suggests that coastal farmland was the priority area for the Bay of Plenty Catchment Commission’s protection works. Most Maori riparian land in Te Urewera was left out of the major protection works constructed in the 1960s and 1970s, although Ruatoki, Waimana, and other areas did obtain some benefit. For Ruatoki, she reported that protection works were not being maintained by the 1990s because the Maori riparian owners simply could not afford it.¹³³⁰

Waikirikiri kaumatua Hori Thrupp spoke of the toll that erosion had taken on Maori riparian land at Ruatoki. He told us:

Our lands that have been carried away by the river or covered in shingle are as follows—Ruatoki A63 Pita Pouwhare whanau, Ruatoki A64 Noho Te Wharau whanau, Ruatoki A65 Kewene Reha whanau, Te Awatapu, Matai, Ngautoka, Poutere, Hauruia, Waitapu, Toketehua, Onuitera, Otaurangi, Ohinenaena, Te Rautao, Te Tapapatanga, Tapuiwahine, Hokowhita a Tu.

1329. Doig, summary of ‘Te Urewera Waterways’ (doc F6), p 5

1330. Doig, ‘Te Urewera Waterways’ (doc A75), pp 201–209; Doig, summary of ‘Te Urewera Waterways’ (doc F6), pp 9, 12

Ruatoki A64 (13 acres) and A65 (41 acres) has been completely devastated by the river. My daughter has to continue paying rates on the whole of those blocks notwithstanding that most of the land has been carried away by the river. Despite all that, we still consider the river belongs to us and that we still own the land that has been overtaken by the river and the shingle.¹³³¹

We see a bitter irony in the fact that, as Brenda Tahi put it, the claimants faced forestry restrictions that required them to ‘sacrifice development of the Urewera for the public good’, so as to prevent erosion and flooding of low lying Pakeha farmland.¹³³² The water and soil conservation laws were used against them to achieve that end (see chapter 18), yet they received little benefit from those laws or from flood protection measures for their own riparian lands.

Another matter, on which we have even less evidence in respect of particular rivers, is the issue of pollution. According to Dr Doig, river pollution has certainly occurred in Te Urewera due to ‘run-off from sprays and fertilisers, pest-control poisons, human waste, farm effluent, storm-water pollution and leaching from riverside dumps around the townships, and unwanted plant invasions.’¹³³³ The dominance of the national park and forestry in the inquiry district means that pollution from towns and farms has mostly been limited to the fringes of the district. Inside the park, the claimants were particularly concerned about pollution of waterways by human waste and pest-control poisons, but their evidence was focused more on Lake Waikaremoana than the rivers running through the park. Dr Doig’s research on this issue concentrated on the period since 1991. We are unable to draw any conclusions about river pollution before the RMA, except to say that some pollution occurred, and Maori had – as with other aspects of river management – little or no say in how it was managed or rectified.¹³³⁴

21.16.7.3.2 THE IMPACTS OF THE CROWN’S HYDRO SCHEMES

The impacts of hydro development were felt in two parts of our inquiry district. The Matahina, Aniwhenua, and Wheao power schemes have already been dealt with by the Tribunal in its *Te Ika Whenua River Report*. We received no new evidence that would cause us to reconsider the findings of that Tribunal in respect of the hydro schemes and their impacts.¹³³⁵

The other relevant power scheme was the Waikaremoana scheme, which we described in chapter 20. The Tuai phase of the scheme was constructed in the 1920s. It used the fall of water between Lake Kaitawa, which is located about a kilometre from Lake Waikaremoana, and the Whakamarino Flat, a swampy, eel-rich area which was converted into an artificial lake. From 1938 to 1943, the

1331. Hori Thrupp, brief of evidence, 13 January 2005 (doc J41(a)), p 4

1332. Brenda Tahi, summary of evidence on behalf of the Tuawhenua Research Team, 10 May 2004 (doc D19), pp 8–9

1333. Doig, ‘Te Urewera Waterways’ (doc A75), pp 161–162

1334. Ibid, pp 161–167; Doig, summary of ‘Te Urewera Waterways’ (doc F6), pp 9, 15

1335. See Waitangi Tribunal, *Te Ika Whenua Rivers Report*, chapters 5–6, 9–11.

lower (Piripaua) phase was constructed, running from the newly created Lake Whakamarino down to the lower courses of the Waikaretaheke River. This was followed by the upper (Kaitawa) phase, on which work began in 1943. Previously, water from Lake Waikaremoana had been the source of power but had not been actively controlled at the lake itself. In the 1940s, as we described in chapter 20, a tunnel was constructed to lower the lake and divert its waters from the natural outlet (the Waikaretaheke River) through a kilometre of tunnels and penstocks, directly to Lake Kaitawa. That stretch of the Waikaretaheke River is now usually dry, especially after the sealing blanket was constructed to stop the leaks. The siphons are used to spill water into the dry bed if the lake levels become too high. Previously, water had spilled over the lake's natural barrier into the river about half of the time, and it had also seeped through the cracks into the river, so water flows varied considerably. After the hydro works in the 1940s, water re-entered the Waikaretaheke River 'at the point of the river's diversion into Lake Kaitawa' (see map 21.2). Lake Kaitawa, originally about a hectare in size, became six hectares after its enlargement for hydroelectricity.¹³³⁶

The effects on the river were also considerable south of Lake Kaitawa as far as the Piripaua power station. The stretch of the river between Lake Whakamarino and Piripaua 'alternated between being dry and being used as a short term discharge channel'.¹³³⁷ The Kahui Tangaroa (also known as Kahutangaroa) River has had its waters diverted and is now partly dry. The diversion of the Mangaone Stream made this stream bed dry as well, but it was cancelled in 1998 after resource consents were refused. We have no information as to whether negotiations to resume the Mangaone Diversion (under way at the time of our hearings) have been resolved.¹³³⁸

As noted earlier, our jurisdiction is limited, in respect of the four southern blocks, to the 'Crown's actions in relation to all the hydro-electric structures and works in Lake Waikaremoana or near the Lake involving waters taken from it, . . . irrespective of the date of the alleged breaches'.¹³³⁹ This encompasses the hydro scheme from the lake's edge to Piripaua, but not south of that power station.

Garth Cant and Robin Hodge explained that the resources of the upper Waikaretaheke Valley were crucially important to its local Maori communities, especially once Ngati Ruapani had to live there permanently after evacuating their northern Waikaremoana lands in the wake of the Urewera Consolidation Scheme. Significant numbers of Ruapani, Tuhoe, and Ngati Kahungunu whanau were living on small riverside reserves at the time of the hydro scheme. The valley's rivers, streams, and wetlands were more productive than Lake Waikaremoana or Lake Waikareiti in terms of mahinga kai (food gathering places), and the people were

1336. Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), pp 17–18, 147–160

1337. Cant, Hodge, Wood, Boulton, and Innes, 'Evidence of Cant and Hodge' (doc H11), p 17

1338. *Ibid.*, pp 15–18; Cant, Hodge, Wood, and Boulton, 'The Impact of Environmental Changes on Lake Waikaremoana' (doc D1), p 240

1339. Waitangi Tribunal, memorandum (paper 2.32), p 9



Whites Aviation Ltd (ATL, Whites Aviation Collection, WA-46437-G)

Lake Whakamarino with Lake Waikaremoana behind, 1958. Lake Whakamarino was created when the Whakamarino Flat was flooded in the Piripaua stage of the Waikaremoana hydro scheme. The creation of the scheme disrupted the normal flow of the upper Waikaretaheke Valley waterways, and it had significant effects on the ability of fish and eels to migrate through the upper valley catchment area.

dependent on those resources for the subsistence component of their economy. The employment provided by the hydro works proved useful but transitory.¹³⁴⁰ As we noted earlier, there is considerable evidence that the peoples of this valley continued to use the rivers and fisheries as they had before the sale of the four southern blocks, until the hydro scheme interrupted a significant part of their customary resource-use and way of life. When the hydro works were completed and the employment dried up, Maori communities 'were faced with the choice of moving

1340. Cant, Hodge, Wood, Boulton, and Innes, 'Evidence of Cant and Hodge' (doc H11), p 15

elsewhere for employment or remaining in the valley with a *greatly reduced subsistence base*' (emphasis added).¹³⁴¹

The Waikaretaheke and its tributaries were also of crucial ecological importance because this river system was the connection between Lake Waikaremoana and the sea. For the indigenous fish species that 'migrate to and from the sea', especially eels, this was their pathway.¹³⁴² Garth Cant and Robin Hodge argued: 'the negative impacts were greatest in the case of the upper Waikaretaheke River. The bed became dry for most of each year, habitat was lost and the migration path for eels and other species was interrupted.'¹³⁴³ Overall, there was a significant loss of habitat and mahinga kai as a result of the drying up or significant reduction of water in rivers and streams, and through the stopping of fish migration. Cant and Hodge commented that the quantity and quality of flora as well as fauna diminished, both in the waterways and on their banks.¹³⁴⁴ The new lakes, however, probably continued to be fished as intensively as the wetlands they replaced, although they were now 'land locked' and with fewer species – Lake Whakamarino, for example, was fished by Ngati Ruapani. Maori continued to exercise their customary fishing rights wherever and whenever the new, diverted waterways allowed.¹³⁴⁵

The claimants told us that there were significant spiritual and cultural consequences to the hydro works. As we discussed in chapter 20, the claimants were very concerned about Haumapuhia, the taniwha who had been turned to stone and who resided in the upper part of the Waikaretaheke River. Haumapuhia was buried in a landslide at the time of the construction works (see chapter 20). Her lament is no longer heard.¹³⁴⁶ Maria Waiwai and others spoke in our hearings of the cultural loss when a taonga is destroyed; when their rivers and streams ran dry, it was a spiritual blow to the kaitiaki of those taonga and damaging to their tribal community. The loss of a renowned food source was also a blow to the survival of the community, culturally and economically.¹³⁴⁷

James Waiwai explained:

One of the most obvious ways that the Hydro Power Dams have impacted upon our people is that they have changed the natural flow of the rivers, and thus changed the natural cycles of our food sources that depend on those rivers. There are strong reasons why our people live near water – we live here for our spiritual and physical sustenance. We are all connected, we all rely on each other. When you change one part of us, it flows through to all our other parts.¹³⁴⁸

1341. Ibid

1342. Ibid

1343. Ibid, p16

1344. Ibid, pp16–18

1345. Waiwai, brief of evidence (doc H14), pp 23–25

1346. Taylor, brief of evidence (doc H17), p13

1347. Waiwai, brief of evidence (doc H18), pp 4–6

1348. Waiwai, brief of evidence (doc H14), pp 23–24

Eels were the main source of protein for the communities living at Waimako and Te Kuha, according to the evidence of James Waiwai.¹³⁴⁹ In the late 1990s, a programme was finally instituted to try to reverse the harm to the migration cycle of the eels. Cant and Hodge explained at a hearing in 2004:

By 1996 . . . no eels were present beyond the diversion dam at Kaitawa. The results of a capture and release programme, organised jointly by iwi and power generating authority have yet to be evaluated. An eel management plan is still in preparation. Only within the last decade have steps been taken to restore this much-depleted habitat.¹³⁵⁰

We have no information as to whether the eel management plan is succeeding in restoring the migration of eels between Lake Waikaremoana and the sea.

Counsel for Wai 144 Ngati Ruapani submitted: ‘Without title to the Lake and associated river systems the Crown authorised and constructed the Tuai Power Scheme without consulting the hapu of Waikaremoana.’¹³⁵¹ The evidence supports the claimants’ view that the hydro scheme was conceived and executed without consulting the peoples of Te Urewera – indeed, the Kaitawa phase was constructed almost in defiance of them, because the tunnelling was under way even as the Native Appellate Court sat in 1944 to decide who owned the lakebed (see chapter 20). We also agree with the claimants that the scheme had significant detrimental effects on them and their taonga, the rivers and fisheries, which is demonstrated in the evidence of Cant and Hodge, Maria Waiwai, James Waiwai, Des Renata, and several others.

The Crown accepted that hydro works on the Waikaretaheke River had ‘affected the ability of tangata whenua to conduct traditional fishing activities’, and had restricted eel migration.¹³⁵² Crown counsel noted, however, evidence that reduced flows *below* the Piripaua power house have aided the migration of some species, such as inanga, up the Waikaretaheke River. The point was also made that the removal of forest cover has had effects on indigenous fish as well, independently of the power scheme. Further, Crown counsel emphasised the RMA consents process in the mid-1990s, which produced the eel management plan and discussions between Electricorp and Maori groups about river flows (among other things), before the consents were granted. Since the RMA process, Electricorp and its successor Genesis have worked with iwi to help restore the eel fishery.¹³⁵³ The claimants made no submissions about the RMA process in the 1990s, but they did accept that there was now at least a plan in place to try to restore the eel fishery.¹³⁵⁴ Its success was uncertain at the time of our hearings in 2005, with the claimants pointing

1349. Waiwai, brief of evidence (doc N14), p 24

1350. Cant, Hodge, Wood, Boulton, and Innes, ‘Evidence of Cant and Hodge’ (doc N11), p 18

1351. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 65

1352. Crown counsel, closing submissions (doc N20), topic 30, p 16; topic 28, p 15

1353. *Ibid*, topic 28, pp 15, 16–17

1354. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, p 81

to technical evidence that ‘the measures may be “insufficient to repair the damage” caused to the fisheries by the dams over the years.’¹³⁵⁵

The Crown’s overall submission was that modern effects can be appropriately managed through RMA processes. For historical effects, ‘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.’¹³⁵⁶ We think that the Crown rightly acknowledged the impact on customary fisheries, but cannot escape its Treaty obligations to the peoples of Te Urewera by invoking the national interest in electricity. We return to that point when we make our Treaty findings.

Here, we note the claimants’ submissions that they received no benefit from the use of their taonga, the rivers, to generate hydroelectricity in the national interest. Ngati Ruapani urged us to apply the findings of the Te Ika Whenua Rivers Tribunal, that the Maori owners of the Waikaremoana river system were ‘entitled to have had conferred on them in 1840 a proprietary interest in the rivers that could be practically encapsulated within the legal notion of the ownership of the waters.’¹³⁵⁷ We have already noted our agreement with this finding above, in respect of the western rim blocks and the Rangitaiki, Whirinaki, and Wheao Rivers. We agree with the Ngati Ruapani claimants that the same finding should be made for the Waikaremoana river system.¹³⁵⁸ It should indeed be made for all the rivers of our inquiry district. This accords with our findings in respect of the use of Lake Waikaremoana for hydroelectricity without permission or compensation (see chapter 20). The Crown argued that ‘rivers, as opposed to the water within rivers, are the focus of cultural importance.’¹³⁵⁹ Without the water, however, the river is simply a dry bed, as Maria Waiwai’s evidence so poignantly reminded us.¹³⁶⁰ We agree that the claimants’ taonga were indivisible water bodies. The use of those water bodies to generate electricity for the national benefit should have been compensated. That is quite apart from any compensation due, morally if not legally, for the harm done to their waterways and fisheries by the scheme.

We turn next to consider the control and management of customary fisheries in more detail.

21.16.7.3.3 MANAGING CUSTOMARY FISHERIES

Customary fisheries are a taonga, the importance of which cannot be overstated. The claimants referred us to the findings of the Muriwhenua Fishing Tribunal, which they felt had a wider significance in explaining the relationship of the peoples of Te Urewera with all the natural gifts of the environment, including fisheries.¹³⁶¹ The Tribunal found:

1355. *Ibid*, p 123

1356. Crown counsel, closing submissions (doc N20), topic 28, p 17

1357. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 68

1358. *Ibid*, pp 63–68; app A, pp 110–112

1359. Crown counsel, closing submissions (doc N20), topic 30, p 23

1360. Waiwai, brief of evidence (doc H18), pp 4–6

1361. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 135–138

In the Maori idiom 'taonga' in relation to fisheries equates to a resource, to a source of food, an occupation, a source of goods for gift-exchange, and is a part of the complex relationship between Maori and their ancestral lands and waters. The fisheries taonga contains a vision stretching back into the past, and encompasses 1,000 years of history and legend, incorporates the mythological significance of the gods and taniwha, and of the tipuna and kaitiaki. The taonga endures through fluctuations in the occupation of tribal areas and the possession of resources over periods of time, blending into one, the whole of the land, waters, sky, animals, plants and the cosmos itself, a holistic body encompassing living and non-living elements.

This taonga requires particular resource, health and fishing practices and a sense of inherited guardianship of resources. When areas of ancestral land and adjacent fisheries are abused through over-exploitation or pollution the tangata whenua and their values are offended. The affront is felt by present-day kaitiaki (guardians) not just for themselves but for their tipuna in the past.

The Maori 'taonga' in terms of fisheries has a depth and breadth which goes beyond quantitative and material questions of catch volumes and cash incomes. It encompasses a deep sense of conservation and responsibility to the future which colours their thinking, attitude and behaviour towards their fisheries.

The fisheries taonga includes connections between the individual and tribe, and fish and fishing grounds in the sense not just of tenure, or 'belonging', but also of personal or tribal identity, blood and genealogy, and of spirit. This means that a 'hurt' to the environment or to the fisheries may be felt personally by a Maori person or tribe, and may hurt not only the physical being, but also the prestige, the emotions and the mana.

The fisheries taonga, like other taonga, is a manifestation of a complex Maori physico-spiritual conception of life and life's forces. It contains economic benefits, but it is also a giver of personal identity, a symbol of social stability, and a source of emotional and spiritual strength.

This vision provided the mauri (life-force) which ensured the continued survival of the iwi Maori. Maori fisheries include, but are not limited to a narrow physical view of fisheries, fish, fishing grounds, fishing methods and the sale of those resources, for monetary gain; but they also embrace much deeper dimensions in the Maori mind . . .¹³⁶²

For all tangata whenua, as this excerpt makes clear, indigenous fish are much more than particular classifiable species that may be used as a food resource. Claimants in our district have noted, for example:

One of the Ngai Tamaterangi tohunga was Rongo Hema. He was the tohunga for the Waiiau River. Rongo ensured that the Waiiau River and its users were protected. All fishing was undertaken depending on the signs and seasons and fishing of particular

1362. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), pp 180–181

species could only be undertaken in certain months of the year. Karakia were an integral part of fishing and the first fish was always returned.¹³⁶³

As we explained earlier in the chapter, the single biggest threat to the customary fisheries of Te Urewera has been the introduction of trout. Predation by trout, or competition by trout for food supplies, had a destructive effect on many of the indigenous fish species of our inquiry district. In the first half of the twentieth century, the evidence is clear that the management of fisheries by Government departments exacerbated this problem, because it was essentially management to protect a Pakeha sport fishery. This mostly consisted of constant introductions of trout ova into the rivers of Te Urewera over many decades, licensing of anglers, and efforts to eradicate or reduce species that were perceived as a threat to the trout fishery. We have already seen that this resulted in a campaign to wipe out shags at Waikaremoana, and efforts to cull eels in Te Urewera rivers in the 1950s. Commercial eeling served a similar purpose and was encouraged in the 1960s by the grant of free licences.¹³⁶⁴

Alongside the management of what was essentially a trout fishery for anglers, the official attitude to most indigenous species was indifferent (except, as noted, where eels were seen as a threat to trout). In Parliament, the importance of customary fisheries to Maori had been acknowledged many times since the early decades of the twentieth century, but little or no Government action had been taken to protect or conserve those fisheries. Section 83 of the Fisheries Act 1908 had provided for the making of regulations relating to freshwater fish, and under that section (as substituted by the Fisheries Amendment Act 1948), regulations could be made

Prohibiting or imposing restrictions and conditions on fishing in any waters or in any specified part or parts thereof, or the taking of any species of fish therein, and, in the case of indigenous fish, exempting Maoris either wholly, partially, or conditionally, or in respect of any specified waters, from the operation of any such prohibition, condition, or restriction.¹³⁶⁵

In the Legislative Council, the Government explained that the intention of this subsection was to allow the imposition of restrictions on (Pakeha) fishing,

while specifically recognising the existing rights of the Maori in relation to indigenous fish. That is a most important provision, as for many years the Maori people have had

1363. Counsel for Ngai Tamaterangi, third amended statement of claim, 16 April 2004 (claim 1.2.4(a), soc 1), p 68

1364. Doig, 'Te Urewera Waterways' (doc A75), pp147, 159–161

1365. Geoff Park, *Effective Exclusion?: An Exploratory Overview of Crown Actions and Maori Responses Concerning the Indigenous Flora and Fauna, 1912–1983* (Wellington: Waitangi Tribunal, 2001) (Wai 262 RO1, doc K4), p 211

certain rights in regard to the fisheries in our lakes and rivers . . . which will be preserved under that paragraph.¹³⁶⁶

In line with the intentions of the 1948 amendment, in 1951, new Rotorua Trout Fishing Regulations were made for roughly the area covering the Rotorua Acclimatisation District, excluding Taupo. The regulations therefore covered Te Urewera. The section relating to indigenous fish in these regulations was much the same as that in the Freshwater Fisheries Regulations 1951, which covered most of the rest of New Zealand. These general regulations provided for protection of upokororo, probably by that time already extinct, and forbade the intentional killing of small indigenous fish other than elvers in the water, while allowing the taking of whitebait and other small indigenous fish for human consumption and scientific purposes. The Rotorua regulations, however, made an additional provision: 'No person (not being a Maori) shall take from any lake or from any tributary of any lake in the district any small indigenous fish in such quantity that he shall have in his possession more than fifty of such fish at any one time.'¹³⁶⁷ It therefore appears that these regulations meant that only Maori could take an unlimited number of small indigenous fish from lakes and their tributaries in Te Urewera. This shows that, while the 'conservation of all indigenous freshwater fish species and their habitats' only finally appears in a statute in 1983 (section 71(1) of the Fisheries Act 1983), there was an attempt, albeit limited, to protect indigenous fish other than tuna for Maori in Te Urewera from the mid-twentieth century. The exception allowing the culling of elvers, however, was only removed from the regulations in 1977.¹³⁶⁸ Consequently, until that point the fish most important to the peoples of Te Urewera received the least statutory protection from the Crown. As we discussed earlier in sections relating to the introduction of exotic species, tuna (eels) were the most important customary fishery for the peoples of Te Urewera.

For much of our inquiry district, however, the national parks legislation was in force from the late 1950s onwards. This brought a preservationist approach to significant stretches of rivers and their indigenous fisheries. As will be recalled from chapter 16, park lands and waterways were to be preserved as far as possible in their natural state, including the native flora and fauna, while exotic flora and fauna were 'as far as possible' to be exterminated.¹³⁶⁹ In theory, this set the prior Government policy – to protect the trout fishery at the expense of indigenous fisheries – at complete loggerheads with the national park ethos. The National Parks Act 1952, however, allowed the National Parks Authority to make exceptions.¹³⁷⁰ Such an exception was made for trout in Te Urewera National Park, and the park authorities have celebrated trout fisheries as a key part of its 'wilderness fishing

1366. D Wilson, 19 August 1948, NZPD, vol 282, p 1602

1367. Freshwater Fisheries Regulations 1951, part xv; Rotorua Trout Fishing Regulations 1951, cl70; sch 1

1368. Regulations 13 to 16 of the 1977 regulations (1977/268) amended regulations 99 to 102 of the Freshwater Fisheries Regulations 1951.

1369. National Parks Act 1952, s3

1370. Ibid

experience' and 'internationally renowned angling opportunities'. Trout have been classed as a recreational fishery in the national park, and angling was permitted so long as the angler held a licence.¹³⁷¹ On the other hand, the impact of trout on indigenous species has also been acknowledged.

The imposition of the national park on the peoples of Te Urewera could have had a very significant impact on their ability to continue exercising their customary fishing rights. The people had continued to exercise customary rights over the natural resources of Te Urewera between the consolidation scheme in the 1920s and the creation of the park; the 'alienation of land, was of the land only'. It was 'after the National Park was established in the 1950s that conflicts emerged'.¹³⁷² The practical impact on rivers and customary fishing was investigated by Evelyn Stokes, Wharehuia Milroy, and Hirini Melbourne in the mid-1980s. They reported:

Eel fishing is a traditional food collecting activity in most rivers, which is still carried on in traditional ways – spear, eel bob, hinaki and building of weirs. Conflicts with national parks and reserves policy include use of kiekie to make eel bobs, digging up riverbank areas to find worms for bait, and construction of dams or weirs in rivers. As far as local people are concerned, eeling is something they have always done, and they will go on doing it. No permits are required and there is little commercial involvement. The issue is whether any permanent damage is inflicted on the forest resource. It would appear that there is occasional minor disturbance but eel fishing creates few real problems.

Native fish species were never very abundant in the rivers of the higher ranges of Te Urewera and have been largely replaced by exotic trout species introduced in the 1890s. Local people do go fishing [for trout] and it is suspected many do not obtain permits [licences]. For obvious reasons it is not possible to assess the extent of fishing by local people, but it is certainly a significant element in local food-gathering activities. Pressures may increase in river areas flanked by Maori blocks in the Whakatane and Waimana Valleys if there is an increase in numbers of fishermen from outside. Although local people are aware that they cannot prevent public use of rivers, there is still a strong feeling that these areas are Maori and local people should have priority.¹³⁷³

For eeling and trout fishing, therefore, the national park's establishment had little practical effect on how the peoples of Te Urewera exercised their customary rights in rivers, except that it brought more sports anglers to the district. We use the word 'customary' deliberately in respect of trout. As we have discussed earlier in the chapter, trout had been fully integrated into the customary economy before the 1950s; indeed, the survival of Maori communities had been partly dependent on it during the difficult decades after birding restrictions were enforced. The 1895

1371. 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 17, 29, 74, 85–86

1372. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), p 350

1373. *Ibid*, pp 353–354

UDNR agreement had anticipated that the peoples of Te Urewera would manage the trout fishery (as well as their own, indigenous fisheries), but no mechanism was put in place to give effect to that part of the agreement.

As we see it, if Maori had had the management of fisheries in their Reserve, some rivers would likely have been reserved for indigenous species, the constant releases of trout ova would have been balanced more carefully against the interests of indigenous species, and tuna would have been protected, rather than being the subject of eradication attempts. As it was, the peoples of Te Urewera continued to exercise their fishing rights, controlling the customary take by means of rahui and community sanctions, but without the ability to control or influence the fishing of others. In these respects, the national park made little practical difference to customary fishing. The claimants' evidence focused mainly on grievances in respect of plant-gathering and hunting restrictions in the park, although the ability to access the rivers without horses was an issue.¹³⁷⁴

The customary tuna fishery was formally recognised in the national park's 1989 management plan. The Department of Conservation said that it would have 'full regard to the Treaty of Waitangi and the traditional rights of the tangata whenua', and that the 'traditional fishing of eels by the tangata whenua for food and other cultural purposes will be permitted provided the demands are not excessive'.¹³⁷⁵

Suzanne Doig's evidence is that, for species other than eel, trout have devastated the indigenous fisheries of Te Urewera. The Crown has accepted this point in closing submissions. We have already discussed this issue earlier in the chapter. The main issue remaining for discussion here is the significant decline of the eel fishery itself, the most vital of the Te Urewera customary fisheries, and the degree of the Crown's responsibility for that decline.

Global climate change is one factor that is considered significant in different parts of the world, because it has reduced the number of elvers coming into a catchment area from the sea. Three other factors recognised internationally as affecting the number and passage of elvers may all have contributed substantially to a lower eel population in Te Urewera. All of these factors have been largely under the control of the Crown: commercial overfishing; habitat loss; and barriers to migration.¹³⁷⁶ A further factor, the attempted culling of tuna on the grounds that they adversely affected the trout population, was also under the control of the Crown but was mostly limited to the 1950s.¹³⁷⁷

1374. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 189, 194, 197–199; counsel for Tuawhenua, appendix to closing submissions (doc N9(a)), pp 181–182; counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 57, app A, pp 99–100, 138; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 120

1375. Department of Conservation East Coast National Parks and Reserves Board, *Te Urewera National Park Management Plan, 1989–1999* (Rotorua: Department of Conservation, 1989) (Campbell, 'Te Urewera National Park, 1952–75' (doc A60), pp 177, 179)

1376. Electricity Corporation of New Zealand, 'Waikaremoana Power Scheme, Volume 2: Assessment of Effects on the Environment', April 1998, p 125

1377. Doig, 'Te Urewera Waterways' (doc A75), p 147; Stirling, 'Southern Te Urewera Waterways and Fisheries' (doc 19), pp 9–11

In respect of barriers to migration, these have already been discussed in the previous section dealing with the hydro works. According to Dr Doig, indigenous fish and traditional fisheries were almost never considered when hydroelectric construction was planned, except that on occasion the long-standing official view that tuna threatened trout was repeated. This militated against providing eel passes in dam designs.¹³⁷⁸ The failure to consult with Maori about the schemes was crucial here:

the expertise of Maori in river management was not acknowledged or taken into account – any consultation with Maori over the likely environmental impacts of the dams would have raised the issue of the effects of migratory barriers such as dams on the eel population.¹³⁷⁹

Since the late 1990s, serious efforts have been made to provide for eel migration in the Waikaremoana scheme. As noted, the Crown accepts that ‘the building of dams on the main stems of the Rangitaiki and Waikaretaheke Rivers in particular would have affected the ability of tangata whenua to conduct traditional fishing activities.’¹³⁸⁰

The Crown also acknowledged that commercial fishing has had a similar impact.¹³⁸¹ Crown counsel relied on Ministry of Fisheries expert Terry Lynch, whose evidence was:

From the late 1960s commercial fishing for tuna greatly expanded, including within the inquiry area. While the building of dams on the main stems of the Rangitaiki and Waikaretaheke Rivers in particular had a drastic effect on recruitment to the majority of the inquiry area, increased commercial fishing depleted the resident stocks of tuna. In combination these actions did affect the ability of tangata whenua to conduct their traditional fishing activities.¹³⁸²

The Crown’s submission was more limited, noting Mr Lynch’s conclusion that dam construction and commercial fishing had ‘affected the ability of tangata whenua to conduct traditional fishing activities,’ as we discussed above. What Mr Lynch more precisely said was that dam construction ‘had a drastic effect on recruitment [of tuna] to the majority of the inquiry area,’ and that commercial fishing had ‘depleted the resident stocks of tuna.’¹³⁸³ In other words, commercial fishing depleted existing stock and dam construction seriously hindered recovery of the stock. Many claimant witnesses pointed out the decline in their tuna fishery, and the effect that this has had on their mana, their ability to manaaki their manuhiri, and their ability to transmit traditional knowledge and the taonga itself to future

1378. Doig, ‘Te Urewera Waterways’ (doc A75), pp 151–152, 173–174

1379. Ibid, p 174

1380. Crown counsel, closing submissions (doc N20), topic 30, p 16

1381. Ibid

1382. Lynch, brief of evidence (doc M14), p 26

1383. Ibid

generations.¹³⁸⁴ The interests of those wanting dam construction and expanded commercial fisheries were advanced to the detriment of the interests of tangata whenua in their customary fisheries. Neither for dam construction nor for commercial fishing did those involved have to consider the customary fisheries of the peoples of Te Urewera, whether to mitigate any damage caused, or to vary what they did to allow for customary fisheries to operate effectively, or to compensate for any damage caused to customary fisheries. The effect of exclusion of the peoples of Te Urewera from management decision-making, of not being able to exercise authority and control over their fisheries taonga, was to make that taonga more vulnerable to damage from competing interests, within the existing Crown-controlled and regulated regime.

Commercial eeling 'spiked in the early 1980s, and has remained stable since that point'. More recently, a moratorium on new commercial fishing permits has been imposed, and tangata whenua have been allocated quota in our inquiry district.¹³⁸⁵ While we consider modern developments in the next section, we note Mr Lynch's observation about the past fisheries regime:

The claimants have claimed that the rivers are managed for commercial purposes to the exclusion of customary interests. *While in the past this could be claimed to be a reasonable observation*, the steps [now] taken to discharge the Crown's duties to iwi in respect of fisheries are intended to sustainably manage the fishery and properly recognise the customary and commercial interest of tangata whenua in the tuna fishery. [Emphasis added.]¹³⁸⁶

Habitat depletion is a matter on which we have less systematic evidence. Clearly, in the areas where State and private forestry has occurred, it has had an impact on rivers and their fisheries,¹³⁸⁷ although to what extent is unknown. Similarly, flood protection works have changed the course and character of rivers, and farming has also had impacts on the fringes of our inquiry district. In the national park, however, habitat has been preserved as far as possible in its natural state, and this has no doubt benefited indigenous fisheries. Small numbers of a variety of indigenous fish still survive in national park waterways.¹³⁸⁸

The lack of provision for tangata whenua to have input into management decision-making over customary fisheries has led to serious damage and depletion of that taonga. We consider that the Crown has failed until very recently to take appropriate account of the importance of indigenous fish, particularly tuna, to the peoples of Te Urewera. The Crown's failure to manage indigenous fish, other than

¹³⁸⁴. See, for example, Higgins, brief of evidence (doc F31), pp 2–3, 9; Lambert, brief of evidence (doc H57), pp 5–7.

¹³⁸⁵. Lynch, brief of evidence (doc M14), pp 26–31

¹³⁸⁶. Ibid, p 30

¹³⁸⁷. Ohlson, brief of evidence (doc G36), paras 24–29; Doig, 'Te Urewera Waterways' (doc A75), pp 218–220

¹³⁸⁸. Department of Conservation, *Te Urewera National Park Management Plan*, 2003, p17

in ways that have actively encouraged a reduction in tuna populations, appears to have favoured the interests of Pakeha sports fishing above the needs of tangata whenua. Activities associated with agriculture, commercial fishing, and hydroelectricity production have had further significant impacts, almost invariably damaging, on the fisheries taonga.

We note that the Tribunal does not have jurisdiction to consider grievances relating to commercial fishing. It is necessary to weigh the effects of commercial fishing in relation to other factors, as above, but we will make no findings specific to commercial fishing in our Treaty analysis and findings section.

21.16.7.4 Modern river and fisheries management: the RMA era

21.16.7.4.1 POST-1991 FISHERIES MANAGEMENT

The Crown's position in respect of traditional fisheries and their management was that 'tangata whenua interests are taken into account . . . through the fisheries regime'.¹³⁸⁹ The claimants, on the other hand, argued that the modern fisheries management regime was 'insufficient' to ensure that fish stocks – especially tuna – remained at a level suitable for customary harvest.¹³⁹⁰ Two key, overlapping issues arise: the management of customary fishing, and the management of indigenous fish species and their habitats.

Before the Sealords deal in 1992, Maori customary fishing was treated by the Crown as part of recreational fishing, and managed under the amateur fishing regulations. As part of the fisheries Treaty settlement of 1992, the Crown undertook to negotiate a separate set of regulations with Maori to govern customary fishing. These negotiations took several years, resulting in the Fisheries (Kaimoana Customary Fishing) Regulations 1998. At the time of our hearings in 2004–05, however, these regulations only applied to coastal fishing. Freshwater fishing was still administered under the latest version of the amateur fishing regulations, which had been developed in 1986. Thus, the 1998 regulations' provisions for Maori management of customary fishing, and for Maori–Crown decision-making about policy, were not available to the peoples of Te Urewera. From Terry Lynch's description of the two regimes, the one operating in Te Urewera was clearly inferior in recognising Maori rights and authority, a point to which we return below.¹³⁹¹

The Crown's submission that 'tangata whenua interests are taken into account . . . through the fisheries regime' was based on Mr Lynch's evidence, which the Crown understood to be that 'currently tangata whenua play an important role in regulating customary fishing *in rivers* in accordance with the Fisheries (Kaimoana Customary Fishing) Regulations 1998' (emphasis added).¹³⁹² This was a misreading of his evidence. Mr Lynch explained:

1389. Crown counsel, closing submissions (doc N20), topic 30, p14

1390. Counsel for Wai 687 claimant, submissions by way of reply (doc N32), p 4

1391. Lynch, brief of evidence (doc M14), pp 4–18, 26–27

1392. Crown counsel, closing submissions (doc N20), topic 30, pp13–14. The Crown relied on Lynch, brief of evidence (doc M14), pp 7–11.

In the North Island, Regulation 27 of the Fisheries (Amateur Fishing) Regulations 1986 provides the only mechanism for tangata whenua to take freshwater species for customary use. The provisions of the [Treaty of Waitangi (Fisheries Settlement) Act 1992] have not been applied as yet to freshwater species because of recent legal challenges by some iwi to the application of the 1992 Fisheries Deed of Settlement (the Deed) to freshwater fisheries. The Courts have found the Deed to apply to all species including freshwater species managed under the Fisheries Act 1996. The Ministry is making regulations to cover freshwater fisheries in the Rotorua Lakes, and intend to consult iwi in the North Island on the desirability of extending the application of the Kaimoana Regulations to freshwater fisheries.

In the interim, Regulation 27 provides that fishers may take tuna for hui or tangihanga if they hold a permit signed by an authorised representative of a marae committee, Maori committee, runanga or trust board that represents the hapu or iwi that hold manawhenua in the area where fishing will take place. Fishers must mark their gear with their telephone number to enable Fisheries Officers to determine who is fishing and whether they are recreational fishers or authorised customary fishers. They must also report their catch to the person who authorised the customary harvest. The authorised representative must provide quarterly reports to the Ministry to enable the level of customary harvest to be properly taken into account when setting allowances for customary use.¹³⁹³

The claimants did not make any submissions about this situation, either the suitability of the amateur fishing regulations or the desirability of applying the 1998 customary fishing regulations in Te Urewera. Their principal concern at the time of our hearings was the decline of their eel fishery, which had been significantly reduced by the factors described in the previous section, including hydro dams, commercial fishing, and habitat degradation.¹³⁹⁴

Commercial over-fishing and hydro dam barriers were two areas which the Crown could address directly to help restore the customary eel fishery. (Habitat degradation was a more difficult problem, less immediately subject to Crown remedial action.)

On the first of these two areas, Mr Lynch told us that a moratorium on new commercial licences, the allocation of significant quota to tangata whenua, and low tuna stocks had all served to reduce commercial fishing in Te Urewera. Little or no commercial fishing was taking place.¹³⁹⁵ Crown counsel 'point[ed] to' this evidence as one of the 'circumstances' to be considered in evaluating the impact of trout and other causes of damage to native fish populations.¹³⁹⁶

1393. Lynch, brief of evidence (doc M14), pp 26–27

1394. This principal concern is set out in a number of briefs of evidence and submissions: see, for example, counsel for Wai 687 claimant, submissions by way of reply (doc N32), p 4.

1395. Lynch, brief of evidence (doc M14), pp 26–31

1396. Crown counsel, closing submissions (doc N20), topic 30, p 16

The claimants' view, however, was that the Crown's remedial measures were inadequate to ensure a healthy customary eel fishery:

Indeed it is the commercial fishermen themselves who make the decision to fish within the Urewera area, and who have chosen not to because previous over fishing combined with hydro development has depleted the stock to a level where it is not worth their while. However, under the current regime, which purports to have as its focus sustainable management, permits for commercial eel fishing within a certain quota management area do not limit eel fishers from fishing where stocks are depleted and therefore in Counsel's submission leaves a wide scope for unsustainable fishing in particular areas.¹³⁹⁷

As earlier, we note these points to acknowledge that commercial fishing was one factor which affected customary fishing, and which must be described so that undue weight is not given to other factors, but we make no findings in respect of it.

In respect of the second area capable of immediate and direct Crown action, Terry Lynch acknowledged that the Crown's construction of dams had had a drastic effect on the customary eel fishery. Nonetheless, he provided no evidence of any Crown remedies.¹³⁹⁸ Suzanne Doig pointed out that no action had been taken to build bypass channels at the Matahina and Aniwhenua dams for 'eel migration in both directions'.¹³⁹⁹ This had been a recommendation of the Te Ika Whenua Rivers Tribunal in 1998,¹⁴⁰⁰ which had not been carried out by the time of our hearings. A bypass was built for elvers at the Matahina dam in 1991–92, and improved in 1996–97, and hand transfers of elvers have taken place since the 1980s. DOC and Ngati Whare appear to have agreed that these steps were inadequate, and that the Whirinaki River eel fishery, for example, was still in decline.¹⁴⁰¹

As we noted in chapter 20, Electricorp worked with DOC and Maori to develop an eel passage management plan for the Waikaretaheke River and its tributaries as part of the RMA consents process in the late 1990s. The Maori trust boards and the Haumapuhia Waikaremoana Authority were involved in implementing the plan, which was described by Genesis as a 'co-management' arrangement. Ministry of Fisheries authorisation was required for elver transfers, and the plan was to be monitored by DOC. Hand transfers of elvers was the primary method but this only provided for one part of the eels' life cycle. The plan required development of a mechanism for safe downstream passage within 10 years. This had not occurred by the time of our hearings in 2005, and the claimants were concerned about that

1397. Counsel for Wai 687 claimant, submissions by way of reply (doc N32), p 4

1398. Lynch, brief of evidence (doc M14)

1399. Doig, 'Te Urewera Waterways' (doc A75), p 178

1400. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 145; Doig, 'Te Urewera Waterways' (doc A75), p 178

1401. Doig, 'Te Urewera Waterways' (doc A75), pp 176–179

fact. It was too early to tell at that point whether the plan was succeeding in restoring the customary eel fishery south of the lake, although there were promising signs (see chapter 20).¹⁴⁰²

The question of whether the Crown had done everything in its power to help the eel fishery recover was thus a work-in-progress at the time of our hearings.

More generally, DOC and regional councils have taken steps to protect indigenous fish species. Inside the national park, the achievements had not been stellar by the time of our hearings. As will be recalled from earlier in the chapter, trout predation or competition was a key factor in the serious decline of indigenous fish species (other than eels). A policy was introduced to prevent the further spread of trout to unaffected waterways.¹⁴⁰³ Otherwise, the sport fishery was encouraged in the park, and the department did not prohibit restocking of waterways in which trout had declined or disappeared.¹⁴⁰⁴ DOC's activities in respect of native fish mostly focused on monitoring.¹⁴⁰⁵ Professor Murton commented:

The threat posed to indigenous fish by trout and barriers to access (such as culverts and dams) has been given more recognition under Department of Conservation management, although most action involves monitoring their distribution and abundance, and maintaining an inventory of obstacles to fish passage.¹⁴⁰⁶

Outside the national park, Environment Bay of Plenty acted under the RMA to:

put in place policies to encourage the protection and restoration of river habitats for both indigenous fish and trout. Spawning sites have been given extra protection, and through the creation of a calendar of fish migrations, seasonal restrictions have been placed on disturbances in rivers during key times, such as whitebait runs, inanga spawning, elver migrations, downstream eel migrations, and trout spawning.¹⁴⁰⁷

We have no evidence as to how successful these efforts to protect and enhance indigenous fish stocks have been.

In respect of the management of customary fishing, Mr Lynch's evidence shows that the 1998 customary fishing regulations provided enhanced recognition

1402. In addition to the discussion in chapter 20, see Tracey Hickman, brief of evidence, 7 February 2005 (doc L11), p19; Waiwai, brief of evidence (doc H14), p25; 'Waikaremoana Power Scheme Resource Consents Monitoring Programmes', sch 8: 'Eel Passage Management Plan' (Tracey Hickman, comp, supporting papers to brief of evidence, 7 February 2005 (doc L11(a)), pp [55]–[60]).

1403. Department of Conservation, *Te Urewera National Park Management Plan, 2003*, p85; East Coast Conservancy, *Conservation Management Strategy 1998–2008*, p42 (Peter John Williamson, comp, attachments to brief of evidence, February 2005 (doc L10(a)), attachment f)

1404. Department of Conservation, 'Te Urewera National Park Management Plan: Summary of Submissions by Chapter', submissions on chapter 2, pp 5, 13–14 (Williamson, attachments to brief of evidence (doc L10(a)), attachment j)

1405. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 912–913

1406. *Ibid*, p 912

1407. *Ibid*, p 913

of Maori fishing rights and greater autonomy in fisheries management than the regime operative in Te Urewera (Regulation 27 of the amateur fishing regulations).¹⁴⁰⁸ We have no evidence as to whether the peoples of Te Urewera were involved in developing either the 1986 regulations or the 1998 customary fishing regulations, or whether the new regulations have been adopted in Te Urewera since the close of our hearings in 2005.

At the time of our hearings, a significant part of the claimants' customary fishing was managed under the arrangements for Te Urewera National Park, which had its own, distinct statutory framework. As we discussed earlier, customary fishing persisted in the park from the time of its creation in the 1950s, no matter what legal or administrative framework governed it. In their research and assessment of this matter in the 1980s, Stokes, Milroy, and Melbourne pointed out that customary fishing practices were not always strictly lawful in the park. In reality, however, those practices barely modified the environment and so did not conflict with national park values.¹⁴⁰⁹

In the consultation which took place over the draft management plan in the late 1980s, some Tuhoe held that the tuna and trout fisheries (among other resources) were Tuhoe resources and should be under the tribe's control; 'the Crown administers the land [of the national park] only'.¹⁴¹⁰ The Tuhoe-Waikaremoana Maori Trust Board also objected to any restrictions on customary tuna fishing.¹⁴¹¹ According to Dr Coombes, 'the nature of the protest was not only about access to biological resources within the Park; it also highlighted tangata whenua desires to be involved in (and to direct) management'.¹⁴¹² At the same time, no doubt recognising that eel fishing was not restricted in practice, park authorities were reminded that there were 'other things besides the taking of tuna that are traditional rights for Tuhoe people'.¹⁴¹³

The resultant management plan of 1989 reserved control to DOC, stating that the 'traditional fishing of eels by the tangata whenua for food and other cultural purposes will be permitted provided the demands are not excessive', a judgement which DOC would make.¹⁴¹⁴ When DOC defended itself before a special ministerial

1408. Lynch, brief of evidence (doc M14), pp 7–16

1409. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 353–354

1410. 'Tuhoe Hunting and Access Rights', notes on deliberations of tangata whenua of Ruatahuna, [1987], pp 5–6, MTP 121, Archives New Zealand, Wellington (Coombes, supporting papers to 'Making "Scenes of Nature and Sport"' and 'Preserving a "Great National Playing Area"' (doc A121(a)), pp 236–237)

1411. Tuhoe-Waikaremoana Maori Trust Board, submission to East Coast National Parks and Reserves Board, 5 July 1987, pp 6–7 (Coombes, supporting papers to 'Making "Scenes of Nature and Sport"' and 'Preserving a "Great National Playing Area"' (doc A121(a)), pp 248–249)

1412. Coombes, 'Preserving a "Great National Playing Area"' (doc A133), p 378

1413. Peter Owens, minutes of East Coast National Parks and Reserves Board, 15–17 July 1987 (Coombes, 'Preserving a "Great National Playing Area"' (doc A133), p 391)

1414. Department of Conservation East Coast National Parks and Reserves Board, *Te Urewera National Park Management Plan, 1989–1999* (Rotorua: Department of Conservation, 1989), p 62 (Campbell, 'Te Urewera National Park, 1952–75' (doc A60), p 179)

inquiry a decade later (see chapter 20),¹⁴¹⁵ it argued that the management plan's permission for the 'traditional fishing of eels by Tangata Whenua' was one of the matters which made it 'unique in its recognition of the relationship of the Tangata Whenua to this land'.¹⁴¹⁶

The 1998 ministerial inquiry 'suggested the need for "more dialogue"' between DOC and Maori in respect of customary harvesting (including fishing). Nonetheless, this was one of the few matters in which the ministerial inquiry 'did not suggest a process for resolution'. The inquiry accepted DOC submissions that 'the management plan included appropriate provisions for tangata whenua use without considering either those provisions or broader debates about customary rights'.¹⁴¹⁷ The issue of fishing (as of right) and control of fishing remained important to Tuhoe. When the national park management plan was again up for consultation in 1999, there were submissions from Tuhoe that their right to take customary fish species should be absolute, and also that they should have authority in respect of others' taking of 'all indigenous flora and fauna' (which would have included fishing).¹⁴¹⁸

The 2003 management plan did provide for DOC to negotiate a joint department and iwi management arrangement for customary tuna fishing, so long as:

- ▶ traditional harvesting methods were used;
- ▶ the demand did not 'significantly impact on the population of the species or other natural values'; and
- ▶ the agreed joint management process could be reviewed periodically to check for adverse effects.¹⁴¹⁹

We did not receive submissions from parties about this apparent DOC concession to the claimants' wishes. Presumably, given that neither the Crown nor the claimants mentioned it, no such joint management regime had been negotiated by the time our hearings closed in 2005. The Te Urewera National Park Management Plan still reserved for DOC the control of non-Maori fishing of tuna in the park's rivers.

In sum, Maori customary fishing rights received a degree of recognition in DOC's management of Te Urewera National Park. In particular, traditional fishing of tuna was a permitted activity and, by 2003, one which was recognised as requiring departmental-iwi co-management. Other customary fishing in the park continued, not necessarily with the requisite licences, including fishing of trout. What

1415. In 1998, in response to Nga Tamariki o te Kohu's lakeside occupation at Waikaremoana, the Ministers of Conservation and Maori Affairs appointed the Maori Trustee, John Paki, and a solicitor, JK Guthrie, to hold a ministerial inquiry. The purpose was to inquire into a series of allegations about DOC's handling of the lease of Lake Waikaremoana. This inquiry, its origins, and outcome are described in chapter 20.

1416. DOC, '[Draft] response to allegations', 1998 (Coombes, 'Preserving a "Great National Playing Area"' (doc A133), p 439)

1417. Coombes, 'Preserving a "Great National Playing Area"' (doc A133), p 440

1418. Te Waimana Kaaku, 'Submission, Te Urewera Draft Management Plan', 7 September 2001 (Coombes, 'Preserving a "Great National Playing Area"' (doc A133), pp 470-471)

1419. Coombes, 'Preserving a "Great National Playing Area"' (doc A133), pp 472-473

is remarkable for this modern period is that Maori were shut out of any management role for their customary fisheries in the park before the 2003 management plan. Further, their control from 2003 was to be restricted to co-management of their own activities in respect of tuna, not those of other fishers (of tuna) or for other taonga species.

Outside the national park, customary fishing was controlled by amateur fishing regulations up to the time of our hearings. These regulations, as the Crown's fisheries witness showed, gave Maori comparatively little control over their own customary fishing and were clearly inadequate to provide for Maori fishing rights.

In addition, key claimant concerns about the serious decline of the eel fishery were not able to be satisfactorily answered at our hearings. Although the Crown had taken some steps to halt the decline, their effectiveness was at that time unknown. As noted earlier, the decline in the eel fishery was substantially attributable to acts or omissions of the Crown (in particular, its prioritisation of sport fisheries and its introduction of barriers to recruitment of elvers and passage to the sea).

We turn next to the management of rivers in the RMA era.

21.16.7.4.2 POST-1991 RIVER MANAGEMENT

In their closing submissions, the claimants made few submissions about the Resource Management Act 1991, and almost none about the Act in respect of its regime for river management. Nga Rauru o Nga Potiki's submissions about the RMA, for example, were focused on how the Act applied to Ohiwa Harbour.

Counsel for Wai 144 Ngati Ruapani made a general statement about all river management regimes over the past few decades, including the RMA:

The environmental protection regimes put in place by the Crown have not recognised or provided for the traditional fisheries and other activities of Maori with regard to their rivers, and have failed to give Maori the consultative and management role they are entitled to by the Treaty.¹⁴²⁰

Counsel's submission in respect of post-1991 river management was:

Problems continue to this day with consultation. Tangata whenua are seldom consulted over the range of waterways management matters, and where [it] does occur, it is in the role of land owner, rather than in recognition of Tuhoe's tangata whenua status. The transfer of management functions from centralised Crown agencies to local governments has been difficult, with local authorities arguing they are only required to recognise Treaty rights in terms of the prescriptions of the Resource Management Act 1991.¹⁴²¹

1420. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, p 117

1421. Ibid, p 114; counsel for Tuawhenua, appendix to closing submissions (doc N9(a)), p 114

Counsel for Wai 36 Tuhoe added that the 1991 Act fell short of what was required under the Treaty because it vested river management in regional councils, and ‘Tuhoe have no recognised legal role’ to manage their rivers.¹⁴²²

The claimants accepted, however, that the RMA was an improvement on the previous resource management regime. Nga Rauru o Nga Potiki considered that the Act generally was ‘well intentioned’ but ‘has been found on occasion to diminish the status of tangata whenua and in some cases, a full recognition of tangata whenua rights is not assured under its strictures.’¹⁴²³ Counsel for Wai 621 Ngati Kahungunu observed that the Crown has vested power over rivers in regional councils, and it is up to those local authorities to decide whether power should be transferred on to iwi authorities (under section 33 of the Act).¹⁴²⁴

The RMA’s purpose is to promote the sustainable management of natural and physical resources. Sustainable management is defined as the *use, development, and protection* of resources in such a way as to enable people and their communities to provide for their social, economic, and cultural well-being (and their health and safety). The Act specifies that ‘use’ and ‘development’ must be carried out in a way or at a rate that:

- ▶ sustains the resources for future generations;
- ▶ safeguards the life-supporting ability of the environment; and
- ▶ avoids, remedies, or mitigates any harmful effects.¹⁴²⁵

The Act, however, does not provide for remedying historical damage, which claimant Douglas Rewi called healing ‘the environmental scars of the past.’¹⁴²⁶

In giving effect to the Act’s purpose, all people who exercise powers and functions under it (mainly local authorities) have to consider the matters set out in sections 6 to 8.

The wording of section 6 makes the considerations specified in that section the most important. Decision makers have to ‘recognise and provide for’ seven ‘matters of national importance’. These include ‘the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga’. The protection of ‘recognised customary activities’ is also a matter of national importance under section 6.¹⁴²⁷ In 2003, section 6 was amended to add the protection of ‘historic heritage’ as a matter of national importance, which includes waahi tapu and other ‘sites of significance to Maori’.¹⁴²⁸

Section 7 sets out 11 matters to which decision makers under the Act must have ‘particular regard’, which is a lesser requirement than to ‘recognise and provide for’ the matters listed in section 6. One section 7 matter is ‘kaitiakitanga’, defined

1422. Counsel for Wai 36 Tuhoe, thematic submissions for Ruatoki hearing (doc J43), p 4

1423. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 268

1424. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 149

1425. Waitangi Tribunal, *Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), pp 54–55

1426. Rewi, brief of evidence (doc F18), p 16

1427. Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, p 55

1428. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maori*, vol 3, p 1166

as ‘the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.’ Section 7 also states that ‘particular regard’ should be given to protecting the habitat of trout and salmon.¹⁴²⁹

Finally, and with the least weight among these various factors, those who exercise powers and functions under the Act have to ‘take into account’ Treaty principles.¹⁴³⁰ As counsel for Ngati Haka Patuheuheu observed, the RMA does not ‘require persons exercising functions and powers under the Act to *act in conformity with* the principles of the Treaty of Waitangi’ (emphasis added).¹⁴³¹

Under the RMA, the ‘principal management documents’ for rivers are ‘regional policy statements and plans’, which are prepared by regional councils. When preparing or changing these management documents, councils must ‘consult with the tangata whenua’ and ‘have regard to’ any relevant iwi management plans.¹⁴³² We received little evidence, however, as to how the tribal relationship with the council worked in practice, what efforts the council had made to consult iwi and hapu, what input the tribes had had into RMA plans, or how far the people had taken up the opportunities the RMA provides for input and influence (or what resourcing capacity they had to do so). In particular, iwi management plans could have been influential,¹⁴³³ but we are not aware whether any such plans were prepared (or whether the peoples of Te Urewera had access to the financial and technical resources to create such plans). Neither the claimants nor the Crown provided evidence on such matters.

Dr Doig referred to the claimants’ belief that they are still not fully or adequately consulted under the RMA, although she provided no specific or detailed examples in respect of a river or a river-related matter. She did give an example of positive engagement between the Western Tuhoe Maori Executive and Environment Bay of Plenty on river management at Ruatoki from the late 1990s. Dr Doig also outlined some of the opportunities for input available under RMA processes. But the evidence is short on specifics.¹⁴³⁴

At the time Dr Doig prepared her report (2002), the process of preparing regional management documents was still ongoing.¹⁴³⁵ There was recognition of the need to consult Maori and to accommodate their values alongside more ‘traditional’ management issues. Doig considered it unclear, however, ‘how well these policies and objectives in planning documents will be transformed into actual

1429. Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, pp 54–55

1430. *Ibid*, p 55

1431. Counsel for Ngati Haka Patuheuheu, submissions by way of reply, 8 July 2005 (doc N25), p 36. Although this submission was made in respect of the Waikopu Hot Springs, it is also relevant here.

1432. Boast, ‘The Crown and Te Urewera in the 20th Century’ (doc A109), p 276

1433. When the RMA was enacted in 1991, regional councils were required to ‘have regard to’ iwi management plans under sections 61 and 66. This was changed by the Resource Management Amendment Act 2003 to a requirement to ‘take into account’ any iwi management plans.

1434. Doig, ‘Te Urewera Waterways’ (doc A75), pp 155–158, 163–164, 165–166, 180, 199–200, 236–241, 253–258; Suzanne Doig, responses to questions of clarification, no date (doc F24), p 5

1435. Doig, ‘Te Urewera Waterways’ (doc A75), p 199

practice on the ground, and whether meaningful joint management and extensive consultation will eventuate.¹⁴³⁶

According to Dr Doig, Environment Bay of Plenty itself noted in 2000:

many local Maori communities have challenged the council's legislative management right over resources not owned by the Crown, and have found it inconsistent with their rangatiratanga and kaitiakitanga. The 'gap in understanding' is particularly large in the case of water resources, given that sole rights of apportioning water usage have been vested in regional councils and mere lip-service [it was believed] is given to the role of tangata whenua as kaitiaki.¹⁴³⁷

Dr Doig's research revealed a general and persistent distrust of Environment Bay of Plenty, even though the new statutory regime provided 'a major departure from the management structures of the past'.¹⁴³⁸

The Crown's closing submissions made frequent reference to the RMA in respect of river management. In its view, 'tangata whenua interests are taken into account through the RMA in terms of how the natural environment is managed'.¹⁴³⁹ In all the issues of concern to the claimants, including gravel extraction, pollution, hydro dams, and flood control, the Crown's response was that these matters are now managed appropriately through the RMA. Tangata whenua are consulted and their values are taken into account.¹⁴⁴⁰ Crown counsel did note Dr Doig's evidence that 'in practice claimants consider this consultation and recognition has been limited'.¹⁴⁴¹ But the Crown also observed that 'Doig has not made an assessment of the validity or otherwise of the claimants' concern that this consultation and recognition has been limited'. In the Crown's submission, therefore, there is 'insufficient evidence before the Tribunal to draw any finding of Treaty breach'.¹⁴⁴²

The Crown offered no evidence of its own in support of its contention that all matters are now managed appropriately through the RMA. In closing submissions, Crown counsel referred us to two specific examples of RMA processes in respect of rivers: the 1998 Electricorp consents process for the Waikaremoana power scheme, and gravel extraction at Ruatoki.¹⁴⁴³

We have already discussed the Waikaremoana consents process in chapter 20 (see section 20.10.3.4). Here, we consider the case of the Ohinemataroa River at Ruatoki.

Environment Bay of Plenty had acknowledged in 2001 that 'ownership of river beds and implicitly also gravel' was 'uncertain', and was then 'before the Crown

1436. Doig, 'Te Urewera Waterways' (doc A75), p 200

1437. Ibid, p 199. Doig was relying here on Environment Bay of Plenty, *Draft Regional Water and Land Plan Version 2.0* (Whakatane: Environment Bay of Plenty, 2000), sec 3.1.

1438. Doig, 'Te Urewera Waterways' (doc A75), p 200

1439. Crown counsel, closing submissions (doc N20), topic 30, p 14

1440. Ibid, pp 2-3, 13-18

1441. Ibid, p 13

1442. Ibid, p 14

1443. Crown counsel, closing submissions (doc N20), topic 30, p 17; topic 28, pp 16-17

and the courts.¹⁴⁴⁴ In the meantime, the council continued to authorise the extraction and sale of metal by contractors.¹⁴⁴⁵ Steven Oliver described the new regime for this gravel extraction under the RMA as follows:

Gravel extraction from the Whakatane River is now administered by the Operations and Rural Development Section of Environment Bay of Plenty. Before consents are granted to the removal of gravel from the river affected parties are consulted and independent commissioners are appointed to hear submissions. Site meetings are held before extraction occurs and issues such as access to the sites are discussed. The discussions involve contact individuals and the Western Tuhoe Executive. Appeals can be made and when a consent is granted, the contractors are monitored to ensure the correct amount of gravel is removed.¹⁴⁴⁶

Issues at Ruatoki concerned the balance between extraction for profit (selling the shingle) and stabilising the river; flood protection works; access across Maori land; and Tuhoe claims to ownership of the river and its gravel. Mr Oliver's brief account of these issues indicates that there was consultation about extraction in 1991, including with Joe Te Maipi of the Ruatoki River Committee, and that there were later opportunities for landowners and others to have input during the consents processes. But tensions persisted. Tuhoe wanted control rather than consultation. Ownership (and entitlements to royalties) remained a vexed issue, and contractors' machinery was vandalised in protest. Mr Oliver did not provide details or examples of the consents process or how the RMA operated in practice.¹⁴⁴⁷

The pre-1991 management regime, in which Maori were not consulted (as the Crown admitted) but rather excluded from all decision-making, had left a legacy of distrust and suspicion. Claimants interviewed by Dr Doig believed that 'the regional council will do nothing even if their concerns are expressed to it.'¹⁴⁴⁸ Kaumatua Hori Thrupp told us: 'As far as I can see, Environment BOP isn't making any serious attempt to improve the river; instead it is just selling the gravel. You should take a look at Otairangi; there is a real threat that the houses there may be carried away by the flooding.'¹⁴⁴⁹

Tama Nikora and Hakeke McGarvey also expressed the Ruatoki community's feeling of exclusion from decision-making about the Ohinemataroa River, regardless of the enactment of the RMA.¹⁴⁵⁰ In the claimants' view, the RMA did not go far enough in any case because it did not accord them a 'recognised legal role in the management of the river'. Until 'ownership and management of the river' is restored to iwi, it will continue to be managed by the regional council alone, and

1444. Steven Oliver, 'Ruatoki Block Report' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A6), pp 216–217

1445. Oliver, 'Ruatoki' (doc A6), pp 216–219

1446. *Ibid*, p 218

1447. *Ibid*, pp 216–219

1448. Doig, 'Te Urewera Waterways' (doc A75), p 200

1449. Thrupp, brief of evidence (doc J41(a)), p 4

1450. McGarvey, brief of evidence (doc J33), pp 3–7; Nikora, brief of evidence (doc J40), pp 6–8

– in the claimants’ view – gravel extraction will continue without proper flood protection works.¹⁴⁵¹ On the other hand, Tame Iti told us that jetboat racing on the river had been successfully contested by local hapu in 1990–91, and ‘all river [boat racing] activities must now gain hapu consent’.¹⁴⁵²

Ultimately, Crown counsel relied on the provisions of the RMA itself as a complete answer to the claimants on all river management issues:

Since 1991 decisions concerning water uses have been made by regional councils under the RMA. Such decisions must take Treaty principles into account and particular regard to kaitiakitanga must be had, but in practice claimants consider this consultation and recognition has been limited. . . .

The Crown submits that tangata whenua interests are taken into account through the RMA in terms of how the natural environment is managed, and through the fisheries regime. . . .

The RMA currently regulates the taking of any gravel from any river. Section 13(1)(b) provides that no person may, in relation to the bed of any lake or river, excavate, drill, tunnel, or otherwise disturb the bed, unless expressly allowed by a rule in a regional plan, proposed regional plan or a resource consent. The removal of any gravel is controlled by local authorities. Local authorities are required to consider tangata whenua values when making decisions about gravel extraction. . . .

Section 13(1)(d) of the RMA provides that no person may, in relation to the bed of any lake or river, deposit any substance in, on, or under the bed, unless expressly allowed by a rule in a regional plan, proposed regional plan or a resource consent. Any discharges that are allowed are therefore regulated by local authorities, which must consider tangata whenua values. . . .

The RMA gives local authorities the responsibility for regulating activities in rivers, especially those within the ambit of s13. The RMA requires that tangata whenua interests be taken into account in making decisions concerning the permissibility of certain river activities.¹⁴⁵³

We agree with Crown counsel that there is not much evidence before us that would show how the RMA worked in practice in respect of Te Urewera communities and their rivers. We are left largely with the Crown’s reliance on its submission that the Act itself is Treaty-consistent.

There is no doubting that the RMA is a significant improvement on the pre-1991 regime for management of rivers.¹⁴⁵⁴ The claimants emphasised, however, that the Act accorded them no legal management role over their rivers. The key here is section 33 of the Act. Professor Boast and Dr Doig both noted that this section allowed for the transfer of powers from local to iwi authorities.¹⁴⁵⁵ ‘Under this

1451. Counsel for Wai 36 Tuhoe, thematic submissions for Ruatoki hearing (doc J43), pp 4–5

1452. Wairere Tame Iti, brief of evidence (English), 10 January 2005 (doc J22), pp 13–14

1453. Crown counsel, closing submissions (doc N20), topic 30, pp 13, 14, 17, 18

1454. Doig, ‘Te Urewera Waterways’ (doc A75), p 200

1455. Boast, ‘The Crown and Te Urewera in the 20th Century’ (doc A109), p 276; Doig, ‘Te Urewera Waterways’ (doc A75), p 199

Summary of Section 33 of the Resource Management Act 1991

Section 33(1) of the Resource Management Act 1991 (as amended in 2003) states that '[a] local authority may transfer any 1 or more of its functions, powers, or duties under this Act, except this power of transfer, to another public authority in accordance with this section'. Prior to 2003, the power of transfer had not included the power to approve a policy statement or plan (or changes to the statement or plan), or the exercise of powers under part 8 of the Act, which relate to designations and heritage orders.

Section 33(2) specifies that a 'public authority' includes 'an iwi authority'. Section 33(3) states that the delegating authority would retain ultimate responsibility, but this was repealed in 2003. Section 33(4) requires a local authority, before transferring any of its functions, powers, or duties, to (i) hold a public consultation process about the transfer; (ii) notify the Minister; and (iii) agree with the 'public authority' that transfer is 'desirable' on the grounds of representation (the new authority 'represents the appropriate community of interest'), efficiency, and 'technical or special capability or expertise'. Under section 33(8), the local authority retains power to 'change or revoke the transfer at any time'.

provision', said Boast, 'councils could, in theory, transfer the management of particular water bodies to iwi authorities'. The essential problem was that no regional councils had 'shown any willingness to do so to date [2002]'.¹⁴⁵⁶ No management powers in respect of any rivers in Te Urewera had been transferred to Tuhoe or other iwi by the time of our hearings, despite the Act having been in effect by then for 14 years.

At Ruatoki, for example, Paki Nikora and Hakeke McGarvey established the Ohinemataroa River Management Committee in 2001, with the agreement of the Tuhoe Western Maori Executive Committee and the support of the Ruatoki people. The river committee was established 'to try to take control of the management of the river'.¹⁴⁵⁷ It has had 'some small success with restoration of the river', establishing a 10-year plan to 'rejuvenate the river and wetlands' and restore indigenous fish populations.¹⁴⁵⁸ Environment Bay of Plenty assisted with some funding, and the committee also obtained assistance from DOC's Nga Whenua Rahui biodiversity fund. The committee set up a native plant nursery in partnership with Ruatoki School, and – at the time of our hearings – had planted 20,000 native plants along the river banks. The committee also carried out fencing and had cleared willows and poplars with community support. Restoring natural cover, it

1456. Boast, 'The Crown and Te Urewera in the 20th Century' (doc A109), p 276

1457. McGarvey, brief of evidence (doc J33), p 3

1458. Ibid, pp 3–4, 6–7

was hoped, would help native fish stocks recover. The committee consulted marine and environmental scientists for help to restore customary fisheries.¹⁴⁵⁹

But, Mr McGarvey told us:

The biggest obstacle to the Committee's work is its lack of legal standing. According to the law, the River Committee has no status. Only Environment WOP has the legal status. We say this is wrong, as the river is Tuhoe's river, and should be controlled by Tuhoe.

We do not have the legal standing to ensure that our views as the owners and kaitiaki of the river are respected. We are developing a working relationship with Environment WOP; however, because we do not have legal standing our ability to influence policy is dependent on what we can negotiate rather than having a recognised management role as of right.¹⁴⁶⁰

The committee, for example, was in the process of negotiations with the regional council at the time of our hearings, trying to obtain a 'general authority to grant permission for people to extract volumes of up to 5000 cubic metres of metal from the river.'¹⁴⁶¹ The committee planned to authorise the taking of smaller amounts, 'granting or withholding authorities as we felt was appropriate.' With the council's 'expertise available to us' to assist, the committee hoped to get exclusive control of at least local Ruatoki gravel extractions.¹⁴⁶²

We have no evidence as to the outcome of this negotiation. We have noted that section 33 of the Act which permits transfer to iwi authorities of one or more powers exercised by local authorities had not been used in Te Urewera by 2002. In the absence of any section 33 delegations, the claimants' argument that they had had no legal management powers or role since 1991 was correct. As a consequence, they continued to feel disempowered in respect of river management after 1991, even if they were consulted from time to time.¹⁴⁶³

Under the RMA, the Crown vested management and control of rivers in local authorities, and left it to those authorities to decide whether to utilise section 33 and transfer management powers to iwi. We assess the Treaty-compliance of these arrangements in the following section of our chapter, in which we make our Treaty findings in respect of rivers.

21.17 TREATY ANALYSIS, FINDINGS, AND RECOMMENDATION: RIVERS

21.17.1 Findings on river ownership

The rivers and streams of Te Urewera were and are taonga to those hapu and iwi who have ancestral relationships with them. Each river has its own mauri and each

1459. McGarvey, brief of evidence (doc J33), pp 4–7

1460. Ibid, pp 4–5

1461. Ibid, p 5

1462. Ibid

1463. See, for example, McGarvey, brief of evidence (doc J33), pp 3–7; Doig, 'Te Urewera Waterways' (doc A75), pp 199–200.

is guarded by taniwha that inhabit it. Rivers were the arteries of life in the region, a source of fish and birds, of plants, and drinking water, and the centre of eel cultures. Waterways are associated with the rhythm of life; they were where people made their settlements, where transport and commerce between kainga took place. Whanau, hapu, and iwi exercised mana and tino rangatiratanga over the rivers and waterways within their rohe; had deeply felt obligations of kaitiakitanga to them.

Under article 2 of the Treaty of Waitangi, the peoples of Te Urewera are entitled to tino rangatiratanga over their forests, fisheries, and other taonga, which clearly includes rivers. At no point has the Crown come close to giving effect to this guarantee.

The one clear concession the Crown made about its conduct affecting rivers in Te Urewera was that the 1866 raupatu of Eastern Bay of Plenty lands, including the beds of rivers within the confiscation boundary, was in breach of Treaty principles. That is certainly true, as our examination in chapter 4 of this report explains. The Crown also conceded, without further explanation, that the Urewera Consolidation Scheme involved Treaty breaches. Our conclusions about the UCS are presented shortly. Apart from those two concessions, the essence of the Crown's submission was that its ownership of riverbeds in Te Urewera is authorised by New Zealand law and that the relevant laws are not in breach of Treaty principles.

Previous Waitangi Tribunal inquiries have investigated and reported on issues very similar to those before us. Consistently, the earlier Tribunals have upheld the claimants' essential submission that a river is an entity distinct from the adjacent lands, that each has its own mauri and some are taonga, so vital are they to their peoples' existence. Consistently too, earlier Tribunals have observed that the Maori conception of a river is a world apart from the English common law notion that it is land covered with water and that only the riverbed, which is an extension of the dry land adjacent to it, can be owned. Yet in this inquiry the Crown repeated its submission that Maori customarily regard rivers in much the same way as does the English common law. The Crown contended, in effect, that Maori conceive of rivers as being land so connected to the adjoining dry land that when that dry land is sold, so too is the riverbed, or half of it (to mid-river: *ad medium filum aquae*) where the river is the boundary between two land blocks. This line of argument enabled the Crown to defend its acquisition in the nineteenth and early twentieth centuries of the beds of many rivers as being not only lawful but also consistent with Treaty principle. Our inquiry has included close examination of the various means by which Maori land was alienated in Te Urewera, whether by purchase of individual interests in land blocks in the period from 1870 to the 1920s, or during the UCS – by which Maori owners' interests were consolidated into 210 blocks and the Crown was awarded the massive Urewera A block – or by the Crown's taking of marginal strips along the Tauranga River and its tributaries. We are satisfied that the *ad medium filum* presumption was not known to Maori land sellers in Te Urewera, let alone to those whose land was taken without their consent. As a result, we can endorse the earlier Tribunals' rejection of the

Crown's submission that Maori custom and the common law have a shared view on the effect of the sale of land adjacent to a river. We note too that in the 2014 case of *Paki v Attorney-General*, the chief justice of New Zealand (with some support from the other three Supreme Court judges in that case) has rejected the lawfulness of applying the *ad medium filum* presumption to Maori land sales.

Before 1903, the English common law rules governed the ownership of the beds of New Zealand rivers whether or not the rivers were 'navigable'. With the 1903 statutory taking by the Crown of the beds of navigable rivers – without the knowledge or consent of Maori in Te Urewera – the common law's operation was reduced to rivers that are not 'navigable'. But the meaning of 'navigable' in the Coal Mines Act Amendment Act and its successors has been beset with confusion for the entire time it has been part of New Zealand's law, and there is no readily accessible forum to solve the definition problems either generally or in particular cases. The 2012 Supreme Court decision in the *Paki* case is helpful but does not provide definite answers to all the questions that have arisen about the meaning of 'navigability'. The result is that for over 100 years now there has been considerable doubt as to which New Zealand riverbeds, or stretches of them, are Crown owned on the grounds that they are 'navigable'. In addition, there has been doubt (since at least the time of the Court of Appeal's *Ika Whenua* decision) that the 1903 Act and its successors used sufficiently explicit language to extinguish Maori customary rights to their navigable rivers. This, too, adds to the confusion as to who owns the beds of navigable rivers in New Zealand.

The lack of clarity surrounding the common law and statutory rules about riverbed ownership was further complicated in the case of Te Urewera National Park, which was created in 1954, greatly expanded in 1957, and further expanded in 1962. The fact that different legislative words were used in 1962 (as compared with 1954 and 1957) to describe the park's inclusion of waterways might have provided the Crown with an argument that it owned the full width of waterways on the park's boundaries. Aside from that, the many rivers and streams that adjoined the extended park's boundaries – including the Tauranga (Waimana) River, Ruakituri River, Waiiau River, Ohinemataroa River, and the Whirinaki River – could be claimed by the Crown *ad medium filum*, and some of the rivers within and adjoining the park could be claimed on the basis of their 'navigability'.

The situation just described, where the law governing the ownership of riverbeds in Te Urewera is both antithetical to Maori customary law and hopelessly confused, is a grave and ongoing breach of Treaty principle of which the Crown has long been apprised. It is far from consistent with the Crown's Treaty's promise actively to protect 'tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa' ('the full exclusive and undisturbed possession of the Lands and Estates Forests Fisheries and other properties') for an English legal presumption about rivers, of which Maori had no knowledge and which runs counter to their own understandings, to have stripped them of their customary ownership of rivers when adjoining lands were acquired. It is far from consistent with that same Treaty promise for a statutory provision, about which Maori had no knowledge at the time or for years afterwards, to have expropriated, without compensation, the

beds of their ‘navigable’ rivers. And that breach is compounded by the Crown’s failure to remove the confusion and resulting unfairness that has long been recognised as surrounding the statutory provision. As we have seen, while the status quo serves the Crown’s interests, it continues to prejudice those with legitimate Treaty claims to New Zealand rivers. And recent statements from our highest court suggest that a substantial part of the status quo may not even be lawful: the presumption *ad medium filum aquae* may not have been good law for land purchases from Maori,¹⁴⁶⁴ and the meaning of a ‘navigable’ river is more limited than the Crown and its delegates have sometimes relied on.¹⁴⁶⁵

Returning to the Urewera Consolidation Scheme, clearly it differed from Crown purchase situations in which the Crown might assume the common law on riverbed ownership to apply, including the *ad medium filum* presumption. The commissioners were charged with resolving the chaotic situation that had resulted from a period of predatory Crown purchase of thousands of individual interests scattered over 51 blocks. Also, no UDNR purchase deed conveyed (or compensated for) the beds of any rivers. What all this meant in practice was that the Crown could not claim to have purchased any particular rivers or riparian stretches of land, a situation which could only have been clarified upon partition by the Native Land Court. Instead, a consolidation scheme was used to locate the interests of whanau on the ground (in 183 new blocks) and then consolidate all the Crown interests in the Urewera A block. The *ad medium filum* rule was later applied to the lands that the Crown obtained through consolidation, not the unlocated, individual interests that it had purchased. This meant that Maori never consented to any alienation of the stretches of river that the Crown later claimed to own. Some of the Crown’s riparian land was also acquired during the scheme as a result of the survey and roading contributions, again without any willing or knowing alienation of rivers. When the consolidation scheme was planned and agreed to in 1921, there was no mention of rivers or the *ad medium filum* presumption. Then, when the commissioners were giving effect to the scheme on the ground, they too did not explain or even refer to the *ad medium filum* presumption in their dealings with the Maori landowners. In 1924, the commissioners responded to a Tuhoe petition about the Whakatane and Waimana Rivers by stating that the rivers were not included in the Crown’s awards. Tuhoe, therefore, emerged from the scheme with the understanding that they still owned their rivers.

Further, and quite apart from the dubious relevance of the *ad medium filum aquae* presumption to the unique circumstances of the UCS, we are satisfied there was no lawful authority for the Crown’s acquisition of reserves or marginal strips along river banks. Crown ownership of those strips could not, therefore, support a lawful, let alone a Treaty-consistent, claim to half of the adjacent riverbed.

In all these respects, we find the Crown’s reliance on the UCS as the source of authority for its riverbed ownership to be inconsistent with Treaty principles.

1464. *Paki v Attorney-General* (No 2) [2014] NZSC 118

1465. *Paki v Attorney-General* [2012] 3 NZLR 277 (SC)

Overall, it is our finding that the Crown's actions, policies and laws discussed to this point have had the effect of expropriating the rivers of Te Urewera from their customary owners without their knowledge or consent, in breach of the Crown's Treaty obligations to protect Maori taonga and properties.

In many respects our findings echo those of earlier Tribunals, including those of the Te Ika Whenua Tribunal whose inquiry was focused on the taonga Rangitaiki, Wheao, and Whirinaki Rivers and their tributaries, and so overlaps the Te Urewera inquiry district. That Tribunal found that Maori retained residual proprietary interests in the rivers that they had not relinquished voluntarily, but which had been claimed by the Crown through the *ad medium filum* presumption. Where we differ is to note that the Crown may not have actually succeeded in expropriating the ownership of riverbeds at law, although it has acted as if it has done so. The confusion in the law as to who actually owns the riverbeds of Te Urewera is inimical to Maori property rights, and is fundamentally inconsistent with the Crown's guarantee of those rights in articles 2 and 3 of the Treaty.

As has been noted, we endorse most of the findings of the Te Ika Whenua Rivers Tribunal but since it did not inquire into land transactions, and we have conducted that inquiry for many of the lands adjoining the Te Ika Whenua rivers, we can bolster its findings in certain respects. For example, the Te Ika Whenua Tribunal was of the view that even if there was evidence that the customary owners of the three taonga rivers were willing sellers of adjacent land, that would not establish their willingness to relinquish tino rangatiratanga over the rivers. Having investigated many of the relevant land transactions, we can confirm that when a river is a taonga, that is the most important fact to be weighed in any assessment of the effect of its customary owners' sale of adjoining land – not the fact that it runs beside or through a (more recently defined) block of land. Nor did we receive any evidence of a knowing and willing sale of a river; quite the reverse, as demonstrated by ongoing customary use of rivers and fisheries after land sales unless forcibly interrupted.

The Crown and claimants disputed whether the Crown paid for the beds of the rivers and streams that it acquired throughout Te Urewera on the basis of the common law rules, including the *ad medium filum* presumption. Our finding, that the customary owners were unaware of those English legal devices, supports the claimants' submission that the Crown did not pay for the beds of the waterways it claims to own by virtue of those devices. The resulting financial prejudice to the customary owners would be additional to any other loss they may have sustained in particular cases (such as the loss of use of a waterway) from the Crown's assumed ownership of the beds of their waterways. Further on the matter of payment, it is plain that the Crown did not compensate anyone in 1903 when it claimed ownership of the beds of all 'navigable' New Zealand rivers – whichever they may be.

As a Tribunal whose findings reiterate those of earlier Tribunals that have dealt with freshwater issues, we are extremely concerned at the complete lack of clarity in the New Zealand law of waterway ownership and the ongoing confusion and injustice that is perpetuated by that situation. Reform is urgently needed,

we consider, to produce clear law about who has proprietary rights in relation to rivers and a clear process for applying, and testing, that law in the case of particular rivers or stretches of them. To date, the task of undertaking that reform has been left to languish in the Crown's too hard basket and it seems the Treaty settlement process is being used instead, as a piecemeal substitute for a nationwide legal regime for river ownership and management that is consistent with Treaty principles. It is our view that the piecemeal approach is bound to prejudice some Maori groups as against others. Also, if the quantum of a Treaty settlement does not reflect the Crown's wrongful taking of the beds of rivers and the resulting harm to their customary owners, then the Crown is obtaining a further benefit from that approach.

21.17.2 Recommendation in respect of river ownership

For all those reasons, we are driven to make a recommendation to the Crown, as we are empowered to do by section 6(3) of the Treaty of Waitangi Act 1975. We recommend that the New Zealand law of waterway ownership be reformed as a matter of urgency so that it is made consistent with Treaty principles. This recommendation, on one view of it, can only relate to those claims that have not been settled by legislation. It appears to us, however, that the Crown's failure to resolve the issue after 21 September 1992 is a continuing omission constituting a continuing breach of the Treaty, resulting in continuing prejudice. We take that particular view. If we are wrong, we make the recommendation in any event, in relation to those groups who have not settled.

21.17.3 Findings on river management

The Crown's failure to properly acknowledge Maori ownership of their awa is matched by its failure to give effect to the Treaty in its management of the rivers and river fisheries. While some acknowledgement was occasionally given to Maori rights to their fisheries, precedence was given to power generation, demand for gravel, and sport fishing. Until about the 1990s, hapu and iwi were rarely even consulted over the management of rivers and river resources, even when their interests were seriously affected. The most obvious example of this was the construction of hydro works. These had hugely detrimental effects on tuna (eels) and other river life, but the affected communities were given no say or compensation.

There seems to have been some improvement in recent decades, but at the time of our hearings the Crown was still not giving effect to its Treaty obligations. In particular, it did not appear that enough was being done to restore fisheries, and Resource Management Act powers to delegate or share power with iwi were not being used. As the Wai 262 Tribunal found, the Resource Management Act 'has delivered Maori scarcely a shadow of its original promise.'¹⁴⁶⁶ In our inquiry, claimants said that they were not even properly consulted over environmental matters. Management of the Ohinemataroa River, in particular the selling of gravel, was cited as one instance in which the rights and interests of tangata whenua were

1466. Waitangi Tribunal, *Ko Aotearoa Tenei, Te Taumata Tuarua*, vol 1, p 284

virtually ignored. Overall, we did not receive enough evidence to make findings on the operation of the Resource Management Act in Te Urewera, except to say that it appears that the Wai 262 Tribunal's findings apply to our inquiry district.

We now turn to our findings on specific matters, namely gravel extraction, the impact of the Waikaremoana hydro scheme on the rivers, and customary fisheries.

21.17.3.1 Gravel extraction and flood protection

The Crown has rightly conceded that the management of gravel extraction in Te Urewera was substandard. This management failure occurred despite Crown agencies being aware of the problem and its consequences from at least 1963. This was part of the Crown's wider failure to involve or consult kaitiaki in river management, and in this instance the Treaty breach was compounded by the cavalier attitude taken by the various bodies involved in gravel extraction from Te Urewera rivers.

The claimants argued that there were two main prejudices arising from the taking of gravel without the consent of kaitiaki: loss of royalties, and environmental damage. As we have seen, the Crown and local agencies extracted gravel from Te Urewera riverbeds without properly inquiring as to their ownership. To the extent that the Crown may be wrong about its ownership of Te Urewera rivers, the failure to properly ascertain ownership is compounded by its failure to pay royalties to the rivers' traditional owners.

We lack sufficient evidence to make any finding on the environmental impact of gravel takings in Te Urewera. It is clear that erosion and flooding were problems in the district before gravel extraction began, and we do not know whether they were exacerbated by gravel extraction. What is clear is that riparian Maori land in Te Urewera has not been adequately protected from flooding and river erosion, despite the restrictions placed on many Maori land blocks for the purposes of erosion control. The Crown's failure to provide an adequate degree of protection is a breach of its article 2 obligation to actively protect Maori landholdings.

21.17.3.2 The impact of the Waikaremoana hydro scheme on the rivers

In chapter 20, we found that the Crown permanently altered Lake Waikaremoana, without consulting or compensating its traditional owners, in service of the hydro-electric works. In this chapter, we have seen that the hydro works also significantly altered several rivers and a wetland, and their fisheries. Several rivers became dry much of the time, interrupting the migration of fish, and the eeling grounds at Whakamarino Flat were destroyed. As the eels were a significant source of food for local whanau, the alteration of the rivers and wetlands did significant economic as well as cultural damage. As with the lake, there was no adequate consultation with the traditional owners, and nor were they compensated.

The Crown acknowledged the 'negative impacts' of the hydro works on the local environment, but submitted that they 'must be assessed against the significant benefits [the hydro works] has provided to the country'.¹⁴⁶⁷ We acknowledge that

1467. Crown counsel, closing submissions (doc N20), topic 28, p17

the works did deliver a substantial benefit to the nation as a whole. In our view, however, this underlines the injustice of the Crown failing to grant compensation or other benefit to the tangata whenua whose rivers and wetlands were damaged for the benefit of others. In chapter 23 we will see that the Maori communities of Waikaremoana did not even benefit from the provision of electric power to their communities, since most could not afford to pay electricity bills.

The Te Ika Whenua Rivers Tribunal found

That the Crown's actions in conferring the right to generate hydroelectricity on power boards and later privatising them was in breach of the principles of the Treaty in that it failed to qualify the exercise of its power to govern with its Treaty guarantees of tino rangatiratanga over taonga and:

- i. to consult properly with Te Ika Whenua as a Treaty partner over the proposals;
- ii. to take into account Te Ika Whenua's interest in the rivers, including their right to development;
- iii. to attempt to ameliorate the effect and impact of the exercise of kawanatanga upon the needs and aspirations of Te Ika Whenua;
- iv. to compensate Te Ika Whenua for the loss of their rights and interests in the rivers; and
- v. to acknowledge and respect the position of Te Ika Whenua as a Treaty partner and to encourage Te Ika Whenua in the development of their resource.¹⁴⁶⁸

We consider that these findings apply also to the rivers affected by the Waikaremoana hydro works. As we suggest above, any works which significantly altered the rivers and wetlands should have been accompanied by fair compensation to their traditional owners. Perhaps more importantly, the owners should have been properly consulted about the hydro projects, and their potential impact on the awa, before any work started. The importance of the rivers and eeling grounds for sustenance should have been taken into account by the Crown, and every effort made to preserve and maintain those taonga. This was particularly so given the impoverished and almost landless state of the tangata whenua by the time the works began. As we find throughout this report, their condition was due almost entirely to Crown actions which we have found to be in breach of the Treaty.

21.17.3.3 Customary fisheries

The river fisheries of Te Urewera – particularly the eels – were clearly a taonga of the peoples of the rohe, an important and valued food source for many communities. It is clear to us that the hapu and iwi of Te Urewera never ceded their rights to those fisheries, and continued to exercise their rights for as long as they were able to do so. The Crown therefore had an obligation to actively protect the fisheries and the right of Te Urewera peoples to make use of them.

1468. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 138

Over the course of the twentieth century, however, the health and viability of the fisheries deteriorated significantly, for a range of reasons. The Te Ika Whenua Rivers Tribunal found that the rivers fishery in the Te Ika Whenua rohe was

gravely depleted through a lack of proper control and through policies and actions of the Crown favouring trout fishing over the customary fishery and permitting the construction of the hydroelectric power schemes, particularly the Matahina and Aniwhenua Dams.¹⁴⁶⁹

We endorse that finding insofar as our inquiry overlaps that of Te Ika Whenua, and also find that it applies to other rivers in Te Urewera, particularly those affected by the Waikaremoana hydro works. Earlier in this chapter, we saw that the introduction of trout harmed indigenous fish stocks, and that tuna were deliberately culled in order to protect trout. We found that the damage done to indigenous fisheries for the benefit of trout fishing was in breach of the Crown's Treaty obligations of partnership and active protection. We have also found, above, that the damage done to customary fisheries by the Waikaremoana hydro works, without consultation or compensation, was in breach of the Treaty guarantee of tino rangatiratanga.

From the 1950s, some attempts were made to protect indigenous fish, particularly within the national park area. More recently, steps have been taken to restore the tuna fisheries in various Te Urewera rivers, particularly where they have been affected by hydro works. We received little information on the effectiveness of these actions, but it seems they have not been sufficient to restore eel stocks, and possibly not even enough to halt the decline. Overall, it did not appear at the time of our hearings that there was any comprehensive plan to fix the damage done to Te Urewera fisheries over the twentieth century. As the Te Ika Whenua Rivers Tribunal found, this failure of protection is in breach of the principle of active protection.¹⁴⁷⁰

Nor did we see any evidence that the Crown has ever given the hapu or iwi of Te Urewera official control over, or partnership in, fisheries management in their rohe. From 1998, the rivers in Te Urewera should have been covered by the Fisheries (Kaimoana Customary Fishing) Regulations. By the time of our hearings in the mid-2000s these had still not been applied to rivers, only to coastal fishing. Freshwater fishing was still administered under amateur fishing regulations dating from 1986, which did not adequately recognise Maori rights or authority over their traditional fisheries. There was some allowance for traditional fishing, and cooperation between Maori and various State bodies relating to eels in the Waikaretaheke River. However there was no real partnership – in the national park, for example, decisions seem to have been made by DOC alone. There appears to have been some improvement in the 2003 management plan, but we did not receive enough

1469. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 137

1470. *Ibid*

evidence to be certain of this. Following the Te Ika Rivers Tribunal, we find the lack of consultation to be in breach of the principle of partnership.¹⁴⁷¹

Many different factors contributed to the reduction of indigenous fisheries, some of them beyond the control of the Crown. On balance, however, we find that the depletion of tuna and other indigenous fish in Te Urewera was a prejudice arising from multiple Treaty breaches, particularly the Crown's repeated failure to consult with hapu and iwi or to actively protect their customary fisheries. This prejudice was exacerbated by the Crown's failure to take adequate steps to restore the fisheries to anything close to their former state.

1471. Ibid

CHAPTER 22

NGA TONO ANGANUI – SPECIFIC CLAIMS

22.1 INTRODUCTION

22.1.1 Categories of claims

This chapter considers a number of discrete claims that we have not addressed elsewhere. We have grouped them into four broad categories:

- ▶ Claims relating to public works. This category includes claims about land taken under the Public Works Act, roads not built, and alleged prejudice caused by the erection of power transmission lines.
- ▶ Claims relating to rating. These relate to issues including the general exemption of Urewera District Native Reserve (UDNR) land from rating, and the lifting of that exemption in 1964; levies imposed within the UDNR area before 1964 and whether these were effectively rates; rates on Maori land outside the UDNR; and the rating of Maori land throughout the inquiry district from 1964.
- ▶ Claims relating to cultural property, specifically taonga tuturu (artefacts), and the Crown's obligations when it accepts gifts of taonga from Te Urewera leaders.
- ▶ Claims relating to schools in our district. This category includes claims that the Crown has not fulfilled the conditions of two different land donations, and a claim that schools in the inquiry district should have received the profits from trees planted by the schools' pupils.

Many related claims are dealt with elsewhere in this report. Non-land issues relating to schools, and to education more generally, are dealt with in chapter 23, on socio-economic issues. Cultural property claims on issues other than taonga tuturu have been dealt with mostly in relation to their location, and so have been addressed in our chapters on the national park, Lake Waikaremoana and, in relation to the Whirinaki Forest, environmental issues.

22.1.2 Claims not addressed in this report

There are a number of claims that we have been unable to determine in this report because of jurisdictional problems or insufficient evidence. One is the Parahaki horse paddock claim made by the Tuawhenua claimants. Counsel for Tuawhenua submitted that no compensation was paid for the 21-acre paddock after it was taken in 1920.¹ Although the land was valued at the time at £51, it appears that no

1. Counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), p193

compensation was paid in 1920, possibly due to complications relating to partitions and Crown purchasing in neighbouring blocks.² We have no evidence about any compensation arrangements the Crown may have made after that, and so are unable to make any finding on this matter.

Other claims on which we have been unable to make findings relate to the Mokomoko whanau. The claims relating to the trial, execution, and posthumous pardon of Whakatohea rangatira Mokomoko, and the Crown's treatment of his whanau, have been dealt with in chapter 4. We have covered these claims, even though they relate mostly to areas outside our district, because of the urgent need to address the matter of Mokomoko's pardon. Our findings on the pardon are included in chapter 4 of this report.

Most of the Mokomoko whanau's other claims relate to areas outside our district, and affect hapu, whanau, and individuals who have not participated in this inquiry.³ There are two issues that we can address to some extent: the management of Hiwarau c by the Maori Trustee, and the sufficiency of the Hiwarau reserves to meet the present or future needs of their owners.

In relation to the first issue, counsel for the Mokomoko whanau have accepted that the Maori Trustee is not part of the Crown.⁴ The Crown is, however, responsible for a statutory safeguard provided for owners of land managed by the Trustee: the owners were able to seek a review of the management. Since the Hiwarau c owners did not seek any such review, the adequacy of the Crown's safeguard was never put to the test and so we are not in a position to assess it.⁵

As for the Hiwarau reserves, we saw in chapter 4 that Mokomoko and his Upokorehe hapu were in armed conflict with the Crown in the mid-1860s, and that the hapu's lands at Ohiwa were subsequently confiscated. Upokorehe were then settled on reserves at Hiwarau and Hokianga Island, comprising 1,260 and 13 acres respectively.⁶ Counsel for the Mokomoko whanau described the reserves as 'woefully inadequate' due to their small area and poor quality.⁷ Crown counsel accepted that the development potential of Hiwarau was 'severely limited', but maintained that there is insufficient evidence that the reserves were inadequate for Upokorehe's needs.⁸

2. 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 179; Anita Miles, *Te Urewera*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1999) (doc A11), p 406 n

3. Counsel for Mokomoko whanau, request for direction on issues not addressed in Te Urewera report, 13 November 2009 (paper 2.885), pp 1–3

4. Counsel for Mokomoko whanau, closing submissions, no date (doc N3), p 42

5. Trustee Act 1956, s 68(1)

6. Ewan Johnston, 'Research Report on Wai 203 and Wai 339 [re: Upokorehe and Hiwarau Claims]' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A14), pp 56–58, 60–61. Although Hiwarau was initially stated to be 1,073 acres, an 1886 survey stated it to be 1,260 acres.

7. Counsel for Mokomoko whanau, closing submissions (doc N3), pp 37–38, 41

8. Crown counsel, closing submissions, June 2005 (doc N20), topic 5, p 10

Hiwarau's 1,260 acres were initially shared by 56 owners, which equates to 22.5 acres per person. This failed to meet the Crown's contemporary minimum reserve size of 50 acres per person.⁹ Previous Tribunals have found even the 50-acre standard to be inadequate.¹⁰ We also note that few Upokorehe had land elsewhere.¹¹ The problem was compounded by poor land quality. A series of reports for the Maori Land Court, the Maori Trustee, and the Hiwarau c trustees in the 1960s and 1990s found Hiwarau's potential for economic development to be limited, with the land being unable to support development costs.¹² At the time of our hearings the Hiwarau blocks collectively returned an average of about \$8 a year to each of their 660 owners.¹³ We find that the Hiwarau reserve was clearly inadequate for the contemporary and future needs of its owners. We cannot, however, say to whom this prejudice has been caused; this will require the participation of others with claims to the reserves.

22.2 PUBLIC WORKS CLAIMS

22.2.1 Introduction

In general, the scale of public works takings in Te Urewera has not been large. The most significant exception has been the roading contribution made as part of the Urewera Consolidation Scheme, which we have discussed in chapter 14. The comparatively limited takings reflect both the sparse nature of infrastructural development throughout the region, and the fact that large-scale alienation of Maori land tended to occur in advance of such development. Indeed, as was seen when Urewera District Native Reserve owners sought roads, the Crown sometimes withheld development until more Maori land had been alienated. However, it is precisely because the peoples of Te Urewera have had so little utilisable land left in their possession that the significance of further land losses for public works has been magnified.

We examine four public works-related claims in this section. The first concerns unmet Crown promises to build an access road to Papapounamu and other blocks

9. Native Land Act 1873, s24; Johnston, 'Research Report on Wai 203 and Wai 339' (doc A14), pp56–57

10. See Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, pp 631–632

11. Ewan Johnston, 'Ohiwa Harbour' (commissioned research report, Wellington: Waitangi Tribunal, 2003) (doc A116), p178

12. RG Lockie, 'Utilisation Report: Hiwarau Blocks', 8 May 1968 (counsel for Mokomoko whanau, supporting papers to opening submissions (paper 2.424(b)), pp 1–2); IJ Brosnahan, 'Initial Inspection Report: Hiwarau A and B Blocks', 12 May 1969 (counsel for Mokomoko whanau, supporting papers to opening submissions (paper 2.424(c))); D W Steele, 'Property Report: Hiwarau Block', 9 June 1969 (counsel for Mokomoko whanau, supporting papers to opening submissions (paper 2.424(d)), pp1–3); John Douglas, 'Land Use Capability: Hiwarau B Block', [1994] (counsel for Mokomoko whanau, supporting papers to opening submissions (paper 2.424(a)))

13. Tuiringa Mokomoko, brief of evidence, no date (doc B19), p 20

as compensation for land loss during the consolidation scheme. The second claim also involves an unbuilt road, through the Tahora 2F2 block. In this instance, the claimants submit that the Treaty breach and prejudice arise from the Crown's failure to return the land. The third claim in this section relates to the taking of land from the Heiotahoka and Te Kopani reserves south-east of Lake Waikaremoana for a hydroelectric power plant. The final claim involves the building of transmission lines across part of the Te Manawa o Tuhoe block, preventing the land from being used for forestry.

It should be noted that only one of these claims directly involves public works legislation. We consider, however, that the Crown's Treaty obligations are the same regardless of which legislation it relies on to take or otherwise use Maori land for public works.

The taking of Maori land for public works has been discussed in detail by numerous Tribunals, which have consistently found that the Crown breached the Treaty in both the content and the application of public works law. As that law has been traversed so thoroughly by earlier Tribunals, we will not detail it here except where necessary to understand a particular taking. Instead, we move directly to summarise the Treaty standards that previous Tribunals have found the Crown must meet in relation to public works takings. We also adopt these standards.

- ▶ The Crown must enter into early and genuine consultation with Maori land-owners, and ensure that it is well informed about the cultural, spiritual, and economic value of the land, and the amount of other land retained by the owners.¹⁴ If it still intends to take the land, it must enter into fair negotiations over the extent and conditions of any alienation.¹⁵
- ▶ The Crown must explore all alternatives to the taking of Maori land, including the taking of other land instead, and alternatives to permanent alienation, such as leases or easements.¹⁶
- ▶ If land is taken, the Crown must pay fair, equitable, adequate, and prompt

14. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 2, p 793; Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, p 852; Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 1, pp 279–283

15. Waitangi Tribunal, *The Ngati Rangiteaorere Claim Report 1990* (Wellington: Brooker and Friend Ltd, 1990), s 4.2.5; Waitangi Tribunal, *Te Maunga Railways Land Report*, 2nd ed (Wellington: GP Publications, 1996), p 71

16. Waitangi Tribunal, *Te Maunga Railways Land Report*, pp 70, 81; Waitangi Tribunal, *The Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), pp 308, 312; Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report* (Wellington: Brooker's Ltd, 1995), p 366; Waitangi Tribunal, *The Petroleum Report* (Wellington: Legislation Direct, 2003), p 54; Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 839; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 3, p 1282; Waitangi Tribunal, *Wairarapa ki Tararua Report*, vol 2, p 795; Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 1, pp 273–278; Waitangi Tribunal, *Te Kahui Maunga: The National Park District Inquiry Report*, 3 vols (Wellington: Legislation Direct, 2013), vol 2, pp 743–744, 751

compensation, with interest if there are any delays in payment.¹⁷ Where the Crown has suitable land, it must consider exchanging it for the land taken.¹⁸

- ▶ The Crown's powers of compulsory acquisition should be applied to Maori land 'only in exceptional circumstances and as a last resort in the national interest'.¹⁹

These standards inform our analysis of the individual public works claims, below.

22.2.2 Was the failure to build the Papapounamu access road in breach of Treaty principle, and has it caused prejudice to the landowners?

22.2.2.1 Introduction

As we outlined in chapter 14, the Crown undertook a process of consolidation in the UDNR area during the 1920s. A Crown-appointed commission separated out land interests which the Crown had purchased from those remaining in Maori ownership, so that each group had title to specific pieces of land, rather than sharing ownership of blocks. A key promise made by the Crown was that it would build a network of arterial roads, making it easier for hapu to develop their remaining land. This promise was broken, and many parts of the district remained inaccessible by road. The claim relating to the Papapounamu access road relates to a similar story, although with the added complication that the promised but unbuilt road was to go through general land, outside the UDNR area.

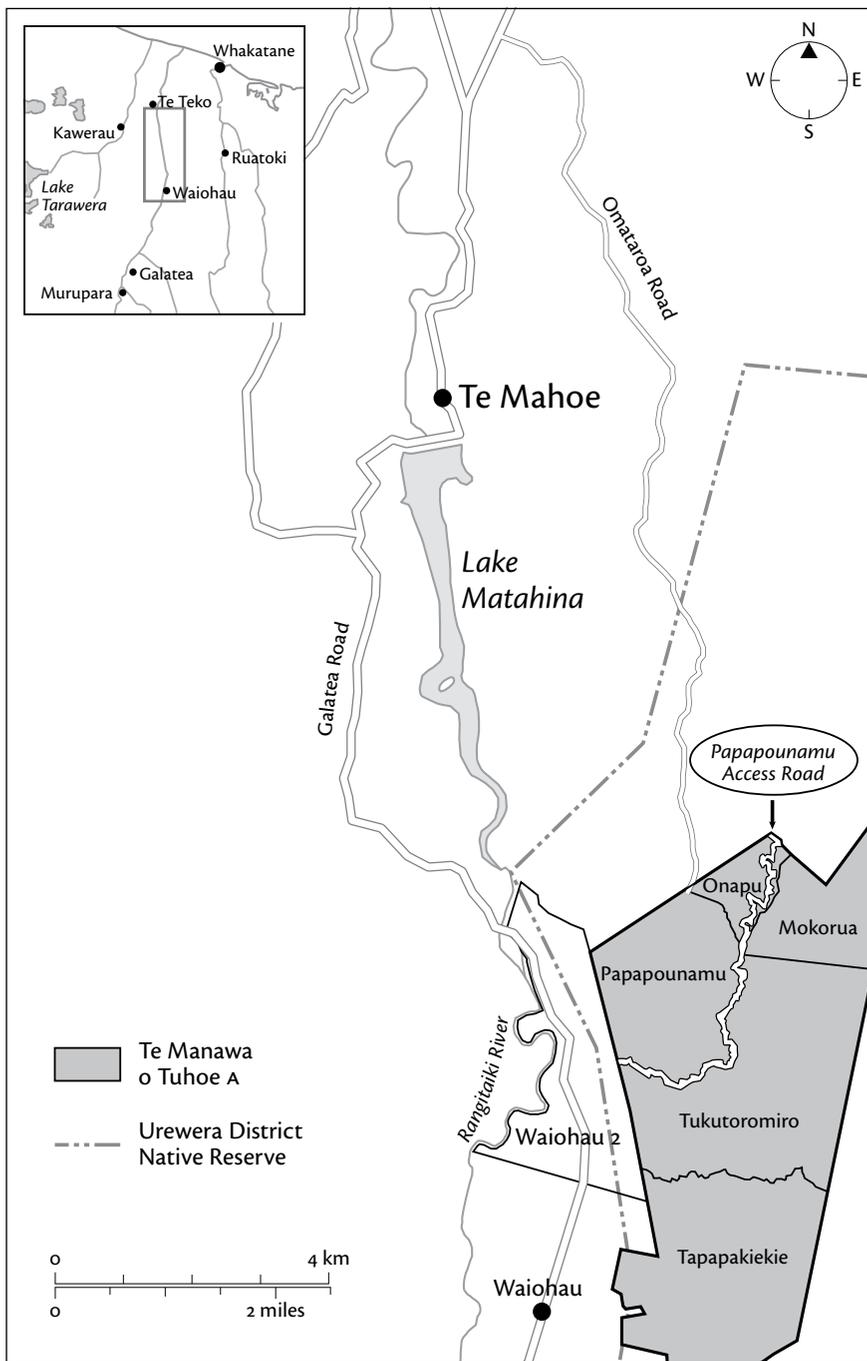
We briefly discussed the Papapounamu road claim in chapter 14, stating that, because the Crown had taken land in the area, the commissioners saw a need to create legal access to the Papapounamu and Tukutomiro blocks, and the neighbouring Mokorua and Onapu blocks. As with other blocks in the consolidation scheme, the Crown had taken one-quarter of the original acreage of each block. In July 1923, the Urewera commissioners Harold Carr and RJ Knight ordered that a road going through the Papapounamu and Tukutomiro blocks be continued through the Waiohau 2 block to Galatea Road.²⁰ Later in the year, a road was

17. Waitangi Tribunal, *Ngati Rangiteaorere Claim Report*, s4.2.5; Waitangi Tribunal, *Turanga Tangata Turanga Whenua: Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 648; Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 839, 849; Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 1, pp 291–292

18. Waitangi Tribunal, *Ngai Tahu Ancillary Claims Report*, p 365; Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 1, p 262

19. Waitangi Tribunal, *Ngai Tahu Ancillary Claims Report*, p 11; see also Waitangi Tribunal, *The Turangi Township Report 1995*, p 300; Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), pp 438, 451; Waitangi Tribunal, *The Petroleum Report*, p 54; Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 839, 868; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, vol 3, p 1290; Waitangi Tribunal, *Wairarapa ki Tararua Report*, vol 2, p 743; Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 1, pp 294–295

20. Urewera commission minutes, app 5 (Tama Nikora, 'Urewera Consolidation Scheme (1921–1926): An Analysis' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc E7), app C3)



Map 22.1: Papapounamu access road

surveyed along the course of a stream between the Papapounamu and Onapu blocks on one side and the Tukutomiro and Mokorua blocks on the other, and then through the Waiohau 2 block to Galatea Road.²¹ This land seems to have been proclaimed as a public road in 1930, and was still appearing on cadastral maps as late as 1972.²²

Waiohau 2, however, had been privately purchased in 1917.²³ The commissioners had no power to do anything with general land outside the UDNR area.²⁴ The Crown could instead have purchased the land from the owner or used the Public Works Act to compulsorily acquire it. No land was purchased or taken, however, and no road was built, meaning that the four blocks had no connection to the main road.

In 1979, all four blocks – which had by this time become part of the huge Te Manawa o Tuhoe block – were leased to the Crown for forestry purposes.²⁵ As part of the lease, the Forest Service agreed to build a road from the Te Manawa o Tuhoe block to the existing Omataroa road to the north.²⁶ Maintenance was to be shared between the Crown and the landowners, and later between the landowners and anyone using the land for forestry purposes.²⁷ The new road was about 14 kilometres long, whereas the road across Waiohau 2 would have been only about one kilometre.²⁸ While the new road has provided access between the blocks and the main road, it is therefore much less convenient than what would have been provided under the original arrangement.

21. ML 13352, ML 13354, app 6, 9 (TR Nikora and KR Locke, 'Report on Legal Access to Te Manawa-o-Tuhoe A Block across Waiohau No 2 Block', app 6 (Tama Nikora, 'Urewera Consolidation Scheme (1921–1926)' (doc E7), app C3, pp [130], [135]))

22. TR Nikora and KR Locke, 'Report on Legal Access to Te Manawa-o-Tuhoe A Block across Waiohau No 2 Block', app 2, p 4 (Nikora, 'Urewera Consolidation Scheme (1921–1926)' (doc E7), app C3)

23. Certificate of title (Nikora and Locke, 'Report on Legal Access to Te Manawa-o-Tuhoe A Block', app 2 (Nikora, 'Urewera Consolidation Scheme (1921–1926)' (doc E7), app C3, p [120]))

24. Urewera Lands Act 1921–22, s 11(1)

25. Nikora and Locke, 'Report on Legal Access to Te Manawa-o-Tuhoe A Block', p 5 (Nikora, 'Urewera Consolidation Scheme (1921–1926)' (doc E7), app C3)

26. Memorandum of Lease, 9 February 1979 (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)(I)), p 84); 'Order Laying Out a Roadway Pursuant to Sections 415, 416 and 418 of the Maori Affairs Act 1953 for the Purpose of Providing Improved Access to Te Manawa-O-Tuhoe Block', 10 December 1980, clause 1(c) (Maori Land Court documents (doc O1), pp [77]–[79])

27. Whakatane Maori Land Court, minute book 115, 20 July 2007, fols 13–17 (Maori Land Court documents (doc O1), pp [13]–[17]); Waiariki District Maori Land Court, minute book 57, 10 July 2012, fols 132–133

28. The entire roadway occupies some 27.87 hectares (68 acres 3 roods 17 perches) of these blocks and, given its more or less uniform width of 20 metres, we have calculated its length to be approximately 13.9 kilometres: see Nikora and Locke, 'Report on Legal Access to Te Manawa-o-Tuhoe A Block', p 5 (Nikora, 'Urewera Consolidation Scheme (1921–1926)' (doc E7), app C3); Peter Clayworth, 'A History of the Tuararangaia Blocks' (commissioned research report, Wellington: Waitangi Tribunal, 2001) (doc A3), p 125.

22.2.2.2 The claims and the Crown response

Counsel for Wai 36 Tuhoe argued that the absence of the Papapounamu access road has made it costly and impractical to access the part of Te Manawa o Tuhoe A block that includes the former UCS blocks of Papapounamu, Tukotomiro, Mokorua, and Onapu. The claimants wanted the Crown to provide better access to the area, as was originally intended.²⁹ Crown counsel responded that there was insufficient evidence of any economic loss from poor access, and submitted that the failure to build the road was compensated by the Crown's 1957 payment for its failure to build the consolidation scheme roads.³⁰

22.2.2.3 Tribunal analysis and conclusions

In our discussion of the consolidation scheme in chapter 14, we noted the report of the consolidation commissioners that the hapu and iwi of Te Urewera agreed to the consolidation scheme in large part because of the promise of roads. In light of this, we found that the Crown's failure to build the roads was a particularly egregious breach of the Treaty. We also found that the compensation paid in 1958 was inadequate to redress the prejudice arising from the Crown's broken promise. Similarly, we find that the Crown's failure to build the Papapounamu access road, despite promising to do so and despite taking a quarter of each of the affected blocks, was a breach of the principles of good faith and active protection.

What prejudice has arisen from the lack of a road through Waiohau 2? Despite the road not being built, cutting rights to the Papapounamu, Onapu, and Tukotomiro blocks were sold in the 1940s.³¹ This was when the Te Urewera timber industry was showing the most growth, so it is not clear that the lack of a road across Waiohau 2 delayed the logging of these blocks. Despite this early milling activity, it was still apparently necessary for the Forest Service to build a road as part of its 1979 lease. This was much longer than the Waiohau 2 route would have been, and so would have increased maintenance costs, which as we have seen were split between the owners and the leaseholders. The costs would have cut into the owners' profits, and possibly reduced the lease income. The claimants submitted that the existing route is 'impractical and costly', but did not provide any figures or evidence in support.³² We do not know, therefore, the extent of any cost or impracticality, but note that it would depend on where workers and logging trucks were coming from. A journey to or from Kawerau or Whakatane would be roughly the same length via the current road layout or by the Papapounamu route, had it been built. If they were going to or from Murupara, on the other hand, the

29. Counsel for Wai 36 Tuhoe, second amended statement of claim, 4 October 2004 (claim 1.2.2(b), SOC BB), p 183; counsel for Wai 36 Tuhoe, closing submissions, pt C, schedule of primary findings and recommendations, 2005 (doc N8(b)), p 10

30. Crown counsel, closing submissions (doc N20), topics 18–26, p 105

31. 'Facts and Figures of the Urewera Maori Lands in Relation to the Four Catchment Areas, National Parks and State Forests, Delivered by Honourable ET Tirikatene, Minister of Forests, at Ruatoki, 22.11.59' (Tamaroa Nikora, 'Te Urewera Lands and Title Improvement Schemes' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2004) (doc G19), app C, p 26)

32. Counsel for Wai 36 Tuhoe, second amended statement of claim (claim 1.2.2(b), SOC BB), p 183

existing route is longer, by approximately 28 kilometres in each direction, than the Papapounamu route. We find that the increased maintenance costs on the Forest Service road were a prejudice arising from the failure to build the Papapounamu access road. We are unable to reach any further finding on the impact of the existing road's route.

The Crown has submitted that the failure to build the road was covered by the 1957 compensation payment. In chapter 14, we found that the payment was inadequate to rectify the prejudice caused by the Crown's failure to build the arterial roads. We consider that the prejudice was less severe in this instance than in relation to the arterial roads. However, the compensation payment was only for the failure to build the arterial roads, and so it cannot also be compensation for the failure to build the Papapounamu road.

22.2.3 Was there a Treaty breach and prejudice arising from the alienation of land from the Tahora 2F2 block for a road?

22.2.3.1 Introduction

In this section, we look at another 'paper road' claim. In this instance, unlike the Papapounamu access road claim, the Ngai Tamaterangi claimants allege that they have been prejudiced by the Crown's failure to return the land, rather than its failure to build the road. The block in question is Tahora 2F2, which lies in the Ruakituri Valley, east of Lake Waikaremoana. In the early 1920s, as part of the wider consolidation roading scheme, the Crown planned to build a road linking Whakatane and Gisborne via the Waimana and Ruakituri Valleys.³³ At this time, Tahora 2F2 was under the control of the East Coast commissioner, who agreed to let the Crown take nearly 50 acres from the block under section 12(3) of the Land Act 1924, on the understanding that the new road would improve access.³⁴ The Public Works Department had initially requested a monetary contribution from the commissioner, and later from the tenants, but seems to have been unsuccessful.³⁵

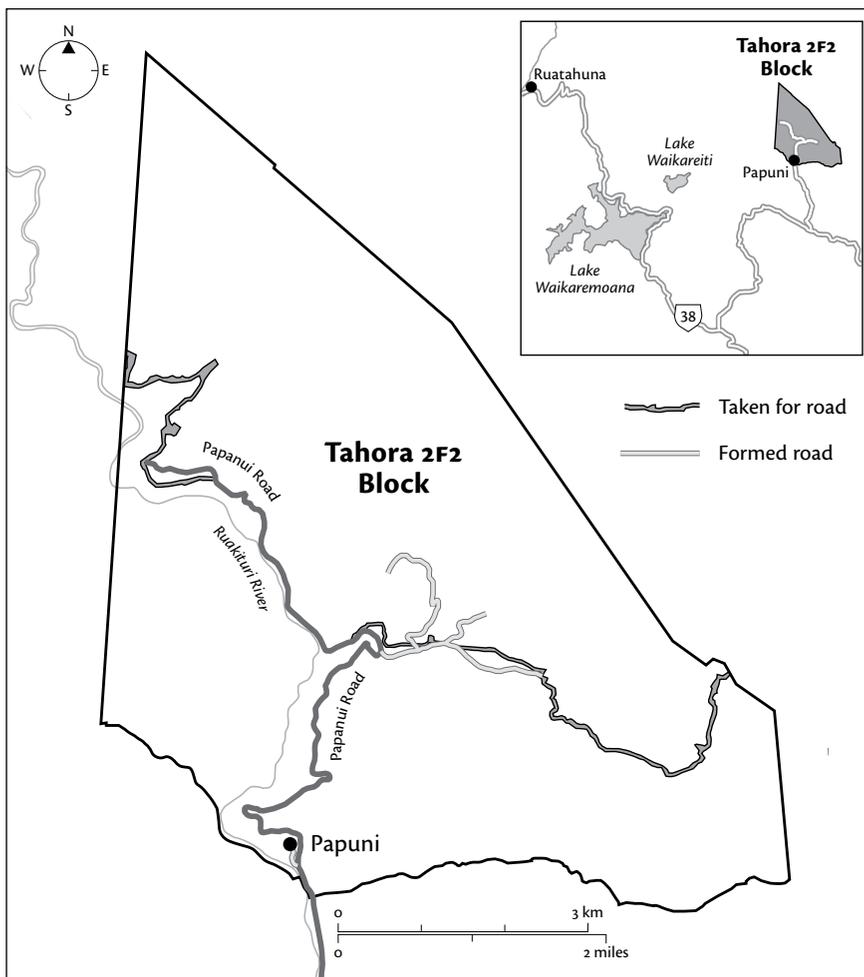
As we detailed in chapter 14, the Crown abandoned its consolidation roading scheme in the 1930s. Before this, it built a 7.8-kilometre road part-way into the Tahora 2F2 block.³⁶ In 1972, the Counties Act 1956 was amended to transfer ownership of all rural roads except State highways and motorways to the local County Council. Consequently, both the built and unbuilt parts of the Tahora road passed out of Crown ownership, becoming the property of the Wairoa County Council, later succeeded by the Wairoa District Council. In the 1990s, the Tahora owners began negotiating with the council for the return of the unbuilt section, which

33. Philip Cleaver, 'Urewera Roding' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A25), pp 75–78; *Attorney-General v Maori Land Court* (1999) 4 NZ ConvC 192,906 (CA)

34. Peter Boston and Stephen Oliver, 'Tahora' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A22), pp 288–291, 325; 'Land Proclaimed as a Road, and Roads Closed', 5 April 1930, *New Zealand Gazette*, 1930, no 27, p 1123

35. Boston and Oliver, 'Tahora' (doc A22), pp 288–291

36. *Attorney-General v Maori Land Court* (1999) 4 NZ ConvC 192,906 (CA), 27



Map 22.2: Tahora 2F2 paper road

was being used as a walking track. The two groups agreed that the land could be returned as long as the walking track remained open, but could not agree on where the track should run.³⁷ The owners then went to the Maori Land Court seeking the return of 37 acres of land in a 4.2-kilometre strip.³⁸ This eventually resulted in the High Court and then the Court of Appeal ruling that the council had no duty to either build the road or return the land.³⁹

37. *Attorney-General v Maori Land Court* (1999) 4 NZ ConvC 192,906 (CA)

38. *Ibid*

39. *Wairoa District Council & Attorney-General v Maori Land Court & Proprietors of Tahora 2F2* (1998) 3 NZ ConvC 192,772; *Attorney-General v Maori Land Court* (1999) 4 NZ ConvC 192,906 (CA)

22.2.3.2 *The claims and the Crown response*

Counsel for Ngai Tamaterangi submitted that the East Coast commissioner allowed the land to be taken without compensation, or consultation with the owners. They also noted the unsuccessful efforts of the Tahora 2F2 owners to establish in court that the Wairoa District Council holds the road under a fiduciary duty to them. Counsel submitted that the land should be returned, as it is not being used for the purpose for which it was taken.⁴⁰ Crown counsel responded that the land might still be used for a road, and is functioning as such even if only for foot traffic. It also noted that, because the land was acquired under the Land Act 1924, rather than public works legislation, the usual offer-back provisions attached to surplus public works land do not apply.⁴¹

22.2.3.3 *Tribunal analysis and conclusions*

In chapter 12, we discussed the East Coast Native Lands Trust, and how it came to administer large areas of Maori land in and to the east of our district during the first half of the twentieth century. These included five parts of Tahora 2, including Tahora 2F2. These lands were originally vested in the Carroll–Pere Trust, and then vested by statute in 1902 in the East Coast Native Trust Lands Board. The owners of Tahora 2F2 were not consulted about the transfer, but initially no alienation could take place without the consent of the original trustees. In 1906, the Crown appointed a single commissioner in place of the trust board, and vested the land in him. From 1911, the East Coast commissioner had the power to sell, lease, or mortgage the land (Native Land Claims Adjustment Act 1911, section 14). In 1922, the power to sell the land was made subject to the Native Minister's approval (Native Land Amendment and Native Land Claims Adjustment Act 1922, section 28(3)) but at no point was the commissioner required to seek or obtain the approval of the owners.

It is important to note at this point that while the 1911 Act gave the commissioner the power to sell, lease, or mortgage land, it did not confer the power to gift it. He was able to do so, however, under section 12 of the Land Act 1924. Although the Land Act generally applied only to Crown land, section 12 allowed the Governor-General to proclaim any Crown land or other land as a road. Any such proclamation required the consent of the owner, unless it was held in trust, in which case the trustee had the sole power to consent. This empowered the East Coast commissioner to alienate land from Tahora 2F2 without consulting the owners, or receiving any payment or other compensation.

If the land had been taken under the Public Works Act 1928, the consent of the owners would still not have been required, as the Act allowed for compulsory acquisition. However, the Crown would have been compelled to pay the owners compensation for loss of the land (Public Works Act 1928, section 104), whereas under the Land Act 1924 there was no such entitlement.

40. Counsel for Ngai Tamaterangi, closing submissions, 30 May 2005 (doc N2), pp 60–62

41. Crown counsel, closing submissions (doc N20), topic 37, p 9

Where Maori land has been taken for public works and not used for that purpose, there are usually two means by which the former owners can get it back: offer-back provisions under public works legislation, and the Treaty claims settlement programme. Neither of these is available to the claimants in this instance. The public works legislation route is closed to them because the Land Act 1924 did not provide for offer-backs. The Treaty settlement option is also closed because it is limited to Crown land, and the land from Tahora 2F2 was transferred to the Wairoa County Council in the 1970s. In addition, both options would require the Crown to concede that it is not using the land for its original purpose. As noted above, the Crown submitted in this inquiry that the land was in fact being used as a road, even if only for foot traffic.⁴² This submission was also made by the Wairoa District Council during the 1990s litigation, and was accepted by the Court of Appeal.⁴³

It seems to us that the two most important facts in this claim are that the land was taken without the owners' consent, and that they now have no practical means to get it back, even though it remains essentially in public ownership. As we note above, the East Coast commissioner did not need the owners' consent to alienate their land. In chapter 12 we found that by giving the commissioner power to alienate Maori land without the owners' consent, the Crown breached the plain meaning of article 2 of the Treaty, which guarantees Maori the continued possession of their land for as long as they wish to retain it. In this instance, the commissioner was able to give the land to the Crown under section 12(3) of the Land Act 1924, which specifies that reserved, endowed, or vested land could be taken with the consent of the 'body or persons in whom the land or the control thereof may be vested'. As applied to Maori land, this too was in breach of article 2 of the Treaty.

We consider that the East Coast commissioner was not part of the Crown. We repeat our finding in chapter 12 that, by granting him the power to alienate Maori land without the consent of its owners, the Crown was in breach of article 2 of the Treaty and of the principle of active protection. The alienation of the Tahora 2F2 land was a prejudice arising from this breach.

22.2.3.3.1 HOW HARMFUL WAS THIS PREJUDICE ?

In alienating the land for the road, the East Coast commissioner probably saw himself as acting in the best interests of the owners. Even if the owners had agreed with this, the Crown had a clear obligation to return the paper road land once it became clear that the road would not be completed. We are not convinced by the Crown's argument that a walking track constitutes a road, except as a legal nicety. Apart from being contrary to the usual meaning of the word, it delivers few if any of the benefits which the owners, or the East Coast commissioner, would have expected.

We did not receive any evidence on why the Land Act, rather than the Public Works Act, was used to obtain the land for the Crown. It seems likely, in light

42. Crown counsel, closing submissions (doc N20), topic 37, p 9

43. *Attorney-General v Maori Land Court* (1999) 4 NZ ConvC 192,906 (CA)

of the Public Works officials' earlier requests that the commissioner contribute to the cost of the road, that it was used because it did not require the Crown to pay compensation. If this was the case, it compounds the Crown's breach of the Treaty.

The Land Act 1924 did not include any provision for non-Crown land to be returned if it was not being used for its intended purpose. This cut off one means for the claimants to have their land returned, and is in breach of the principle of active protection. As noted, the land is also out of reach of the Treaty settlement process.

22.2.3.3.2 HAS THE TREATY BREACH BEEN MITIGATED BY THE CONSTRUCTION AND MAINTENANCE OF THE ROAD WHICH WAS BUILT ?

In the Court of Appeal judgment concerning the paper road, Justice Blanchard found that 'overall what was negotiated by the Commissioner seems to have been a very good deal for the owners'.⁴⁴ This was because, in exchange for a relatively small area of land, the Crown constructed and maintained nearly eight kilometres of road within the block – around twice the length of the paper road – and a bridge which in 1985 cost the council \$158,000. In addition, the judge found that the Crown had not made any commitment to building more of the road, and so had no obligation to return the land.⁴⁵ He also stated that it was 'unrealistic' to regard the built and unbuilt roads as separate matters, which we take to mean that the Crown would not have built any road at all in the block unless it had been able to take all of the paper road land.⁴⁶ We agree that the owners have received benefits from the road construction and maintenance which did go ahead, and we accept that this probably would not have happened if the paper road land had not been taken. This does not excuse the Crown's breach of the Treaty, nor does it mean that the loss of the paper road land is not a prejudice arising from that breach. We do find, however, that the prejudice has been partly mitigated.

22.2.4 Were the Crown's takings of portions of the Heiotahoka and Te Kopani reserves for public works in breach of Treaty principles and, if so, did Tuhoe and Ngati Ruapani suffer prejudice?

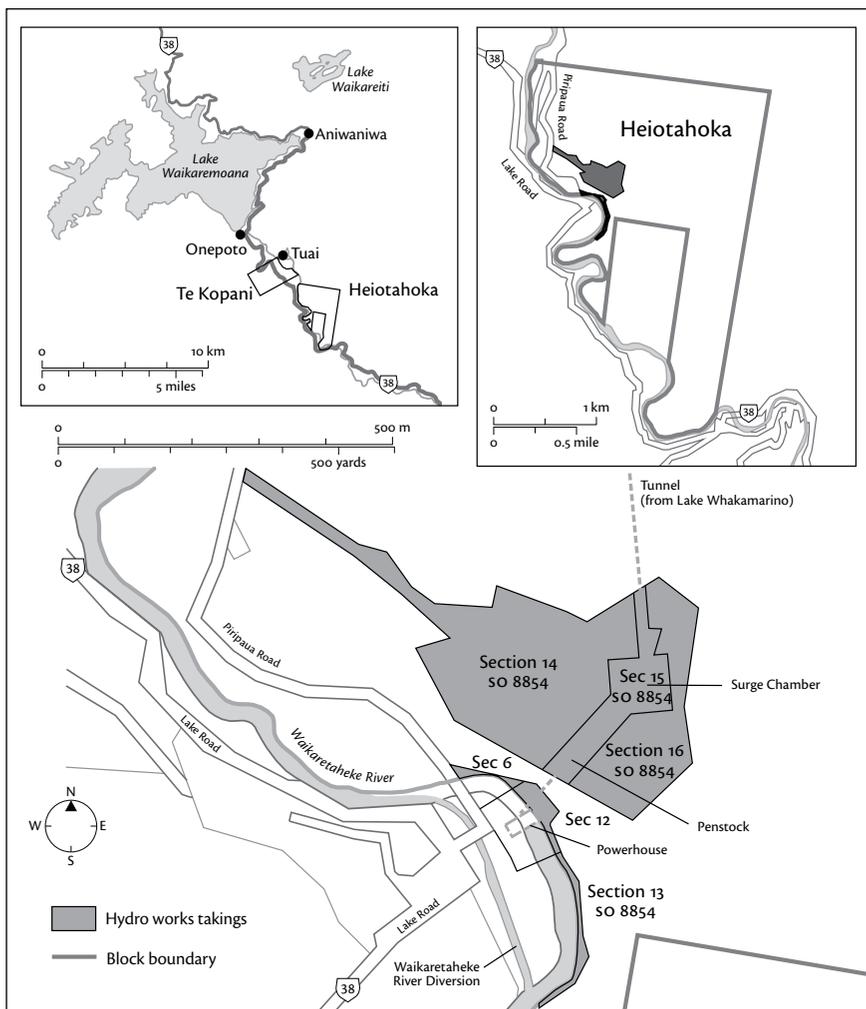
22.2.4.1 Introduction

Over the course of this report, we have shown how the Crown gradually reduced Maori landholdings near Lake Waikaremoana. In 1875, it purchased the four blocks to the south-east of the lake in egregious circumstances, which we saw in chapter 7 left Tuhoe and Ngati Ruapani with four supposedly inalienable reserves. In chapter 14, we described how, during the Urewera Consolidation Scheme and in breach of the Treaty, the Crown took the Waikaremoana block to the north of

44. *Ibid*, p 27

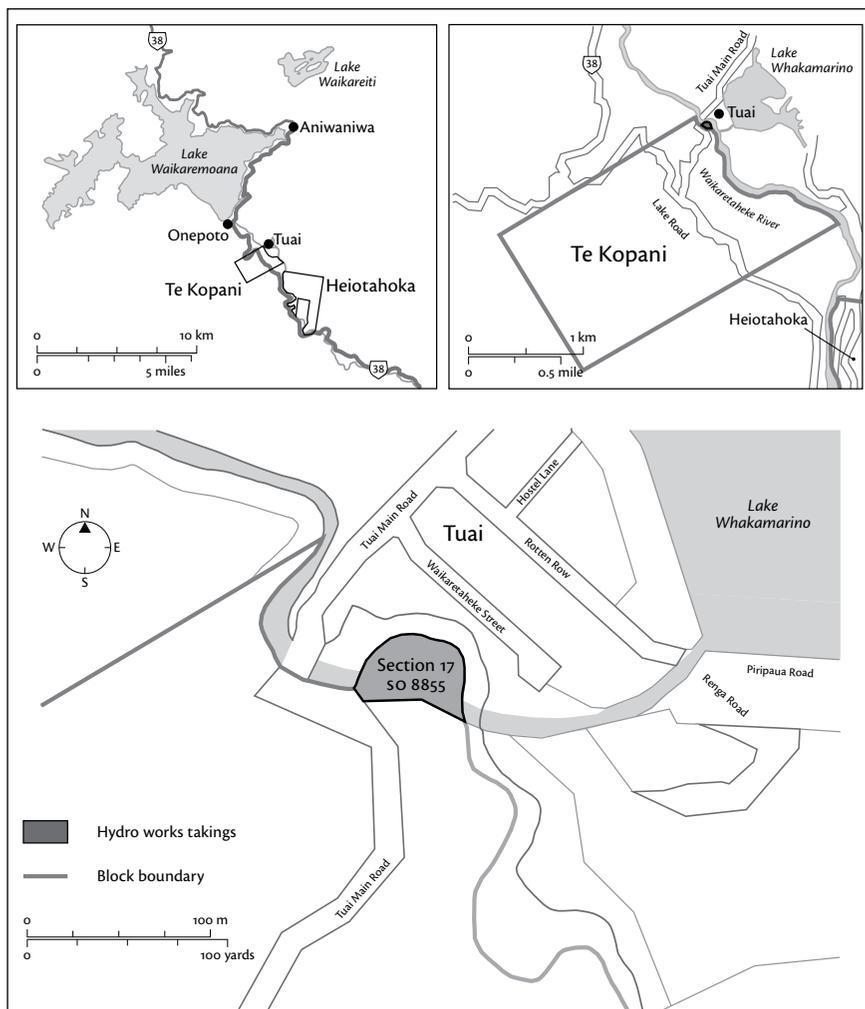
45. *Ibid*, pp 26–27. According to the Reserve Bank inflation calculator, \$158,000 in the first quarter of 1985 (Q1 1985) was equivalent to \$346,998 in the first quarter of 2005, at the time of our hearings. Inflation calculator at http://www.rbnz.govt.nz/monetary_policy/inflation_calculator, accessed 6 November 2014.

46. *Attorney-General v Maori Land Court* (1999) 4 NZ ConvC 192,906 (CA), p 26



Map 22.3: Heiotahoka public works

the lake and two of the four reserves to the south. Ngati Ruapani were particularly prejudiced, as they were left virtually landless, with the Crown failing even to pay the full amount it had promised for the land. By the end of the consolidation scheme, Tuhoë and Ngati Ruapani retained just 2,488 acres near Waikaremoana, mostly in the Heiotahoka and Te Kopani reserves to the south-east of the lake. In chapter 15, we showed that the Crown was well aware that Ngati Ruapani and other groups near Waikaremoana were living in dire poverty, having lost most of their land and having few sources of income. Despite this, in the early 1940s the Crown compulsorily acquired 35 acres from Heiotahoka reserve and one acre from the Te Kopani reserve for use in the Waikaremoana hydroelectric scheme.



Map 22.4: Te Kopani public works

While these takings were very small compared to many alienations discussed in this report, we consider them significant for two reasons: first because the owners, particularly Ngati Ruapani, had already lost nearly all their land and could ill afford to lose more; and second because the takings were from reserves which were supposed to be inalienable. The Waikaremoana hydro project also had significant environmental impacts, which we have discussed in chapter 20. There we found that the Crown had the lake level permanently lowered without consultation, consent, or compensation, even though this had serious long-term effects on fisheries and the land around the lake, and did significant spiritual damage to the people of the lake and their taonga.

In our introduction to the public works claims, we summarised the Treaty standards which the Crown must meet in relation to public works takings. These are that:

- ▶ The Crown must enter into genuine consultation with Maori landowners, and ensure that it is well informed about the cultural, spiritual, and economic value of the land, and the amount of other land retained by the owners.⁴⁷ If it still intends to take the land, it must enter into fair negotiations over the extent and conditions of any alienation.⁴⁸
- ▶ The Crown must explore all alternatives to the taking of Maori land, including the taking of other land instead, and alternatives to permanent alienation, such as leases or easements.⁴⁹
- ▶ If land is taken, the Crown must pay fair, equitable, adequate, and prompt compensation, with interest if there are any delays in payment.⁵⁰ As well as the economic value, compensation must take into account the spiritual and cultural value of the land, its use for traditional purposes such as hunting, and how much comparable land the owners retained.⁵¹
- ▶ The Crown's powers of compulsory acquisition should be applied to Maori land 'only in exceptional circumstances and as a last resort in the national interest.'⁵²

All of these standards are relevant to this claim, and will form the basis of our analysis below. We also address the temporary use of the land by public works employees during construction. Most of the evidence before us related to the Heiotahoka lands; we received very little on Te Kopani.

22.2.4.2 The claims and the Crown's response

Counsel for the Wai 144 Ngati Ruapani and Nga Rauru o Nga Potiki claimants both submitted that land was taken for the hydro works without the consent of

47. Waitangi Tribunal, *Wairarapa ki Tararua Report*, vol 2, p 793; Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 852; Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 1, pp 279–283

48. Waitangi Tribunal, *Ngati Rangiteaorere Claim Report*, s 4.2.5; Waitangi Tribunal, *Te Maunga Railways Land Report*, p 71

49. Waitangi Tribunal, *Te Maunga Railways Land Report*, pp 70, 81; Waitangi Tribunal, *Turangi Township Report 1995*, pp 308, 312; Waitangi Tribunal, *Ngai Tahu Ancillary Claims Report*, p 366; Waitangi Tribunal, *The Petroleum Report*, p 54; Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 839; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui Report*, vol 3, p 1282; Waitangi Tribunal, *Wairarapa ki Tararua Report*, vol 2, p 795; Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 1, pp 273–278; Waitangi Tribunal, *Te Kahui Maunga*, vol 2, pp 743–744, 751

50. Waitangi Tribunal, *Ngati Rangiteaorere Claim Report*, s 4.2.5; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 648; Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 839, 849; Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 1, pp 291–292

51. Waitangi Tribunal, *Wairarapa ki Tararua Report*, vol 2, p 796; Waitangi Tribunal, *Te Kahui Maunga*, vol 2, p 753

52. Waitangi Tribunal, *Ngai Tahu Ancillary Claims Report*, p 11; see also Waitangi Tribunal, *Turangi Township Report 1995*, p 300; Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa*, pp 438, 451; Waitangi Tribunal, *The Petroleum Report*, p 54; Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 839, 868; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, vol 3, p 1290; Waitangi Tribunal, *Wairarapa ki Tararua Report*, vol 2, p 743; Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 1, pp 294–295.

the landowners.⁵³ Counsel for Nga Rauru o Nga Potiki also stated that the Crown took more land than it needed, and refused to consider alternatives to permanent alienation, despite the owners' clearly stated preference for leasing.⁵⁴ During construction, land was used without permission and crops and orchards were damaged, but only minimal compensation was paid.⁵⁵ Counsel for Nga Rauru o Nga Potiki and the Wai 144 Ngati Ruapani claimants also submitted that the Crown failed to take into account how little land remained in hapu ownership at the time of the takings, even though it was well aware that Ngati Ruapani had hardly any land and were living in dire poverty.⁵⁶

Crown counsel submitted that a 'balancing exercise is required' between tino rangatiratanga and the Crown's kawanatanga obligations to the public interest.⁵⁷ This balance can be struck, they argued, by the Crown adequately consulting with Maori, protecting their rights and interests in land, being 'measured' in the use of its compulsory acquisition powers, and paying 'fair market compensation.'⁵⁸ They submitted that consultation did occur in this instance, but conceded that 'compensation dealings' were not satisfactory, and that workers trespassed on Maori land during construction.⁵⁹ Counsel acknowledged that the Crown should have considered whether the takings would have left hapu without sufficient land, but submitted that the evidence on the record 'does not indicate public works acquisitions significantly impacted on the land holdings of Urewera Maori.'⁶⁰ They also submitted that Maori in Te Urewera benefited from employment in public works projects such as the hydro works, and that 'the general benefits of a strong infrastructure enhanced New Zealand's economic and social development.'⁶¹

22.2.4.3 *Tribunal analysis and conclusions*

Waikaremoana's potential for electricity generation was first recognised in the nineteenth century, and the prospect was explored in more detail in the early twentieth century.⁶² Waikaremoana was one of many different sites considered for hydroelectric development, and in 1918 was selected as one of three priority sites.⁶³ We have seen in chapter 14 that the requirements of the planned hydro scheme, particularly the need to maintain water levels in the lake, were a factor in

53. Counsel for Ngati Ruapani, closing submissions, 30 May 2005 (doc N13), p 58; counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), p 279

54. Counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), pp 278–279

55. *Ibid*, p 279

56. *Ibid*, p 283; counsel for Wai 144 Ngati Ruapani claimants, submissions in reply, 8 July 2005 (doc N30), p 63

57. Crown counsel, closing submissions (doc N20), topic 37, p 9

58. *Ibid*, p 10

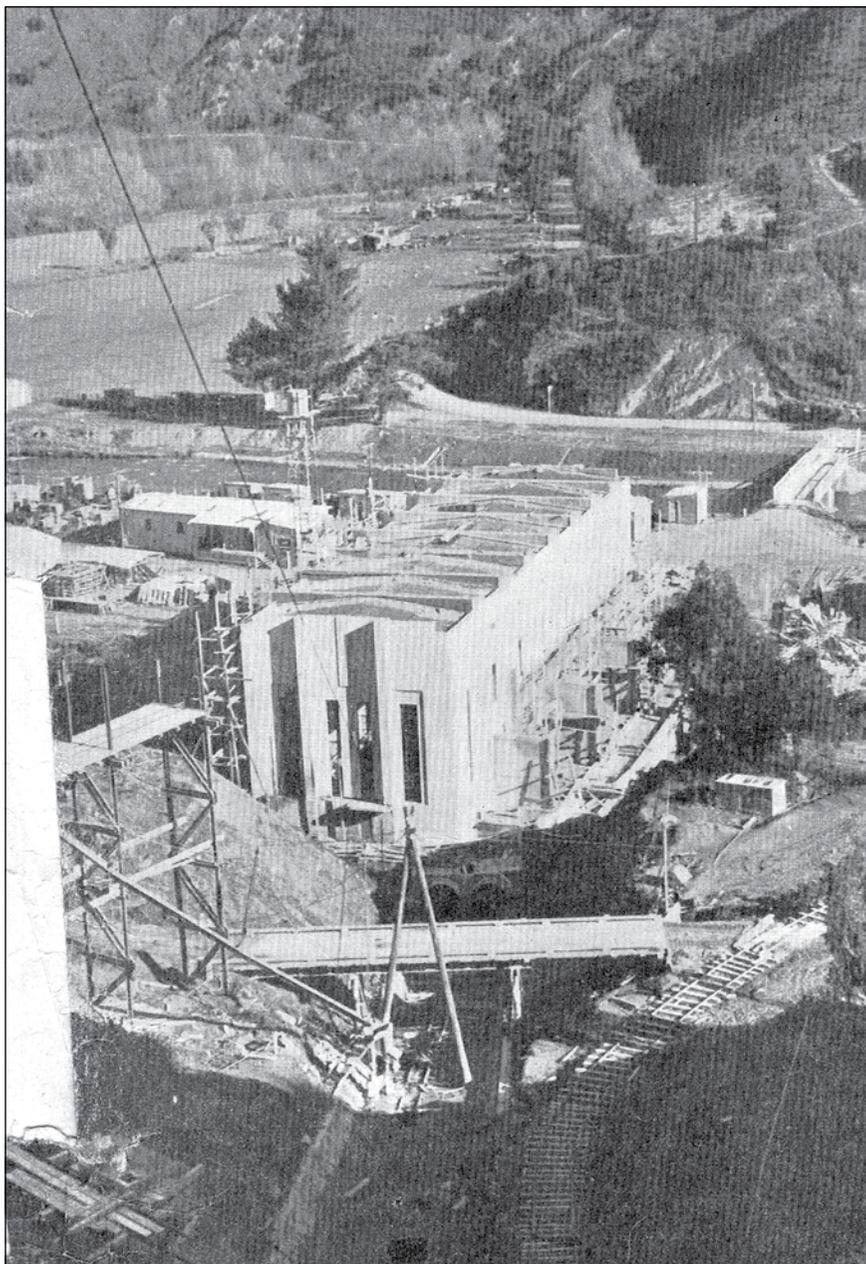
59. *Ibid*, p 5

60. *Ibid*, p 10

61. *Ibid*

62. G G Natusch, *Power from Waikaremoana: A History of Waikaremoana Hydro-Electric Power Development* (Tuai: Electricorp, 1992), p 7

63. Tony Walzl, 'Waikaremoana: Tourism, Conservation & Hydro-Electricity (1870–1970)' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A73), pp 181, 185



Auckland Weekly News (SCGSC, Auckland Libraries, AWNS-19410702-32-1)

The construction of an extension to the Tuai power station, 1941. The third phase of the Waikaremoana hydroelectricity scheme involved the creation of a station at Piripaua and a storage lake (Lake Whakamarino) at the base of Tuai station. In 1941, the Crown compulsorily acquired land for the scheme's expansion from Maori reserves at Tuai and Piripaua, despite the owners' lack of other lands and the supposedly inalienable nature of the reserves.

the Crown's acquisition of the Waikaremoana block. The hydro works were built in stages from the early 1920s to the 1950s, with the third stage in the 1930s and 1940s involving the creation of Lake Whakamarino at Tuai and a power station at Piripaua, adjacent to the Heiotahoka reserve.⁶⁴ As part of this stage, land was taken from Heiotahoka and Te Kopani in 1941, with compensation of £275 and a five-acre paper road provided in return for nearly 40 acres of Heiotahoka, and £4 paid for one acre of Te Kopani.⁶⁵ The return of the paper road means that a net 35 acres was lost from Heiotahoka. The main block of Heiotahoka land was used for the station's surge chamber, pipes, and access to the pipes and chamber, while another small area was involved in the channelling of the Waikaretaheke River through the power house.⁶⁶ The Te Kopani acre was used for river diversion further upstream. The hydro works are now run by Genesis Energy, a State-owned enterprise.

Investigative surveys of the Heiotahoka reserve block began around mid-1937. The surveyors did not seek permission, but instead wrote to the Native Land Court after they had begun work, seeking permission to cut and burn scrub.⁶⁷ The court registrar responded that he had no authority to give such permission, and advised the surveyors to notify the owners.⁶⁸ By January 1938, some of the owners had become aware that the Public Works Department was interested in their land, and telegraphed the Native Minister on 10 January to say that they 'do not want to sell but we agree to lease.'⁶⁹ On behalf of the Minister, Frank Langstone replied that no decision had been made, but when it was, 'consideration will be given to representations of owners.'⁷⁰ The owners met shortly afterwards and instructed their lawyers to seek compensation.⁷¹ Public works staff then met with some of

64. Natusch, *Power from Waikaremoana*, pp 9–11, 33; Walzl, 'Waikaremoana' (doc A73), pp 298–302

65. Wairoa Native Land Court, minute book 48, 25 February 1942, fol 76 (Tony Walzl, comp, supporting papers to 'Waikaremoana: Tourism, Conservation & Hydro-Electricity (1870–1970)', 4 vols, various dates (doc A73(c)), vol 3, pp 1574–1575); see also 'Land Taken for Road in Block 1V', 13 June 1941, *New Zealand Gazette*, 1941, no 52, p 1858; 'Land Taken for the Development of Water-power', 13 June 1941, *New Zealand Gazette*, 1941, no 52, p 1861, for notification of land taking. These notices seem to include land for the neighbouring Tapper farm. For details of Tapper land, see 'Application for Cabinet Approval of Compensation', 27 October 1943 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1510).

66. Alecock to district engineer, 15 July 1938 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1464)

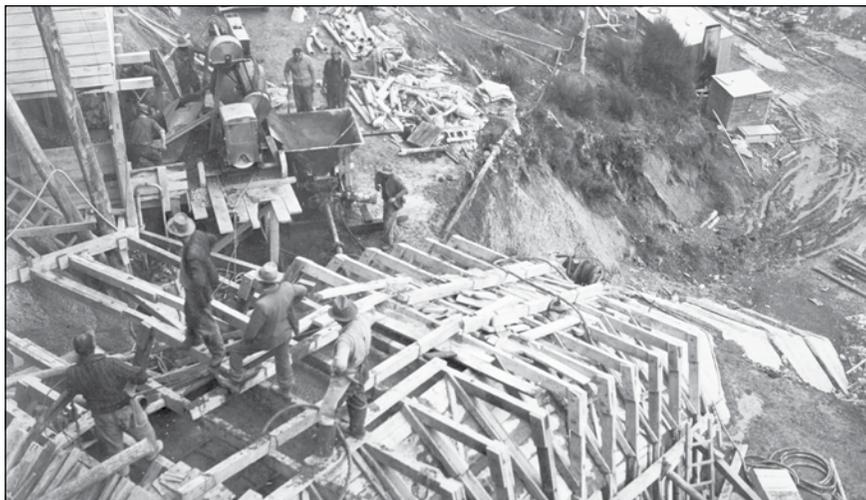
67. Assistant electrical engineer to registrar, 28 May 1937 (Craig Innes, comp, supporting papers to 'Report on the Tenure Changes Affecting Waikaremoana "Purchase Reserves" in the Urewera Inquiry', 7 vols, various dates (doc A117(c)), vol 3, p [168]); engineer to O'Mally [*sic*] and Jones, 2 March 1938 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1476)

68. Registrar to electrical engineer, 2 June 1937 (Innes, supporting papers to 'Report on the Tenure Changes Affecting Waikaremoana' (doc A117(c)), p [169])

69. Ngati-Ruapani to Native Minister, 10 January 1938 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1480)

70. Langstone to Waipatu Winiata, 3 February 1938 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1481)

71. O'Malley to engineer in charge, 15 February 1938 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1477)



Cory-Wright & Salmon Engineers (ATL PACOLL-1344-05-33)

Construction workers at Piripaua, 1942

the owners, 12 of whom gave written permission for public works employees to access their land. However some of the older owners refused to do so.⁷² There seems to have been an informal agreement that if any land was taken the owners would receive ‘an area of flat land, at present a “paper road,” which is very suitable for potato growing’ in exchange for the area required for the hydro scheme. Public Works and Native Department staff thought that the proposal would be in the owners’ interests, and that ‘they were definitely not averse to the land being taken.’⁷³ It is not clear whether this account accurately reflected any of the owners’ views, let alone all of them, nor do we know how much land the owners thought they would lose. At this time, Heiotahoka was not being farmed, but there were plans for development, and the area wanted for the hydro works was ‘the best part of the land.’⁷⁴

Public works employees entered the reserve again around June 1938, setting up camp, laying a road, making surveys, and employing two local Maori men to clear scrub.⁷⁵ The camp seems to have been on 18 acres at the western-most point

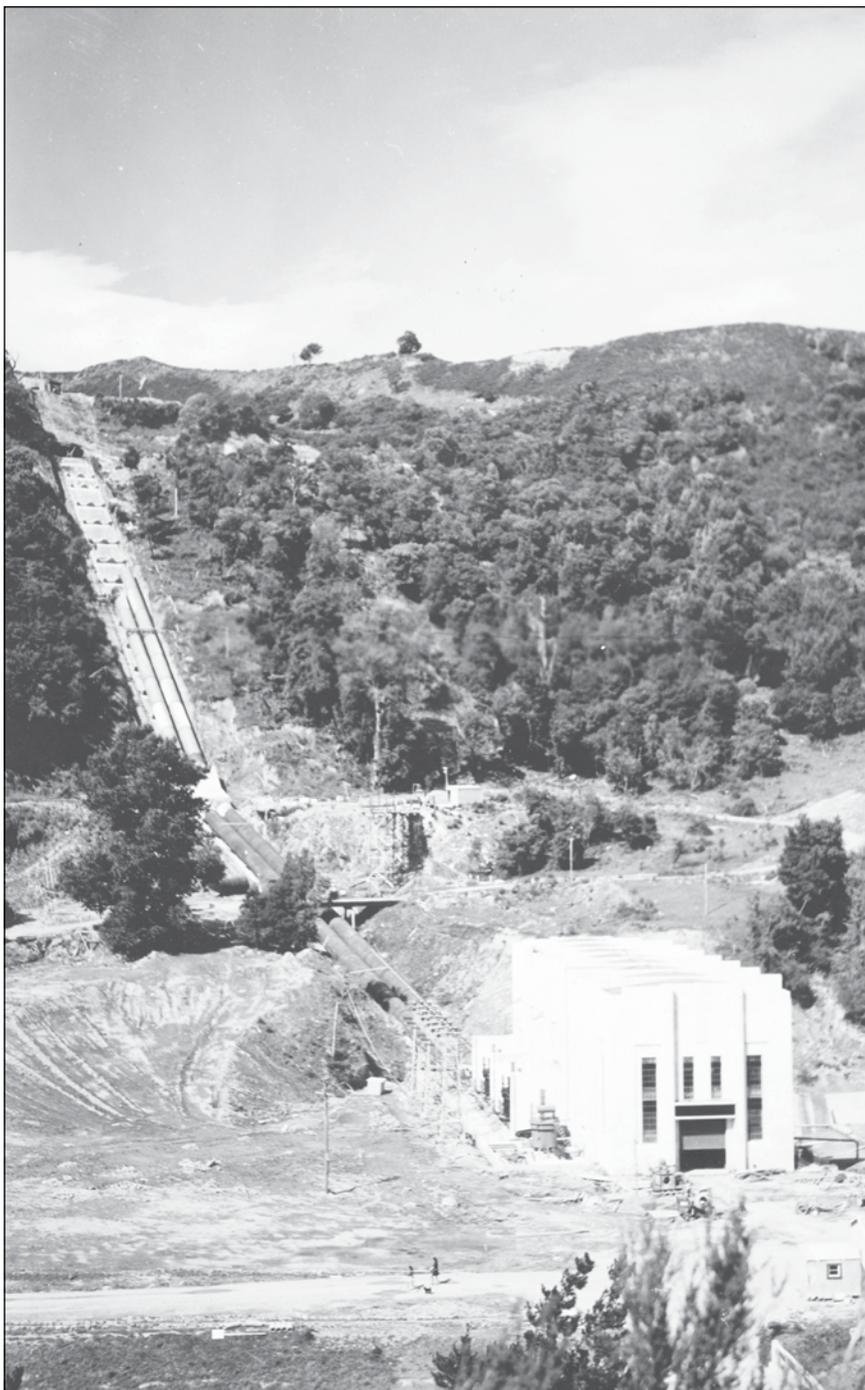
72. Engineer, Tuai, to H Voice, Public Works Department, 2 March 1938 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), p1475)

73. Under-Secretary, Native Department, to engineer-in-chief and Under-Secretary, Public Works, 8 February 1938 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), p1479). The owners seem to have been Peter Taoho and Ngatau, as mentioned in Alecock to district engineer, 15 July 1938 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), p1464). The paper road referred to appears to be the five-acre paper road which was eventually given to the Heiotahoka owners.

74. Registrar to Under-Secretary, Native Department, 27 January 1938 (Innes, supporting papers to ‘Report on the Tenure Changes Affecting Waikaremoana’ (doc A117(c)), p[171])

75. Alecock to district engineer, 15 July 1938 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), p1464); O’Malley to permanent head, Public Works Department, 8 Dec 1938 (Walzl, supporting papers to ‘Waikaremoana’ (doc A73(c)), p1446)

Cory-Wright & Salmon Engineers (ATL, PACOLL-1344-05-15)



The Piripau power station, 1942. The station was commissioned in 1943.

of Heiotahoka 2B, 12 acres of which was in use by the Public Works Department until 1955.⁷⁶ According to the department, there was an agreement that the owners would be paid £8 a year for use of the land.⁷⁷ It is not clear that any rent was paid for occupation after 1942, although when the camp was vacated the owners were given the camp's water supply system.⁷⁸

There were ongoing problems with the camp. Shortly after the workers arrived, resident owner Mokai Hine complained to the district Maori Land Board about their activities, saying that they were putting a road through her orchard and potato paddock. She added that she and all her children had been born on the land. She later consented to the road after public works staff agreed to fence it, transplant some trees and other plants, and leave her spring alone.⁷⁹ The Tuai engineer, Charles Alecock, seems not to have taken her complaints particularly seriously, or seen much value in the property his men were interfering with, stating:

As soon as we began survey work on this side of the river, the Maoris, sensing compensation, moved over and began making gardens about our road line . . . Two other Maoris have built shacks and have taken up residence apparently to have further claims. As for the orchard – there are about six weather beaten old apple trees, apparently self sown, scattered over about half a mile in length. They are infested with codlin moth and undoubtedly a menace to other fruit trees in the district.⁸⁰

Underpinning Alecock's dismissive attitude was the belief, expressed by the district engineer, that the Public Works Act gave his staff

full powers of entry upon lands to carry out the necessary works . . . Notwithstanding those powers it is the practice to advise owners and/or occupiers of the lands affected of our intentions to enter upon their lands whenever practicable, but it is often impractical to advise individual owners of native lands.⁸¹

76. District engineer to permanent head, 23 May 1944, and accompanying map (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1507–1508); Walzl, 'Waikaremoana' (doc A73), p 356; Craig Innes, 'Report on the Tenure Changes affecting Waikaremoana "Purchase Reserves" in the Urewera Inquiry' (commissioned research report, Wellington: Waitangi Tribunal, 2003) (doc A117), p 71). The area remains in Maori ownership.

77. Under-Secretary to district engineer, 12 September 1944 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1500)

78. Innes, 'Tenure Changes affecting Waikaremoana "Purchase Reserves"' (doc A117), p 71; Walzl, 'Waikaremoana' (doc A73), pp 357–358

79. Mrs Nelson or Mokai Hine to Maori Land Board, 8 July 1938 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1468); Mrs Nelson or Mokai Hine to Tuai engineer, 18 July 1938 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1466). Her house also seems to have been connected to the camp water supply: Natusch, *Power from Waikaremoana*, p 34.

80. Alecock to district engineer, 15 July 1938 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1464)

81. District engineer to registrar, Native Department, 22 July 1938 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1460); see also district engineer to permanent head, Public Works, 28 July 1938 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1458).

The public works engineer-in-chief informed his Waikaremoana staff that they were, in fact, trespassing; a view that was confirmed by the Crown solicitor.⁸² After this, public works employees appear to have made more effort to work with the owners, although there continued to be friction over matters such as firewood, fencing, and the destruction of scrub and trees.⁸³ The diversion of the Waikaretaheke River, which acted as a stock barrier, was another problem. The Crown formally agreed to erect a fence once the river had been diverted, but does not appear to have done so until many months after the river diversion, and after the owners had complained that their crops had been destroyed by wandering stock.⁸⁴ As their solicitor pointed out, the owners 'have very little land suitable for cultivation and it will be a big hardship to them if, through lack of fencing, they cannot cultivate the above mentioned Block'.⁸⁵

In late 1938, the Crown considered how much land it needed to take for the hydro works. The engineer-in-chief, J Wood, requested a legal opinion on whether the Crown needed to take land in order to construct and access tunnels, aqueducts, and other peripheral parts of the hydro scheme, or whether workers could simply use Public Works Act rights of access.⁸⁶ The Crown solicitor responded that construction required the land to be purchased or leased. Tunnels could be erected under private land, but the Crown did not have the right to access them through private land.⁸⁷ Wood then asked the district engineer to determine 'in respect of which items the land must be taken as permanently required, which items being of a temporary nature must be arranged with the consent of the land-owners, and which items although permanent do not necessitate the taking of the land'.⁸⁸

82. Engineer-in-chief and Under-Secretary, Public Works Department, to district engineer, 11 August 1938 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1456); Crown solicitor to Under-Secretary, Public Works Department, 23 September 1938 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), pp1451-1452)

83. Assistant Under-Secretary to district engineer, 21 April 1939 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1436); Matamua to Ngata, 26 February 1939 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1437); registrar to Hine, 1 February 1939 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1440); Hine to Native Land Board, 27 January 1939 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1441); Carr to Joyce, 15 February 1939 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1442); O'Malley and Jones to engineer, 7 December 1938 (Innes, supporting papers to 'Tenure Changes Affecting Waikaremoana "Purchase Reserves"' (doc A117(c)), pp185-186)

84. Wairoa Maori Land Court, minute book 48, 25 February 1942, fol 76 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), pp1574-1575); O'Malley to Minister for Public Works, 28 July 1943 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), pp1515-1516); Minister of Works to O'Malley and Jones, August 1943 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1514)

85. O'Malley to Minister for Public Works, 28 July 1943 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), pp1515-1516)

86. Engineer-in-chief and Under-Secretary, Public Works Department, to Solicitor-General, 16 September 1938 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), pp1453-1454)

87. Crown solicitor to Under-Secretary, Public Works, 23 September 1938 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), pp1451-1452)

88. Engineer-in-chief and Under-Secretary, Public Works Department, to district engineer, 30 September 1938 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1450)

Early in 1939, Alecock stated that the Crown would need to permanently take land for tunnels, the power house, and various other parts of the hydro works, as well as a spoil tip, a permanent village, and access to the village and the works. Public works staff had also moved a road line. In addition, staff were using areas for temporary camps and a road to the main tunnel.⁸⁹ As we have seen, the camp area was rented rather than purchased.

Alecock's letter seems to have been the basis of the decision, probably made at some point in 1939 or 1940, to take 40 acres of Heiotahoka and an acre of Te Kopani. A notice of intention to take land was issued, and Hemi Te Waaka and 11 others responded that they 'object to the taking of the aforesaid land, and hereby make application for claim of compensation for same'.⁹⁰ The Minister of Public Works responded that 'I feel sure that the position has not been fully understood as there is no intention to take the land without paying proper compensation.'⁹¹ He informed the owners that 'your objection does not amount to a "well-grounded objection" within the meaning of those words given by the Public Works Act, in that it refers only to the compensation payable, and assumed that the owners 'will not now have any objection since compensation will be paid'.⁹² The Public Works Act 1928 (section 22(1)(d)) did not define what a well-grounded objection would be, but did specify that 'no objection as to the amount or payment of compensation . . . shall be deemed a well-grounded objection.' It seems likely that the owners' reference to compensation was not the reason for the objection, but rather an assertion that they would claim compensation if the land was taken against their will. The real cause of the owners' objections was almost certainly that they had already lost most of their ancestral land and did not want to lose any more. We consider that this would have been a well-grounded objection. The Crown should also have taken steps to find out what the owners' objection actually was, rather than making a dubious assumption.

Compensation was worked out in early 1942. The owners of Heiotahoka made a compensation claim for £786, of which £100 was for the land itself and the rest for loss of timber and cultivations, and damage to the remaining land.⁹³ In February, the Native Land Court ruled that they would receive £275 plus a five-acre land block which had been taken for a road but never used, and fencing where the river

89. Resident engineer to district engineer, 24 January 1939 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1445)

90. Legal officer to Under-Secretary, 10 June 1941 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1598); Te Waaka to Public Works Minister, 27 March 1941 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1601)

91. Minister of Public Works to Te Waaka, 22 April 1941 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1600)

92. Ibid

93. O'Malley and Jones to permanent head, 9 February 1942 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p1578)

no longer formed a stock barrier.⁹⁴ The money appears to have included four years' rent for the workers' camp.⁹⁵ The Te Kopani owners would receive £4.⁹⁶ Florence Tapper, who was losing just under 30 acres of an adjoining block, meanwhile laid a claim for £1,857, of which £384 was for the land and the rest for damages done during construction.⁹⁷ In late 1943 she received £711, a three-acre paper road, and fencing.⁹⁸ While both parties had their claims drastically reduced, Tapper still received much more than either group of Maori landowners: £26 per acre, compared to just under £8 per acre for Heiotahoka and £4 for Te Kopani.⁹⁹ The Tapper land was better quality, but as there is no explanation on the record of how either compensation figure was calculated, we are not confident that the payments were fair or equitable.¹⁰⁰

We now turn to address the extent to which the Crown, in taking the Heiotahoka and Te Kopani lands, met the Treaty standards outlined earlier.

22.2.4.3.1 DID THE CROWN ENTER INTO EARLY AND GENUINE CONSULTATION WITH LANDOWNERS? DID IT HAVE ADEQUATE KNOWLEDGE AND UNDERSTANDING OF THE CULTURAL, SPIRITUAL, AND ECONOMIC VALUE OF THE LAND TO THE OWNERS, AND THE AMOUNT OF OTHER COMPARABLE LAND RETAINED BY THEM?

The Crown and the owners of the Heiotahoka block were in communication over matters including access to the land, compensation, and whether the land would be taken. However, in our view, this communication could not be described as consultation. The landowners only became aware of the Crown's plans after

94. Wairoa Maori Land Court, minute book 48, 25 February 1942, fol 76 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1574–1575). Craig Innes (doc A117, p74) states in his report that the five-acre 'paper road' still appears separately on cadastral maps, but our research indicates that it did become part of Heiotahoka 2: see the calculations on 'Heiotahoka Native Res No 2' (Innes, supporting papers to 'Tenure Changes Affecting Waikaremoana "Purchase Reserves"' (doc A117(c)), p [60]) showing the block being reduced to 817 acres by the public works takings and then increased to 822 acres with the addition of five acres. A 1960 map of the reserve shows it to be 822 acres in area: 'Heiotahoka No 2A' (Innes, supporting papers to 'Tenure Changes Affecting Waikaremoana "Purchase Reserves"' (doc A117(c)), p [21]).

95. Under-Secretary to district engineer, Napier, 7 June 1944 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1506)

96. Wairoa Maori Land Court, minute book 48, 25 February 1942, fol 76 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), pp 1574–1575)

97. 'Application for Cabinet approval of Compensation', 27 October 1943 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1510)

98. Under-Secretary, Public Works, to FC Tapper, 11 November 1943 (Walzl, supporting papers to 'Waikaremoana' (doc A73(c)), p 1509)

99. These figures take into account the paper roads, meaning that Tapper lost a net 27 acres while the Heiotahoka owners lost 35 acres.

100. Another part of the Tapper land was graded first class: see Under-Secretary, Lands and Survey Department, to Under-Secretary, Native Department, 30 August 1923 (Vincent O'Malley, comp, supporting papers to 'The Crown's Acquisition of the Waikaremoana Block, 1921–25', 3 vols, various dates (doc A50(b)), vol 2, p 442).

surveyors had entered their property, and the Crown seems to have misunderstood their objections to losing land, dismissing their protests as being about compensation. Although the owners did have an opportunity to object to their land being taken, this was only after the decision had been made. When they did object, the Crown did not understand or properly consider their objections. There were also problems with the Crown's temporary use of the land, although an effort was eventually made to communicate with owners and meet what were seen as reasonable requests.

Crown agents were rather dismissive of the land's significance for its owners, whether in cultural, economic, or spiritual terms. Apparently, they did not know or care that the Waikaremoana people retained very little land overall, and did not consider that this made their remaining land all the more important to them. Crown agents failed to take into account the extreme poverty of the Waikaremoana people. Had the Crown considered its own role, since the 1860s, in reducing the people to near-landlessness, it could not reasonably or decently have taken this land.

22.2.4.3.2 DID THE CROWN GIVE PROPER CONSIDERATION TO TAKING OTHER LANDS INSTEAD, OR TO NON-PERMANENT FORMS OF ALIENATION ?

In the early decades of the twentieth century, the Crown appears to have given serious consideration to constructing hydro works in other parts of the country. We did not see any evidence of consideration given to using other lands in the Waikaremoana area for the hydro works, but nor did we see any evidence that Maori land was specifically targeted. It is likely that Crown engineers simply picked the most suitable land without consideration of who owned it; we note that general land as well as Maori land was taken for the hydro plant.

Crown employees seem to have given some consideration to non-permanent forms of alienation. The workers' camp was leased rather than purchased, and inquiries were made as to whether access to tunnels required alienation. It is clear that many parts of the works were permanent structures which in some cases were built into the land. The only alternative to acquisition in these cases would have been long-term or perhaps perpetual lease. In other instances it appears that the land was taken even though, once the works were completed, it was required only for access purposes. In these cases we consider that alternatives to purchase should have been given more consideration, and at higher levels. This may have required an amendment to the Public Works Act, so that land would not be taken from its owners when the Crown needed only access rights.

22.2.4.3.3 WAS THE NATIONAL INTEREST SUFFICIENT TO OUTWEIGH THE INTERESTS OF THE LANDOWNERS IN RETAINING THEIR LAND ?

We accept that the hydro development was, at the time that it was built, an important project in the national interest. As we state above, however, it is not clear that it was necessary to permanently alienate all the land that was taken. Given the very limited amount of land retained by the Heiotahoka and Te Kopani owners

before the hydro development began, we consider they had a very strong interest in retaining all their remaining land, and that this should have taken precedence where land was needed for access only. Where the land was needed for permanent structures, we consider that some form of alienation was necessary in the national interest, but in that case the Crown should have considered a perpetual or long-term lease as an option.

In summary, we consider that the taking of land from the Heiotahoka and Te Kopani reserve blocks was in breach of the principles of the Treaty, for two key reasons. First, there was no real consultation; although the owners did have the opportunity to object, their objections were not fully understood or given proper consideration. Nor did the Crown adequately inform itself of the value that the owners attached to two of their few remaining areas of land. In general, it had insufficient regard for the fact that the owners had already lost nearly all their land. In addition, the Crown failed to communicate with the owners at all until after its agents had begun work on their land. Secondly, it does not appear that the Crown fully considered alternatives to the permanent alienation of the land in question. While we do consider that the hydro works were necessary in the national interest, and so it may have been necessary to take some of the land, the Crown's process for doing so was in this case in breach of the Treaty principles of active protection and partnership.

22.2.4.3.4 WHAT PREJUDICE RESULTED FROM THE COMPULSORY TAKING OF LAND FROM THE HEIOTAHOKA AND TE KOPANI RESERVES ?

It is clear that the hydro works project left the owners of Heiotahoka and Te Kopani worse off. They had already lost nearly all of their ancestral land, and the Crown's compulsory takings further reduced this remnant. With this in mind, it is hard to see how even a generous monetary payment could truly have compensated the owners for their cultural and spiritual loss. If the Crown needed to take land from the extremely limited acreage retained by the owners, we consider it had a duty to provide other suitable land in exchange.

In chapter 14, we saw that Ngati Ruapani agreed to participate in the consolidation scheme if the Crown purchased private land for them next to Te Kopani, from a block known as Tapper's farm, with the purchase money to be deducted from Ngati Ruapani's interests. They would also give up two of their reserves. The Crown then purchased the farm for twice its valuation, and Ngati Ruapani refused to pay this increased price, but lost their two reserves anyway. The Tuhoe owners of the reserves were not even included in the arrangement, and also received nothing in return for the lost land. As we note above, we believe that, in connection with the hydro works, the Crown should have given consideration to providing the owners with other land instead of, or as well as, money. If the Crown's part of Tapper's farm had remained in Crown ownership, this would have been an ideal exchange. Alternatively, since the Crown had acquired so much Ngati Ruapani land over the previous few decades, there must have been other land in the area that could have been returned; for example, some of the land around the lake

which was later used for tourism purposes. And while the return of such land would have thwarted the Crown's other plans for it, we are clear that, in all the circumstances, the Crown's duty of active protection required it to give precedence to the needs of Ngati Ruapani. The return of the 'paper road' was a positive step, but we consider that, since it was not being used, it should have been returned anyway, rather than being part of a compensation package.

Rather than entering into a land exchange, the Crown paid the owners monetary compensation about a year after the land was taken, and four years after public works employees began camping on Heiotahoka. While the compensation could perhaps have been paid sooner, we note that Tapper was not paid until nearly two years later, so the Maori owners were clearly not treated inequitably as far as prompt payment was concerned. Rent for the camp, however, was not paid until the camp had been in place for four years, which was far too late. In addition, it is not clear that any rent was paid in subsequent years. We do not know the value of the water supply system that the owners eventually received, and so are unable to say whether it was adequate payment in lieu of rent money.

22.2.5 Did Treaty breach and prejudice result from the erection of electricity transmission lines across part of Te Manawa o Tuhoe in the early 1980s?

22.2.5.1 Introduction

In the late 1970s, as part of the Aniwhenua hydroelectric power scheme, two transmission lines were built across the southern part of the Te Manawa o Tuhoe block by the Bay of Plenty Electric Power Board (later Bay of Plenty Electricity Ltd), preventing trees from being planted along the line corridors. Counsel for Wai 36 Tuhoe provided us with evidence that the affected land was worth \$58,000 in 1995.¹⁰¹ As we saw in chapter 18, the Tuhoe-Waikaremoana Maori Trust Board, which managed the land, was at this time leasing the affected area to the Crown under a forestry lease.¹⁰² Although there was correspondence in the late 1980s and early 1990s between the Ministry of Forestry and Bay of Plenty Electricity about compensation, no agreement was reached and no compensation paid.¹⁰³

22.2.5.2 The claims and the Crown response

Counsel for Wai 36 Tuhoe submitted that the erection of transmission lines across the Te Manawa o Tuhoe block resulted in '14.5 hectares being removed from the forest plantation.'¹⁰⁴ They contended that this was an interference with Tuhoe's 'full, exclusive and undisturbed' possession of their land, for which the trust board has

101. Atkinson Boyes Campbell to Tuhoe-Waikaremoana Trust Board, 4 December 1995 (counsel for Wai 36 Tuhoe, written questions for Peter Gorman, 2005 (paper 2.827), p 5)

102. 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 847-849

103. Peter Gorman, written answers to questions, 6 May 2005 (doc M32), p 4.

104. Counsel for Wai 36 Tuhoe, closing submissions, pt A, overview, 31 May 2005 (doc N8), p 67

never been compensated.¹⁰⁵ Counsel stated that this was 'surely a breach of the duty of active protection.'¹⁰⁶ In response, Crown counsel pointed to the discussions between the Ministry of Forestry and Bay of Plenty Electricity as evidence of its efforts to ensure the trust board was compensated. Crown counsel further submitted that the trust board should seek compensation directly from the entity responsible for the transmission lines.¹⁰⁷ Counsel for Wai 36 Tuhoe replied that by passing responsibility to a non-Crown entity, the Crown was breaching the duty of active protection.¹⁰⁸

22.2.5.3 *Tribunal analysis and conclusions*

The lines are part of the Aniwhenua hydroelectric power scheme built by the Bay of Plenty Electric Power Board. Electric power boards were elected regional boards; essentially, local authorities concerned with the generation and distribution of electricity in their areas.¹⁰⁹ Like other local authorities, electric power boards were not part of the Crown, and therefore not subject to our jurisdiction. We are limited to assessment of relevant Crown policies and practices, such as the law governing compensation for power board work.

The Aniwhenua scheme was first publicly notified in 1975. Planning and discussion went on for most of the rest of the decade, and involved the Tuhoe-Waikaremoana Maori Trust Board.¹¹⁰ The route to be used by transmission lines appears to have been chosen by May 1978; it is not clear whether the trust board or any other Maori group had any influence over it.¹¹¹ While this was going on, the trust board was also negotiating a 30-year afforestation lease with the Crown's Forest Service.¹¹² The final agreement allowed the Forest Service to 'clear or not clear[,] plant or not plant' any land under or adjacent to power transmission lines.¹¹³ However, the amount of rent for the first five years of the lease was exactly

105. Counsel for Wai 36 Tuhoe, closing submissions, pt B, response to statement of issues, 30 May 2005 (doc N8(a)), p 212

106. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 67

107. Crown counsel, closing submissions (doc N20), topic 37, p 12

108. Counsel for Wai 36 Tuhoe, submissions in reply, 9 July 2005 (doc N31), p 57

109. Electric Power Boards Act 1925

110. Geoff Bertram, 'The Aniwhenua and Whaeo Hydro Schemes and the Energy Companies Act 1992', vol 1, 1993 (Wai 212 RO1, doc A6), pp 52–54; minutes of meeting of Tuhoe Lands Working Party Committee, 26 May 1977, 2 September 1977, 11 October 1978 (Brent Parker, 'List of Documents – Compensation for Restrictions Placed on Milling of Native Timber in the Urewera' (doc M27(b)), pp 698, 752, 777)

111. J Duder, Tonkin and Taylor, to [T?] Nikora, 24 May 1978 (Brent Parker, 'List of Documents – Compensation for Restrictions Placed on Milling of Native Timber in the Urewera' (doc M27(a)), pp 207–209). Compare the transmission lines shown on 'Te Urewera Maps including Hikurangi-Horomanga, Ruatoki, Raroa, Waimana, Ohaua and Tarapounamu Series Consolidation Blocks' (doc M12(a)).

112. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 847–850

113. 'Memorandum of Lease', 9 February 1979, p 3 (Murton, supporting papers to 'The Crown and the Peoples of Te Urewera' (doc H12(a)(I)), p 83)

the same as had been approved by Cabinet in 1977, before the route of the transmission lines was known.¹¹⁴ The trust board therefore did not lose any income from the location of the lines in the first few years of the lease. We did not receive any information about lease income after the first five years, and so are unable to make any finding of prejudice or Treaty breach.

22.3 RATING CLAIMS

22.3.1 Introduction

The imposition of rates on Maori land is an ongoing issue in our inquiry district. Nationally, the percentage of Maori land subject to rates slowly increased from the late nineteenth century into the 1920s. We do not know when rates began to be imposed on Maori land in our district, but we are aware of rates debt on the southern Waikaremoana reserves in the 1920s and on the Waiohau block by 1931. In 1922, the law implementing consolidation made most land within the Urewera District Native Reserve non-rateable, and this exemption from rates remained in place until 1964. Despite this, levies were imposed on the development schemes at Ruatoki and Ruatahuna to pay for local services. After the general exemption was lifted in 1964, some urupa, marae, and uneconomic blocks remained exempt. Other land was subject to rates, despite the difficulty many owners had in paying them or deriving economic benefit from their land. Some of this debt has been written off by local authorities.

Previous Tribunals have found, and we agree, that the Crown has a general right to allow local authorities to impose rates on Maori land. As the Turanga Tribunal found, 'Maori land should bear a fair share of the district's rates burden.'¹¹⁵ Whether particular rating regimes are Treaty compliant depends on whether the rates imposed are 'a fair share'; in particular, whether they reflect the actual economic value of the land and the value of services received by the ratepayer. The Tauranga Moana Tribunal found that rating policy and practice breached the Treaty when it failed to take into account the poverty of Tauranga Maori and the difficulties that many had in using their land for economic purposes.¹¹⁶ As rating issues have been explored by numerous other Tribunals, we will not include a comprehensive history of rating legislation here, but will discuss the law only insofar as it is necessary to understand the rating of Maori land in Te Urewera.

Rates have generally been levied by local authorities, such as county or district councils. Such authorities are not part of the Crown, and we therefore have no jurisdiction to make findings on their activities. We can, however, make findings on rating law, and the Crown's response to conflict between Maori and local authorities over rates.

114. Extract from minutes of Cabinet Expenditure Committee, 31 May 1977 (Parker, 'List of Documents' (doc M27(a)), pp 309–310); Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 849–850

115. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 2, p 653

116. Waitangi Tribunal, *Tauranga Moana 1886–2006*, vol 1, pp 380–381

In this section, we have grouped together claims on similar issues, for example the levies imposed on the Ruatoki and Ruatahuna development schemes. The issues we will examine are:

- ▶ the rating of Maori land outside the UDNR before 1964, and the role of rates debt in the Crown's acquisition of land at Waiohau, Te Teko, and Waikaremoana;
- ▶ whether Maori land in the Urewera District Native Reserve area should have remained exempt from rates;
- ▶ the imposition of levies for local services at Ruatoki and Ruatahuna in the mid-twentieth century, even though these areas were exempt from rating; and
- ▶ the imposition of rates on Maori land since 1964.

There were also claims about the rating of Minginui in the years since the village was returned to Ngati Manawa;¹¹⁷ we will address these in chapter 23, in the section dealing with timber industry corporatisation.

22.3.2 The claims and the Crown response

Crown counsel submitted that rating of Maori land was not inconsistent with Treaty principles, and that 'where land receives tangible and actual services from councils then rates should be levied for those services'.¹¹⁸ The issue was whether the Crown had properly balanced its exercise of kawanatanga powers with its duties and obligations under articles 2 and 3 of the Treaty.¹¹⁹ In Crown counsel's submission, the balance has been 'appropriate'.¹²⁰

Claimant counsel agreed that there was a need for balance between kawanatanga and the Crown's obligations, but submitted that the Crown had not got the balance right. Counsel for Wai 36 Tuhoe, for example, accepted that 'where land receives tangible and actual services from councils, then rates can be levied in respect of those services'. They submitted, however, that much Maori land in Te Urewera received no benefits from local councils and was not productive, and should therefore be exempt from rates.¹²¹ Counsel for Ngati Haka Patuheuheu similarly argued that the claimants received no benefit from rates and should not therefore have to pay them.¹²² Counsel for Ngati Haka Patuheuheu and Te Mahurehure submitted that Te Urewera Maori land should be exempt due to the poverty of the owners; this applied to both historical and contemporary rating.¹²³ Counsel for Wai 36 Tuhoe and Nga Rauru o Nga Potiki felt that rates should not be levied

117. Counsel for Ngati Whare, supplementary closing submissions on corporatisation and Minginui, 3 June 2005 (doc N16(a)), pp 28–29, 38, 42

118. Crown counsel, closing submissions (doc N20), introduction and overview, p 30; topics 18–26, p 81

119. Crown counsel, closing submissions (doc N20), topic 27, p 5

120. *Ibid*, p 6

121. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 128

122. Counsel for Ngati Haka Patuheuheu, submissions in reply, 8 July 2005 (doc N25), p 61

123. Counsel for Te Mahurehure, closing submissions, 14 June 2005 (doc N21), pp 15–20; counsel for Ngati Haka Patuheuheu, closing submissions, 31 May 2005 (doc N7), pp 154–155

on land which is unproductive, uneconomic, or has its use restricted for environmental purposes.¹²⁴ Crown counsel responded that rating law has always taken into account the special features and problems associated with Maori land, and that since 1988 the Crown has introduced rates relief mechanisms for Maori land for reasons including being landlocked, being used for customary purposes, or not receiving services.¹²⁵ They also noted that in 1986 the Wairoa County Council waived \$40,000 in unpaid rates on the Waikaremoana reserves.¹²⁶

On more specific matters, some claimants alleged that the Crown made and broke promises over the rating of particular areas. Counsel for Nga Rauru o Nga Potiki submitted that in 1895 the Crown pledged that Maori land in the Urewera District Native Reserve would not be rated.¹²⁷ Crown counsel responded that there is no evidence of such a promise, although the hapu and iwi of Te Urewera might have believed that their land would only be rated if it was productive, and this was provided for in 1910 legislation. In any case, Crown counsel submitted, there is no evidence of prejudice in relation to rating in the reserve area.¹²⁸ Similarly, counsel for Tuawhenua stated that in 1922, as part of consolidation negotiations, Apirana Ngata told the Ruatahuna community that land would only be rated if settled by Pakeha.¹²⁹ Crown counsel did not directly address this allegation, but did state that a promise was made that land would be unrated for a year or more after consolidation.¹³⁰

The Crown is also alleged to have broken promises over the rating of the Waikaremoana reserves. Several claimant counsel argued that, during negotiations over the consolidation programme, the Crown agreed not to rate reserves from the Waikaremoana block. It was only because of this and other conditions, they submitted, that Tuhoe and Ngati Ruapani agreed to include Waikaremoana in the scheme. However, the Wairoa County Council levied rates on the reserves despite the promise and despite the fact that the reserves produced no income.¹³¹ The rates have been remitted since the mid-1980s, but only after a long fight by

124. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 66–67; counsel for Wai 36 Tuhoe, closing submissions, pt C (doc N8(b)), p 12; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 275

125. Crown counsel, closing submissions (doc N20), introduction and overview, p 31; topic 27, p 5

126. *Ibid*, topic 28, p 23; Waitangi Tribunal, statement of issues, no date (statement of issues 1.3.6), para 27.43. Note the Crown's closing submissions incorrectly refer to the Wairoa District Council, which was not in existence in 1986.

127. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 271

128. Crown counsel, closing submissions (doc N20), topic 27, p 8

129. Counsel for Tuawhenua, closing submissions (doc N9), p 187

130. Crown counsel, closing submissions (doc N20), topics 18–26, p 17

131. Counsel for Wai 36 Tuhoe, closing submissions (doc N8(a)), p 124; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 250; counsel for Wai 144 Ngati Ruapani, closing submissions, 3 June 2005 (doc N19), paras 183–188; counsel for Wai 144 Ngati Ruapani, submissions in reply (doc N30), pp 24–25

Ngati Ruapani.¹³² Crown counsel responded that there was no evidence of a promise that the reserves would never be rated.¹³³

Claimant counsel have alleged two instances in which rates debt led to land loss. In the 1930s, Ngati Haka Patuheuheu lost £21 worth of land at Waiohau to cover rates, even though only £2 was attributable to the Waiohau land.¹³⁴ This arose out of a rates demand for £192, mostly on their Te Teko block, in 1931, which was made even though the hapu had lost most of their good land and were consequently experiencing hardship. It was also made despite the Crown having failed to build its promised roads, and despite very little development having occurred on Ngati Haka Patuheuheu lands.¹³⁵ This contradicts the Crown's assertion that rating was only imposed on productive land.¹³⁶ Counsel for Wai 36 Tuhoe alleged that 'Rates arrears were a factor in the Crown's acquisition of the Whareama and Ngaputahi reserves' near Lake Waikaremoana.¹³⁷ Crown counsel responded that there was no evidence of this.¹³⁸ Although these were the only instances in which claimants alleged a connection between rates and land loss, counsel for Wai 36 Tuhoe submitted that the threat of land loss due to rates arrears constitutes a prejudice, even if no land has been lost in this way.¹³⁹

Rates issues are strongly connected to the issue of roads, particularly the Crown's failure to build promised roads in the UDNR. Counsel for Tuawhenua submitted that it was a Treaty breach to allow Ruatahuna to be rated to pay for roads, since the community had already paid for them with land.¹⁴⁰ Similarly, counsel for Nga Rauru o Nga Potiki argued that rating to pay for roads was in breach of the Crown's 1895 agreement to pay for the roads itself.¹⁴¹ Several claimant groups raised the problem of local authorities refusing to maintain roads in the UDNR when they were not receiving any rates.¹⁴² Counsel for Wai 36 Tuhoe stated that 'Tuhoe could not produce revenue on lands that were not serviced by roads, and could not get assistance to build and maintain roads until they were able to pay rates – yet another Catch 22 created by the Crown's non-performance of its roading obligation.'¹⁴³ Crown counsel accepted that local authorities were reluctant to

132. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), para 188

133. Crown counsel, closing submissions (doc N20), topics 18–26, p 76

134. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 124–125, 154–155

135. *Ibid*, p 154

136. Counsel for Ngati Haka Patuheuheu, submissions in reply (doc N25), p 35

137. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 124

138. Crown counsel, closing submissions (doc N20), topics 18–26, p 75

139. Counsel for Wai 36 Tuhoe, submissions in reply (doc N31), p 30

140. Counsel for Tuawhenua, appendix to closing submissions, no date (doc N9(a)), p 94

141. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 271–272

142. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 137–138; counsel for Tuawhenua (Wai 842), appendix to closing submissions (doc N9(a)), pp 105–106; counsel for Tuawhenua, closing submissions (doc N9), p 243; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 274

143. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 138

maintain roads in areas which did not return any rates.¹⁴⁴ However, they did not accept that there is ‘an inherent Treaty obligation to fund or ensure all roads are maintained so as to ensure Maori are properly provided with roads.’¹⁴⁵ They submitted that the question of whether the Crown should have funded maintenance is ‘complex’ and needed to take the contemporary context into account, including the availability of resources.¹⁴⁶

22.3.3 To what extent were Te Urewera Maori lands outside the former Urewera District Native Reserve area subject to rates before 1964, and were those rates fair and equitable?

Under the changing rating laws of the late nineteenth and early twentieth centuries, whether Maori land was rated depended at various times on its title, whether it was leased to a European, and its proximity to roads.¹⁴⁷ At times, Maori land in the north and west of our inquiry district could have been subject to rates under these laws, but we have no evidence on when rates were first charged on Maori land in our inquiry district.¹⁴⁸ Rates were charged on Maori land by various county councils and road boards overlapping our district from at least 1885, but we do not know if any of the rated lands were within our inquiry district.¹⁴⁹ We do know that the Te Aitanga-a-Mahaki incorporations were paying rates by 1908. This might have included the Tahora 2 block, which was certainly being rated by 1913. But we do not know when the rating of land in our district began or whether any rates were actually collected.¹⁵⁰

From 1925, all Maori land was made rateable unless it remained in customary ownership, was an urupa, a marae or a church, or was exempted by the

144. Crown counsel, closing submissions (doc N20), topics 18–26, pp 95, 101

145. *Ibid*, p 101

146. Crown counsel, closing submissions (doc N20), topics 18–26, p 101

147. Tom Bennion, ‘The History of Rating in Te Urewera’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A130), pp 8–9, 12, 14, 18–20, 38

148. Before 1882, Maori land could be rated only if it was under non-customary title and leased to a European, which meant that Waimana was the only rateable Te Urewera block: Jeffrey Sissons, ‘Waimana Kaaku: A History of the Waimana Block’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A24), pp 31, 36–37, 43. Between 1882 and 1888, Maori land could be rated if it was within five miles of a public road, which meant that Matahina, Ruatoki, and Waimana could have been rated: Murton, ‘The Crown and the Peoples of Te Urewera’ (doc H12), pp 283–284. See also our discussion of roads in chapter 8. For an indication of which blocks were within five miles of a public road, see the Public Works map (PWD W000 6541) from 1877 featured in Judith Binney, ‘Encircled Lands, Part One: A History of the Urewera from European Contact until 1878’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A12), p 118.

149. Bennion, ‘The History of Rating in Te Urewera’ (doc A130), pp 17–18

150. Kathryn Rose, ‘Te Aitanga-a-Mahaki Land: Alienation and Efforts at Development, 1890–1970’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2000) (doc A64), p 255; rating schedule, April 1916 (Paula Berghan, comp, supporting papers to ‘Block Research Narratives of the Urewera, 1870–1930’, 18 vols, various dates (doc A86(o)), vol 15, p 5206)

Governor-General in council.¹⁵¹ In 1939, the Whakatane County Council made several hundred applications to the Native Land Court under the Native Land Rating Act 1924 to have blocks at Rangitaiki, Waimana, Omataroa, and other places vested in the Native Trustee or put under a receiver in order to obtain rates owing. It appears that such applications were rarely if ever granted; the threat of vesting or receivership was essentially a tool to bring landowners into negotiation, after which back-payments in cash or produce might be made.¹⁵² Unpaid rates were also sometimes registered as a lien on the land title.¹⁵³ Large areas of unproductive land were exempted from rating around this time.¹⁵⁴

The four reserves to the south-east of Waikaremoana were rated from the 1920s and probably earlier.¹⁵⁵ During the consolidation scheme of that decade, the Crown undertook to pay the local rates owing on the two reserves, Whareama and Ngaputahi, which it took as part of the scheme.¹⁵⁶ We do not know how much money was owed, how long the land had been rated for, or whether the debt contributed to Ngati Ruapani's decision to give up these reserves. As we found in chapter 14, the owners appear to have received nothing in return for the loss of these lands except release from that debt. The remaining southern reserves, Heiotahoka and Te Kopani, continued to be subject to rates. After partitioning in 1925, the urupa blocks Te Kopani 3 and 6 became exempt from rating, and Judge Carr recommended that Te Kopani 2 and 5 also be made exempt, probably due to the extreme poverty of the occupants, to which we refer in several chapters of this report.¹⁵⁷ Despite being gazetted as papakainga in 1927, these blocks were not exempted.¹⁵⁸

Waiohau and Te Teko, in the north-east of our district and just outside the UDNR boundary, were also subject to rates. As we explained in chapter 19, Waiohau was incorporated into the Ruatoki consolidation scheme in the 1930s. As part of this

151. Rating Act 1925, ss 102–104

152. Bennion, 'The History of Rating in Te Urewera' (doc A130), pp 70–72

153. Paula Berghan, 'Block Research Narratives of the Urewera, 1870–1930' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2001) (doc A86), p 694

154. Bennion, 'The History of Rating in Te Urewera' (doc A130), p 72

155. Rates charging orders in Heiotahoka Block Order File 120B (Innes, supporting papers to 'Tenure Changes Affecting Waikaremoana "Purchase Reserves"' (doc A117(c)), pp [74]–[75]); rates charging orders in Te Kopani Block Order File 240A, Maori Land Court, Gisborne (Craig Innes, comp, supporting papers to 'Report on the Tenure Changes Affecting Waikaremoana "Purchase Reserves"', 7 vols, various dates (doc A117(d)), vol 4, p [113]). We know that Whareama and Ngaputahi were also rated because, as we discuss in this paragraph, when the Crown took them it undertook to pay rates owed on them.

156. 'Urewera Lands Consolidation Scheme', 31 October 1921, AJHR, 1921, G-7, pp 6, 8

157. Innes, 'Tenure Changes Affecting Waikaremoana "Purchase Reserves"' (doc A117), pp 80–81; court orders setting apart Te Kopani 2 and 5 as native reserves, 5 September 1925, Te Kopani block order files 240A and 240C, Maori Land Court, Gisborne (Innes, supporting papers to 'Tenure Changes Affecting Waikaremoana "Purchase Reserves"' (doc A117(d)), pp [128]–[179])

158. Innes, 'Tenure Changes Affecting Waikaremoana "Purchase Reserves"' (doc A117), p 81; 'Setting Aside Land as a Native Reservation', 6 June 1927, *New Zealand Gazette*, 1927, no 39, p 1981 [Te Kopani 2 and 5]

process, the Crown took land at Waiohau and Te Teko in exchange for money owing from surveys and unpaid rates.¹⁵⁹ We noted that these debts were written off at Ruatoki, but not at Waiohau or Te Teko. The Crown actively opposed the remission of Waiohau rates, although it eventually agreed to write off the interest and two-thirds of the original debt. Before the write-off, the rates debt comprised £192, of which £2 was owed on Waiohau and the rest on Te Teko. We found this to be particularly unfair as Te Teko had only recently been returned to Maori ownership, as compensation for the Waiohau fraud. Most of the debt had been accrued before Ngati Haka Patuheuheu had had a chance to occupy the land. We also found that, even if the Crown chose not to wipe the rates debt, it could have been charged against the land and repaid from lease money or farming profits, as debt was at Ruatoki. Once the Ruatoki–Waiohau consolidation was completed and the Waiohau development scheme was producing an income, the Whakatane County Council began levying rates on Waiohau again. A total of £664 17s 8d was owing by 1939, including court costs. The Native Department considered that there were 12 owners able to pay rates, and that they owed a total of £130, which the department proposed to pay before recovering the money from the owners. This was accepted by the council.¹⁶⁰ It appears that the rest of the money was written off.

While Te Urewera Maori landowners tended to oppose rating, some were willing to pay rates if it would result in roading improvements. The Crown had stopped maintenance on the Matahi road in 1930, meaning that Maori dairy farmers in the area then had difficulty getting their cream to the local factory.¹⁶¹ In desperation, a group of Tuhoe farmers offered to pay rates or a proportion of farm earnings if the road was maintained. After ‘lengthy negotiations’, the council agreed to maintain the road in exchange for a £1,000 Native Affairs grant and a butterfat and wool levy from the Matahi farmers.¹⁶² Even then, the part of the road which crossed into Opotiki County was not repaired, and the council there was not prepared to maintain its part of the road without its own grant. Although Maori farmers paid £200 to the Opotiki County Council, in 1953 half the road was still unusable by dairy trucks.¹⁶³ We discussed the effects of inadequate road access on the Waimana Valley communities, and their struggle for economic survival, in chapter 15.

By the 1960s, with the district in better financial shape, most Maori communities outside the UDNR area, including Murupara, Waimana, and Waiohau, were paying rates, apparently without much controversy.¹⁶⁴ In 1964, the general rates

159. Bernadette Arapere, ‘A History of the Waiohau Blocks’ (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A26), p 85

160. David Alexander, ‘The Land Development Schemes of the Urewera Inquiry District’ (commissioned research report, Wellington: Crown Forestry Rental Trust, 2002) (doc A74), p 205

161. Sissons, ‘Waimana Kaaku’ (doc A24), pp 129–131

162. *Ibid*, p 131

163. *Ibid*, p 132

164. Bennion, ‘The History of Rating in Te Urewera’ (doc A130), p 76. For the contemporary economic situation, see chapter 23.

exemption covering the UDNR area was removed, and from that point on there was no difference between Maori lands inside or outside the former UDNR.¹⁶⁵

22.3.4 When and why were Maori lands in the UDNR area exempt from rates? What charges were imposed instead, and why was the exemption removed?

Claimants in this inquiry submitted that, during negotiations over the Urewera District Native Reserve in the 1890s, Premier Richard Seddon promised that their lands would not be rated.¹⁶⁶ The Crown denied that any such promise was made.¹⁶⁷ We discussed the UDNR negotiations and agreement in chapter 9, and noted that there was no specific reference to rating in the record of the agreement reached between Seddon and the Te Urewera delegation in September 1895, or the Urewera District Native Reserve Act. We found no evidence elsewhere that there had been a promise about rating. It is possible that a promise was made but not recorded, or that, because the agreement and Act provided for local self-government, the Te Urewera chiefs assumed that any rating power would belong to the General Committee rather than a road board or county council.

In any case, no rates were imposed on any UDNR lands until the 1920s. In 1920, the Whakatane County Council began improving the roads on the Ruatoki block, which were used by the owners to transport their milk to the local dairy factory. The council collected £200 in rates from the Ruatoki owners, who had asked for the road to be improved.¹⁶⁸ The improvements seem to have enabled the development of Maori dairy farming in the area, which had previously been impeded by the poor roads.¹⁶⁹ The rates money was deducted from the owners' milk cheques, which meant that the roads were paid for by those who most benefited.¹⁷⁰

In chapter 14, we saw that in the early 1920s the Crown organised the consolidation of ownership of the UDNR lands. As part of the consolidation scheme, the Crown agreed to build arterial roads through the district, on condition that Maori landowners gave up 40,000 acres of land. As we found in chapter 14, this was out of keeping with contemporary practice, which was for main roads to be funded by central government. Landowners should not therefore have had to surrender any land for roads. Even worse, the Crown never built the roads it had promised, and for which the hapu and iwi of Te Urewera had given so much land. Eventually, in 1958, the Crown paid £100,000 for the land it had taken for the roads; we found that this agreement was not adequate compensation.

Consolidation was brought about under the Urewera Lands Act 1921–22, which included a provision exempting all Maori land within the Reserve from rates

165. *Ibid*, p 93

166. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 271–273

167. Crown counsel, closing submissions (doc N20), topic 27, p 8

168. Cleaver, 'Urewera Roothing' (doc A25), pp 34, 43; Berghan, 'Block Research Narratives' (doc A86), p 544

169. See Berghan, 'Block Research Narratives' (doc A86), pp 535–538, 543.

170. *Ibid*, p 544

until at least a year after the consolidation order had been made. Once a year had passed, the Native Minister could gazette a notice ending the exemption for a specific piece of land.¹⁷¹

Claimants in this inquiry have submitted that the Crown promised that the reserves from the Waikaremoana block would have a rates exemption over and above the general UDNR exemption.¹⁷² In 1925, Matamua Whakamoe and others wrote to Native Affairs Minister Gordon Coates stating that an agreement had been reached in 1923 that the reserves from the Waikaremoana block would not be rated.¹⁷³ However, the terms under which the block was transferred to the Crown, published in October 1921, did not include any mention of rates.¹⁷⁴ Tuhoe and Ngati Ruapani strongly objected to the terms of consolidation, and to any suggestion that their land would be rated.¹⁷⁵ The consolidation commissioners informed Tuhoe that it was too late to complain about the scheme, but said that rates would be levied only after the scheme had been completed, and then only if the Minister gave his approval.¹⁷⁶ Whakamoe and others of Ngati Ruapani and Tuhoe seem to have believed that the Crown had agreed not only to the general UDNR rates exemption, but to a more permanent exemption for the Waikaremoana reserves. We do not consider it likely, however, that any such agreement was made even though Whakamoe and others understood that it had been; indeed, the evidence we have suggests that the Crown explicitly rejected such an exemption. In any case, like all UDNR land, the Waikaremoana reserves were not rated until the general exemption for the district was lifted in 1964. We will discuss what happened after that in the next section.

Despite the rates exemption, Whakatane County Council was able to get some contributions towards roads and other local services by means of the development schemes set up by the Crown at Ruatoki and Ruatahuna from 1930. Some communities which did not have development schemes also contributed towards roads. At Matahi, for example, the Maori community spent £100 building a road, which the Whakatane County Council helped maintain. After it was washed out, however, the council refused to repair it without a rates contribution.¹⁷⁷

During the 1930s and 1940s, roads and other public works at Ruatoki were paid for by the Crown, with some costs repaid through the development scheme.¹⁷⁸

171. Urewera Lands Act 1921, s16; Steven Oliver, 'Ruatoki Block Report' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A6), p160

172. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p124; counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p250; counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), paras 183–188

173. Matamua Whakamoe and others to Coates, 30 March 1925 (O'Malley, supporting papers to 'The Crown's Acquisition of the Waikaremoana Block' (doc A50(b)), p514)

174. 'Urewera Lands Consolidation Scheme', AJHR, 1921, G-7, p9

175. Vincent O'Malley, 'The Crown's Acquisition of the Waikaremoana Block, 1921–25' (commissioned research report, Tuai: Panekire Tribal Trust Board, 1996) (doc A50), pp107–108

176. Urewera minute book 1, 22 February 1922, fol 32 (O'Malley, 'The Crown's Acquisition of the Waikaremoana Block' (doc A50), pp109–110)

177. Bennion, 'The History of Rating in Te Urewera' (doc A130), p76

178. Oliver, 'Ruatoki' (doc A6), p162

The council continued to argue that Ruatoki lands should be rateable, and by 1938 the Department of Native Affairs, which administered the scheme, felt that some rates could be paid without hardship to the owners.¹⁷⁹ Due to the confusion about whether Ruatoki could legally be rated (see sidebar page 39), in 1942 the department agreed to pay the Whakatane County Council £250 for hospital rates, and to maintain bridges and roads in the Ruatoki area. The development blocks would then pay the department £250 for the hospital rates, £360 for a patriotic fund, and £600 for road maintenance. The first two payments would be charged according to ability to pay, while the road maintenance payment was compulsory. All appear to have been one-off payments.¹⁸⁰

Over the next decade, the department and council argued over who should be responsible for the roads, and in particular who should bring them up to county standards. Throughout, the owners opposed removal of the rates exemption, mostly on the grounds that many subdivisions were uneconomic. In the meantime, bridges at Ruatoki needed repairs and, by 1952, had become unsafe.¹⁸¹ In 1948, the council agreed to take over the Ruatoki roads and bridges in return for the Crown spending £33,000 to bring them up to county standards, and the development scheme farms paying £1,000 a year in total, which would increase to £1,700 a year over an eight-year period. It is not clear when this arrangement took effect, but it seems to have been in 1949 or the early 1950s.¹⁸² It ran into problems by the early 1960s, as farms began to be released from the development scheme and ceased to be under departmental control, and so could not continue to be levied. The remaining farms therefore carried an increasingly heavy burden.¹⁸³

One of the kainga most severely affected by the Crown's failure to build its promised roads was Ruatahuna. By the mid-1940s, roads to the settlement had become almost impassable and a bridge had been swept away. This meant communities on the other side of the Mangaorongo Stream from Ruatahuna were cut off from the school and from medical aid.¹⁸⁴ The Whakatane County Council refused to maintain the roads as it was not receiving any rates from the area, although it did contribute £20 a year towards maintenance.¹⁸⁵ There were also some Crown contributions.¹⁸⁶ In 1949, the Ruatahuna community lobbied the Maori Affairs Department for road funding, agreeing to pay some rates, but pointing out that thousands of acres of Maori land had already been contributed, through the consolidation

179. *Ibid*

180. *Ibid*, pp 165–166

181. *Ibid*, pp 166–167

182. *Ibid*, pp 167–168

183. Bennion, 'The History of Rating in Te Urewera' (doc A130), p 73; Oliver, 'Ruatoki' (doc A6), pp 169–170

184. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p 354; Heather Bassett and Richard Kay, 'Ruatahuna: Land Ownership and Administration, c1896–1990' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A20), p 323

185. Bassett and Kay, 'Ruatahuna' (doc A20), pp 323–324; Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), pp 353–355

186. Bassett and Kay, 'Ruatahuna' (doc A20), p 324



Auckland Weekly News (Whakatane District Museum and Gallery, B4-1)

A crossing over the Mangaorongo stream at Rauwiri, on the road to Mataatua, 1940. The failure of the Crown and the Whakatane County Council to build and adequately maintain roads and other infrastructure in the area meant that communities on the other side of the Mangaorongo Stream from Ruatahuna were routinely cut off by flooding.

scheme, towards roading in Te Urewera.¹⁸⁷ Maori Land Board registrar J Dillon estimated that the road could be repaired if each farm paid about £12 to £15 per year, under a similar arrangement to that in effect at Ruatoki.¹⁸⁸ Local fundraising by a variety of means, as well as a Crown contribution, led to some improvements in the 1950s.¹⁸⁹ However, the road north from Ruatahuna to Mataatua remained in poor repair, and the school bus driver threatened to stop the service if the road was not improved.¹⁹⁰ The lack of usable roads was also preventing the development of nearby land.¹⁹¹ Part of the problem was that the council was still refusing to maintain the roads without rates being paid.¹⁹² The road was eventually widened and metalled, and a bridge built, in 1959; this work was carried out by locals

187. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), pp 355–356

188. Notes of meeting, 29 August 1949 (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 655–657)

189. Bennion, 'The History of Rating in Te Urewera' (doc A130), p 76; Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), pp 359–360

190. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p 360

191. Bassett and Kay, 'Ruatahuna' (doc A20), p 325

192. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p 361

and Fletcher Timber Mills staff, with the aid of a £200 Maori Affairs grant.¹⁹³ It seems to have been part of a more general agreement that Fletcher would maintain roads which it was using and which were not otherwise being looked after.¹⁹⁴ Similarly, the road to Maungapohatu was built and maintained by the Bayten Timber Company; the owners seem to have sold the timber rights partly in order to get the road. The council refused to pay for maintenance to this road while no rates were being paid.¹⁹⁵

In the 1950s and early 1960s, the Whakatane County Council, which covered most of the UDNR area, campaigned to have the rating exemption on UDNR land removed, particularly from blocks which were being milled.¹⁹⁶ The Department of Maori Affairs and the Waiariki Maori Land Court registrar were concerned about the imposition of rating on uneconomic Maori farms, unmillable land, and, in the future, land from which all the millable bush had been removed.¹⁹⁷ In a meeting between the department, the council, and Tuhoe in September 1959, Tuhoe representatives asked why millers could not pay timber royalties for the upkeep of roads, as they did when milling Crown land.¹⁹⁸ A few months later, Prime Minister and Minister of Maori Affairs Walter Nash wrote that the council could not be blamed for not wanting to maintain roads when it was not receiving rates from anywhere in the Reserve area. He argued that, when the exemption was granted in the 1920s, it would have been unfair to rate Maori land in the UDNR because the consolidation scheme made ownership uncertain, and because landowners had already given up land for the roads. By 1960, however, the consolidation scheme was completed and Tuhoe had been compensated for the roading land; the general exemption should therefore be lifted.¹⁹⁹

In 1963, as a result of the conflicts and problems outlined above, the local government commission was asked to investigate and make recommendations on rating in the area.²⁰⁰ The council submitted that it could not maintain roads unless rates were paid.²⁰¹ Tuhoe Tribal Committee lawyer JD Dillon responded that, in most areas, only a small amount of road maintenance would be done, and it was unfair to remove the general exemption for this. He did, however, state that it

193. *Ibid*, p 362

194. Bassett and Kay, 'Ruatahuna' (doc A20), p 327

195. Bennion, 'The History of Rating in Te Urewera' (doc A130), p 101

196. *Ibid*, pp 77–78

197. *Ibid*, pp 79–80; Bassett and Kay, 'Ruatahuna' (doc A20), pp 326–327

198. Bennion, 'The History of Rating in Te Urewera' (doc A130), pp 81–82

199. *Ibid*, p 82

200. 'Report of the Local Government Commission for the Year Ended 31 March 1964', AJHR, 1964, H-28, p 17. The commission was tasked with investigating a range of local government issues. Its members were John Bradley Yaldwyn (chair), a barrister and solicitor and member of various Hutt Valley and Wellington region local authorities; John Charles Derby Mackley, Masterton County Clerk and member of various local government associations; and Ronald Erle White, former Mayor of Timaru. We do not know if any of these men were Maori or whether they had any connection to Te Urewera: G C Peterson, ed, *Who's Who in New Zealand*, 8th ed (Wellington: AH & AW Reed, 1964), pp 199, 302; 'Timaru City Council: Resolution Making Special Rate', 5 August 1954, *New Zealand Gazette*, 1954, no 48, p 1282.

201. Bennion, 'The History of Rating in Te Urewera' (doc A130), p 86

would be reasonable to rate blocks in the Ruatoki and Ruatahuna areas.²⁰² He also noted that Tuhoe had agreed not to mill some of their land, for flood protection and soil conservation purposes, and that Maori landowners had been contributing to road upkeep through the levies, maintenance of the Ruatahuna road, and free metal from their lands.²⁰³ In June 1963, the commission informed the Minister of Internal Affairs that the owners and Whakatane County Council had agreed that developed and owner-managed lands in the former UDNR area should be made rateable; farms still in the development schemes should remain unrateable; millable areas should be rated, with the rates paid by the millers whenever possible; and that the council should take over roads, water supplies, and other works currently maintained by landowners or the Department of Maori Affairs.²⁰⁴ The following year, the general exemption was lifted.²⁰⁵

22.3.5 To what extent have Te Urewera Maori lands been subject to rates since 1964, and have such charges been fair and equitable?

When the general rating exemption was lifted from the former UDNR in 1964, a total of 131 blocks, comprising 38,250 acres and including at least 14 urupa, eight papakainga or pa, and seven marae, were exempted from rating.²⁰⁶ These were probably the blocks recommended to be exempt by the Maori Land Court, as being either urupa, marae, housing reserves, unproductive and likely to remain so, or blocks which should remain undeveloped because of water catchment needs.²⁰⁷ All of these blocks were in Whakatane County; we do not know why blocks in other counties were not included.²⁰⁸ There were many large blocks on the list, including 10 of over 1,000 acres each, which were presumably not suitable for development. At the time of our hearings, none of these exemptions had been repealed.²⁰⁹ However, the amalgamations of the 1970s, which we detailed in chapter 19, meant that many of these blocks ceased to exist. This was especially the case at Ruatoki, where rates-exempt blocks comprising more than 5,000 acres were incorporated into the Te Manawa a Tuhoe block, leaving only about 45 acres with rates-exempt status.²¹⁰

Maori landowners who could not pay their newly levied rates reached a variety

202. Bennion, 'The History of Rating in Te Urewera' (doc A130), p 86

203. Ibid, p 87

204. Yaldwyn to Minister of Internal Affairs, 19 June 1963 (Tom Bennion, comp, supporting papers to 'The History of Rating in Te Urewera', 2 vols, various dates (doc A130(b)), vol 2, pp 84–87)

205. Bennion, 'The History of Rating in Te Urewera' (doc A130), p 93

206. 'Exempting Maori Land from Payment of Rates', 6 April 1964, *New Zealand Gazette*, 1964, no 24, pp 701–702

207. Bennion, 'The History of Rating in Te Urewera' (doc A130), p 94

208. The inclusion of Opotiki County blocks was suggested at the time, but this seems to have been ignored: JH W Barber to Maori Affairs Head Office, 25 February 1964 (Bennion, supporting papers to 'The History of Rating in Te Urewera' (doc A130(b)), p 93).

209. Bennion, 'The History of Rating in Te Urewera' (doc A130), p 103

210. 'Exempting Maori Land from Payment of Rates', 6 April 1964, *New Zealand Gazette*, 1964, no 24, p 701; Nikora, 'Te Urewera Lands and Title Improvement Schemes' (doc G19), p 74

Rating at Ruatoki: A Legal Conundrum

Ruatoki was the only large Maori community to be part of the Urewera District Native Reserve but not the Te Urewera Consolidation Scheme. This created a great deal of legal confusion over rating, which was finally resolved only in 2003.

In its 1921–22 governing legislation, the Te Urewera Consolidation Scheme adopted the UDNR boundary, which included Ruatoki even though Ruatoki was not part of the scheme.¹ This meant that Ruatoki was included in the general rates exemption, even though it had been rated earlier in the decade. Exemptions could be removed from specific blocks after a consolidation order had been made, but since Ruatoki was not part of the consolidation scheme, there could be no consolidation order there.² An amendment to the Act in 1922 removed the requirement for a year to pass between the order and removal of the exemption from Ruatoki 1, 2, and 3, but this did not solve the problem that there could be no order for any of those blocks.³ The Whakatane County Council had lobbied for the amendment, pointing out that it had rated Ruatoki in the past, and consequently spent a lot of money on improving roads in the area.⁴ However, even after the amendment was passed, the legality of Ruatoki rates remained uncertain and the owners refused to pay. By the end of the decade there was £102 owing.⁵ Another attempt was made in 1940 to remove the exemption from Ruatoki, but the legal uncertainty remained.⁶

In 1964, the rates exemption was removed for the entire former UDNR, including Ruatoki. The legality of this does not seem to have been considered until 2000, when the Whakatane District Council's right to levy rates there was legally challenged. The definitive ruling on the issue came in 2003, when the Court of Appeal held that, because no consolidation order could ever have been made for Ruatoki under the original Act, there was no requirement for one prior to the removal of the rates exemption.⁷ Legally speaking, Ruatoki could have been rated from 1922. It was perhaps fortunate for its owners that the Crown did not realise this.

1. The UDNR is not referred to in the text of the Urewera Lands Act, but Bennion states that the area described therein is 'exactly' the area in the schedule of the UDNR Act: Tom Bennion, 'The History of Rating in Te Urewera' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2003) (doc A130), p 51.

2. Steven Oliver, 'Ruatoki Block Report' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A6), p 161

3. Native Land Amendment and Native Land Claims Adjustment Act 1922, s 43(3)

4. Paula Berghan, 'Block Research Narratives of the Urewera, 1870–1930' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2001) (doc A86), pp 511–512

5. *Ibid*; Bennion, 'The History of Rating in Te Urewera' (doc A130), pp 58–60

6. Oliver, 'Ruatoki' (doc A6), pp 163–164

7. *Keepa v Whakatane District Council* CA60/02, 24 July 2003, paras 14–16; see also *Whakatane District Council v Keepa*, High Court, M7/00, 27 June 2000, and *Whakatane District Council v Keepa*, High Court, M7/00, 18 December 2001

of agreements with local councils, although this sometimes took several decades. One of the earliest agreements was reached in 1969, between a Tuhoë deputation and the Whakatane County Council. Under the agreement, all accessible Maori land in Te Urewera would be rated, even if it was incapable of returning a profit, as long as inaccessible land was not rated.²¹¹ It appears that the council did not rate the inaccessible land even when rates were owing on other land, but there were serious fears that it would do so.²¹² This was a major problem because some land was made rateable in 1964 on the basis that timber was being milled from it at that time. However, rating continued 'long after timber cutting grants had expired', and even after the milling of timber was prohibited.²¹³ Although the 1963 agreement between landowners and the council did not explicitly state that undeveloped and unmillable land would not be rated, this was the clear implication. Also around 1969, the Whakatane council wrote off around \$17,000 in unpaid rates and agreed not to rate some Ruatoki hill land intended for afforestation, allowing the land to be amalgamated and later leased for forestry purposes. As of the early 2000s, the owners were paying rates from the area's forest income.²¹⁴

Wairoa County Council seems to have been more difficult. The reserves from the Waikaremoana block, north of the lake, became subject to Wairoa County rates in 1964, with the removal of the UDNR rating exemption, even though some contained urupa and marae.²¹⁵ Rating also continued after the reserves were given legal Maori reserve status in 1974, although some rating debt was remitted at this time.²¹⁶ In 1986, Stokes, Milroy, and Melbourne wrote:

In the Wairoa County District Scheme all the Reserves are designated as proposed additions to the Urewera National Park. . . . In effect, the Reserves can not be used for any purpose that does not comply or accord with use as a National Park. In particular, this means that owners can not build dwellings or other accommodation. Despite this, the owners have consistently been sent rate demands for the Reserves, for land that does not and can not generate any income, has no services supplied by the county, and which owners can not use. In 1972 the rate debt was \$14,056. In 1985 it was over \$40,000.²¹⁷

In 1986, after negotiations, the Wairoa County Council agreed to waive unpaid rates.²¹⁸

211. Tuawhenua Research Team, 'Te Manawa o te Ika, Part Two' (doc D2), p 467

212. *Ibid*, p 468

213. Cleaver, 'Urewera Roothing' (doc A25), p 120

214. Oliver, 'Ruatoki' (doc A6), p 173

215. None were on the 1964 exemption list: 'Exempting Maori Land from Payment of Rates', 6 April 1964, *New Zealand Gazette*, 1964, no 24, pp 701-702; 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), pp 81, 85. Te Kopani and Heiotahoka were not exempted either.

216. Innes, 'Tenure Changes Affecting Waikaremoana "Purchase Reserves"' (doc A117), pp 33-35

217. Stokes, Milroy, and Melbourne, *Te Urewera* (doc A111), pp 86-87

218. *Ibid*, p 87

In the early 2000s, the Whakatane District Council, which covers most of our inquiry district, had a policy of remitting rates on multiply owned Maori blocks which were ‘non-revenue producing, inaccessible and incapable of development for future use.’²¹⁹ There was no special provision for remote areas in receipt of few services, although from 1993 the council waived the works and facilities rate for the Maungapohatu Incorporation block, as no money had been spent on the access road.²²⁰ The Gisborne District Council, which covers some of the south-east of our district, had a whenua rahui programme through which Maori landowners could apply for up to three years’ rates relief if their land was unoccupied and of proven historic, ancestral, or cultural significance.²²¹ We did not receive evidence on whether relief was received for blocks in our district.

Under the Local Government (Rating) Act 2002, urupa, marae, Maori reservations, and Maori customary land were specified as exempt from rates.²²² The Local Government Act of the same year required local authorities to adopt a policy on the remission and postponement of rates on Maori freehold land. The authority must consider a wide range of objectives including avoiding alienation of Maori land; recognition of the connection between Maori and their ancestral land; protection of wahi tapu; and recognition of inaccessible land.²²³ We did not receive any information on Maori land rating policies, at the time of our hearings, of any district councils overlapping the inquiry district.

22.3.6 Tribunal analysis and conclusions

We consider that, generally speaking, the Crown has a kawanatanga right to allow local authorities to collect rates from Maori land. Rates should be imposed, however, only in the following circumstances:

- ▶ consideration is given to rating relief for land incapable of returning a profit, such as urupa, marae, land not capable of development, and land with significant legal restrictions;
- ▶ those owning and/or using the land will receive a reasonable level of services and amenities in return; and
- ▶ rating assessment takes into account past contributions (such as land, gravel, and labour) made to construction and upkeep of roads and other amenities.

Where those terms are met, we consider that the imposition of rates on Maori land is not in breach of Treaty principles. We now turn to our findings on specific rating issues.

On the question of whether any promise was made in the 1890s not to impose rates on land within the Urewera District Native Reserve, we received insufficient evidence to make a finding.

219. Bennion, ‘The History of Rating in Te Urewera’ (doc A130), p103

220. Ibid

221. Ibid

222. Local Government (Rating) Act 2002, sch 1

223. Bennion, ‘The History of Rating in Te Urewera’ (doc A130), pp104–105; Local Government Act 2002, s108, sch 11

In relation to the rates and levies imposed on Ruatoki and Ruatahuna lands before 1964, we make the following findings:

- ▶ The rating of Ruatoki lands in the early 1920s was reasonable, considering that the owners benefited from local roads and were apparently able to pay rates at this time. It was not therefore a breach of Treaty principles.
- ▶ Once owners of Maori land in the Urewera Consolidation Scheme had surrendered 40,000 acres of their land for arterial roads, they should not have been asked to make any further contribution to roading in the Reserve area, especially given that many of the promised roads were never built. As we found in chapter 14, the compensation payment in the 1950s was inadequate and therefore did not justify the subsequent imposition of rates for roading purposes.
- ▶ The levies imposed by the Crown on development scheme farms around the middle of the twentieth century were effectively rates. In Ruatahuna, the imposition of these levies subverted the rates exemption, and ignored the substantial contribution of land which the community had already made towards roads. The Crown therefore breached the Treaty principle of partnership, which requires the parties to act towards one another with the utmost good faith. The increased hardship suffered by these impoverished communities was a prejudice arising from this breach of the Treaty.
- ▶ The levies on Ruatoki are a different matter. That area was not part of the main consolidation scheme, and the community did not give up land for roads. It was quite recently determined that the Crown could legally have removed the rates exemption, although it did not manage to do so before 1964. As with the rating in the early 1920s, we cannot see any breach of Treaty principles in the Crown's imposition of levies on productive land at Ruatoki.

In relation to general rating policy and practice, we make the following findings:

- ▶ It is understandable that local authorities did not want to pay for roads in areas where they were collecting few or no rates. However, this does not mean that Maori landowners should have shouldered the burden of high rates or bad roads. The Crown had taken large areas of their land to pay for roads that were never built, and the roads served the national park as well as Maori communities. The Crown should therefore have made more of a contribution towards roads in Te Urewera, and its failure to do so was a breach of the principle of partnership with its requirement of good faith. We discuss the prejudice arising from the Crown's failure to build its promised roads elsewhere in this report, showing that it severely impeded the economic capability of many Te Urewera communities.
- ▶ We consider that it was not a breach of Treaty principles for productive Maori land in the former UDNR to incur rates after 1964, but only if those rates related to services and amenities (other than roads) which the landowners were able to use. Rates should not have been imposed to pay for roads; as noted, Maori landowners in the UDNR had already paid for them with land.

In addition, we repeat our findings in chapters 14 and 19 that the Crown should

not have taken land at Waiohau, Te Teko, and Waikaremoana as payment for rates debt. It should instead have remitted the debt as it did in relation to Ruatoki.

22.4 CULTURAL PROPERTY CLAIMS

In this inquiry, most claims relating to cultural property fell into one of three categories:

- ▶ Claims with nationwide application, such as generic issues relating to matauranga Maori and taonga tuturu, many of which have been addressed by the Wai 262 Tribunal.²²⁴ We do not examine any generic issues in this section.
- ▶ Claims relating to wahi tapu. Generic wahi tapu issues have been examined by the Tauranga Moana Tribunal, and we endorse its findings that the Crown has a duty to protect Maori cultural heritage, but has largely failed to do so.²²⁵ In relation to claims about specific wahi tapu in our inquiry district, we address those relating to the national park in chapter 16, to Waikaremoana in chapter 20, and to Whirinaki in chapter 21.
- ▶ Claims relating to taonga tuturu, also known as artefacts or cultural objects. In this section, we deal with taonga tuturu which have been removed from Te Urewera.

We received other claims relating to the national park, for example the place of matauranga Tuhoe; we address these in chapter 16.

In chapter 5, we detailed how, during the 1860s and 1870s invasions of Te Urewera by Crown forces, taonga such as whareniui were deliberately destroyed. We found that this was in breach of articles 2 and 3 of the Treaty, as well as the principle of active protection. As we stated in chapter 5, the trauma of the invasions was intensified by the wanton destruction and looting of irreplaceable taonga and the desecration of wahi tapu. One soldier boasted of having ‘got some very fine specimens of Maori trappings[:] one figurehead to a Maori war canoe, tomahawk, spear, paddle and some greenstone.’²²⁶ The present location of most of the items looted during the wars is unknown.

Some significant Te Urewera taonga were presented to high-ranking visitors to recognise their mana and mark the occasion.²²⁷ The Wai 36 Tuhoe claimants submitted that such gifts were given

to affirm and sustain the reciprocal relationship between Tuhoe and the Crown. The Crown has wrongly viewed such gifts as demonstration of Tuhoe submission and

224. Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims concerning New Zealand Law and Policy Affecting Maori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, pp 33–46, 77–91, vol 2, pp 504–514

225. See Waitangi Tribunal, *Tauranga Moana, 1886–2006*, vol 2, pp 671–701

226. Ngahuia Te Awekotuku and Linda Waimarie Nikora, ‘Nga Taonga o Te Urewera’ (commissioned research report, Wellington: Crown Forestry Rental Trust 2003) (doc B6), p 56

227. Te Awekotuku and Nikora, ‘Nga Taonga o Te Urewera’ (doc B6), p 56

retained them on that basis: Tribal heirlooms such as [the taiaha] Rongokarae appear to have been treated as constituting an absolute and personal gift to the recipient. The failure to return State gifts is a breach of the Crown's duty to treat with Tuhoe in the utmost good faith.²²⁸

Crown counsel responded that there is no evidence that the Crown 'intended to distort tribal customs of Tuhoe' by not returning gifted taonga when this was expected. However, they acknowledged that there was sometimes a failure to understand that the gifts should have been returned.²²⁹

One example of the Crown's failure to meet the expectations of Te Urewera iwi with regard to gifts dates from 1870. At a peace-making hui between Tuhoe rangatira Te Whenuanui and the Crown, Tuhoe presented Major William Mair with two pounamu weapons (one named Tuhua) and three cloaks. Mair reciprocated with a watch (to be named Te Maungarongo), a gold pin, a gold ring, and a shawl.²³⁰ In 1971, T R Nikora informed the office of Maori Affairs Minister Duncan MacIntyre that the Minister's upcoming visit to Ruatahuna would be an appropriate time to return the gifts. At the hui, Tuhoe returned Mair's gifts, given a century before, but MacIntyre had been unable to locate Tuhoe's gifts. He then saved the Crown's honour somewhat by presenting them with his own personal walking stick, a valuable Scottish heritage piece. This was presented back to MacIntyre the following year, when he visited Ruatoki. In their evidence, Te Awekotuku and Nikora stated that the return of MacIntyre's stick 'was in stark contrast to Pakeha practice, and recognises the significance of material objects in a ceremonial or negotiating context.'²³¹

The shell trumpet Te Umukohukohu, which was sounded in 1868 to rally Tuhoe resistance to invading Crown forces, is another significant taonga presented to Crown representatives. Te Whenuanui gifted this to Lord Ranfurly's party at Ruatahuna in 1904, and it is now held by the Te Papa Tongarewa museum.²³² Te Awekotuku and Nikora argue that there would have been an expectation that the taonga, 'one of the most singularly meaningful taonga extant for Tuhoe', would be returned.²³³

The taiaha Rongokarae was presented to Richard Seddon by the Tuhoe rangatira Kereru Te Pukenui during Seddon's visit to Te Urewera in 1894. As we stated in chapter 9, this was a gift of great significance. Kereru was reported as saying that it symbolised a wish for future peace, and Tuhoe's commitment to partner with the Government and obey the law. We considered that the gift was intended to create a covenant, binding both sides to peace and future consultation with each other.

228. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 223

229. Crown counsel, closing submissions (doc N20), topic 40, p 12

230. Elsdon Best, *Tuhoe: The Children of the Mist*, 2nd ed (Wellington: Reed, 1972), p 665

231. Te Awekotuku and Nikora, 'Nga Taonga o Te Urewera' (doc B6), pp 57–58

232. 'Putatara (Trumpet), Named "Te Umukohukohu"', Museum of New Zealand Te Papa Tongarewa, <http://collections.tepapa.govt.nz/Object/119511>, accessed 27 May 2015; Te Awekotuku and Nikora, 'Nga Taonga o Te Urewera' (doc B6), pp 64–65

233. Te Awekotuku and Nikora, 'Nga Taonga o Te Urewera' (doc B6), p 65

Although Seddon may not have fully understood the meaning of the gift, apparently believing that it signified Tuhoe's submission, he did understand that it had imposed a trust upon him. At the time of our hearings the location of Rongokarae was unknown, which was a source of distress to the claimants. It was subsequently discovered that the taiaha had remained with the Seddon family, and in August 2014 it was returned to Tuhoe by the Crown and Richard Seddon's great-grandson, Tim Jerram.²³⁴

In each of the examples above, Tuhoe leaders presented high-ranking Crown representatives with taonga on significant occasions. It is clear to us that the purpose of such presentations was to ensure that the circumstances in which they were made would be remembered on both sides for generations, as part of their shared history. These were not gifts in the everyday sense of the word; according to tikanga, the recipient held the taonga on the basis that it would be returned on an appropriate occasion; years, perhaps generations, hence.

The Crown failed to inform itself of the significance attached to the presentation of taonga on historic occasions, and of its obligations as recipient, including the obligations to care for the taonga and eventually to return them. In two of the examples above – the Mair gifts and Rongokarae – the Crown seems to have lost possession of the taonga. In the case of Rongokarae, Seddon appears to have regarded the taiaha as his own personal property, and handed it down through his family. The taonga presented to Mair seem to have been lost entirely; they may lie unrecognised in some museum, or be in a private collection in New Zealand or overseas. Since Te Umukohukohu is still in the Crown's possession, it can consider returning this taonga to Tuhoe on a suitable occasion. We commend the Crown and the Seddon family for their recent return of Rongokarae.

In losing the taonga presented to Mair, the Crown has breached not only its Treaty duty of active protection of taonga, but also its broader duties of partnership and good faith. In relation to Rongokarae, the Crown's carelessness is symbolic of its wider failure to honour the wider UDNR partnership, which the gift originally marked.

22.5 SCHOOLS CLAIMS

In this section we deal with claims involving schools and school property which relate primarily to issues other than education. Education issues will be addressed in our socio-economic impacts chapter. In this section, we examine three claims. The first relates to part of the Tuararangaia block, transferred to the Crown as an education endowment on conditions that the claimants say were never fulfilled. The second is about the Te Whaiti School playing field, and whether the Crown fulfilled the conditions of that gift of land. The final claim in this chapter relates

234. Christopher Finlayson, 'Address to Tuhoe – Crown Settlement Day in Taneatua', 22 August 2014, <http://www.beehive.govt.nz/speech/address-tuhoe-crown-settlement-day-taneatua>, accessed 10 November 2014

to the planting of seedlings by pupils from two primary schools in the Whirinaki Valley and one at Ruatahuna, and what should have happened to the profits when those trees were harvested.

22.5.1 What were the conditions of the Tuararangaia land transfer, and did the Crown fulfil them?

22.5.1.1 Introduction

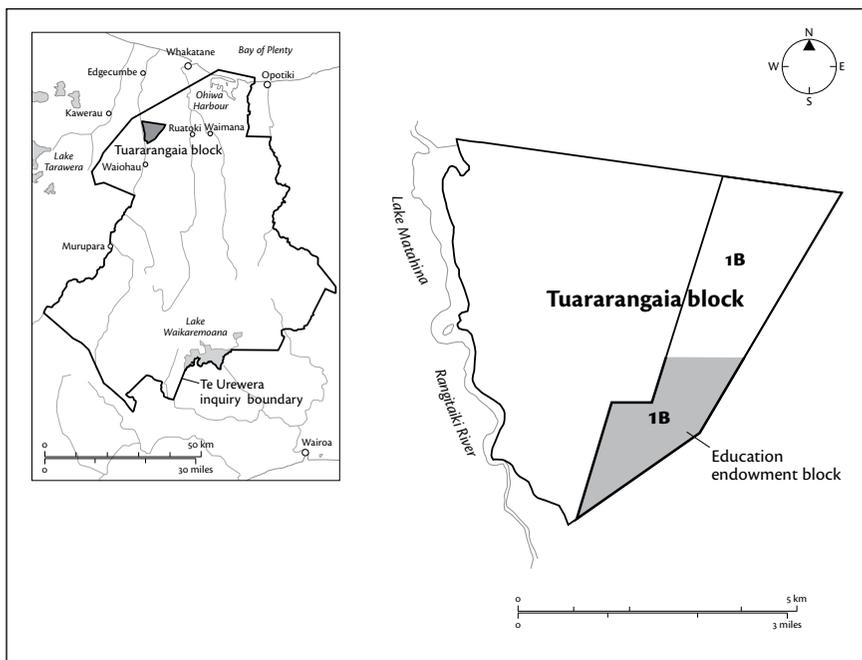
In 1912, the assembled owners of the 2,619-acre Tuararangaia 1B block agreed to cede 1,000 acres of that block to the Crown, in support of a Maori college in the Ohiwa area. The Crown's title was not formalised until 1918, and nothing was done with the land until the 1950s, when logging took place. The profits were returned to the Education Department, which appears to have put them in its general fund. Tuhoe representatives requested the return of the land in 1972, and this occurred later in the year, on the grounds that it was no longer required for education purposes.²³⁵ As of 2001, the endowment block was one of only two subdivisions in the greater Tuararangaia block remaining in Maori ownership. Part of the land is being used for pine plantations, while the rest is native forest.²³⁶

We set out the alienation history of Tuararangaia in chapter 10. In summary, the 8,656-acre parent block went through the land court in 1890, and the 3,500-acre Tuararangaia 1 was awarded to Tuhoe. Tuararangaia 1A was awarded to the Crown for survey costs, leaving Tuhoe with the 2,619-acre 1B block. On the recommendation of the Native Minister and the Stout–Ngata commission, the 1B owners formed an incorporation in 1910, with an elected management committee. The committee offered 1,000 acres to the Crown to support a college for local iwi, and this decision was confirmed by a meeting of owners assembled at Ruatoki. The rest of the block was ceded to the Crown in 1914, as a contribution to the war effort. We found in chapter 10 that at this time Tuhoe had little money, and offered gifts to the Government in the hope of improving and solidifying their relationship, establishing reciprocity, and getting college-level education for their children. We also found that the land transfers clearly had support from the wider tribe and some of its leaders, and was an example of the exercise of tino rangatiratanga.

Although the Crown investigated development of the block, no economic activity took place until the early 1950s, when the cutting rights were sold. The Education Department received a net £8,212 from the sale of timber, and appears to have put the money in its general funding account. This seems to have been done on the basis that Maori colleges and schools were now completely funded by the Crown. Below, we will examine exactly what the terms of the gift were, and whether the Crown fulfilled them.

235. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), pp 98, 103, 116–117, 123–124; Whakatane Maori Land Court, minute book 52, 1 November 1972, fols 290–291

236. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), pp 10, 124



Map 22.5: The Tuararangaia block

22.5.1.2 *The claims, and the Crown response*

Counsel for Wai 36 Tuhoe submitted that the Tuararangaia land was intended to establish a college ‘for the children of Tuhoe, Ngati Awa and Te Arawa in the Ohiwa region.’²³⁷ The Crown failed to establish any such college, or account for the money it derived from the land. ‘In light of the above, the Crown has a long standing obligation to provide a college or tertiary institution within the Urewera area.’²³⁸ Claimant witness Colin Pake Te Pou said to us that the ‘government sold the trees and kept the profits – no school was established and none of the schools received any money.’²³⁹ It was clear to us that the claimants regarded this as yet another promise that the Crown had made and forgotten.

Crown counsel accepted that the land was donated as an endowment for Maori schools or colleges, and that the Crown does not know exactly what the money it made from the land was spent on.²⁴⁰ They conceded that it ‘does not follow’ that putting the endowment money into the Crown’s general consolidated

237. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 219

238. Ibid

239. Colin Te Pou, brief of evidence, 26 March 2004 (doc C32(a)), p 13

240. Crown counsel, closing submissions (doc N20), topic 39, pp 31–33

fund for education would have been a fulfilment of the landowners' intentions.²⁴¹ In response to questions as to why the Crown took so long to do anything with the land, counsel stated that 'from time to time' the Crown considered cost-effective uses of the land, and made a correct decision not to undertake unprofitable work.²⁴² To a question about the costs taken from Tuararangaia profits, Crown counsel responded that trustees were entitled to be reimbursed for reasonable costs incurred in carrying out their duties.²⁴³

22.5.1.3 Tribunal analysis and conclusions

On 15 April 1912, Numia Kereru wrote to Inspector of Native Schools William Bird on behalf of the owners of Tuararangaia 1B, offering 1,000 acres of the block for a college at Ohiwa.²⁴⁴ Te Pouwhare also wrote, confirming the offer.²⁴⁵ Bird was initially against accepting the land, arguing that a thousand acres would 'not go far to support a "College" specially provided for the Urewera people and *it would not be right to accept the land for general school purposes*' (emphasis in original).²⁴⁶ In June or July, however, he talked to Apirana Ngata, who suggested that the Crown accept the land and ask Numia and Te Pouwhare to persuade other Te Urewera hapu to also donate land for the college. Bird now seemed to be more favourable towards accepting the land, writing that 'the Maori children would probably get much more benefit from the lands thus reserved than they would if the lands were sold or alienated, as they are being in the North.'²⁴⁷ Shortly afterwards, Numia Kereru repeated the offer and the view that the college should be in the vicinity of Ohiwa. He also suggested that the Crown donate another thousand acres; it is not clear whether this was meant as a land swap or a donation towards the college.²⁴⁸

On 15 July, the Native Minister directed the Waiariki Maori Land Board to summon a meeting of the Tuararangaia 1B owners to consider a resolution that 'a portion of the south end of the block, containing 1,000 acres, be ceded to the Crown, to be set aside as a permanent endowment for Native Schools or Native Colleges.'²⁴⁹ This phrasing does not seem to convey the owners' specific desire for

241. Crown counsel, closing submissions (doc N20), topic 39, p 35

242. Ibid, p 33

243. Ibid, pp 33-35

244. Numia to Bird, 15 April 1912, ABEP W4262 7749 box 990 18/1/23, Archives New Zealand, Wellington

245. Te Pouwhare to Bird, 13 April 1912, ABEP W4262 7749 box 990 18/1/23, Archives New Zealand, Wellington

246. Bird to secretary for education, 24 June 1912, ABEP W4262 7749 box 990 18/1/23, Archives New Zealand, Wellington

247. Bird to inspector-general, 15 July 1912, ABEP W4262 7749 box 990 18/1/23, Archives New Zealand, Wellington

248. Extract from inspection report of Ruatoki, 22 July 1912, ABEP W4262 7749 box 990 18/1/23, Archives New Zealand, Wellington

249. Native Minister, application to summon meeting of owners, 15 July 1912 (Peter Clayworth, comp, supporting papers to 'A History of the Tuararangaia Blocks', various dates (doc A3(a)), p 30)

a college in their rohe. This means that what was said at the meeting was of crucial importance. Board member and Te Arawa rangatira Hemana Pohika attended the meeting and reported back to the board president. We quote his account in full:

Maketu
4 September 1912

The President, Waiariki D M L to Board

Te Huinga onga tangata no ratau te whenua raro i wahi xviii, Ture Whenua Maori 1909.

Mo Tuararangaia No 1B

Ko te Motini 'Te whakaarohia ana te pito ki te tonga o taua whenua 1000 nga eka, kia tukua ki te Karauna hei oranga mo nga Kura me nga Kareti Maori.'

He nui nga rangatira o Tuhoe i tu ki te whai kupu i tau huihuinga a wahakaetia ana te motini.

Hemana Pokiha
Rep of Board

I whai kupu ano aua rangatira o Tuhoe kia tino whakapumautia te whakatu e te Kawanatanga tetahi kura ara Kareti mo nga tamariki o Tuhoe o N'Awa me te Arawa ki te takiwa Ohiwa.

Meeting at Tauarau, Ruatoki
27 August 1912²⁵⁰

For our purposes, the most important part of this report was the postscript about the owners' expectations of the Government ('Kawanatanga') in response to their gift. Waitangi Tribunal research officer Wayne Taitoko translated it as: 'Those chiefs of Tuhoe also discussed the commitment made by the Government to erect schools, that is colleges, for the children of Tuhoe, Ngati Awa and Te Arawa in the district of Ohiwa.'²⁵¹ Tuhoe-Waikaremoana Maori Trust Board claims manager Tama Nikora provided another translation: 'Those chiefs of Tuhoe also added and emphasised that Government must establish a school that is a college, for the children of Tuhoe, N'Awa and Te Arawa.'²⁵²

It is clear to us from the te reo text and both translations that the owners expected a college to be founded at Ohiwa. In the first translation, the Government

250. Pokiha to president, Waiariki Maori Land Board, 27 August 1912 (Clayworth, supporting papers to 'A History of the Tuararangaia Blocks' (doc A3(a)), p 31)

251. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), p 100

252. Ibid, p 101

is seen as having already made a commitment, whereas in the second version the owners seem to have regarded the establishment of a local school as the *quid pro quo* for their gift of land.

It is not clear that the Crown understood these expectations. Reporting the meeting's outcome to the Solicitor-General in November, Native Department Under-Secretary Thomas Fisher wrote only that the resolution, that the land 'be set aside as a permanent endowment for Native schools or Native colleges', had been carried.²⁵³ When the Crown's certificate of title was issued on 10 January 1918, after more than five years of delays and official confusion, it similarly stated that the land was transferred the Crown 'to be held by His Majesty for the purpose of a permanent endowment for native schools or native colleges.'²⁵⁴ It appears that this was based on the meeting resolution, rather than the clearer statement of intent in Pohika's postscript. While it conveys that the land transfer was to benefit Maori education, it gives no indication of its more specific purpose: to provide for a college at Ohiwa for Tuhoe, Ngati Awa, and Te Arawa.

It appears that no college has ever been in operation at Ohiwa, but a district high school was founded at Whakatane in 1920.²⁵⁵ Although the school was located fairly close to Ohiwa, and opened just two years after the Crown's possession of the Tuararangaia endowment block was formalised, it does not appear to have been connected to Tuararangaia, and there is no indication that the school gave any particular consideration to Maori in general, let alone the specific *iwi* mentioned at the owners' meeting. As we discuss in more detail in chapter 23 on socio-economic issues, few Maori from Te Urewera attended any secondary schools before the Second World War, for reasons including poverty, transport difficulties, and the monocultural and monolingual nature of State education. A boarding allowance and school buses were later provided, but these were never enough to remove the barriers between Te Urewera children and secondary education.

Another reason why the foundation of Whakatane District High School is unlikely to be connected to Tuararangaia is that the school was founded in 1920 and the Crown did not receive any money from the land until the mid-1950s. This was largely because of the land's unsuitability for farming. Crown surveyors and rangers inspected the land at various times in the 1920s, concluding that it would be better used as a State forest or water conservation reserve.²⁵⁶ In 1924, clearly still hoping that the gifted land would be used for its intended purpose, Tupapa Tamana and 634 others petitioned Parliament for the Tuararangaia block to 'be

253. Fisher to Solicitor-General, 19 November 1912 (Clayworth, supporting papers to 'A History of the Tuararangaia Blocks' (doc A3(a)), p 36)

254. Certificate of title, 10 January 1918 (Clayworth, supporting papers to 'A History of the Tuararangaia Blocks' (doc A3(a)), p 92). See page 103 for a brief account of the delays in getting the title finalised.

255. The first mention we could find of Whakatane District High School was in the 1921 Education Department report: 'Secondary Education', AJHR, 1921, E-6, p 26.

256. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), pp 18–19, 114

vested in the directors of the proposed Presbyterian Maori Technical College at Waimana.²⁵⁷ However, the Native Minister considered that the endowment was intended to support Government-run native schools and colleges, and so it would be inappropriate to transfer the land to support a denominational school.²⁵⁸ In any case, the school was never founded.²⁵⁹ There seems to have been little further action during the 1930s or through the war years. There were occasional suggestions that the block could be used for soldier resettlement, along with the rest of Tuarangaia 1B, which had been donated for the war effort during the First World War. This idea was rejected, as the land was unsuitable.²⁶⁰

By the late 1940s, the timber industry was fully established in Te Urewera, as we describe in chapter 23. This made it more viable to mill blocks that may previously have been uneconomic for forestry purposes. In this context, the Under-Secretary for Lands reported that a number of millers were interested in the timber on the Tuarangaia endowment block. He suggested that the State-owned Forest Service be asked to administer the sale of the timber, and noted that the 'net revenue would, of course, have to be applied, in terms of the endowment'.²⁶¹ The Director of Education was somewhat confused about the status of the land, writing that it 'is not directly under the administration of this Department', and was 'something in the nature of an oddment', but also that he was 'pleased to learn that it has saleable timber situate [*sic*] upon it'. He stated that the land was in trust 'for the endowment of Native Schools or Colleges' and gained the approval of the Minister of Education to proceed as suggested.²⁶²

Timber-cutting rights for two parts of the block were sold to the Tunncliffe Timber Company in the early 1950s.²⁶³ The Forest Service received an appraisal fee and 10 per cent commission, and Tunncliffe had to offer 15 per cent of the rimu and miro building timber for sale to the Department of Maori Affairs, at

257. Petition 265/24, 'Reports of the Native Affairs Committee', 3 November 1924, AJHR, 1924, I-3, p 42

258. JG Coates, Native Minister, to FF Hockly, 25 June 1926, ABEP W4262 7749 box 990 18/1/23, Archives New Zealand, Wellington

259. Judith Binney, 'Maungapohatu Revisited: Or, How the Government Underdeveloped a Maori Community', *Journal of the Polynesian Society*, vol 92, no 3, 1983 (doc A128), p 365; JG Laughton, *From Forest Trail to City Street: The Story of the Presbyterian Church among the Maori People* (Christchurch: Presbyterian Bookroom, 1961), p 42. In 1937, the church was able to establish a school, but much further away at Te Whaiti.

260. Clayworth, 'A History of the Tuarangaia Blocks' (doc A3), pp 114–115

261. Under-Secretary for Lands to Director of Education, 3 May 1948 (Brent Parker, comp, supporting papers to 'Tuarangaia 1B Education Endowment', various dates (doc M15(a)), p 5)

262. Acting Director of Education to Minister of Education, 17 May 1948, ABEP W4262 7749 box 990 18/1/23, Archives New Zealand, Wellington; acting Director of Education to Under-Secretary for Lands, 21 May 1948 (Parker, supporting papers to 'Tuarangaia 1B Education Endowment' (doc M15(a)), p 6; Clayworth, 'A History of the Tuarangaia Blocks' (doc A3), pp 116–117

263. Brent Parker, 'Report of Brent Parker in Relation to Tuarangaia 1B Education Endowment' (commissioned research report, Wellington: Crown Law Office, 2005) (doc M15), pp 4–5

ex-mill prices, for the 'purposes of Maori development'.²⁶⁴ When milling began, the Minister of Maori Affairs informed Takurua Tamarau of Tuhoe that 'the royalties will be paid over to the Education department for assistance to Maori schools and colleges'.²⁶⁵ This was in accordance with the certificate of title, but not the owners' recorded intentions when they transferred the block.

By mid-1954, the two contracts had generated a total of £10,200, from which an appraisal fee and commission were deducted, leaving £8,410.²⁶⁶ In the year ending 1 March 1954, the Crown spent just over £24 million on education, of which £402,191 was spent on the Maori schools system. The Tuararangaia revenue was therefore equivalent to just over 2 per cent of annual spending on Maori schools.²⁶⁷ As another point of comparison, the 1954 value of £8,410 was, according to the Reserve Bank's inflation calendar, equivalent to \$340,909 at the time of our hearings.²⁶⁸

In 1948, when the plan to log the block was being discussed between departments, the acting Director of Education advised the Under-Secretary for Lands:

The land is subject to a definite trust in favour of Maori schools but as the whole of the cost of maintaining Maori schools is now found from the Consolidated Fund through the Education Vote, it appears that any income from the land should be credited to Consolidated Fund, ordinary Revenue Account, other receipts, Departmental Receipts, Education Department General Code No.020207019.²⁶⁹

The consolidated fund was the generic account from which all education funding was paid. We are unable to find out what the Tuararangaia money was spent on, or even whether it was differentiated from other money in the fund. Education Department accounting files that may have provided more information have not been found, despite searches by the Crown in the early 1970s and for this inquiry, and by our staff.²⁷⁰ One Education Department file, which the Crown thought might shed some light on the matter but could not find, has been located in the

264. Parker, 'Tuararangaia 1B Education Endowment' (doc M15), pp 3-4; Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), pp 116-117; sawmilling licence, 17 April 1951 (Parker, supporting papers to 'Tuararangaia 1B Education Endowment' (doc M15(a)), p 12)

265. E Corbett, Minister of Maori Affairs, to Takarua Tamarau, 25 May 1951 (Parker, supporting papers to 'Tuararangaia 1B Education Endowment' (doc M15(a)), p 9)

266. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), p 117

267. New Zealand Official Yearbook, 1955, http://www3.stats.govt.nz/New_Zealand_Official_Yearbooks/1955/NZOYB_1955.html#idchapter_1_62060, accessed 3 October 2014

268. Reserve Bank inflation calculator, http://www.rbnz.govt.nz/monetary_policy/inflation_calculator, accessed 3 October 2014, based on the second quarter of 1954 and the first quarter of 2005

269. Acting Director of Education to Under-Secretary for Lands, 21 May 1948 (Parker, supporting papers to 'Tuararangaia 1B Education Endowment' (doc M15(a)), p 6)

270. Parker, 'Tuararangaia 1B Education Endowment' (doc M15), p 2; Crown counsel, closing submissions (doc N20), topic 39, pp 32-33; see note on R Lander, for regional superintendent of education, to commissioner of Crown lands, 25 August 1971 (Clayworth, supporting papers to 'A History of the Tuararangaia Blocks' (doc A3(a)), p 95).

course of research for this report. While this file provided useful information, it did not help us to identify how the proceeds of the endowment were spent.²⁷¹

We stated above that the Tuararangaia endowment land was ceded to the Crown in the expectation that a college would be founded at Ohiwa for the benefit of Tuhoe, Ngati Awa, and Te Arawa. It is clear that no such college was ever founded. Should this have been impractical, the Crown could have negotiated a change of terms, perhaps offering scholarships, boarding assistance, or a Maori college in another location. It is possible that there was within the consolidated fund a sub-fund for Maori education purposes and that this was simply not mentioned in the 1948 letter. Even if this was the case – and the mention of a ‘general code’ makes it unlikely – we do not think it plausible that there was a separate fund for Tuhoe, Ngati Awa, and Te Arawa. Nor have those iwi, or the Ohiwa area, been mentioned in any historical Crown correspondence on the matter. The specific purpose for the Tuararangaia cession was, it seems, either misunderstood or ignored by the Crown, which took it simply as a general gift towards Maori education. From the evidence before us, it appears that even this watered-down condition was not properly adhered to.

The central concern of the claimants was the Crown’s failure to meet the terms of the Tuararangaia land transfer; we consider that this claim is well founded, and that the Crown’s actions were a clear breach of the good faith required by the Treaty principle of partnership. We consider that the Crown’s duties were heightened by the fact that the rest of the block was also transferred as a gift to the Crown.

Two main prejudices arose from this breach of the Treaty. The first was that secondary education remained difficult for Te Urewera rangatahi to access. Although Whakatane District High School was opened shortly after the land was transferred, it made no particular provision for Maori pupils, and was unlikely to have significantly benefited the whanau of the Tuararangaia owners. The second was that the owners lost the use of their land for 50 years, for no return; had they retained it, they would have received the profits which instead went to the Crown.

Was the Crown’s failure to develop the land before the 1950s also a breach of Treaty principles? We have seen that the Crown did investigate possible uses for the land in the 1920s, and concluded that it was not suitable for farming. Given that the land remains under forest today, we think that this was probably a correct assessment. We were not provided with enough evidence to determine exactly why no timber milling took place until the early 1950s. In chapter 23, however, we discuss the Te Urewera timber industry in depth, and show that it expanded dramatically in the 1940s. It may be that it was simply not economical to mill Tuararangaia until timber companies had established a presence in the area. If this was the case, the Crown acted reasonably in not attempting to mill the block before the 1940s,

271. Parker, ‘Tuararangaia 1B Education Endowment’ (doc M15), p1; Crown counsel, closing submissions (doc N20), topic 39, p33. One of the files was Education Department reference E 10/13/2 (later renamed E 18/1/23). This is now ABEP W4262 7749 box 990 18/1/23, Archives New Zealand, Wellington. The other missing file which Parker identified, E 7/1/79, was not found.

and this was not in itself a breach of Treaty principles. However, once it realised in the 1920s that the block would not return any profits in the foreseeable future, it should have explained the situation to the former owners and offered the land back. Its failure to do so is a further breach of good faith. The owners' separation from the land for a further five decades was a prejudice arising from this breach.

22.5.2 Has the Crown acted consistently with Treaty principles in relation to the gift of the school playing fields at Te Whaiti and, if not, has any prejudice resulted?

22.5.2.1 Introduction

In May 1938, Rama Te Tuhi of Tuhoe wrote to the Director of Education offering land for a football field for Te Whaiti School.²⁷² The land was two acres and two roods (10,117 square metres) in area, and came from the 171-acre Te Pahou block which surrounded the school reserve on three sides.²⁷³ Te Tuhi was one of eight owners of the block; the other seven were members of her whanau.²⁷⁴ The donation was made on four conditions, which she specified:

1. The ground shall be known as Rama Te Tuhi Park
2. Neither I nor my descendants shall be liable for any expenses incurred through this gift of land
3. The right to use the School access road to my property shall be granted [to] me
4. Improvements to the donated land shall be commence[d] within twelve months from the date of transfer.²⁷⁵

Shortly afterwards, Te Tuhi also requested a cottage as recompense for the field and other donations of land which she claimed to have made.²⁷⁶ She was turned down by the Native Department, as it was against departmental policy to provide houses without payment.²⁷⁷

On 29 September 1938, the Te Pahou block was duly partitioned by the Native Land Court, with the gifted land becoming Te Pahou 1. Te Teira Wi testified that 'The matter has been fully discussed by the people who consent to it.'²⁷⁸ He also asked, on Te Tuhi's behalf, that a means of access be preserved on the eastern side of the block, and accordingly the court ordered that the 'portion of the block to the eastward of the school reserve of Te Pahou No 1 be laid off as a road line'. The court minutes recorded that, subject to the gift being accepted, the Crown would

272. Peter Clayworth, 'The Te Pahou Blocks: A Report on the Wai 725 Claim' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A19), p 38

273. Ibid, pp 32, 38–40

274. Ibid, p 38

275. Rama Te Tuhi to Director of Education, 3 May 1938 (Clayworth, 'Te Pahou Blocks' (doc A19), pp 38–39)

276. Clayworth, 'Te Pahou Blocks' (doc A19), p 41. See below for more on the contested donations.

277. Ibid

278. Rotorua Native Land Court, minute book 90, 29 September 1938, fol 188 (Clayworth, 'Te Pahou Blocks' (doc A19), p 39)

Unknown (ATL, 1/2-082146-F)



The Te Whaiti School house, circa 1928. Rama Te Tuhi of Tuhoë gifted land to the school for a football field in 1938, but the claimants contended that the Crown subsequently failed to abide by the conditions attached to her donation.

remit the cost of the court hearing and the requisite survey costs.²⁷⁹ The Crown took possession of the land in September 1939 by taking it under the Public Works Act 1928.²⁸⁰

In June 1941, the Native Land Court heard the case for compensation for the taking of Te Pahou 1. Although Rama Te Tuhi, who had died about two years earlier, had wanted to gift the land, Judge Harvey was evidently of the view – one subsequently endorsed by the chief judge in consultation with the other judges – that the court should exercise its jurisdiction as to what compensation should be paid. Since the Crown was unable to provide a valuation for Te Pahou 1, the hearing was adjourned.²⁸¹ It was not until January 1949 that the compensation case was heard again. On the basis of a special valuation made in March 1948 under section 552 of the Native Land Act 1931, the court awarded £65 compensation to the Waiariki Maori Land Board, to be held in trust for the successors to Te Pahou 1.²⁸²

279. Ibid

280. Clayworth, 'Te Pahou Blocks' (doc A19), p 41

281. Rotorua Native Land Court, minute book 92, 11 June 1941, fol 231; Clayworth, 'Te Pahou Blocks' (doc A19), pp 41–42

282. Rotorua Maori Land Court, minute book 97, 26 January 1949, fol 92; Clayworth, 'Te Pahou Blocks' (doc A19), p 42

22.5.2.2 The claims and the Crown response

Counsel for the Te Whaiti Nui a Toikairakau claimants submitted that the Crown failed to abide by the conditions set by Rama Te Tuhi when she gifted land for the Te Whaiti School playing fields.²⁸³ In their amended statement of claim, counsel further asserted that the £65 payment that the Native Land Court subsequently ordered, despite the gifting, was paid to the Waiariki Maori Land Board rather than to Rama Te Tuhi's successors.²⁸⁴

Crown counsel responded that all the conditions set by Rama Te Tuhi, other than the naming of the playing field as Rama Te Tuhi Park, were met. With respect to the £65 payment, Crown counsel have argued that there is no evidence as to whether or not the Maori land board held this in trust for Rama Te Tuhi's successors.²⁸⁵

22.5.2.3 Tribunal analysis and conclusions

As we have seen, Te Tuhi's four conditions were that the field be named after her, that she and her whanau not be liable for any expenses related to the gift, that she have access to her property via the school grounds, and that improvements to the field be carried out within a year of the donation. She subsequently requested that a cottage be built for her, but the Crown declined this request before the Native Land Court hearing. We do not therefore consider that it was a condition of the donation. As well as the conditions, we also look at the £65 compensation payment.

The Crown has conceded that it failed to name the field after Rama Te Tuhi, despite this being a condition of the donation. We were not told why this was not done, but it is possible that the naming could have been regarded as exacerbating conflict over land issues in the area. These include Te Tuhi's claims to have donated the school reserve and land for a police station; in both cases other groups also claimed to have donated the land.²⁸⁶ We consider that, if the Crown decided that it was not possible to meet Mrs Tuhi's naming condition, it should have informed her (or her whanau if the decision was made after her death) that this was the case. In the absence of any evidence as to why the Crown did not name the field after

283. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 362

284. Counsel for Te Whaiti Nui a Toikairakau, amended consolidated statement of claim, 8 October 2004 (claim 1.2.7(c), SOC DD), p 117

285. Crown counsel, closing submissions (doc N20), topic 39, p 23; Crown counsel, statement of response to stage 3 claims, 13 December 2004 (statement of response 1.3.7), pp 41–42

286. For the school site, see counsel for Ngati Whare, fourth amended statement of claim, 22 April 2004 (claim 1.2.16(a), SOC X11), p 33; John Hutton and Klaus Neumann, 'Ngati Whare and the Crown, 1880–1999' (commissioned research report, Wellington: Crown Forestry Rental Trust, 2001) (doc A28), p 243; Hiraina Hona, under cross-examination by counsel for Ngati Whare, Murumurunga Marae, Te Whaiti, 16 September 2004 (transcript 4.10, pp 103–104). For the police station, see Richard Boast, 'Ngati Whare and Te Whaiti-nui-a-Toi: A History' (commissioned research report, Wellington: Crown Forestry Rental Trust, 1999) (doc A27), p 111; Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 219.

Mrs Te Tuhi, we are unable to make a finding on whether it was a breach of Treaty principle.

As we have seen, all the costs associated with the donation were met by the Crown, and the Native Land Court set aside an access road through the donated land. The road seems to have been formed in 1939.²⁸⁷ The field itself does not seem to have been formed until mid-1941.²⁸⁸ While this was in breach of Te Tuhi's conditions, we consider that the delay was probably related to the outbreak of the Second World War and does not indicate bad faith or neglect on the part of the Crown, and was not in breach of the Treaty.

As for the payment of the £65, we believe it was appropriate for the money to have been held in trust, since it was not until 1956 that Rama Te Tuhi's successors were determined.²⁸⁹ Subsections (1) and (2) of section 552 of the Native Land Act 1931 provided that the moneys held were then to be paid out, at the board's discretion, either to the beneficiary or to whomsoever the beneficiary directed the money to be paid. We have not been able to determine whether the compensation money was paid out.²⁹⁰ In the absence of any further evidence on this issue, we are unable to make a finding.

22.5.3 Should Te Urewera schools have received the profits from trees planted by their pupils?

From the 1930s until the 1980s, forestry was the dominant industry in Te Urewera, and a high percentage of Maori there were timber workers, particularly in the west of our inquiry district. As we will see in our socio-economic impacts chapter, the New Zealand Forest Service had a close and paternalistic relationship with local Maori communities, acting as employer, landlord, community organiser, and, at times, teacher. One aspect of this relationship was a project in which pupils from the Minginui, Te Whaiti, and Huiarau (Ruatahuna) primary schools planted pine seedlings for the Forest Service. According to the Ngati Whare claimants, the eventual profits from the trees were supposed to go to the schools, but shortly after the last trees were planted, the Forest Service was corporatised. According to William Eketone, who worked for the Forest Service in the early 1980s and taught the pupils how to plant the trees, 'the whole project was forgotten by the Government and the companies that took over the forests.'²⁹¹

The Forest Service instituted school planting projects in a number of State forests from the 1960s.²⁹² The Whirinaki Forest project seems to have begun in the late 1970s, when former Huiarau pupils remember planting and pruning stands of exotic forest at Minginui under Forest Service supervision, although the official

287. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 468

288. The work was carried out rather reluctantly by the Forest Service, after the Minister of Education became involved: Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 468.

289. Clayworth, 'Te Pahou Blocks' (doc A19), p 42

290. Ibid; Crown counsel, closing submissions (doc N20), topic 39, p 23

291. William Eketone, brief of evidence, September 2004 (doc G29), pp 3-4

292. Crown counsel, closing submissions (doc N20), topic 38, p 15



John Hutton

A sign for the Combined Schools Forestry Project. The project, which it seems ran from the late 1970s to the 1980s (though the official starting point was 1981), involved pupils from Minginui, Te Whaiti, and Huiarau primary schools planting pine seedlings for the Forestry Service.

starting point seems to have been 1981.²⁹³ Crown counsel agreed that the project did take place, but stated:

The files disclose that it was not Forestry [*sic*] Service's general policy at the time of the planting project in Urewera to pay a share of profits to the schools. However what the general policy does show is that in some cases *ex gratia* payments could be made. (This was the exception rather than the rule.)²⁹⁴

Unfortunately, counsel did not provide us with the documents they refer to. In general, any agreement over the trees in question was probably an informal one, and it is entirely possible that no written contract ever existed. However there does seem to have been widespread awareness and acceptance of the arrangement as Mr Eketone describes it. He provided us with affidavits and letters from other former Forest Service and school staff, as well as some of the pupils involved in the planting. All support the assertion that profit from the trees was to go at least partly to the schools.²⁹⁵ During our hearings, Crown counsel conceded that there was strong evidence that the schools were to get the profits from the trees.²⁹⁶

293. See affidavits in support: William Eketone, comp, supporting papers to brief of evidence, various dates (doc G29(a)), p 2; Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 777.

294. Crown counsel, closing submissions (doc N20), topic 38, p 15

295. Eketone, supporting papers to brief of evidence (doc G29(a))

296. Crown counsel, under questioning by presiding officer, Murumurunga Marae, Te Whaiti, 16 September 2004 (transcript 4.10, p 94)

The school planting projects ended when the Forest Service was corporatised in the mid- to late 1980s, in a process which we detail in chapter 23. At Whirinaki, the indigenous forest became part of the Department of Conservation's estate, while the exotic forest areas were transferred to the new Forestry Corporation.²⁹⁷ The harvesting rights to the exotic forests were sold to Fletcher Challenge in 1996, with the underlying land retained by the Crown for possible use in future Treaty settlements.²⁹⁸ There was nothing in the Crown Forest Licence indicating that the schools had any right to profits from any of the trees, and Fletcher Challenge later told Mr Eketone that they had not been told about the schools partnership.²⁹⁹ In 2008, the land covered by the planting project was returned to Ngati Whare as part of the Crown's forestry settlement with central North Island iwi, and is now vested in the trustees of Te Runanga o Ngati Whare.³⁰⁰

In April 2014, we sought an update from the respective counsel as to whether a successful resolution had been reached.³⁰¹ Counsel for claimants and for the Crown both agreed that it would be appropriate for the Crown to deal with the matter separately from the historical Treaty claims, and noted that in 2005 the Crown offered to make a one-off payment, to be split between the three schools.³⁰² As counsel for Ngati Whare have explained, this offer was not responded to at the time because of uncertainty as to what role other counsel should play in representing Ruatahuna school, it being outside Ngati Whare's rohe. As of December 2014, no deal had been reached, but counsel for Ngati Whare, who were awaiting instructions from the three school boards concerned, were hopeful of substantive progress towards a resolution in the coming months.³⁰³

We find that there was an agreement that the schools would receive at least some of the money from the trees planted by the pupils. The Crown's failure to keep proper records of this agreement, and then its failure to even inform Fletcher Challenge of its existence, let alone ensure that Fletcher Challenge gave effect to it, are breaches of the good faith required by the Treaty principle of partnership. We are unable to make a finding on the adequacy of the Crown's 2005 offer, as we do not know how much the eventual profits from the trees were, or how the Crown's 2005 offer compared to it; nor do we know the exact terms of the original agreement.

297. Boast, 'Ngati Whare and Te Whaiti-nui-a-Toi' (doc A27), p 239; Crown counsel, closing submissions (doc N20), topic 38, p 13; Douglas Rewi, brief of evidence (doc G37), pp 15–16

298. Crown counsel, closing submissions (doc N20), topic 38, p 13

299. Ibid, p 15; Eketone, brief of evidence (doc G29), pp 2, 4–5

300. Rewi, brief of evidence (doc G37), pp 15–16; Central North Island Forests Land Collective Settlement Act 2008, s6, and sch 1; Crown counsel, memorandum updating the Tribunal in respect of question 38(h), 16 May 2014 (paper 2.922), pp 2–3; Ngati Whare Claims Settlement Act 2012, ss 80, 101(2), sch 3

301. Presiding officer, memorandum requesting update in respect of question 38(h), 10 April 2014 (paper 2.921), pp 2–3

302. Crown counsel, memorandum updating the Tribunal (paper 2.922), p 2

303. Counsel for Ngati Whare, memorandum concerning Minginui-Ruatahuna-Te Whaiti School planting project, 4 July 2014 (paper 2.923), pp 2–3

