WAITANGI TRIBUNAL

WAI 167

CONCERNING the Treaty of Waitangi Act 1975

AND a claim in respect of the Whanganui River

TO the Minister of Maori Affairs

AND TO the Minister for the Environment, and the Minister of Justice

INTERIM REPORT AND RECOMMENDATION

Rarely has a Maori river claim been so persistently maintained as that of the Whanganui people. Uniquely in the annals of Maori settlement, the country's longest navigable river is home to just one iwi, the Atihau-a-Paparangi. It has been described as the aortic artery, the central bloodline of that one heart.

The Atihau-a-Paparangi claim to the authority of the river has continued unabated from when it was first put into question. The tribal concern is evidenced by numerous petitions to Parliament from 1887. In addition, legal proceedings were commenced as early as 1938, in the Maori Land Court, on an application for the investigation of the title to the river bed. From there the action passed to the Maori Appellate Court in 1944, the Maori Land Court again in 1945, the Supreme Court in 1949, to a further petition and the appointment of a Royal Commission in 1950, to a reference to the Court of Appeal in 1953, to a reference to the Maori Appellate Court in 1958 and to a decision of the Court of Appeal in 1962. This may represent one of the longest set of legal proceedings in Maori claims history, yet in all those proceedings, it is claimed, the principles of the Treaty of Waitangi had no direct bearing. Nor did the matter rest there for the court hearings were followed by further petitions and investigations, and in more recent times, Atihau-a-Paparangi were again involved in the Catchment Board inquiry on minimum river flows in 1988 and in the Planning Tribunal and High Court hearings on the same matter in 1989, 1990 and 1992.

The Claim

The long outstanding grievance is now before the Waitangi Tribunal on a claim that in essence, is in four parts:

1. that Atihau-a-Paparangi has the customary authority, possession and title to the lands, waters, fisheries and associated taonga, of the Whanganui river;

2. that this was guaranteed to them by the Treaty of Waitangi and has not been willingly relinquished;

3. that the claimed authority, possession and title has been eroded or displaced by Crown laws, policies and practices inimical to the Treaty; and

4. that they continue to be eroded or displaced by current Crown laws, policies and practices.

Underlying these are more specific claims alleging the expropriation of the river bed, the wrongful acquisition of riparian lands, the wrongful imposition of water-use laws, the relegation of customary laws, the divesting and fragmentation of use, ownership, control and management, the destruction of eel weirs, the denial of access to and of fishing rights for the river and adjacent ocean, environmental degradation, uncompensated gravel extraction and water abstraction, the construction of works, the deferral of a past Commission recommendations to compensate gravel losses and, more recently, the unilateral suspension of Crown-Atihau-a-Paparangi negotiations. For now a stay is sought on the formulation or implementation of new controls.

The claim is brought by the late Hikaia Amohia and by nine persons who are, or were at the time, members of the Whanganui River Maori Trust Board ('the Board'). The Board was established by the Whanganui River Trust Board Act 1988 for the members of Atihau-a-Paparangi according to their three hapu, Tama Upoko, Hinengakau and Tupoho. The Board is constituted as a Maori Trust Board under the Maori Trust Boards Act 1955, and in that capacity has particular functions in promoting the health, housing, education, employment and welfare of its Atihau-a-Paparangi beneficiaries (s24). Such Boards may also participate in Government schemes for Maori social and economic development (s24D), and as some indication of an intention that they should act generally in the interests of their people, the Boards may acquire and farm lands (s26), administer private trusts including Maori land management trusts (s24C), act as the Committee of Management for a Maori Incorporation (s24E) and provide administrative services for local Maori trusts and bodies (s24F).

The claim assumes the Trust Board shall also "exercise responsibility, as rangatira and kaitiaki for the protection of the Whanganui River" (claim paragraph 1.5) but that function is not in fact legislatively prescribed. The Board has an interest in the river however, at least prospectively, for a further provision, that gives some recognition to the validity of the claim, provides that the Board has a particular function to

> "... negotiate with the Government, or any other body or authority concerned, for the settlement of all outstanding claims relating to the customary rights and usages of Te Iwi o Whanganui, or any particular hapu, whanau or group, in respect of the Whanganui River, including the bed of the river, its minerals, its water and its fish" (s6 Whanganui River Trust Board Act 1988)

The Board maintains a roll of its beneficiaries, or hapu members, and reports annually to a beneficiary's hui which in turn elects the Board. Accordingly the Board appears to qualify as a prospective "iwi authority" for the purposes of consultation under the Resource Management Act 1991.

The Claim for a Stay on Certain Proceedings

Pending a full inquiry the claimants are concerned with the fourth aspect of the claim which bears immediacy. New laws and policies

affecting the claimed Maori interest in the river have been made or are intended, each being sourced to or depending for validity upon some Act, regulation or Crown policy. Also, we are informed, each has been initiated without any or any adequate discussion with the iwi, or with the Board which may be seen as the iwi representative (though we note in this respect that the claimant's request for a stay on certain proceedings, was filed by the claimants without notice to persons particularly affected, the Royal Forest and Bird Protection Society and the Manawatu-Wanganui Regional Council, in this instance). In addition, it is contended, each initiative has proceeded or is proceeding without prior settlement of the Atihau-a-Paparangi claim to a proprietal interest.

More particularly the claimants refer to the following:

- the discussion document of the Manawatu-Wanganui Regional Council of March 1993 which precedes the preparation of a 'Regional Plan for the Beds of Lakes and Rivers' in the district, and which is ancillary to the Regional Policy Statement required under the Resource Management Act 1991. The regional plan will provide the guidelines and rules for lake and river usage. The discussion document called for submissions and envisaged consultations;

- the application of 25 June 1993 of the Royal Forest and Bird Protection Society of New Zealand Incorporated ('the Society'), to the Minister for the Environment, for a Water Conservation Order for the Whanganui river to restrict the development and use of the river for the purposes of safe-guarding the important characteristics that the Society attributes to it. Part IX of the Resource Management Act 1991 enables any person to apply to the Minister to set in train a process for such an order to be made. The order, if made, would restrict the powers of the Manawatu-Wanganui Regional Council to approve certain river uses. The order would preserve however, (amongst other things), the minimum flows fixed by the Planning Tribunal in 1990, and thus the existing rights of abstraction held by Electricorp for the purposes of the Tongariro Power Development Scheme;

- the actual and prospective amendment and extension of rules governing the use of the river's surface waters under the Water Recreation Regulations 1979 and the Whanganui River Control By-Laws 1991. These are administered respectively by the Department of Conservation and the Whanganui, Ruapehu and Stratford District Councils. There are current proposals to substitute certain regulations with a "voluntary code" to be settled in consultation with river users;

- the implementation of a Facility User Pass System by the Department of Conservation, a fee on visitors using the Whanganui National Park facilities; and

- the prospective granting of new resource consents under the Resource Management Act 1991, or the renewal or amendment of those currently operative.

The claimants contend they are prejudiced by each of these developments. Claimant counsel has proffered various grounds that,

we see as resolving themselves to these:

- that each new assertion of statutory authority impinges upon the authority that the iwi claim to possess;

- that each new assertion of statutory authority reinforces in the public mind the assumption that the authority of the river is vested in the Crown, without fetter, or in the Crown's chosen delegatees; or conversely, it reinforces the view that the iwi have no authority or proprietal interest in the river, or that their interest is less than that which the claimants contend for;

- that each formulation of a legal right or sanction, especially those in the wake of lengthy public discussions or hearings, entrenches the underlying assumption about the right to formulate them, and makes future change more difficult in the event that the claimants' claim is upheld;

- that the application for a Water Conservation Order, if allowed to proceed to an inquiry, would or could:

  - reduce the claimants to the status of supplicants before the Special Tribunal to be constituted, or before the Planning Tribunal that may follow;

  - involve them in litigation costs in addition to the costs borne from the 1990's Planning Tribunal proceedings;

  - means that the Special Tribunal, and if necessary the Planning Tribunal, in considering Maori factors, would lack the benefit of a specialist inquiry into those factors;

  - result in a restrictive order that would be contrary to the claimants' claimed right of management;

  - and further, a report from this Tribunal, if favourable and if accepted by the Government, would lead to the revocation or amendment of the proposed hearing process with regard to the Whanganui river;

- that likewise, the process for settling the Regional Plan relegates the claimant's to supplicants and is inconsistent with the priority of interest and the status that the claimants contend for;

- that the claimants are denied collaboration in local and central Government processes except as a minority group of private individuals without special status;

- that the proposed 'voluntary code' for river users, places 'ownership' of the code in those of the general public who sanction or formulate the code, creating an informal law and set of understandings amongst the public that is not readily displaceable;

- that as the National Park structural facilities are mainly accessed via the river, the Facility User Pass System assumes

the character of a fee for river access, the payment to the Crown appearing to the Crown as the current river owner; and

- that resource consents may be granted and become entrenched before the claimants' status is determined.

Conversely it appears, on the basis of those opinions, that were this Tribunal to report favourably upon the Atihau-a-Paparangi claim to an authority over the river and to a proprietal interest, certain consequences would flow in this order of ascension:

- a greater awareness of and information on the extent of the Maori interest and on the application of the Treaty;
- an enlarged status for iwi representatives in making submissions or in treating with authorities;
- a greater weighting to iwi submissions and opinions; and
- the amendment of legislation to locate the proper authority of the iwi in any decision-making processes required.

Each contention assumes that a Maori right of control and ownership existed and was guaranteed by the Treaty, and that the Crown's legislation and policy, more particularly the Resource Management Act and other legislation assuming a right of Crown control or a right to vest that control in others, is inconsistent with the Treaty. It follows, in claimant Counsel's argument, that the hearing of the Maori claim should take precedence and proceedings under the legislation that is challenged, should be suspended.

The claimants referred finally to the Crown's deferral of current negotiations with the Board pending the Crown's determination of a generic policy to govern Maori claims to rivers and other natural resources. They complain:

- the claimants have no input to the settlement of that policy and must present their claim to this Tribunal in order to put to the test the policy they consider appropriate to the circumstances; and
- negotiations are deferred while resource consents may still be applied for and new control policies are arranged.

We understand the claimants to hope, however, that negotiations might be resumed, a course which this Tribunal also urges.

Accordingly the claimants sought recommendations:

- that the Minister for the Environment makes no decision under section 202(1)(a) (on the application for a Water Conservation Order) until the Waitangi Tribunal has reported on the Whanganui River and that report has been considered by the Crown [memo 2.5 para 3.1, submissions A7 para 11.2];
- that the Crown impose a moratorium to the effect that the Regional Council does not proceed further to notify the Regional Plan insofar as it related to the Whanganui River or that no action is taken on the Regional Plan until the Waitangi Tribunal reports on the claim of Atihau-a-Paparangi

to the Whanganui River [memo 2.5 para 3.1, submission A15]; and

- that no other action be taken in respect of the river [memorandum 2.5 para 3.1].

The claimants then asked that this Tribunal inquire into and report upon the claim as a matter of priority. Based upon advice that all necessary research would be completed by February, the Tribunal would be in a position to open hearings in February, and, subject to the time required for the Crown to respond, the Tribunal would expect to report in June.

Crown counsel opposed both the making of recommendations and an early hearing, the latter on the grounds that urgency was unnecessary and would create a precedent that would affect other Maori claims to rivers. Counsel for the Society on the other hand, supported the claimants' request for an urgent Waitangi Tribunal hearing and a recommendation the Water Conservation Order application be deferred in the interim.

The Application for a Water Conservation Order

Crown Counsel contended, though there is no current judicial authority on the matter, that under section 202 of the Resource Management Act 1991, the Minister for the Environment is constrained in determining whether or not to refer the Water Conservation Order application to a special tribunal. A purpose of such an order is to protect a river's outstanding amenity or intrinsic values and, in her submission, the Minister could reject the application only if the inquiries the Minister is bound to undertake, led to the view that the river did not have those values (A12: para 7). The Minister must make those inquiries "as promptly as is reasonable in the circumstances" (section 21), and having made them is bound to act "as soon as practicable" (section 202). She questioned moreover whether a report from this Tribunal could assist the Minister's deliberations, presumably because of the constraints described and the fact that all relevant considerations would be addressed by any Special Tribunal convened (A12:paras 6, 7). This Tribunal's eventual report might also not assist the Special Tribunal, she argued, unless it was linked to the matters the Special Tribunal is bound to consider (A12:para 9). It was added that the claimants were not prejudiced to the extent that they could advance their views in submissions to the Special Tribunal and the Special Tribunal was bound to take into consideration, Maori cultural and treaty factors (A12: paras 15, 17 and see the Act, sections 6(e), 7 and 8). (The claimants argued that Maori values and the treaty can be overridden, however, by a Water Conservation Order, if those values and the treaty are inconsistent with the order's purpose (A7:7.4) and they referred to the Tribunal's Ngawha report (1993, 146-7) which doubts the efficacy of the provisions for Maori interests and the treaty to be considered).

In any event, Crown counsel argued, the ultimate decision after hearings and reports, remained with the Minister (A12 para 11 and Act section 215). This latter point was relevant also to whether the claim needed to be given an urgent or early hearing. On that it was added that proceedings for Water Conservation Orders are invariably protracted (A12: para 17). Pertinent to the constraints

upon the Minister's role, and the jurisdiction of the Special Tribunal, was the Crown's further observation that questions of river ownership are not relevant to Water Conservation Orders under the Resource Management Act (A2: para 12) - and that last point, as we see it, goes to the nub of the problem.

In support of the claimants' requests, counsel for the society argued that the Minister's discretion under section 202 is wider than Crown counsel had contended. While the Minister cannot bring into account extraneous matters outside the parameters of the Resource Management Act, the further information the Minister could require included the matters in section 199, which embraces Maori cultural concerns by virtue of the definition of 'amenity values' in section 2 and as is provided for in section 199(1)(c). These are matters on which the Tribunal, presumably, would report. The Minister may be bound to act "as soon as practicable" on completing inquiries (s202) and to undertake inquiries "as promptly as is reasonable is the circumstances" (s21) but it is reasonable to await the report of this Tribunal, and not practicable to act until the Tribunal has done so.

We accept claimant counsel's argument that the Maori complaint arises not from the actions of the society but from the framework and assumptions of the Resource Management legislation which allows those actions to be taken. As we see it, this Act is an Act of the Crown that allows resource rights to be determined before outstanding Maori claims to the resource have been investigated and settled. Though there was little argument on the principles of the Treaty, yet it appears clear to us that the Treaty intended protection for the Maori use and 'rangatiratanga' of those resources not willingly alienated, and guaranteed a right of undisturbed possession. The determination of use and control rights pursuant to the Act, in our view, is inconsistent with those provisions and the principles flowing from them without prior inquiry as to whether the claimed Maori control and use rights existed and still enure, or would enure save for some act of extinguishment that itself was contrary to the Treaty.

We find further that the claimants are prejudiced as a result in being put to a form of proceedings the propriety of which is a central issue in contention.

The earlier Crown proposal, as apparent in the Whanganui River Maori Trust Board Act of 1988, that the matter be settled by negotiation, was a proper policy; but negotiations having been suspended and with events inimical to the claimants proceeding, we consider it necessary that the claim should now come to a full and early hearing, and that such steps as may be practicable to stay events in the meantime, should be taken.

Short of some statutory amendment, section 202 offers the only scope for delaying matters. The question is whether the Minister should be called upon to do so pursuant to that section. We doubt that the Minister's role under section 202 is as constrained as Crown counsel see it and accept the alternative proposition of Counsel for the Society. Should the Tribunal find that as a matter of culture and tikanga that Atihau-a-Paparangi hold rangatiratanga and kaitiakitanga over the river, that would constitute material information for the Minister, in our view, in considering the

Society's application.

This is not a situation where this Tribunal should defer its own inquiry, in terms of section 7 of the Treaty of Waitangi Act 1975, upon the grounds that relief might be had from other proceedings. Accordingly:

> **It is recommended that the Minister for the Environment take no steps to appoint a Special Tribunal to hear and report on the application of the Royal Forest and Bird Protection Society for a Water Conservation Order in respect of the Whanganui River, until the Waitangi Tribunal has reported upon the claim of Hikaia Amohia and others concerning that river.**

The Regional Plan and Other Matters

For the same reasons the claimants are prejudiced by the proceedings set in train for the establishment of the regional plan, but there was not put to us any base on which the Crown can intervene to defer that matter, except by effecting some statutory amendment. We do not think it appropriate or practicable to recommend a statutory intervention without a prior full inquiry and a finding that the substantive claim is well-founded. In the Arawa geothermal claim a recommendation for a moratorium on regional plans relevant to geothermal resources, followed only after a substantive inquiry had been held (Preliminary Report, Arawa Geothermal Claims 1993:35). The same applies to the statutory amendment to the Resource Management Act that was recommended in the Tribunal's Ngawha Geothermal Report. There again the recommendation followed an extensive hearing and findings of fact and interpretation (1993: para 7.7.12). For those reasons, no recommendations are made in respect of the regional plan as the claimants' requested. That being our opinion, and the Regional Council having had no notice of this proposal, it was not necessary to adjourn this matter for the Council to be notified, as would otherwise have been necessary.

The further recommendation sought, "that no other action be taken in respect of the river" is too general, we consider, to enable a proper consideration to be given to the action required or the possible implications of that action. No specific interim recommendations were asked for in respect of the proposed river use laws, the 'voluntary code', the Facility User Pass system or the prospective granting of new resource consents.

Substantive Hearing

The Tribunal has advice from the Waikato river claimants, whose claim was filed earlier, that they have no objection to the granting of any priority for the Whanganui River claim. Accordingly:

> **The Tribunal Registrar has been instructed to arrange a conference of Crown and claimant counsel, for as soon as practicable, to settle matters of research and hearing arrangements, with a view to a hearing of this matter in February 1994 and a report by the following June.**

The Registrar has also been directed to ensure that the Society and Manawatu-Wanganui Regional Council are given notice of any hearings

and afforded the opportunity to make submissions if they wish.

Copies of this report will be sent to counsel appearing:

- M Dawson, K Ertel for claimants
- E France and Miss Owen for Crown
- J R Jackson for Royal Forest and Bird Protection Society

and to:

- Manawatu-Wanganui Regional Council

DATED at Wellington this 19th day of November 1993

ETJ Durie

G S Orr

K W Walker

THE SEAL OF THE WAITANGI TRIBUNAL