SOME ASPECTS OF CROWN INVOLVEMENT WITH WATERWAYS IN THE WHANGANUI INQUIRY DISTRICT

SUMMARY

of

An overview report commissioned by Crown Forestry Rental Trust

David Alexander

September 2008

1. My name is DAVID JAMES ALEXANDER. My qualifications and experience are set out in my report, of which this is a summary.

2. My report was commissioned by the Crown Forestry Rental Trust, in response to a Direction by the Waitangi Tribunal approving the preparation and presentation of additional evidence relating to waterways. I was asked to address four waterways-related topics:

Groundwater

- Investigate issues surrounding ownership of groundwater or artesian water supplies.
- Examine any central or local government legal/policy frameworks or licensing regimes for this resource.
- Carry out a review of past and current legislative and planning regimes, and consider any Whanganui Maori responses to these regimes documented in official records.

Environmental Effects of the Tongariro Power Development Scheme

- Consider documentary evidence pertaining to any downriver environmental effects of the Tongariro Power Development (TPD) scheme (in particular the Eastern Diversion) on the Whanganui River and other waterways in the Whanganui Inquiry District.
- Examine any impacts of the scheme on river levels, flora and fauna, customary fisheries, customary river usage and adjacent lands (including wahi tapu) in the Whanganui Inquiry District.
- Examine whether compensation was paid for the diversion of water for this scheme in the Whanganui district, and whether this was appropriate.

Draining of Waterways

- Investigate circumstances surrounding the draining of certain lakes and swamps in Whanganui Inquiry District, utilising case studies, such as the draining of Lake Ngarongokahui for railways purposes.

- What consultation, if any, was carried out with tangata whenua? Was compensation paid? What, if any, environmental effects resulted from this action?

Roadworks and Geological Extractions

- Take account of whether local government and non-governmental interventions, such as road-works or gravel, scoria or pumice extraction, impacted upon certain waterways in the Whanganui Inquiry District, for example Lake Te Ahu o te Rangi, or the Otoko and Pahihi Streams.

3. In this summary, I look at each of these topics in turn, before concluding with some general remarks about the Crown's behaviour towards Maori and Maori customary authority, insofar as it has applied with respect to waterways, and insofar as the Crown's approach can be discerned from the research undertaken during this project.

Groundwater

4. For the first 113 years after the signing of the Treaty of Waitangi in 1840, the ability for anyone to abstract from or discharge to groundwater was unconstrained, subject only to obtaining land surface rights of access to the location at which the groundwater was being tapped. Rights to the water beneath the ground ran with the rights to the surface of the land. This arrangement for "open access" to the resource was allowed by the common law derived from the English experience. It meant, however, that there was no limit to how much water was abstracted, and abstractors or polluters of groundwater could act without any regard for the effect of their actions on neighbours. The only remedy available to affected neighbours was to become abstractors themselves. Any Maori authority over groundwater was lost if the title to the land passed out of Maori ownership.

5. By the late 1940s large-scale abstractions of groundwater by industrial and municipal users were having consequences for smaller-scale farmers and homeowners relying on the same aquifers. The problems were arising only in certain parts of the country, such as the Heretaunga Plains, the Hutt Valley and the Taieri Plains, and the

Crown's response was directed at regulating those local situations. The Underground Water Act 1953 allowed for a local Underground Water Area to be proclaimed, for the territorial local authority to be appointed as an Underground Water Authority, and for the Authority to develop bylaws aimed at licensing by permit all abstractions from and discharges to groundwater within the Area. None of the Areas proclaimed during the next 14 years were in the Whanganui Inquiry District, where the common law continued to prevail.

6. The statutory provisions for groundwater differed from the statutory provisions for geothermal steam, even though geothermal water can be thought of as a superheated form of groundwater. The Geothermal Steam Act 1952 and the Geothermal Energy Act 1953, passed at the same time as the Underground Water Act 1953, vested the geothermal resources of New Zealand in the Crown, and thereby gave the Crown monopoly powers over their use and management. Whether previous Tribunal reports on geothermal resources are relevant to the status of groundwater resources can most appropriately be addressed in legal submissions.

7. The common law applying to groundwater was overturned with the passing of the Water and Soil Conservation Act 1967. By this Act, the sole right to the use and management of all natural water, including groundwater, was vested in the Crown. The Crown's statutory authority was effectively delegated to Regional Water Boards, whose task it was to issue fixed-term water rights allowing takings or discharges to the natural water beneath the surface of the land. Takings or discharges for household, stock-water and fire-fighting use were exempted from the requirement to obtain water rights. This meant that a Regional Water Board was unaware of the total extent to which an aquifer was relied upon and drawn from, making management of that aquifer difficult. However, this does not seem to have been seen as a problem within the Whanganui Inquiry District, because no aquifer was being relied upon to its limits. The most concentrated use of groundwater was in Wanganui city and its environs, though this was not so severe as to prompt the Rangitikei-Wanganui Regional Water Board to call upon its statutory powers under the 1967 Act to draw up bylaws for the regulation of the use of the resource.

8. Examination of the files of the Ministry of Works (responsible for the development of the 1953 and 1967 Acts) did not disclose any consideration given during the lead up to the legislation for the relationship of the new Acts to the Treaty of Waitangi and Maori customary rights to groundwater. Neither Act explicitly imposed any Treaty-related or tangata whenua-related obligations or limitations on the Crown or local administrators of the legislation. An implicit obligation in the 1967 Act was only recognised in 1987 with a decision of the High Court in the *Huakina Development Trust v Waikato Valley Authority* case. There was little opportunity for case law to develop after this decision before the Resource Management Act 1991 (RMA) was passed.

9. The RMA, relying on a continuation of the vesting power contained in the 1967 Act, provided for groundwater to be used whenever water permits or discharge permits were issued. In issuing permits, and in drawing up management plans for use of groundwater resources, a regional council, such as the Manawatu-Wanganui Regional Council in the case of most of the Whanganui Inquiry District, is obliged to have regard for the exercise of kaitiakitanga responsibilities by tangata whenua, and to take into account the principles of the Treaty of Waitangi. These obligations have been criticised in the reports of previous Waitangi Tribunals as not properly and fully reflecting the guarantees promised to Maori when the Treaty was signed. However, the Crown has chosen not to amend the nature of the obligations. The stand-off between Maori and the Crown has hindered the development of close working relationships between Maori and regional councils. Another difficulty lies in the nature of the permits that are issued, being viewed by the courts as a form of property right that grant permit holders some prior rights over later applicants for permits. Such a view places Maori, who generally are not permit holders, at an inherent disadvantage both as customary guardians of the groundwater resource, and as potential future permit-holders.

Environmental Effects of the Tongariro Power Development (TPD)

10. During the 1950s the TPD was conceived as a method for the capture of additional water in the central North Island, and its eventual utilisation by the hydro-electric power stations of the Waikato River. The additional water came from the upper Whanganui, upper Whangaehu and upper Rangitikei River catchments. The

first two of these are partly in the Whanganui Inquiry District, with other parts in the National Park Inquiry District. The waterways downstream of the intakes in these two catchments, which have been exposed to the environmental effects of the TPD, are almost wholly within the Whanganui Inquiry District.

11. The legal authority for the taking and diversion of the water from the Whanganui and Whangaehu Rivers and tributaries was an Order in Council issued under the Public Works Act in 1958. This Order preceded a decision in principle to undertake the TPD, made by the Crown in March 1964, and a final decision to proceed with construction, made in October 1964. While the Crown initiated discussions with Ngati Tuwharetoa, in connection with the use of Lake Rotoaira as a storage lake, and with the use of Turangi land for the construction township, it did not make any approach at any time to the iwi or hapu who are tangata whenua for the downstream waterways in the Whanganui and Whangaehu catchments. Although there was opposition expressed during 1964 by the local community (led by European residents) in the Taumarunui and Waimarino districts, and this opposition was probably shared by local Maori, the Crown's view was that the need to provide additional national electricity generation capacity took precedence over local concerns.

12. When making its decisions in 1964, the Crown was aware that the loss of water in the rivers downstream of the abstraction points would have environmental consequences for the waterways. It saw these consequences as a change (not necessarily negative) to the introduced trout fishery, restrictions on the ease with which boats could navigate the Whanganui River, reduced water quality, reduced dilution capacity for the absorption of effluent, and probable loss of power generation capacity at Taumarunui Borough Council's Piriaka hydro-electric power scheme. None of these potential environmental impacts deflected the Crown from its decision to approve the TPD. The Crown did not foresee any adverse environmental impacts for the Whangaehu River, because that river's quality was regarded as being already compromised environmentally by the inputs of highly acidic water from the Crater Lake and upper slopes of Mount Ruapehu. In addition the series of minor tributaries from which the water would be taken were in a Crown-owned exotic forest and had little substantive record of having been fished. Water is not abstracted from the Whangaehu River itself.

13. When construction was completed, and the diversions of water commenced, in the early 1970s, the effects on the downstream waterways were readily apparent, and were the cause for a further round of locally-based opposition. The Whakapapa River, which had barely been mentioned in Crown reports in 1964 about the likely environmental effects of the TPD, was revealed as being the most critically affected by the loss of downstream water. In response to the outcry from that river's trout fishers, the Crown promised to allow a minimum flow of about ½ cumec (cubic metres per second) to continue past the intake and down the river. It made no other concessions to local concerns in the manner in which the TPD was operated, although a new boat-launching ramp was provided some 12 kilometres downstream of Taumarunui, because the river at Taumarunui had become too shallow for most jet boats. The 1958 legal authority had not imposed any conditions on the Crown's abstraction rights, so these concessions were voluntarily made by the Crown, and were designed to minimise any consequences for the hydro-electric generation potential of the TPD and the Waikato River power stations.

14. Diversion of some 84% of the water out of the affected upper tributaries of the Whanganui River had an impact downstream in those tributaries, and in the main stem of the river. Mean low flows were reduced by 45% upstream of Taumarunui at Piriaka, by 22% downstream of Taumarunui at Te Maire, and by 8% at Paetawa (approximately 25 km upstream of the rivermouth).

15. In 1977 the New Zealand Canoeing Association asked for a minimum flow to be determined for the Whanganui River downstream of the TPD. Local interests saw this as an opportunity to claw back some of the environmental damage caused by the Scheme. The Crown (New Zealand Electricity Department), on the other hand, argued that any reduction in allowable draw-off of water would result in a loss of power generation, and therefore would have a financial cost. A full inquiry was undertaken by a tribunal of the Rangitikei-Wanganui Regional Water Board. The tribunal's decision, adopted by the Water Board and the National Water and Soil Conservation Authority, was to establish minimum flows in the main stem of the Whanganui River at a recording station at Te Maire, just downstream of Taumarunui.

A minimum flow of 22 cumecs during the summer months, and 16 cumecs during the rest of the year, was implemented from 1983 onwards.

16. The minimum flow regime was for a five-year term, and was reviewed in 1988. Local interests were still concerned about damage to the environment, and were supported by one Crown agency, the Department of Conservation. Another Crown entity, the State-owned enterprise Electricity Corporation of New Zealand, sought no further restrictions on abstraction than had been required by the earlier minimum flow decision. The Regional Water Board's hearing tribunal abandoned the setting of a minimum flow on the main stem of the river, and instead set minimum flows on the upper tributaries, which it felt would ensure sufficient water in the main stem below Taumarunui for boat navigation. The residual flow that was required to be spilled over the TPD intake on the Whakapapa River and retained in the river was increased to 8.5 cumecs during the summer months, while no abstraction was allowed at the intake on the upper Whanganui River itself. These recommendations were appealed to the Planning Tribunal, which cancelled the hearing tribunal's conclusions and substituted its own decision. The Planning Tribunal's decision set minimum flows for both the Whakapapa River and the Whanganui River at Te Maire, while allowing abstraction without restriction at the upper Whanganui intake. The minimum flow on the Whakapapa River was set at 3 cumecs, and at Te Maire was raised to 29 cumecs over summer. In raising the minimum flow at Te Maire, the Planning Tribunal accepted that there had been damaging consequences on the main stem below Taumarunui for navigation by boats (due to lack of depth of water), and effects on sedimentation. The Tribunal's decision became operative in 1992-1993. Since then mean low flows have been reduced from pre-TPD rates by 40% at Piriaka and 20% at Te Maire.

17. In 2001 the unconditional taking of water allowed by the 1958 Order in Council expired, and the TPD operator (the State-owned enterprise Genesis Power Ltd) was obliged to obtain a series of water permits under the RMA for continued takings and discharges of water in connection with the Scheme. The necessary resource consents for takings of water at each intake in the Whanganui and Whangaehu catchments, and for cleaning and removing shingle and sediment from each intake, were granted for a period of 35 years, within an overall water management regime that retained the same

minimum flow rates for the Whakapapa River and the Whanganui River at Te Maire as had been set earlier by the Planning Tribunal. However, on appeal to the Environment Court, the term of each of the consents was reduced to 10 years. This reduction in term was specifically designed by the Court to give both Genesis Power Ltd and tangata whenua a spur to adopt a more cooperative approach towards each other. The Court referred to the need for a "meeting of the minds".

18. In the Whangaehu catchment, minimum flow regimes have never been established, and the 2001 resource consent hearings have been the only inquiry into conditions as a result of the TPD diversions. The tributary streams immediately below the water intakes run dry, and mean low flows in the Whangaehu River itself at Karioi have been reduced by 20%.

19. Besides the most obvious environmental effect of a reduction in the amount and flows of water in the rivers downstream of the intakes, there have been a number of other effects. Where the flow reductions have been greatest (i.e. in the Whakapapa catchment and in the Karioi district of the Whangaehu catchment), the river has ceased to be a barrier to stock and wild animals, requiring fencing along the riverbanks, and provision of a substitute stockwater supply. The loss of high quality upper catchment water has reduced the dilution capacity of the downstream rivers, in terms of acidity in the case of the Whangaehu River, and in terms of pollution off farmland and from treated sewage discharges in the case of the Whanganui River. Sediment patterns have been altered, with coarser sands being lost and finer silt particles that remain having a binding and cementing effect. These have affected the habitat for fish life. In the Whakapapa River, the changes to the bed, and the reduced flow, have significantly affected the trout population, with the more prevalent rainbow trout being more affected than the rarer brown trout. Of additional concern for Maori in the Whanganui catchment, lower flows of water in the river have affected boat passage, and the changed pattern of flows through the year has made the habits of lampreys and eels less predictable.

20. Because the project brief was to examine the environmental effects of the TPD, the impact on rangatiratanga values, and on Maori perceptions of a loss of control and

authority over taonga, have not been examined, and can be better expressed to the Tribunal by tangata whenua themselves.

Draining of Waterways

21. The settlement of New Zealand during the last 160 years has wrought substantial change to the land. Forests have been cleared, farms developed, and roads constructed. Mechanical technology today enables the ground to be excavated and reshaped in ways unimaginable to earlier generations. Waterways have also been affected by these changes. The clearing of the land has washed erosion material into the rivers that has altered the characteristics of the riverbeds. The quality of the waters has been altered by pollution. Waterways have also been called upon to serve the needs of settlement. They have been excavated, straightened, channelised and diverted, in order to avoid flooding and ensure that water is efficiently moved downstream. The term used has been "rivers control". This is the antithesis of working in harmony with a river; it is about subordinating the natural environment to the needs of settlement.

22. The Crown has been the leader of this movement, as it was the organisation with the funds and the expertise to make any changes. It has also provided local government organisations with the statutory authority they needed to undertake their own works. Both the Crown and local authorities have been aided in their ability to have a generally free rein by the legal imprecision surrounding the ownership of waterways. Unlike the surrounding lands, waterways have tended not to be included in land titles. Riparian owners are entitled to claim ownership of the bed of a waterway to its centre line (the ad medium filum aquae presumption), but that is not as secure or obvious a right as inclusion in a title. The right is complicated by the Crown having vested the beds of navigable waterways in itself under the Coal Mines Amendment Act 1903, without ever defining what made a waterway navigable. Even before then, the Crown had treated some rivers as public highways, others in mining districts as sludge channels, and yet others as vehicles for timber floating.

23. In aiming to accommodate the needs of settlement, the Crown has consistently ignored any Maori perspective. The taonga status of a river, such as the Whanganui

River (as determined by the Waitangi Tribunal in its Whanganui River report), has not been able to be reconciled with the statutory instruments enacted by the Crown over the years to meet requirements that it deemed to be important. This was most vividly demonstrated during the works to ease the passage of riverboats up the Whanganui River to Taumarunui. The Wanganui River Trust Act 1891 made no provision for Maori use and customs associated with the river, apparently assuming that the interests of Maori were no different to those of the European settlers. Certainly Maori would have benefited from the removal of timber snags in the river. However, the Crown and the Trust Board went further, with the dynamiting of rapids to increase the depth of water, and the construction of groynes to concentrate flows and encourage scouring to maintain the depth of water. These impacted on fishing weirs at the rapids and effectively trampled on Maori interests in the river. When Maori opposed what the Trust Board was doing, the Crown's response was to call in the Police and overwhelm that opposition.

24. Other instances have been identified where a Maori interest was clearly present, but was ignored. An eel weir on the Whangaehu River at Kauangaroa was removed in 1950. Maori had (and still have) title to the bed of Lake Kaitoke, near Wanganui, yet works were carried out on the outlet to the lake that affected the level of the water in the lake, without directly consulting or obtaining the approval of the Maori owners. Instead the views of the Registrar of the Maori Land Court, a Crown official, were taken as expressing the likely views of the owners.

25. Such clear and visible expressions of a Maori stake in a waterway were, however, the exception. More commonly, the Crown and local authorities were seemingly not aware of any Maori use or interest, and made no effort to discover whether Maori might be affected by or concerned about any change to a waterway. The administrative procedures established for approving the issue of licences for hydro-electric power generation at Piriaka and near Raetihi did not include ascertaining the views of Maori, even when, in the case of the Raetihi hydro scheme, this involved a transfer of waters from the Whangaehu catchment to the Whanganui catchment.

26. With the passing of the Soil Conservation and Rivers Control Act 1941, a new stream of Crown and local authority activity was created. The Soil Conservation and

Rivers Control Council, and local Catchment Boards, funded (by means of grant subsidy) numerous local works to clean out riverbeds, build stopbanks, and generally re-shape waterways. The administrative procedures established for approving these subsidies did not provide for ascertaining the views of Maori, or indeed any consideration of the ownership of the riverbed. Instead there was a presumption that the Crown and the Catchment Boards had a virtually unfettered right to intervene in the waterways, because what they were doing was regarded as being in the public interest. The cumulative effect of the many small-scale yet incremental changes to the waterways was not a consideration, except in terms of river engineering matters.

27. More substantial changes to waterways might be fully funded by the Crown. This was the case with two diversions of the Whanganui River at Taumarunui, where the river was threatening to erode its banks. These both involved the use of riparian land for the new diversion cut. In one instance, at Winters Island, the riparian land was Crown-owned, while in the other instance, at Manunui, Maori-owned land was involved. In each case, apart from central government corresponding with local government and vice versa, there was no discussion or consultation with anyone about the Crown's intentions. At Manunui, the Crown viewed any Maori issues only in terms of the need to compulsorily acquire the Maori-owned land using the Public Works Act.

28. Research undertaken during this project identified a number of examples of local works to prevent erosion of riverbanks, avoid flooding, and make it easier for water to travel down waterways. The Crown files about these works were invariably silent about any Maori dimension. Tangata whenua undoubtedly would have had something to say about these works, if they had been asked, but that never happened. The long-standing absence of dialogue, and of consideration for Maori points of view, has conspired to prevent the development of mechanisms that might reconcile Maori use and customs with the interests of other residents in a district.

Roadworks and Geological Excavations

29. A subset of the changes to waterways described above is the effect of road and railway construction, including the need for road metal and railway ballast. Direct consequences for waterways arising from road construction can arise wherever a road

runs close to or crosses a waterway. State Highway 4, the Parapara Road between Raetihi and Wanganui, closely follows the Mangawhero River. The country through which the road passes is prone to slipping, and on occasions when slips fell on the road, one way of removing the slips was to push them into the river. Other effects occurred when the road had to be built over the numerous side streams that drop steeply into the Mangawhero, including the Otoko and Pahihi Streams. To ease construction over the side valleys, the streams were sometimes diverted through tunnels cut through the papa, which could have an impact on fish passage. More recently, with upgrades to the highway to allow for higher speed travel, the side streams have been crossed by means of lengthy culverts. On neither occasion, when constructing the tunnels and culverts, was any evidence discovered that tangata whenua were consulted.

30. The papa mudstone that covers much of the Whanganui backcountry limits the availability of sources of rock and metal. The riverbeds, with their pre-sorted stones and shingle, have been a primary source of roading and railway material. The berm areas alongside the waterways also contain stone and shingle material from previous flood events. While extraction from these berm areas may not have a direct effect on a waterway, the washing of the shingle resulted in discharges of polluted water into the conveniently adjacent rivers.

31. Shingle has been extracted from the Whanganui riverbed at Taumarunui, and from the Taringamotu River, to such a degree that the resource, which had built up over geological time and is renewable to only a minor extent, has been almost completely depleted. At Taumarunui the shingle was extracted under Crown licensing arrangements, made possible by the Crown adopting a flexible attitude towards the definition of navigability, such that it was able to argue that the bed of the river was vested in the Crown. The claim that the shingle resource was Crown-owned was at odds with the Crown's attitude to the same stretch of riverbed at other times, where it accepted that the ad medium filum aquae presumption applied. There was no counterweight from any other organisation or individual to challenge the Crown's interpretation. The result was that the Crown benefited considerably from what was effectively a free resource, because it did not charge itself any royalty where the

shingle was to be used for its own (or a local authority's) road and railway construction needs.

Concluding Remarks

32. This particular project has been an exercise in frustration for a researcher, because of the limited number of occasions where the Crown records yielded any information about Maori viewpoints about waterways. Usually the purpose of research of such records is to gain an understanding of the nature of the relationship between the Crown and Maori. With waterways, however, the overwhelming characteristic is the absence of a relationship. The Crown has carried out its activities and made its decisions while being ignorant of what Maori were thinking, and while being blind to any idea that tangata whenua might have some elements of authority over rivers. Where Maori did make their views known, or claimed rights to a river, the Crown was largely impervious to their concerns. This administrative attitude was carried across to the attitudes of local authorities, because the legislation enacted by the Crown gave those local authorities no instructions, nor any guidance, about consulting with or obtaining approval from Maori.

33. The examples researched for this project have demonstrated that, at a fundamental level, the Crown failed to respect or incorporate into its own attitudes a Maori viewpoint that waterways are important, both in customary and traditional terms, and with respect to ongoing day-to-day life. Waterways are a key element in Maori views about taonga, yet the Crown has failed to tease out what this means for its own activities. Because the cases researched and examined for this project are examples only, there is a possibility that they do not properly represent the true nature of the relationship between the Crown and Maori with respect to waterways, as it applied nationally. However, it is more likely, in my opinion and from my experience, that the examples are representative, and demonstrate an absence of partnership that has in turn had an adverse affect on the wider relationship between the Crown and Maori.