Wai 2357, #A57(a)

Introduction

My name is DAVID JAMES ALEXANDER. I am an environmental consultant and historical researcher, of Auckland. I hold a BA (Honours) degree in Geography, and an MSc degree in Conservation.

From 1975 to 1987 I was a planner in the Department of Lands and Survey. This enabled me to gain a thorough understanding of land status matters, including the titles and ownership status of riverbeds and other water areas, as well as an appreciation of water management issues. In 1987, after a short period working for the Department of Conservation, I established my own consultancy. The following year I prepared my first brief of evidence for the Waitangi Tribunal, which was hearing the Ngai Tahu claim. Since then I have prepared a number of other reports for claim hearings. I have prepared reports (and presented them as evidence in most cases) on the Ngati Rangiteaorere, Pouakani, Te Roroa, Whanganui-a-Orotu, Ngati Awa, Mohaka River, Ika Whenua Rivers, Turangi Township, Ngati Pahauwera, Hauraki, Muriwhenua, Rongowhakaata, Te Tau Ihu, Tuhoe, Central North Island, Tauranga, Northland, East Coast, Whanganui, Te Rohe Potae and Taihape claims.

Reports I have prepared for the Whanganui-a-Orotu, Mohaka River, Ika Whenua Rivers, Northland, Whanganui and Taihape claims have addressed water and waterways matters.

Project Brief

I have been asked by the Wai-2357 & Wai-2358 claimants to examine a number of historical features of the relationship between the Crown and iwi regarding water. Those features are:

- The 1967 vesting in the Crown of the right to control and use natural water
- The 1903 vesting in the Crown of the right to use water for electricity generation
- Professor Alan Ward's commentary relating to water issues in his National Overview report for the Tribunal's Rangahaua Whanui project
- The nature of the interaction between the Crown and iwi with respect to particular waters (Lake Omapere, the Kaituna River, the Waikato rivermouth,

and the Lake Taupo outlet), which can serve as case examples as the Treaty jurisprudence arguments are debated before the Tribunal

For this brief of evidence, I have not undertaken any fresh research of primary sources. Given the tight time deadlines for filing of evidence, I have relied on previous research that I carried out for earlier reports and published materials. Statements I make in this evidence, and historical documents I rely on, are referenced in footnotes to my earlier briefs of evidence and their supporting papers. Where previous Waitangi Tribunals have commented upon or made findings about the matters I address, I include those references in my discussion.

Lake Omapere

Introduction

This evidence on Lake Omapere is presented as a case example of the Crown's failures in the past to fulfill its duty of active protection of Maori rangatiratanga, and its continuing failure today.

Lake Omapere is the largest freshwater lake in Te Tai Tokerau (Northland). To Ngapuhi it is a symbol uniting that iwi's various branches on the east coast and the west coast. As such it has inestimable value to Ngapuhi. Exercising rangatiratanga over the lake is supremely important. The struggles that Ngapuhi were put through during the twentieth century to protect their rangatiratanga and, as they see it, to fend off a Crown challenge to their rangatiratanga, have been a major contributor to a less-than-satisfactory relationship between the iwi and the Crown.

Even if Lake Omapere did not hold such an important place in the traditional stories of Ngapuhi, its role as a rich source of eels would require that rangatiratanga over the lake was jealously protected. For all the reasons it is important to them, Ngapuhi regard Lake Omapere as a taonga.

The evidence I give below relies on research I undertook in 2005 and 2006 when writing a report on Northland environmental issues. This evidence has been filed with the Waitangi Tribunal[1], but has not yet been presented at a Tribunal hearing. With respect to the Native Land Court hearing in 1929, the evidence I give relies on the research by Ben White that was published in the Waitangi Tribunal's Rangahaua Whanui report on lakes[2].

Early encroachments on rangatiratanga rights

I will identify the scope and nature of the rangatiratanga rights associated with Lake Omapere prior to the signing of the Treaty of Waitangi, beyond noting that they were extensive and considered highly significant by Ngapuhi. One of the first intrusions

[1] D Alexander, *Land-based resources, waterways and other environmental impacts*, 2006, Chapter 11 (Case Studies – Lake Omapere), pages 326-399. Evidence filed for the Wai-1040 (Te Paparaki o Te Rahi) inquiry, Doc #A7.
[2] Ben White, *Inland Waterways: Lakes*, Waitangi Tribunal Rangahaua Whanui Series National Theme Q, 1998, Chapter 7, pages 203-248.

upon the lake came when the lands around the lake were surveyed, issued with titles that were purchased by private individuals and by the Crown, and settled by European agriculturalists. In my report, I posed the question "how do you define the edge of a lake that can rise and fall vertically by as much as 1.5 metres (5 feet) on a seasonal basis?", and discussed how the edge of the lake was probably defined by the first surveyors on the basis of incomplete information with one result being that the lake at high levels encroached onto adjoining titled land. The lake became the only part of the earth's surface in the district that was not titled land, placing Ngapuhi at an inherent disadvantage when dealing with titled landowners and the Crown.

One response of Ngapuhi was to seek to be awarded title to the lake. In 1882 application was made to the Native Land Court to investigate title to a 5 acre area at the outlet from the lake. This outlet was the point at which eels were caught in specially dug channels at the time of the year that they ran to the sea. The rights to trap eels in these channels were held by different hapu. The Court awarded a title to the area, known as Omapere 3 block, in 1890. The block remains in Maori ownership today, although the drainage actions of settlers and the Crown (discussed below) have periodically affected the fishing rights to a severe extent.

In 1905 and 1910 stones in the outlet channels were dynamited on the instructions of the European owner of some of the riparian lands around the lake, so that the lake level in the wintertime could be lowered to its summertime level. Based on later statements by Maori, it is probable that the European landowner paid them compensation. A report in 1914 noted that the lake by that time contained introduced trout and carp, adding that freshwater crayfish populations had declined because of fish predation (though without identifying whether the offending fish were the introduced species or some other species). Road and railway construction in 1916 infilled (probably temporarily) two of the three outlet channels.

In 1913 an application was made to the Native Land Court for it to investigate the title to the lake itself. The reason for this application at this time is not known. It may have been local circumstances, or it may have been a response to the Court of Appeal's decision in the Arawa Lakes court case. That court case undoubtedly shaped the Crown's response to the Omapere application. A Crown Law Officer's

opinion argued that riparian rights applied to the lake bed, giving owners of the land around the lake rights to the lake bed. Another Crown Law opinion concentrated on the legal confusion over titles to lakes. The Crown also refused to provide the Native Land Court with a survey plan of the area applied for, which was a pre-requisite to the Court's consideration of the application. The net effect of this obstructionist mode, rather than one based around active support for and protection of rangatiratanga, was that the hearing of the title application was stalled, and remained so for the next ten years. The Crown's duty of active protection for Maori rights to the lake is not apparent in the Crown's response to the title application. Evidence to the title hearing in 1929 (see below) was that the lowering of the lake had affected the size of the eel harvest.

During the period that the title application was stalled by Crown inaction, from 1913 to 1923, further motivation was provided for the Crown to actively oppose the claim by Maori to have an ownership/title interest in the lake. After the First World War ended, the Crown acquired some of the land that bordered on the lake for the settlement of returned soldiers. Having placed these soldiers on its land, the Crown then felt bound to support the title it had granted to them, which, as previously described, often extended into the lake at times of high level in the wintertime. Drainage works to lower the lake's level by digging out the eeling outlet channels were undertaken by the Crown in 1921-22. This work did not receive prior consent from Maori, although once commenced one Maori leader asked that the levels of all three outlet channels be lowered, rather than just the one originally envisaged by the Crown. The work included blasting of rock, as well as removing boulders and timber, implying that the work done was something more than a cleaning out or restoration of the channels that had been dug by Maori. It also suggests that the lowering of the lake's level was intended to be to levels below its normal summertime level. As the work continued, the Maori leader who had asked for all three channels to be lowered expressed his concerns that the digging out was more substantial than he had expected, and he asked that Maori be compensated for the damage that was being done.

Title Investigation Hearing

Although the survey plan of the lake had been provided to the Native Land Court in 1923, it was not until 1929 that the hearing for the investigation of title took place in Kaikohe. Substantial evidence of a traditional and customary association with the lake was presented, all of which was based around use and occupation, and all of which supported rangatiratanga. The Judge, Frank Acheson, had to satisfy himself that the lake was Native customary land, and that it was both appropriate and legally correct that the Court should order a title. He had little in the way of precedent from elsewhere in the country to guide him, as few lakes had been recognised as being Maori, and even fewer had been the subject of Native Land Court cases. In addition, he knew that alternative legal interpretations existed about the status of lakes and lake beds, which challenged any Maori right to them. Indeed the Crown took an active part in the hearing opposing the issue of a Native Land Court title, its involvement requiring that a separate hearing be held in Auckland to consider legal arguments.

The Crown's contention was that Maori custom did not recognise ownership of lake beds, that in the absence of Maori being the owner it was the Crown that was the owner, and that in addition the Crown (by virtue of its acquisition of riparian land after the First World War) was the presumptive owner of rights fronting its land and extending to the middle of the lake. The Maori claimants' case was that Lake Omapere had always been Maori owned, that the Crown had never claimed it prior to the present hearing and had not acquired any rights in the lake, that there existed no presumption in law that the Crown had rights to lakes such as Omapere, that the lake was customary Maori land and as such it had not been legally possible for the Crown to acquire it, and that the Treaty preserved such proprietary rights as were being asserted in the case of Lake Omapere.

In his 26-page decision[3], Acheson recognised that customary rights held by Maori to the lake included, inter alia:

- Rights of fishing, for eels, freshwater mussels, and freshwater crayfish
- Rights held by particular hapu to use particular outlet channels for eel trapping

[3] Omapere Lake, decision on applications for investigation of title, 1 August 1929. Maori Land Court minute book 11 BI 253-278.
It should be noted that the minute book references in Ben White's *Inland Waterways: Lakes* report are incorrect.

- Rights of gathering raupo and flax from the lake fringe for house thatching and weaving
- Rights to snare wildfowl
- Rights to use the lake for canoeing and "other aquatic pleasures and exercises universal among the Maoris of other days"
- A development right (i.e. first exercised after 1840) of digging for gum from the lake bed
- Something more besides the above, which Acheson referred to in the following terms (at the Kaikohe hearing):

> To the Maori, as we nearly all know, a Lake was a Lake. It was something besides, something that stirred the hidden memories in a tribe or an individual, and it is impossible to believe that those thousands of Maoris who were inhabiting the Pahs, who had been born in sight of the Lake, it is impossible to believe that these Maoris had not loved Lake Omapere for the sake of the Lake itself, and regarded it as a treasured possession. And nothing can make me believe that they would look upon it in such a mean way as to regard it only as an occasional source of food supply for the tribe.[4]

He also referred to this in his decision:

> To the spiritually-minded and mentally-gifted Maori of every rangatira tribe, a lake was something that stirred the hidden forces in him. It was (and, it is hoped, always will be) something much more grand and noble than a mere sheet of water covering a muddy bed. To him, it was a striking landscape feature possessed of a 'mauri' or 'indwelling life principle' which bound it closely to the fortunes and destiny of his tribe. Gazed upon from childhood days, it grew into his affections and his whole life until he felt it to be a vital part of himself and his people.[5]

Acheson found that the customary right envisaged the lake, including its bed and its waters, as being an indivisible whole.

> The bed of any lake is merely a part of that lake, and no juggling with words or ideas will ever make it other than part of that lake. The Maori was and still is a direct thinker, and he would see no more reason for separating a lake from its bed (as to the ownership thereof) than he would see for separating the rocks and the soil that comprise a mountain. In fact, in olden days he would have regarded it as rather a grim joke had any strangers asserted that he did not possess the beds of his own lakes.

[4] Maori Land Court minute book 11 BI 66.
[5] Maori Land Court minute book 11 BI 260.

> A lake is land covered by water, and it is part of the surface of the country in which it is situated, and in essentials it is as much part of that surface and as capable of being occupied as is land covered by forest or land covered by a running stream.
>
> All the old authorities are agreed that the whole surface of the North Island of New Zealand was held in definite ownership, according to ancient Maori custom and usage, by the various tribes and their component parts. The Native Land Court has proved the truth of this time after time in every district[6]

Having regard to the legal arguments being advanced by the Crown, Acheson was at pains to conclude that the customary right to Lake Omapere was not just a fishing right, but was a right of full ownership.

> By no process of reasoning known to the Native Land Court would it be possible to convince the Ngapuhis that they and their forebears owned merely the fishing rights and not the whole lake itself.[7]

He defended his opinion in the following terms:

> He [Acheson] has perused his own records and more particularly his notes of old Native Land Court judgements and his notes of the opinions of practically all the old authorities whose opinions were worth having, … and nowhere throughout those judgements or opinions has he found the slightest suggestion by inference or otherwise that the ancient custom and usage of the Maoris did not provide for the full ownership of lakes in exactly the same manner as for the ownership of mountains and forests.[8]

The customary right of ownership had never been extinguished by the Crown, and presumptive rights to the lake bed as a consequence of riparian land ownership did not apply as the riparian lands had clearly defined boundaries.

Acheson in his decision also considered the relevance of the Treaty of Waitangi to Native Land Court decision-making. In doing so he was straying into largely uncharted territory, as references to the Treaty in Native Land Court decisions are next to non-existent. He considered that the Court had to have regard for the Treaty, because it had been recognised in certain statutes and in some case law. In his opinion lakes were covered by the wording of article 2, and Lake Omapere was so important to Ngapuhi that they would almost certainly have been unwilling to sign the Treaty if they had known that it could not protect their ownership of the lake.

[6] Maori Land Court minute book 11 BI 259.
[7] Maori Land Court minute book 11 BI 262.
[8] Maori Land Court minute book 11 BI 260.

The Court's decision concluded that, having established that Maori had ownership of Lake Omapere under their customs and usages, that Maori ownership had been maintained since the signing of the Treaty, and that ownership rights had been asserted on the occasions when the Crown had carried out drainage works, the Court was able to find that Lake Omapere was "customary land" within the meaning of the Native Land Act 1909 to which title could be ordered.

Because the hearings leading up to this decision had primarily been concerned with whether or not the Court considered that Lake Omapere was customary land, Acheson did not issue a title. Instead the Court's decision was an interim one (a 'preliminary Judgement') only, with further hearings necessary to determine which persons were the Maori owners. Acheson was also conscious that his decision was a controversial one, and was bound to be appealed by the Crown, which is exactly what happened.

The Waitangi Tribunal in its Whanganui-a-Orotu report described Acheson's decision as "one of the most perceptive judgements in the legal history of this country"[9].

Reserving the lake

The Crown's appeal had still not been heard ten years later, in 1939. Application was then made to the Native Land Court to declare the lake to be a Native Reservation under the Native Purposes Act 1937, as this was thought to give greater protection of the lake against continuing incursions by the Crown (discussed below). If trustees were then appointed to administer the reservation, who could generate an income from the lake, a tribal fund for the benefit of Ngapuhi might be built up. Acheson was the judge who considered the application and, expressing his disgust that the appeal had not been resolved because of the delaying tactics of the Crown, indicated his willingness to reserve the lake, as justice for the Maori people demanded it.

In making the application, Maori were motivated by a desire to see Lake Omapere treated as a tribal estate, rather than being owned by multiple individuals. As a tribal reservation, it was thought to be less at risk of being alienated, although it was

[9] Waitangi Tribunal, *Te Whanganui-a-Orotu report*, 1995, page 207.

acknowledged that special legislation might also be needed to provide the lake with greater protection.

The Court assured itself that the proposed course of action had been adequately discussed, that the hui at which the reservation had been discussed was representative of those interested in the lake, and that those interested and attending the Court hearing were unanimously supportive. It then agreed to award ownership of Lake Omapere to "the Ngapuhi tribe" as a tribe, recommend that Lake Omapere become a Native Reservation, and appoint 20 persons as "temporary" trustees to administer the reservation. This was a recommendation to the Native Minister who, under the legislation, made the final decision[10]. However, action on the Court's recommendation languished while the appeal remained unresolved.

The Crown's appeal against Native Land Court title

The prosecution of the Crown's appeal against the Court's 1929 decision was in the Crown's hands, and while it chose not to pursue prosecution of the appeal, it was impossible for the appeal to be heard by the Native Appellate Court. This left the way open for the Crown to treat the lake as not being Maori-owned, and to continue its practice of helping the surrounding European settlers with drainage works. The outlet channels were cleaned out by the Crown, ostensibly without being deepened, in 1931 and 1935. On the first occasion, there was no consultation with Maori, while on the second occasion the work was arranged in consultation with the Native Department, the consent of Maori was obtained after an on-site meeting at which Judge Acheson was also present, and there was agreement that compensation would be paid if the channels were widened or deepened. The work was regarded as maintenance and repair, and did not require the payment of compensation. In connection with the 1935 cleaning there was a revealing comment by one Crown official, that "if the Crown confers with the Natives too much, it may be construed by the Natives as an admission of ownership by them"[11].

[10] Maori Land Court minute book 18 BI 97-104.
[11] Commissioner of Crown Lands North Auckland to Under Secretary for Lands, 30 July 1935. Lands and Survey Auckland file 3/709. Wai 1040, Doc #A7a, Supporting Papers # 2833-2834.

However, further deepening was still being investigated by the Crown, without any notification to Maori. The Public Works Department was asked to report what would be necessary to provide "reasonable drainage" for the Crown lessees (the returned soldiers) whose land fronted on to the lake, it being suggested that "the Natives need not be advised of these further investigations"[12].

A hearing of the Native Appellate Court was held in 1936, at which the Crown sought and obtained an adjournment sine die, on the grounds that the Crown was willing to negotiate with Maori and see if an agreement could be reached with them. The draft terms of agreement drawn up by the Crown were that the Crown would withdraw its appeal if Maori agreed to allow the lake to be lowered by a further 18 inches, or some other figure based on engineering investigations still to be carried out. 'Inducements' identified to encourage Maori to come to an agreement were that the Crown could continue with its appeal, and making Maori aware that the Crown could use the compulsory powers under the Public Works Act to push ahead with the drainage work (although in that event Maori would have to be compensated). The draft terms were discussed between the solicitors for the two parties, and this was enough for the Chief Judge of the Native Land Court to agree not to set the appeal down for hearing. Another Court hearing in 1937 continued the adjournment because the engineering investigations had not been completed. This latter delay was in the face of increasingly bitter feelings by Maori.

When the results of the engineering investigations were received in mid 1937, they showed that the drainage and drying out of the peat soils on the lake front land would require virtually complete drainage of the lake. This would be an expensive proposition that would benefit only a relatively small acreage of lake front land. A large area of lake bed would become dry, requiring an unknown amount of compensation to be paid to Maori. The local Crown official who had up to then been pushing for the further drainage works admitted that the cost was too great, and drainage of the lake was out of the question; in his opinion it would be better to accept that the Crown lessees' land could not be drained, and adjust the rental values accordingly. If his recommendation was accepted, then the only factor relevant to

[12] Commissioner of Crown Lands North Auckland to District Engineer Whangarei, 25 September 1935. Lands and Survey Auckland file 3/709. Wai 1040, Doc #A7a, Supporting Papers # 2836.

deciding whether the appeal was continued or withdrawn would be the precedent-setting effect for lakes generally of Lake Omapere having a Native Land Court title.

Unfortunately, however, the letter from the local official to his superiors in Wellington was never replied to, nor was any action taken on it, leaving the appeal still in place and nothing being done to resolve it. This remained the position at the time of the Native Land Court hearing in 1940 when a Native Reservation was recommended, and continued to be the case throughout the Second World War. Apparently, Crown legal officials had decided that the Omapere case should await the results of an appeal against another Native Land Court lakes decision, to award the bed of Lake Waikaremoana to Maori. This appeal was not heard until 1944, and went against the Crown. There was some thought given immediately after the 1940 Court hearing for Lake Omapere to the passing of special legislation which would incorporate the Court's decisions in 1929 and 1940, subject to a right to construct drains across the drained portion of the old lake bed (i.e. between the lake title boundary and the water of the lake). While the thinking got to the stage of a draft clause for inclusion in legislation being drawn up, it was never discussed with Ngapuhi generally or the temporary trustees, and it was never pursued by the Crown.

Withdrawal of the appeal

After the Second World War, the Crown undertook further maintenance cleaning of just one of the lake's three outlet channels in 1948-49. This had received the prior consent of the trustees, who couched their consent in terms that suggested they considered that the agreement entered into in 1935 to allow maintenance cleaning was an ongoing one. What the trustees had not been told, however, was that survey investigations showed that a water level established just after the drainage works in 1921-22 had been exceeded (i.e. the lake had been lower) at times since 1922, suggesting that the so-called maintenance drainage works since 1922 had actually caused a further lowering of the lake level. The local Crown engineer, aware of this, noted, "I considered it unwise to take the local Natives into my confidence"[13].

[13] District Engineer Auckland to Commissioner of Crown Lands North Auckland, 14 October 1947. Lands and Survey Auckland file 3/709. Wai 1040, Doc #A7a, Supporting Papers # 2907.

While this work was going on, consideration was being given by the Crown to the location of the boundary of the lake title vis a vis the boundary of the Crown leasehold sections and a thin strip of unalienated Crown Land fronting the leasehold sections which was a residue of the old Omapere Estate title. The strategic decision made by the Crown at this time was that the appeal would not be withdrawn while this remained to be resolved, and while there had been no agreement with the Maori owners to allow drains from the leasehold land to extend to the wet area of the lake title. The prevailing Crown attitude was that the rights of its settlers needed to be robustly protected, at the expense of Maori being able to obtain a clean title to the lake.

At this point, in 1952, the soldier settler most affected by flooding of his land at high lake levels indicated that he was satisfied with the status quo achieved by the maintenance cleaning in 1948-49. The Crown seized upon this as an opportunity to avoid taking any further responsibility for drainage of their flood-prone lands. However, it was only when an application was lodged by Maori at the end of 1952 to have the Crown's appeal dismissed for lack of prosecution that the Crown examined the implications for the appeal of the removal of any obligations to the settlers. The first reaction of the legal officials had been to seek another adjournment, while the second reaction was to agree to withdrawal of the appeal on condition that continued maintenance cleaning of the outlet channels would be allowed, and the settlers would be allowed to graze up to the water's edge (i.e. on any dry part of the lake title). However, when the most senior district-based Crown official baldly stated that "the ownership of the lake is not of any great moment"[14], the Crown became willing to withdraw the appeal unconditionally. At the hearing before the Maori Appellate Court in 1953, the Crown's solicitor still sought to extract some concession from the Maori side in return for withdrawal, but the Appellate Court would have none of it, saying that conditions could not be attached to the withdrawal of an appeal. It then dismissed the Crown's appeal, as it did so describing the Crown as a "tardy litigant", and the delays as "unjustifiable".

> It would appear from the course of proceedings that the appeal may have been intended to be treated as a lever for negotiations for a settlement of some sort

[14] Commissioner of Crown Lands North Auckland to Director General of Lands, 29 July 1953. Lands and Survey Auckland file 3/709. Wai 1040, Doc #A7a, Supporting Papers # 2954.

> with the Maori owners. If that is so it is reprehensible and an abuse of the process of the Court. The Court looks to the Crown's advisors in these matters to be meticulous in setting an example to be followed in the use of the Court's procedure. This has not been done in these proceedings, and we record our disapproval of the course followed.[15]

The delaying tactics of the Crown, which it had resolutely pursued for 24 years since the Native Land Court had agreed that Maori were the owners of Lake Omapere, were the complete opposite of a principled approach based upon a duty to actively protect the rangatiratanga rights of Maori.

Maori Reservation and trustees' terms of trust

The withdrawal of the appeal towards the end of 1953 meant the Court's 1929 decision was final, and its decisions made in 1940 on the basis of the 1929 finding could be perfected.

It might be thought that the Crown would have ceased to adopt a controlling attitude towards Maori rangatiratanga over Lake Omapere, but unfortunately this was not the case. The proposal for a Native Reservation under the Native Purposes Act 1937 (by 1953 a Maori Reservation under the Maori Affairs Act 1953) still had to be approved by the Minister of Maori Affairs. Appointing trustees for a Native Reservation had been changed to vesting land in trustees under Section 438 Maori Affairs Act 1953. When the Minister looked at the terms of trust, he insisted on some changes to recognise aspects of Crown kawanatanga.

The terms under which the trustees would administer the lake were drawn up by the Maori Land Court in 1955[16]. They were broad-ranging, and oriented towards development, as had been envisaged in 1940 when the talk had been of the lake proving a trust income for Ngapuhi. The first duty of the trustees was "to take such steps as may be necessary to complete title to the lake". To achieve this would require acceptance that "the Ngapuhi tribe" was a sufficiently rigorous phrase to appear on the title as owner of the lake, and would also require the attachment to the

[15] Maori Land Court minute book 12 APAD 347-349. Wai 1040, Doc #A7a, Supporting Papers # 4236-4238.
[16] Order of the Court, 22 February 1955. Maori Land Court Whangarei Block Order File 708. Wai 1040, Doc #A7a, Supporting Papers # 4181-4183.

title of a diagram based on a survey plan showing the boundaries of the lake. Neither of these matters has been as straightforward as they might seem. Indeed, the trustees have never been actively assisted by the Crown to complete the title.

Other duties of the trustees, as set out in the trust order supplied to the Minister for approval, have included (in summary):

- To use for farming or camping, or to lease out, any portions of the land "from which the water has now receded"
- To sell the water
- To erect water works and promote hydro-electric works
- To promote or exploit fisheries, both native and exotic
- To drain the whole or part of the Lake
- To borrow and spend monies, and to apply any revenue towards "any purpose that may be beneficial for the Ngapuhi tribe as a whole or for any members thereof, either in respect of education, relief of hardship, general advancement, or in any manner that the Trustees may deem beneficial"
- To provide annual financial statements

When approving the order, the Minister insisted on changes to the wording of the trust clause to do with water works and hydroelectricity, and the trust clause to do with fisheries, so as to clarify that Crown legislation on these topics took precedence.

One of the most significant features of the trust order that was drawn up by the Maori Land Court, and that was approved by the Minister of Maori Affairs, is that it continues the thinking adopted by Judge Acheson in 1929 that the lake was an indivisible whole. While being deliberately vague about what area was covered by the trust order, because there was no title order or survey plan then in existence, it described the lake as

> the land **and the water thereon** known as Lake Omapere, hereinafter termed 'The Lake', containing some 3,000 acres more or less.[17]
> [highlighting added]

[17] Order of the Court, 22 February 1955. Maori Land Court Whangarei Block Order File 708. Wai 1040, Doc #A7a, Supporting Papers # 4181-4183.

As an aside, I note that in my researching of Maori titles over the last 24 years I have come across only one other Court title that includes water in its description of the Maori interest that it covers. This was during research I undertook for the Ngai Tahu claims, where I examined the history of a series of fishery easements in the area of Kemp's Deed (Canterbury) that were ordered as additional reserves for Maori by the Native Land Court in 1868[18]. The Court's order for a series of fishery easements and occupation reserves in south Canterbury linked to the Arowhenua Reserve was a composite one that identified all the additional lands being ordered for the benefit of Arowhenua Maori. It was later printed in the *Appendices to the Journals of the House of Representatives*. The order included the following provision:

> And it is further ordered that the several Crown grants of weirs and easements shall contain a provision saving the rights of the owners of land to the undisturbed flow of water in the several streams running through the said parcels of land.[19]

Although the orders of the 1868 Court were subsequently legislated for in the Ngaitahu Reference Validation Act 1868, I was never able to clarify the status of the provision of a right to the undisturbed flow of water, as the printed copy of the order was the only reference I located to it, and it does not feature in the subsequent history of the fishery easements. The reference to water flow was not included in the title orders for each individual fishery easement that were granted by the Native Land Court in 1887. It is possible that somehow the water reference was blocked from being perfected. It is also possible that it was deemed to be redundant on the grounds that it was only repeating a common law right.

In summary, therefore, the title for Lake Omapere (and probably the title for Lake Waikaremoana, though I have no personal knowledge of this) can be said to be one that 'got away' from the Crown. It had become almost a matter of principle for the Crown to object to the Native/Maori Land Court investigating title to lakes, in much the same way as it continually attempted to frustrate attempts to grant title to rivers and the foreshore and seabed. An academic paper by a former Crown Law official in 1966 set out how extensive had been the Crown's opposition[20].

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[18] D Alexander, *History of the Kemp Block Reserves*, 1988. Wai 27, Doc #O5, pages 8-10.
[19] *Appendices to the Journals of the House of Representatives* (AJHR), 1876, G-7, pages 5-6.
[20] EJ Haughey, 'Maori claims to lakes, river beds and the foreshore', in *New Zealand Universities Law Review*, Vol 2 (1966), pages 29-42. Wai 212, Doc #C5a, Supporting Papers #V33-V40.

Management of the lake since 1955

Since the mid 1950s the trustees have been almost completely left by the Crown to make their own way. There has been little support provided. This was particularly apparent with three matters that have required the trustees' attention. The first has been Kaikohe Borough's water supply, the second has been commercial eeling in the lake, and the third has been weed growth and algal blooms in the lake.

When Kaikohe Borough Council sought to take water from Lake Omapere in the 1970s to supply the town with water, the view of the Crown and the Northland Catchment Commission was that a water right had to be obtained from the Commission. This was despite the water being treated in the trust order as being owned by Maori. I did not discover when any legal opinions were obtained about this. The water take proceeded when a water right from the Commission, and an easement from the Maori trustees, were obtained.

A commercial eeler operated in the lake in about 2001. He was obliged to obtain permission from the Maori trustees (for which he made royalty payments), and a permit from the Crown, as a result of the change to the trust order by the Minister in 1956.

The weed growth and algal blooms that plagued the lake from the early 1980s onwards were a problem far and away greater than the trustees could handle on their own. The Crown generally declined to be involved in coming to the assistance of the trustees, and only the Northland Catchment Commission (later the Northland Regional Council) shared the trustees' concerns. When in the late 1990s the trustees sought to introduce grass carp to the lake to eat the weed growth, they experienced difficulties with the two Crown agencies (Ministry of Fisheries and Department of Conservation) whose consent they needed. The Maori Affairs Select Committee of Parliament held an inquiry and issued a report in 2001 which was strongly critical of the Crown's general lack of active support.

Although the Department of Conservation has an obligation to uphold the Treaty of Waitangi which is written into the Conservation Act 1987, the Select Committee found that this obligation did not increase the priority given by the Department to

Lake Omapere. Nor did the general rarity of lakes in Northland increase the priority. Instead the Department's thinking was that, with no rare or endangered indigenous species involved, and with a development-oriented terms of trust for how the lake was to be managed, Lake Omapere did not merit the Department's full attention.

Besides the Department of Conservation, the Select Committee also found fault with the responses of the Ministry for the Environment and Te Puni Kokiri, and urged that the Crown should take a more active role to ensure that the lake did not suffer an ecological collapse. It recommended to the Government that the Ministry for the Environment should take a lead role in overseeing the work to save the lake, and that Te Puni Kokiri should provide capacity-building assistance to the lake trustees[21].

Concluding Remarks

Judge Acheson in 1929 made a careful examination of what was to be guaranteed and protected by the Treaty of Waitangi. He concluded that, in the context of a lake, Maori custom and tradition included the waters as an indivisible part of a lake. Because it was proper to issue a title, effectively a statement of ownership, to Lake Omapere, and because the Treaty required that Maori rights and interests were to continue undisturbed until voluntarily relinquished, then the title had to include the waters of the lake in its description of the lake.

The three instances set out above about the interaction the Maori trustees have had with the Crown demonstrate that Maori ownership of a water resource does not on its own guarantee a good outcome. The Crown's kawanatanga has been spread so widely throughout the community that exercising tino rangatiratanga requires perseverance by Maori in engaging with the Crown and continually encouraging the Crown to properly fulfil its duty of active protection.

[21] *Inquiry into the Possible Collapse of Lake Omapere: Report of the Maori Affairs Committee*, 5 April 2001. Appendices to the Journals of the House of Representatives (AJHR), 2001, I-22B, pages 1176-1198. Wai 1040, Doc #A7a, Supporting Papers # 4510-4521.