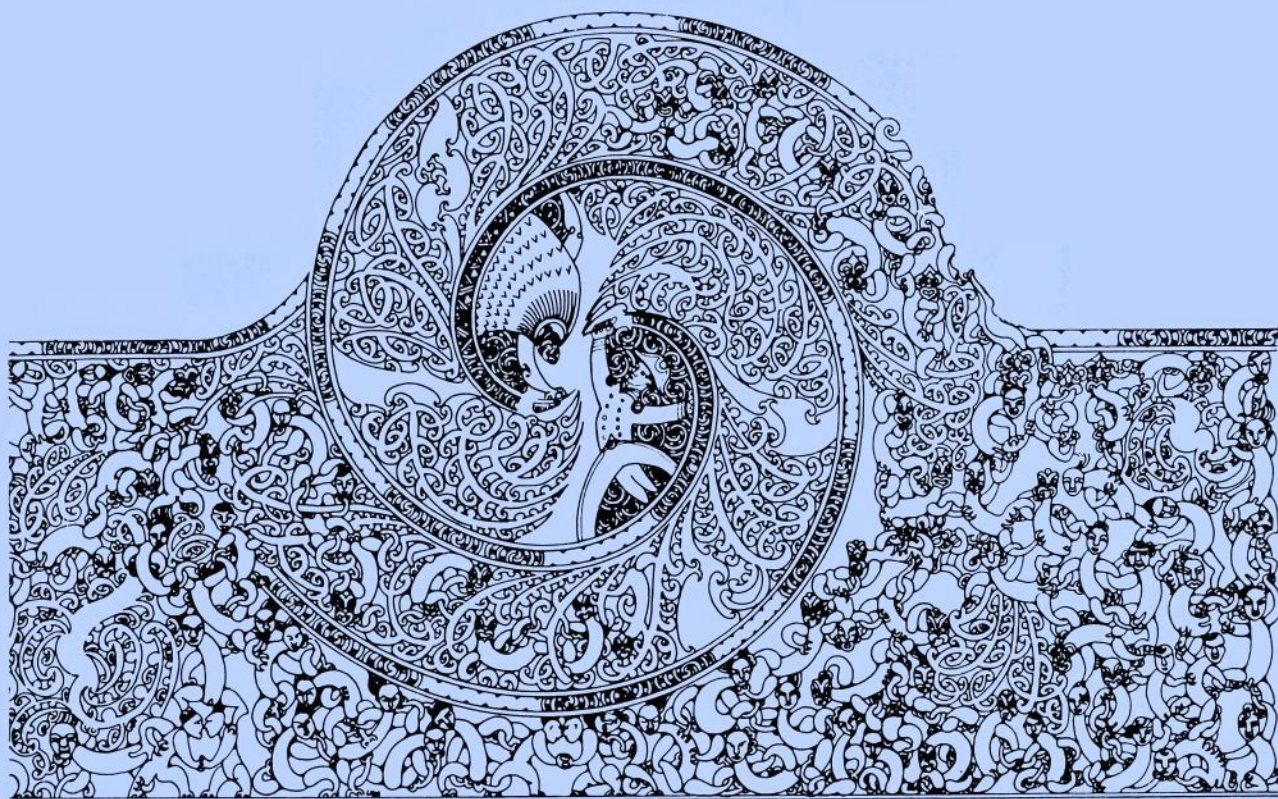


TE  
IKA WHENUA RIVERS  
REPORT



WAITANGI TRIBUNAL REPORT 1998

## TE IKA WHENUA RIVERS REPORT



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REPORT

WAI 212

WAITANGI TRIBUNAL REPORT 1998





The cover design by Cliff Whiting invokes the signing  
of the Treaty of Waitangi and the consequent interwoven development  
of Maori and Pakeha history in New Zealand as it continuously  
unfolds in a pattern not yet completely known

A Waitangi Tribunal report

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The waiata on page v, *Te Waiata Aroha*,  
was composed by Harehare 11 of Ngati Manawa

The waiata and the translation on page vii were taken from  
Gwenda Paul and Maanu Paul, *The History of Kaingaroa No 1,  
the Crown, and the People of Ngati Manawa*, 2nd ed, Murupara,  
Te Runanganui o Te Ika Whenua, 1994, pages i and ii

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### Te Waiata Aroha

*Kaore te mokemoke te tuohu noa nei e  
I te po roa, i te po makariri e  
Tū mai e hika ka haere taua e  
E hoa ma e, katahi hanga kino e  
Ko aku koiwi kau te tirohia mai na e  
Tāka ka roto nei ka mawherangi au e  
Wai ka kite ake i te whui a te atua e  
Pa mai ki ahau whakahiangongo ai e  
Ka mate te marama ka kohiti ko te toru e  
E waha e hika ka haere taua e  
Nga roa mania i raro o Neketuri e  
Ka hoki taua kite whare huri ai e*

*Tāngi a te ruru ru kei o hokihoki mai e  
E whakawherowhero ra i te putahitanga  
Naku nei ra koe i tuku kia haere  
Te puritia iho nui rawa te aroha  
Tē ua i te rangi ko te ua i aku kamo  
Kei whea e tau to kupu mana nei  
Hei toko i au puta rawa i tawhiti e  
Ripa ki Horomanga tai tata rawa mai*



Te Waiata Aroha

So lonesome and crestfallen now am I  
Through this long winter's night  
Stand forth O Son so that I may caress you  
O friends all, what woeful state is this  
'Tis only my wasted frame you now gaze upon  
Whilst all within is in turmoil

There was no warding off the gods' affliction  
And thus stricken I am slowly pining away  
The waning moon has brought forth the bitter cold  
Wherefore on my shoulders climb dear one and let us go  
Over the winding plains below Neketuri  
Winding our homeward way and there to meditate

The call of the owl yonder is oft repeated  
Hooting out there where the trails meet  
It was I who allowed you to go  
When my deep love should have detained you  
The rain from the heavens is now matched by my tears  
Where dear one is the fulfilment of your promise?  
To sustain me until I emerge afar off  
With the divide of Horomanga looming night



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The Waitangi Tribunal  
Wellington

The Honourable Tau Henare  
Minister of Maori Affairs

and

The Honourable Douglas Graham  
Minister in Charge of Treaty of Waitangi Negotiations

Parliament Buildings  
Wellington

Tena korua

We have pleasure in presenting to you the Waitangi Tribunal's report on the Te Ika Whenua rivers claim.

Our report traverses the extent of Te Ika Whenua's customary rights over the rivers, the guarantees given by the Crown under the Treaty of Waitangi, and the lack of any recognition of any rights to rivers other than those provided under common law. We background the acquisition of the title to the beds of the rivers through the *ad medium filum* rule and the Crown's acquisition or control over them through legislative means.

We have found that there have been breaches of the principles of the Treaty and have set out these findings and our recommendations in chapter 11 of the report.

Heoi ano

## LIST OF ABBREVIATIONS

AC	<i>Appeal Cases</i>
AJHR	<i>Appendices to the Journals of the House of Representatives</i>
CA	Court of Appeal
ch	chapter
DLR	<i>Dominion Law Reports</i>
DNZB	W H Oliver (ed), <i>The Dictionary of New Zealand Biography</i> , Wellington, Allen and Unwin and the Department of Internal Affairs, 1990
doc	document
F Supp	<i>Federal Supplement</i>
fig	figure
fn	footnote
fol	folio
Knapp	<i>Knapp's Reports</i>
LS	Department of Lands and Survey file
ltd	limited
MA	Department of Maori Affairs file
MS	manuscript
NZED	New Zealand Electricity Department
NZLR	<i>New Zealand Law Reports</i>
NZPCC	<i>New Zealand Privy Council Cases</i>
OECD	Organisation for Economic Cooperation and Development
p, pp	page, pages
P	president of the Court of Appeal (when used after a surname)
PC	Privy Council
pt	part
s	section (of an Act)
sec	section (of a book, report, etc)
sess	session
US	<i>Reports of Cases in the Supreme Court of the United States of America</i>
vol	volume
Wai	Waitangi Tribunal claim





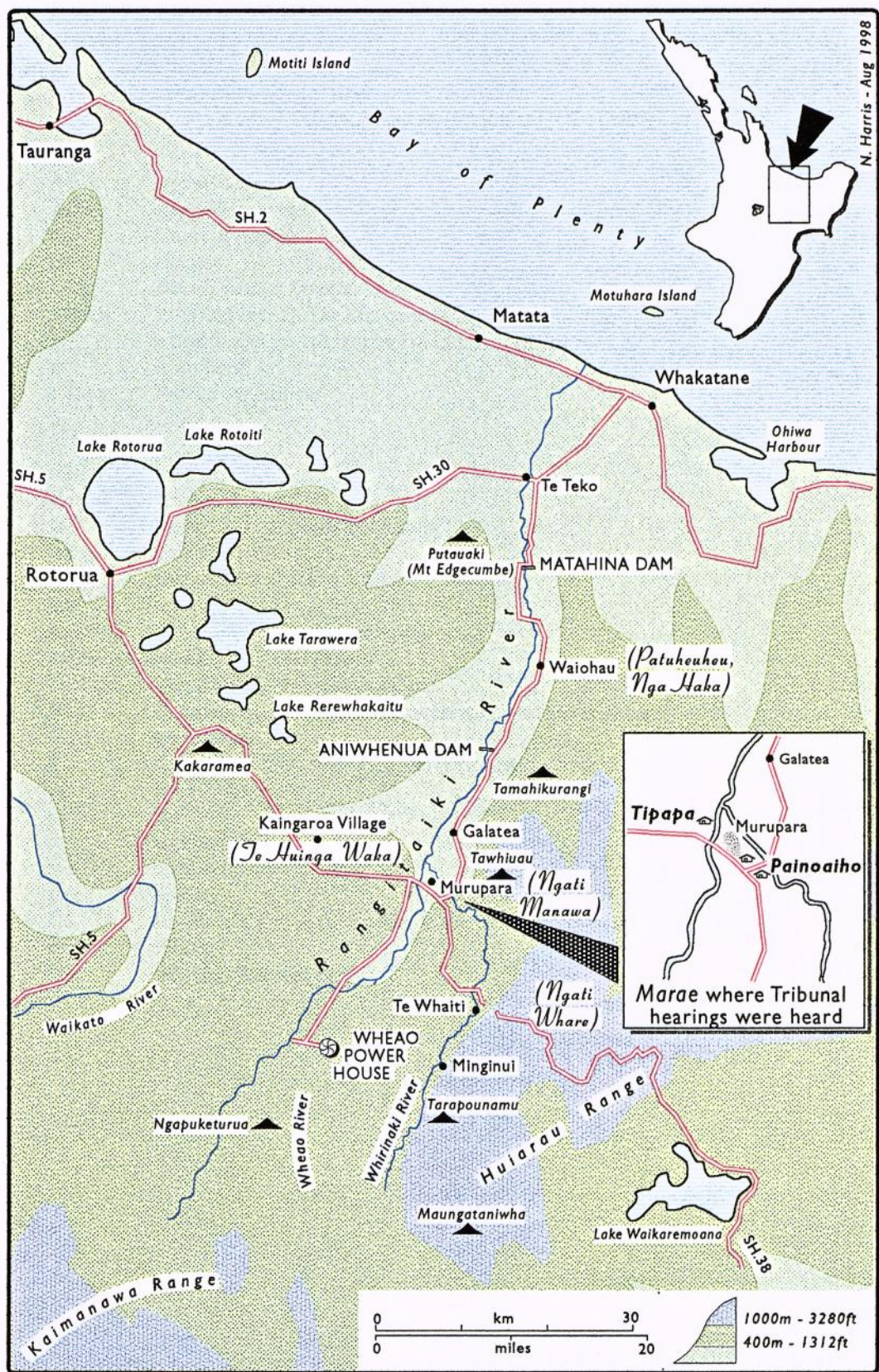


Figure 1: Location map

## CHAPTER 1

# THE CLAIM AND THE CLAIMANTS

### 1.1 THE CLAIM

This claim concerns the mana and tino rangatiratanga of the hapu of Te Ika Whenua over the Rangitaiki, Wheao, and Whirinaki Rivers and their tributaries. These rivers have their headwaters in the Urewera and Kaingaroa plateau. The claim relates to the middle reaches of the rivers, which flow through Te Ika Whenua's traditional rohe down to the Galatea Plains.

The claim builds on the Te Ika Whenua energy assets claim (claim 1.1(d)) and has a narrow focus.<sup>1</sup> Like the energy assets claim, it was severed from Te Ika Whenua's original claim to lands and waterways, dated 6 June 1991 (claim 1.1), and was accorded urgency by the Waitangi Tribunal at the claimants' request and after other tribes with river claims had agreed.<sup>2</sup> This was in line with the view expressed in our *Energy Assets Report* that the substantive claim should be heard as soon as possible.<sup>3</sup>

Amended particulars to this claim (claim 1.1(e)), dated 26 October 1993, state:

- that the Rangitaiki, Wheao, and Whirinaki Rivers, including their tributaries, 'are a water body which jointly and severally are the taonga of claimants';
- that the Crown in the Treaty of Waitangi guarantees to the hapu of Te Ika Whenua te tino rangatiratanga over these rivers for as long as they wish to retain them;
- that the claimants have never relinquished their tino rangatiratanga over these rivers either through legislation or through the application of the English common law presumption that the owner of land on the bank of the river also owns the bed of the river to the middle line (the *ad medium filum aquae* rule);
- that the construction and operation of the Aniwhenua Dam and Wheao scheme were and are detrimental to these rivers and their fisheries.

Claimant counsel, Kathy Ertel, expanded on the above particulars as follows:

In 1840 the Rangitaiki, Wheao and Whirinaki Rivers were a taonga and possession of the claimants. The Crown guaranteed to the hapu concerned, pursuant to the Treaty of Waitangi, te tino rangatiratanga and full exclusive and undisturbed possession of the Rangitaiki, Wheao and Whirinaki Rivers for so long as it was the wish of those hapu to retain them.

---

1. Document B4, p 5

2. Paper 2.35

3. Waitangi Tribunal, *Te Ika Whenua - Energy Assets Report* 1993, Wellington, Brooker and Friend Ltd, 1993, ch 6



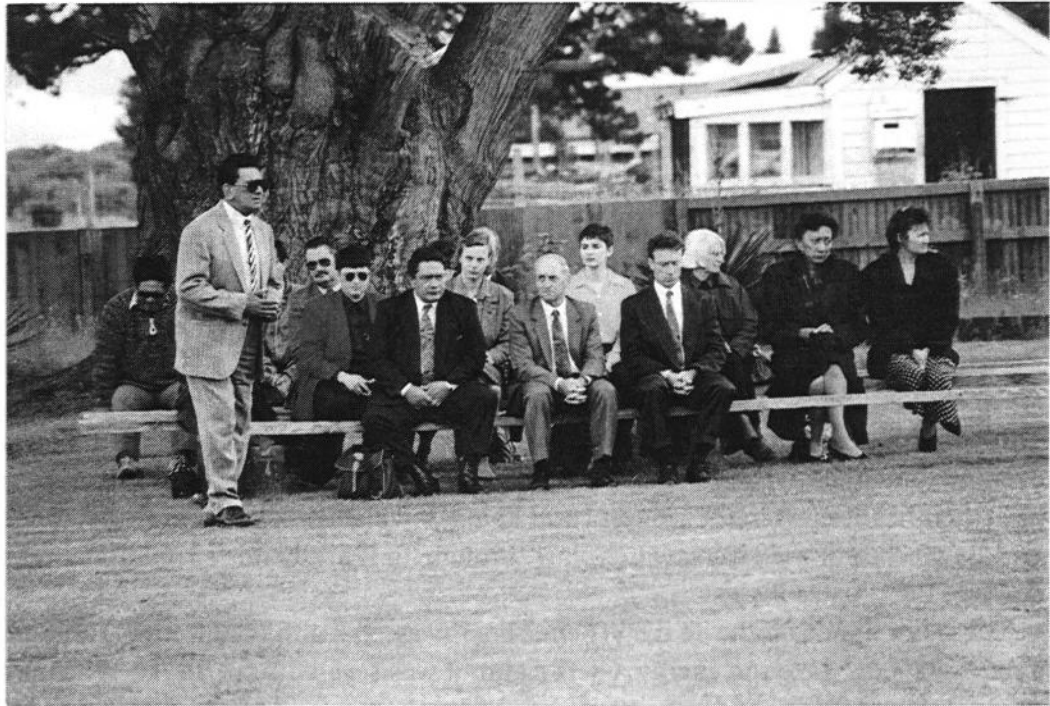


Figure 2: Powhiri, first hearing, Tipapa Marae (manuhiri)

The rivers continue to be taonga to the claimants.

They have never wished to relinquish te tino rangatiratanga over or possession of their rivers.

The claimants have been and are prejudiced in the full enjoyment of their Treaty rights guaranteed to them by, inter alia:

- (a) The expropriation by the Crown of the beds of the rivers via various Coal Mines Legislation.
- (b) The expropriation of management rights and the right to take, use, and dam the water in their rivers (see the Water and Soil Conservation Act 1967, the Public Works Acts, and the Electricity Act 1968).
- (c) The Resource Management Act 1991.
- (d) The application of the *ad medium filum aquae* rule.
- (e) The failure of the Crown to develop a system consistent with the Treaty for the recognition of the rights of the claimants to their rivers.
- (f) The failure of the Crown to recognise to give effect to Maori custom as it relates to rivers.
- (g) The fragmentation of elements of the Rangitaiki, Wheao, and Whirinaki Rivers for the purposes of ownership, control, and management.
- (h) The detriment to their rivers by the construction and operation of the Aniwhenua Dam and the Wheao scheme.
- (i) The detriment to their fisheries of the Aniwhenua and Wheao scheme.
- (j) The proposed creation of third party rights with the consent of the Crown in the Aniwhenua and Wheao scheme.<sup>4</sup>

4. Document B5, pp 6-8



Figure 3: The claimants (tangata whenua)

## 1.2 THE CLAIMANTS

The original claim was brought in the name of Hohepa Waiti and Kingi Porima, as the chairman and secretary respectively of Te Runanganui o Te Ika Whenua Incorporated Society, on behalf of themselves and the hapu represented by Te Ika Whenua: namely, Ngati Whare, Ngati Manawa, Ngati Patuheuheu, and Ngati Huinga Waka.<sup>5</sup>

Wiremu McCauley, a Patuheuheu pakeke, explained that Te Ika Whenua was 'the area surrounded by the mountains of the Rangitaiki valley' and that they had 'always missed out on development because of Te Arawa, Ngati Awa and Tuhoe who surrounded them'. They wanted a runanga to look after their land, rivers, waterways, and dams. Looking at their needs, they had 'decided to establish Te Runanganui O Te Ika Whenua' in a deliberate attempt to create a mechanism and a process to enable them to seek justice. Each tribal unit had discussed the proposal and had agreed to support it:

Let the mana of the falls of the rivers, especially the Rangitaiki, identify Te Ika Whenua.<sup>6</sup>

The claimants' research team further explained that:

The Ika Whenua people have Te Runanganui o Te Ika Whenua as their whakaruruhau (overarching-authority) which is derived from the practice of *tuku rangatiratanga* (transfer of authority).

5. Claim 1.1; *Te Ika Whenua – Energy Assets Report 1993*, sec 1.1

6. Document B4, p 1; doc B4(a)(4), p 10



Figure 4: Tangiharuru meeting house, Tipapa Marae

... The limitations are that Te Runanganui O Te Ika Whenua has authority only to the extent of initiating, implementing, processing, negotiating and completing the claims of Ngati Manawa of Murupara, Ngati Whare of Te Whaiti and Minginui, Ngati Patuheuheu and Ngati Haka of Waiohau and Te Huinga Waka of Kaingaroa.

Once the claims are concluded and the transfer of lands and waterways to the respective iwi is reached, Te Runanganui and Te Ika Whenua's authority will cease. At that point the practice of *tuku rangatiratanga* will come to an end ... Three delegates from each of the above iwi form the Runanganui.<sup>7</sup>

At the first hearing, Maanu Paul, a consultant to the claimants, said that the overarching authority of Te Ika Whenua was not static but dynamic – the constituent hapu could take it back again: 'We have to keep returning to the constituent hapu.'<sup>8</sup>

Oral evidence given by Hohepa Waiti demonstrated that this claim was not the first time that the hapu under Te Ika Whenua's umbrella have come together as one people and gone forward as one iwi to remedy their grievances. In 1924, every man, woman, and child in the area had been levied 10 shillings to raise funds to petition Parliament for an investigation into the Crown purchase of the Kaingaroa 1 block. Most managed to pay, and Iki Pouwhare had listed their names under whanau in a journal. There were 36 pages of names and some 20 to 30 names on each page. On most pages, Mr Waiti was able to identify names of whanau still living in the area.<sup>9</sup>

7. Document B4, pp 2–3

8. Maanu Paul, oral submission on behalf of the claimants, first hearing, 11 November 1993, tape 5, side A, 2370–2377

9. Hohepa Waiti, oral submission on behalf of the claimants, first hearing, 10 November 1993, tape 3, side A, 0194–2603; doc B2, p 87



Figure 5: The Tribunal (first hearing). From left: Georgina Te Heuheu, Judge Glendyn Carter (presiding), Bishop Manuhuia Bennett, and Mary Boyd.

Another witness, Thomas Higgins, agreed that they were all one people who had lived at Te Houhi, although different sections of the tribes overlapped one another.<sup>10</sup>

### 1.3 THE RELIEF SOUGHT

In her opening submissions, Ms Ertel explained that:

The relief able to be sought in the circumstances of this urgent hearing is limited. The claimants seek recognition of their tino rangatiratanga in relation to the Rangitaiki, Wheao and Whirinaki Rivers. This will necessarily include the development, together with the Crown, of a system of recognition which:

- (a) Gives effect to the claimants' beneficial interest in the resource (recognising their right to develop the resource).
- (b) Assures their authority in relation to the management of all aspects of the Rangitaiki, Wheao and Whirinaki Rivers.
- (c) Compensates the claimants for past breaches of the Treaty which have, among other things, resulted in lost opportunity and incursions upon the mana of the claimants.<sup>11</sup>

10. Thomas Higgins, oral submission on behalf of the claimants, first hearing, 10 November 1993, tape 3, side A, 4907-4955

11. Document B5, pp 8-9

The redress sought was 'nothing less than to fully give effect to Maori custom as it relates to rivers'.<sup>12</sup>

With regard to fisheries, counsel explained that:

Te Ika Whenua does not ask for recommendations relating to the taking of fish ...

Findings are sought on:

- (a) the importance of fisheries, especially eel, to the Ika Whenua culture/tikanga
- (b) the effect of the dams on the traditional fisheries and the integrity of the claimants' culture/tikanga
- (c) the effect on the traditional fisheries of other Crown actions.<sup>13</sup>

## 1.4 WAITANGI TRIBUNAL HEARINGS

### 1.4.1 The first hearing

The first hearing of this claim was held at Tipapa Marae, Murupara, from 8 to 11 November 1993. In formal speeches at the powhiri on the marae and in the meeting house, Tangiharuru, speakers for Te Ika Whenua introduced themselves, as is customary, by whakapapa, whakatauki, and waiata. The claimants were represented by Kathy Ertel. Peter Andrews from the Crown Law Office appeared for the Crown and was assisted by Camilla Owens. Vicky Stanbridge of Kensington Swan appeared for the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority, and Paul Sandford had a watching brief for the Forestry Corporation of New Zealand.

Opening submissions were presented by claimant counsel. Miss Stanbridge spoke on behalf of the power boards. In order to prevent unnecessary repetition, it was agreed that the traditional evidence given by witnesses for the claimants at the Rotorua hearing of the energy assets claim,<sup>14</sup> as summarised in chapter 2 of our *Energy Assets Report 1993*, should be adopted and form part of the record of the present hearing.<sup>15</sup> Further oral and written evidence was presented by six witnesses for the claimants: Hohepa White, Maurice Toetoe, Thomas Higgins, Gwenda Paul, Billy Messent, and Maanu Paul.

Claimants arranged a helicopter flight over the claim area for members of the Tribunal and counsel and a ground visit for everybody to the Wheao Dam, the Aniwhenua Dam and powerhouse, and the site of the proposed Kioreweku scheme. On both occasions, spokespersons for the claimants pointed out the natural features of the landscape and special places of historical importance described in oral evidence presented at the energy assets hearing. The helicopter flight gave us a bird's-eye view of the extent of the rohe of Te Ika Whenua described by Hohepa White in oral evidence. The site visits graphically demonstrated the vast area of remaining native bush extending into the Whirinaki Forest Park and the Urewera National Park. This

12. Document B10, p 37

13. Document B5, p 10

14. Document A8(1)-(18)

15. Paper 2.36; doc B14

provided a striking contrast with the 250,000 hectares of the Kaingaroa State Forest, which is said to be the largest exotic forest in the southern hemisphere (see fig 14).

#### 1.4.2 The second hearing

The second hearing was held at the Maori Land Court in Rotorua between 29 and 31 August 1994. Terence Arnold, assisted by Andra Mobberley, appeared for the Crown and Ms Ertel, assisted by Rachel Steel, appeared for the claimants. Interested parties were the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority, represented by Joseph Williams, assisted by Christian Whata, and the Forestry Corporation of New Zealand, represented by Mr Sandford. Tamaroa Nikora appeared for the Tuhoe-Waikaremoana Maori Trust Board (Wai 36 claimants) and for Wai 40 and Wai 386 claimants, whose claims were to be considered with Wai 36. John Tahuparae and Archie Taiaroa for the Whanganui River claimants attended and spoke in support of the Te Ika Whenua claim.

Opening submissions were presented by Mr Arnold on behalf of the Crown and Mr Williams on behalf of the electricity authorities. The following witnesses were called by Mr Williams for the electricity authorities: Richard Stevens, Neil Brennan, Wayne Donovan, Peter Fitchett, and Alan Withy. Crown counsel then called on David Alexander, a contract researcher and planning consultant, to present his evidence on the Crown's assertion of ownership of the riverbeds, its right to regulate the use of the rivers for hydroelectricity generation, and its activities concerning the eel fishery.

Ms Ertel requested she be given the opportunity to reply to the Crown's assumptions concerning the validity of sales of blocks of riparian lands. Subsequently, she and Mr Arnold requested of the Tribunal that the hearing of the rivers claim be adjourned with a view to having it heard along with the land claim. Following an adjournment to enable the Tribunal to consider this suggestion, Judge Carter explained that this was not possible, because the present Tribunal had been constituted to deal solely with the rivers claim. Mr Arnold then sought a ruling that, for the purposes of the river claim, the Tribunal assume that the land sales were valid and the evidence in reply not relevant. In response, Ms Ertel sought a ruling that the land sales were not valid, the issue being how the Crown got rights over the rivers. Mr Arnold said that, if the validity of the land sales were in question, the whole claim would be opened up to wider issues and the Crown would want to argue them fully. After a 10-minute adjournment, Judge Carter ruled that the validity of land sales was not a point at issue in the Te Ika Whenua rivers claim and that the Tribunal would proceed on the basis that it might be able to reach a determination without considering whether the alienations were valid.

Further evidence was given for the claimants by Gwenda Paul and Maanu Paul. Mr Nikora reserved the right to make a submission.



**1.4.3 Third hearing**

The third and final hearing was held at Painoaiho Marae, Murupara, between 11 and 13 October 1994. Mr Arnold, with Ms Mobberley, appeared for the Crown; Ms Ertel and Ms Steel for the claimants. Interested parties were the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority, represented by Messrs Williams and Whata. The Forestry Corporation of New Zealand was represented by Mr Sandford (as an observer); the Electricity Corporation of New Zealand by Shelley Robinson. Mr Nikora appeared for Wai 36, 40, and 386 claimants.

Further evidence was given by Charles Mitchell for the electricity authorities. Mr Nikora made a submission. Closing submissions were made by Ms Ertel, Mr Williams, and Mr Arnold. Ms Ertel exercised the claimants' right of reply.

**1.4.4 Composition of the Tribunal**

The Tribunal was constituted to comprise Judge Glendyn Donald Carter (presiding), Bishop Manuhuia Bennett, Mary Boyd, and Georgina Te Heuheu.

Georgina Te Heuheu advised the Tribunal that she had been appointed a list candidate for the National Party in September 1996, and from that point on she took no further part in the Tribunal's deliberations, eventually resigning following her election to Parliament later that year.



## CHAPTER 2

# NGA IWI ME NGA AWA O TE IKA WHENUA

### 2.1 IDENTITY

At the hearing of the energy assets claim in Rotorua, the claimants identified themselves and established their relationship to their rivers by whakapapa, whakatauki, and waiata. At the first hearing of this claim at Tipapa Marae, they expanded on this evidence in the customary way. This included a version of the whakatauki establishing the claimants' relationship to their rivers, which referred to the ancestor of the house in which we were sitting and not to the iwi as at Rotorua:

*Ko Tawhiuau te maunga*

*Tawhiuau is the mountain*

*Ko Rangitaiki te awa*

*Rangitaiki the river*

*Ko Tangiharuru te tangata*

*Tangiharuru is the person<sup>1</sup>*

No one challenged the traditional evidence recited at Tipapa Marae.

### 2.2 ANCESTORS

In support of the present claim, evidence was presented on the history and tipuna relating to the various original land blocks in the claimant area.<sup>2</sup>

Much of this evidence came from *Kuranui-o Ngati Manawa*, a booklet compiled by the late Henry Tahawai Bird, a kaumatua of Ngati Manawa.<sup>3</sup> This was supported by extracts from Opotiki and Whakatane minute books of the late nineteenth century recording whakapapa and other evidence given by Te Ika Whenua tipuna to establish their claims to blocks of land being put through the Native Land Court.<sup>4</sup>

According to these traditions, Te Ika Whenua people today generally claim descent from the original inhabitants of the upper reaches of the Rangitaiki Valley, as well as from those who came later and conquered them.<sup>5</sup> The original inhabitants were the Marangaranga, descendents of Toi Kairakau, who preceded the arrival in the Bay of Plenty area of the Mataatua waka in about AD1350. Henry Bird wrote:

- 
1. Compare with Waitangi Tribunal, *Te Ika Whenua – Energy Assets Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 2.1
  2. Document B4
  3. Henry Tahawai Bird, *Kuranui-o Ngati Manawa*, Rotorua, Rotorua Printers, 1980 (doc B4(c)(3))
  4. Document B4(b)
  5. Document B4, p 8

## TE IKA WHENUA RIVERS REPORT

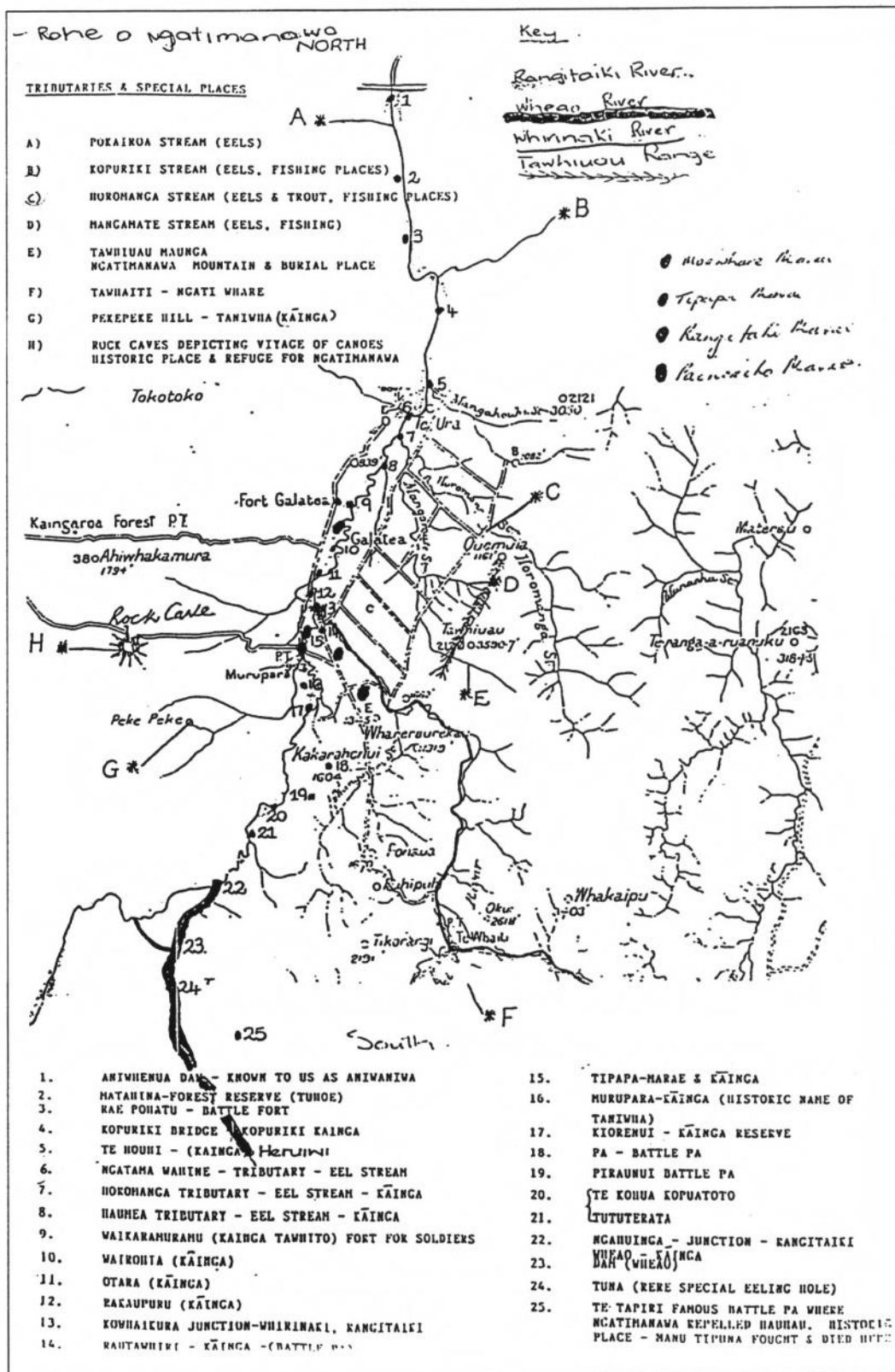


Figure 6: Tributaries and special places in Te Rohe o Ngati Manawa.  
 Map submitted by claimant counsel (doc A8(2)(a)).

The Marangaranga occupied the upper reaches of the Rangitaiki valley from Putauaki in the north the Hikurangi range to the east, the Kaingaroa plateau to the west and as far south as Runanga on the Napier-Taupo highway.<sup>6</sup>

The Marangaranga were conquered by Tangiharuru, who journeyed from Waikato to the Bay of Plenty with his uncle, Wharepakau, and invaded the Rangitaiki Valley.

At the junction of the Rangitaiki and Whirinaki, Tangiharuru and his uncle divided their forces. Tangiharuru led one force up the Rangitaiki and met very little resistance. Wharepakau led the other force up the Whirinaki and was sternly opposed.

At Hinamoki, they joined forces once more and attacked and captured Whangonui, defended by the Marangaranga. The survivors fled to Runanga and Tarawera, where they finally surrendered. Tangiharuru and Wharepakau divided the captured lands between them, Tangiharuru taking the land in the Rangitaiki Valley, including the Kaingaroa Plains, and Wharepakau taking the Whirinaki Valley. The Marangaranga were absorbed by the people with whom they came into contact.

Tangiharuru was the main ancestor of Ngati Manawa and the meeting house at Tipapa Marae was named after him. Wharepakau was the eponymous ancestor of Ngati Whare of Te Whaiti and Minginui.

Whakapapa and the story of Tangiharuru and Wharepakau show that both these hapu were connected to descent lines going back to Tangiharuru and Toi Kairakau and that the middle reaches of the Rangitaiki, the Whirinaki, and the Wheao flowed through their rohe. Places of significant historical and genealogical importance in Te Rohe o Ngati Manawa were described and located for us by a claimant witness, Thomas Higgins (see fig 6).

Claimants stressed that in order to understand the traditional history of Te Ika Whenua hapu it was necessary to appreciate that they were a border people sandwiched between Tuhoe to the east, Te Arawa to the west, Ngati Kahungunu and Ngati Tahu to the southwest, and Ngati Awa and Ngati Pukeko to the north,<sup>7</sup> effectively making them a buffer between the Arawa and Urewera tribes.<sup>8</sup>

Ms Ertel pointed out that you could not just draw lines on a map to show tribal boundaries:

There are certainly areas of exclusive domain but there are hinterlands of overlapping rights and interests. And really the way of telling you who you are and where your boundary is is by the reaction of those around you.<sup>9</sup>

A Tribunal member observed that kinship relationships reflected this. Where boundaries overlapped, there were whanaunga relationships. At the boundary, there would be areas of common usage. Your boundary was really determined by the way the people on your borders regarded you and your rohe.<sup>10</sup>

6. *Kuranui-o Ngati Manawa*, p 13

7. Document B2, p 1

8. *Ibid*, p 8

9. Kathy Ertel, oral submission on behalf of the claimants, third hearing, 13 October 1994, tape 5, side A, 1554-1567

10. Georgina Te Heuheu, oral comment, third hearing, 13 October 1994, tape 5, side A, 1584-1613

### 2.3 THE RIVERS: A MAJOR FOOD SOURCE

In the *Energy Assets Report 1993*, we described the geographical location of the three arterial rivers – the Rangitaiki, Whirinaki, and Wheao – that flow through Te Ika Whenua's rohe, and briefly summarised claimant evidence that was directed to establishing that the rivers were taonga, steeped in tribal lore and history, as well as a main source of material and spiritual sustenance and wellbeing.<sup>11</sup>

More evidence on the rivers was given by claimant witnesses at the first hearing of this claim. Much of it dealt with what Maanu Paul termed the 'eel culture' of Te Ika Whenua. Some of it demonstrated the ihi (awesomeness) and the wehi (power to instill fear) of the rivers. Clearly, the rivers were of central importance in Te Ika Whenua's extensive traditional resource area, bounded on the east and west by bush and to the south by the dry, barren, tussock- and scrub-covered Kaingaroa volcanic plateau. As claimant witnesses explained, in this harsh environment, characterised by long, cold winters and short, hot, dry summers, traditional resources were very localised. Main settlements and cultivations were in bush-covered areas that provided humus and shelter. The tangata whenua were mobile within their rohe, ranging seasonally from place to place, where they had temporary dwellings called patutu, to gather foods such as fern root and berries, and to catch birds, rats, eels, and other fish. The Rangitaiki and its eels, which were available at any time, were a major secure food source and the river was also a source of harakeke (flax) and raupo.<sup>12</sup>

Extensive evidence given by the witnesses indicated that 'Eels and eeling and the rivers have always been the lifeblood of the people of the Ika Whenua valley'.<sup>13</sup> Different varieties of eel once available in the rivers included black eels, called Mataamoe, which lived in holes in the Okahu Stream; the silver-bellied eels of the Rangitaiki, which Patuheuheu called Paewai; blind eels, called Piharau, which lived in the tributaries that flowed through the pumice lands; and yellow-bellied eels, which lived in swamp lands.<sup>14</sup> In different places, they tasted different; some were ordinary, some were special, but all were considered taonga.<sup>15</sup>

While the eel culture was common to all the people of Te Ika Whenua, certain individuals and families possessed special knowledge about eeling. It was their responsibility to protect this knowledge and to pass it on to the next generation. A Patuheuheu whanau with special knowledge was said to carry the mauri of the eels.<sup>16</sup>

Claimants named special places where specific varieties of eels could be caught, and they described traditional methods of eeling.<sup>17</sup> These included whakarapu tuna (eeling in holes) or such devices as hinaki and retireti (see figs 25–27), rama tuna (a flame at night), fern beds or boxes, or simply a line and noke (worm).<sup>18</sup> The claimants explained that the people of Ngati Manawa, Ngati Whare, and Patuheuheu had their

11. *Te Ika Whenua – Energy Assets Report 1993*, secs 2.3–2.4

12. Document B2, pp 9–18

13. Document B4, p 17

14. *Ibid*, p 19

15. *Ibid*, pp 20, 49

16. *Ibid*, p 43

17. *Ibid*, p 20

18. *Ibid*, pp 22–23

own maramataka or fishing calendar. The appropriate time for eeling was at hinapouri or when the moon was darkest.<sup>19</sup>

#### 2.4 THE MAURI OF THE RIVER

According to Wiremu McAuley, whenever you set out to fish or eel, a special karakia would be recited in anticipation of receiving bounty from the river and in thanksgiving for your catch.<sup>20</sup> Water from the Rangitaiki was used in rituals, and many tangata whenua ensured that whanau living outside the rohe had a supply of water for such occasions:

The water from the puna wai [water of the spring] of a whanau is considered a taonga to that whanau as it carries the Mauri [life force] of that particular whanau. Of course all the waters of the puna wai find their way into the river and thereby join with the Mauri of the river. In essence then the very spiritual being of every whanau is part of the river. . . . In this sense the river is more than a taonga[;] it is the people themselves.<sup>21</sup>

Korero purakau (legends) about friendly and hostile taniwha of the rivers, including Murupara, were related at section 2.4 of the *Energy Assets Report 1993*. Claimants identified and named several taniwha and the places with which they were associated, noting that the taniwha often assumed eel-like forms.<sup>22</sup>

The claimants said that the mauri of the Rangitaiki River was in a rock, called Tokokawau, which was associated with kawau or shags.<sup>23</sup> It protected the inhabitants of the river and ensured an abundance of food:

It is not known just when and [by] who[m] the Mauri of the river was instilled in Tokokawau, but it is believed that it must have been done by one of the tipuna of Ngati Manawa and it symbolises the protective role of Rangatiratanga of the people over the river. . . .

. . . It seems that if the people protect the Mauri then the Mauri will in turn protect the people 'it is a reciprocal thing.'<sup>24</sup>

#### 2.5 THE RIVERS: A MEANS OF TRANSPORT AND COMMUNICATION

Waka were used in all the rivers of the Ika Whenua area both for transport and for trading. People cut big logs that were brought down the Horomanga Gorge to the Rangitaiki and the Aniwanui Falls, portaged them around the side of the cliffs, and delivered them to Whakatane for canoes.<sup>25</sup> The rivers were also a means of

19. Ibid, p 22; doc B4(a)(4), p 8

20. Document B4, pp 44-45

21. Ibid, p 45

22. Ibid, pp 30-33

23. Ibid, p 42; doc B4(a)(6), (7)

24. Document B4, p 42

25. Document B18(a), p 16

communication for whanau living on their banks. Before the building of bridges, canoes were left at tauranga (landings) for river crossings. Documentary evidence supports claimant testimony:

The Rangitaiki River was often used for transport to and from the coast for there was only one real obstacle, the Aniwhenua Falls, but it was only a short portage around this and many hands made light work. Coming back upstream, with canoes heavily laden with seafoods, would be heavy going. The Rangitaiki has a strong current and the paddles would be moving fast to maintain progress. In many places of shallow rapids the occupants would need to get out and push or drag the canoes using ropes made from the Flax that grew so handy.<sup>26</sup>

In the post-contact period, the Rangitaiki was used for timber floating, which was impeded by 'numerous substantial eel weirs'.<sup>27</sup> Canoeing and timber floating notwithstanding, the Crown conceded, and the claimants accepted, that these rivers with their waterfalls, narrow gorges, and white-water rapids could not be described as 'navigable' in terms of English common law presumption or statute (see ch 7).

## 2.6 CUSTOMARY USE RIGHTS

Claimant evidence for both the energy assets and the rivers claims was further directed to establishing that Te Ika Whenua had customary water rights and rights to mahinga kai in the middle reaches of the Rangitaiki, Wheao, and Whirinaki Rivers. Most of this evidence related to the customary rights of individuals and family groups, or hapu, to use special resources of the river and to occupy special places in the river such as pa tuna (eel weirs), tauranga ika (landing places for canoes), and fishing stands.

To ensure such rights were recognised and respected by all those living along the river, and by neighbouring iwi, pou (posts) were erected and rahui (prohibitions telling others to keep away) were imposed.<sup>28</sup> Manuka posts were placed in the river with a personal item such as a garment attached, indicating that this place was reserved for a particular person or whanau to fish.<sup>29</sup> Rahui were imposed after drownings for a period of nine days, the time it took for a body to rise to the river surface.<sup>30</sup> Evidence recorded in the Native Land Court minutes for the Kaingaroa 1 and Whirinaki blocks indicated that there were 'many rahui on the banks of the Rangitaiki River' in the old days.<sup>31</sup> It was thought that 'the practice of rahui for eels began to die out in the heyday of forestry development and the migration of people into the area for logging'.<sup>32</sup>

26. A A Coates, 'The Galatea Story', *Whakatane District Historical Review*, monograph, 1980, p 8

27. Document B2(d), p 93

28. Document B4, p 48; doc B4(a)(2), pp 1-4; doc B4(e), pp 17-18

29. Document B4, p 24

30. Ibid, pp 26-27

31. Ibid, p 25

32. Ibid, p 26

## 2.7 MANA AND RANGATIRATANGA OVER THE RIVERS

The claimants stated that they had 'never relinquished the mana of and over their rivers or tino rangatiratanga over them'.<sup>33</sup> Claimant consultant Maanu Paul spoke of tino rangatiratanga as 'governance by iwi [which] succeeds because of the relationships they have with their surrounding area'. Governance, he added, depended on 'the skill of your pakeke (your elders) in maintaining the relationships with the surrounding iwi so that there never arises the idea that somebody will come and demand to take some other portion'.<sup>34</sup> Tribal mana, he explained, was derived from the abundance of special eels for hospitality and traditional gift exchange as koha; Ika Whenua saw themselves as obligated to support others with eels.<sup>35</sup> As they saw the eels disappear, however, it became harder and harder to maintain mana among neighbouring iwi and hapu.<sup>36</sup>

Native Land Court minute books and oral testimonies obtained from pakeke and recorded by claimant researchers indicated that the claimants' tipuna had proprietary rights to pa tuna in the Rangitaiki River and its tributaries and to house sites, cultivations, and mahinga kai on adjacent banks. These sources also indicated that the activity of fishing and marking personal fishing places with tauranga was a means of establishing and exercising tino rangatiratanga, as was the erection of pou and the imposition of rahui. Tino rangatiratanga was asserted and maintained by the protection of the mauri of the river, which was instilled in the rock Tokokawau as a symbol of Te Ika Whenua's guardianship of resources for the next generation.<sup>37</sup> Without such manifestations of tino rangatiratanga, those people would not have had the right to control the river in this way:

you can't have Tino Rangatiratanga if you don't have your Mauri and your Mauri must be recognised by your whanau, surrounding whanau, by your hapu, surrounding hapu, surrounding iwi and so on. They give credence and credibility to your Mauri.<sup>38</sup>

The following historical example of the recognition of Te Ika Whenua's tino rangatiratanga over the rivers in their rohe was given by claimant researchers. When Ngati Manawa returned to Karamuramu after fleeing to Rotorua, they found the Native Contingent under Captain Preece was catching eels in the Ngatamawahine Stream. They asked him to cease eeling and he did. Obviously, Preece recognised their mana over the rivers.<sup>39</sup>

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33. Claim 1.1(e), para 7

34. Document B18(a), p 1

35. Maanu Paul, oral submission on behalf of the claimants, first hearing, 11 November 1993, tape 5, side A, 1858-1873

36. Document B4, p 49

37. Document B4(a)(6), pp 2-3

38. Ibid, p 6

39. Document B4, p 25

**2.8 CONCLUSION**

Claimant evidence clearly established that the middle reaches of the Rangitaiki and the Whirinaki and Wheao Rivers were a taonga over which the hapu of Te Ika Whenua had mana and rangatiratanga. Not only were they a vitally important food source and means of transport and communication, but they were also essential for spiritual and cultural wellbeing. From the Te Ika Whenua perspective, the people belong to the rivers and the rivers belong to them.



## CHAPTER 3

# UPHEAVALS AND CHANGES, 1812–1920

### 3.1 INTRODUCTION

Evidence from Henry Tahawai Bird's *Kuranui-o Ngati Manawa* and from Native Land Court records (see sec 2.2), together with the personal recollections of the claimants, gave us a comprehensive overview of the upheavals and changes that occurred in the relationship of the people to the rivers following the arrival of the Pakeha. Claimant researchers emphasised two main periods in the process of change: namely, the military period and the Native Land Court period.<sup>1</sup>

Crown research supplemented claimant research with detailed evidence from Native Land Court records and Government files on the lease and sale of riparian blocks of land.<sup>2</sup>

In this chapter, we consider how far upheaval and change from about 1812 to 1920 eroded the customary and Treaty rights of the tangata whenua to use, occupy, and control their rivers.

### 3.2 THE MILITARY PERIOD

#### 3.2.1 Intensification of tribal warfare and migration

European contact 'began badly for the Ngati Manawa', with the unprecedented intensification of tribal warfare and temporary migrations inland, which disrupted the lives and settlement patterns of the local hapu for over a decade.<sup>3</sup> In about 1812, Ngati Pukeko from Whakatane invaded Te Ika Whenua territory, eventually driving Ngati Manawa and their close relatives, Ngati Whare, out of the Rangitaiki Valley. Some refugees sought sanctuary at Te Putere on the Waiau River under Ngati Kahungunu; others at Tarawera, under Rangitihi. Then in 1818, 1822, and 1823, Nga Puhi expeditions armed with muskets raided the Bay of Plenty (see fig 7). The 1823 expedition proceeded up the Rangitaiki, advancing on Whirinaki above Galatea, then up the Horomanga Stream to Urewera county. People in these parts retired inland and only returned after Nga Puhi left.<sup>4</sup>

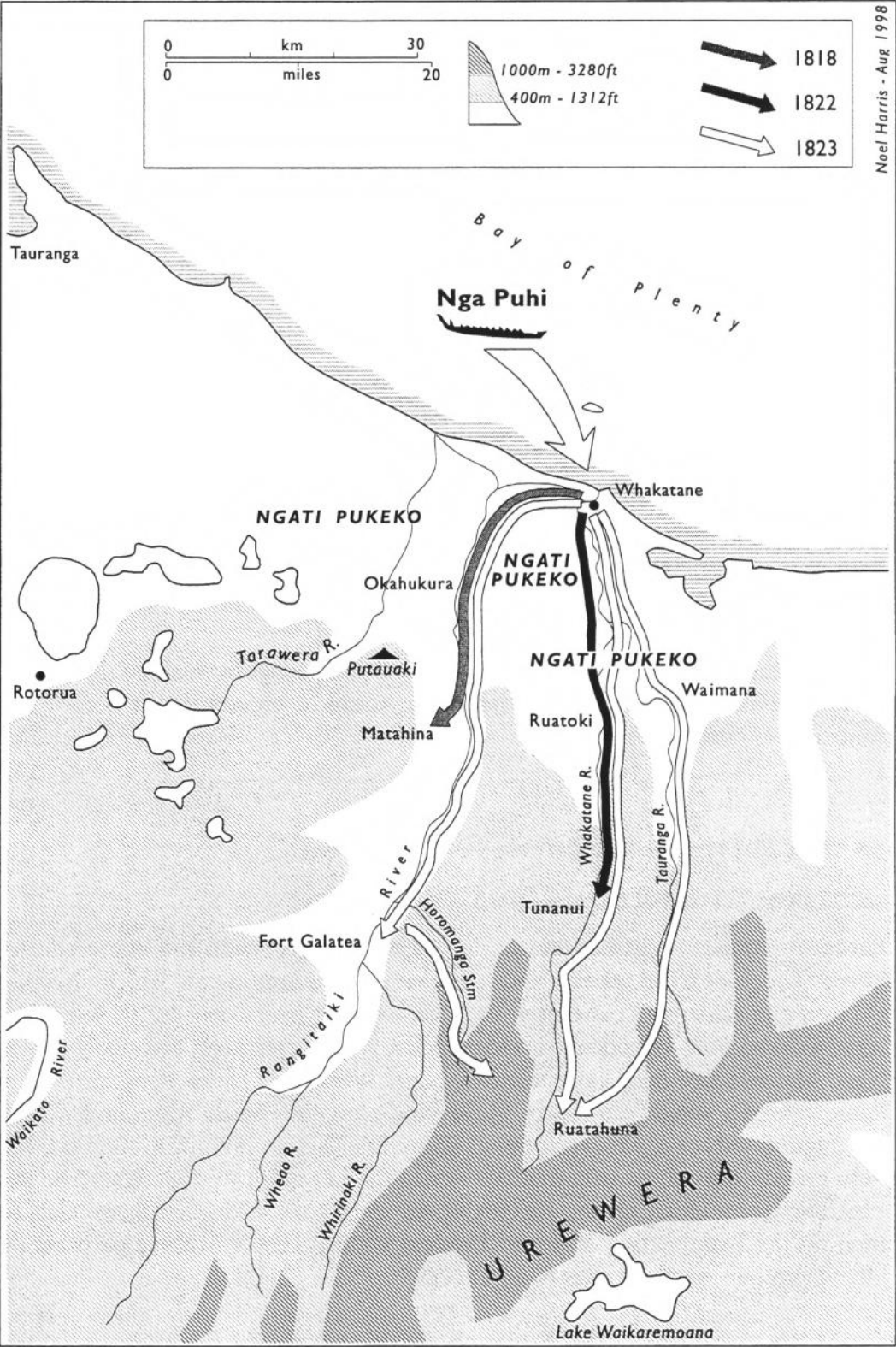
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1. Document B2

2. Documents C3, C3(a)–(c), C4

3. Document B2, p 19

4. Elsdon Best, *Tuhoe: The Children of the Mist*, 2 vols, Wellington, AH and AW Reed, 1973, vol 1, pp 529–530



Noel Harris - Aug 1998

Figure 7: River routes of Nga Puhi, 1818–23. Source: material prepared for the *New Zealand Historical Atlas: Ko Papatuanuku e Takoto Nei*, Auckland, David Bateman Ltd, 1997, supplied courtesy of the editor, Malcolm McKinnon.

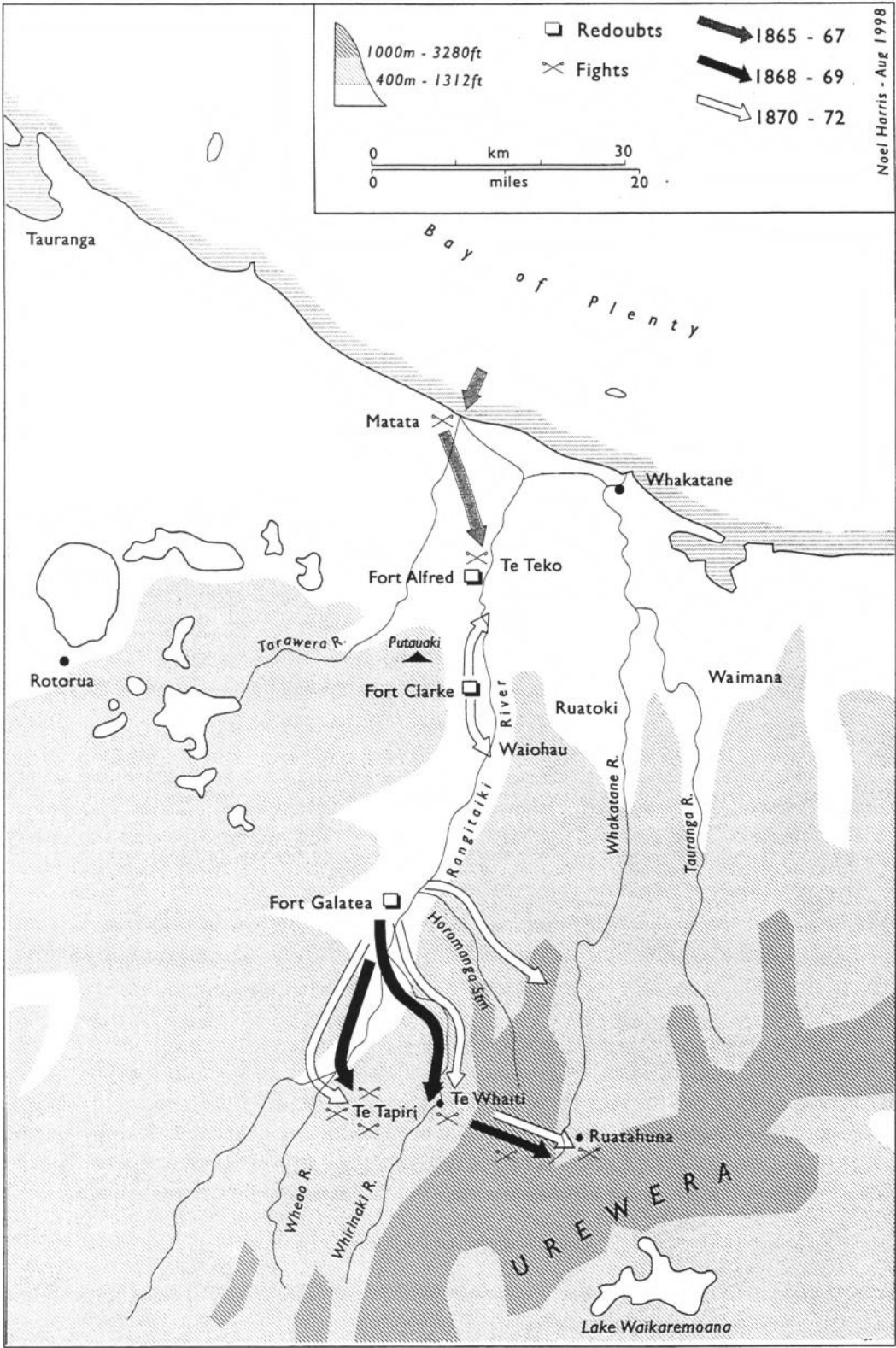


Figure 8: River routes of military incursions, 1865-72. Source: Evelyn Stokes, J Wharehuia Milroy, and Hirini Melbourne, *Te Urewera: Nga Iwi te Whenua te Ngahere (People, Land and Forests of Te Urewera)*, Hamilton, University of Waikato, 1986, fig 5.

### 3.2.2 Early European contacts

In about 1829, Ngati Whare and Ngati Manawa began to visit coastal tribes and European trading stations to procure firearms in exchange for pork. By trading outside their rohe, they gradually acquired a widening range of trade goods, including potatoes, which they began to cultivate in sheltered bush areas to supplement their traditional food resources.

According to Captain Gilbert Mair, who visited Ngati Manawa in 1866, they had cultivations at Motumako, Rekereke, Te Wera o Punua, Oruatewehi, and Otahakorae Bushes, and cultivated all along the Rangitaiki from Ngahuinga to Raepohatu.<sup>5</sup>

In the 1860s, those who lived in open country on the Rangitaiki were ploughing their lands and growing their wheat, and generally had sledges and drays at a steel mill at their kainga.<sup>6</sup> Nevertheless, Captain Whitmore and Captain St John found numerous substantial eel weirs in the Rangitaiki, an indication that the bounty of the rivers remained vitally important in the slowly changing economy.<sup>7</sup>

As early as 1865, Ngati Manawa were urging Mair to lease land from them for running sheep. In 1867, William Hammick leased land from local Maori and put in 2000 sheep, but danger from Te Kooti forced him to evacuate his run.<sup>8</sup> A little later, Captain St George attempted to run sheep on the plains, but the land was generally too poor for them.<sup>9</sup>

The time and manner in which Christianity was received by the hapu of Te Ika Whenua were recorded in Native Land Court evidence given by Hapimana Parakiri on behalf of Ngati Apa claimants to Whirinaki on 24 October 1890:

N' Manawa, N' Apa & N' Hineuru all lived at Otukopeka & while they were there christianity was introduced. Hakaraia brought the first tidings. Shortly after came Hone Heke & Te Waaka from the north (Ngapuhi) via Ruatahuna. My parents received christianity at Otupeka . . . All the tribes were living there for many years and built houses there.<sup>10</sup>

After some years, he and his parents moved to Tututarata and had large houses there, though Ngati Hape were 'the real owners' of this land:

When my parents and all N' Manawa lived at Tututarata we built a church there and Hapimana (mr Chapman, Missionary) asked my father to go to a meeting at Te Rotokakahu. It was the year I was christened perhaps '48. After the meeting my father brought Mr Chapman to Tututarata & I was born on the day he arrived. After I grew up to be a good sized boy 2 ministers came to that place. Mr Brown was one, a teacher in the English church & Mr Preece was the other. Rawiri my father was appointed to

5. Document B2, p 13

6. 'Report from C Hunter Brown, Esq, of an Official Visit to the Urewera Tribes', June 1862, AJHR, 1862, E-9, p 27 (doc D5(a)(2)); see also MS - papers - 0148 - 081, Alexander Turnbull Library, Wellington

7. Document B2(d), p 93

8. 'The Memoirs of William Maxwell Hammick (1848-1915): Part 11 - The Kaingaroa-Taupo Period', *Whakatane and District Historical Review*, vol 29, no 2, November 1981, pp 62-70

9. Document B2, pp 23-24

10. Whakatane minute book 3, fol 49 (doc B4(e), p 25)

conduct the Synod. When I was well grown, but had no beard, N' Manawa moved to Kuhawahia [Kuhawaea] but some to Kahaaruhanui. After christianity was well established & war had ceased the descendants of Tangiharuru and others went away and N' Apa came to the places that I have given names of.<sup>11</sup>

### 3.2.3 Military campaigns, 1868 and 1871

Te Ika Whenua people were drawn into the New Zealand wars in 1865 when Kereopa Te Rau, an emissary of Pai Marire, a new religion led by the prophet Te Ua, passed through their territory seeking converts and Patuheuheu and Ngati Whare joined his followers. When Patuheuheu asked the Ngati Manawa chief Peraniko Tahawai to join them, he wrapped himself in a Union Jack, indicating his support of the Government.<sup>12</sup> In the battle that followed, closely related people fought each other. The defence of Te Tapiri by approximately 200 Ngati Manawa against an enemy force of at least 600 was described by Mr Bird as 'one of the greatest feats of arms ever undertaken'. Together with a delayed reserve force of Ngati Rangitihi led by Mair, it halted any plans Kereopa had of crossing the Kaingaroa Plains to Waikato.<sup>13</sup> Nevertheless, Ngati Manawa were forced to flee, and their property and livestock were destroyed by the 'rebels'.

According to Mr Bird, 'the government had issued a warning that any tribe supporting or harbouring Kereopa would have their land confiscated'.<sup>14</sup> Moreover, under the New Zealand Settlements Act 1863, land confiscations from Maori had already occurred in other parts of the country, and 'Ngati Manawa, always aware of their vulnerability, were not prepared to take that risk'.<sup>15</sup> For several years, most of them lived in exile with Te Arawa in Rotorua; others lived first with Ngati Rangitihi in Tapahoro then at Te Awa o Te Atua on the coast at Matata.<sup>16</sup>

Between 1868 and 1871, Ngati Manawa fought with Government forces as kupapa in campaigns against Te Kooti, the prophet of another new religion, later called Ringatu. Te Kooti and a band of followers had escaped to Poverty Bay from the Chatham Islands, where he had been held in prison as a suspected Hauhau.<sup>17</sup> Pursued by the Armed Constabulary and kupapa, Te Kooti attacked Pakeha settlers and Maori from his stronghold in Urewera and attempted to cross the Kaingaroa Plains to Taupo and link up with the Kingites in the Rohe Potae. George Whitmore, the commander of the Armed Constabulary, led campaigns against Te Kooti in Urewera from

11. Ibid, fols 49–50 (pp 25–26). The Reverend Alfred Brown, the Reverend Thomas Chapman, and the catechist George Preece were Church Missionary Society missionaries stationed at Tauranga, Rotorua, and Ahikereru respectively: see Helen Hogan (ed), *Renata's Journey*, Christchurch, 1994, pp 76, 146–149, and G H Scholefield (ed), *A Dictionary of New Zealand Biography*, 2 vols, Wellington, Department of Internal Affairs, 1940, vol 2, p 183.

12. Document B2(d), p 107; Henry Tahawai Bird, *Kuranui-o Ngati Manawa*, Rotorua, Rotorua Printers, 1980 (doc B4(c)(3)), p 19

13. *Kuranui-o Ngati Manawa*, pp 20–21

14. Ibid, p 19

15. Document B2, p 21

16. Document B2(d), p 107

17. Judith Binney, 'Te Kooti Arikirangi Te Turuki', DNZB, pp 462–466

headquarters he established in the Rangitaiki Valley, first at Fort Alfred, then at Fort Clarke, and finally at Fort Galatea (see fig 8). Whitmore adopted a 'scorched earth' policy to cut off supplies to Te Kooti and his supporters. Kainga, cultivations, and property of local iwi were destroyed and their lives seriously dislocated.<sup>18</sup>

### 3.2.4 Pacification and public works

After Donald McLean became the Native Minister in 1869, he endeavoured to secure peace by using the Armed Constabulary, British regiments, surrendered rebels, and kupapa to build roads and telegraph lines, and by scaling down military operations. Ngati Manawa and Rangitihi kupapa were employed in road gangs, and Ngati Whare and Patuheuheu rebels were persuaded to surrender and were relocated in camps at Te Teko and Te Putere, near the mouth of Te Awa o Te Atua.<sup>19</sup>

Patuheuheu eventually returned to Te Houhi and Ngati Whare to Te Whaiti. In 1872, the rest of Ngati Manawa, who were still residing in Rotorua and elsewhere, were allowed to return to Kaingaroa (see fig 9):

Some returned to their devastated kainga at Motumako, others settled at Karamuramu next to the fort, especially those people whose men were in the military. ... Some it seems also returned to the pre-war settlement of Tauaroa, about five miles from Galatea, as in 1874 a census record shows 123 Ngati Manawa at Tauaroa and Galatea.<sup>20</sup>

The military post of Fort Galatea remained in operation until about 1876.

Returning exiles reasserted their mana and rangatiratanga and customary use rights over the rivers, as evidenced by the placing of a rahui on the Ngatamawahine Stream to stop the Native Contingent eeling.<sup>21</sup> Government policy, however, was to bring remaining Maori districts of the North Island directly under its control by opening them up for Pakeha settlers, and peacefully amalgamating them into the European social, economic, and political system.<sup>22</sup>

## 3.3 THE NATIVE LAND COURT PERIOD

### 3.3.1 The Native Land Acts of 1865 and 1873

A main instrument of Government policy was the Native Land Court, constituted under the Native Lands Act 1865.<sup>23</sup> According to the preamble, the purpose of the Act was to provide for the investigation of Maori customary title and for the conversion of such modes of ownership into titles derived from the Crown.

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18. Document B2, pp 23–27

19. Ibid, pp 27–32

20. Ibid, pp 33–34

21. Document B4, p 25

22. See DNZB, pp 257, 325, 462–466, 564

23. Document C9(a), pp 10–23



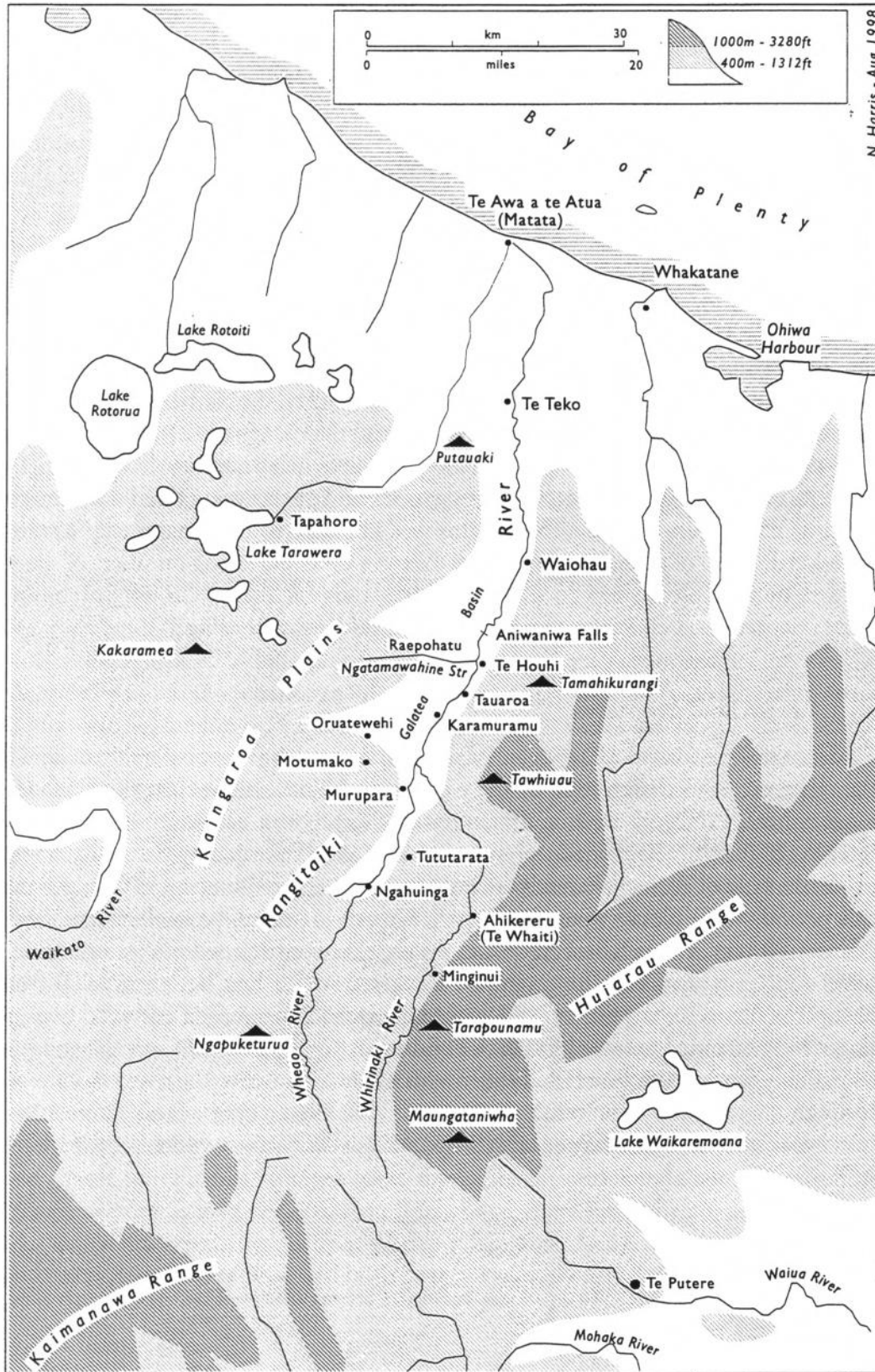


Figure 9: Maori place names

As the historian Judith Binney has written:

The court acquired jurisdiction over the whole country and the Crown's monopoly rights of land purchase were ended. The law gave authority for any Maori to bring tribal land before the court to establish a collective title.

... In the first eight years of its operation, each tribal land block whose title had been determined was vested in ten nominated chiefs from the group establishing the claim. They were called trustees, but in practice they became the owners with the right to sell.<sup>24</sup>

As the Tribunal has indicated in its *Tē Roroa Report 1992*, unfair practices and frauds experienced by those who sold extensive areas of land directly to private purchasers under this 10-owner system led to various amendments to the native land legislation.<sup>25</sup> Under section 47 of the Native Land Act 1873, the Native Land Court was required to include on a 'Memorial of Ownership' the names of all persons found to have rights in a block of land.<sup>26</sup> Sales of land could then be effected by determining the interests of any one or more owners willing to sell and partitioning them out from the interests of the non-sellers. Although this was intended to be a major step towards individualisation of titles, in practice it resulted in ever-increasing numbers of shareholders or multiple owners in a block. This greatly facilitated Crown purchasing, which was renewed in 1873 in competition with private purchasing.<sup>27</sup>

### 3.3.2 Crown land purchases

Evidence presented by the Crown and claimants showed that the ownership of land in the claim area was determined by the Native Land Court between 1878 and 1908.<sup>28</sup> Government surveyors and land purchase officers were active in acquiring the interests of individuals named as owners of land titles awarded by the court. In the event, the bulk of Te Ika Whenua's ancestral lands were partitioned and purchased in this period. Some blocks were taken by the Crown in lieu of survey liens and court charges. Others originally reserved from purchases or partitioned out for non-sellers were eventually acquired; for example, Rangipo, which had been excluded from Kaingaroa 1, and Kuhawaea, which Ngati Manawa had not wanted surveyed because they firmly intended to leave it for their children.<sup>29</sup>

In this report, we are concerned solely with what happened to the rivers that flowed through these lands as a result of Native Land Court orders and Crown land purchases; we are not concerned with the purchases themselves, which are the subject of Te Ika Whenua's land claim.

24. Judith Binney et al, *The People of the Land – Te Tangata me te Whenua: An Illustrated History of New Zealand, 1820–1920*, Wellington, 1990, p 143

25. Waitangi Tribunal, *The Tē Roroa Report 1992*, Wellington, Brooker and Friend Ltd, 1992, sec 1.2; cf Binney, *The People of the Land*, pp 143–144

26. Document C9(a), p 56

27. *The Tē Roroa Report 1992*, secs 1.2, 2.1

28. Document C3, p 122, passim; see also docs B2, C8

29. Document C8, p 1



The fate of Te Ika Whenua rivers was eventually determined by the Crown's application of the English common law presumption of *ad medium filum aquae*; namely, that the owners of land on the banks of a river also own the bed of the river to the middle line (see ch 7). Consequently, for the purposes of the claim, we need to establish what happened to the riparian lands abutting on or including the Rangitaiki, Whirinaki, and Wheao Rivers and their tributaries.

In appendix III, we tabulate the evidence given by Crown researcher David Alexander on the land title history of the riparian blocks. As Mr Alexander explained, he relied exclusively on Government files and Maori Land Court records, and in the time available, he was unable to read and check all the existing records.<sup>30</sup> The appendix is subject to this qualification. For maps based on Mr Alexander's evidence, see figures 10 and 28.

Following the assurance that the Tribunal would proceed to hear the present claim on the basis that it might be able to reach a determination without considering whether the alienations were valid (see sec 1.4.2), this evidence was not challenged and no party made further representations on the validity or otherwise of land sales.

### 3.3.3 The social and economic effects of the Kaingaroa 1 purchase

Claimant evidence on the title investigation and purchase of one of the large riparian blocks, Kaingaroa 1, highlighted some of the social and economic effects on the claimants and counterclaimants who attended the marathon court hearing from 31 July to 20 September 1878 and the rehearing from 27 October to 4 November 1880.<sup>31</sup> Because this evidence was more directly related to Te Ika Whenua's land claim, it was not challenged by the Crown. Nevertheless, it has some bearing on the rivers claim.

To provide suitable accommodation and telegraphic services for European officials, the court sat at Matata and Whakatane respectively. To attend, Maori participants had to travel some distance and stay with local people, who had to try to feed many of them when their own food supply ran out.

Local storekeepers and grog sellers were 'ready and willing to supply the visitors with drink and food and many were more than happy to run up accounts for those known to be the likely beneficiaries of land titles'.<sup>32</sup> A land purchase officer handed out vouchers to Maori, charging them against these blocks of land. Many vouchers were never received by Maori to whom they were made out, and storekeepers charged Maori much more than Europeans.<sup>33</sup>

The first hearing was held during the planting season. Food was constantly short and Maori participants suffered great privation. Ngati Manawa's request that the second hearing be held at Karatia in March, when there would be plenty of food and they would not be taken away from planting, fell on deaf ears. 'This kind of privation and stress and the cost it caused both in money and health and the resulting loss of

30. Document C3, pp 2, 30

31. Document B2, pp 36–73; doc C8, pp 1–18

32. Document B2, p 42

33. Ibid, p 57

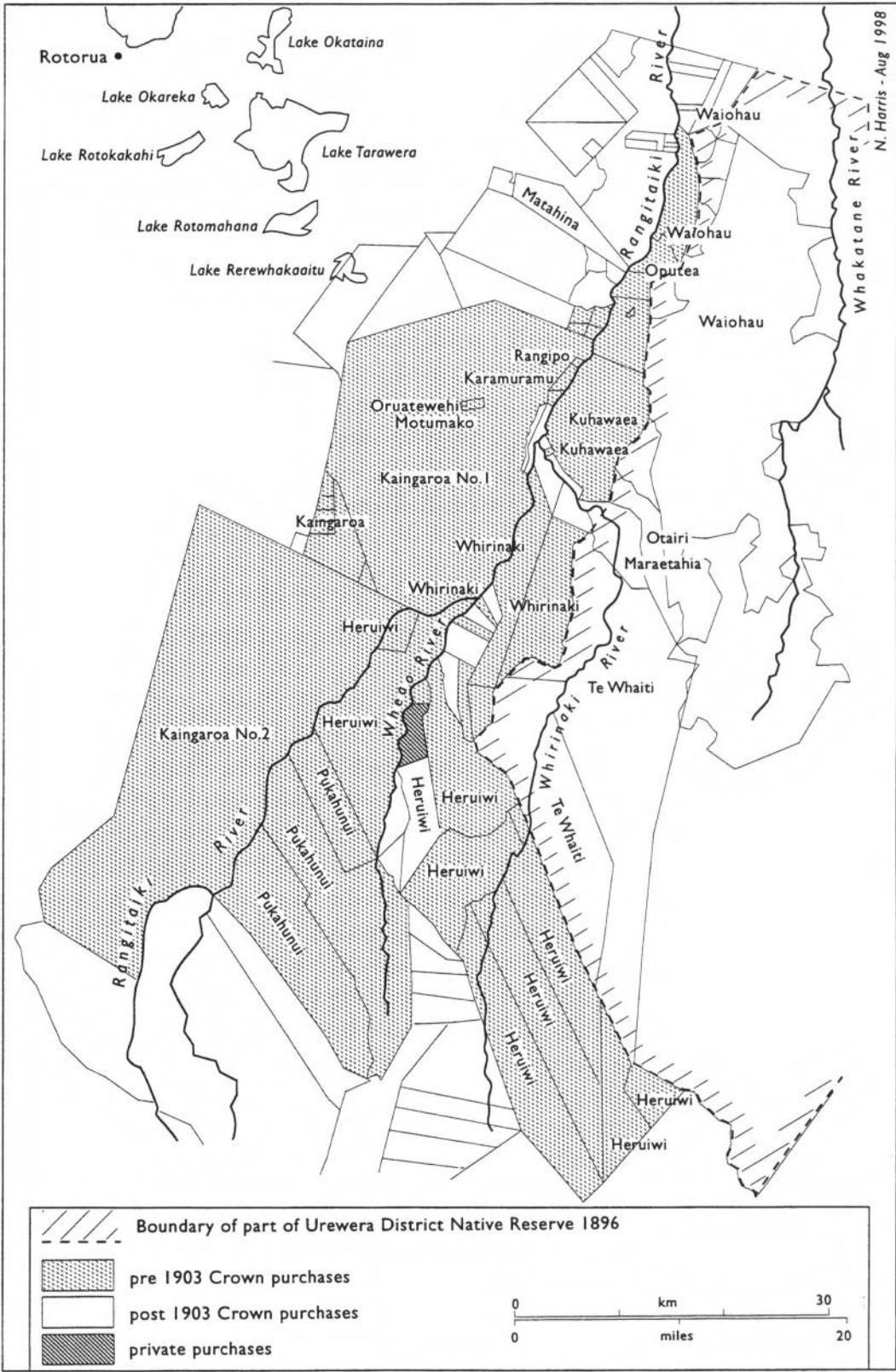


Figure 10: Purchases of riparian blocks. Source: Max Oulton's map of partitions and sales of riparian lands (fig 28). See that map for further details.

land,’ the claimant research team concluded, ‘may be seen as coercion by starvation.’ Moreover, it was made easier ‘by misguided loyalty of ex-military Maori men to their old commanding officer’, Captain Gilbert Mair, who was now the land purchase officer. The court, it seemed, was prepared to allow this. The whole court process was for the benefit of the Crown.<sup>34</sup>

Notwithstanding the economic and social effects of attending Native Land Court hearings, it seemed to the claimant research team that, with so much land being purchased for supposedly large payments, the sellers should have been well-off in the years that followed. However, photographic and other evidence showed ‘poverty and destitution rather than any kind of affluence’.<sup>35</sup>

After the purchase of Kaingaroa 1 and the exclusion therefrom of Oruatewehi Bush (470 acres) and the Rangipo block (670 acres) as native reserves:

The people attempted to live life much as they had before, moving from place to place according to the season and the activities being undertaken. The old kainga at Motumako continued to be the main home for some but there were many more who remained at Karamuramu near the fort. Regular excursions to Heruiwi, Motumako and other places were continued . . . but there was pressure put on them, especially by the schools, to remain living around the fort.

By 1885 there were three meeting houses at Karamuramu. They were Tangiharuru, Ruatapu and Tuwhare. Mr William Bird, who had married one of the old chief Peraniko Tahawai’s grand-daughters, Kiekie, set up shop there in 1884.

In 1878, there had been a school at Fort Galatea for a short time but the teacher didn’t last long and the school closed.<sup>36</sup>

Following a request from Ngati Manawa in 1880 for the Fort Galatea school to be reopened, a new teacher, George Wood, arrived. He took a very active role in the community, attending the sick and acting as a money lender.<sup>37</sup>

In 1881, the native school inspector, James Pope, reported:

There are many Native Settlements here and there along the banks of the river [Rangitaiki]. They are all very small. The cultivations are all in the mountains at Ahikereru and Waiohau, which are at a considerable distance from the school.<sup>38</sup>

During the sale of the Kuhawaea block in 1883, Wood reported that there were 11 European stores on the block and between 500 and 600 Maori, most of whom were living in tents.<sup>39</sup> Claimant researchers took this to mean that ‘the juggernaut of the Native Land Court process and inevitable land sales continued’ without any evidence of economic or social improvements, such as substantial housing, mills, or their own school building or church.<sup>40</sup>

34. Document B2, pp 65, 66

35. Ibid, p 77; doc B2(e), pp 1–5

36. Document B2, pp 74–75

37. Ibid, p 75

38. Document B2(d), p 112

39. Ibid; doc B2, p 77

40. Document B2, p 77

Furthermore:

As the land was sold . . . the people became more and more restricted in their food gathering life-style so the rivers became even more vital to their survival and most of the communities that developed were near the river.<sup>41</sup>

### 3.3.4 Natural disasters

Worse still, beginning with the Tarawera eruption in June 1886, a succession of natural disasters struck the local hapu, seriously disrupting their lives. Large quantities of ash were deposited on the Kaingaroa Plains and the Rangitaiki River valley (see fig 11). People living there lost most of their crops and were forced to move because food became scarce. Maori living at Galatea went further up the Rangitaiki to Heruiwi and Whirinaki, while Patuheuheu evacuated to Ruatahuna and other places.<sup>42</sup>

In 1892 and 1904, serious flooding caused further losses of crops and stock. Unusual frosts in 1897, 1898, and 1900 destroyed crops because local hapu had been encouraged by European example to grow them in the open rather than close to the bush for shelter.

Floods and frosts were followed by famine, much sickness, and deaths. In the absence of local medical services, teachers at Galatea and Te Houhi Schools tried unavailingly to obtain food and medicine for their pupils from the Education Department. Claimant researchers found a letter written by Joseph Wylie, the teacher in Galatea, in September 1887 expressing his disappointment at his request being turned down and reporting that the children come to school 'half starved as well as being half naked'. Finally, they noted, the teacher provided food for them himself because he 'could not bear to see them standing about at play time, so deplorable looking without any spirit for play'.<sup>43</sup> There is no record of the Government providing any relief during the famine years.<sup>44</sup> Rather, it seems, people were forced to buy expensive food they could not afford, and cartage was an additional charge.<sup>45</sup> Presumably, costs were met from payments for land sales or seasonal labour or people ran themselves into debt. Over this period, some men were able to find work on Hutton Troutbeck's sheep station on the Kuhawaea block.<sup>46</sup> The situation in the Rangitaiki Valley at this time was similar to that in other remote Maori districts where the population was still declining, primarily because immunity to European diseases had not been acquired.<sup>47</sup> But undoubtedly it was worse because of the harsh climate and environment, the limited resources, and the succession of natural disasters.

On the other hand, we have no evidence that, after the eruption and floods, traditional food resources of the rivers were any less abundant. Nor have we any evidence

41. Document B4, pp 17-18

42. Document B2(d), pp 114, 116; doc B9, p 3

43. Document B2, p 80; doc B2(c)(4), pp 10-21

44. Document B2, p 79

45. Ibid, p 84

46. Ibid, p 83

47. Compare with *The Te Roroa Report 1992*, sec 5.3.5; see also Keith Sinclair, *Kinds of Peace*, Auckland, Auckland University Press, 1991, pp 30-32





Figure 12: Tangi at Karamuramu on the banks of the Rangitaiki River, near Fort Galatea. The meeting house, Ruatapu, is now at Painoaiho Marae. The photograph was taken by Lundius, an Austrian surveyor, shortly before the Tarawera eruption of 1885. Photograph courtesy of the Auckland Institute and Museum (B4891/C30175).

that, after the sale of large riparian blocks to the Crown, people gave up using the rivers for eeling and food gathering. Rather, it seems, people were becoming less mobile in search of subsistence as they began to subdivide unsold lands in multiple ownership for family farms and to work for cash incomes during the summer months on the roads or in shearing gangs.<sup>48</sup>

From about 1910 on, the health and wellbeing of the people of Te Ika Whenua began to improve slowly, although the absence of many men on active service during the First World War once again interrupted the process of change and development.<sup>49</sup>

### 3.3.5 Rivers a continuing source of livelihood

Although claimant evidence on social change in the aftermath of the New Zealand wars and land-selling dealt mainly with Ngati Manawa, it served to illustrate that, while people were beginning to rely more on subsistence farming, summer shearing, and casual labour, the rivers and eels continued to be their main source of livelihood. When Pakeha settled in the district, river resources were shared. As long as Pakeha were a small minority who married local Maori, they respected the customary rights of tangata whenua.

48. Document B2, pp 85, 90

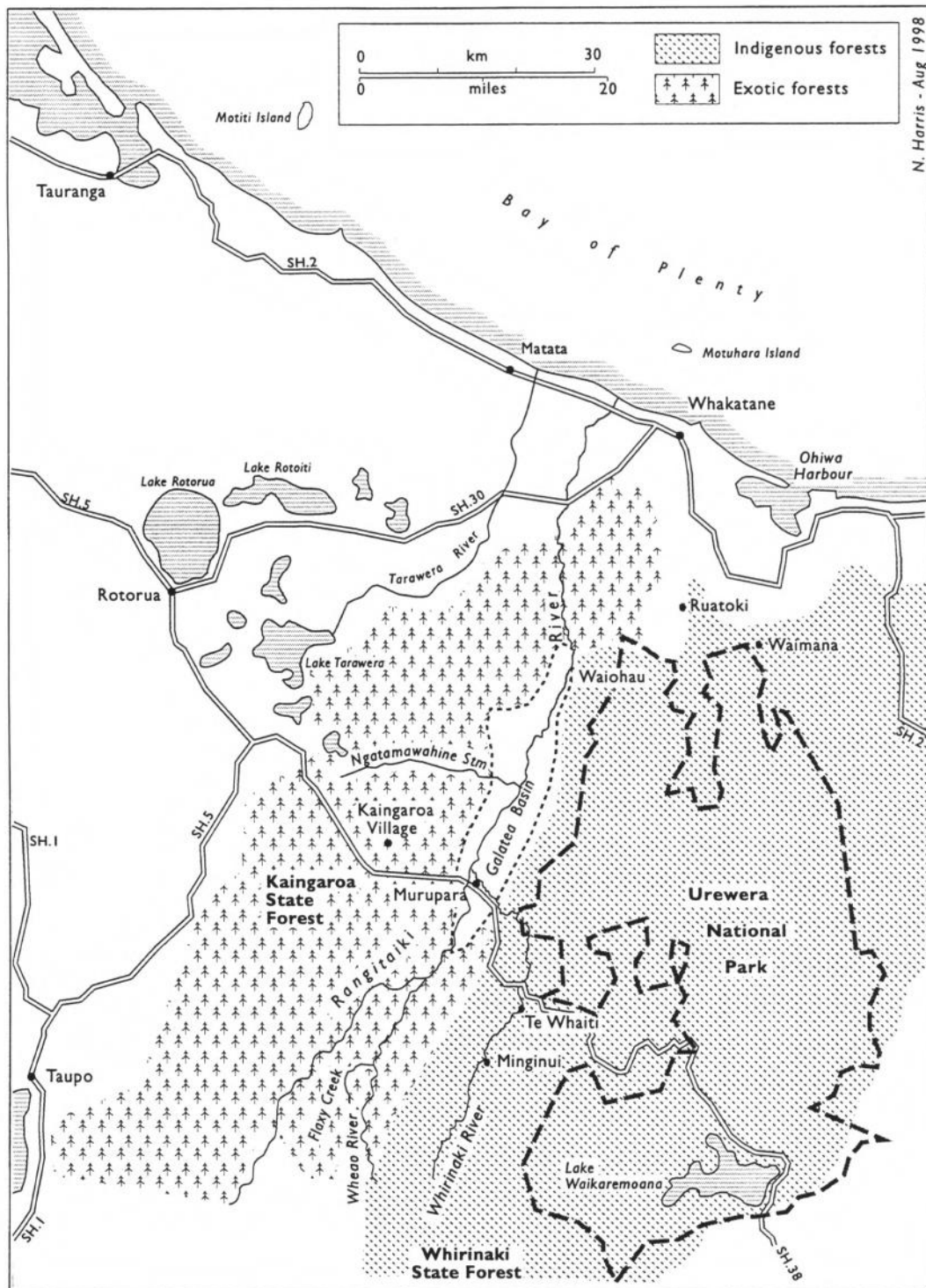
49. Ibid, p 90



Figure 13: Eels drying on a line at Rangitahi Pa, circa 1920.  
Photograph courtesy of Kuini and Henry Nuku.

None the less, through the sale of riparian lands and the Crown's presumption that they included adjoining portions of riverbeds to the middle line, these rights were largely lost (see ch 7). In our next chapter, we examine the economic and social consequences of this loss for the tangata whenua.





N. Harris - Aug 1998

Figure 14: Indigenous and exotic forests. Source: Evelyn Stokes, J Wharehuia Milroy, and Hirini Melbourne, *Te Urewera: Nga Iwi te Whenua te Ngahere (People, Land and Forests of Te Urewera)*, Hamilton, University of Waikato, 1986, fig 1.



## CHAPTER 4

# FROM AN EEL TO A FORESTRY CULTURE

### 4.1 THE PLANTING OF THE KAINGAROA STATE FOREST, 1921–39

The planting of the 249,894-acre Kaingaroa State Forest in pine began in 1920, providing a much needed source of winter employment for local Maori. According to Henry Bird, 'Forestry became a way of life for Ngati Manawa's young men'.<sup>1</sup> However, in the later years of the depression, relief workers from outside the area were taken on and only one Maori gang, described as 'the most skilled gang on the plain', was retained.<sup>2</sup>

Forestry planting largely ceased in 1939, for fear of a future timber glut, and pruning and thinning work commenced.<sup>3</sup> During the Second World War, many local men volunteered for service, resulting in a shortage of manpower in the forest gangs, which was partially relieved by the employment of young women for some tasks.<sup>4</sup> In the aftermath of the war, Te Ika Whenua were dependent on the forestry industry, supplemented by farming, for their livelihood. Nevertheless, the traditional resources of the river still provided sustenance. Increasingly, however, the river was being used by local Pakeha and tourists for recreational trout fishing.

In the oral testimony he gave to claimant researchers, James Doherty, who lived and worked at Wairapukao Camp in the 1950s, recalled the special places along the Wheao River that were important to the people of Ngati Manawa at that time. There was a big pool about 200 metres from the present-day powerhouse where they used to go at night time with a hand line – 'a bit of string with a bait on'. In a couple of hours, they 'would catch between 25–30 good sized eels'; and 'even for trout fishing there were some really good pools in those days'. Fish were plentiful and easy to get, and you were able to use any device – a short rod and spinner were the best. Flaxy Creek, which used to form part of the big pool, was a main part of the food chain for families in the Kaingaroa area, especially those who worked in forestry.<sup>5</sup>

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1. Document B2, p 90; Henry Tahawai Bird, *Kuranui-o Ngati Manawa*, Rotorua, Rotorua Printers, 1980 (doc B4(c)(3)), p 23
  2. Document B2, p 91
  3. Ibid, p 101
  4. Ibid
  5. Document B4(a)(3), pp 1–3

## 4.2 THE NGATI MANAWA LAND DEVELOPMENT SCHEME

To appreciate the degree of Te Ika Whenua's dependence on the forestry industry and the traditional river resources for their livelihood since 1920, one needs to know why the Ngati Manawa land development scheme that was begun in 1936 failed. A brief account of this scheme was given by Henry Tahawai Bird in *Kuranui-o Ngati Manawa*. Further information was found in Maori Affairs and Lands and Survey Department files in Wellington.

Beginning in the 1930s, some remaining Te Ika Whenua lands were brought into Sir Apirana Ngata's land development schemes. Several Patuheuheu blocks at Waiohau were consolidated and placed under the administration of the Ruatoki development scheme.<sup>6</sup> Ngati Whare interests at Te Whaiti and in the Heruiwi block were consolidated and, later, the Karatia and Whirinaki blocks around Murupara were farmed as the Ngati Manawa development scheme.

Representations to the Native Affairs Department by Patuheuheu emphasised that they wanted development both to keep their young people in the Waiohau area and to contribute to the war effort.<sup>7</sup> William H Bird, writing to Apirana Ngata to thank him for the scheme approval on 22 January 1934, made it clear that Ngati Manawa desired development as a measure to combat unemployment.<sup>8</sup> Indeed, as the registrar of the Waiariki Native Land Court wrote to the under-secretary of the Native Department on 23 February 1934, they had 'no means of livelihood and to start a Development Scheme on the above Blocks would be a godsend to them'.<sup>9</sup>

Although Ngati Manawa were contracted to plough, drain, and fence the land that lay on the left banks of the Whirinaki and Rangitaiki Rivers adjacent to the Crown's Galatea estate, the scheme never employed large numbers of local men. According to the claimant researchers:

Like many other Maori land schemes of this era it began well but neglect during the war period and the mis-management of the post-war years under the Maori Affairs Department saw it plummet into debt, in spite of the fact that wool prices were at a premium during the 40s and 50s.<sup>10</sup>

While local Maori were given some development assistance to farm what remained of their ancestral lands, none of the local Maori returned servicemen was successful in the ballots for the Crown's Galatea station farms after the Second World War.<sup>11</sup> Moreover, during the war, Te Whaiti Maori employed in the essential occupation of

6. AAMK 869/903B, 63/57/1, pt 1, 'Ruatoki Development Scheme – Waiohau Area, 1933–46', National Archives, Wellington

7. AAMK 869/903B, 63/57/1, pt 1, National Archives, Wellington

8. Bird to Ngata, 22 January 1934, AAMK 869/874C, 63/43, pt 1, 'Karatia and Whirinaki Blocks, 1934–37: Suggestion that Proceedings be Taken under Section 23/29', National Archives, Wellington

9. Registrar of the Waiariki Native Land Court to the under-secretary of the Native Department, 23 February 1934, AAMK 869/874C, 63/43, pt 1, National Archives, Wellington

10. Document B2, p 100; see also *Kuranui-o Ngati Manawa*, pp 29–32

11. A A Coates, 'The Galatea Story', *Bay of Plenty Historical Review*, monograph, 1980, pp 47–56

timber milling were debarred from military service and, consequently, deprived of the rehabilitation available to returned servicemen.<sup>12</sup>

Little evidence was found on how far the failure of the Ngati Manawa land development scheme encouraged the continuing use of traditional river resources. According to claimant researchers:

People began to work the land as family areas were partitioned out of the reserves and other small pieces of land that remained after the big sales. The old moving lifestyle was still there in the beginning because while many of the large blocks were sold, not very much was being done with them so the people could still use them for hunting, gathering pikopiko, aruhe and other foods. However, as the century moved into the 30's this became more and more restricted and people learned to rely more on subsistence farming.<sup>13</sup>

In June 1933, when Miira Te Tomo wrote to the Native Minister, Sir Apirana Ngata, on behalf of Ngati Manawa requesting permission to go through the Galatea estate to pig hunting grounds near the Horomanga Stream, the Minister of Lands, Ethelbert Ransom, commented:

The necessity for the Natives to have access to what to them is evidently a very important food source is fully appreciated, but on the other hand the interests of the Department must be conserved by ensuring that the Estate is not allowed to suffer through promiscuous ranging or uncontrolled traffic.<sup>14</sup>

He therefore suggested that local Maori should obtain three-month access permits from the Galatea station manager. Undoubtedly, the tangata whenua became increasingly restricted in their access to the traditional resources of their wai tipuna with the development of the Galatea Plains for the settlement of soldiers.

### 4.3 THE MURUPARA PROJECT

In 1949, negotiations commenced between the Crown and Ngati Manawa for the acquisition of Maori land in the Karatia block for a pulp and paper plant.<sup>15</sup> Representations made by Peter Fraser, the Prime Minister and Minister of Maori Affairs, emphasised the national importance of the project and the benefit that would accrue to Ngati Manawa in terms of employment 'for generations'.<sup>16</sup>

Ngati Manawa were reluctant to vacate ancestral land for the development and were alarmed at proposals to take river flats that contained highly-prized flax, a clear

12. 'Te Whaiti and its Future' (minutes of a meeting held at Te Whaiti and endorsed at a public meeting of Maori residents on 5 August 1949), p 3, 'Te Whaiti Regional Development, 1944-63', MA 119/1/491, National Archives, Wellington

13. Document B2, p 90

14. Te Tomo to Ngata, 17 June 1933; Ransom to Ngata, 'Galatea Estate, 1933', LS 1 21/149/995, National Archives, Wellington

15. Document B1, p 18

16. Ibid, p 27

indication of the continuing importance still attached to a traditional resource area.<sup>17</sup> Originally, an exchange of Crown lands for the required Maori lands was proposed by the Crown, but no agreement on terms was reached. The Karatia land was taken in 1954 under the Public Works Act 1928 and developed as the Murupara log yard and rail head.<sup>18</sup>

As Murupara developed to service the logging industry at Kaingaroa, Ngati Manawa became a labour reserve for the Kaingaroa Logging Company. For nearly three decades, they enjoyed full employment and comparative prosperity, and many rented and later bought houses in the township.<sup>19</sup>

#### 4.4 THE CORPORATISATION OF THE FORESTRY INDUSTRY

In late 1985, the Labour Government commenced the process of disestablishing the Forest Service and replacing it with a fully commercial forestry agency that became known as the Forestry Corporation of New Zealand.<sup>20</sup> Corporatisation of the industry involved a dramatic reduction in the number of wage earners employed at Kaingaroa and their replacement with contract workers from outside.

As a result of large-scale redundancies and a lack of alternative employment opportunities, many younger Ngati Manawa families and unemployed Pakeha left Murupara in search of work.<sup>21</sup> The mainly Maori population of Kaingaroa Village, however, refused to let their community die and persuaded the Crown to vest the land on which the village stands in Ngati Manawa. A section 438 trust was then established and through that trust Ngati Manawa granted to the Kaingaroa Village Council a long-term licence to occupy the village. This was finalised on 23 May 1991 and the council is thereby responsible for the administration and management of the village.

Kaitiaki of the Kaingaroa Marae is in the hands of Te Huinga Waka, a group formed by the local Maori community. This group does not have an iwi status based on a tipuna but derives its mana from several iwi uniting on a waka basis.<sup>22</sup>

Those whanau who remained in Murupara suffered increasing welfare dependency. Statistical evidence presented by claimant researcher Gwenda Paul included estimates that, of the total population of 2325 in 1993, 65 percent were on a benefit of some kind. Registered unemployed were 346, but the Rotorua Employment Service's office estimated that 55 percent of those out of work were not registered. In Murupara in 1992, 86 percent of the population were of Maori descent. A similar situation existed in Kaingaroa, where almost 74 percent of the population of about 900 were of Maori descent and 128 were registered as unemployed.<sup>23</sup>

17. Document B1, p 20

18. Ibid, pp 54–55

19. Ibid, pp 66–68; doc B2, p 106; *Kuranui-o Ngati Manawa*, p 44

20. See the State-Owned Enterprises Act 1986

21. Document B2, p 108

22. Ibid, p 111

23. Document B12, pp 1–3

'Considering the huge forest resource at their doorstep,' Mrs Paul observed, 'it clearly provides very little in the way of work opportunities.'<sup>24</sup> The area compared 'very badly' with the rest of the country in terms of income and employment opportunities.<sup>25</sup> All the 1992 secondary school leavers 'either went on to tertiary education, mainly polytech or to trainee courses run by the Murupara Community Learning Centre or other training providers. None went into paid work.'<sup>26</sup> Murupara was 'a very depressed area'.<sup>27</sup>

#### 4.5 THE 'PERMIT CULTURE'

For tangata whenua, employment in the forestry industry at Kaingaroa and Whirinaki meant sharing the rivers with increasing numbers of outsiders and being increasingly subjected to a 'permit culture'. 'I suppose Forestry started it,' said Taima Rangitauira. 'There was [an] . . . Aukati, when you're not allowed to go up there. Like a [permit]'.<sup>28</sup>

Maurice Toetoe explained that:

People have to get permits to get to their own Maori land if access to that land includes going over forest land . . .

The forest is closed to us. There are either gates which are locked outside business hours or a large trench has been dug in the road so that vehicles cannot pass.<sup>29</sup>

Furthermore, you had to have a fishing licence for the season and this was for trout only. If you wanted to go hunting, you had to get a permit. The retireti used for catching eels and kokopu was prohibited gear, since it might be used for trout fishing. You were only allowed to fish for eels (with worms) from 11.00 pm to 5.00 am.<sup>30</sup>

The restrictions on hunting and fishing, he added, affected his ability to pass on his knowledge of these things to his sons so that they would be able to do them too.<sup>31</sup>

In Maanu Paul's view, the whole permit culture was a restriction on their right to the exclusive use and control of their fisheries, a taonga that is guaranteed under article 2 of the Treaty of Waitangi:

We believe that our fisheries includes our methods and artefacts such as our retireti. We have adapted the retireti to catch trout and because of our development of this fishing device we are now penalised.

We, Te Ika Whenua believe that the development of the retireti to catch trout is an integral part of our right to development.<sup>32</sup>

24. Ibid, p 3

25. Ibid, p 4

26. Ibid, p 1

27. Ibid, p 4

28. Document B4(a)(2), p 2; doc B16, paras 28-36

29. Document B11, p 4

30. Ibid, pp 1-2, 4

31. Ibid, p 3

32. Document B16, paras 25-26



Figure 15: Trout fishing on the river bank at Murupara, near Galatea.  
Photograph courtesy of the Whakatane District Museum and Gallery (E933-1).  
Originally published in the *Weekly News*, 7 May 1903.

Evidence presented by Crown researcher David Alexander on the Crown and the eel fishery indicated that:

The Crown took little or no interest in eels until well into this century . . . Eels tended to be seen as a Maori fishery . . . the view was that everyone, settler or Maori, was entitled to catch eels.<sup>33</sup>

Regulations governing the capturing of eels and the issuing of licences for eel fishing were only introduced when commercial eel fishing for export boomed between 1967 and 1975.<sup>34</sup>

We understand that commercial eeling for export in the lower Rangitaiki River involved mainly foreign (Dutch) interests and that Te Ika Whenua did not participate. As we shall see, the Crown argued that commercial eel fishing was a significant cause of the scarcity of eels by the 1970s (see sec 6.6), but the claimants contested this argument (see sec 6.8). Whatever the cause of eel depletion, the regulation and licensing of eel catching clearly aggravated the loss of a major food source, and this loss became accentuated with the onset of unemployment in the forestry towns of Murupara and Kaingaroa in the late 1980s.

By 1945, the transition from an eel culture to a forestry culture was largely complete. The claimants grudgingly accepted restrictions on access to once important resources because the livelihood of the whole community had come to depend on forestry and there were times when the fire risk was too high.<sup>35</sup> Thereafter, further development of recreational tourism centred around the Rangitaiki, Whirinaki, and Wheao Rivers, where trout fishing, canoeing, and white-water rafting led to further restrictions and prohibitions affecting Te Ika Whenua's customary rights.

In recent years, Maanu Paul explained, it had been 'a bone of contention with us with the Department of Conservation and the Forestry Corporation of New Zealand Limited because of the different rates they charge for these people to utilize our rivers'.<sup>36</sup> The River Rafter Company had invited them to raise the issue but they wanted to discuss this with the people who gave them access to the rivers and the rafting permits, not the company itself.

'It seems illogical to us,' he added, 'that we, who own the river, can't do that work and are not in a very wide sense licensed to do it.'<sup>37</sup>

As long as Te Ika Whenua enjoyed the benefits of the forestry industry Fraser had promised them, they generally accepted the restrictions and prohibitions imposed on the exercise of their customary and Treaty rights to use and control their rivers. But when these restrictions and prohibitions denied them the traditional resources they needed to combat unemployment and welfare dependency, they realised that few of their guaranteed rights remained.

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33. Document C6, p 3

34. Ibid, pp 5-6

35. Document B18(b), pp 16-17

36. Document B18(a), p 2

37. Ibid

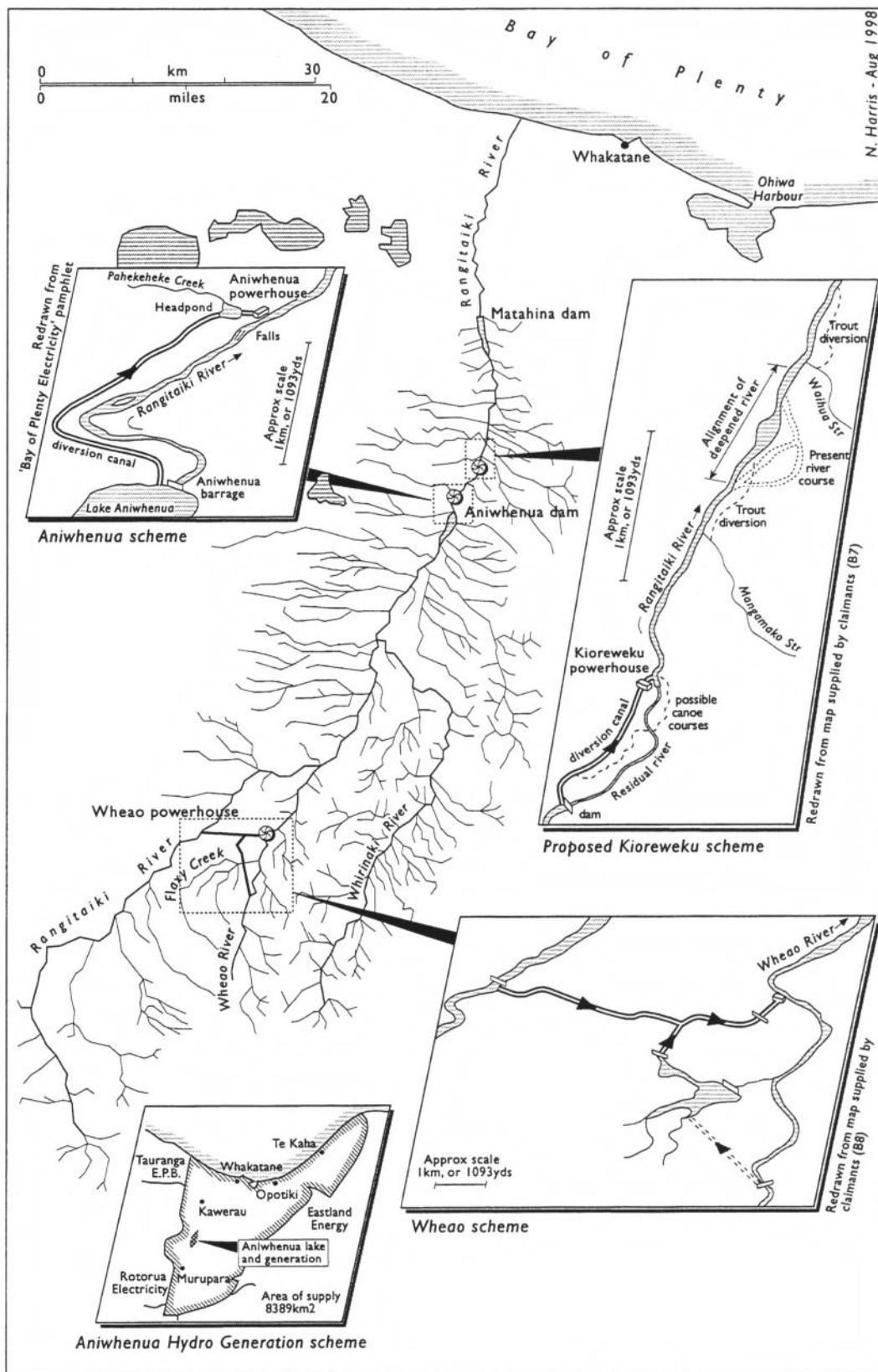


Figure 16: Hydroelectric power schemes on the Rangitaiki River system. Sources: as noted on map.



## CHAPTER 5

# CROWN EXPROPRIATION OF WAI TIPUNA FOR POWER GENERATION

### 5.1 INTRODUCTION

A new phase in the erosion of Te Ika Whenua's customary and Treaty rights to use and control the middle reaches of the rivers flowing through their rohe began with the grant of water rights to the Bay of Plenty Electric Power Board for the Aniwhenua power scheme in 1975 and to the Rotorua Area Electricity Authority for the Wheao scheme in 1977.

In our *Te Ika Whenua – Energy Assets Report 1993*, we briefly summarised the legislation and process by which the Crown expropriated the wai tipuna of Te Ika Whenua for power generation, and we assessed the extent to which the claimants' rights and interests were prejudicially affected. In this chapter of our rivers report, we examine further evidence given by the Crown, the claimants, and third parties on these matters and on the proposed Kioreweku power scheme.

This evidence includes a substantial report by Crown researcher David Alexander entitled 'The Crown's Hydro-electric Generation Rights and the Aniwhenua and Wheao Power Schemes' and its supporting documents, from which we draw heavily.<sup>1</sup>

### 5.2 THE CROWN ASSUMES THE RIGHT TO CONTROL THE USE OF RIVERS FOR POWER GENERATION

#### 5.2.1 Water-power Act 1903

The Crown's assumption of the right to control the use of rivers specifically for hydroelectric power generation was first set out explicitly in the Water-power Act 1903. According to Mr Alexander:

This act represented the coming together of two threads of Government interest, first in the use of waters for mining, and second in hydro-electric power generation, both of which had occupied the minds of the politicians during the previous 35 years. The Crown's approach to the use of waters for mining purposes was transferred to the new technology of hydro-electric generation.<sup>2</sup>

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1. Documents c5, c5(a)

2. Document c5, p 3

In 1896, the Electrical Motive-power Act conferred on the Crown the control of local authority activities connected with hydroelectric development. The combined effects of this Act and the Mining Act 1886 gave the Crown control over water power generation. Section 2(1) of the 1903 Act vested in the Crown, 'Subject to any rights lawfully held, the sole right to use water in lakes, falls, rivers, or streams for the purpose of generating or storing electricity or other power'.

In introducing the second reading of the Bill, the Minister of Public Works said:

The State – the people – should have within their control the power which is contained in those rivers, falls and lakes . . .

If, in the interest of the State, it is considered advisable to take that power, as lands are taken under the Public Works Act, the State would have the right to do so, compensating the owner for any rights or power so taken.<sup>3</sup>

The Tribunal, in its *Ngawha Geothermal Resource Report 1993*, considered the Water-power Act:

seemingly inspired by the common law rule that water, whether on the surface of land or underground, is incapable of being owned until it is abstracted or 'captured', at which point it becomes the property of whoever abstracted it. Consistent with that common law rule, the Water-Power Act vested in the Crown, not ownership, but the sole right to use surface water as a source of power.<sup>4</sup>

### 5.2.2 Concern about Maori rights

In the debate on the Electrical Motive-power Act 1896, both settler and Maori parliamentarians expressed concern about its impact on private property rights. Richard Seddon assured the House that 'it was only designed to affect "public rivers", a term which he never explained'.<sup>5</sup>

Before the Water-power Bill 1903 was introduced into Parliament, the Minister of Public Works sought information from his department 'Re control and use of water power at Mataura Falls, and question as to whether owners of adjoining sections can claim rights to the centre of the river'.<sup>6</sup>

An opinion obtained from the Solicitor General is no longer extant, but in Mr Alexander's view it clearly did not deflect the Government from the course upon which it had embarked.

In the second reading debate, Hone Heke, the member for Northern Maori, thought the provisions in the Bill enabling the Crown to acquire all the water power in the colony were 'going too far'. More particularly, in regard to waterfalls on Maori lands, he thought that:

3. See doc C5, p 9

4. See doc C5, pp 13–14; Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 7.3.1

5. See doc C5, p 6

6. See doc C5, p 10

It would not be proper for a Bill like this to take away from Maori owners the use of water-power on their lands. There is no telling to what use even the Maoris may desire to put such water-power for themselves. It would be entirely different if the Crown desires to acquire water-power on Maori land; it remains for them to acquire it from the Natives . . . It is an attempt to take away Native rights.<sup>7</sup>

In response, the Minister for Public Works, William Hall-Jones, pointed out that the clause of the Bill already met Heke's objection – apparently a reference to the phrase: 'Subject to any rights lawfully held'. He assured the member that, 'If there are vested interests held by the Natives or others they would be preserved, and if required under subsection (2) would have to be paid for . . . that is, if they are wanted'.<sup>8</sup>

It was not clear to Mr Alexander whether or not the Minister's assurances satisfied Maori concerns. He found no evidence that the Crown considered the effects of the Treaty at the time that the Water-power Act 1903 was enacted. Clearly, it had regarded section 2(1) of the Act 'as necessary in the national interest'.

In closing, Ms Ertel submitted that from at least 1903 the claimants' management rights over these waters were expropriated or usurped for the purposes of generating electricity. This was inconsistent with the Crown's Treaty obligations actively to protect taonga.<sup>9</sup>

### 5.3 STATE DEVELOPMENT OF HYDROELECTRICITY

#### 5.3.1 Crown monopoly of power generation, 1908–87

Despite the Government's desire to develop hydroelectricity itself, this was beyond its resources at the time. Consequently, under section 5 of the Public Works Amendment Act 1908, it allowed private enterprise to construct hydro schemes, subject to it issuing a generation consent. Although a few privately owned hydro stations were licensed, these initiatives were too slow to satisfy latent public demand. By 1910, the Government considered that the time had arrived 'to take up with vigour the question of developing our abundant water-powers'.

Thereafter, it became the generator and wholesale supplier, developing a national grid to assist in selling to large consumers and, from 1918, to electric power boards. This effectively put an end to private investment and, until the 1970s, small local schemes. According to the historian J E Martin, 'only the state had the capacity and resources to undertake large projects'. 'The state,' he concluded, 'was to develop these resources for the benefit of the nation . . . the government was determined to ensure its control over crucial natural resources, in this case water.'<sup>10</sup> With the swing to a free

7. See doc C5, p 11

8. See doc C5, p 12

9. Document D2, p 55

10. Document C5, p 16, quoting J E Martin (ed), *People, Politics and Power Stations: Electric Power Generation in New Zealand, 1880–1990*, Wellington, Bridget Williams Books and Electricity Corporation of New Zealand, 1991, pp 286–287

market economy, corporatisation, and privatisation nearly 80 years later, the requirement for direct Crown consent to be secured for any use of water for power generation was repealed by section 3 of the Electricity Amendment Act 1987.

### 5.3.2 Statutory provisions and regulations

To maintain the Crown's sole right to control the use of natural waters for electricity generation, section 2 of the Water-power Act 1903 was incorporated in successive Public Works Acts in 1905 (s 267), 1908 (s 267), and 1928 (s 306). Under section 25 of the Electricity Act 1928, permission to use water power had to be obtained from the Minister of Electricity. The Water Power Regulations 1934 defined how the Crown's sole right of control was to be used. Under regulation 6(27):

Neither the granting of the licence nor anything in the licence expressly or by implication contained shall be deemed to create a lease from His Majesty the King of the bed of any river or any land.

This meant that rights to land, as distinct from rights to the use of water, had to be obtained separately, either by direct negotiation or under the provisions of the Public Works Act.

Subsequent Acts repeating the 1903 provision, or enacting fresh sections that had the same effect, were the Electricity Act 1945, the Water and Soil Conservation Act 1967, and the Electricity Act 1968.

### 5.3.3 Post-war policy on hydro schemes

Under section 3(1) of the Electricity Act 1945, the administration of the relevant provisions of the Public Works Act 1928 and the Water Power Regulations 1934 was transferred from the Public Works Department to the State Hydro-Electric Department. As Mr Alexander saw it, 'the ethic of State development had become virtually absolute'.

In the post-war period, demand for electricity increased dramatically, supply was often insufficient, and power restrictions were imposed.

Despite the long lead-in time for large power schemes, they were seen as being the most efficient option, but as the Minister of Public Works stated in 1948:

These schemes must be properly investigated, designed, and built in accordance with the national needs and then operated so that power developed is made available for the general pool . . . The criterion must be whether the development will benefit the whole community.<sup>11</sup>

In this context, the Waikato schemes were programmed and developed and the Matahina scheme on the Rangitaiki River to the north of Te Ika Whenua's rohe was approved in 1959 and completed in 1967.

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11. See doc C5, p 19

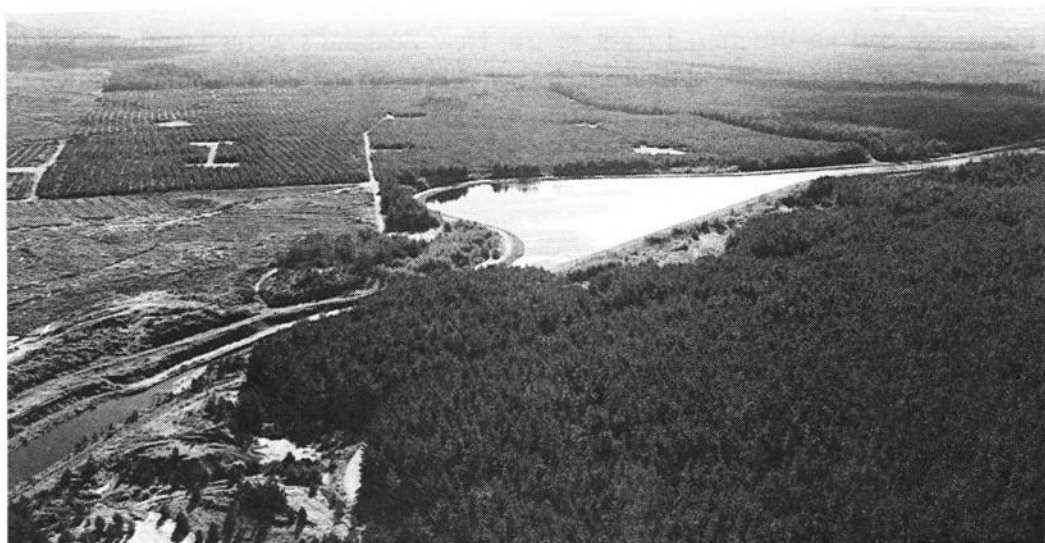


Figure 17: The Wheao scheme – the Flaxy Dam. Photograph courtesy of Hohepa Waiti.

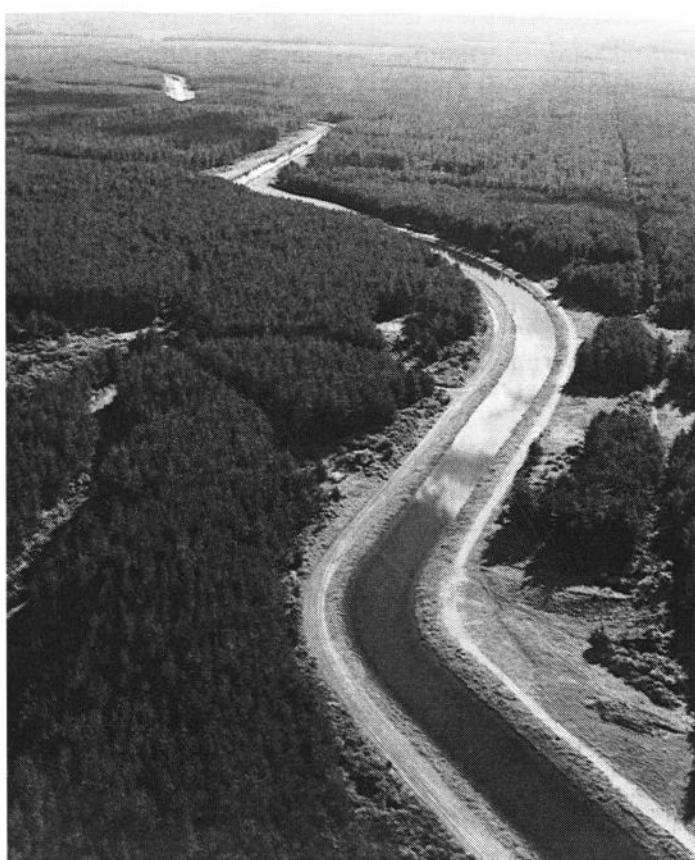


Figure 18: The Wheao scheme – the Rangitaiki canal. Photograph courtesy of Hohepa Waiti.

### 5.3.4 The separation of rights to use water and generate power

Until the passing of the Water and Soil Conservation Act 1967, 'the Minister of Electricity had an unfettered right to use New Zealand's water resources for the generation of electricity and to licence other people to use water if he saw fit'. Under the 1967 Act, the Minister of Electricity or the Electricity Department would 'have to obtain authority from the Water and Soil Conservation Authority just as anyone else has to do'.<sup>12</sup>

The 1967 Act had its effective genesis in the 1965 report of an interdepartmental committee on water which proposed the establishment of a national water authority that was not a user of that resource. The Electricity Department had declined to sign the report on the grounds that electricity was a 'special case' and that control of its 'essential fuel' could not be handed to another body. Nevertheless, the committee's proposal for a national water authority prevailed.

The committee agreed that the Electricity Department should control generation, 'but only within the framework of the national and regional water authorities and their consents'.<sup>13</sup> Accordingly, the Electricity Act 1968 was passed to consolidate the legislation concerning power generation and to amend it to conform to the Water and Soil Conservation Act 1967. A proviso added to clause 25 of the Bill at the committee stage stated that:

Except as expressly authorised by or under any other Act, no person or body shall generate electricity by the use of water without the consent in writing of the Minister [of Electricity].<sup>14</sup>

While consent to the use of rivers for power generation remained in the hands of the Minister of Electricity, the power to use water was a matter for the Water and Soil Conservation Authority. Persons wanting to use water for generating electricity now required two consents, one from the authority, the other from the Minister. Procedurally, it was arranged that an application to the authority for the right to use water would be referred automatically to the department and the two consents would be given together.

By the time those consents were sought for the Aniwhenua and Wheao schemes, Mr Alexander concluded:

The water right was the key consent needed by the electricity authorities. Issuing of the water right also provided opportunities for public submission and appeal, which had been lacking under the Water-power and Public Works Acts.<sup>15</sup>

The Water and Soil Conservation Act, Ms Ertel submitted, was 'almost wholly deficient in criteria . . . to achieve recognition of Maori interests at all in the statutory consent process'.<sup>16</sup> Indeed, it was not until 1987 and the High Court *Huakina* decision

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12. Document C5, p 22

13. Ibid, p 21

14. Ibid, p 24

15. Ibid, p 53

16. Document B5, p 30

that ‘the Treaty of Waitangi and evidence of Maori values were legitimate extrinsic aids to the Act’s interpretation’.<sup>17</sup>

### 5.3.5 Power to grant water rights retained in Resource Management Act 1991

Section 21 of the Water and Soil Conservation Act 1967 (rights in respect of natural water) was retained in section 354(1)(b) of the Resource Management Act 1991. The power to grant rights for the use of natural water, however, was to be exercised by regional water boards instead of by ministerial discretion.

Under the Resource Management Act, specific provision is made for the protection of Maori values and interests. All persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, are required to recognise and provide for various matters of national importance, including the ‘relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga’ (s 6(e)). They are also required to have particular regard to kaitiakitanga (s 7(a)), interpreted as ‘the exercise of guardianship’, including ‘the ethic of stewardship’ (s 2). Furthermore, all persons exercising functions and powers under the Act are required to ‘take into account the principles of the Treaty of Waitangi’ (s 8).

When preparing or changing a regional policy statement, a regional council is required under section 61(2)(a)(ii) and (iii) of the Act to have regard to any regional planning document recognised by an iwi authority affected by the policy statement and to regulations relating to the conservation or management of fisheries, including taiapure, mahinga mataitai, and non-commercial Maori customary fishing. Similar provisions are imposed under section 66(2)(c)(ii) and (iii) in the case of preparation or change of a regional plan. A regional policy statement is to state matters of resource management significance to iwi authorities (s 62(1)(b)). A regional council is required to consider the desirability of preparing additional regional plans whenever any significant concerns of tangata whenua for their cultural heritage in relation to natural and physical resources are likely to arise (s 65(3)(e)).

The Act, Ms Ertel submitted, was deficient because it failed to make any positive provision for the recognition and exercise of Maori ownership and tino rangatiratanga over a river and, particularly, of or over the water.<sup>18</sup>

## 5.4 THE DEVELOPMENT OF THE ANIWHENUA AND WHEAO SCHEMES

### 5.4.1 Local hydro schemes policy

According to Mr Alexander:

Up to 1973 and the first oil crisis, the New Zealand Electricity Department, successor since 1958 to the State Hydro-Electric Department, was of the view that it had the prime

17. *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (doc B5(a)(2)); doc B5, p 30

18. Document D2, pp 61–62

responsibility for developing new power stations to meet a rapidly increasing demand for electricity. Only a State organisation had the resources to build the large schemes necessary to make any serious inroads into the national power shortages. Local power schemes were seen as bit-players which would not be hindered, but neither would they be especially helped ... the Power Division of Ministry of Works ... held a similar view.<sup>19</sup>

A file summary of a policy announcement made in 1965 indicated that a policy of encouraging local body hydro generation in the national interest was already in the making, provided the following conditions were fulfilled:

1. Their construction will not adversely affect the possible future development of a larger scheme.
2. They can be developed economically ...
3. They are designed to make the best use of the water available ...<sup>20</sup>

This policy appeared to Mr Alexander 'to demonstrate that the Crown was at least as much interested in ensuring complementarity with its own commercial generation operations as it was in the sound use of the water resource'.<sup>21</sup>

#### **5.4.2 Consents required**

By the mid-1970s, when the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority wished to proceed with the Aniwhenua and Wheao power schemes respectively, they each required a consent to generate electricity from the Minister, a water right from the Water and Soil Conservation Authority, and approval to raise loan moneys from the Local Authorities' Loans Board. To obtain a ministerial consent, they had to have prepared an environmental impact assessment or report and have had it audited by the Commission for the Environment.

#### **5.4.3 Crown grants water rights for Aniwhenua and Wheao schemes**

Water rights for the Aniwhenua and Wheao power schemes were granted by the Crown to the Bay of Plenty Electric Power Board in 1975 and the Rotorua Area Electricity Authority in 1977 respectively. The Aniwhenua scheme began power generation on 3 October 1980. The Wheao canal collapsed in December 1982, rebuilding commenced in 1983, and power generation began in May 1984.

#### **5.4.4 Dams and water rights transferred to energy companies**

Following the enactment of the Energy Companies Act 1992, which established a process of corporatisation, the determination of the future structure of ownership of the assets and undertakings of power boards passed to representatives of the local

19. Document C5, p 28

20. See doc C5, p 25

21. Ibid, p 26



community. This applied to the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority, which were to become Bay of Plenty Electricity Limited and Rotorua Electricity Limited respectively, and included the Aniwhenua and Wheao Dams and the water rights attaching thereto.

In accordance with the provisions of the Act, establishment plans for Bay of Plenty Electricity and Rotorua Electricity were prepared and submitted to the Minister of Energy for his approval. Each plan provided for the transfer of the assets and undertaking of the board to its energy company. Ministerial approval of the establishment plans was delayed to enable Te Ika Whenua's claim to these energy assets to be heard urgently by the Waitangi Tribunal.

In the *Te Ika Whenua – Energy Assets Report 1993*, we recommended:

That the assets in question, namely the Wheao and Aniwhenua power schemes and water rights attaching thereto, should be protected and retained in their present ownership or alternatively in the hands of the Crown until such time as the substantive claim has been heard and determined.<sup>22</sup>

In the event, the Crown rejected this recommendation, and the Minister of Energy approved the establishment plans. Undoubtedly, the Minister's hand was strengthened by the Court of Appeal judgment in *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20, delivered by Cooke P on 17 December 1993.<sup>23</sup>

#### 5.4.5 *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General*

Following the issue of the *Energy Assets Report 1993* on 20 May 1993, the claimants brought judicial review proceedings seeking a declaration that the Minister not approve any establishment plan providing for the transfer of the dams and not recommend to the Governor-General that she make an Order in Council providing for any such transfer. In these proceedings, the claimants applied for interim relief, which Justice Doogue declined on 15 June 1993.

An appeal from this judgment was heard on 22 and 23 July 1993. The appellants were taken to be 'representing iwi and hapu and all Maori having interests in the Rangitaiki and Wheao rivers in the Bay of Plenty'. Their case was argued on an amended statement of claim based on aboriginal title. They alleged that the Minister of Energy, in consenting to the construction of the dams, and the local power authorities, by constructing the dams, had interfered unlawfully with the rights of iwi. The court's judgment, *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20, read as follows (p 26):

as to these two dams non-Maori control has been an accomplished fact for a decade and more. The clock cannot be put back. The Maori remedy lies in the Waitangi Tribunal

22. Waitangi Tribunal, *Te Ika Whenua – Energy Assets Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 7.4

23. Document C14(b); for the original judgment, see doc C1

claim, or conceivably in Court action based for instance on Maori customary title or fiduciary duty.

In the judgment, ‘aboriginal title’ and ‘Maori customary title’ were used interchangeably. The court stated at page 24 that, however liberally Maori customary and Treaty rights might be construed, ‘one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power’.

In the event, the Minister approved the establishment plans, which transferred the dams and water rights to the energy companies.

## **5.5 CONSENT PROCESS FOR THE ANIWHENUA AND WHEAO SCHEMES**

### **5.5.1 Introduction**

A background research report on ‘The Aniwhenua and Wheao Schemes and the Energy Companies Act 1992’ was commissioned by the Tribunal from Dr Geoffrey Bertram and presented at the hearing of the energy assets claim.<sup>24</sup> This contained evidence on the water right consent and appeal process, the environmental impact assessment or reporting and auditing process, and the financial aspects of approvals by the Local Authorities’ Loans Board.

We were informed by Michael Lear, the general manager of the Energy and Resources Division of the Ministry of Commerce, that the Ministry had examined Dr Bertram’s evidence and considered that it accurately reflected the legislative and regulatory developments affecting the Aniwhenua and Wheao schemes.<sup>25</sup>

Evidence for third parties given by Richard Stevens, the general manager of the Rotorua Area Electricity Authority, and Neil Brennan, a company secretary of the Bay of Plenty Electric Power Board, was directed to establishing that in each case statutory requirements that the public should be consulted were fulfilled.<sup>26</sup>

In the presentation of evidence and submissions, the Rotorua Area Electricity Authority was commonly referred to as Rotorua Electricity and the Bay of Plenty Electric Power Board as Bay of Plenty Electricity, and for the sake of consistency, we adopt these abbreviations in this and the next chapter.

### **5.5.2 Investigations and consents for Aniwhenua**

Mr Alexander’s report included detailed evidence on the investigations and consents process for Aniwhenua.<sup>27</sup> The application for water rights was publicly notified in July 1975. The Wildlife Service investigated the consequences of the proposal but only in terms of trout and water fowl.

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24. Document A6

25. Document C7, p 27

26. Documents C10, C11

27. Document C5, pp 28–38



Figure 19: The Aniwhenua Falls



Figure 20: The Aniwhenua powerhouse and falls. Photograph courtesy of Hohepa Waiti.

Seven objections were received and heard. None came from tangata whenua or concerned their rights and interests in the Rangitaiki River, the Aniwhenua Falls, and traditional fisheries. Bay of Plenty Electricity's environmental impact report was publicly notified in December 1975, by which time a water right subject to certain conditions had been granted by the Bay of Plenty Regional Water Board. Ten submissions were received, but once again, none referred to the rights and interests of tangata whenua. The Commission for the Environment did not independently identify the future of the eel fishery as a concern, and consequently no comment on it was made in the environmental impact audit, completed in March 1976. Rather, the commission expressed the view that the total environmental benefits (such as recreation, public amenity, and electricity) exceeded total environmental costs (such as loss of farm land and the falls). None of the four appeals to the Town and Country Planning Appeal Board on the water right concerned tangata whenua rights and interests.

The Minister of Electricity consented to power generation in December 1976; that is, after the required environmental impact audit had been received by the New Zealand Electricity Department. Subsequent to the consent to generate being granted, the power board in 1977 obtained the consent of the Local Authorities' Loans Board to raise a \$12.5 million loan and a water right to cover the construction period. The water right had been publicly advertised for objection in December 1976.

Following the filling of the lake behind the dam, the power board initiated a public meeting, which led to the setting up of the Aniwhenua Reserves Management Committee by the Whakatane District Council. This joint advisory committee of council representatives and locally elected citizens proceeded to prepare a lake management plan. The plan was publicly notified, and submissions were received and amendments made before it was approved. As far as Mr Alexander could ascertain, no submissions from Maori were made.

### **5.5.3 Investigations and consents for the Wheao scheme**

Again, Mr Alexander's report included detailed evidence on the investigations and consents for the Wheao scheme.<sup>28</sup>

The possibilities of diverting the Rangitaiki into the Wheao for power generation were first investigated in the early 1960s by the Ministry of Works, then by the Tasman Pulp and Paper Company. In the late 1960s, the views of the Wildlife Service were sought. The conservator in Rotorua 'was adamant that the addition of such a large volume of new water into the Wheao would eliminate the trout fishery'. The Nature Conservation Council and the Marine Department supported this assessment and the council recommended that the Electricity Department not grant a generation licence. Nothing came of the investigations until the proposal was picked up by Rotorua Electricity in 1974. In October 1975, Rotorua Electricity decided to go ahead and obtain the necessary consents.

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28. Document C5, pp 39–51

An environmental impact assessment was completed and published in February 1977 and appraised by the Commission for the Environment in May and July 1977. Generally, it was supportive except in respect of the impact the scheme would have on trout fishing. The Fisheries Research Division, however, expressed concern at the lack of comment on native fish. Accordingly, the commission recommended that the Minister of Electricity be advised to withhold his consent until possible modifications involving less of an impact on fisheries had been considered.

Three alternatives to that proposal by Rotorua Electricity were made, but its consulting engineers were of the opinion that the only one that was 'really viable' produced 'only little reduction on the impact of the scheme on the Wheao River'. The Electricity Department was satisfied that both Rotorua Electricity and its consultants were 'aware of the impact of the scheme on the fish, the fishing and the environment generally', and would 'treat the development with the required sensitivity'.

The commission, while admitting that the works would affect the fish and, to a greater degree, the fishing in the river, considered 'the problem should not last much longer than it takes for the work to be carried out'. It seemed clear to Mr Alexander that the commission had trout and trout fishing in mind, not eels and eeling. The first reference he had located to eels was to their being found stranded and dead after the collapse of the Wheao canal and dams; that is, several years after the investigatory process had been completed and the appropriate consents granted.

The land use consent given by the Taupo County Council imposing a power generation designation on the site was publicly advertised for comment in December 1976. Water rights were applied for in November 1976 and granted in July 1977. Appeals were dismissed in March 1978. An environmental impact assessment was prepared in December 1976 and appraised by the Commission for the Environment in May 1977.

The newly established Committee on Local Authority Hydro Development recommended making a Government construction loan to the Minister in August 1978. The Local Authorities' Loans Board in September 1978 approved Rotorua Electricity incurring debts by raising loans.

On 28 November 1978, the Minister granted a generation consent, notwithstanding that he had been advised of the environmental objections that had resulted in the appeal to the Town and County Planning Appeal Board and, more cursorily, of the alternatives suggested to meet fishery concerns.

#### **5.5.4 The Flaxy Creek pipeline and subsidiary powerhouse**

Some weeks earlier, Rotorua Electricity had advised that it wished to expand generating capacity by including a subsidiary powerhouse at the end of the Flaxy Creek pipeline where it dropped into the Rangitaiki canal. In 1980, the Committee on Local Authority Hydro Development recommended, and the Electricity Department supported, this expansion, despite forecasts of excess generating capacity and a Government review of local hydro policy early in 1979. The Minister of Energy

approved the recommendation in April 1981. The committee also recommended the approval of a supplementary construction loan, which the Minister approved in August 1981.

A revised generation consent to cover the Flaxy Creek pipeline power station was granted on 18 February 1982.

#### **5.5.5 Mr Alexander's conclusions on investigations and consent process**

In his examination of the considerable documentation by Government agencies of the investigations and consents for the Aniwhenua and Wheao power schemes, Mr Alexander found no references to objections by Maori or to what he considered to be 'a Maori component, concerning the rivers'. He noted, however, that the 'ability to object and appeal was not foreign to local Maori, as demonstrated by the Tuhoe-Waikaremoana Trust Board's involvement on land-related matters, in the Aniwhenua water right application and environmental impact report'. Any concerns expressed by Maori, he concluded, had always been after the event, despite there being three power schemes on the river and their being well publicised in local newspapers. 'From the Crown's point of view, there was a total silence from tangata whenua about the rivers while the power schemes were being debated and constructed.'

### **5.6 PUBLIC CONSULTATION**

#### **5.6.1 Aniwhenua scheme proposal**

According to Mr Brennan, Bay of Plenty Electricity undertook extensive public consultation when it applied for a water right.<sup>29</sup> The main opposition had come from local farmers whose land would be affected by the Aniwhenua scheme. The Tuhoe-Waikaremoana Maori Trust Board had also objected, because approximately 39 hectares of its land on the bank of the Rangitaiki River were involved. Bay of Plenty Electricity agreed to certain conditions that met those objections. They included a right to draw water from the reservoir, exclusive access to the foreshore, and adequate compensation by way of an exchange of land.<sup>30</sup>

As part of its independent audit of the scheme's environmental impact, the Commission for the Environment had canvassed the trust board's views. The trust board asked that suitable provision be made to avoid possible fire hazard problems arising for forestry developments from increased recreational usage of the Aniwhenua Dam. Another matter of concern to the trust board was that transmission lines would cross Maori land and impede forestry developments on it. Terms of entry and compensation for loss of production were negotiated with the power board. In Mr Brennan's view, 'Bay of Plenty Electricity complied with all the requirements imposed by statute at the time it applied for and was granted the water and electricity

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29. Document C11, pp 4-6

30. Document C11, pp 4-5; doc C11(d)

generation rights', and the 'Trust Board participated fully in the water rights process'. As far as he was aware, the trust board, as the largest and most influential tribal authority in the district then in existence:

represented the interests of tangata whenua at the time of the water rights hearing. Certainly, there was no other Maori objection to the scheme. The Trust Board's submissions did not raise the issue of ownership of the river or impact of hydrodam development on native fisheries.<sup>31</sup>

### 5.6.2 Wheao scheme proposal

According to Mr Stevens, 'Rotorua Electricity undertook extensive public consultation' during the development of the Wheao scheme.<sup>32</sup> This began in December 1975 with a seminar for public authorities and members of Parliament for five electorates, including Eastern Maori.

Rotorua Electricity wanted to ascertain the likely impact, if any, the development would have on areas of importance to Maori. Early in November 1976, its environmental consultants, Murray-North Partners, had discussions with Maurice Bird, a kaumatua representing Ngati Manawa. The consultants then wrote to Mr Bird inviting his views on an enclosed scheme statement and asking for any assistance he was able to give on the likely impact, if any, on sites of Maori or general historical interest. As far as Mr Stevens knew, Mr Bird did not respond.

Prior to the public hearing of its application to the Bay of Plenty Regional Catchment Commission for a water right, Rotorua Electricity held a series of public meetings to discuss the project with the local community. Consequently, the project was fully exposed in the news media over a period of about two years. No Maori interests objected at the public hearing. Rotorua Electricity 'complied in full with all the numerous statutory requirements in place at the time of the Wheao scheme development' and gave 'local Maori an opportunity to participate and express any concerns they may have had'.

## 5.7 THE CROWN'S RIGHT TO EXERCISE KAWANATANGA

In this chapter, we have examined the evidence presented to us on how the Crown conferred upon itself statutory powers to control the use of rivers and falls for power generation in the national interest and how for some 80 years it exercised these powers. More particularly, we have examined how the Crown in the mid-1970s controlled and managed the use of the Rangitaiki and Wheao Rivers to encourage the development of the Aniwhenua and Wheao schemes. In conclusion, we need to consider the argument put forward by the Crown to support its exercise of statutory powers to grant water rights and generation consents for those local hydro schemes.

31. Document C11, p 6

32. Document C10, pp 2-3

The Crown said that it must have the right under article 1 of the Treaty to provide for the protection, management, and exploitation of natural resources where it would be in the national interest; that is, for the benefit of all. Article 2 rights to tino rangatiratanga would be accommodated wherever practicable, but could not give tangata whenua the right to veto or prevent power developments on the rivers.<sup>33</sup> Questioned as to the possibility of partnership if Maori had similar objectives as the Government, Crown counsel replied that some situations bred conflict and, where compromise was impossible, article 1 must prevail.

Evidence given by Mr Lear for the Ministry of Commerce underlined the importance of hydro-generated electricity to New Zealand's economy.<sup>34</sup> It was a renewable resource developed at a cost that was among the lowest in OECD countries. Following energy sector reforms, the Government's role was to set up the regulatory structure for the energy industry. The method of generation was, relatively speaking, environmentally friendly, though it might involve environmental modification and affect recreational uses. Furthermore, in terms of section 5 of the Resource Management Act 1991, the development of the Aniwhenua and Wheao schemes was 'sustainable management of natural and physical resources'.<sup>35</sup>

Mr Brennan, on behalf of Bay of Plenty Electricity, stressed the attractiveness of the Aniwhenua scheme:

Cheaper electricity for consumers was the Board's primary reason for pursuing the project. It was estimated the scheme would be able to supply power to the Board at a lower cost than NZED bulk-supply power. Another was the security of having a local supply to supplement the NZED system.<sup>36</sup>

In the event, it had been a significant factor in Bay of Plenty Electricity being able to delay the passing on of price increases to its consumers. Furthermore, the construction of a reservoir where the Rangitaiki River crossed farm land had provided the Aniwhenua Lake recreational areas and wildlife sanctuaries, which are popular with tourists and New Zealanders for trout fishing, water sports, camping, and picnicking.

Mr Stevens, on the other hand, in giving evidence for Rotorua Electricity, said that the Wheao scheme 'funded by a loan from Government under its Local Hydro Schemes Policy ... was not profitable and necessitated a write-down of Rotorua Electricity's debt'.<sup>37</sup>

The claimants alleged that the Crown, in asserting its right to expropriate their wai tipuna for power generation under article 1 of the Treaty, was trampling on their article 2 right to tino rangatiratanga over their taonga. More particularly, they alleged that the Crown had failed to consult with its Treaty partner over the construction of the Aniwhenua and Wheao Dams and the proposed Kioreweku scheme.

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33. Document D5, pp 23-24

34. Document C7

35. Ibid, p 8

36. Document C11, pp 3-4

37. Document C10, p 2



Other major concerns were the diversion of the Rangitaiki River into the Wheao River and the depletion of the traditional eel fishery above the Aniwhenua Dam. In the following chapter, we examine the evidence presented to us on these concerns. Treaty issues arising from them are discussed in chapters 8 and 9.



## CHAPTER 6

# THE LOCAL POWER SCHEMES: CLAIMANT CONCERNS AND CROWN RESPONSES

### 6.1 CLAIMANT CONCERNS

Three major concerns were expressed by the claimants to this Tribunal concerning the local power schemes constructed or proposed on the rivers:

- (a) the diversion of the Rangitaiki River into the Wheao River;
- (b) the lack of consultation over the Aniwhenua and Wheao schemes and the proposed Kioreweku scheme; and
- (c) eel depletion and the lack of consultation over the eel replenishment scheme.

In this chapter, we examine the evidence and submissions on the claimants' concerns and the Crown's responses.

### 6.2 THE DIVERSION OF THE RANGITAIKI INTO THE WHEAO

#### 6.2.1 The claimants' perspective

The claimants strongly objected to the Wheao scheme on spiritual and cultural grounds because it mixed the waters of the Rangitaiki with the Wheao; indeed, this was a 'great hurt'.<sup>1</sup>

Billy Messent explained that this mixing of the waters reversed and forever destroyed the tuakana (older brother) and teina (younger brother) concept of wai tipuna. Ten miles of the Rangitaiki River had gone:

The river has been diverted into the tributary, the Rangitaiki into the Wheao. The tuakana into the teina. The mana of the Rangitaiki has been eroded.<sup>2</sup>

According to Maanu Paul:

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1. Hohepa Waiti, oral submission on behalf of the claimants, first hearing, 10 November 1993, tape 3, side A, 2980-2988  
2. Document B13, p 2

The Wai Tipuna at the Wheao scheme have and are subjected to a huge dislocation of their mauri leading to an irreversible state of the extinction of their mana.<sup>3</sup>

Traditionally, the Rangitaiki was the tuakana of their ancestors and the Wheao and Whirinaki were the teina 'that joined their tuakana at Ngahuinga and Kowaikura respectively'. Since the Wheao scheme had mixed the waters, it was 'difficult/impossible' to tell who was the tuakana and who was the teina of their wai tipuna. The mixing had shattered their 'tapu/sanctity'.<sup>4</sup>

Further up the Rangitaiki, Mr Paul continued, Flaxy Creek, which used to flow into the Wheao above the dam, was channelled into the Flaxy Dam, then through a tunnel and canal to mix with the Rangitaiki and Wheao, and finally through the penstocks, through the Wheao powerhouse, and down into the Wheao:

If the river is diverted and the waters are mixed then the life force is extinguished – no longer can we continue to quote our pepeha, without attracting derision and ridicule from other iwi who know the reality of the loss of mauri through the construction of the schemes.<sup>5</sup>

Hohepa Waiti, in cross-examination, expressed similar concerns. He had an objection to the building of the dam if it affected their spiritual way of life.<sup>6</sup> He was opposed to the rechannelling of the sacred river Rangitaiki and the mixing of its waters with the Wheao, which upset their natural relationship. Moreover, the claimants were unable to identify whether the rechannelled river was the Rangitaiki or the Wheao, an important matter when the tangata whenua identified themselves with the pepeha 'Tawhiuau is the mountain, Rangitaiki is the river and Tangiharuru is the man'.<sup>7</sup> In order to restore the spiritual relationship they had with the river, Mr Waiti sought a natural flow of water that would allow the eels access to the length of the river.

### 6.2.2 Rotorua Electricity's perspective

Commenting on tangata whenua concerns about the 'unnatural mixing' of the Wheao and Rangitaiki Rivers, Dr Wayne Donovan, the director of Bioresarches Consulting Biologists of Auckland, who was speaking on behalf of Rotorua Electricity, said he was in no position to respond to the cultural reasons for this. From a scientific perspective, their data indicated that the waters in these two rivers were very similar in quality and that both supported a diverse range of plants and animals, including trout – an indication that the waters were of a high quality, both before and after they were mixed.<sup>8</sup>

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3. Document B16, para 11

4. Ibid, paras 13–15

5. Ibid, para 80

6. Document B18(c), p 29

7. Ibid, p 32

8. Document C13, p 11

### 6.3 LACK OF CONSULTATION OVER ANIWHENUA AND WHEAO SCHEMES

#### 6.3.1 The claimants' charge

The claimants alleged that, in allowing the construction of the Aniwhenua and Wheao power schemes on their rivers and in granting water rights for those schemes without consultation with their Treaty partners, the Crown had trampled on their tino rangatiratanga over those stretches of the Rangitaiki and Wheao Rivers that flowed through their rohe.

Thomas Higgins said the dams were constructed without any consultation with Te Ika Whenua, only with people from outside the area.

Maanu Paul thought that the tangata whenua really had no idea of what was happening to their wai tipuna during the construction of the Wheao scheme. Even though Rotorua Electricity had taken urgent action to log the area, the scale of the scheme had not been explained to them and could not have been imagined.<sup>9</sup> Moreover, it prejudiced their full enjoyment of their customary and Treaty rights.

#### 6.3.2 The Crown's response

The Crown rejected the claimants' charge that they were not consulted over the power schemes.<sup>10</sup> It pointed out that other Maori groups had utilised existing objection procedures; for example, the Tuhoe–Waikaremoana Maori Trust Board. Representatives of local iwi, and Maurice Bird in particular, were specifically consulted by the power boards. Te Ika Whenua as a group did not raise concerns about power development.

Admittedly, it might be said that the consultation procedures were inadequate and did not explicitly provide for Maori spiritual and cultural values. But the power boards (later companies) were not the Crown or agents thereof and were under no obligation to act in accordance with Treaty principles. To the extent that there was any obligation to consult, the Crown did so on the facts of the case. The existing objection procedures, although arguably not adequate to meet the Crown's Treaty obligations, did provide an opportunity for Te Ika Whenua people to raise at least some of their concerns, yet they did not do so.

#### 6.3.3 Third party submissions

In opening and closing, counsel for third parties (Rotorua Electricity and Bay of Plenty Electricity) submitted that consultation by the companies was appropriate and sufficient in the context of the time.<sup>11</sup> Prior to 1986, there was no broadly recognised obligation, whether under the Treaty or otherwise, to consult tangata whenua. The statutory regime that they operated under then was marked by an absence of consideration for Maori interests. The Town and Country Planning Act 1953 contained no

9. Document B16, para 10

10. Document C14, p 15–16; doc D5, pp 24–26 and interpolations

11. Document C15, pp 2–6; doc D4, pp 3–9

express reference to Maori interests and no requirement to consult Maori. The Town and Country Planning Act 1977 did have a provision to recognise matters of national importance but did not take effect until 1 June 1978 – that is, after the consents were granted. The Water and Soil Conservation Act 1967 did not require specific notification to be given to Maori, though after the *Huakina* decision in 1987, consideration of Maori matters became a requirement under the Act.<sup>12</sup>

At the time of the development of the power schemes, statutory concerns focused on environmental impact, not principles of the Treaty. Despite this, the companies did consult with tangata whenua in good faith and made genuine efforts to accommodate Maori concerns where possible.

Water rights applications were publicly notified; the Tuhoe–Waikaremoana Maori Trust Board objected to a water right for the Aniwhenua project. In fact, Bay of Plenty Electricity relied on the board as representative of tangata whenua because there was no other Maori objection to the scheme. At that time, Te Runanganui o Te Ika Whenua did not exist. A water right was issued on 4 December 1975 by the Bay of Plenty Regional Catchment Commission and the regional water board.

With regard to the Wheao proposal, contact was made with Ngati Manawa, in particular with Mr Bird, at meetings and on site visits, but this contact did not reveal tangata whenua concerns about eels or rangatiratanga. A water right was granted by the Bay of Plenty Water Board on 1 July 1977, and it was approved by the Town and Country Appeal Board on 2 March 1978.

#### 6.3.4 Consultation in the Wheao development

Evidence supporting Mr Williams's submissions was given by Peter Fitchett, a civil engineer employed by Murray–North Partners, who, along with Alan Withy, a principal of the firm, had been engaged by Rotorua Electricity to handle the scheme development and specifically to make an environmental impact assessment (see sec 5.4.2). 'In essence,' he said, 'we relied on the status of Mr Bird, a kaumatua of Ngati Manawa, and sought his guidance.'<sup>13</sup>

Early in 1977, he made a site visit to the affected area with Mr Bird, who told him something about its history. Significantly, Mr Bird said there was nothing of sacred interest to Ngati Manawa in the Wheao Gorge, only on higher ground. The fishing and eeling had deteriorated, especially since the Matahina Dam was built, and in particular the lower part of the Rangitaiki (above the confluence) was not considered good for eels.

Mr Bird made a second visit to the site on 19 May 1982, accompanied by Dennis Whimp. Neither Mr Fitchett nor Mr Whimp could recall any adverse comments from Mr Bird regarding the Wheao development. On 20 May 1982, Mr Whimp wrote to Mr Bird as follows:

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12. *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (doc B5(a)(2))

13. Document C17, p 2; cf doc C19, pp 5–6

A large portion of the flow in the Rangitaiki River will be diverted into the Wheao River upstream of the Ngahuinga Block, increasing the flow of the Wheao substantially. . . this increased Wheao flow will accelerate erosion of the riverbank.<sup>14</sup>

Although Mr Whimp had asked Mr Bird if he or the Ngahuinga Trust he was representing had any concerns, none were voiced. On that basis, Murray–North Partners had concluded that the effects of the scheme on Maori tribal interests would be minor and proceeded with the completion of the development.

Similar evidence was given by Mr Withy.<sup>15</sup> Conventional wisdom on the processes of consultation in the 1970s, he acknowledged, was very undeveloped and recognition of Treaty principles very limited. In this context, he had approached Mr Bird, who was regarded by the Murupara Borough Council as spokesman for Ngati Manawa, a major landowner within the borough through the Ngati Manawa Tribal Lands Incorporation. On 9 November 1976, he sent Mr Bird a copy of the Wheao scheme statement and invited his views on the proposal. He met Mr Bird on more than one occasion at his Rotorua office and drove him to Murupara to inspect the general area and location of the scheme.

About the same time, Mr Withy had considerable contact with Tamaroa Nikora, a Rotorua-based surveyor and planner in the Department of Lands and Survey. He had sought Mr Nikora's advice on numerous occasions in respect to Maoritanga and tangata whenua matters, but could not recall anything specific in relation to the Wheao power scheme.

Mr Bird had confirmed that Ngati Manawa were the tangata whenua in the Murupara–Wheao area but had not referred to any sacred sites or burial grounds in the area of the Wheao development, nor to eel fishing as being of significance or great interest above the confluence of the Rangitaiki and the Wheao.

The conclusions of Murray–North Partners concerning local Maori interests as recorded in their 1977 environmental impact assessment were as follows:

To avoid any risk of . . . affecting land associated with Maori history or culture, Mr Bird was invited to inspect the area affected by the scheme. The various elements of the scheme and the general nature of the proposal were indicated to him. It was found that the scheme in no way conflicts with tribal interests in the area.<sup>16</sup>

Mr Withy believed Mr Bird had been 'the appropriate person to talk to about Maori interests in the Wheao scheme development area' and he 'was not aware of any other person or body capable of representing what is now known as Te Ika Whenua'.<sup>17</sup>

### 6.3.5 The claimants' response

In her closing submissions, Ms Ertel said that the Crown had admitted that its obligations to consult were discharged by third parties. But there was no evidence that

14. See doc C17, p 5

15. Document C18, pp 2–6 and interpolation

16. See doc C18, pp 5–6; for the 1977 environmental impact assessment, see doc C18(a)

17. See doc C18, p 6

anyone other than Rotorua Electricity and Bay of Plenty Electricity had contacted tangata whenua prior to and about the construction of the Wheao and Aniwhenua schemes. The information provided and the consultation undertaken were seen by claimants as inadequate. In cross-examination, Neil Brennan had admitted that even today he did not know the name of the tangata whenua that he was supposed to consult.<sup>18</sup>

In reply to Mr Williams and Mr Andrews, Ms Ertel refuted the power companies' view that tangata whenua could not have been unaware of the Aniwhenua and Wheao proposals. It was easy to see local Maori being unaware of the '*actual effect* on the rivers of the scheme' (emphasis in original).<sup>19</sup> She also criticised the legislative framework within which this happened, not the power companies themselves (see sec 6.3.3).

With regard to Mr Brennan noting that the Tuhoe-Waikaremoana Maori Trust Board did not raise the issues of river ownership or the impact of the dams on the eel fishery when objecting to the schemes, she pointed out that the trust board made no claim to the rivers.

It seemed there was uncertainty as to whether Mr Bird received anything other than the preliminary report in respect of the hydro scheme. The information provided was scant and not explicit about the effects of the scheme, and yet the boards were able to obtain rights that had a prejudicial effect on the cultural and property rights of the claimants.

## 6.4 CONSULTATION OVER THE KIOREWEEKU PROJECT

### 6.4.1 A proposed new claim

In her opening submissions, Ms Ertel referred to a proposed new claim concerning Bay of Plenty Electricity's project to build another dam near Lake Aniwhenua (the Kioreweku Dam) and to consultative meetings called under the Resource Management Act 1991. The claimants had been formally advised of the proposal, which seemed to have gone through some modification and been the subject of a feasibility study.<sup>20</sup>

The claimants showed us a videotape of a meeting hosted by Bay of Plenty Electricity in October 1993, and provided us with a transcript of the proceedings to support their contentions, first, that they had not been properly informed and consulted as a Treaty partner who had tino rangatiratanga over the area and, secondly, that the Resource Management Act was 'fatally flawed'.<sup>21</sup>

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18. Document D2, pp 17-20

19. Document D6, p 3

20. Document B10, p 23 and interpolation

21. Documents B15, B15(a)



### 6.4.2 Third party evidence and submissions

At the first hearing on 9 November 1993, Miss Stanbridge, on behalf of third party interests, briefed the Tribunal on the proposal and consultation process initiated under the Resource Management Act.<sup>22</sup> On our site visit, Laurie Scott, the manager of Bay of Plenty Electricity, explained the proposal.

At the second hearing, Mr Brennan outlined Bay of Plenty Electricity's current investigations of the Kioreweku project, which it considered was in the best interests of the people of the region and which it hoped would protect the local community against future price rises and further national power shortages.<sup>23</sup>

Consultation had begun with the local community and tangata whenua representatives with the intention of getting early feedback on the various options for the design and location of the new dam. Consultation with local Maori had highlighted the existence of a wahi tapu (the riwai site), which was threatened by flooding under one of the development options, since abandoned. Discussions were under way for the appropriate design of two elver passes for the new dam. Applications had been lodged for the necessary resource consents and would be publicly notified. There would be an opportunity for all interested parties to make submissions to the Bay of Plenty Regional Council. In the meantime, consultation with the local Maori community would continue.

Bay of Plenty Electricity was fully aware of the requirement for consultation with tangata whenua under the Resource Management Act. It had entered that consultation process with good intentions and the belief that the process would be of benefit to all participants.

Dr Donovan, who had been involved in surveys of a number of rivers in the Bay of Plenty, gave evidence evaluating the impact of the proposed Kioreweku scheme on the ecology of a section of the Rangitaiki River downstream of the Aniwhenua Falls.<sup>24</sup> Primary impacts were the formation of an 18-hectare lake, the diversion of approximately one kilometre of the existing river through a canal and power station, and the deepening of some 2.5 kilometres of river downstream of the power station. Design features to minimise the impact on the ecology of the river included pools to sustain fish in the diverted section, eel passes to permit upstream movement of eels and other native fish, and screens on the penthouse intakes to prevent the passage of larger fish through the turbines.

Bay of Plenty Electricity had carried out consultation with the Waiohau Community Trust, Te Runanganui o Te Ika Whenua, Ngati Manawa, and Tuhoe o Waikaremoana. As a result, Bioresarches Consulting Biologists was requested to complete a preliminary assessment of sites of historical and cultural importance (wahi tapu) in the area of the scheme. Tangata whenua assisted in this preliminary assessment. This had identified the riwai site, which was a factor in Bay of Plenty

22. Miss Stanbridge, oral submission on behalf of third party interests, first hearing, 9 November 1993, tape 2, side A, 3140–3430. For the overall provisional layout of the project, see doc 87.

23. Document C11, pp 7–8

24. Document C13, pp 8–10

Electricity abandoning one of the proposed options for the scheme, which would have involved flooding the site.

#### 6.4.3 The claimants' response

In closing, Ms Ertel reminded us that the Resource Management Act 1991 had 'heralded a new era in consultation', but the claimants were critical of the Act, as was the Tribunal, particularly in the *Ngawha Geothermal Resource Report 1993* and the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims 1993*.<sup>25</sup> One of the faults of the Act was that it did not require input from the tangata whenua until much preliminary work had been done and the tangata whenua were faced with a fait accompli. 'Relegating the tangata whenua to the role of a submitter or objector to the Regional Council' was an affront to their mana and not in accordance with the rangatiratanga promised in the Treaty.<sup>26</sup>

Bay of Plenty Electricity had begun consultation with the local community and tangata whenua. Mr Donovan was then commissioned to produce a report on the Kioreweku site, and his evidence described the consultation process undertaken in this project by Bay of Plenty Electricity. The consultation, however, was not about whether the project would proceed but design options and the location of the new dam, subject to the granting of resource management consents.

An example of this consultation was the October 1993 meeting held between some claimants and Bay of Plenty Electricity representatives at the Aniwhenua powerhouse. In the 14 years of its existence, this was the first time that these claimants had been there, which underlined the attitude of the electricity authorities. Some of the land needed for development was Maori owned. It was inappropriate, Ms Ertel suggested, that hired property consultants were directed by Mr Scott to discuss purchase options with attendant Maori landowners at a function serving alcohol.

Bay of Plenty Electricity had asked the Tribunal not to judge the consultation, which it had not completed. It was, however, within the jurisdiction of the Tribunal to make findings on the evidence presented that this was not consultation in accordance with the principles of the Treaty. For consultation to meet Treaty requirements, Bay of Plenty Electricity would have to talk with tangata whenua about the need for the Kioreweku Dam and dismantle the Resource Management Act process.

A finding from the Tribunal that the claimants owned the waters of the river would provide them with protection in the future and give them a more appropriate level of influence over future development such as Kioreweku. There was no suggestion that they would seek to stop development. The Treaty required that rangatiratanga be recognised and given effect. The Resource Management Act was inconsistent with the Treaty because it failed to make positive provision for Maori ownership of the river, and particularly the water, and Maori rangatiratanga and the exercise of it. If the

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25. Document D2, p 58

26. Ibid, p 61

Tribunal dealt with these issues at an early stage, it would assist those in whom statutory discretions were vested under it.<sup>27</sup>

#### 6.4.4 Closing submissions of counsel for power companies

Counsel for Bay of Plenty Electricity and Rotorua Electricity submitted that claimant counsel, in requesting a recommendation on Kioreweku consultation, was asking the Waitangi Tribunal to 'second guess' what the Planning Tribunal might say about its adequacy. Indeed, she was seeking a finding from the Waitangi Tribunal to 'derail' Bay of Plenty Electricity's consent application.<sup>28</sup> The issue of this Tribunal's ability to review the Planning Tribunal had been canvassed in its *Mohaka River Report 1992*. The Waitangi Tribunal had agreed with Crown counsel that the Planning Tribunal was 'neither the Crown nor the agent of the Crown'. Although it had the power to review the legislation under which the Planning Tribunal operated, it did not have the power to review Planning Tribunal actions under that legislation.<sup>29</sup> The Planning Tribunal was, 'as a result of the provisions of Part II of the Resource Management Act, becoming increasingly familiar and comfortable with Treaty jurisprudence'. Parliament had clearly intended that it 'should be the forum in which Treaty compliance under that Act was tested'.<sup>30</sup>

### 6.5 EEL DEPLETION AND THE EEL REPLENISHMENT SCHEME

#### 6.5.1 Claimants' concerns

In their original claim for lands and waterways (claim 1.1), the claimants allege that the Aniwhenua and Wheao Dams had 'deprived them of their kaiawa (eels), an important food for which they were "nationally renown" by blocking the migratory routes for the eels to and from the sea'.<sup>31</sup>

Building on the oral evidence presented at the urgent hearing of the energy assets claim, a number of witnesses for the claimants in the present claim gave evidence on the depletion of the eels since the construction of the Matahina, Aniwhenua, and Wheao Dams.

In their report *Nga Awa me nga Iwi o te Ika Whenua*, the claimants' research team stated that:

During the heyday of forestry development, people would go down to the Wheao from Waipukao and Kaingaroa villages and catch eels with a bait and line at night. A

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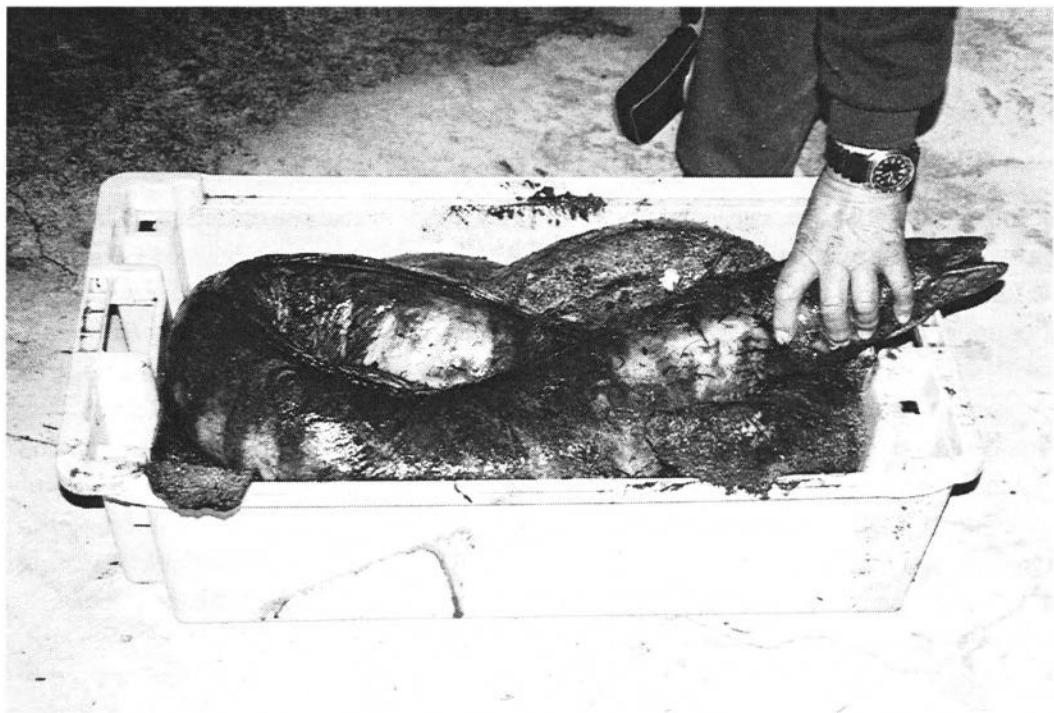
27. Ibid, p 62

28. Document D4, p 10

29. Waitangi Tribunal, *The Mohaka River Report 1992*, 2nd ed, Wellington, GP Publications, 1996, sec 5.6

30. Document D4, p 11

31. Waitangi Tribunal, *Te Ika Whenua ~ Energy Assets Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 1.2



Figures 21 (above) and 22 (below): Eels retrieved from the grilles of the Aniwhenua Dam, where they were caught as they migrated to the sea; the marks on their bodies were caused by the grilles. Photographs courtesy of Hohepa Waiti.



normal catch would be about 25 eels in two hours. These would be taken back to the villages and shared or the people would pawhara (dry) them for future use.<sup>32</sup>

According to Maurice Toetoe, who had lived in Murupara all his life and fished around the area since childhood, the mixing of the waters of the Rangitaiki and the Wheao affected the fishing grounds in both. Consequently, the Wheao became faster running and its bottom more turbulent. This meant there was less food for fish on the bottom of the river, and less fish. The Rangitaiki is now almost a dry river where no eels can live.<sup>33</sup>

For Billy Messent, one of the greatest tragedies of the diversion of the Rangitaiki and the Wheao 'blowout' was that all the beautiful little pools of clear water that made the Wheao one of the greatest trout fishing rivers in the world, as well as a great place for tuna, were wiped out. The Wheao they had known, the lands on which they had lived for weeks and what used to be a great place for mahinga kai were all gone.<sup>34</sup>

Evidence given at the hearings and on the site visit indicated that the dams were impregnable walls that prevented not only the annual migration of eels down the river to the sea to spawn but also the migration of baby elvers up the rivers. But because eels have a 30-year breeding cycle, the full effects of this were only recently being realised.<sup>35</sup>

### 6.5.2 Crown involvement in the eel fishery

Mr Alexander presented detailed historical evidence headed 'The Crown and the Eel Fishery', mostly for the period 1929 to 1987, and supporting documents to that report.<sup>36</sup> In this section, we summarise his evidence, which in effect indicates that he was mistaken when he concluded in his earlier report that 'there was total silence from tangata whenua while the power schemes were being debated and constructed', which 'certainly proved fatal to the ability of the schemes as constructed to protect the eel fishery'.<sup>37</sup>

Occasional Maori complaints to the Government about the effects of Pakeha fishers on the eel population and traditional fisheries dated back to the 1930s and 1940s, but 'these were not considered to have sufficient substance to them to justify a statutory response'.<sup>38</sup> In any case, the traditional view of the acclimatisation societies that eels were a threat to trout and salmon fisheries was shared in official circles and worked against remedial action. This view was still held by the Rotorua office of the Conservator of Wildlife in the early 1960s, and was echoed in the early 1980s 'in the form of notes of caution about doing too much to help eels get around the Matahina and Aniwhenua dams'.<sup>39</sup> 'The Rangitaiki,' Mr Alexander noted, 'was effectively

32. Document B4, p 18

33. Document B11, p 4

34. Document B13, p 2

35. Document A8(13), pp 4-5

36. Documents C6, C6(a)

37. Document C5, p 54

38. Document C6, p 4

39. Ibid, p 5

dammed, and eel migrations cut, from 1963.<sup>40</sup> Some years elapsed, however, before Maori realised that eel populations above the dam were seriously depleted.

On 26 June 1970, the *Rotorua Daily Post* reported that:

Maori anger is mounting over development on the Rangitaiki River that has seriously depleted eel populations in the Murupara District . . . Below the Te Mahoe dam [at Matahina], eel populations are building up. But in the quiet Ikawhenua Range country, the river's birth place, Maoris are concerned that one of their traditional foods is disappearing.

Moves to press the Internal Affairs Department into building a run-off or race for eels so they might 'climb' over the dam have been turned-down because of high costs.<sup>41</sup>

In 1976, a report from a local Wildlife Service officer indicated 'a good population of eels' still existed in the Wheao River, yet 'the eel fishery did not get a mention in the Conservator's written submissions' after he lodged an objection to the water right in 1977.<sup>42</sup>

In 1981, the Murupara Maori Committee asked the Hamilton district manager of the Electricity Department for an investigation to see if the Matahina Dam was the cause of the scarcity of eels. The letter was referred to the Conservator of Wildlife in Rotorua, who replied that the dam had stopped what was previously 'a very small run migrating up to the central reaches' of the Rangitaiki River owing to 'a general obstruction at the Aniwhenua Falls'. Compounding the position was 'the establishment of the barrage in the Aniwhenua Lake'.<sup>43</sup> The Wildlife Service, Mr Alexander pointed out, was apparently unaware of Elsdon Best's references to elvers traversing the falls and of the size and scope of the eel fishery above the falls.

At a meeting held by the Bay of Plenty Electric Power Board in Murupara in March 1982, a representative of the Maori Women's Welfare League spoke about the scarcity of eels and blamed the Aniwhenua scheme for preventing migration. Following discussion with the Wildlife Service, the board replied to the league members that service studies had revealed that elvers were able to cross both the Matahina and the Aniwhenua Dams and had been found by its own station attendants at the top of the Aniwhenua Dam referred to as the barrage.

Later that year, the Murupara Maori Committee made representations to its local member of Parliament, the member for Eastern Maori, Peter Tapsell, who wrote to the Minister of Energy. The Minister in reply repeated, word for word, the previous response of the Conservator of Wildlife. He added that the Electricity Division of the Ministry had not made any attempt and had never been requested by the Wildlife Service to provide for eels to migrate up and down the river. He suggested that the committee discuss the matters with the service in Rotorua, which he understood was to conduct investigations that November relating to eels in the Rangitaiki River.

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40. Document c6, p 8, fn13

41. See doc c6, pp 8-9; doc c6(a), p 55

42. See doc c6, p 10; doc c6(a), p 58

43. See doc c6, p 11; doc c6(a), p 61

By this time, the conservator had admitted that, regardless of what had caused the decline in the availability of eels above Aniwhenua, there was 'obviously more of a need to enhance the traditional fishery than to attribute blame'.<sup>44</sup> The options were to restrict commercial harvesting, provide an eel pass through, over, or around the Aniwhenua Barrage, or transport elvers around the Matahina Dam.

On 7 January 1983, eight days after the collapse of the Wheao canal, 13 long-finned eels were collected off the Aniwhenua intake screens. Mr Tapsell wrote again to the Minister of Energy, on behalf of the Murupara Maori Committee, which felt 'very strongly about this matter'.<sup>45</sup> He pointed out that the Maori people would confirm that the population of eels had dwindled drastically within the last few years and that they did not accept that this was due to over-fishing during this period of time.

The Acting Minister replied that it was now apparent that substantial numbers of eels were able to pass the Matahina Dam but the Aniwhenua Barrage remained a barrier to their upstream migration and appeared to be the principal cause of the decline in numbers in the upper reaches. A small felt matting structure attached to the flap gate above the spillway would be a practical proposition to convey elvers over the barrage.

In response to letters from the Acting Minister and Mr Tapsell, the Wildlife Service and the power board offered to install an experimental eel pass over the Aniwhenua Dam during the summer of 1983-84. After the collapse of the Wheao canal and following representations from Mr Tapsell to the Ministers of Fisheries, the Environment, and Energy, it was decided to commission a report from a Fisheries Research Division scientist, Charles Mitchell, in the Ministry of Agriculture and Fisheries in Rotorua.

Mitchell reported that the Aniwhenua Barrage was 'virtually impassable' for the greatly diminished number of elvers that managed to reach it, and he identified two options: the construction of elver passes or, for the immediate elver season, the transportation of elvers around the dam and their release into Aniwhenua Lake. In regard to the latter option, he noted that 'The Maori have long had a tradition of stocking eels in bodies of water they would be unable to reach by normal means'.<sup>46</sup>

The Hamilton district manager of the Electricity Department and the general manager of the Bay of Plenty Electric Power Board favoured the second option (manual transfer). So did Ngati Manawa elders at Murupara, who, through Henry Bird, informed Mr Tapsell and the conservator that they had a very suitable man to do the job. The Wildlife Service officer at Murupara also supported the trans-shipment option, primarily because of a lack of time to install eel passes before the next seasonal migration.

As a result of agreement by all concerned, a trans-shipment programme was put into effect during the 1983-84 elver migration season. The costs were shared by the Wildlife Service, the Electricity Division of the Ministry of Energy, and the Bay of Plenty Electric Power Board. Transfers were made of an estimated total of 15,000

44. See doc C6, p 16; doc C6(a), p 75

45. See doc C6, p 18; doc C6(a), p 84

46. See doc C6, p 23; doc C6(a), p 115; for Mitchell's report, see doc C6(a), pp 101-119

elvers. The programme was repeated during the 1984–85 season, involving an estimated 23,000 elvers.

In both instances, Mr Bird's offer of Maori participation was declined; in 1983–84 on the ground that, being the first season, the emphasis was on developing various transfer techniques; in 1984–85 because the elvers had already moved through to the dam and been transferred. When Mr Tapsell inquired about using Maori people to carry out the transfer the following season, he was told that the small amount of time involved would not warrant employment of local people specifically for the task. Further transfers took place in the 1985–86 and 1986–87 seasons; in the latter about 40,000 elvers were involved.

Mr Alexander concluded that 'the Crown failed to appreciate that the Matahina dam would sever the essential reproductive links between the eel fishery of Te Ika Whenua and the sea'.<sup>47</sup> Since then, the elver transfer programme had shown 'a willingness by the Crown to respond' to Maori concerns. Construction of the dams meant that the maintenance of the eel population in the upper reaches of the river must inevitably involve human intervention. This was not inconsistent with Maori practice. Although to his knowledge Te Ika Whenua did not have a tradition of eel relocation, and did not respond to the new situation by undertaking transfers themselves, there were records of tribes elsewhere moving eels between lakes and rivers.

Christopher Richmond, the manager of science and technical services at the Department of Conservation in Rotorua, gave further evidence on the Crown's involvement with the eel fishery on the Rangitaiki River mostly since 1987. This clarified a few of Mr Alexander's comments on the lack of action taken by the Wildlife Service to protect eel populations.

Legislative responsibilities for freshwater fish species from 1972 to 1987, he explained, were divided between the Ministry of Agriculture and Fisheries and the Wildlife Service. The former was responsible for research and management as well as for controlling the harvest of whitebait and eels; the latter was responsible for trout and non-harvested populations of native fish: 'In relation to eel passage and populations MAF had research and regulatory responsibilities whereas the Wildlife Service roles were advisory, advocacy and management of transfers.'<sup>48</sup>

Consultation with tangata whenua on the protection and management of the eel fisheries was undertaken by the Wildlife Service. From the Rotorua regional office files, this appeared 'to have ranged from initially minor to more substantial in more recent years'. He understood that the old field office files contained notes of verbal consultation with local tangata whenua:

Preliminary liaison . . . about the capture of elvers at Matahina for transfer upstream was based on misunderstanding of iwi boundaries and responsibilities, and so approvals were sought from Ngati Awa as the collection point was within that rohe. Subsequent consultation placed more emphasis on the Ngati Manawa people of

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47. Document C6, p 29

48. Document C16, p 3



Murupara . . . The Wildlife Service concluded eventually that the elvers were collected from Ngati Awa waters, transferred across Tuhoe waters and released into Ngati Manawa waters.<sup>49</sup>

Since the formation of the Department of Conservation in 1987, the quality of iwi consultation about fishery management and protection had improved. Previously dispersed administrative responsibilities had been merged, allowing the development of more integrated management of non-commercial fisheries. Moreover, under section 4 of the Conservation Act 1987, the department was required to give effect to the principles of the Treaty of Waitangi. The Bay of Plenty Conservation Board included a high level of representation of iwi interests. One of the initial members was the claimant representative Hohepa Waiti, who was subsequently reappointed and was recently chairman of the board's Maori Policy Committee.

In August 1990, Mr Richmond invited and received a deputation from Te Runanganui o Te Ika Whenua to discuss the eel situation and options for quickly rehabilitating the fishery. Of primary concern was the need to increase the recruitment of elvers upstream from Aniwhenua; of secondary, but increasing concern were the hazards to the return of mature adult eels to their spawning grounds in the Pacific. He was able to confirm departmental commitments to continue and to increase the annual transfer of elvers upstream from Matahina; to monitor the effectiveness of the fish pass established over the Matahina Dam; and to work with iwi and the Bay of Plenty Electric Power Board to find an effective form of fish pass upstream from Aniwhenua and with fisheries scientists and the power authorities to develop effective methods of ensuring that at least some mature adults completed their return migration to the spawning grounds. In 1994, iwi representatives and Department of Conservation staff assisted fisheries consultant Charles Mitchell with the first trial for capture of downstream migrant adults.

Two priorities of special significance identified in the draft *Conservation Management Strategy* prepared by the Bay of Plenty conservancy in 1994 were:

- to establish a charter of partnership with the tangata whenua of the area; and
- to promote the restoration of fish passage across the dams and other barriers within the Rangitaiki catchment area.<sup>50</sup>

In Mr Richmond's opinion, the department and board had 'made good progress in implementing these priorities', and he was confident that 'this partnership and the goodwill of the power authorities' would 'result in the rehabilitation and enhancement of the eel fishery' as their knowledge and technical skills increased.<sup>51</sup>

### 6.5.3 Impact of local hydro schemes on eel populations

Evidence of the impact of the hydro schemes on eel populations was presented on behalf of Bay of Plenty Electricity by its fisheries consultant Mr Mitchell.<sup>52</sup> The dams

49. Ibid, pp 3-4

50. Ibid, p 6

51. Ibid

52. Document C12

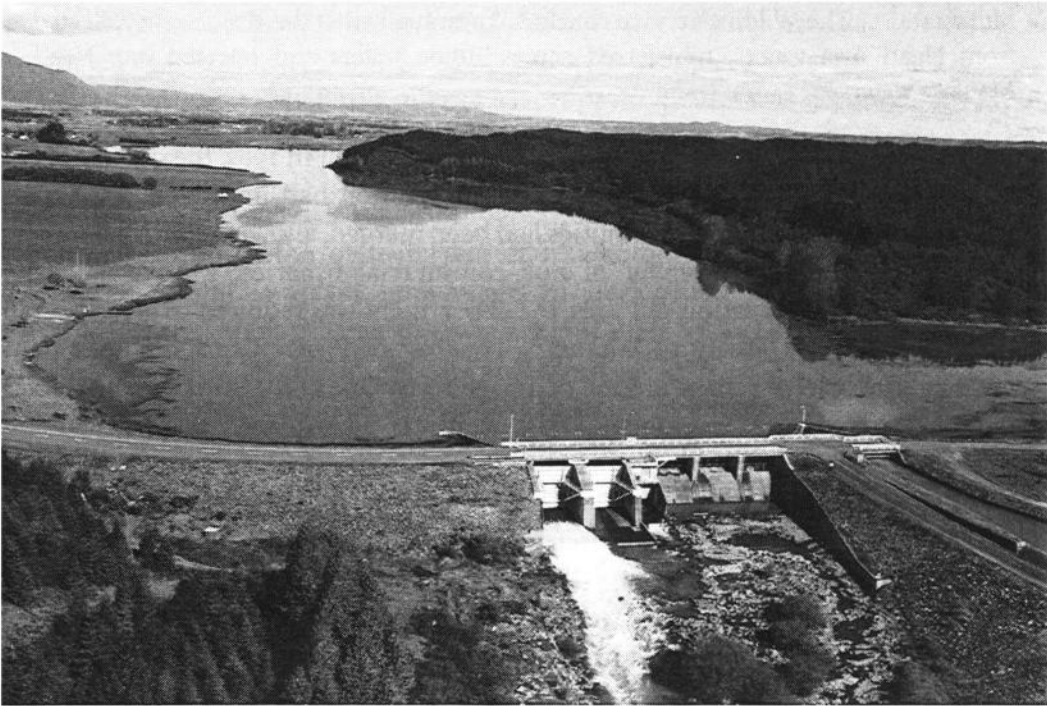


Figure 23: The Aniwhenua Dam. Photograph courtesy of Hohepa Waiti.

and power stations, he said, posed obstacles for the fishery upstream because of the diadromous life cycle of eels. Each spring, the elvers swarmed into the river from the sea and migrated up it. These migrations were remarkable not only for the numbers involved but for the tenacity with which they climbed up the wetted side of the Aniwhenua Falls. The migration might take several years before the elvers settled into suitable habitats. Adult eels, after they had attained a suitable size and perhaps fat level, migrated back to the sea to breed and never returned. Mortality in turbines was related directly to the size of both the turbines and the fish. The survival of particularly large migrant eels was likely to be poor:

Recruitment of elvers to the eel population of the Upper Rangitaiki would have been greatly reduced by construction of Matahina Dam . . .

Nonetheless some eels seem to have got over the dam in the years since construction . . . Nighttime inspections of Aniwhenua Barrage, the base of the Power House and Aniwhenua Falls in 1992 and 1993 found elvers present in very small numbers (1–10), not the teeming multitudes as described by Best.<sup>53</sup>

Dr Donovan, on behalf of Rotorua Electricity, supported Mr Mitchell's evidence in respect of the major impact of the Matahina Dam on the eel fishery. As to references to the loss of eels from the Wheao River, in his opinion, 'there was a significant reduction in the number of eels in the Wheao River prior to the construction of the Wheao scheme as a result of [the] construction of the Matahina Dam.'<sup>54</sup>

53. Document C12, p 6

54. Document C13, p 10

There was 'little doubt that [the collapse of the Wheao canal] changed the character of the river ... in particular over a four-kilometre section downstream of the powerhouse', but surveys indicated that trout had readily colonised the river following the collapse and had reached average numbers within three years following that event.<sup>55</sup> While the Wheao scheme had resulted in significant changes to some aquatic habitats, as would the proposed Kioreweku scheme, design features had been included to reduce the impact of these developments; in particular, on the fisheries in those areas. But in both schemes, principal concerns had been expressed about the impact on the trout fishery.<sup>56</sup>

#### 6.5.4 The eel replenishment scheme

At the urgent hearing of the energy assets claim and on our site visit, we were told that Bay of Plenty Electricity had transported 70,000 elvers from below the Matahina Dam to above the Aniwhenua Dam and was committed to spend \$25,000 the following year on this eel replenishment scheme.<sup>57</sup>

More detailed evidence on the scheme was given by Mr Mitchell, who in the previous 11 years had been involved with measures introduced by the Electricity Corporation of New Zealand and Bay of Plenty Electricity to restore and enhance the eel population of the Rangitaiki River above their respective power stations.<sup>58</sup>

Elver passes, he explained, were necessary because of the diadromous life cycle of eels. Early releases of elvers into the Matahina and Aniwhenua Reservoirs were certainly successful. When he examined the Aniwhenua power station and barrage again in 1992, with a view to installing an elver pass, he concluded that very low numbers of elvers present below the dam meant that the construction of a full-scale pass was unnecessary. The same outcome could be achieved by the more cost-effective method of capturing them below the Matahina Dam and releasing them into the Aniwhenua Reservoir. The claimants' observation that 'new' eels had been introduced was correct. Short-finned eels were now being stocked above Aniwhenua when few would have migrated past this point naturally. The long-finned eels had been the dominant eel in the upper Rangitaiki in former times, and they ate the smaller short-finned eels when they encountered them. Unfortunately, he had failed to consider the status of long-finned eels as a traditional food in his original recommendations for restocking. This, he admitted, reflected 'a lack of cultural awareness'.

Although the impetus for the restocking work came from local Maori, he was not initially involved in any consultation with them. In the first instance, he had recommended that local Maori be encouraged and supported to trap elvers below the Matahina Dam for release into the Aniwhenua Reservoir. However, the Wildlife Service and its successor, the Department of Conservation:

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55. *Ibid.*, p 7

56. *Ibid.*, p 11

57. Document A8(13)(h); see also doc D5, pp 3-4

58. Document C12, pp 8-21

did not wish to delegate authority for management of fisheries values. In particular, concerns were expressed over the impact on trout of releasing large numbers of eels into the catchment. The now disbanded Wildlife Service was dominated by trout fishing interests ... only recently ... local people have become involved with the stocking of eels.<sup>59</sup>

To sustain an eel population in the upper Rangitaiki River, all aspects of the life cycle had to be completed by at least part of the stock. A proportion had to pass downstream unharmed to spawning grounds somewhere in the tropical Pacific Ocean. This conclusion led to the project in February and March 1994, financed by Bay of Plenty Electricity, to trap migrating eels within the Aniwhenua power canal, transport them downstream below the Matahina Dam, and release them. At the conclusion of these trials, a report on the experiment would be prepared. Mr Mitchell considered the results 'highly encouraging and relevant to the sustainable management of eel stocks in catchments above power stations'.<sup>60</sup> Although he understood the claimants had requested that a two-way channel for eels be provided, he considered trapping and manually transporting the migrant eels was better. Any two-way channel at the Aniwhenua Dam would simply divert eels to their death at the Matahina Dam. The eels were now very few in number and it was physically impractical to do anything else but net these few eels. Moreover, a take of migrating eels was fully compatible with the traditional Maori fishing practice of building large and permanent pa tuna on rivers and trapping the heke (migration).

The work to date on downstream migrating eels had been strongly supported by Maori. Young men from Murupara and Waiohou had appeared to work beside Mr Mitchell. Discussions with them and local residents led Mr Mitchell to believe that a migrant eel catch and release programme would be supported. Bay of Plenty Electricity had clearly demonstrated its support for programmes designed to sustain the native fisheries in the Rangitaiki River. Its migration programme provided an opportunity to develop a traditional fishery and traditional fishing customs that coexisted with an operating hydro dam. Their efforts had been motivated by a desire to minimise as far as possible the impact the dams had had in the past on the native fish population.

### 6.5.5 The capture and release method

Maanu Paul pointed out that Te Ika Whenua had no faith in the capture and release method to assist adult eels' migration back to the Pacific Ocean. It was contrary to their traditional knowledge that eels migrate by following the scent of their parents – indeed, it disrupted this process. It was based on 'the hit and miss methodology of the Western scientific approach', as was the technique of electric fishing used to catch the eels. It had been 'foisted on tangata whenua without their input'. They were 'simply there to do the donkey work'.<sup>61</sup> At no time were they invited to make decisions

59. Document C12, p 13

60. Ibid, p 18

61. Document C19, p 3

that catered for their Maori techniques or knowledge. The rate of survival was two elvers out of four million per spawning adult. The capture and release method should not be used in future. Instead, Te Ika Whenua proposed a two-way floating pipeline over the Aniwhenua Dam.<sup>62</sup>

Mr Mitchell denied Mr Paul's criticisms. The capture and release method, he maintained, was based on a close examination of all the conditions. The proposed pipeline over the Aniwhenua Dam would merely lead the eels to their deaths at the Matahina Dam, and it was simply not viable to have a pipeline over the latter dam. Contrary to what Mr Paul said, people of Te Ika Whenua had assisted Bay of Plenty Electricity to save the eels of their own volition. He had worked side by side with local men and shared their knowledge to achieve sustainable management of the eel stocks.

Mr Mitchell defended electro-fishing as a useful technique for capturing eels during the daytime. He disagreed with Mr Paul's statement that it would not result in the eels being stunned since they were already asleep during daylight hours. This was an established and well-recognised fishing technique, used by fisheries scientists throughout the world, not just Western scientists.<sup>63</sup>

## 6.6 CROWN SUBMISSIONS

The Crown stressed that the hydro scheme that seemed to have had the greatest impact on the eel population was the Matahina project, which was completed in the 1960s. This was downstream of the area claimed by Te Ika Whenua, but 'plainly affected the eel fisheries in the rivers and streams which they claim'.<sup>64</sup> The building of the Matahina Dam was not the subject of complaint by Te Ika Whenua, possibly because it was outside their claimed rohe and there was little evidence about it before the Tribunal.

The Crown had attempted to deal with this problem from the early 1980s by employing Mr Mitchell, who experimented with devices for moving elvers above the dam. The work was carried on by the Electricity Corporation of New Zealand, and there was now a permanent elver pass over the Matahina. Similar steps were being taken at Aniwhenua. 'In short, the Crown and the power boards, in consultation with local Maori, had been working on solving the problems for some time.'<sup>65</sup>

The Crown said that commercial eel fishing in the early 1970s seemed 'to have been at least as significant a factor in the decline of the eel fisheries as the hydro developments'. Indeed, it was 'a major, perhaps the major, contributor to the decline'.<sup>66</sup> In December 1972, before the construction of the Aniwhenua and Wheao schemes, Mr Paul, as chairman of the Ngati Awa Maori Executive, had written to the Minister of Maori Affairs expressing the concern of the people of the area at the

62. For a drawing of this, see doc C19(a).

63. Document D1, p 3

64. Document D5, p 26

65. Ibid, p 27

66. Ibid, pp 3, 26

serious depletion of eel stocks resulting from commercial fishing and estimating that within six months eel stocks would be exhausted.

Under cross-examination, Mr Mitchell agreed that commercial fishing was a major factor in the decline of eel stocks.<sup>67</sup>

### 6.7 THIRD PARTY SUBMISSIONS

In his opening submissions on eels, counsel for Bay of Plenty Electricity and Rotorua Electricity submitted that, prior to the building of the Aniwhenua and Wheao Dams, eel numbers in the upper Rangitaiki were extremely low, and in the lower Wheao even smaller, and that there was a correlation between low eel numbers and the Matahina Dam.<sup>68</sup> Active measures were undertaken to sustain the population and Bay of Plenty Electricity financed elver restocking. Experts concluded that the most effective method was recapture below the Matahina Dam and release in the Aniwhenua Reservoir. In 1993 and 1994, 200,000 eels were restocked. An elver pass at Aniwhenua was looked at and a programme was begun to transport mature migrating eels from the Aniwhenua to below the Matahina. This trapping system complemented traditional Maori eel harvesting. In closing, counsel submitted that the Bay of Plenty Electric Power Board had 'gone to great lengths to preserve eel populations in the Rangitaiki River above the Matahina Dam'.<sup>69</sup>

### 6.8 CLAIMANT SUBMISSIONS

The claimants stated that they had not been consulted about the eels. Indeed, several of their spokesmen were frankly sceptical that the transferred eels would survive; trout and shags would eat them. Unless eel channels were built, eels would be unable to reach the sea to breed. There was only one way for eels to survive – to come and go freely – and this was known by the powers that be.<sup>70</sup>

Ms Ertel, in closing, submitted that the Crown's failure to protect the eel fishery was highlighted by Mr Alexander's evidence that it had not appreciated the effects of the Matahina Dam on eel reproduction.<sup>71</sup> The Crown had also failed to protect the claimants' customary rights in the eel fishery by allowing it to come under stress from commercial fishing before the construction of the Aniwhenua and Wheao power schemes and by failing to ensure that the power schemes did not exacerbate the stressed fishery.

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67. Charles Mitchell, oral submission on behalf of third party interests, second hearing, 30 August 1994, tape 5, side B, 0356–0380

68. Document C15, pp 11–12

69. Document D4, p 2

70. Thomas Higgins, oral submission on behalf of the claimants, first hearing, 10 November 1993, tape 3, side A, 4200–4222

71. Document D2, p 23

Although in recent years the Crown and Bay of Plenty Electricity had come to acknowledge some responsibility in assisting the migration of adult eels downstream, the capture and release process failed to take account of the traditional Ika Whenua belief and body of knowledge; namely, that elvers migrate by following the scent of their parents.<sup>72</sup> The scientific uncertainty in this area was confirmed by Mr Mitchell in cross-examination. The elver pass, constructed in 1992, had only one of the two entrances in the original design, and they had been lobbying the Electricity Corporation of New Zealand ever since. The best guess Mr Mitchell could make was that, for every thousand elvers making it over the dam, one might survive to be a migrating adult. The laissez-faire policy of the 1970s had endangered the eel fishery. The Crown, in breach of the Treaty, allowed the fishery to be exploited:

The Crown failed to ensure that Maori retained authority over their fishery. The power to regulate and protect the fishery was not left, in a legally enforceable sense, with Maori.<sup>73</sup>

## 6.9 ISSUES ARISING FROM CLAIMANT CONCERNS

An important issue arising from the claimants' concerns and the Crown's responses was whether or not Te Ika Whenua were appropriately and sufficiently consulted as Treaty partners over the construction of the dams for power generation and the eel replenishment scheme. Underlying this issue was the more general and fundamental issue arising from the claimants' Treaty rights to tino rangatiratanga and the Crown's Treaty rights to kawanatanga. These issues are examined in chapters 8 and 9.

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72. Ibid, pp 20–21

73. Ibid, pp 22–23; see also doc C19, p 3





## CHAPTER 7

# RIPARIAN RIGHTS

### 7.1 RIPARIAN OWNERSHIP IN THE CLAIM AREA

'Riparian land' is land that runs along the margins or banks of rivers and streams. While the term is commonly used, there is no defined separate title or strip of land that comprises riparian title. The owner of land, no matter how large the area, whose title includes riparian land – that is, land on the bank of a river or stream – is known as a riparian owner.

The variety of riparian land ownership in the claim area was demonstrated by Ms Ertel in her opening submissions as follows:

- (i) State forest land subject to a Crown Forest Licence (Flaxy Creek, Whirinaki, Heruiwi and Northern Boundary Blocks)
- (ii) State forest land not yet subject to a Crown Forest Licence. The fee simple being vested in the Forest Corporation of New Zealand Ltd (a State-Owned Enterprise)
- (iii) Maori land owned by individuals represented by Te Ika Whenua
- (iv) General land owned by individuals represented by Te Ika Whenua
- (v) General land owned by individuals not represented by Te Ika Whenua (Pakeha)
- (vi) General land owned by the Tasman Pulp and Paper Company
- (vii) The Aniwhenua Dam itself is owned by the Bay of Plenty Electric Power Board. Next to this, on the left bank, is an SOE (Forest Corporation of New Zealand Limited). Tasman Forestry owns land on the bank between Forestcorp's land and the end of the scheme. This is the Matahina Forest. On the right bank the owners are either:
  - (a) Pakeha—M Treloar, K R Wilcox, P J Savage, Neil, Duggan and Baker; or
  - (b) Maori—A Reha, Muriwa Charles White, Hapurona, Ted Maki and Others, Te Arai Maki and Others and Te Kani Rangi and Others.<sup>1</sup>

Approximately 90 percent of the left bank of the Wheao River was subject to the Flaxy Creek Crown forest licence and approximately 50 percent of the right bank was subject to the Whirinaki Crown forest licence, Ms Ertel continued; other owners on the right bank were either Maori or Forestcorp (the land not yet being subject to a Crown forest licence); and there were possibly some Pakeha owners with land bordering the Wheao, but in such case this would involve a very small portion of the river.<sup>2</sup>

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1. Document B5, pp 55–56

2. Ibid, p 56

In her submissions, Ms Ertel also advanced the hypothesis that part of the river system could be classed as navigable and part non-navigable.<sup>3</sup> In the former instance, the bed of the river would belong to the Crown by virtue of section 261 of the Coal Mines Act 1979,<sup>4</sup> while in the latter, the *ad medium filum* rule would apply and the bed to the middle of the river would belong to the owner of the area of bank adjoining the river. Ms Ertel was prepared to argue her case so as to cover both principles of law.

Early during the first hearing at Tipapa Marae, Murupara, the claimants arranged for the Tribunal to view the area. It then appeared to the Tribunal that it would be difficult to classify any of the rivers as navigable in accordance with the provisions of English common law. Accordingly, it initiated its own inquiry of the Department of Survey and Land Information at Hamilton. In a letter dated 16 March 1994, the department, after reviewing the authorities, stated:

In the case of the Rangitaiki River bed, I am unable to find relevant file evidence to support any assertion that it was navigable (in 1903). Neither can I find relevant file evidence to the contrary. Examination of the earliest available aerial photographs and relevant plans does not assist.

In the absence of persuasive evidence either way, I am bound to recommend in favour of applying the presumption of *ad medium filum aquae*.

It would be wrong of the Crown to assert ownership without convincing evidence of navigability – evidence that would stand up in a Court of law.

Further, I cannot identify a compelling reason for carrying out the possibly protracted and complicated research required to prove such navigability.

In the absence of instruction and funding to determine navigability I stand by my recommendation to apply the principle of presumptive ownership by adjoining owners (some of whom will be the Crown) to the middle line of the river bed.<sup>5</sup>

When this correspondence was put to the parties, counsel for the Crown conceded that it had not made any claim to the bed of these rivers under the Coal Mines Act 1979 or prior legislation and regarded the rivers as non-navigable with the *ad medium filum* rule applying. Counsel for the claimants accepted this proposition, and the Tribunal proceeded on the premise that it was dealing with non-navigable waterways to which the *ad medium filum* rule applied.

## 7.2 AD MEDIUM FILUM AQUAE RULE

Ms Ertel commented in her submissions that New Zealand common law riparian rights had their source in the English Laws Act 1858. She quoted from section 1 of that Act as follows:

The laws of England as existing on [14 January 1840] shall so far as is applicable to the circumstances of . . . New Zealand, be deemed and taken to have been in force therein

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3. Document B5, pp 33–36

4. Repealed by s 120(1) Crown Minerals Act 1991 but reaffirmed by s 354(1)(c) Resource Management Act 1991

5. Paper 2.52

on and after that day and on that day, and shall continue to be there and apply in the administration of justice accordingly.<sup>6</sup>

The principle of the rule of *ad medium filum aquae*, which is commonly referred to as the *ad medium filum* rule, is simply stated by Hinde, McMorland, and Sim in *Introduction to Land Law*:

Where land is bounded by a non-tidal, non-navigable river the presumption is that the boundary is the centre line of the stream; but this presumption may be rebutted by the terms of the grant or by the surrounding circumstances.<sup>7</sup>

Applied to the lands within the rohe of Te Ika Whenua, this presumption means that the owners of riparian lands own to the middle line of the rivers. No suggestion or argument that the presumption has been rebutted or does not apply was put to us, and we therefore proceed on the basis that the presumption applies.

### 7.3 NATURAL WATER INCAPABLE OF OWNERSHIP

At common law, ownership of the bed of a river does not confer ownership of the water above. The position is stated in *Introduction to Land Law* as giving riparian owners the following rights:

- (1) To take stream water in any quantity for 'ordinary' purposes in the use of the riparian land; ie for domestic purposes and for stock;
- (2) To take stream water (subject only to returning it substantially undiminished in volume and unaltered in character) in the reasonable use of the riparian land for 'extraordinary' purposes, eg irrigation or industrial use; and
- (3) To receive the unimpeded flow of stream water unaltered in volume and quality from higher riparian owners.<sup>8</sup>

These rights are now affected by the Resource Management Act 1991, where section 14(3)(b) and (e) give power for the taking and use of water when:

- (b) In the case of fresh water, the water, heat, or energy is required to be taken or used for—
  - (i) An individual's reasonable domestic needs; or
  - (ii) The reasonable needs of an individual's animals for drinking water,—and the taking or use does not, or is not likely to, have an adverse effect on the environment; or . . .
- (e) The water is required to be taken or used for fire-fighting purposes.

6. Document 85, p 36

7. Hinde, McMorland, and Sim, *Introduction to Land Law*, 2nd ed, Wellington, Butterworths New Zealand Ltd, 1986, sec 2.201

8. Ibid, sec 12.011

Notwithstanding these rights of user, natural water, which includes water in rivers, is regarded as incapable of ownership. *Introduction to Land Law* states:

Natural water includes all water whether on or below the surface of the land and whether in a defined channel or not. It is incapable of ownership, unless it has been confined in a receptacle, but there were certain rights to use natural water, and certain rights and obligations in respect of its flow.<sup>9</sup>

The rights and obligations referred to in this quotation are those we have cited above.

#### 7.4 MAORI VIEW OF OWNERSHIP

As already established in other Tribunal reports, the traditional Maori view of ownership is completely different from that of the common law. Conceptually, a river is a taonga, a valuable food resource to those who possess it, which carries its own separate mauri (life force) and is guarded by the taniwha that inhabit it. The physical cannot be divorced from the metaphysical; the two are inseparable (see sec 2.4).<sup>10</sup>

In her opening submissions, Ms Ertel stated:

The claim of the claimants to ownership and rangatiratanga over their rivers as an undivided entity is consistent with Maori custom and is supported by the evidence currently before the Tribunal and yet to be presented.<sup>11</sup>

Her reference to the rivers as ‘an undivided entity’ contrasts with the separate concepts of bank, bed, and water that apply at common law. In the Court of Appeal decision in *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20, Cooke P in delivering the judgment of the court referred to this at pages 26 and 27:

The Maori Affairs Act 1953, s 155, enacts that except so far as may be otherwise expressly provided in any other Act the Maori customary title to land shall not be available or enforceable by proceedings in any Court or in any manner against the Crown. The provision goes back to 1909 and the draftsmanship of Sir John Salmond. It is not clear that the provision extends to water; and in their *Te Ika Whenua – Energy Assets Report* in 1993 and *Mohaka River Report* in 1992 the Waitangi Tribunal have adopted the concept of a river as being taonga. One expression of the concept is ‘a whole and indivisible entity, not separated into bed, banks and waters’. The vesting of the beds of navigable rivers in the Crown provided for by the Coal-mines Amendment Act 1903 and succeeding legislation may not be sufficiently explicit to override or dispose of that concept, although it is odd that the concept seems not to have been put forward in quite that way in the line of cases concerning the Wanganui River, the last of which was the decision of this Court in *Re the Bed of the Wanganui River* [1962] NZLR

9. *Introduction to Land Law*, sec 12.011

10. See *Report of the Waitangi Tribunal on the Manukau Claim*, secs 9.2.6, 9.3.8; *The Mohaka River Report* 1992, 2nd ed, Wellington, GP Publications, 1996, secs 2.6, 6.3

11. Document 85, pp 43–44

600. Perhaps the approach which counsel for Maori argued for in that line of cases, emphasising the bed and the adjacent land more than the flow of water, is an example of the tendency against which the Privy Council warned in *Amodu Tijani* (at 403) of rendering native title conceptually in terms which are appropriate only to systems which have grown up under English law. Similarly, as the Waitangi Tribunal bring out in their *Mohaka River Report* at 34–8, the *ad medium filum aquae* rule applied in the 1962 case is inconsistent with the concept and may well be unreliable in determining what Maori have agreed to part with.<sup>12</sup>

In the above extract, the Court of Appeal suggests that the reason the Whanganui River litigation concerned the bed of the river and not the river as an undivided entity could arise from the tendency of rendering native title conceptually in terms that are appropriate only to systems that have grown up under English law. We believe this to be the case. Since the establishment of title through the Maori Land Court, Maori have had to frame their argument as to the title to rivers in accordance with English common law. It is only since the 1985 amendment to the Treaty of Waitangi Act 1975 that Maori have had a forum in which to argue their own customary laws and rights instead of English law, which was arbitrarily imposed regardless of the guarantees under article 2 of the Treaty of Waitangi.

Ms Ertel in her opening submissions referred to two parallels to the present claim to the rivers as ‘an undivided entity’. The first was Judge F O V Acheson’s statement in the 1929 *Lake Omapare* decision of the Native Land Court:

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

A lake is land covered by water, and it is part of the surface of the country in which it is situated, and in essentials it is as much part of that surface and as capable of being occupied as is land covered by forest or land covered by a running stream.

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. [Emphasis in original.]<sup>13</sup>

The second was Judge H H Carr’s 1944 Native Appellate Court judgment, cited in the 1950 report of the royal commission on the Whanganui River:

It must be conceded that the pre-treaty Maori never concerned himself with the abstruse question as to whether or not a river or lake was land covered by water. In many ways the mind of the Maori works inversely to that of the European. The Courts of the latter have laid it down to him that to possess the exclusive use of a lake or river he must own the bed thereof. To the Maori the water would be the predominating factor and the exclusive use of that water would carry with it everything below. If the land was

12. Document C14(b), pp 26–27; for the original judgment, see doc C1, p 11

13. Document B5, pp 47–48; B5(a)(10), p 7

below, then that land. If a taniwha was below, then that taniwha: and the Wanganui River was not an exception to the widely held belief as to fabulous reptiles inhabiting unfathomable depths and acting as tribal guardians. The water and the land underneath it are to the Maori indivisible . . .

. . . the Wanganui Tribe did exercise an exclusive right of ownership over this body of water and over its bed of land below and that this exercise of ownership was in accord with customs and usage existing at the date of the Treaty of Waitangi.<sup>14</sup>

Similarly, the Tribunal in its report on the Mohaka River claim concluded that the river as a living, indivisible entity was tribal property.<sup>15</sup>

### 7.5 CUSTOMARY RIGHTS OF HAPU

Maori communities in the early contact period consisted of hapu – that is, kin groups linked by descent from an eponymous ancestor and commonly known as subtribes. In the case of the hapu of Te Ika Whenua, evidence shows that they exercised tino rangatiratanga over their lands and resources and customary rights to use particular resources at prescribed times for particular purposes. Such use rights included papakainga, mara, mahinga kai (fishing places), and pa tuna (eel weirs) (see sec 2.6).

Customary rights of the hapu of Te Ika Whenua to use, occupy, and control their land and resources are recognised by the Maori text of the Treaty of Waitangi, which in the preamble and article 2 refers to rangatira and hapu and in article 2 confirms and guarantees te tino rangatiratanga (the unqualified exercise of chieftainship) over whenua (land), kainga (villages), and taonga (properties of special significance).

Clearly, the customary and Treaty rights of rangatira and hapu and tangata katoa (all the people) of Te Ika Whenua are part of their tino rangatiratanga and are in conflict with Crown assertions on the ownership of rivers by virtue of statute or common law. Claimant evidence shows that rivers were and still are a taonga that provides material and spiritual sustenance and a strong continuing bond. The people belong to the river and the river belongs to the people.

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14. Document 85, pp 50–51

15. *The Mohaka River Report* 1992, secs 2.12, 6.3

## CHAPTER 8

# ISSUES: TE TINO RANGATIRATANGA

### 8.1 TINO RANGATIRATANGA OVER THE RIVERS AS AT 1840

The evidence outlined in our opening chapters illustrates that the claimant hapu exercised tino rangatiratanga over the rivers within their rohe as at 1840 and for many decades thereafter. It further illustrates that these rivers ‘jointly and severally’ were and still are their tipuna awa and taonga.

Although the Crown in article 2 of the Treaty of Waitangi guaranteed to the claimant hapu te tino rangatiratanga over these rivers for as long as they wished to retain them, and the claimants say that they have never wished to relinquish their tino rangatiratanga, the evidence shows that it has been seriously undermined by Government actions, policies, and omissions. More particularly, this has been through the introduction and application of the *ad medium filum aquae* rule, which has seen the owners unknowingly divested of title to beds of rivers when riparian lands were sold (in many cases to the Crown); also through legislation empowering the Crown to manage and control the water in the rivers for hydroelectric power generation and other purposes. In consequence, the claimants’ hapu contend that they have been denied their customary and Treaty rights to use, occupy, control, and enjoy these rivers and have sought relief under this claim.

Crown counsel Terence Arnold, in his opening submissions, accepted that as at 1840 the iwi or hapu making up Te Ika Whenua held mana over portions of rivers and tributaries associated with the lands over which they held mana at that time. He pointed out that Ms Ertel, in opening, and Maanu Paul, in cross-examination, had accepted that persons could sell or relinquish control over taonga inextricably linked with that land, and that, if this were done voluntarily, the article 2 guarantee would no longer apply. A Treaty breach in respect of such alienation could arise if the Crown failed in its fiduciary obligation actively to protect taonga.<sup>1</sup> For reasons we examine later (see sec 8.4.3), the Crown did not see mana over rivers as separate from and unrelated to mana over adjoining lands but as being coextensive with mana over land.<sup>2</sup>

Mr Arnold emphasised that there were overlapping claims, and he expressed concern that the extent of the rohe claimed by Te Ika Whenua had not been established or settled. If the Tribunal found for the claimants, then the Crown was concerned that the territory was properly defined so that it knew with whom to

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1. Document C14, p 11

2. Ibid, p 12

negotiate.<sup>3</sup> Apart from its concern over the extent of the proper boundaries of the rohe and the extent of Te Ika Whenua's interest in the rivers and streams, the Crown did not dispute that as at 1840 the claimant hapu were tangata whenua of the rohe and that the rivers and streams formed part thereof.<sup>4</sup> The Tribunal accepts this position.

### 8.2 THE RIVERS AS TAONGA OF TE IKA WHENUA

Evidence has been given as to the importance of the river system to the hapu of Te Ika Whenua. We do not need to revisit this evidence but observe the general importance of river systems to tangata whenua. In the case of Te Ika Whenua, we have been presented with evidence of a harsh, not very fertile land, a severe climate, and an almost total reliance on their river system for sustenance. To them, the rivers were a life force, a taonga of inestimable value.<sup>5</sup> We accept that they were part of the psyche of Te Ika Whenua, that they formed and still form a large part of the lives of the people, and that they were and still are regarded as taonga.

We note that our finding is consistent with that of the Mohaka River Tribunal, which found that the Mohaka River was a taonga of Ngati Pahauwera when the Treaty of Waitangi was signed in 1840 and remains so today.<sup>6</sup>

Similarly it is consistent with the comments of the Pouakani Tribunal that in 'local Maori terms', the Waikato river 'was, and still is, regarded as a taonga, a highly-prized resource, by the hapu who occupied the area'.<sup>7</sup>

### 8.3 DID THE CROWN FAIL TO PROTECT TE IKA WHENUA'S CUSTOMARY AND TREATY RIGHTS TO THE RIVERS?

In the Maori text of article 2 of the Treaty of Waitangi (signed by most chiefs, except those at Waikato Heads), the Queen agreed to preserve to the chiefs, the hapu, and the people 'te tino rangatiratanga' over their wenua (land), kainga (villages), and taonga.

The English text, on the other hand, guaranteed to:

the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.

While the term 'te tino rangatiratanga' has been the subject of much interpretation and comment, in the context of this claim we see no need for further detailed

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3. Document D5, pp 8-9

4. Ibid, pp 2, 10

5. See Waitangi Tribunal, *Te Ika Whenua - Energy Assets Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 2.4

6. Waitangi Tribunal, *The Mohaka River Report 1992*, 2nd ed, Wellington, GP Publications, 1996, sec 6.3

7. Waitangi Tribunal, *The Pouakani Report 1993*, Wellington, Brooker's Ltd, 1993, sec 16.2



examination or analysis. The Tribunal in earlier reports has variously described 'te tino rangatiratanga' as 'full chieftainship', 'tribal self-management', and 'full authority'.<sup>8</sup> Generally, it appears accepted that the term, applied to taonga, means authority and control.

In the *Mohaka River Report 1992*, the Tribunal in its consideration of tino rangatiratanga made reference to two earlier reports as follows:

In both the *Muriwhenua Fishing Report* and the *Ngai Tahu Sea Fisheries Report*, the tribunal referred to three main elements embodied in the Treaty guarantee of rangatiratanga:

First, authority or control, since without it the tribal base is threatened. Secondly, the exercise of that authority must recognise the spiritual source of the taonga; thirdly, the exercise of authority was not only over property but over persons within the kinship group and their access to tribal resources.

In addition the *Ngai Tahu Sea Fisheries Report* emphasised that an important element in rangatiratanga is trusteeship.

To use the words of the Ngai Tahu tribunal:

While rangatiratanga is best defined in its own context, there are some principles of general application. . . . Rangatiratanga includes management and control of the resource and reciprocal obligations between those who actually harvest the resource.<sup>9</sup>

As far as the word 'taonga' is concerned, it has a more exclusive meaning of special significance than is denoted by the word 'properties'. It is a highly prized and precious treasure, something of inestimable value. Applied to nga awa (the rivers), not only does it describe a food source and a means of sustenance for the hapu of Te Ika Whenua; it represents their 'spiritual and physical mana'.<sup>10</sup>

The case for the claimants is that, in the words of the Treaty, the rivers were 'other properties', 'taonga' guaranteed to the hapu of Te Ika Whenua. This was the position in 1840 and still is, there being no argument by the Crown that the rivers were not included in the article 2 guarantees.

The essence of Te Ika Whenua's claim is that they never voluntarily relinquished their possession or control of the rivers and that their loss of ownership of the beds of the rivers and the Crown's appropriation of the management and control of the waters is a breach of the Treaty principle of active protection contained in article 2. We accept that, while Te Ika Whenua still exercise vestiges of te tino rangatiratanga, there is no legal recognition of this in accordance with Treaty principles.

Ms Ertel called evidence to show that legislation affected Te Ika Whenua's authority and enjoyment of the rivers. Predominant in this legislation were the statutes that gave water rights to the Crown and made provision for the local Aniwhenua and Wheao power schemes (see secs 5.1-5.4.3). The impact of these schemes changed the character of the Wheao and Rangitaiki Rivers (see sec 6.2.1).

8. See, for example, Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 2, secs 4.6.6-4.6.7, and *The Mohaka River Report 1992*, sec 5.5.2.

9. *The Mohaka River Report 1992*, sec 5.5.2.

10. Compare with *The Mohaka River Report 1992*, sec 2.6.

To people who see themselves as kaitiaki or traditional guardians of the mauri of the river, this was undoubtedly an affront to their values. In the words of the Manukau Tribunal, 'it was as though not just their beliefs had no status, but they as a tribe and as a people had no status'.<sup>11</sup>

The Aniwhenua and Matahina Dams depleted eels and other native fish, causing the loss of an important food source. This severely limited the capacity of the claimants to fulfil their traditional obligations to host (manaaki). It also impacted on the way they related to each other and to their rivers, all of which the Crown failed to appreciate (secs 6.5.1–6.5.2). The Tribunal sees these matters as a consequence of the serious undermining of te tino rangatiratanga.

While there are now provisions under the Resource Management Act 1991 for consultation with tangata whenua,<sup>12</sup> these could be likened to recognition of tangata whenua as a party with a special interest, not one with authority and control commensurate with tino rangatiratanga over taonga or property. It is not surprising that the claimants allege that consultation was inadequate over the Kioreweku proposal (see sec 6.4) and the eel replenishment scheme (see secs 6.5–6.8), for while some individuals were consulted, there was no attempt made to identify and consult with hapu interests. Although the Act makes specific provision for the protection of Maori values and interests (see sec 5.3.5) – in contrast to the Water and Soil Conservation Act 1967 (sec 5.3.4) – it does not accord to tangata whenua the authority or control over taonga or property guaranteed to them under article 2 of the Treaty.

The Crown did not dispute that it had failed to protect Te Ika Whenua's tino rangatiratanga over the rivers. Rather, it claimed that Te Ika Whenua had voluntarily relinquished it in selling their riparian lands. The erosion of tino rangatiratanga is not a matter of contention. It is the manner of erosion, either by voluntary relinquishment, as put by the Crown, or by other means in breach of the Treaty, as put by the claimants, that is at issue.

## **8.4 DID TE IKA WHENUA VOLUNTARILY RELINQUISH TINO RANGATIRATANGA OVER THE RIVERS?**

### **8.4.1 The Crown's submissions**

In his final submissions, Mr Arnold contended that Te Ika Whenua, through sales of riparian lands (see sec 3.3.2), voluntarily relinquished tino rangatiratanga over the rivers.<sup>13</sup> He also contended that the claimants had accepted that taonga can be sold and that this concession was supported by the evidence in relation to the sale of the Tawhiuau block, which contained what was to some of the Ika Whenua peoples a sacred mountain, Tawhiuau.

11. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed, Wellington, Department of Justice: Waitangi Tribunal, 1989, sec 9.3.5

12. See Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, 1st ed, Wellington, Brooker's Ltd, 1995, sec 9.10

13. Document D5

The Crown did not rely on or endeavour to justify the *ad medium filum aquae* rule as a means of land acquisition consistent with the Treaty and thereby constituting voluntary relinquishment of tino rangatiratanga but put forward alternative arguments, which we now examine.

#### 8.4.2 Riparian land sales

Figure 10 on page 26 shows that most riparian lands were sold in the final quarter of the last century and the early part of this century. The Crown relied very much on these land sales and, in support of its contention that Te Ika Whenua had voluntarily relinquished jurisdiction over the rivers, submitted:

- there is strong prima facie evidence that the owners of the riparian lands were willing sellers of that land;
- there is a very strong case in respect of those streams or rivers that were entirely within the boundaries of land sold that mana over those rivers or streams was relinquished when mana over the lands was relinquished;
- in relation to those rivers or streams which form the boundary of lands sold, the position is less clear and, while there is evidence that mana over the rivers was relinquished, the matter is better not resolved until further research has been completed.<sup>14</sup>

Dealing with the first of these submissions – namely, that ‘there is strong prima facie evidence that the owners of the riparian lands were willing sellers of that land’ – we do not accept that there is such evidence. We do, however, have evidence that suggests that costs and expenses incurred by owners in obtaining title through the court were telling factors in inducing them to sell (see secs 3.3.2–3.3.3). Even if we did have evidence that the owners were willing sellers of their lands, we fail to see its relevance to establishing their willingness to relinquish tino rangatiratanga over the rivers. We simply cannot accept the proposition that, even if members of Te Ika Whenua were willing sellers of their lands, then, by implication or inference, they were willing sellers of their rivers or voluntarily relinquished tino rangatiratanga over them. Mr Arnold’s submission fails to take into account the value and significance of the rivers to the tangata whenua, and there is simply no evidence to support the claim that the rivers were included as part of the sale of riparian land.

Secondly, Mr Arnold said that:

- there is a very strong case in respect of those streams or rivers that were entirely within the boundaries of land sold that mana over those rivers or streams was relinquished when mana over the lands was relinquished.<sup>15</sup>

In our view, the Rangitaiki, Wheao, and Whirinaki Rivers were taonga and entitled to protection under article 2 of the Treaty. However, the position in respect of tributaries and streams is less clear. There is little evidence to suggest that they too were regarded

14. Ibid, p 10

15. Ibid

as taonga. Consequently, we find it hard to believe that tino rangatiratanga was retained over streams and tributaries that were contained within the boundaries of land sold and where access to and authority and control over them was eventually lost.

The case for Te Ika Whenua in these circumstances rests almost entirely on the validity or otherwise of the land sales, and the issue of tino rangatiratanga over these streams and tributaries is a question that must be reserved until the land claims are heard.

Mr Arnold observed that, 'in relation to those rivers or streams which form the boundary of lands sold, the position is less clear and, while there is evidence that mana over the rivers was relinquished, the matter is better not resolved until further research has been completed'.<sup>16</sup> Having agreed to look at the present claim without regard to the validity or otherwise of the land sales, the Tribunal is somewhat surprised by this statement. David Alexander's evidence showed quite conclusively that from 1878 the Crown presumed that the *ad medium filum aquae* rule applied to all freehold titles to riparian lands unless there was a clearly expressed intention and understanding to the contrary.<sup>17</sup> Furthermore, there was no instance where plans annexed to sale documents showed external boundaries extending into a river, let alone to the middle line.

Notwithstanding the Crown's contentions, we have no firm evidence that mana over rivers was ever voluntarily relinquished when riparian lands were alienated. We do, however, have firm evidence that, after the land transactions described in Mr Alexander's evidence, the people of Te Ika Whenua continued to use, occupy, and control their rivers in much the same way as before; but sharing the resources and benefits with incoming settlers (see secs 3.3.3–3.3.5) until the 'permit culture' restricted their exercise of customary and Treaty rights (see sec 4.5). Moreover, our general understanding is that very few Maori would knowingly and willingly relinquish mana over land and rivers. The Crown's case relies essentially on inferences drawn from the fact of sale and the subsequent loss of tino rangatiratanga.

### 8.4.3 The Crown purchase of the Tawhiuau block

Mr Alexander gave evidence that by 31 March 1920 the Crown had purchased the majority of the shares in the Tawhiuau block.<sup>18</sup> Further purchases occurred until June 1921. During the Urewera consolidation scheme in 1921, the Crown sought and was awarded the whole of the block, and the interests of the non-sellers were relocated. We fail to see how this can be accepted as evidence that 'the people were prepared to sell a taonga'.<sup>19</sup> Wharehuia Heta and three others of Murupara wrote to the Native Minister on 16 October 1916 and gave as the reason for the sale of the land the need to pay survey charges on Crown-granted lands; that is, the family subdivisions:

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16. Document D5, p 10

17. Document C3, p 22

18. Ibid, pp 117–121

19. Document D5, p 12

This (Tawhiuau) mountain is the rangatira mountain of our clans, and its caves contain our dead.<sup>20</sup>

We incline to the view that Maori were prepared to sell this taonga under the pressures placed on them and on the understanding that the mountain would become part of the national Urewera reserve and remain a taonga under the protective mantle of the Crown.

#### 8.4.4 The link between the land and the rivers

Mr Arnold, in his closing submissions, stressed the link between riparian lands and rivers and put the Crown's case thus:

the possession of mana over land surrounding or adjacent to rivers or streams carried with it the possession of mana over those streams or rivers (or parts of them where different iwi occupied opposite banks); and  
relinquishment of mana over the surrounding or adjacent land carried with it the relinquishment of mana over the rivers or streams (unless rights in relation to the rivers or streams were specifically reserved).

This is similar to the philosophy underlying the common law principles as to riparian rights encapsulated (where opposite banks are in different ownership) in the 'ad medium filum' concept.

Had Ika Whenua relinquished mana over the surrounding or adjacent lands as a result, for example, of conquest or of abandonment of the lands they would surely have relinquished mana with the associated rivers or streams. The question is why, where there [sic] relinquishment of mana over land is by sale, the same would not apply.<sup>21</sup>

We note that, in presenting the above submissions, Mr Arnold substituted for 'mana' the words 'jurisdiction' or 'overriding authority and control'. But to Maori, the word 'mana' means many more things.

Mana is acquired by whakapapa and can never be extinguished by Pakeha law, even though the physical exercise of the rights pertaining to it may at the time be 'legally' impossible.

The Crown's notion that mana can be relinquished as a result of conquest or abandonment or through land sales is completely alien to Maori culture and philosophy and is a misunderstanding of Maori land tenure. In traditional Maori society, conquest rarely if ever resulted in abandonment of land. Those who fled and lived in exile eventually returned and resumed their use rights. After conquest, it was mana over people not land that would have been affected. If victors migrated and resettled in the territory of the vanquished, they incorporated the original occupants for greater security or were themselves incorporated. Through intermarriage, they validated land rights (cf secs 2.2, 3.2.1, 3.2.4).

20. Document C3, pp 118–119

21. Document D5, pp 12–13

At the time of the land sales, alienation of land interests by individuals unrestrained by whanau and hapu considerations was novel and absolute alienation of land and rivers was generally inconceivable. The Maori concept of land sales in post-contact years was essentially reciprocal, a new form of traditional gift exchange and hospitality.<sup>22</sup> The use of rivers was shared with settlers as part of their rangatiratanga. As was said at section 5.1 of the *Mohaka River Report 1992*, 'Far from relinquishing any of their mana or control,' the sellers 'were using their mana or control to invest in the future development of a resource and for the benefit of a people.'

The Crown endeavoured to establish a link between lands and rivers by reference to Native Land Court title hearings containing evidence of use of rivers and streams for eeling in support of ownership of adjoining land. In this, it relied very much on the evidence and conclusions of Mr Alexander, who observed that:

In a number of cases river-related activities such as eel fisheries, and (in the case of Kuhawaea) a dam, were referred to before the Court to substantiate occupation of the riparian lands. The river was an important feature of adjoining lands. As the Maori Appellate Court said in relation to the Wanganui River [*In Re the Bed of the Wanganui River* [1962] NZLR 600, 619 (CA)]:

... claims of ownership and use of eel weirs were frequently given in proof of occupation and ownership of such lands ... the ownership of the riparian lands would likewise have a very large bearing, if not indeed a decisive one, upon the ownership of the bed of the river that lay within such lands.<sup>23</sup>

Mr Alexander found no evidence in the Native Land Court records he had examined 'to suggest that the rivers were separately distinguished from the lands adjoining them'. In his belief, 'historically the river and the adjoining lands were so interlinked as to be indistinguishable'.<sup>24</sup> Nor did he find anything he would interpret as an expression of tino rangatiratanga concerning the rivers or that would give the Crown reason to believe that there was a grievance about rivers.<sup>25</sup>

We find that the references to rivers and streams in support of claims to land ownership are understandable, since in establishing the right to title in the Native Land Court, the question of occupation and use of land played an important part. For this reason, it was common to refer to physical landmarks such as mountains, streams, and rivers and to the use of resources, kainga, cultivations, and hunting and fishing grounds as evidence of occupation.

As we have seen, rivers were and are regarded differently from land. They have separate physical characteristics, provide distinctive resources and benefits, and possess their own mauri (life force) and spiritual being. They constitute whole and indivisible entities, not being separated into bed, banks, and waters. Though the rivers and the land are all in one rohe and under the tino rangatiratanga of the hapu,

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22. Compare with Waitangi Tribunal, *The Te Roroa Report 1992*, Wellington, Brooker and Friend Ltd, 1992, sec 1.3

23. Document C3, p 122

24. Ibid, p 123

25. Ibid, p 125

we cannot accept, in the absence of any firm evidence, the Crown's argument that where riparian lands were sold such sales automatically included rivers to the middle line. Nor do we accept that, by implication, Maori, because of customary links between the lands and the rivers, generally understood the *ad medium filum aquae* rule. Both arguments are based on presumptions that the Tribunal has already rejected in the *Mohaka River Report* 1992.<sup>26</sup>

#### 8.4.5 'I roto i te awa' and 'i roto o te awa'

Mr Arnold referred to the use of the words 'i roto o' and 'i roto i' in correspondence and documents relating to Crown purchases as evidence that Ngati Manawa understood that control of the rivers went with control of the land.<sup>27</sup> Mr Alexander instanced examples in relation to the boundaries of the Crown purchases of Kaingaroa 1 and Kuhawaea 1. In English, the words 'i roto i Rangitaiki awa' were 'thence down the Rangitaiki River' and the words 'i roto o te awa o Rangitaiki' were 'thence in the Rangitaiki River'.<sup>28</sup> Other English renderings of 'i roto o Rangitaiki' and 'i roto o te awa o Whirinaki' were 'bounded ... by the Rangitaiki River' and 'thence ... by the Whirinaki'.<sup>29</sup>

Mr Arnold emphasised that the Crown's argument as to the relationship between the land and the rivers and streams did not depend on the interpretation given to the words 'i roto i te awa'. He suggested, however, that the Crown's argument might be assisted if the words were interpreted as meaning 'in the river'; but even if they meant 'along the river', the Crown's submission remained good.<sup>30</sup> At that point, the Crown was 'simply ... not able to identify precisely what the parties had in mind when they used the term'.<sup>31</sup> Accordingly, it was agreed by both parties that Mr Arnold would prepare written questions for Professor Karetu of the Maori Language Commission.<sup>32</sup>

In response, Professor Karetu supported wholeheartedly a comment by Lyndsay Head in her report to the Tribunal on Maori land boundaries to the effect that further research was required to ascertain the difference between 'i roto i te awa' (translated as 'within the river') and 'i te awa' (translated as 'along the river').<sup>33</sup> He felt quite strongly that it was 'crucial' in coming to a decision about the most appropriate translation to take cognisance of the background of the documents in which the words were used.<sup>34</sup>

In light of the Crown's conclusion that, on the evidence available, the position was unclear,<sup>35</sup> the Tribunal sees no need to pursue the matter further. It notes, however,

26. *The Mohaka River Report* 1992, sec 3.7

27. Document C14, pp 12-13

28. Document C3, pp 48, 53-54

29. *Ibid*, p 54

30. Document D5, p 16

31. *Ibid*, p 17

32. Paper 2.56(a); for these questions, see paper 2.56(b)

33. Document C2, p 45

34. Paper 2.57

35. Document D5, p 17

that the various interpretations of the words ‘i roto o te awa’ and ‘i roto i te wai’ presented in evidence at the hearing of the Mohaka River claim did not help that Tribunal resolve the problem of ambiguity in a deed of sale over a river boundary.<sup>36</sup>

#### 8.4.6 Reserves

Mr Arnold tried to show ‘an understanding that rights to use the river went with ownership of the bank’ by pointing to the Ngati Manawa petition to Parliament in 1924 in relation to the sale of the Kaingaroa 1 block. Among other things, this petition alleged that the Crown failed to set aside a reserve (Kiorenuī) that was intended for use as a fishing ground.<sup>37</sup>

Elaborating on the necessity to provide bush and river reservations for trapping birds and rats and for food gathering and planting, Mr Arnold submitted that river reservations were also needed for access to the resources of the river:

The fact that the need . . . was discussed between local Maori and Government officials suggests that it was understood that, without such reservations, Maori would not have access to important natural resources.<sup>38</sup>

With regard to the 1924 petition, Mr Arnold noted that the commissioner who investigated it rejected the claim in relation to the Kiorenuī reserve and submitted that what the petition did tend to show was ‘that Ngati Manawa understood that rights to use the river, for example for fishing, went with ownership of the bank. Accordingly they needed to reserve some of the bank for the purpose of fishing.’<sup>39</sup>

Our assessment of this evidence is that, while it illustrates that Ngati Manawa were aware of the need to reserve riparian land and fishing grounds from Crown purchase, it did not constitute an acknowledgement that the river itself or jurisdiction over it passed as a consequence of the Kaingaroa 1 purchase. Furthermore, because land, not river, was reserved, rights to use the river were not an issue. Indeed, the allegation that the Crown failed to set aside the Kiorenuī reserve supports the argument that the petitioners believed that the Crown purchase cut off their access to the river, which they needed for the continuing exercise of their customary river rights.

#### 8.4.7 The wider context

Mr Arnold submitted that, when considering the issue of whether mana over rivers and streams was relinquished when mana over riparian lands was relinquished, there were at least two other factors that needed to be taken into account. First, the changing economy, which meant that at least some of the people of the area considered that they could operate within the money economy and so, at least to

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36. *The Mohaka River Report* 1992, sec 3.5

37. Document C14, p 13

38. Document D5, p 18

39. *Ibid*, p 19



some extent, neglected their traditional culture and food gathering activities; and, secondly, the various reservations made for Ngati Manawa to use as food sources, which, together with unsold areas, may well have been adequate for the needs of a relatively small population.<sup>40</sup>

We have already outlined the economic and social changes that occurred in the claim area in the nineteenth and early twentieth centuries and the extent to which Ngati Manawa and other hapu participated in the money economy (see secs 3.2.2, 3.2.4, 3.3.3-3.3.5, 4.1-4.3). The conclusions we drew were that the river remained a continuing source of food and spiritual sustenance for the people and that they never wished to relinquish rangatiratanga over it. Rather, this was usurped by the Government through the application of a common law principle and legislation designed mainly for the purposes of forestry, the Murupara project, hydropower schemes, towns, and recreation. Consequently, we reject any inference that these factors influenced the hapu of Te Ika Whenua voluntarily to relinquish mana and tino rangatiratanga over the rivers.

## 8.5 OVERLAPPING CLAIMS

In his closing submissions for the Crown, Mr Arnold referred to various overlapping claims as follows:

- *Ngati Tahu*: Ngati Tahu have notified a claim, the boundaries of which go from Onepu across the Rangitaiki River to Ngapuketurua, back across the Rangitaiki to Wairapukao and from there towards Waiotapu – see document B3, p 3 and enclosure 2.1. Importantly for present purposes the Ngati Tahu claim covers the upper portion of the Rangitaiki River, including the area where the waters of the Rangitaiki are diverted into the Wheao. Wai 288 is a claim by Ngati Tahu for the Kaingaroa Forest;
- *Tuhoe*: Tuhoe have lodged a claim for the Whirinaki River (see Wai 36) and have indicated that they are researching a claim for the Rangitaiki River or some part of it – see Doc A10. Tuhoe have made it plain that they do not accept Ika Whenua's claimed rohe or right to represent the tangata whenua of the area – see Doc A10 pp 4-6;
- *Ngati Tuwharetoa*: Ngati Tuwharetoa have filed a claim (Wai 269) to the Kaingaroa Forest Crown lands;
- *Ngati Awa*: Ngati Awa have advised that they wish to prepare and present a claim in respect of the Kaingaroa Forest – see letter from Martelli McKegg Wells & Cormack to Waitangi Tribunal dated 26 August 1994.<sup>41</sup>

Mr Arnold went on to state that the claims had not been fully particularised or researched and that, when they were, the areas of conflict may be reduced or eliminated. The Crown was concerned to ensure that, whatever process was adopted for resolving Te Ika Whenua's claims, no other group either had cause for complaint

40. Document D5, pp 19-20

41. Ibid, p 8

that their rights had been adversely affected without their having had a proper opportunity for input or could raise the question as to whether the Tribunal had adhered to its obligations to comply with the rules of natural justice.

We note the point made by the Crown. This claim proceeded only after considerable consultation and has attracted reasonable publicity. We would therefore have expected any of the possible overlapping claimants to have made representations had they any concerns over the claim proceeding. We are also aware of a claim filed by Potaka Dewes for various Arawa tribes to which the same comment would apply.

Of those tribes mentioned by Mr Arnold, Tuhoe were present at the hearing and were represented by Mr Nikora, who was happy for the claim to proceed, subject to the caveat that the question of boundaries and representation for Ngati Patuheuheu might have to be resolved at a later date. For Ngati Tahu, Timoti Rangitatau at Tipapa Marae supported Te Ika Whenua's claim and then said:

In terms of boundary overlaps, or even river boundary overlaps, there are processes, culturally appropriate processes that have been put in place by Ngati Tahu and Te Ika Whenua which are still in consultation at the moment. There is no contention there, there is some slight disagreement and differences of opinions perhaps on where the stones were a hundred years ago, but, in terms of resolving that, we believe that the appropriate processes are in place and we have met several times and will continue to meet as a united iwi in this particular case and other cases that we have coming up. So I want to expel the fact that there is dispute between Ngati Tahu and Te Ika Whenua in terms of this river claim, and I just wanted to make that clear this morning.<sup>42</sup>

Ngati Awa, in correspondence from their solicitor, indicated that they did not want to be heard unless the Ika Whenua claim extended to, or northward of, Lake Matahina on the Rangitaiki River.<sup>43</sup>

There is no doubt that the rohe of Te Ika Whenua comprises the major part of the area claimed and that the overlapping claims are in the perimeter areas. Notwithstanding, any finding will be only in respect of the lands within the rohe of Te Ika Whenua and will be subject to the qualification that the rohe is subject to competing claims and has to be finally settled. A finding and recommendation may provide a catalyst to the resolution of the rohe. We are mindful that there are other procedures available to promote the settlement of disputes over rohe and representation, and no doubt these could be implemented if the Crown sought to negotiate. In any event, the rohe may be settled as part of the land claims, the determination of which would appear to be only a matter of time.

For the foregoing reasons, we do not see that it is imperative that the rohe be settled before we make a finding on this claim.

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42. Timoti Rangitatau, oral submission on behalf of third party interests, first hearing, 11 November 1993, tape 5, side A, 4504-4543

43. Paper 2.60

## 8.6 CONCLUSION

In this chapter, we have addressed both the issue of whether or not the claimant hapu voluntarily relinquished their tino rangatiratanga over the rivers and the Crown's substantial argument that they did so through the sale of riparian lands. We note, however, that the Crown's argument was intended to show that such voluntary relinquishment was independent of any application of the *ad medium filum* rule.

In its final submission, the Crown concluded that:

it is impossible for the Tribunal to be satisfied at this stage that the owners of the riparian lands did not relinquish mana over the rivers and their tributaries when they relinquished mana over the riparian lands by selling them. As to the rivers and streams *within* the various blocks, there is a strong case that mana was relinquished. As to the rivers which *border* blocks, there is significant evidence that mana was relinquished. Further evidence is likely to emerge as further research is carried out on the land transactions. [Emphasis in original.]<sup>44</sup>

The focus of the Crown's initial argument was to show that, by the land sales, tino rangatiratanga was voluntarily relinquished. Its final submission, however, did not support voluntary relinquishment but used these facts to further a negative argument: namely, that it was impossible for the Tribunal to be satisfied that the owners of riparian lands did not relinquish jurisdiction over the rivers when selling their lands.

In dealing with the Crown's argument under the various subheadings, we have commented that there is no firm evidence to support the contention that the owners disposed of their interest in, or tino rangatiratanga over, the rivers as part of or allied to the sales of riparian lands. While those sales may have made physical access to the rivers difficult, that does not mean that title or tino rangatiratanga must pass or be surrendered. Where land is difficult of or without access, title or control does not pass with the purchase of adjoining land. Why then should the position with rivers be any different?

We can accept that some of the owners of riparian lands may well have contemplated a lesser use of their riparian rights or a sharing of rights for a variety of reasons as the result of such land sales. However, this is an entirely different proposition from an acknowledgement that their rights and interests in, or tino rangatiratanga over, the rivers passed with such sales. In presenting the argument that, because of the links between the lands and the rivers, the owners in selling riparian lands voluntarily relinquished their rights to the rivers, the Crown evidences a lack of understanding of Maori land rights and tenure.

The anthropologist Joan Metge described the system as follows:

Under the Maori system of land tenure, rights of occupation and usufruct were divided among sub-groups and individuals, but the right of alienation was reserved to the group. Each hapu of the tribe controlled a defined stretch of tribal territory, which

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44. Document D5, p 20

it guarded jealously. Trespassers and poachers were punished severely, and persistent border violations led to fighting even between hapu of the same tribe. Within hapu, whanau, nuclear families and individuals held rights of occupation and use over specific resources: garden plots, fishing-stands, rat-run sections, trees attractive to birds, clumps of flax, and shell-fish beds . . . the rights of individuals and lesser groups were always subject to the over-right of the greater group.<sup>45</sup>

As from about 1865, the awarding of undivided interests in land to individuals, who were allowed to dispose of those interests, was a concept entirely alien under the Maori system of land tenure just described. That system stressed the over-right of the hapu to control its territories. We therefore find it inconceivable that vendors would even remotely contemplate that the sales of interests in lands would carry with them the transfer of or extinguishment of rights in rivers when the rights of alienation thereto were reserved to the hapu.

Under the terms of the Treaty, the Crown guaranteed to Maori 'full exclusive and undisturbed possession' of their properties, 'so long as it is their wish and desire to retain the same in their possession'. This was a positive guarantee. If title and possession of property has passed from Maori to others so as to free the Crown from such guarantee, then surely the onus rests with the Crown to show that Maori have willingly given up the wish and desire to retain such property. In the present case, however, the Crown seeks to establish that, regardless of the application of the *ad medium filum* rule, Te Ika Whenua voluntarily relinquished tino rangatiratanga as part of the land sales. Having regard to the fact that title to the bed of the rivers passed by virtue of that rule and was instrumental in the loss of tino rangatiratanga, the onus of proof of the alternative proposition must rest with the Crown.

The Crown has argued that the *contra proferentem* rule should not be applied against it. This rule provides that, where there is an ambiguity in a document, it should be construed against the party who drafted or proposed the law or document. We do not see the above determination as an operation of this rule. The Crown has propounded an alternative argument on the loss of tino rangatiratanga, and the onus rests with the Crown to prove such argument.

It is inescapable that the major factor in the loss of title and te tino rangatiratanga over the rivers is the application of the *ad medium filum aquae* rule. By operation of that rule of law, title to the middle of the rivers passed to the purchasers of riparian lands. In the *Mohaka River Report 1992*, the Tribunal found that this was an operation of law inconsistent with the principles and guarantees under the Treaty.<sup>46</sup> We agree. At least with the majority of the Te Ika Whenua land sales, the vendors would have had no idea of this law. Although the riverbeds passed on the sale of riparian lands, this could hardly be said to be a voluntary sale or relinquishment of tino rangatiratanga. It is significant that the Crown did not even endeavour to argue voluntary relinquishment based on transfer of title under this principle.

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45. Joan Metge, *The Maoris of New Zealand: Rautahi*, London, Routledge and K Paul, 1976, p 121

46. *The Mohaka River Report 1992*, sec 4.7 passim

While hypothesis is somewhat dangerous in that it can always lead to other hypothetical questions, we might ponder as to what might have happened to the beds of the rivers had it not been for the *ad medium filum aquae* rule. In such a case, where in deeds of sale rivers were shown to be boundaries, title to the beds thereof would neither have passed nor have been created and would have remained as Maori customary title. Whatever the situation, the ownership and tino rangatiratanga of the greater portion of the Te Ika Whenua rivers would not have passed from their hands by virtue of the land sales.

The Tribunal does not accept the Crown's call for further investigation into the land sales before making its finding on the rivers claim. The parties had ample notice of this claim. Following representations by counsel, the Tribunal determined that the validity of the land sales was not an issue on which it had to rule. The question of whether title to the rivers passed under the land sales was always going to be an issue in this claim, and the parties had ample time to research and argue this issue.

Our finding is that the loss of tino rangatiratanga over the rivers by the claimant hapu was primarily brought about by the loss of customary and Treaty rights to those rivers through the application of the *ad medium filum* rule, a principle of law about which the vendors of the various riparian lands had no knowledge. This constituted a breach of the article 2 guarantees in the Treaty and the Treaty principle of active protection. The hapu of Te Ika Whenua did not knowingly and voluntarily relinquish tino rangatiratanga over their rivers, which were and still are taonga.



## CHAPTER 9

# ISSUES: TREATY GUARANTEES AND KAWANATANGA

### 9.1 INTRODUCTION

In chapter 8, we dealt with the argument of the Crown: namely, that members of the claimant hapu sold their riparian lands and with them their rights to the rivers. The Crown continued its submission with the proposition that the appropriation of the right to generate power by the Crown was a reasonable exercise of kawanatanga. We note that the word 'kawanatanga' is a transliteration of the word 'government'.<sup>1</sup> In article 1 of the Maori text of the Treaty of Waitangi, 'te Kawanatanga katoa o o ratou wenua' was given absolutely by the chiefs to the Queen. The Ngai Tahu Tribunal accepted that this means 'complete government' and 'all the government', and that this is less than the supreme sovereignty conferred in the English text.<sup>2</sup>

The issue we now have to determine is not whether the Crown's control and management of the rivers of Te Ika Whenua for hydropower generation is a justifiable exercise of kawanatanga but whether or not the exercise of kawanatanga was reasonable and proper, having regard to the Treaty guarantee of tino rangatiratanga and the Crown's associated duties and obligations.

### 9.2 TITLE AND TREATY GUARANTEES

In the English text of the Treaty of Waitangi, the Crown confirmed and guaranteed to the chiefs and tribes 'the full exclusive and undisturbed possession of their lands . . . and any other properties' so long as they wished to retain them. Notwithstanding this undertaking, the Crown undertook no inquiry as to the establishment of any particular rights or title in accordance with Maori custom that would accord protection to those properties that Maori regarded as having special significance. Instead, the Native Land Court was established to investigate title to Maori customary land and to issue certificates of title based on English law. The Torrens land transfer

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1. Compare with Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed, Wellington, Department of Justice: Waitangi Tribunal, 1989, sec 8.3; *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 2, sec 4.6.6; and *The Te Roroa Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 26.
  2. *The Ngai Tahu Report 1991*, vol 2, sec 4.6.6

system, subsequently introduced from the colony of South Australia as a means of recording and simplifying proof of title, reinforced the English law.

Consequently, no consideration was given to a system of title that might recognise or protect Maori customary rights (or do both). In the case of rivers, instead of a composite title that reflected such rights, the separate entities at common law of bank, bed, and water were introduced. Under this regime, in the case of non-navigable rivers, when Maori sold riparian lands, the title to the bank and bed and rights to the use of the waters passed to the purchaser.

In our view, this was clearly a consequence of 'the tendency of rendering native title conceptually in terms which are appropriate only to systems which have grown up under English law' referred to by the Court of Appeal in its decision in *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20 (see sec 7.4).<sup>3</sup> The failure of the Crown under its power of kawanatanga to put into effect a form of title that recognised customary and Treaty rights of Maori to their rivers is an underlying factor in the present claim.

The effect of the application of English law, which was applied to New Zealand under section 1 of the English Laws Act 1858, is not confined to this claim but has been widely felt and recognised. The Treaty gave to the Crown the right of pre-emption in the purchase of land. When land was acquired, property rights were taken in accordance with English law. As we have seen, notwithstanding the Treaty, rights to rivers were determined under those laws. Beds of navigable rivers belonged to the Crown. Other rivers and streams belonged to riparian owners. Through such application of law, the Crown has appropriated lands, properties, and fisheries that belonged to Maori. At times, the Crown has recognised the injustice of this, as, for example, in the recent fisheries settlement contained in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

The claimants contend that by exercising its right of kawanatanga to create title based on English law, the Crown has been able to assert ownership over large areas of the beds of Te Ika Whenua's rivers and thereby to expropriate their wai tipuna for power generation. Consequently, they claim to have been denied the right to exercise an inherent element of tino rangatiratanga: namely, to develop their rivers for their own social, cultural, and economic benefit.

### **9.3 CONTROL OF NATURAL RESOURCES AND TREATY GUARANTEES: THE CROWN'S CASE**

The Crown says that it must have the right under article 1 to provide for the protection, management, and exploitation of natural resources where it is in the national interest, although article 2 rights will be accommodated wherever that is practicable. In the case of utilisation of water resources for electricity generation, the Crown considers that this is undoubtedly an area where its rights of kawanatanga

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3. Document C3; for the original judgment, see doc C14(b)



must prevail. Mr Arnold referred to evidence on the importance of electricity to the New Zealand economy and the advantages of generation by water power. He submitted that the Crown took control of electricity generation for sensible reasons of social policy, with widespread benefits to all members of the New Zealand community.<sup>4</sup>

We do not doubt that under the Treaty the Crown has the overriding right to exercise its power of kawanatanga in the national interest. It is not, however, our brief to consider whether or not the Crown was justified in assuming the right of overall management and control of the water resource of Te Ika Whenua, having regard to the importance to New Zealand of hydroelectricity. What we do have to consider is how far the Crown had a duty and obligation to qualify its exercise of kawanatanga, having regard to the guarantees contained in article 2 of the Treaty.

## 9.4 DUTIES AND OBLIGATIONS IN THE EXERCISE OF KAWANATANGA

### 9.4.1 Reciprocity

In the *Ngai Tahu Report 1991*, the Tribunal dealt with the principle that the cession of Maori sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga. The Tribunal declared:

This concept is fundamental to the compact or accord embodied in the Treaty. Inherent in it is the notion of reciprocity – the exchange of the right to govern for the right of Maori to retain their full tribal authority and control over their lands and all other valued possessions.<sup>5</sup>

The Tribunal in the *Ngai Tahu Sea Fisheries Report 1992* saw this principle as of paramount importance and as overarching and far-reaching, being derived directly from the provisions of articles 1 and 2 of the Treaty. On the notion of reciprocity, the Tribunal said:

It is clear that cession of sovereignty to the Crown by Maori was conditional. It was qualified by the retention of tino rangatiratanga.

The Crown in obtaining the cession of sovereignty under the Treaty therefore obtained it subject to certain limitations upon its exercise. In short, the right to govern which it acquired was a qualified right.<sup>6</sup>

4. Document D5, p 23

5. *The Ngai Tahu Report 1991*, vol 2, sec 4.7.5; see also Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 5.1.2; *Maori Development Corporation Report*, Wellington, Brooker's Ltd, 1993, sec 6.3; *Te Whanganui-a-Orotu Report 1995*, 1st ed, Wellington, Brooker's Ltd, 1995, sec 12.2.1

6. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, sec 11.5.1

As our outline of the historical background to the present claim shows, right from the beginning there was conflict between the two systems and the two parties, the indigenous people, who had their own customary laws and protocols, and the colonising power, which they welcomed (see chs 3–6). The belief of the indigenous people was that the Treaty would establish ‘a settled form of Civil Government’ and secure ‘Peace and Good Order’ to ‘avert the evil consequences which must prevail from the absence of necessary Laws and Institutions’ (see the preamble to the Treaty). They could not foresee that this new system of kawanatanga would not always provide the protections promised and would at times preclude them from exercising their tino rangatiratanga.

In our *Te Ika Whenua – Energy Assets Report 1993*, we outlined how the Crown under the Water and Soil Conservation Act 1967, the Public Works Act 1928, and the Electricity Act 1968 allowed the Aniwhenua and Wheao power schemes to be constructed by local power authorities. We found that the Crown granted the required water rights for power generation without giving thought or consideration to the general overarching Treaty principle of exchange and the other principles inherent in it. More particularly, we found that the Crown failed in its associated fiduciary duty to consult with ‘the people directly concerned ... such as the claimants’.<sup>7</sup>

#### 9.4.2 Consultation

In the Court of Appeal decision *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, Sir Ivor Richardson at page 683 described the duty to consult as follows:

In truth the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty. I think that the better view is that the responsibility of one Treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision which is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation, it will have discharged the obligation to act reasonably and in good faith.

The Court of Appeal has similarly held in other cases that, where the Government under its powers of kawanatanga seeks to deal with interests of Maori that are otherwise protected by the Treaty of Waitangi, there should be full consultation with the Treaty partner.

That court, in *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 at page 152, stated:

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7. Waitangi Tribunal, *Te Ika Whenua – Energy Assets Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 5.2

In the judgements in 1987 this Court stressed the concept of partnership. We think it right to say that the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues. That is really clear beyond argument.

In *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 at pages 683 and 684, the Court of Appeal, speaking generally on the requirement to consult but not with direct reference to the Treaty, said:

If the party having power to make a decision after consultation holds meetings with parties it is required to consult, provides those parties with relevant information and with such further information as they request, enters the meetings with an open mind, takes due notice of what is said, and waits until they have had their say before making a decision, then the decision is properly described as having been made after consultation. It is immaterial that those parties may have had other concerns which for their own reasons they chose not to put forward.

The Tribunal in various reports extending over a longer period has likewise held that the Crown has a duty to consult its Treaty partner and has reflected upon the consultation process in particular claims. The need for early consultation was set out in the 1985 *Report of the Waitangi Tribunal on the Manukau Claim*. Sir Ivor Richardson's reasoning in the 1987 *New Zealand Maori Council* case was explored in the *Ngai Tahu Report 1991*, where the following observations were made:

in some areas more than others consultation by the Crown will be highly desirable, if not essential, if legitimate Treaty interests of Maori are to be protected. Negotiation by the Crown for the purchase of Maori land clearly requires full consultation. On matters which might impinge on a tribe's rangatiratanga consultation will be necessary. Environmental matters, especially as they may affect Maori access to traditional food resources – mahinga kai – also require consultation with the Maori people concerned. In the contemporary context, resource and other forms of planning, insofar as they may impinge on Maori interests, will often give rise to the need for consultation. The degree of consultation required in any given instance may, as Sir Ivor Richardson says, vary depending on the extent of consultation necessary for the Crown to make an informed decision.<sup>8</sup>

With regard to the duty to consult, the Tribunal made precisely the same statement in both its *Ngawha Geothermal Resource Report 1993* and its *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*:

Before any decisions are made by the Crown, or those exercising statutory authority on matters which may impinge on the rangatiratanga of a tribe or hapu over their taonga, it is essential that full discussion take place with Maori. The Crown obligation actively to protect Maori Treaty rights cannot be fulfilled in the absence of a full appreciation of the nature of the taonga including its spiritual and cultural dimensions. This can only be gained from those having rangatiratanga over the taonga.<sup>9</sup>

8. *The Ngai Tahu Report 1991*, vol 2, sec 4.7.17

9. *Ngawha Geothermal Resource Report 1993*, sec 5.1.6; Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, Wellington, Brooker and Friend Ltd, 1993, p 32

In the present claim, the Crown did not contest that consultation was required. Mr Arnold said:

While the Crown accepts, as a matter of general principle, that tangata whenua have a right to be consulted about proposed developments, and modifications that can sensibly be made to meet their concerns should be made, Maori interests protected by Article 11 cannot give tangata whenua the right to veto or prevent power developments on the rivers.

Ultimately there must be a practical accommodation of the two sets of rights, although there may be circumstances where one set must prevail over the other and, where that must occur, it is the Crown's right of kawanatanga that must prevail. In relation to water resources the Crown says that s 8 of the Resource Management Act does provide for an appropriate recognition of Treaty values.<sup>10</sup>

## **9.5 DID THE CROWN FAIL TO MEET ITS TREATY OBLIGATIONS TO TE IKA WHENUA?**

### **9.5.1 Inadequate consultation over local power schemes**

The Crown and the local power supply authorities point to consultation with the claimant hapu over the power schemes, notwithstanding that power boards were not the Crown or its agents and were under no Treaty or other obligation to consult with tangata whenua (see secs 6.3.2–6.3.3). The Crown submitted that such consultation constituted a reasonable exercise of kawanatanga. Mr Arnold said that in such exercise of kawanatanga there needed to be a practicable accommodation of the two sets of rights: the existing objection procedures, 'although arguably not adequate to meet the Crown's Treaty obligations, did provide an opportunity for Te Ika Whenua to raise at least some of their concerns, yet they did not do so'.<sup>11</sup> By virtue of those circumstances, he argued, it could not be said that the Crown's Treaty obligations had not been fulfilled.

The claimants, on the other hand, criticised the nature and extent of consultation and contended that it fell far short of the requirements of the Treaty (see secs 6.3.1, 6.3.5, 6.4.1, 6.4.3).<sup>12</sup> Further, that the Crown's disregard of their tino rangatiratanga over the rivers constituted a breach of the provisions of the Treaty.

In our view, if there is to be consultation that satisfies the terms of the Treaty, there must first be recognition of the rights and interests of Maori under article 2. It is not possible for the Crown successfully to argue the proper exercise of kawanatanga in accordance with the terms of the Treaty without indicating the regard it has had to the guarantees contained in article 2. Likewise, it is not sufficient to consult without recognition of any right or interest and then argue that such consultation complies with the requirements of the Treaty.

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10. Document D5, pp 23–24

11. Ibid, p 26

12. See also doc C19, pp 5–6

The Tribunal has before it no evidence of any regard by the Crown of its guarantees under article 2 of the Treaty in its dealing with the rivers of Te Ika Whenua. It has merely accepted the common law view of ownership of rivers and acted accordingly. Consultation was conducted, essentially on an ad hoc basis, with parties at large rather than with people with special rights. Furthermore, the rights to water for power generation had already been appropriated by the Crown. Consequently, consultations were not as between Treaty partners in recognition of the special rights of Maori but as between the power boards and a group of Maori with some riparian rights and cultural and historical ties with the rivers. Consultation on such a basis could hardly be said to satisfy the Crown's obligations under the Treaty of Waitangi. Given those circumstances, the fact that the proposed developments were virtually a fait accompli and there was no real process for objection by tangata whenua, it is hardly surprising that Maurice Bird, when consulted, expressed little objection to the Wheao scheme (see sec 6.3.4).

The local power schemes were backed by the Government; Maori were not represented on the planning and controlling authorities; the legislation and processes under which they operated were essentially monocultural; the Treaty of Waitangi Act 1975 to 'provide for the observance and confirmation of the principles of the Treaty' had not yet taken effect. Maori at that time did not usually participate in the investigation and consent process by lodging objections, submissions, and appeals. Attitudinal as well as legislative changes were needed for more effective consultation and participation.<sup>13</sup> Furthermore, by the 1960s, forestry provided full employment for tangata whenua and the rivers were no longer an essential food source. None the less, they remained a sacred taonga. Given the mood of change and progress and the lack of any official or public recognition of any property right in the rivers, what Mr Alexander mistook for 'total silence from tangata whenua while the power schemes were being debated and constructed' is quite understandable (see sec 6.5.2). In fact, as he later discovered, Maori complaint about the serious depletion of the eel fishery predated the local power schemes and concerned both the commercial eeling activities of Pakeha and the Matahina Dam, which cut eel migration up and down the Rangitaiki River in 1963.

### 9.5.2 Impact of local power schemes

The impact of the Aniwhenua and Wheao power schemes was twofold. First, there was the physical impact, particularly as regards the Wheao scheme, which mixed the waters, shattering their sanctity and affecting the spiritual relationship of the people with the river (see secs 6.2.1, 6.2.2). Secondly, there was the effect on the traditional fishery of Te Ika Whenua. While emphasis has been placed on the eel fishery, it must not be forgotten that the claimants also complained about the diminishing numbers of native fish (see sec 6.5.1). Evidence as to the physical impact of the schemes was not disputed.

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13. Compare with the *Report of the Waitangi Tribunal on the Manukau Claim*, sec 9.2.6

The Crown, in closing submissions, referred to and acknowledged two other factors in the depletion of the eel fishery: the Matahina Dam and commercial eeling. Mr Arnold said:

the hydro scheme which seems to have had the greatest impact on the eel fishery is the Matahina Project which was completed in the 1960s. It is this project which was primarily responsible for impeding the passage of eelers up the river system from the sea and it would also have made it difficult for adult eels to migrate to the sea to breed. The Matahina Project is downstream of the area claimed by Ika Whenua but plainly affected the eel fisheries in the rivers and streams which they claim . . .

. . . commercial eel fishing in the early 1970s seems to have been at least as significant a factor in the decline of the eel fisheries in the rivers as the hydro developments. In December 1972, before the construction of the Aniwhenua or Wheao power schemes, Mr Paul, as chairman of the Ngati Awa Maori Executive, wrote to the Minister of Maori Affairs expressing the concern of the people of the area at the serious depletion of eel stocks resulting from commercial fishing and estimating that within six months eel stocks would be exhausted – see doc C14(c) at pp 31–32. Mr Mitchell, the eel expert, agreed in cross-examination that commercial fishing was a major factor in the decline of eel stocks.<sup>14</sup>

Mr Arnold argued the relevance of these two factors to the present claim as follows:

- (a) The building of the Matahina Dam was not the subject of complaint by Te Ika Whenua, possibly because it was outside the area of their claimed rohe and there was little evidence about it before the Tribunal.
- (b) Eel depletion arose at least in part from commercial fishing. The Tribunal therefore could not make any recommendation over eels because commercial freshwater fisheries such as eel fisheries were outside the jurisdiction of the Tribunal under section 9(a) of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.<sup>15</sup>

Dealing with the first point, we are not sure what its purpose is; presumably we are expected to ignore the admitted effects of the Matahina Dam on the eel fishery if we find a breach of the Treaty. Surely, if the Crown is in breach of the Treaty and is required to remedy that breach, then it is important to identify the cause, whether inside or outside the rohe, so that if consultation or negotiations are to be undertaken the remedies needed can be fully addressed. While the claim only refers to the detriment to the fisheries through the construction of the Wheao and Aniwhenua schemes, we do not believe that any good purpose would be served by ignoring the effects of the Matahina Dam and leaving the claimants to bring a further claim on that issue.

As to the second point, based on the fishery being a commercial fishery, the Tribunal does not accept this argument. Eels were and still are primarily a much sought after delicacy to the local hapu; indeed, Te Ika Whenua were renowned for the succulence and quality of their eels, that contributed to their mana. Commercial

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14. Document D5, pp 26–27

15. Ibid, p 27

exploitation was only one brief incident which assisted in their depletion and was of such short duration that we cannot seriously regard the rivers as commercial fisheries. In any event, section 9(a) of the 1992 Act only precludes further claims in respect of commercial fishing and clearly does not apply to this claim, which is about customary and traditional fishing rights.

Comprehensive evidence of the claimants as to the effect of the dams on eel population was not contested and was supported by expert evidence from Mr Mitchell and Dr Donovan (see sec 6.5.3). Both agreed that the dams formed an impassable barrier preventing young elvers from passage upstream. Conversely, the dams also formed a barrier for adult eels ready to migrate to their breeding grounds in the sea, and most were killed in the turbines of the dams. The weight of evidence, both claimant and expert, was that the dams had a major impact on the eel population of the rivers.

The eel fishery of Te Ika Whenua was and still is a taonga. Under the terms of the Treaty, the Crown promised Maori the retention and protection of their fisheries. The rivers constituted an important fishery for the people of Te Ika Whenua and it is clear that the Crown in authorising the construction of the dams ignored any possible effect upon the eel fishery. Even if we were to accept that the construction of the dams was in consequence of a proper exercise of kawanatanga, the Crown had a responsibility to take into account their effect on the fishery and to ameliorate it. Evidence suggests that the Crown, through the Department of Internal Affairs (which administered the trout fishery), looked upon the decline of the eel fishery as something to be encouraged for the benefit of recreational trout fishing (see sec 6.5.2).

It is our view that, in permitting and encouraging the dams to be erected, the Crown has ignored their effect on this taonga and is in breach of the Treaty. It therefore has a responsibility to take all reasonable steps to protect and restore the fishery in full consultation with its Treaty partner.

Evidence of measures being taken to replenish the eel fishery is outlined in sections 6.5.2 to 6.5.4. Bay of Plenty Electricity is involved in the capture and release of both elvers and migrating eels. The Electricity Corporation of New Zealand has constructed an elver pass over the Matahina Dam, though only one of the two pick-up points in the original design has been built. Mr Mitchell, one of the designers, acknowledges that it will be far more effective when it is finally completed.<sup>16</sup>

Te Ika Whenua complain that there was and still is a lack of consultation over these measures. We share this concern. The measures seem to be undertaken on an ad hoc basis and without an overall long-term plan. Although the Electricity Corporation and Bay of Plenty Electricity are to be complimented on their initiatives, they are under no requirement or obligation to continue them or guarantee their continuance.

In our view, in accordance with the Treaty principles implicit in article 2, there should be proper consultation with Te Ika Whenua on the measures necessary to replenish and protect the eel fishery. A long-term plan should be agreed to and undertaken in a manner that satisfies them that something tangible and effective is

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16. See doc C12, p 2

being done. In the final analysis, the responsibility for protecting this fishery rests with the Crown.

### 9.6 THE KIOREWEEKU PROJECT

The Kioreweku project involves a further dam, which Bay of Plenty Electricity proposes to build downstream from Aniwhenua. Some consultation has been held with local landowners, including Maori. At one particular meeting, a social hour was held and persons interested were invited to have discussion with the company's land purchase officer. Criticism was levelled at the nature of the consultation and at the lack of consultation with Te Ika Whenua. It was suggested that we should find that such consultation was not in accordance with the Resource Management Act 1991 and that the Act itself was 'fatally flawed' (see sec 6.4.1).

We understand that the investigation and consent process for this scheme is ongoing. Furthermore, the claim before us does not include this project. Therefore, we cannot make any such findings.

We draw to the attention of the claimants that the question of consultation is a matter to be addressed and judged under the provisions of the Resource Management Act. Several recent Tribunal reports have already addressed this question and have recommended appropriate amendments to the Act.<sup>17</sup>

### 9.7 THE RETIRETI AND CUSTOMARY FISHING RIGHTS

A further issue raised by the claimants related to the Crown's exercise of kawanatanga through the imposition of trout fishing regulations. They say these infringe their customary fishing rights and tino rangatiratanga over their fisheries and rivers. In particular, they restrict the use of a customary fishing device, namely the retireti (board).

The retireti is made from a flat piece of timber and attached to a line (see fig 26). Hooks or lures are attached to the timber by lines and it is then cast into a river or stream. The line is played out, and when restraint is placed against it, the shape of the board is such as to work against the current and gradually make its way to the opposite side of the river or stream. Using these skills, Te Ika Whenua were able to fish both sides of their rivers and streams.

Maurice Toetoe presented evidence that the retireti was used for eeling but was 'prohibited gear' under the rules and regulations applying to trout fishing because it was possible to use it for catching trout.<sup>18</sup> He said that he had been told by rangers that he could only fish for eels with a worm between the hours of 11.00pm and 5.00am.

17. See *Ngawha Geothermal Resource Report 1993*, sec 8.5.2; *Tē Whanganui-a-Orotu Report 1995*, secs 9.10.5, 12.4.4

18. Document B11, pp 1-3



Maanu Paul contended that Te Ika Whenua's rights of use and control of their fisheries included the use of their methods and artefacts, such as the retireti. The retireti had been developed to catch trout and this was an integral part of Te Ika Whenua's right to development (see also sec 4.5).<sup>19</sup>

We accept that the retireti is part of Te Ika Whenua's customary fishing practices and that they are concerned at limitations on its use. Access to parts of the rivers is often difficult, and the retireti can be instrumental in opening up for fishing areas of water that might not otherwise be reached. In closing submissions, Ms Ertel requested that the Tribunal 'declare the lawfulness of the retireti'.<sup>20</sup>

While the Tribunal does not have the authority to make such a declaration, it regards the retireti as part of Te Ika Whenua's customary fishing rights and practices, which are entitled to protection under the Treaty. Regulations restricting the use of the retireti impinge upon those rights and practices.

As we have already demonstrated, the exercise of kawanatanga carries with it the fiduciary obligation of proper and full consultation. Our impression is that the fishing regulations were drafted and introduced to protect and advance the trout fishery at the expense of the customary eel fishery without consultation with Te Ika Whenua or any consideration of their rights.

We are not sure, however, that the limitations on customary fishing practices recounted by Mr Toetoe are correct and that the effect of the trout fishing regulations is properly understood.

A copy of a fishing licence was produced, but we were not referred to any legal authority by way of statutes, regulations, or bylaws, nor were any submissions advanced on this point. Notwithstanding, we find it appropriate that, as part of our recommendations, the impact of trout fishing laws and regulations be the subject of negotiation and we therefore see no need to use our investigatory powers to clarify the position further.

We should add that we do not necessarily agree with Mr Paul that the adaptation of the retireti to catch trout can be classified as a customary fishing practice. Surely specific laws could be prescribed for the taking of trout so as to leave Te Ika Whenua free to utilise their customary practices in the taking of other species.

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19. Document B16, paras 22–27

20. Document D2, p 75



## CHAPTER 10

# ISSUES: RIGHT TO DEVELOPMENT

### 10.1 INTRODUCTION

Incorporated in Te Ika Whenua's claim is a right to the development of their interest in the rivers. This right to development is asserted in the prayer for relief set out in paragraph 9 of the amended particulars of claim (see app 1) as follows:

9. The claimants seek the following relief:
  - (a) Recognition of te tino rangatiratanga in relation to the Rangitaiki, Wheao and Whirinaki Rivers including their tributaries.
  - (b) A recommendation that a system of recognition of the claimants' tino rangatiratanga be given effect. Such a system should recognise the claimants' beneficial interest in the rivers (including their right to development) and their authority in relation to the management of all aspects of the Rangitaiki, Wheao and Whirinaki Rivers.
  - (c) A recommendation that the claimants be compensated for past breaches of the Treaty.
  - (d) Any other relief the Waitangi Tribunal deems fit.<sup>1</sup>

In final submissions, the claimants claimed rights over the rivers in the nature of a proprietary interest and sought findings including that:

- (a) The river as a whole, including the water is a taonga.
- (b) The claimants have a proprietary interest, which can practically be encapsulated within the legal notion of ownership in the waters of the rivers.
- (c) This proprietary interest and relationship between the claimants and the water existed at 1840 and has continually been in existence from 1840 until today.<sup>2</sup>

In this chapter, we examine Te Ika Whenua's claim to a right to development, including the nature and extent of their interest in the rivers, which we see as an integral part of the present claim and the nub of the relief sought.

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1. Claim 1.1(e), para 9

2. Document D2, pp 71-72

## 10.2 DEVELOPMENT – A TREATY RIGHT

### 10.2.1 The claimants' view

Inherent in the claimants' argument is the principle that the Treaty does not simply preserve for Maori their customary rights as at 1840 but includes a right to development. Ms Ertel submitted:

The pre-amble to the Treaty specifically envisaged immigration and a place in one country for both people. At the time of the signing of the Treaty all lay ahead, immigration, the development of a new country, good order and a settled form of civil government. The flexibility and adaptability, 'the living Document', nature of the Treaty has as an imperative the development of both Maori and Pakeha. This includes economic and technological development.<sup>3</sup>

Counsel then quoted from the Tribunal's findings in its report on the Muriwhenua fishing claim to support such an argument:

Maori no longer fish from canoes but nor do non-Maori use wooden sailing boats. Nylon lines and nets, radar and echo sounders were unknown to either party at the time. Both had the right to acquire new gear, to adopt technologies developed in other countries and to learn from each other.

The Treaty offered a better life for both parties. A rule that limits Maori to their old skills forecloses upon their future. That is inconsistent with the Treaty.

A treaty that denied a development right to Maori would not have been signed.

It is the inherent right of all people to develop and progress in all areas. No one has seriously suggested that Maori could not develop their lands on Western lines and sell the produce of their industry.

The Treaty envisaged that Maori would gain greater development opportunities from settlement and access to new markets.<sup>4</sup>

Ms Ertel also pointed to actions by the Crown in ratifying international declarations and instruments as setting for itself minima that it should not fall below when exercising kawanatanga. In particular, she cited the following articles of the United Nations Declaration on the Right to Development adopted by the General Assembly on 4 December 1986 (resolution 41/128), which was supported by New Zealand:

#### **Article 1(1)**

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

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3. Document B10, pp 8–9

4. Ibid, quoting from *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 3rd ed, Wellington, GP Publications, 1996, secs 11.6.5, 11.6.6

**Article 3(1)**

States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.

**Article 10**

Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.<sup>5</sup>

To advance her argument that Maori Treaty rights were not frozen in time as at 1840 and contained a right to development, Ms Ertel then quoted from the Tribunal's *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*:

The question of development of rights was a subject of considerable discussion in chapter 10 of the Tribunal's *Ngai Tahu Sea Fisheries Report 1992*. There, the Tribunal noted that it is by now a truism that Maori Treaty rights are not frozen as at 1840. All lay in the future and there would be developments that could not have been foreseen or predicted at that time. The generation of electricity from geothermal energy is surely a good example.<sup>6</sup>

**10.2.2 The Crown's response**

The Crown limited its response to comment based on the decision of the Court of Appeal in *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20 as follows:

66. Rangatiratanga appears to be a flexible concept, which can vary both as between peoples and as between situations. In the Mohaka River case the Tribunal described rangatiratanga as 'something more than ownership or guardianship of the river but something less than the right of exclusive use'. Such a general description provides little assistance and seems in the present case to be inconsistent with the Court of Appeal's judgement in the *Ika Whenua* case.

67. The Court of Appeal indicated that Maori interests had to be articulated or capable of contemplation as at 1840. For that reason, the Court found that Ika Whenua had no right under the Treaty to an interest in the power schemes. Viewed in this way, Crown Treaty duties towards Ika Whenua in respect of the rivers will be limited – to recognition of traditional values for food gathering and so on. A consequence of this is that Ika Whenua's mana or rangatiratanga in the rivers, if it continues, will be defined solely by reference to those traditional values.<sup>7</sup>

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5. Document 810, p 10

6. Ibid, quoting from *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, Wellington, Brooker and Friend Ltd, 1991, p 22

7. Document 05, p 22

### 10.2.3 The courts' approach

The courts have made several observations with respect to the principles of the Treaty of Waitangi and, by implication, the right to development. Their approach has been limited by the traditional view expressed in *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC): namely, that the court can only recognise or rely on rights under the Treaty to the extent that those rights have been incorporated into statute.

It should be noted that the courts have not been called upon to consider a right to development on the same basis as has the Tribunal. The Tribunal is specifically required under the Treaty of Waitangi Act 1975 to take into account the principles of the Treaty, whereas the courts' consideration is limited to proceedings where those principles are incorporated into statute or otherwise relevant to the proceedings. Nevertheless, there are some statements by the courts that imply a right to development or the need to adapt and apply the Treaty in the light of present-day circumstances.

In *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA), Cooke P did not tie Tainui's interest in coal to its use by them in 1840 but considered that they were entitled to compensation based on a considerable proportion of the resource. At page 529, he said:

The demand for coal and the establishment of the New Zealand coal industry have come largely from European or Western civilisation. Even so coal can be classified as a form of taonga, there was apparently some limited Maori use of it before the Treaty, and there has been the Maori contribution to the industry. A negotiated settlement which recognised as regards coal that Tainui are entitled to the equivalent of a substantial proportion but still considerably less than half of this particular resource could be suggested as falling within the spirit of the Treaty of Waitangi.

The following year, in delivering the judgment of the Court of Appeal in *Te Runanga o Muriwhenua Incorporated v Attorney-General* [1990] 2 NZLR 641, Cooke P referred to the Treaty as a living instrument and the obligations thereunder as ongoing and evolving as conditions change. At pages 655 and 656, he said:

As was said in the *Maori Council* case, the Treaty is a living instrument and has to be applied in the light of developing national circumstances. For most of the 150 years of the lifetime of the Treaty Maori were in general evidently content to raise no objection to Pakeha sea fishing. The resource was abundant. The problem has arisen in recent decades when inshore fish stocks have become depleted and the more valuable fishing areas are at distances from the coast which Maori fishing canoes can have reached at best only sporadically. Certainly the overfishing of traditional Maori fishing grounds has created a situation not foreseen at the time of the Treaty.

and at page 656:

The position resulting from 150 years of history cannot be done away with overnight. The Treaty obligations are ongoing. They will evolve from generation to generation as conditions change. The North American experience is instructive in this respect also.

The Courts there have so exercised their jurisdiction as to bring about or encourage changes with what the Supreme Court of the United States call 'all deliberate speed'. The phrase was used, for instance, in *Brown v Board of Education of Topeka* 349 US 294, 301 (1954), known as *Brown II*, the desegregation case.

The Privy Council in the Maori language case, *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, referred to the obligations of the Crown as being dependent upon the situation that exists at the time, a clear indication of the application of the Treaty to ongoing and changing circumstances. Lord Woolf, delivering the judgement of the Judicial Committee, said at page 517:

Foremost among those 'principles' are the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of taonga, in return for being recognised as the legitimate government of the whole nation by Maori . . . It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. For example in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant. Again, if as is the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection.

Conversely, the decision of the Court of Appeal in *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20 was cited by the Crown in this claim as authority for limiting the Crown's duties towards Te Ika Whenua in respect of the rivers to the recognition of traditional values for food gathering and so on.<sup>8</sup> Cooke P, in delivering the judgment of the court, reasoned at page 24 that (with respect to the right to generate electricity):

The Treaty of Waitangi 1840 guaranteed to Maori, subject to British kawanatanga or government, their tino rangatiratanga and their taonga, or in the official English version 'the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties . . .'. In doing so the treaty must have been intended to preserve for them effectively the Maori customary title, as mentioned in the fisheries case [*Te Runanga o Muriwhenua Incorporated v Attorney-General* [1990] 2 NZLR 641 (CA)] at p 655. But, however liberally Maori customary title and treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power. Such a suggestion would have

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8. Document C14(b); for the original judgment, see doc C1

been far outside the contemplation of the Maori chiefs and Governor Hobson in 1840. No authority from any jurisdiction has been cited to us to suggest that aboriginal rights extend to the right to generate electricity. Nor was the argument for the appellants put to the Court in that way. It was not contended that the dams are themselves taonga.

and at page 26 that:

It seems that the obstruction of free passage of migrating eels up and down the rivers has been one Maori grievance. But the assumption of control over the rivers implicit in the construction of the dams is more fundamental. If control has been assumed without consent there may well have been breaches of the Treaty of Waitangi, as the Crown acknowledges. But, as to these two dams non-Maori control has been an accomplished fact for a decade and more. The clock cannot be put back.

We consider the above decision further at section 10.3.5.

#### 10.2.4 The Tribunal's view

The traditional and somewhat muted approach on the right to development adopted by the courts must be contrasted with that taken by the Tribunal. In a number of reports where that right has been an issue, the Tribunal has clearly expressed the view that a right to development of property or taonga guaranteed under the Treaty is indeed a Treaty right.

Earlier in this chapter we referred to Ms Ertel's submissions, which included extracts from the *Report on the Muriwhenua Fishing Claim* supporting the right to development (see sec 10.2.1). The Tribunal followed this with a similar finding as to a right to development in the *Ngai Tahu Sea Fisheries Report*.<sup>9</sup> Notwithstanding that in both these hearings the Crown contested the right to development, settlement of the fisheries claims was effected by the passing of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The basis upon which settlement was negotiated and reached is not known, but having regard to the amount of the settlement and the extension of the fishery to the 200-mile zone, it is obvious that the settlement did not bind Maori to the exercise of their customary rights tied in time to 1840. Rather, it was a recognition by the Government of their right to the development of property and resources that were subject to the guarantees under the Treaty.

Ms Ertel referred to the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, where the Tribunal found that 'the Rotoma claimants have a Treaty right to develop the geothermal resource lying under their land'.<sup>10</sup> This serves to illustrate that the right to development has been accepted by the Tribunal, not only in the case of fisheries but also where natural resources involving the generation of electricity are concerned.

In contrast to the reports cited above, which are of relatively recent origin, we refer to the *Report on the Motunui–Waitara Claim* of 1983, where the Tribunal said:

9. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, ch 10

10. *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, p 23



The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilise a status quo, but to provide a direction for future growth and development. . . .

We consider then that the Treaty is capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to its broad principles.<sup>11</sup>

Thus, the Tribunal has, over a number of years, consistently upheld the principle that the Treaty did not simply preserve the status quo as at 1840 but that it must be adapted to meet changing needs and circumstances – in other words, it must allow a right of development.

This Tribunal firmly supports the principle that the rights to property and taonga preserved and guaranteed under the Treaty included a right to development and that this right extended to Te Ika Whenua in the case of its rivers.

### 10.3 THE NATURE OF TE IKA WHENUA'S INTEREST IN THE RIVERS

#### 10.3.1 Introduction

Having found that Te Ika Whenua has a right to development in the case of its rivers, a number of questions arise. What is the extent of that right? Is it qualified in any way by the application of the principles of the Treaty or by the nature of the interest in the rivers? Did Te Ika Whenua 'own' the rivers? Is the right to generate electricity from water power excluded by the Court of Appeal's 1993 *Te Ika Whenua* decision?

We now proceed to examine these questions.

#### 10.3.2 The position as at 1840

In pre-Treaty times, Te Ika Whenua held tino rangatiratanga (territorial jurisdiction) over its rohe. While individual members of the hapu or whanau may have held customary use rights to areas of land and rivers, it was the hapu that held territorial rights and through which such use rights were derived. We would, however, caution that we must not confuse tino rangatiratanga with modern 'ownership'. Customary rights and traditional ownership were displaced by the systems of title introduced by the Crown. From 1865 on, when Crown grants and Native Land Court title were awarded, seldom to hapu but normally to individuals on the basis of ancestry, occupation, and use, 'ownership' was thereby acquired, notwithstanding that tino rangatiratanga remained with the hapu.

Maori or native rights are often described as aboriginal rights or title or native customary rights. The use of these terms often leaves the impression that these are simply use rights or possessory rights – in law, something less than full title. In *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR

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11. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed, Wellington, Government Printing Office, 1989, sec 10.3

20, the Court of Appeal referred to the terms 'Maori customary title' and 'aboriginal title' as being interchangeable. At page 24, the court commented that at one extreme 'they may be treated as approaching the full rights of proprietorship of an estate in fee recognised at common law' and at the other extreme as 'at best a mere permissive and apparently arbitrarily revocable occupancy'. In rejecting the submission of Te Ika Whenua that aboriginal or customary title to its rivers included the right to generate hydroelectric power, the Court of Appeal left the impression that it regarded such title as fixed in time and something less than full title.

This raises the question as to what is guaranteed under article 2 of the Treaty. Is it full rights of proprietorship or merely customary use rights? Article 2 guarantees 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties'. In our view, the guarantee of exclusive and undisturbed possession could not be maintained if the Treaty were construed as merely guaranteeing existing use rights and the territorial authority or *tino rangatiratanga* of the hapu were not taken into account.

Furthermore, the Treaty constitutes an acknowledgement by the Crown that Maori were the sovereign people of New Zealand. In article 1, the chiefs ceded to Her Majesty the Queen 'all rights and powers of Sovereignty' that they exercised or possessed 'over their respective Territories as the sole Sovereigns thereof'. The recital preceding the execution of the Treaty refers to the chiefs 'claiming authority over the Tribes and Territories which are specified after our respective names'. The nature and intent of the Treaty is clearly to recognise the territories of the chiefs and tribes, and article 2 is a full and unequivocal guarantee as to the exclusive and undisturbed possession of those territories. Although the word 'territories' is not mentioned in article 2, which spells out the nature of the property guaranteed and could extend to customary use rights enjoyed outside a particular tribal territory, the guarantee of territorial rights is implicit. The whole tenor of the Treaty is to guarantee full proprietary rights and there is nothing in it to suggest that the guarantee is limited merely to use rights as at 1840. Individuals and families who held such customary rights over lands and rivers were dependent upon their hapu holding and maintaining its territorial authority over its rohe.

To construe the Treaty as simply guaranteeing Maori customary use rights tied to particular uses as at 1840 overlooks the territorial authority of the hapu. In 1846, Sir William Martin, the first chief justice in New Zealand, wrote:

So far as yet appears, the whole surface of these Islands, or as much of it as is of any value to man, has been appropriated by the Natives, and, with the exception of the part which has been sold is held by them as property. Nowhere was any piece of land discovered or heard of [by the commissioners] which was not owned by them or some person or set of persons . . .<sup>12</sup>

In this statement, Sir William acknowledged that the territorial rights of Maori extended to the whole of New Zealand. The same view was held by Governor Hobson

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12. AJHR, 1890, G-1, p 3

and accepted by the British Colonial Office.<sup>13</sup> The Treaty also recognised this: article 2 guaranteed to Maori full proprietary rights, that is, full rights of ownership in their respective territories; namely, 'their Lands and Estates Forests Fisheries and other properties', for as long as it was their wish and desire to retain them.

Where, in accordance with Crown procedures, land title was established and awarded to Maori subsequent to the Treaty, full possessory title was inevitably granted. It mattered not that the lands may have been used only seasonally for hunting purposes or for foraging or for both; a grant of full freehold title was still made. An award of lesser title was not contemplated.

While one of the purposes of the Native Land Court in awarding full possessory title may have been to provide specified owners who could deal with and convey acceptable title to purchasers, the Crown has long regarded the issue of such titles to Maori as being in compliance with its guarantee in respect of lands under article 2 of the Treaty. If, from the Crown's perspective, full possessory title could be awarded for lands under the principles of the Treaty, why should rivers be dealt with any differently? The answer, of course, lay in the application of the common law principles to rivers, as we have already demonstrated in chapter 7. Suffice to say that, at common law, there was no ownership of running water. From the Maori perspective, however, lands and rivers were both their properties and their rights of ownership were absolute.

In *Te Ika Whenua's* case, we reject any suggestion that their customary rights to the rivers were tied in time to their use as at 1840. If such were the case, it would have been open to others to enter their rohe and use the rivers for any purpose that did not interfere with those rights. Such a proposition overlooks *Te Ika Whenua's* territorial rights and *tino rangatiratanga*; indeed, we cannot envisage such a situation arising without their full acquiescence. In our view, *Te Ika Whenua's* customary rights entitled them to the full use and control of their rivers and enabled them to enlarge and develop those uses as time and circumstances dictated, subject to conformity with their own protocols and customs.

### 10.3.3 'Ownership' of the rivers

The claimants seek a finding that they have a proprietary interest 'which can practically be encapsulated within the legal notion of ownership in the waters of the rivers'.<sup>14</sup> This immediately raises a difficulty in that the Tribunal is being asked to recognise a form of ownership of waters that is not recognised in English common law and that is not easily described in conventional legal terms.

We feel that it is important to distinguish, at this stage, between the elements of 'property' that *Te Ika Whenua* possessed in respect of their rivers and that were guaranteed to them under article 2 of the Treaty. There was, first, *tino rangatiratanga*, or authority and control, which was vested in the hapu and, secondly, rights of use,

13. Peter Adams in *Fatal Necessity: British Intervention In New Zealand, 1830-1847*, Auckland University Press and Oxford University Press, Auckland 1977, ch 6, pp 175-209

14. Document 02, p 72

which were available to members of the hapu. Use rights did not need to be all the same, and it was not unusual for occupiers of riparian lands to hold special rights to sections of a river, nor for members of another hapu, particularly those with a connection through whakapapa, to be accorded use rights.

The exercise of tino rangatiratanga generally required no active demonstration by the hapu, being recognised through custom and protocol. Rahui, for example, as to times of fishing and as to who could fish were known and accepted customs. In the case of a drowning, members of the bereaved family would pronounce a tapu, which would also be accepted by way of custom. It was only where the interest of the hapu as a whole might be affected, such as by a grant of right of passage to another hapu, that a decision was made at hapu level, generally by the rangatira.

As at 1840, Te Ika Whenua were entitled to the full use and control of their rivers. The rivers were theirs and nobody could obtain use rights other than by submitting to their jurisdiction and control and through their authority or acquiescence.

The Treaty promised to Maori in respect of their taonga – the rivers – full, exclusive, and undisturbed possession, something more than mere common law rights. This encompassed the two separate elements of tino rangatiratanga and full rights of use referred to above. Accordingly, Te Ika Whenua were entitled, as at 1840, to have conferred on them a proprietary interest in the rivers that could be practically encapsulated within the legal notion of ownership of the waters thereof. The term ‘ownership’ conflicts with the common law view because the waters were not captured but flowed on and were consequently available to other users downstream. Protection of those users’ interests by way of preservation of the resource would be provided for by custom and protocol. Notwithstanding this limitation, the right of use and control of their rivers rested with Te Ika Whenua. We therefore describe the ‘ownership’ or property or proprietary right of Te Ika Whenua of or in their rivers as being the right of full and unrestricted use and control of the waters thereof – while they were within their rohe.

#### 10.3.4 The position as of now

Essentially, the Treaty of Waitangi was a blueprint for the settlement of this country that sought to provide benefits and guarantees for both parties. What the Treaty partners contemplated when the Treaty was signed was seen by Ms Ertel as immigration and a place in one country for both people, the development of a new country, good order, and a settled form of government (see sec 10.2.1). It must therefore have been contemplated by Maori that there would, of necessity, be a sharing of those resources that were essential for immigrants to settle and survive in a new land. In effect, this would be a reciprocal arrangement in consideration for the apparent advantages of being part of the expanding empire of trade and Christianity and *pax Britannica*. The article 2 guarantee of exclusive possession of resources had to be modified by a practicable accommodation by Maori to make the Treaty a living and workable document. In other words, the Treaty had to be viewed in the light of existing circumstances and it had to be interpreted reasonably.

When Maori, including Te Ika Whenua, sold lands that were to be used for settlement and development and that depended upon the resources of rivers, whether for water, fishing, travel, or other uses, in no way did they alienate their dependence on those resources. Rather, they relied on the guarantee of tino rangatiratanga under the Treaty to protect their rights to those resources. Inevitably, the resource had to be and was shared, and Te Ika Whenua, like Maori generally, accepted this situation, although not, at times, without protest. What they do say, however, is that the rights of use so permitted are subject to their Treaty rights of tino rangatiratanga.

The perception of Maori is that the extension of rights of use to others is part of and consistent with the exercise of tino rangatiratanga. It was, and still is, not uncommon for one hapu to allow members of another hapu to exercise certain rights by way of custom within its rohe, including those of passage, hunting, foraging, and fishing. The extension of such rights to others enhances rather than detracts from or diminishes tino rangatiratanga.

The Tribunal has already referred to the sharing of resources in several of its earlier reports. In the *Mohaka River Report 1992*, it examined the shared use of the river with neighbouring settlers and concluded that:

Far from relinquishing any of their mana or control over the river, [Ngati Pahauwera] were using their mana or control to invest in the future development of a resource and for the benefit of a people.<sup>15</sup>

In considering the position of the seas, harbours, and foreshores, the Manukau Tribunal said:

By the same token we do not think the Maori interest in the seas is the 'full exclusive and undisturbed possession' of the English text. European New Zealanders need this Treaty too because by it the Maori people agreed to and accepted the existing and projected settlements and emigration referred to in the preamble and thereby agreed that the Europeans too would 'belong'. Both parties stood to gain by this Treaty as partners in a new enterprise. The new partner necessarily needed access. The Europeans' interest in the harbour and foreshore areas cannot be denied either.

We suspect that the original Maori signatories would have appreciated this and that the subsequent claims to exclusive ownership reflect the total denial of the Maori mana in the laws of the seas and fisheries. Those who appeared before us claiming that the Manukau belonged to them spoke of the Maori willingness to share the Manukau. They spoke also of the belittlement they felt when their 'first nation' status was relegated to that of 'an ethnic minority'.

We conclude that the Treaty did promise the tribes an interest in the harbour. That interest is certainly something more than that of a minority section of the general public, more than just a particular interest in particular fishing grounds, but less than that of exclusive ownership. It is in the nature of an interest in partnership the precise terms of which have yet to be worked out.<sup>16</sup>

15. Waitangi Tribunal, *The Mohaka River Report 1992*, 2nd ed, Wellington, GP Publications, 1996, sec 5.1

16. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed, Wellington, Department of Justice: Waitangi Tribunal, 1989, sec 8.3

Te Ika Whenua face a similar situation in that they have shared the use of their rivers. They claim recognition of their mana over the rivers, their authority and control, and restoration of the means to protect and preserve this resource, as is guaranteed by the Treaty. They also claim a proprietary interest in the rivers. We do not see that their acquiescence in sharing the use of the rivers should detract from their claim to tino rangatiratanga.

What we do see, however, is that the sharing anticipated under the Treaty derogates or detracts, not from tino rangatiratanga but from the proprietary interest in the rivers. Just as Te Ika Whenua claim the right to the development of their interest in the rivers, so too can other users – indeed, the public at large – although effectively such right is controlled by the Crown. In fact, we are seeing increased public use of the rivers, particularly for recreation and as a water supply. The claimants appear to have accepted this except where such usage is of a commercial nature, in which case they consider they should get a return for the use of their proprietary interest.

We find that Te Ika Whenua held a proprietary interest akin to ownership of the rivers as at 1840 in that they had full and unrestricted use and control of the waters thereof while they were in their rohe. That right or interest was property guaranteed protection under article 2 of the Treaty. Since then, circumstances, such as the sale of lands for settlement and the general contemplation under the Treaty that there would need to be a sharing of the resources upon which settlement depended, have led to a reduction of Te Ika Whenua's proprietary interest. The residue proprietary interest has never been acknowledged or protected by the Crown, and this constitutes a breach of the Treaty principle of active protection guaranteed in article 2.

We see little difference in our approach from that adopted by the Manukau and Mohaka River Tribunals, which found, in the case of the harbour and the river respectively, that Maori could not claim an exclusive interest under the Treaty because they had agreed that Europeans would 'belong'. Notwithstanding, Maori were entitled to the recognition of their special interest as Treaty partner. In the case of Te Ika Whenua and their rivers, the same could be said. There has been a sharing of the proprietary interest, as contemplated by the Treaty, but effectively the Crown has appropriated total management and control. Yet, under the Treaty, Te Ika Whenua are entitled to the recognition and active protection of their residual proprietary interest by the Crown. It matters not whether we call this a residual interest to which Te Ika Whenua are entitled or a share under a partnership – the result is the same. We also see a similarity in our finding and the dicta of Lord Cooke in *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) when he stated that Tainui were entitled to a share of the Waikato coal resource.

In coming to this determination, we have considered other alternatives. It could be argued that Te Ika Whenua, in sharing, merely allowed the settlers use rights to the rivers appropriate to those times and retained for themselves full rights to development or to any future uses that might eventuate or to both. Conversely, it might be argued that in the process of sharing Te Ika Whenua simply retained for themselves customary use rights, and the residual rights, including those to

development and future uses, went to the settlers and were thereby able to be acquired or appropriated by the Crown.

Our view is that neither argument is tenable. Sharing of the rivers occurred on an ad hoc basis as the country was developed and settled. No thought was given to the reservation of customary and Treaty rights for Maori, let alone to the reservation of rights to development or for possible future uses in favour of either party. The generation of hydroelectric power was not even contemplated.

The Treaty, as we have said, envisaged settlement and, in consequence, a sharing of the river resource for the benefit of Maori and Pakeha alike. For a finding to be made in the case of Te Ika Whenua's rivers that excludes either the tangata whenua or other New Zealanders would be contrary to the Treaty principle of partnership.

Consequently, having regard to the very nature of the sharing, the intent of the Treaty, and the principle of partnership, our rejection of the above alternatives reinforces our finding that, while Te Ika Whenua were, and still are, entitled under the Treaty to a proprietary interest akin to ownership in the rivers and to the active protection thereof, they agreed to a sharing of that interest.

We cannot be finite as to the extent of the residual entitlement Te Ika Whenua now have in the rivers. This should be a matter for negotiation and settlement between the Crown and the claimants. Regardless of present-day circumstances, such as access and legal title to the banks and beds of the rivers, the interest must be of reasonable substance. However, the ability of Te Ika Whenua to control and deal with their interest because of their riparian land holdings may support a claim to a greater proprietary interest. In this regard, the result of the land claim, still to be heard, may have an influence on the overall negotiation. Although it may not be appropriate to reach a final settlement prior to that claim being finalised, some interim relief is urgently needed to provide Te Ika Whenua with an economic resource that they can utilise to develop and protect their interest in the rivers and to assist them to break away from welfare dependency. To delay such relief would constitute a breach of the Treaty principle of redress.

### 10.3.5 The *Te Ika Whenua* decision

Under the principles of the Treaty, Te Ika Whenua are entitled to a right to development in respect of their rivers and to a proprietary interest therein. The decision of the Court of Appeal in *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20 raises the question as to whether Te Ika Whenua's right to development extends to the right to generate electricity by the use of water power.

Mr Arnold, for the Crown, contended that Te Ika Whenua do not have a right to generate electricity by harnessing water power and that the Crown's Treaty duties to Te Ika Whenua in respect of the rivers are limited to the recognition of traditional values. He quoted as authority the above decision, where the Court of Appeal found that Maori customary title and Treaty rights did not include the right to generate

electricity from water power. Extracts from that decision, including this finding, are set out earlier in this chapter at section 10.2.3.

The decision and pronouncements in the *Te Ika Whenua* case must be looked at in their proper context. *Te Ika Whenua* brought judicial review proceedings in the High Court seeking an interim declaration that the Minister of Energy not approve any establishment plan providing for the transfer of the Wheao and Aniwhenua Dams to certain electricity companies being established under the Energy Companies Act 1992 and not recommend to the Governor-General that she make an Order in Council providing for any such transfer until such time as this Tribunal had heard and determined *Te Ika Whenua*'s claim to the rivers. Interim relief was declined by the High Court and *Te Ika Whenua* appealed.

The decision of the Court of Appeal turned simply on what the court described as the strength of the case of the appellants. At page 23, Cooke P said:

In the present case a major factor must be the strength or otherwise of the case of the appellants. As the legislation stands now, the Crown has only limited powers over electric power boards and authorities. In general they are not agents of the Crown. But there is power under ss 95 and 96 of the Electric Power Boards Act 1925 to purchase electric works compulsorily at a price to be determined by arbitration. That power will cease when s 96 of the Energy Companies Act 1992 comes into force: see s 1(4) and (8) of the 1992 Act. But if there were any realistic prospect that by compulsory purchase or otherwise the Crown would take steps to bring about a complete or partial vesting of the dams in the tangata whenua, or that a Court might order such a vesting, we think that this Court should give at least serious consideration to making an order which would keep those prospects open. It is because, in the light of the nature of Maori customary title, the scope of treaty rights and the history of electricity generation in New Zealand, no such realistic prospect appears, that we dismiss this appeal.

The court, on the following page (p 24), made the statement referred to earlier in this chapter regarding the right to generate electricity by harnessing water power (see sec 10.2.3) and then at page 25 said:

The essence of what has been said above is that neither under the common law doctrine of aboriginal title, nor under the Treaty of Waitangi, nor under any New Zealand statute have Maori, as distinct from other members of the general New Zealand community, had preserved or assured to them any right to generate electricity by the use of water power. Consequently there can be no legal objection to the transfer of the Aniwhenua and Wheao dams to energy companies. If any claims to compensation for interference with Maori customary or fiduciary or treaty rights to land or water can be mounted, they will not be diminished or prejudiced in any real sense by such transfers.

We do not disagree with the comment of the Court of Appeal that Maori, as distinct from other members of the community, have not had preserved or assured, through customary title, any right to generate electricity by the use of water power. What we do say is that under the Treaty Maori were entitled to the full, exclusive, and undisturbed possession of their properties, which would include their rivers. As part



of that exclusive possession, they were entitled to the full use of those assets and to develop them to their full extent. This right of development would surely include a right to generate electricity. The ability to exercise that right, however, depends on present-day circumstances, not on the position as at 1840. Te Ika Whenua have shared the use of their rivers, thus reducing their interest therein. This and other circumstances must have an impact on their development rights, including their right to generate electricity. We look at this further in the next section.

#### 10.4 THE CROWN'S OBLIGATIONS TO TE IKA WHENUA

We have found that the claimants have never voluntarily relinquished their tino rangatiratanga over their rivers and have been deprived of the ability to exercise tino rangatiratanga through laws or policies introduced by the Crown. Coupled with this is our finding that under the principles of the Treaty the claimants should hold a proprietary interest in the rivers. The question then arises as to what scope and encouragement the claimants should be given by the Crown to exercise their authority in relation to the management and development of the resource.

In the present case, we must emphasise that the right to generate hydroelectricity cannot be regarded as sole and exclusive to the claimants. The Crown for a long time appropriated the right to generate hydroelectricity, although the way is now open for others to acquire such rights. The ability of the claimants, or any other person for that matter, to undertake such schemes would depend on a number of factors, not the least being the retention of the land or the ability to acquire the land needed for such works. Notwithstanding that those factors may pose difficulties, there is a strong case that the tangata whenua should be afforded priority to partake in or share in such development where the opportunity arises.

The Treaty encompasses reciprocity and partnership. Both parties have an obligation to the nation as a whole to act fairly and responsibly. Where, as in this case, one party has effectively surrendered property rights by sharing them as envisaged by the Treaty, and such property can be the subject of development, then the Crown should ensure that its Treaty partner is able to partake fully in that process. While the Crown is able to appropriate or regulate the interest parted with by Te Ika Whenua (or do both), the residuary interest retained by the claimant remains subject to the Treaty guarantees. The Crown is therefore obliged actively to protect that interest and to allow Te Ika Whenua the full use and enjoyment thereof, including their right to development. The Treaty principle of partnership coupled with the foregoing factors, together with the need to encourage tangata whenua in the sphere of economic development, provide all the more reason for the Crown to make every endeavour to involve them in the development, at least on a partnership basis, of assets in which they retain a substantial interest. The Crown, of course, must have the right to govern in accordance with the general overarching Treaty principle of exchange (see sec 9.4.1), which includes proper consultation. If it decides that development or

management not including tangata whenua is required in the public interest, full compensation would need to be paid for the use of Te Ika Whenua's interest.

In the present case, we do not see the Crown's restriction of the right to generate electricity from water under the Water-power Act 1903 and succeeding legislation as other than a reasonable exercise of kawanatanga. The legislation sought to protect the resource for the benefit of all New Zealand and we do not think that many would argue against that. Where the Crown failed in its Treaty obligations is that, in considering whether or not the Rangitaiki and Wheao Rivers were suitable for local power schemes and in determining how and by whom the power schemes were to be constructed, it failed to consult with Te Ika Whenua and to take into account their interest in the rivers and their economic wellbeing.

The Crown pointed out that the legislation that allowed the development of hydroelectric power by power boards was meant to provide electricity for the benefit of all New Zealand. Mr Arnold submitted that, because of the importance of the resource to New Zealand and the benefits that flowed to all, this was a reasonable exercise of kawanatanga.<sup>17</sup> In answer to a question from the Tribunal as to whether this was a reasonable exercise of the Government's powers, Maanu Paul responded that, while the benefit came from Te Ika Whenua's resource, the people of Te Ika Whenua received no compensation or extra benefit above that derived by the public at large (see fig 24).

We agree with Mr Paul's comments. If kawanatanga is to be exercised, then such exercise should be fair and with proper consultation. If property rights are to be affected, then full compensation should be paid. We have accepted that Te Ika Whenua are entitled to a proprietary interest in the rivers, and it is therefore hard to deny the logic that they are entitled to be paid for the use of such interest. The Court of Appeal suggests as much in the *Te Ika Whenua* decision.

The recent changes in the power industry through the introduction of commercialisation and user pays as a result of the Electricity Companies Act 1992 provide further fuel for Te Ika Whenua's claims. The power schemes are now owned by companies with shareholders who derive a profit from the power generated from Te Ika Whenua's resources. In remoter areas, user pays often means that those subscribers pay more for their power than those in more populated localities. In many cases, people in those areas have an interest in the resource that supplies the power but derive no benefit from that interest. The Wheao scheme, for example, serves the district of Rotorua but not that of Te Ika Whenua.<sup>18</sup>

The Crown sought to justify the use of the rivers for the production of hydroelectricity by local power authorities without compensation or payment for the use of Te Ika Whenua's interest as a reasonable exercise of kawanatanga because of the cooperative aspect of the enterprise and the overall benefit therefrom. We do not accept this argument. Under the principles of the Treaty, Te Ika Whenua were entitled to full consultation and to compensation for the loss of their property rights, although such compensation might have been negotiated on a lesser basis because of that

17. Document C14, p 15; doc D5, p 23

18. Document A8(2), p 9

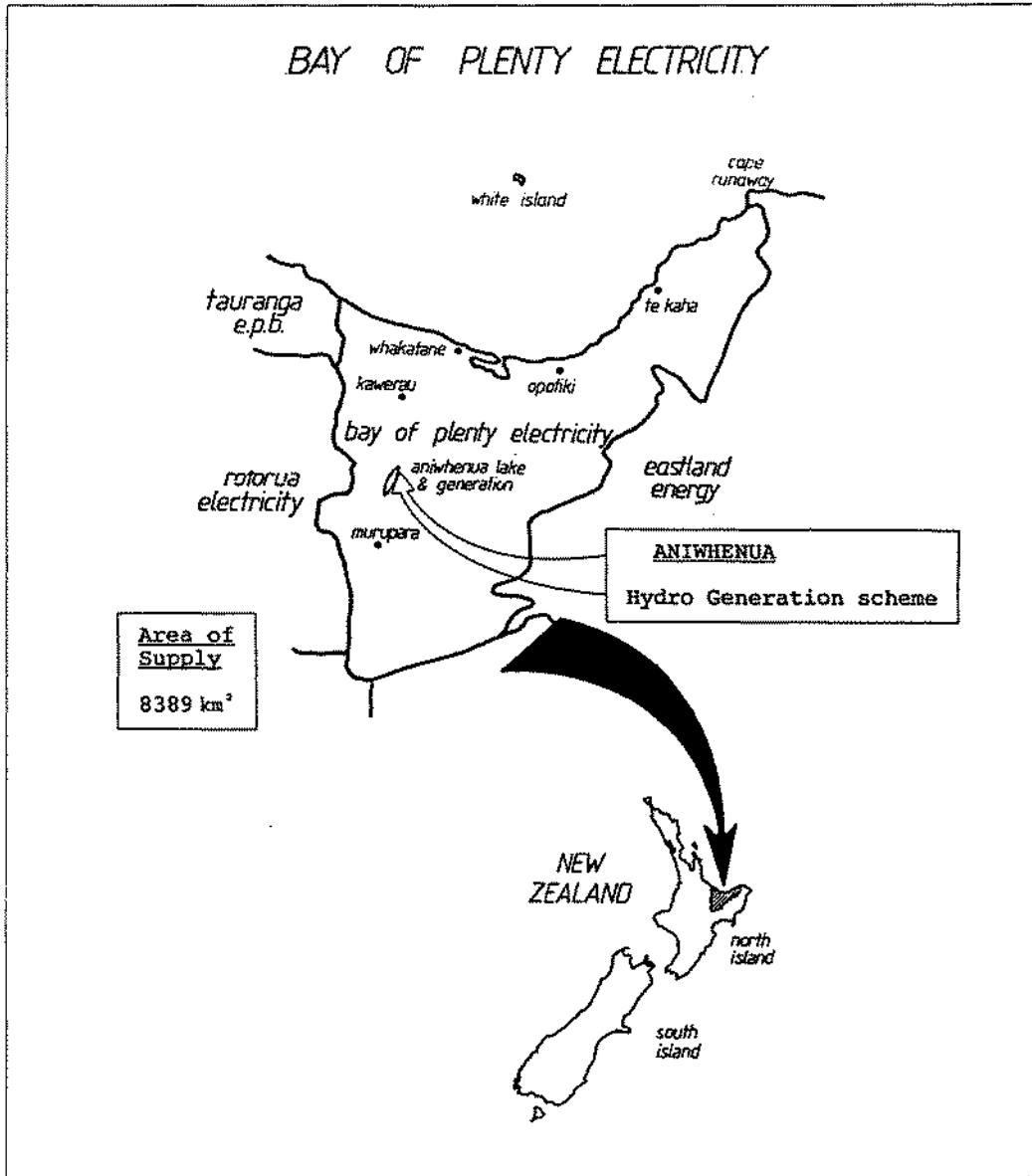


Figure 24: Location map of the Aniwhenua hydro generation scheme and electricity supply areas.  
Map submitted by counsel for the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority (doc c11(a)).

cooperative aspect and the benefits that would flow to all. The Crown has failed in these obligations to Te Ika Whenua and this failure now needs to be addressed.

Moreover, settlement on the above basis does not satisfy for all time the Crown's obligations under the Treaty, and the transition to commercialisation of power production creates another scenario for consideration. The Treaty has been described as a living document, the interest of Te Ika Whenua in the rivers remains, and if the circumstances of the use changes, as has happened, then the Crown is bound to reconsider the interest of Te Ika Whenua. It seems quite unacceptable that commercial profit can be made from Te Ika Whenua's interest in the rivers without

any form of compensation or payment. The considerations that might be addressed in appropriating property for cooperative use as opposed to commercial use could be markedly different, and the Crown in fairness to its Treaty partner is bound to take these into account.

The Tribunal holds that Te Ika Whenua are entitled to payment for the use of their interest in the rivers for power generation and recommends that the Crown consult and negotiate with Te Ika Whenua over past use and to ascertain a suitable formula for payment for future use. It would seem to us, without attempting to bind or limit the parties in the areas of their negotiations in any way, that the following matters at least need to be addressed:

- (a) compensation for past use;
- (b) compensation for loss of rights or the ability to share as a partner in power production; and
- (c) payment for the future use of the proprietary interest of Te Ika Whenua in the rivers.

## CHAPTER 11

# FINDINGS AND RECOMMENDATIONS

### 11.1 INTRODUCTION

In the last three chapters, we have dealt specifically with the various issues arising out of this claim and have made comment and findings as we saw fit as well as some recommendations. These issues are not separate or stand-alone entities. Contained within the rohe of Te Ika Whenua, they are all integrally related. The common bond between them is the claimants' right to exercise tino rangatiratanga over properties or taonga – a right recognised by the Treaty. In this chapter, we address the claim as a whole and summarise our findings and make our recommendations. While we do not intend to revisit or restate our comment in detail, some recapitulation will be necessary.

### 11.2 TREATY PRINCIPLES

#### 11.2.1 Section 6 of the Treaty of Waitangi Act 1975

Authority for the Tribunal to act is conferred under section 6 of the Treaty of Waitangi Act 1975. Under section 6(1), Maori may submit a claim if prejudicially affected by any act or omission, policy or practice of the Crown and its agents that was or is inconsistent with Treaty principles. If the Tribunal, after inquiry, finds the claim is well founded, it may, under section 6(3), 'recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future'.

There is no doubt that the claimants' case falls within the ambit of the above section. They complain of the policies and practices of the Crown relative to their rivers and how these have impacted upon the various guarantees contained in the Treaty; that of tino rangatiratanga over the rivers, that of protection of their rights over and interests in the rivers, and that of protection of their fisheries.

Section 6 requires that we assess the claim on the basis of the principles of the Treaty, and as we have dealt with each of the issues raised by Te Ika Whenua, we have referred to the Treaty principles that have applied and that have been breached. These principles are not new but have been enunciated and discussed in a succession of Tribunal reports and court decisions. We therefore see no need to devote a separate section of this report to a detailed analysis and explanation of them but will simply make some brief comments on the major Treaty principles that apply. We consider the

discussion on Treaty principles in the *Mohaka River Report 1992* and the *Turangi Township Report 1995* particularly apposite to this claim.<sup>1</sup>

### 11.2.2 The principle of active protection

As in the *Mohaka River Report 1992*, we find that, of these principles, the most important is that the Crown must actively protect Maori property interests to the fullest extent reasonably practicable (see secs 8.2, 8.3, 8.6).<sup>2</sup> It is derived from the Crown's article 2 guarantee of tino rangatiratanga over properties (taonga) and in our view extends to the right of development (see secs 10.2.4, 10.3.3). That principle was the basis of the Court of Appeal decision in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, where it is notable that in separate decisions each of the five judges of that court supported it. We quote, as indicative of the court's view, from the judgment of Cooke P at page 664:

Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's *Tē Atiawa* [*Report of the Waitangi Tribunal on the Motunui–Waitara Claim*], *Manukau* and *Tē Reo Maori* reports which support that proposition and are undoubtedly well-founded. I take it as implicit in the proposition that, as usual, practicable means reasonably practicable. It should be added, and again this appears to be consistent with the Tribunal's thinking, that the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers and reasonable co-operation.

### 11.2.3 The principle of exchange – reciprocity

In the *Turangi Township Report 1995*, the basic overarching Treaty principle of exchange–reciprocity is seen as embodying the principle of protection.<sup>3</sup> This principle is formulated in the *Ngai Tahu Report 1991* and briefly discussed in the *Ngai Tahu Sea Fisheries Report 1992*.<sup>4</sup> It is derived directly from articles 1 and 2 of the Treaty and establishes that the cession of sovereignty (kawanatanga) was conditional upon the continuing guarantee of tino rangatiratanga (full authority and control) (see sec 9.4.1). Applied to the present claim, it follows that the Crown's authority to control and manage *Tē Ika Whenua's* rivers is qualified or limited by *Tē Ika Whenua's* tino rangatiratanga over their taonga.

Closely associated with this principle of exchange are the Crown's fiduciary obligations not only to protect Maori Treaty rights (referred to above) but also to

1. Waitangi Tribunal, *Mohaka River Report 1992*, 2nd ed, Wellington, GP Publications Ltd, 1996, sec 6.1; *The Turangi Township Report 1995*, Wellington, Brooker's Ltd, 1995, ch 15

2. *Mohaka River Report 1992*, sec 6.1

3. *Turangi Township Report 1995*, sec 15.2.1

4. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 2, sec 4.7.5; *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, sec 11.5.1

consult fully with Maori on the exercise of kawanatanga (see sec 9.4.2) and to redress Treaty breaches by taking positive steps to make amends, including compensation for loss.<sup>5</sup>

We do not regard it as part of our brief to consider whether the Crown's assumption of the overall control and management of Te Ika Whenua's water resource for power generation was justified in Treaty terms (see sec 9.3). Rather, we have to consider whether the Crown breached the Treaty principle of exchange and its associated obligations in exercising the powers and responsibilities of government in this way. There is no doubt that the Crown failed actively to protect Te Ika Whenua's Treaty rights (see secs 8.1, 8.3, 8.6) or to consult them as Treaty partners (see secs 9.5.1, 9.5.2) or to compensate them for loss of water power and the right of development (see sec 10.4). In other words, it failed to qualify or limit its exercise of kawanatanga over Te Ika Whenua's rivers in a manner that was consistent with article 2 Treaty guarantees.

#### 11.2.4 The principle of partnership

A further important principle of the Treaty applicable to the present claim is that of partnership. This, too, is well established in earlier Tribunal reports and is authoritatively laid down in the *New Zealand Maori Council* case cited above. It derived from 'a basic object of the Treaty that two people would live in one country ... a covenant in Maori eyes, for a continuing relationship between the Crown and Maori people, based on their pledges to one another'.<sup>6</sup>

Associated with this principle is the responsibility of one partner to act towards the other 'in good faith, fairly and reasonably' (see secs 9.4.2, 10.3.3, 10.4); there is also the duty fully to consult one's Treaty partner (see sec 9.4.2). When the Crown assumed the overall control and management of Te Ika Whenua's rivers, it is evident that it did not properly consult with, or give thought or consideration to sharing power with, its Treaty partner (see secs 9.5.1, 9.5.2).

### 11.3 FINDINGS

In the course of this report, we have made various findings and given reasons for them. We now precis those findings in much the same way as the issues to which they relate were presented to us.

#### 11.3.1 Tino rangatiratanga

As to tino rangatiratanga, we find:

- (a) That the Rangitaiki, Wheao, and Whirinaki Rivers are tipuna awa and living taonga of the hapu of Te Ika Whenua.

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5. *Turangi Township Report* 1995, secs 15.2.1(1), 15.2.2–15.2.4

6. *Ibid*, sec 15.3, quoting the Muriwhenua Tribunal

- (b) That the hapu of Te Ika Whenua as at 1840 exercised tino rangatiratanga over the reaches of these rivers within their rohe so as to protect the resources of the rivers for their sustenance and benefit.
- (c) That these rivers were and still are to Te Ika Whenua whole and indivisible entities in contrast to the separate constituent parts as recognised at common law: namely, bank, bed, and water.
- (d) That the title system introduced by the Crown failed to recognise and protect Te Ika Whenua's rights and interests in the rivers and tino rangatiratanga over them.
- (e) That the assumption of ownership of the rivers to the middle line through the application of the common law doctrine of *ad medium filum aquae* differed from and conflicted with the Maori view of 'ownership'.
- (f) That the hapu of Te Ika Whenua had no knowledge or understanding of the presumption of *ad medium filum aquae* when freehold titles were conferred under the Native Land Court system.
- (g) That the sellers of the riparian blocks of land between 1870 and 1920 would not have intended or understood those sales to carry with them the ownership of adjacent beds of rivers to the middle line.
- (h) That those sellers of riparian lands adjoining the rivers did not intend to sell their interests in the rivers or to relinquish tino rangatiratanga over them.
- (i) That Te Ika Whenua did not knowingly and voluntarily relinquish tino rangatiratanga over the rivers.
- (j) That all Government policies, actions, and legislation that effected the transfer of ownership of the riverbeds to the Crown or to private purchasers of riparian lands, or that vested or confirmed exclusive control of the waters in the Crown or third parties, were breaches of the Treaty principles of active protection of taonga, exchange, and partnership.
- (k) That, as a consequence of the various actions referred to, there is now no recognition and protection by the Crown of Te Ika Whenua's right to tino rangatiratanga over the rivers as is guaranteed by article 2 of the Treaty, and Te Ika Whenua are unable to exercise such right.
- (l) That the loss of the ability to exercise tino rangatiratanga has been occasioned in such a manner as to constitute a breach of the Crown's duties and guarantees under the Treaty of Waitangi and, therefore, the principles of the Treaty.
- (m) That the alteration of the waters of the rivers so that the Rangitaiki and Wheao merged into one indistinguishable watercourse resulted in the transgression of the ancient tapu with which the rivers were regarded – the rivers were not only part of the environment of successive generations of ancestors but also part of the ancestral link with both the past and the future, with each river being specific to that linkage. The cultural and spiritual stress and trauma of all this is still evident in the people.



### 11.3.2 The fishery

As to the fishery, we find:

- (a) That the fishery within the rivers of Te Ika Whenua constituted a taonga of Te Ika Whenua as at 1840.
- (b) That such fishery provided an essential food source.
- (c) That the fishery has remained a taonga and Te Ika Whenua have never relinquished their tino rangatiratanga over, and property in, the fishery.
- (d) That the abundance and quality of eels from this fishery contributed greatly to the mana and standing of Te Ika Whenua.
- (e) That the fishery does not constitute a commercial fishery and the claim is not in respect of commercial fishing within the meaning of section 9(a) of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.
- (f) That the fishery has been gravely depleted through a lack of proper control and through policies and actions of the Crown favouring trout fishing over the customary fishery and permitting the construction of the hydroelectric power schemes, particularly the Matahina and Aniwhenua Dams.
- (g) That the Crown's exercise of kawanatanga in respect of the fishery has been devoid of proper consultation and in breach of the Treaty principles of exchange and partnership and the associated obligations arising therefrom.
- (h) That the Crown has failed to recognise and protect Te Ika Whenua's property in the fishery in accordance with article 2 of the Treaty and that such failure is a breach of the Treaty principles of active protection of taonga and exchange.
- (i) That, in consequence, the Crown has a fiduciary obligation to take all reasonable steps to protect and restore the fishery in full consultation with its Treaty partner.
- (j) That the Crown's restrictions on customary times and methods of fishing constitute breaches of the Treaty principles of protection and exchange and associated obligations.

### 11.3.3 Right to development

As to the right to development, we find:

- (a) That as at 1840 Te Ika Whenua held tino rangatiratanga over, and aboriginal or native customary title to, the lands and rivers within their rohe.
- (b) That, subject to the dictates of custom, Te Ika Whenua were not restricted in their rights of use of their rivers, which were in the nature of a proprietary right or interest, and were free to extend or develop such rights of use as they might from time to time determine as appropriate.
- (c) That, in the event of any other person wishing to acquire rights in the rivers or rights of use thereof, such could be acquired only with the acquiescence and consent of Te Ika Whenua.
- (d) That Te Ika Whenua were entitled to the full protection of such rights by the Crown under article 2 of the Treaty for as long as they wished to retain them.

- (e) That, subject to the Treaty and as envisaged thereunder, Te Ika Whenua shared the use of the rivers with the early settlers.
- (f) That the residual interest of Te Ika Whenua in the rivers included full and unrestricted rights of use, including the right to development, except where those uses were detrimental to or incompatible with the rights of other users.
- (g) That the Crown's actions in conferring the right to generate hydroelectricity on power boards and later privatising them was in breach of the principles of the Treaty in that it failed to qualify the exercise of its power to govern with its Treaty guarantees of tino rangatiratanga over taonga and:
  - (i) to consult properly with Te Ika Whenua as a Treaty partner over the proposals;
  - (ii) to take into account Te Ika Whenua's interest in the rivers, including their right to development;
  - (iii) to attempt to ameliorate the effect and impact of the exercise of kawanatanga upon the needs and aspirations of Te Ika Whenua;
  - (iv) to compensate Te Ika Whenua for the loss of their rights and interests in the rivers; and
  - (v) to acknowledge and respect the position of Te Ika Whenua as a Treaty partner and to encourage Te Ika Whenua in the development of their resource.

#### 11.4 COMMENTARY

##### 11.4.1 Overview

The foregoing findings provide an overview as to the totality of the claim and clearly illustrate a consistent lack of attention by the Crown to the guarantees under article 2 of the Treaty and its effects upon the properties of Te Ika Whenua. No attention was paid to the special nature of the relationship of Te Ika Whenua with their rivers. No attempt was made to provide title to properties or rights or interests in other than lands nor to introduce a system that gave recognition to tino rangatiratanga over their wai tipuna and to customary water rights. Instead, various policies and practices were introduced that aimed at facilitating the acquisition of Maori land and the amalgamation of the two peoples predominantly under English systems and structures.

At all times, strong emphasis was placed by the Crown on its unlimited power of kawanatanga. The development of the forest industry through the 1920s and 1930s and the construction of the hydropower schemes in the 1960s and 1970s took little or no cognisance of Te Ika Whenua's Treaty rights. The Treaty was not, then, part of domestic law and there was no special process whereby Maori could claim rights under it or contest Crown actions that might infringe those rights. There has been some change in that some statutes, notably the Conservation Act 1987, require the principles of the Treaty be given effect to, while others, such as the Resource Management Act 1991, require those principles to be taken into account. Further, the Treaty of Waitangi Act 1975 now allows Maori to bring Treaty grievances before the

Waitangi Tribunal. Nevertheless, the Treaty has yet to be formally adopted as part of New Zealand law.<sup>7</sup>

Throughout those years of development, the Crown was politically dominant. They were times of transition for Te Ika Whenua, who eventually became a labour force for the forestry industry. To ameliorate their social and economic conditions, they had little alternative but to accept and adapt to this process of change. It is thus not surprising that there was little protest over the failure of the Crown to recognise their rights and interests under the Treaty.

Te Ika Whenua have illustrated how various policies and practices of the Crown have undermined their property rights, mana, and tino rangatiratanga and have in recent years produced high rates of unemployment and welfare dependency. Far from active protection, the Crown has deprived Te Ika Whenua of most of their rights and interests in the rivers. In particular, and unbeknown to the claimants at the time, the *ad medium filum aquae* rule brought about much of their loss of the one and only title they were awarded in respect of their rights to their rivers: namely, title to the beds thereof.

We find it noteworthy that the Crown argued that Te Ika Whenua had voluntarily relinquished their interest in the rivers through the sale of adjoining lands, claiming title links between lands and rivers. Such argument, based on inference and implication, hardly accords with the Treaty guarantee of retention of property for so long as desired and the Treaty principle of active protection of such property. Rather, it suggests a dearth of hard evidence to support this argument and an unwillingness by the Crown to apply those Treaty principles to the rivers as taonga of Te Ika Whenua.

#### 11.4.2 Overlapping claims

In section 8.5, we referred to the fact that there are overlapping or competing claims in respect of small areas of the rohe and that questions of representation, particularly for Ngati Patuheuheu, may need to be resolved. Our views on those issues are adequately covered in that section of this report, and for the reasons stated therein, we do not see it as imperative that these questions be settled before making findings on this claim.

#### 11.4.3 Access

The claimants invite the Tribunal to award such other relief as the Tribunal deems fit.

One of the concerns expressed by the claimants was the difficulty of access both to the rivers and to the forests that now form part of Crown land. Permits are generally needed, and time constraints and working hours often make it hard to obtain them. In the context of the claim, access is an important part of Te Ika Whenua's tino rangatiratanga over and ability to utilise their interest in the rivers.

The Crown has long been committed to providing access to lakes, rivers, and seas by means of what is commonly known as the Queen's chain. However, when land is

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7. Compare with *The Turangi Township Report 1995*, secs 15.1.2–15.1.3

acquired by the Crown, it generally takes no steps to provide such access, possibly on the precept that Crown ownership will protect the public right of access, but more probably as lessees and Crown agencies that use such lands seek to restrict access for their own purposes: for example, the protection of forests, stock, and fishing rights. In Te Ika Whenua's case, there is no general right of access because permits are required – a situation that Maanu Paul referred to as the 'permit culture'. The use of land for forestry right down to the banks of the rivers without provision for esplanade reserves militates against public access, and there is no requirement to allow or provide access.

We consider that the provision of access to the rivers is an important ingredient in the restoration of tino rangatiratanga to Te Ika Whenua and that this should be a matter of negotiation between the Crown and the claimants.

## 11.5 CONSIDERATION OF RELIEF SOUGHT

### 11.5.1 As to tino rangatiratanga

The claimants sought the following specific relief in respect of tino rangatiratanga:

- (a) the recognition of te tino rangatiratanga in relation to the Rangitaiki, Wheao, and Whirinaki Rivers, including their tributaries; and
- (b) a recommendation that a system of recognition of the claimants' rangatiratanga be given effect. Such a system should recognise the claimants' beneficial interest in the rivers (including their right to development) and their authority in relation to the management of all aspects of the Rangitaiki, Wheao, and Whirinaki Rivers.<sup>8</sup>

In general terms, the claimants sought recommendations that they be compensated for past breaches of the Treaty and be accorded any other relief the Tribunal deemed fit.

In her closing submissions, Ms Ertel requested the following relief:

- (a) that the management and control functions exercised pursuant to the Resource Management Act 1991 be vested in the claimants; and
- (b) that the regional authority transfer the required financial and other resources to the claimants to enable them to undertake all required functions.<sup>9</sup>

Earlier in those submissions, Ms Ertel traversed various legislative enactments by which the management rights of Te Ika Whenua were appropriated or usurped by the Crown, commencing with the Water-power Act 1903 through to the Resource Management Act 1991.<sup>10</sup> These are dealt with in chapter 5.

Particular reference was made to section 21 of the Water and Soil Conservation Act 1967, under which all rights of management, use, and authority of natural water were vested in the Crown. This legislation was considered by the Tribunal in the *Mohaka River Report 1992*, where it found that the Act was in breach of the letter and principles

8. Claim 1.1(e)

9. Document D2, p 74

10. Ibid, pp 54–55, 58–62

of the Treaty to the extent that it conferred on the central government exclusive control over the waters of the Mohaka. We have made a similar finding in the case of Te Ika Whenua's rivers on the basis that, because tino rangatiratanga was never voluntarily relinquished, the Crown's assumption of exclusive rights of control, without Te Ika Whenua's consent, constituted a Treaty breach.

Current legislation relating to the use of water is the Resource Management Act 1991. Ms Ertel claims that this legislation is inconsistent with the Treaty because it fails to recognise positively:

- (a) Maori ownership of the river and particularly the water; and
- (b) Maori rangatiratanga and the exercise of it.<sup>11</sup>

The *Mohaka River Report 1992* contrasts the Resource Management Act with the Water and Soil Conservation Act 1967 in that:

it requires 'all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources,' to 'take into account the principles of the Treaty of Waitangi' (s 8). It also recognises that the 'relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga' is a matter of 'national importance' (s 6(c)) and that all persons exercising powers and functions under the Act shall have particular regard to 'Kaitiakitanga' (s 7(a)), meaning the exercise of guardianship (s 2).<sup>12</sup>

It is noteworthy that two pages later in that report the Tribunal comments that, while the Crown is entitled to devolve its duties under the Treaty to another authority through carefully worded legislation, it cannot divest itself of its Treaty obligation actively to protect rangatiratanga over taonga. The Mohaka River Tribunal made no finding on whether the Act is consistent with the principles of the Treaty.

We have found that the claimants have been denied the ability to exercise tino rangatiratanga over their rivers. The Crown has been in breach of article 2 and has failed actively to protect the taonga of Te Ika Whenua. While the Resource Management Act requires those administering it or in management to take into account the principles of the Treaty and Maori views and values, it does not confer tino rangatiratanga on tangata whenua or recognise any such status. It simply gives Maori the opportunity to be heard by the controlling body on matters of concern to them; albeit without any funding or assistance by way of proper legal and technical advice – a situation that seems to us to be far removed from the guarantee given under article 2 of the Treaty.

In the *Ngawha Geothermal Resource Report 1993*, the Tribunal found that:

the Resource Management Act is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi.<sup>13</sup>

11. Ibid, p 62

12. *The Mohaka River Report 1992*, sec 5.7.1

13. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 8.4.7

In the *Tē Whanganui-a-Orotu Report 1995*, the Tribunal endorsed those findings and drew attention to the absence in that Act of any provision giving priority to the protection of taonga and confirming Treaty rights in the exercise of rangatiratanga and kaitiakitanga.<sup>14</sup>

We agree with those observations and with the view that the Resource Management Act cannot be said to provide compliance by the Crown with the principles of the Treaty relative to those issues.

Ms Ertel, on behalf of the claimants, seeks a recommendation that the management and control function exercised pursuant to the Resource Management Act be vested in the claimants and that the regional authority transfer to the claimants all the required funds and other resources necessary to undertake those functions.

The Crown has a power of kawanatanga that is qualified or limited by the Treaty guarantee of tino rangatiratanga. In exercising that power, it must have regard to Te Ika Whenua's right of tino rangatiratanga over their rivers and their position as a Treaty partner and weigh these against the interests of other users and the national interest. How the Crown addresses its obligation to restore tino rangatiratanga is a matter for it to assess in consultation and negotiation with Te Ika Whenua. We do not therefore consider the suggested recommendation to be appropriate in that it could inhibit the Crown as to the manner in which it seeks to redress its Treaty breach.

Our recommendation will therefore correspond with the claimants' prayer for relief: namely, that a system of recognition of the claimants' rangatiratanga over the rivers be given effect. This is also similar to the recommendation given in the *Mohaka River Report 1992*.

### 11.5.2 As to the fishery

The relief sought in the amended statement of claim is set out earlier in this chapter (sec 11.5.1) and in respect of the fishery was merely encompassed in the general prayer for relief. In final submissions, the claimants expanded upon their claim for relief, seeking recommendations that the Crown:

- (a) reconstitute the native eel fishery;
- (b) compensate the claimants for the loss of and interference with the traditional fishery;
- (c) declare the lawfulness of the retireti; and
- (d) transfer to the claimants all management functions and adequate resources to undertake those functions.

In section 9.5.2, we considered some of the measures needed to remedy the breach of the Treaty principles of active protection and exchange in respect of the fishery and the Crown's obligation to address its depletion and to safeguard Te Ika Whenua's right to exercise tino rangatiratanga over it. The Crown has a duty to take steps to replenish and protect the eel fishery and to involve Te Ika Whenua in the process and

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14. Waitangi Tribunal, *Tē Whanganui-a-Orotu Report 1995*, 1st ed, Wellington, Brooker's Ltd, 1995, sec 9.13.5

in its future management so that their tino rangatiratanga is recognised. Our recommendations will incorporate these measures.

We note that problems with the Matahina Dam mean that considerable strengthening and reconstruction work is to be undertaken. We draw the Crown's attention to this because there may be an opportunity to include with such works passes that would accommodate elvers and migrating eels, and if such opportunity exists, it would be a pity for it to be lost.

### 11.5.3 As to the right to development

The relief sought in the amended statement of claim is again as set out earlier in this chapter (sec 11.5.1). In closing submissions, a finding is sought that the development right inherent in the Treaty be not affected by the Court of Appeal decision in the *Te Ika Whenua* case and alternatively, if it be so affected, the claimants seek a recommendation that the Crown legislate to clarify that the Treaty contains a development right.

In chapter 10, we discussed the nature of Te Ika Whenua's interest in the rivers and in particular their interest in the waters. We found that as 1840 Te Ika Whenua had customary rights to their rivers, somewhat akin to ownership, comprising full rights to use of the waters within their rohe, have since shared those rights with other New Zealanders and now hold a residual interest of which they are entitled to protection under the Treaty. They have an inherent right to develop that interest. Where the Crown wishes to use or provide for the development of a resource incorporating such interest, it has duties and obligations to Te Ika Whenua arising under the Treaty.

Our recommendations take these findings and duties and obligations into account.

## 11.6 COSTS OF BRINGING THIS CLAIM

Te Ika Whenua have succeeded in establishing most aspects of their claim. We think that they should be reimbursed by the Crown for any reasonable costs and disbursements incurred in bringing this claim where they exceed any contribution that may have been made by the Tribunal or the Crown Forestry Rental Trust.

## 11.7 RECOMMENDATIONS

We recommend:

- (a) That the Crown enter into discussions and negotiations with Te Ika Whenua to establish a suitable regime of management and control of the rivers that recognises and takes into account the Treaty guarantee of tino rangatiratanga over them, at the same time taking into account the interest of other river users brought about by their sharing.

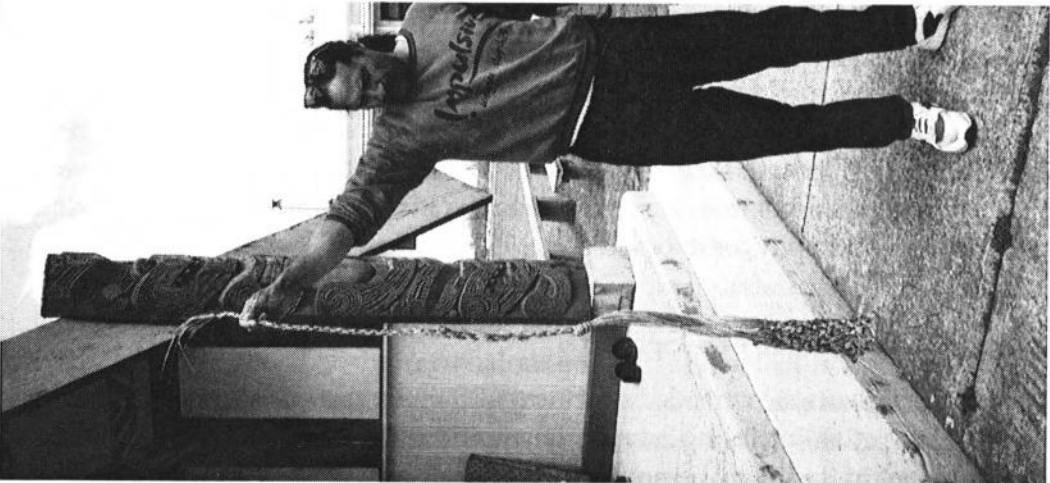


Figure 27: An eel trap

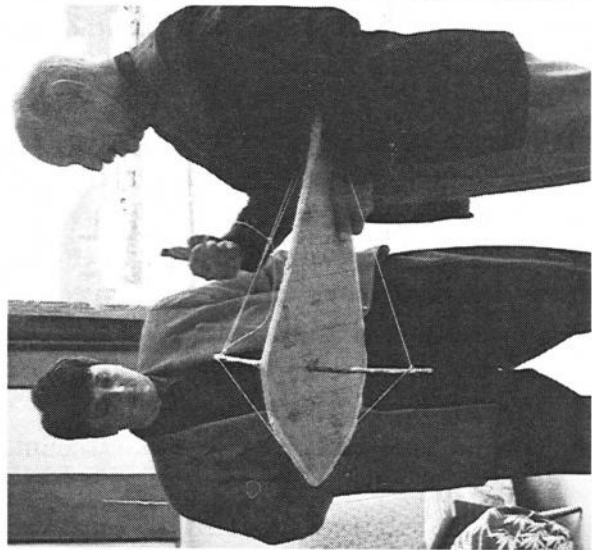


Figure 26: Kathy Ertel and Bert Messent with a retireti board

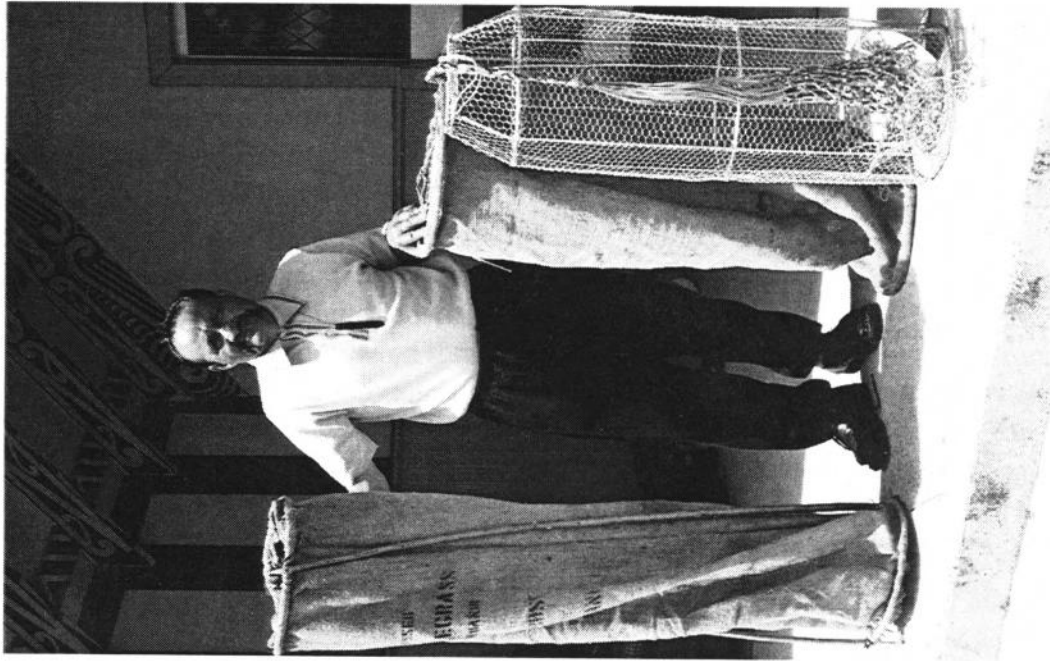


Figure 25: Hohepa Waiti with hinaki



- (b) That the Crown take steps to recognise and protect Te Ika Whenua's residuary rights and interests in the rivers, which we described in chapter 10 as being a proprietary interest akin to ownership.
- (c) That the Crown enter into discussions with Te Ika Whenua as a Treaty partner with a view to reaching agreement over the vesting in them of the bed of those parts of the Rangitaiki, Whirinaki, and Wheao Rivers within the rohe of Te Ika Whenua where title is held by the Crown or as Crown forest land so as to reinforce Te Ika Whenua's right to an interest in the rivers and to compensate them in part for their loss of title through the *ad medium filum* rule.
- (d) That the Crown take steps to provide suitable access for Te Ika Whenua to their rivers and fisheries over Crown and Crown forest lands adjoining those rivers.
- (e) That the Crown compensate Te Ika Whenua for the appropriation and use of their rights to and interests in the rivers for the production of hydroelectric power and for the continued use of such rights and interests for that purpose.
- (f) That the Crown enter negotiations and discussions with Te Ika Whenua to establish a suitable regime of management and control of the native fishery in the rivers that involve Te Ika Whenua and that recognises and takes into account the Treaty guarantees of tino rangatiratanga over and protection of taonga, Te Ika Whenua's customary fishing rights and practices, and the impact of any fishing laws or regulations on those rights and practices.
- (g) That the Crown take all necessary steps to re-establish the native fishery and in particular to replenish the eel fishery by the introduction of suitable measures, including a means to enable elvers and migrating spawning eels to bypass or negotiate the Aniwhenua and Matahina Dams following due consultation and agreement with Te Ika Whenua.
- (h) That the Crown make adequate funds available to Te Ika Whenua to enable them to engage the necessary professional and administrative services to pursue negotiations with the Crown over each of the above recommendations.
- (i) That the Crown reimburse Te Ika Whenua their reasonable costs and the disbursements of bringing the claim, less such costs as have been contributed by the Crown Forestry Rental Trust or the Tribunal.



Dated at Wellington this *1<sup>st</sup>* day of *September* 1998

*G D Carter*

Judge G D Carter, presiding officer

*M A Bennett*

M A Bennett, member

*M B Boyd*

M B Boyd, member





APPENDIX I

**STATEMENT OF CLAIM**

Note: This statement of claim is the amended claim 1.1(e)

WAITANGI TRIBUNAL

CLAIM WAI 212

CONCERNING      the Treaty of Waitangi Act 1975

AND                A claim by Te Runanganui o Te Ika Whenua  
relating to the Rangitaiki, Wheao and Whirinaki Rivers

AMENDED PARTICULARS OF CLAIM TO THE  
RANGITAIKI, WHEAO, AND WHIRINAKI RIVERS

**Introduction**

1. This amended particulars of claim amends and further particularises the claim of Te Ika Whenua in respect to the Rangitaiki, Wheao and Whirinaki Rivers including their tributaries.

2. These three rivers including their tributaries are a water body which jointly and severally are the taonga of claimants. In 1840 these rivers were a taonga and possessions of the claimants.

**The Treaty of Waitangi**

3. The Crown guaranteed to the hapu of Te Ika Whenua te tino rangatiratanga, exclusive and undisturbed possession of the Rangitaiki, Wheao and Whirinaki Rivers for as long as they wish to retain them.

**Te Tino Rangatiratanga**

4. Tino rangatiratanga has, as an integral component Maori tikanga (or custom).

5. The claimants have their own tikanga which dictates for them the way they manifest their management, interests and rights over and in their taonga.

6. The bed, waters, flora and fauna including fisheries and other non physical properties are all taonga of the claimants.

7. The claimants have never relinquished the mana of and over their rivers or tino rangatiratanga over them.

### The Prejudice

8. The claimants have been and are prejudiced in their full enjoyment of the Treaty rights guaranteed to them by:

- (a) The expropriation by the Crown of the beds of the rivers via various Coal Mines Legislation.
- (b) The expropriation of management rights, the right to take, use and dam the water in their Rivers (see the Water and Soil Conservation Act 1967, The Public Works Acts and the Electricity Act 1968).
- (c) The Resource Management Act 1991.
- (d) The application of the *ad medium filum aquae* rule.
- (e) The failure of the Crown to develop a system consistent with the Treaty for the recognition of the rights of the claimants to their rivers.
- (f) The failure of the Crown to recognise to give effect to Maori custom as it relates to rivers.
- (g) The fragmentation of elements of the Rangitaiki, Wheao and Whirinaki Rivers for the purpose of ownership, control and management.
- (h) The detriment to their rivers by the construction and operation of the Aniwhenua Dam and Wheao scheme. The detriment to their fisheries of the Aniwhenua and Wheao scheme.
- (i) The proposed creation of third party rights with the consent of the Crown in the Aniwhenua and Wheao scheme.

### Relief

9. The claimants seek the following relief:

- (a) Recognition of te tino rangatiratanga in relation to the Rangitaiki, Wheao and Whirinaki Rivers including their tributaries.
- (b) A recommendation that a system of recognition of the claimants' tino rangatiratanga be given effect. Such a system should recognise the claimants' beneficial interest in the rivers (including their right to development) and their authority in relation to the management of all aspects of the Rangitaiki, Wheao and Whirinaki Rivers.
- (c) A recommendation that the claimants be compensated for past breaches of the Treaty.
- (d) Any other relief the Waitangi Tribunal deems fit.

Dated at Wellington this 26th day of October 1993

Kathy L Ertel  
Counsel for the Claimants

## APPENDIX II

# RECORD OF INQUIRY

## RECORD OF HEARINGS

### THE TRIBUNAL

The Tribunal constituted to hear the Te Ika Whenua rivers claim comprised Judge Glendyn D Carter (presiding); Georgina Te Heuheu; Mary Boyd; and Bishop Manuhuia Bennett.

### FIRST HEARING, TIPAPA MARAE, MURUPARA, 8–11 NOVEMBER 1993

#### Claimant counsel

The claimants were represented by Kathy Ertel.

#### Crown counsel

The Crown was represented by Peter Andrew, assisted by Camilla Owens.

#### Also appearing

Also appearing were Vicky Stanbridge for the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority and Paul Sandford for the Forestry Corporation of New Zealand.

#### Submissions and evidence

Submissions and evidence were received from: Nga Awa me nga Iwi o te Ika Whenua (docs B4, B4(a)–(e), B9 (presented by Kathy Ertel)); Kathy Ertel (docs B5, B5(a), B10, B10(a), B14, B14(a)); Hohepa White (oral, no paper submitted); Thomas Higgins (oral, no paper submitted); Tahi Tate (oral, no paper submitted); Timoti Rangitakatu (oral, no paper submitted); Maurice Toetoe (doc B11); Gwenda Paul (doc B12); Billy Messent (doc B13); and Maanu Paul (doc B16).

**SECOND HEARING, MAORI LAND COURT, ROTORUA, 29–31 AUGUST 1994**

**Claimant counsel**

The claimants were represented by Kathy Ertel, assisted by Rachel Steel.

**Crown counsel**

The Crown was represented by Terence Arnold, assisted by Andra Mobberley. Matiu Mareikura was the Crown's kaumatua.

**Also appearing**

Also appearing were Joseph Williams and Christian Whata for the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority; Paul Sandford for the Forestry Corporation of New Zealand; Tamaroa Nikora for the Tuhoe–Waikaremoana Maori Trust Board and the Wai 40 and Wai 386 claimants; and John Tahuparae and Archie Taiaroa for the Wai 167 claimants.

**Submissions and evidence**

Submissions and evidence were received from Terence Arnold (docs C14, C14 (a), (b), (c)); Joseph Williams (docs C15, C15(a), (b)); Richard Stephens (doc C10); Neil Brennan (docs C11, C11(a), (b), (c), (d)); Tamaroa Nikora (oral, no paper submitted); Wayne Donovan (docs C13, C13(a)–(l)); Peter Fitchett (doc C17); Alan Withy (docs C18, C18(a)); Charles Mitchell (doc C12); David Alexander (docs C3, C3(a), (b), (c), C4, C5, C6); Gwenda Paul (doc B2); and Maanu Paul (docs C19, C19(a)).

**THIRD HEARING, PAINOAIHO MARAE, MURUPARA, 11–13 OCTOBER 1994**

**Claimant counsel**

The claimants were represented by Kathy Ertel, assisted by Rachel Steel.

**Crown counsel**

The Crown was represented by Terence Arnold, assisted by Andra Mobberley. Matiu Mareikura and Mrs D Jaram were the Crown's kaumatua.

**Also appearing**

Also appearing were Joseph Williams and Christian Whata for the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority; Paul Sandford for the Forestry Corporation of New Zealand; Shelly Robinson for the Electricity Corporation of New Zealand; and Tamaroa Nikora for the Tuhoe–Waikaremoana Maori Trust Board and the Wai 40 and Wai 386 claimants.



### Submissions and evidence

Submissions and evidence were received from Charles Mitchell (doc D1); Kathy Ertel (docs D2, D2(a), (b), D6); Tamaroa Nikora (doc D3); Joseph Williams (doc D4); and Terence Arnold (docs D5, D5(a)–(d)).

## RECORD OF PROCEEDINGS

### 1. CLAIMS

#### 1.1 Wai 212

A claim concerning Te Ika Whenua lands and waterways by Hohepa Joseph Waiti and another for Te Runanga o Te Ika Whenua, 6 June 1991

- (a) Memorandum from claimant counsel to the Waitangi Tribunal requesting an urgent hearing on the Aniwhenua and Wheao Dams, 30 November 1992
- (b) Memorandum from claimant counsel to the Waitangi Tribunal requesting an urgent hearing on the Murupara logging head, 30 November 1992
- (c) Memorandum from claimant counsel to the Waitangi Tribunal providing further information in respect of the application for an urgent hearing, 16 December 1992
- (d) Particulars of urgent claim, 23 February 1993
- (e) Amended particulars of claim to the Rangitaiki, Wheao, and Whirinaki Rivers, 26 October 1993
- (f) Statement of claim concerning the Matahina c and c1 blocks, 1 February 1995
- (g) First amended statement of claim, 16 May 1996

### 2. PAPERS IN PROCEEDINGS

2.1 Direction of the chairperson registering claim 1.1, 18 June 1991

2.2 Memorandum from claimant counsel to the Tribunal requesting an urgent hearing on the Aniwhenua and Wheao Dams, 30 November 1992

2.3 Memorandum from claimant counsel to the Tribunal requesting an urgent hearing on the Murupara logging head, 30 November 1992

2.4 Direction of the chairperson concerning the requests for urgent hearings (papers 2.2, 2.3), 14 December 1992

2.5 Memorandum from claimant counsel to the Tribunal providing further information in respect of the application for an urgent hearing, 16 December 1992

2.6 Directions of the chairperson concerning the request for an urgent hearing concerning the Aniwhenua and Wheao Dams (paper 2.2), 22 December 1992

- 2.7 Directions of the chairperson concerning the request for an urgent hearing concerning the Murupara logging head, 22 December 1992
- 2.8 Notice of claim concerning the Murupara logging head, 14 January 1993
- 2.9 Letter from the Tainui Maori Trust Board to the registrar concerning the claimants' request for an urgent hearing, 15 January 1993
- 2.10 Letter from the Whanganui River Maori Trust Board to the registrar concerning the claimants' request for an urgent hearing, 18 January 1993
- 2.11 Letter from Te Runanga o Ngati Apa to the registrar concerning the claimants' request for an urgent hearing, 18 January 1993
- 2.12 Draft minutes of a judicial conference held on 18 January 1993, undated
- 2.13 Directions of the chairperson concerning the request for an urgent hearing, 3 February 1993
- 2.14 Memorandum from Crown counsel to the Tribunal concerning negotiation of the claim, 3 February 1993
- 2.15 Affidavit of Maanu Paul, 9 February 1993
- 2.16 Direction of the chairperson concerning the need for an urgent hearing and the assembly of information, 16 February 1993
- 2.17 Draft minutes of a registrar's conference held on 8 February 1993, undated
- 2.18 Direction of the chairperson constituting a sitting of the Tribunal, 19 February 1993
- 2.19 Notice of energy assets hearing (Aniwhenua and Wheao Dams) on 8 March 1993, 23 February 1993
- 2.20 Memorandum of Crown counsel setting out the Crown's energy policy and the proposed restructuring of electricity supply authorities, 2 March 1993
- 2.21 Opening submissions of claimant counsel, undated
- 2.22 Opening submission of Crown counsel, 9 March 1993
- 2.23 Closing submissions of claimant counsel, undated
- 2.24 Urgent application for interim relief from claimant counsel, 31 March 1993

- 2.25 Memorandum from counsel for the Whanganui River Maori Trust Board to the Tribunal concerning the transfer of riverine assets and interests, 1 April 1993
- 2.26 Memorandum from claimant counsel to the Tribunal in response to the chairperson's direction of 16 February 1993 (paper 2.16), 31 March 1993
- 2.27 Direction of the Tribunal deferring decision on claimant counsel's request for urgency, 2 April 1993
- 2.28 Direction of the Tribunal declining claimant counsel's urgent application for interim relief, 2 April 1993
- 2.29 Letter from claimant counsel to the registrar concerning exercise of powers by the Minister of Energy, the substantive hearing, and legal aid, 18 May 1993  
Te Runanganui o Te Ika Whenua Incorporated Society statement of claim to the High Court (claimant counsel)
- 2.30 Letter from Tasman Forestry Ltd to the registrar concerning the Murupara logging yard, 3 April 1993  
Letter from Tasman Forestry Ltd to the Forestry Corporation of New Zealand concerning the Murupara logging yard, 10 March 1993
- 2.31 Letter from counsel for the Forestry Corporation of New Zealand to the registrar concerning High Court proceedings relating to the Murupara logging yard, 6 May 1993
- 2.32 Memorandum from Crown counsel concerning request for urgency, 6 May 1993
- 2.33 Direction from the Tribunal instructing the registrar to schedule conference to consider request for urgency, 17 June 1993
- 2.34 Letter from the Whanganui River Maori Trust Board to the registrar concerning the relationship of the Te Ika Whenua rivers claim to the Whanganui River claim (Wai 167), 24 June 1993  
Letter from the Whanganui River Maori Trust Board to the registrar concerning the Crown's position on riverine issues and requesting an urgent hearing of the Whanganui River claim (Wai 167), 24 June 1993  
Letter from the Minister of Justice to the Whanganui River Maori Trust Board concerning the draft framework agreement between Whanganui and the Crown and a generic approach by the Crown to Treaty claims to natural resources, 18 May 1993
- 2.35 Directions of the Tribunal setting date of first hearing and date for completion of claimant research, 9 August 1993
- 2.36 Memorandum from the Tribunal to counsel concerning preliminary and first hearings, adoption of kaumatua evidence, and cross-examination of witnesses, 8 October 1993

- 2.37 Notice of preliminary and first hearings, 14 October 1993
  
- 2.38 Memorandum from claimant counsel concerning timetable of preliminary and first hearings, 20 October 1993
  
- 2.39 Letter from Crown counsel to the registrar requesting adjournment of first hearing and postponing of decision on the status of the river claim, 21 October 1993
  
- 2.40 Letter from claimant counsel to the registrar objecting to adjournment of first hearing, 21 October 1993
  
- 2.41 Letter from the Tribunal to the registrar declining Crown counsel's request for adjournment of first hearing, 22 October 1993
  
- 2.42 Letter from Vicky Stanbridge to the registrar advising the Tribunal that Kensington Swan is acting for the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority, 26 October 1993  
 Memorandum from counsel for the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority outlining the power authorities' position with respect to the waterways claim, 26 October 1993
  
- 2.43 Direction of the chairperson appointing Georgina Te Heuheu as a member of the Tribunal, 3 November 1993
  
- 2.44 Letter from Crown counsel to the registrar requesting adjournment of second hearing, 11 May 1994
  
- 2.45 Letter from claimant counsel to the registrar objecting to adjournment of second hearing, 16 May 1994
  
- 2.46 Direction of the Tribunal adjourning second hearing, 16 May 1994
  
- 2.47 Letter from the Tribunal to Crown counsel concerning the illegibility of some material filed, 4 July 1994
  
- 2.48 Letter from the Crown Law Office to the registrar (in response to paper 2.47) concerning the illegibility of some material filed and the relevance of that material and enclosing replacement pages, 2 August 1994  
 Letter from U-Bix Business Machines Ltd to the Crown Law Office concerning the reproduction quality of documents copied, 28 July 1994
  
- 2.49 Notice of second hearing, 11 August 1994
  
- 2.50 Memorandum from claimant counsel to the Tribunal concerning the claimants' evidence in reply, 15 August 1994

- 2.51 Memorandum from assistant Crown counsel to the Tribunal proposing a timetable for the second hearing, 17 August 1994
- 2.52 Letter from the district manager and chief surveyor of the Department of Survey and Land Information Hamilton to Judge Carter concerning the ownership of the bed of the Rangitaiki River, 16 March 1994
- 2.53 Notice of third hearing, 9 September 1994
- 2.54 Letter from claimant counsel to Crown counsel concerning briefs of evidence from Professor Timoti Karetu and Sheila Watson and asking two questions of Chris Richmond, 26 August 1994  
Letter from Chris Richmond to assistant Crown counsel answering questions asked in the above letter, 16 September 1994
- 2.55 Letter from assistant Crown counsel to claimant counsel enclosing 16 September 1994 letter from Chris Richmond (paper 2.54), 23 September 1994
- 2.56 Crown on Karetu and Tuhoe's position, 21 October 1994  
(a) Letter from assistant Crown counsel concerning paper 2.56(b) and a claim by Tuhoe to parts of the Rangitaiki River, 21 October 1994  
(b) Questions prepared by Crown counsel for Professor Karetu concerning the words 'i roto i', undated
- 2.57 Letter from Professor Timoti Karetu in response to paper 2.56(b), 2 November 1995
- 2.58 Fax from counsel for Ngati Awa concerning the Kaingaroa Forest, 26 August 1994
- 2.59 Memorandum from the Tribunal to counsel for Ngati Awa concerning the waterways claim, 23 November 1995
- 2.60 Fax from counsel for Ngati Awa in response to paper 2.59, 20 December 1994
- 2.61 Direction of the chairperson registering a claim concerning the Matahina c and c1 blocks, 10 February 1995
- 2.62 Memorandum from claimant counsel concerning the Matahina claim, 9 February 1995
- 2.63 Notice of the Matahina claim, 14 February 1995
- 2.64 Direction of the deputy chairperson registering an amendment to the statement of claim as claim 1.1(g), 12 July 1996
- 2.65 Application from claimant counsel for an urgent hearing regarding the Murupara logging yard and railhead, 20 December 1996

**3. RESEARCH COMMISSIONS**

**3.1** Direction from the Tribunal commissioning Dr Geoffrey Bertram to prepare a report on various matters concerning power boards, energy reforms, and the Aniwhenua and Wheao Dams, 25 February 1993

**3.2** Direction from the chairperson commissioning Anita Miles from 14 December 1993 to 28 February 1994 to carry out additional research required for the Wai 212 claim and to assist the Tribunal in drafting its report, 15 December 1993

**3.3** Direction from the chairperson commissioning Max Oulton to prepare a cadastral map of lands fronting the middle reaches of the Rangitaiki, Whirinaki, and Wheao Rivers, 28 June 1995

**3.4** Direction from the chairperson commissioning Anita Miles from 2 October 1995 to 1 April 1996 to carry out additional research required for the Wai 212 claim and to assist the Tribunal in drafting its report, 8 November 1995

**RECORD OF DOCUMENTS**

\* Document confidential and unavailable to the public without a Tribunal order

† Document held in the Waitangi Tribunal library, Waitangi Tribunal offices, third floor, 110 Featherston Street, Wellington

The name of the person or party that produced each document or set of documents in evidence appears in parentheses after the reference, except where that source is already apparent.

**A. TO END OF ENERGY ASSETS HEARING (ANIWHENUA AND WHEAO DAMS), MAORI LAND COURT, ROTORUA, 8-10 MARCH 1993****A1**

(a)<sup>†</sup> Cadastral map of Kaingaroa 1

(b)<sup>†</sup> Department of Lands and Survey 1:50,000 cadastral map of Murupara (261-V17), 3rd ed, 1983

(c)<sup>†</sup> Department of Land and Survey Information 1:50,000 topographical map of Murupara (260-V17), August 1986, with diagrams of the Murupara logging head attached

**A2** Dr Geoffrey Bertram, 'Electricity Industry Restructuring: Background to the Transfer of ESA Assets', unpublished paper, undated

**A3** Electricity Industry Task Force, *Towards Efficiency in the New Zealand Electricity Industry: A Guide to the New Zealand Electricity Industry and the Report of the Electricity Task Force*, Wellington, Government Printing Office, September 1989 (Crown counsel)

**A4** Bay of Plenty Electric Power Board, *Revised Establishment Plan*, December 1992 (Crown counsel)

**A5** Rotorua Area Electricity Authority, *Establishment Plan for Rotorua Electricity Ltd*, Rotorua, 1992 (Crown counsel)

**A6** Brief of evidence of Dr Geoffrey Bertram, undated

Dr Geoffrey Bertram, 'Research Report', vol 1 of 'The Aniwhenua and Wheao Hydro Schemes and the Energy Companies Act 1992', 2 vols, unpublished report, March 1993

(a) Dr Geoffrey Bertram, 'Supporting Appendices to the Research Report', vol 2 of 'The Aniwhenua and Wheao Hydro Schemes and the Energy Companies Act 1992', 2 vols, unpublished report, March 1993

(claimant counsel)

**A7** Opening submissions of claimant counsel, undated

(a) List of authorities (vol 1)

(1) Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed, Wellington, Government Printing Office, 1989, sec A3.4.1

(2) *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA)

(3) *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA)

(4) *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA)

(5) *Te Runanga o Muriwhenua Incorporated v Attorney-General* [1990] 2 NZLR 641 (CA)

(6) *Guerin v The Queen* (1984) 13 DLR (4th) 321

(b) List of authorities (vol 2)

(7) *R v Sparrow* (1990) 70 DLR (4th) 385

(8) *Poverty Bay Electric Power Board v Attorney-General and Electricity Corporation of New Zealand Ltd* unreported, 5 November 1987, Davison CJ, High Court Wellington CP552/87

(9) The Electric Power Boards Act 1925

(10) *Te Runanga o Muriwhenua Incorporated v Attorney-General and Others* unreported, 28 June 1990, Court of Appeal CA110/90

(11) 'Introductory Speech of the Minister of Maori Affairs on the Treaty of Waitangi Amendment Bill', 1993

The Treaty of Waitangi Amendment Bill 1993

(12) The Energy Companies Act 1992

**A8** Briefs of evidence of kaumatua

(1)\* Brief of evidence of Hohepa Waiti, undated

(2) Brief of evidence of Thomas Higgins, undated

(a) Map of tributaries and special places in Te Rohe o Ngati Manawa

(3) Brief of evidence of Taima Rangitauira, undated

(4) Brief of evidence of Hana Meihana, undated

(5) Brief of evidence of Te Whaiti Waiti, undated

(6) Brief of evidence of Muriwai White, undated

(a) Whakatane District Council 1:750,000 map of approved zoning under change 34 to the transitional Whakatane district plan, 16 March 1992

(b) Bay of Plenty Electricity watercolour of the proposed Kioreweku hydroelectric project

(7) Brief of evidence of Percy Murphy, undated

(8) Brief of evidence of Rewi Wihare, undated

**A8—continued**

- (9) Brief of evidence of Te Rauparaha Tihema, undated
- (10) Brief of evidence of Billy Messent, undated
- (11) Brief of evidence of James Doherty, undated
- (12) Brief of evidence of Eddie Heurca, undated
- (13) Brief of evidence of Maanu Paul, undated
  - (a) Black and white photocopy of photograph of Kaingaroa, 1960
  - (b) Black and white photocopy of photograph of Kaingaroa taken soon after the 1886 Tarawera eruption
  - (c) Black and white photocopy of photograph of Kaingaroa, 1969
  - (d) Black and white photocopy of photograph of early planting of Kaingaroa
  - (e) Black and white photocopy of photograph of cave drawings at Murupara
  - (f) Joan Boyd, *Pumice and Pines*, Wellington, GP Publications, 1992, pp 1, 4
  - (g) National Institute of Water and Atmospheric Research Ltd, draft working group report on freshwater eels, undated, and covering letter, 26 February 1993
  - (h) J A T Boubee, C P Mitchell, 'Matahina Elvers Pass Study', unpublished report to Electricorp from the Ministry of Agriculture and Fisheries, undated
  - (i) Colour photocopies of parts of a geological map showing tephra beds in the claim area
  - (j) Notes from Kaingaroa 1 report
  - (k) Waiata and translation (*River Song*), Maanu Paul
- (14) Affidavit of Irihapeti Edwards
- (15) Affidavit of Teresa Paul-Issac
- (16) Affidavit of Rangi Anderson
- (17) Affidavit of Maurice Toetoe
- (18) Affidavit of Thomas Maher  
(claimant counsel)

**A9 Opening submissions of Crown counsel, 9 March 1993**

- (a) Flow diagram showing the approval of establishment plans for energy companies where the establishing authority is a power board, undated
- (b) National Maori Congress, 'Submission on the Energy Sector Reform Bill' submission to the Select Committee on Planning and Development, 15 February 1992, and covering letter
- (c) Tainui Maori Trust Board, 'Energy Sector Reform Bill (114-1)', submission to the Select Committee on Planning and Development, 7 February 1992
- (d) Whanganui River Maori Trust Board, 'Submission on Energy Sector Reform Bill (114-1)', submission to the Select Committee on Planning and Development, undated
- (e) Letters from the Electricity Distribution Reform Unit to various persons concerning electricity distribution reforms, 6 April 1992, 27 January 1992, 24 October 1991
- (f) Letter from the Minister of Energy to the National Maori Congress concerning the Energy Sector Reform Bill and the Treaty of Waitangi, undated  
Letter from the National Maori Congress to the Minister of Energy concerning the Energy Sector Reform Bill and the Treaty of Waitangi, 28 January 1992
- (g) National Maori Congress, 'Electric Power Boards: National Maori Congress Proposal for Maori Ownership in the New Energy Company', 1992
- (h) Press releases and other material from the National Maori Congress concerning Maori participation in electric power boards, 10 November 1992



**A9—continued**

- (i) Letter from Te Arawa Maori Trust Board to the Minister of Energy concerning the formation of a Maori energy company, 13 November 1992
- (j) Direction from Tribunal concerning urgency, further particulars of claim, and matters of hearing venue and notice, 22 December 1992
- (k) *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (CA)

**A10** Submission of Te Kotahitanga Tait, 8 March 1993 (Tuhoe–Waikaremoana Maori Trust Board)

**A11** Submission of Archie Taiaroa, undated (Whanganui River Maori Trust Board)

**A12** Submission of the National Maori Congress, undated

**A13** Submission of Te Runanga o Ngati Tahu, 10 March 1993

**A14** Closing submissions of claimant counsel, undated

**A15** Interim report of the Waitangi Tribunal on an urgent claim by Te Runanganui o Te Ika Whenua relating to the effect of the Energy Companies Act 1992 upon claims concerning the Rangitaiki and Wheao Rivers, 1 April 1993

**A16** Waitangi Tribunal, *Te Ika Whenua – Energy Assets Report 1993*, Wellington, Brooker and Friend Ltd, 1993

**B. TO END OF FIRST HEARING (TE IKA WHENUA RIVERS), TIPAPA MARAE, MURUPARA, 8–11 NOVEMBER 1993**

**B1** Rachel Paul, 'Murupara Log Yard and Rail Head Report', unpublished report, undated

- (a) Document bank to document B1 (vol 1)
- (b) Document bank to document B1 (vol 2)
- (c) Document bank to document B1 (vol 3)
- (claimant counsel)

**B2** Gwenda Paul and Maanu Paul, *The History of Kaingaroa No 1, the Crown, and the People of Ngati Manawa*, 2nd ed, Murupara, Te Runanganui o Te Ika Whenua, 1994

- (a) Document bank to document B2 (vol 1)
- (aa) Transcripts of selected documents from document B2(a)
- (b) Document bank to document B2 (vol 2)
- (bb) Transcripts of selected documents from document B2(b)
- (c) Document bank to document B2 (vol 3)
- (d) Document bank to document B2 (vol 4)
- (e) Document bank to document B2 (vol 5)

**B2**—continued

- (f) Document bank to document B2 (vol 6)
- (g) Document bank to document B2 (vol 7)
- (claimant counsel)

**B3** Submission of Te Runanga o Ngati Tahu Ngati Whaoa, 23 June 1993

**B4** Marian Porima, Gwenda Paul, Hohepa Waiti, Maanu Paul, *Nga Awa me nga Iwi o te Ika Whenua*, Murupara, Te Runanganui o Te Ika Whenua, 1993

- (a) Document bank to document B4 (vol 1)
  - (1) Transcript of an interview with Taima Rangitauira, 20 July 1993
  - (2) Transcript of an interview with Taima Rangitauira, 21 August 1993
  - (3) Transcript of an interview with James Doherty, 8 August 1993
  - (4) Translated transcript of an interview with Wiremu McAuley, 19 July 1993
  - (5) Translated transcript of a discussion between persons of Patuheuheu and Ngati Haka descent from Waiohau, 14 August 1993
  - (6) Transcript of an interview with Maanu Paul and Hohepa Waiti, 15 September 1993
  - (7) Transcript of an interview with Himiona Nuku, 26 August 1993, and notes of a discussion with Himiona Nuku, 17 September 1993
  - (8) Notes of and quotations from an interview with Hana Meihana, 15 September 1993
- (b) Document bank to document B4 (vol 2)
  - (1) Whirinaki hearing, 20 October – 1 November 1890, Whakatane minute book 3, fols 12–89
  - (2) Whirinaki judgment, 6 November 1890, Whakatane minute book 3, fols 100–105
  - (3) Extracts from Kaingaroa 1 hearing, September 1878, Opotiki minute book 1, fols 188–189, 192–193
  - (4) Transcript of Waiohau hearing, 24–26, 29–30 July 1878, Opotiki minute book 1, fols 96–114
- (c) Document bank to document B4 (vol 3)
  - (1) Petition to Parliament by Wharehuia Heta and others, circa 1924, N1925/311, National Archives, Wellington
  - (2) Poka Laenui, 'Culture in Contemporary Society', *Canadian Journal of Native Education*, vol 14, no 3, 1987, pp 4–13
  - (3) Henry Tahawai Bird, *Kuranui-o Ngati Manawa*, Rotorua, Rotorua Printers, 1980
- (d)<sup>†</sup> Composite map formed from three Department of Lands and Survey 1:50,000 cadastral maps (Tarawera (261-v16); Murupara (261-v17); and Whirinaki (261-v18))
- (e) Transcript of the Whirinaki hearing from document B4(b)
- (claimant counsel)

**B5** Opening submissions of claimant counsel (pt 1), undated

- (a) List of authorities
  - (1) Mircea Eliade, *Patterns in Comparative Religion*, translated by Rosemary Sheed, New York, Sheed and Ward, 1958, ch 5
  - (2) *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188
  - (3) *The King v Morrison* [1950] NZLR 247

**B5(a)**—*continued*

- (4) Professor Ludwik Teclaff, 'What You Have Always Wanted to Know about Riparian Rights, but Were Afraid to Ask', *Natural Resources Journal*, vol 12, January 1972, pp 30–55
- (5) *Nireaha Tamaki v Baker* (1901) NZPCC 371
- (6) *Baldick v Jackson* (1910) 30 NZLR 343
- (7) *Mullick v Mullick* (1829) 1 Knapp 245
- (8) *Bumper Development Corporation Ltd v Commissioner of Police* [1991] 4 All ER 638 (CA)
- (9) *Public Trustee v Loasby* (1908) 27 NZLR 801
- (10) *Omapere Lake*, unreported, 1 August 1929, Judge Acheson, Native Land Court (Bay of Islands Native Land Court minute book, vol 2, pp 253–278)
- (11) Monique Shay, 'Promises of a Viable Homeland, Reality of Selective Reclamation: A Study of the Relationship between the *Winters* Doctrine and Federal Water Development in the Western United States', *Ecology Law Quarterly*, 1992, pp 547–590

**B6<sup>†</sup>** Composite map formed from three Department of Survey and Land Information 1:50,000 topographical maps (Tarawera (260-v16), July 1987; Murupara (260-v17), August 1986; and Whirinaki (260-v18), July 1986) with the Northern Boundary, Whirinaki, and Flaxy Creek blocks outlined (claimant counsel)

**B7<sup>†</sup>** 1:2500 map of the provisional overall layout of the proposed Kioreweku hydroelectric scheme (claimant counsel)

**B8<sup>†</sup>** Diagram of the Wheao and Flaxy Creek powerhouses, waterways, and intake structures (claimant counsel)

**B9** Timeline of events in the Bay of Plenty affecting Te Ika Whenua from 1150 to 1991 (claimant counsel)

**B10** Opening submissions of claimant counsel (pt 2), undated

**(a)** List of authorities

- (1) *Lane v Pueblo of Santa Rosa* 249 US 110 (1919)
- (2) *R v Sparrow* (1990) 70 DLR (4th) 385
- (3) Sir Mari Kapi CBE, 'The Underlying Law in Papua New Guinea', *Ninth Commonwealth Law Conference*, 1990, pp 129–134
- (4) The Constitution of the Independent State of Papua New Guinea, chapter 19: the Customs Recognition Act
- (5) Aeau Epati, 'Traditional Authority in the Contemporary Pacific', *Ninth Commonwealth Law Conference*, 1990, pp 581–587
- (6) *Pyramid Lake Paiute Tribe of Indians v Morton* 354 F Supp 252 (1973)
- (7) *United States v Creek Nation* 295 US 103 (1935)
- (8) M A Hill, A J Press, 'Kakadu National Park: An Australian Experience in Joint Management', draft report for the Australian National Parks and Wildlife Service, 28 October 1992

**B10(a)**—*continued*

- (9) Kakadu Board of Management and Australian National Parks and Wildlife Service, *Kakadu National Park Plan of Management*, Canberra, Australian National Parks and Wildlife Service, 1991
- (10) The National Parks and Wildlife Conservation Act 1975 (Aus)
- The National Parks and Wildlife Conservation Act 1985 (Aus)
- The National Parks and Wildlife Conservation Amendment Act 1985 (Aus)
- The National Parks and Wildlife Conservation Amendment Act 1987 (Aus)
- The National Parks and Wildlife Conservation Amendment Act (No 2) 1987 (Aus)

**B11** Brief of evidence of Maurice Toetoe and supporting documents, November 1993 (claimant counsel)

**B12** Brief of evidence of Gwenda Paul, undated (claimant counsel)

**B13** Brief of evidence of Billy Messent, undated (claimant counsel)

**B14** Letter from claimant counsel to Crown counsel concerning the presentation of traditional evidence and the claimants' tino rangatiratanga over the rivers, 5 October 1993

(a) Letter from Crown counsel to claimant counsel concerning the postponing of the first hearing, the claimants' tino rangatiratanga over the rivers, and evidence already given to the Tribunal, 21 October 1993  
(claimant counsel)

**B15** Transcript of Bay of Plenty Electricity presentation on the proposed Kioreweku Dam, undated

(a) Videotape of Bay of Plenty Electricity presentation on the proposed Kioreweku Dam, undated

**B16** Brief of evidence of Maanu Paul, November 1993 (claimant counsel)

**B17** Transcript of brief of evidence of Hohepa Waiti, 10 November 1993

**B18**

- (a) Transcript of cross-examination of Maanu Paul by Crown counsel, first hearing, undated
- (b) Transcript of questioning of Maanu Paul by the Tribunal, first hearing, undated
- (c) Transcript of cross-examination of Hohepa White by Crown counsel and questioning by the Tribunal, first hearing, undated
- (d) Transcript of evidence of Thomas Higgins, first hearing, undated

**C. TO END OF SECOND HEARING (TE IKA WHENUA RIVERS), MAORI LAND COURT, ROTORUA, 29–31 AUGUST 1994**

**c1** *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* unreported, 17 December 1993, Court of Appeal CA124/93 (since reported at [1994] 2 NZLR 20; see doc c14(b))

**c2** Lyndsay Head, 'Maori Land Boundaries', report commissioned by the Waitangi Tribunal, 1993

**c3** David Alexander, 'Native Land Court Orders and Crown Purchases', report commissioned by the Crown Law Office, undated

(a) Supporting documents to document c3 (vols 1–3)

(b) David Alexander (comp), 'Original Maori Blocks in the Rangitaiki River Catchment above Te Mahoe (Matahina) Dam', collection of Department of Survey and Land Information 1:50,000 topographical maps with notes by the compiler, April 1994

(c) Map of original block boundaries of riparian lands

(Crown counsel)

**c4** Supporting documents to document c3 (vols 1–3) (Crown counsel)

**c5** David Alexander, 'The Crown's Hydro-electric Generation Rights and the Aniwhenua and Wheao Power Schemes', report commissioned by the Crown Law Office, undated

(a) Supporting documents to document c5

(Crown counsel)

**c6** David Alexander, 'The Crown and the Eel Fishery', report commissioned by the Crown Law Office, undated (Crown counsel)

(a) Supporting documents to document c6

**c7** Revised brief of evidence of Michael Lear (Crown counsel)

(a) G W Mills, R J Aspden, and R E Stewart, *Hydro Resources of New Zealand*, Wellington, Ministry of Commerce: Energy and Resources Division, Resource Information Report 7, April 1990

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**c9** Rachel Paul, 'Native Land Legislation from 1862 to 1880', unpublished report, 1994

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**c10** Brief of evidence of Richard Stevens, August 1994 (Rotorua Area Electricity Authority)

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(a) Bay of Plenty Electricity location map of the Aniwhenua hydro generation scheme and electricity supply areas, undated

(b) Tonkin and Taylor 1:2500 map of the Aniwhenua hydroelectric project overall layout, September 1977

(c) Bay of Plenty Electricity, *Tōi and Aniwhenua Power Schemes*, promotional pamphlet, undated

(d) Agreement between the Tuhoe–Waikaremoana Maori Trust Board and the Bay of Plenty Electric Power Board for the exchange of land, 9 December 1980

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c12 Brief of evidence of Charles Mitchell, 10 June 1994 (Bay of Plenty Electric Power Board and Rotorua Area Electricity Authority)

c13 Brief of evidence of Wayne Donovan, 2 June 1994

(a) Map of fishery and water quality assessment sites on the Wheao and Rangitaiki Rivers, November 1985

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c14 Outline of opening submissions of Crown counsel, 29 August 1994

(a) Map of water board regions between Tauranga and Poverty Bay

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(c) Extracts from Marine Department eel file M8 w1833 74/1, held at National Archives, Wellington

**c15** Opening submissions of counsel for the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority, 29 August 1994

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**c16** Affidavit of Christopher Richmond, 24 August 1994 (Crown counsel)

**c17** Brief of evidence of Peter Fitchett, August 1994 (Rotorua Area Electricity Authority)

**c18** Brief of evidence of Alan Withy, August 1994

(a) Letter from Alan Withy to Maurice Bird concerning the Rotorua Area Electricity Authority's Rangitaiki–Wheao hydroelectric scheme, 9 November 1976

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**c19** Brief of evidence of Maanu Paul, 30 August 1994

(a) Maanu Paul, hand-drawn diagram of proposed floating pipeline, August 1994

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**c20** Brief of evidence of Sheila Watson, 26 August 1994 (claimant counsel)

**c21** Brief of evidence of Timoti Karetu, 29 August 1994 (claimant counsel)

**c22** Brief of evidence of Marian Porima, undated (claimant counsel)

**c23** Miscellaneous papers concerning the Tawhiuau block from documents c4, vol 3 (Maori Affairs head office files MLP1910/28/14, MLP1918/11, National Archives, Wellington), c3(a), vol 2 (memorandum of transfer for the Tawhiuau block) (claimant counsel)

**D. TO END OF THIRD HEARING (TE IKA WHENUA RIVERS), PAINOAIHO MARAE, MURUPARA, 11–13 OCTOBER 1994**

**D1** Brief of evidence of Charles Mitchell, 11 October 1994 (Bay of Plenty Electric Power Board and Rotorua Area Electricity Authority)

**D2** Outline of closing submissions of claimant counsel, October 1994

(a) Maps of fishery and water quality assessment sites on the Wheao and Rangitaiki Rivers, April 1985, November 1985

Map of fish and benthic invertebrate assessment sites on the Wheao and Rangitaiki Rivers, undated

Maps of fishery, water quality, and sediment sampling locations on the Wheao and Rangitaiki Rivers, April 1987, April 1988, April 1989, April–May 1990, May 1991

(b) Two colour photographs of the Wheao powerhouse, undated

**D3** Submission of Tamaroa Nikora on behalf of the Tuhoe-Waikaremoana Maori Trust Board and Wai 36, Wai 40, and Wai 386 claimants, undated

**D4** Closing submissions of counsel for Bay of Plenty Electricity Ltd (formerly the Bay of Plenty Electric Power Board) and Rotorua Electricity Ltd (formerly the Rotorua Area Electricity Authority), 12 October 1994

**D5** Outline of closing submissions of Crown counsel

(a) Material from the *Appendices to the Journals of the House of Representatives* (1862, E-9; 1870, A-11; 1874, G-7, G-9; 1875, C-4A; 1876, G-5; 1878, G-2; 1881, G-3; 1883, G-1A; 1886, G-12; 1891, G-4)

(b) The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992

(c) *In re the Bed of the Whanganui River* [1962] NZLR 600

(d) Department of Lands and Survey 1: 63,360 map of Tuhitarata, June 1891

**D6** Submission of claimant counsel in reply

**D7** *Re Two References under Clause 14 of the First Schedule to the Resource Management Act 1991*, 20 September 1994, Planning Tribunal Tauranga, decision A72/94 (counsel for Bay of Plenty Electric Power Board and Rotorua Area Electricity Authority)

**D8** *Re an Appeal by Joseph Hohepa White*, 14 October 1994, Legal Aid Review Authority Wellington, decision 210/94 (claimant counsel)



APPENDIX III

**PARTITIONS AND SALES OF  
RIPARIAN BLOCKS**

The following table is drawn from information contained in David Alexander's report 'Native Land Court Orders and Crown Purchases' (doc c3) and the three volumes of supporting documents to it (doc c3(a)).

Block	Area (acres)	Title CT - Certificate of title MO - Memorial of ownership	Partitions	Sales
Matahina C	1000	Awarded on rehearing to Ngatihaka CT22/2/1884 128 names		Two-thirds of Matahina C and Matahina C1 were awarded to the Crown on 27 September 1907 for survey liens of 30 January 1891
Matahina C1	1000	Awarded on rehearing to Patuheuheu CT22/2/1884 43 names		
Waiohau 1	14,464	MO24/7/1878 148 names Patuheuheu, Ngati Manawa, Ngati Rongo	Waiohau 1A Waiohau 1B Plan of subdivision, 15 January 1887	
Waiohau 1B	7000	Transferred to two owners on 31 December 1886		Sold to a private purchaser on 14 June 1887
Waiohau 2	1100	MO24/7/1878 81 names Ngata Moeke of Ngati Pukeko		
Waiohau B9	2073.2			The consolidation of Crown interests was ordered on 15 September 1936
Karamuramu	323	MO22/7/1878 Two names		Sold to the Crown on 18 September 1873 (site Fort Galatea) Court order for sale to the Crown on 10 June 1879
Kaingaroa 1	104,480	MO5/11/1880 28 names, Ngati Manawa cancelled on partition	Rangipo	The Crown leased 103,393 acres from 1875 The block was sold to the Crown on 18 December 1880, except for Oruatawehi Bush (417 acres) and the Rangipo block

Block	Area (acres)	Title CT - Certificate of title MO - Memorial of ownership	Partitions	Sales
Rangipo			Partitioned on 24 June 1890 into Rangipo 1 and Rangipo 2	
Rangipo 1				Sold in 1917
Rangipo 2	602	CT16/5/1893 Three names Survey lien to Crown discharged on 10 July 1893		Sold to a private purchaser on 10 July 1893
Karatia		An investigation of title was made in March-April 1908	First partition made on 20 May 1914	
Kuhawaea	22,280	An investigation of title was made on 26-28 September 1882	Partitioned on 20 October 1882 into Kuhawaea 1 and Kuhawaea 2	Offered for sale in 1874; leased to Hutton Troutbeck
Kuhawaea 1	21,594	CT20/10/1882 92 names		Sold to Hutton Troutbeck on 16 June 1884
Kuhawaea 2	586	CT20/10/1882 30 names	Partitioned on 3 December 1915 into Kuhawaea 2A and Kuhawaea 2B	Kuhawaea 2B sold in 1918 and Kuhawaea 2A sold in 1923 to the owners of Kuhawaea 1
Kaingaroa 2	143,700	MO13/10/1879 10 names, Ngati Tahu cancelled for western portion of 52,171 acres, 24 March 1883		An agreement to sell whole or a portion to the Crown was made on 3 October 1878 The eastern portion (91,529 acres) was sold to the Crown on 18 January 1881

Block	Area (acres)	Title CR - Certificate of title MO - Memorial of ownership	Partitions	Sales
Whirinaki	31,500	Crown title 22 September 1897 for 21,499 acres (Whirinaki 1 section 1, Whirinaki 1 section 3, Whirinaki 2 section 2, Whirinaki 2 section 4)	Whirinaki 1 Whirinaki 2 The non-sellers' interests were partitioned out as Whirinaki 1 sections 2 and 4 and Whirinaki 2 sections 1 and 3, and the Crown's interests were partitioned out as Whirinaki 1 sections 1 and 3 and Whirinaki 2 sections 2 and 4, on 5 December 1895	Whirinaki 1 and 2 were sold to the Crown on 4 December 1895, except for 400 acres at the northern end of Whirinaki 2
Whirinaki 1 section 1	10,111			Sold to the Crown on 5 December 1895 by court order
Whirinaki 1 section 4			Partitioned on 15-16 May 1899 into Whirinaki 1 sections 4A and 4B	Section 4A was awarded to the Crown in lieu of survey charges owing on the original survey of the Whirinaki block and was returned to Ngati Manawa in 1981 in exchange for the Motumako block on Kaingaroa 1
Whirinaki 1 section 4B			Partitioned on 2 July 1902 into Whirinaki 1 sections 4B1 and 4B2	
Whirinaki 1 section 4B1			Partitioned on 17 May 1913 into Whirinaki 1 sections 4B1A and 4B1B	Section 4B1A was sold to the Crown

Block	Area (acres)	Title CT - Certificate of title MO - Memorial of ownership	Partitions	Sales
Whirinaki 1 section 4B2			Partitioned on 23 August 1920 into Whirinaki 1 sections 4B2A-4B2G	A number of sections and interests were sold to the Crown in the 1960s and were returned to Ngati Manawa in 1981 in exchange for the Motumako block in Kaingaroa 1
Whirinaki 2 section 3A		An investigation of title was made on 24 November 1890		Section 3A was awarded to the Crown in lieu of survey charges owing on the original survey of the Whirinaki block
Heruiwi	24,394	MO24/7/1878 54 names Ngati Manawa and Ngati Apa	Partitioned on 13 December 1881 into Heruiwi 1-3 Crown interest (20,910 acres)	Heruiwi was leased to the Crown in February 1875 for 30 years Heruiwi 1 was sold to the Crown on 13 December 1881 and was gazetted wasteland of the Crown on 30 March 1882
Heruiwi 2	2,484	MO13/12/1881 Eight names		Sold to the Crown on 19 March 1895 11 signatures
Heruiwi 3	1000			
Heruiwi 4		Order on investigation 2 December 1890	Partitioned on 20 November 1895 into Heruiwi 4A (for the non-sellers) and Heruiwi 4B (for the Crown)	Heruiwi 4B (9276 acres) was awarded to the Crown on 20 November 1895 118 signatures
Heruiwi 4A	5880 (deed plan) 5580 (deed of sale)		Partitioned on 13 May 1899 into Heruiwi 4A1	Heruiwi 4A1 was sold to the Crown on 13 May 1899 136 signatures

Block	Area (acres)	Title CR – Certificate of title MO – Memorial of ownership	Partitions	Sales
Heruiwi 4A2			Partitioned on 6 December 1915 into Heruiwi 4A2A and 4A2B	Heruiwi 4A2A was awarded to the Crown in lieu of survey charges owing on the original survey of Heruiwi 4
Heruiwi 4A2B	1667		An attempt to partition the block in 1943 was adjourned	The Crown acquired just over half the shares between 1921 and 1932 A meeting of owners agreed to sell the land, but not the timber, to the Crown in September 1962 and the resolution was confirmed by the Maori Land Court on 26 March 1963
Heruiwi 4F			The Crown's interest (7130 acres) was partitioned out as Heruiwi 4F1 on 20 November 1895 and the non-sellers' interests as Heruiwi 4F2	7634 acres in Heruiwi 4F were awarded to the Crown on 20 November 1895
Heruiwi 4G, 4H, 4I		An order on the investigation of title was made on 2 December 1890	The Crown's interests in Heruiwi 4G (10,520 acres), 4H (14,509 acres), and 4I (15,643 acres) were partitioned out on 21 September 1895	40,672 acres in Heruiwi 4G, 4H, and 4I were awarded to the Crown on 26 April 1892 49 signatures
Pukahunui	46,740	MO22/7/1878 75 names Ngati Manawa	Partitioned on 10 December 1881 into Pukahunui 1 and Pukahunui 2	Pukahunui 1 (5500 acres) was awarded to the Crown by Native Land Court order on 10 December 1881 and was gazetted wasteland of the Crown on 30 March 1882
Pukahunui 2	41,240	MO10/12/1881 75 names		Memo of transfer to J E Platt, 12 September 1882

Block	Area (acres)	Title CT - Certificate of title MO - Memorial of ownership	Partitions	Sales
Otairi	6910	Investigated by Urewera commissioners on 18-24 April and 20 May 1901 Memo of transfer to Maori proprietors, 30 August 1907		By 31 March 1920, the Crown had purchased almost 5932 acres and it was awarded the whole block during the Urewera lands consolidation scheme in 1921
Maraetahia	5512	Investigated by Urewera commissioners on 25-29 April and 20 May 1901 Memo of transfer to Maori proprietors, 30 August 1907		By 31 March 1920, the Crown had purchased more than 4316 acres and it was awarded the whole block during the Urewera lands consolidation scheme in 1921
Te Whaiti 1	45,048	Investigated by Urewera commissioners on 1-18 April and 20 May 1901 Memo of transfer to Maori proprietors, 30 August 1907		By 31 March 1920, the Crown had purchased almost 31,286 acres and it sought, but was not granted, the whole block during the Urewera lands consolidation scheme in 1921 Parts were apportioned to eight groups of owners The Crown purchased further shares in 1923





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# Partitions and Sales of Riparian Lands

Source Maps: NZMS 261; U17 -19  
V16 -18, W16 -18

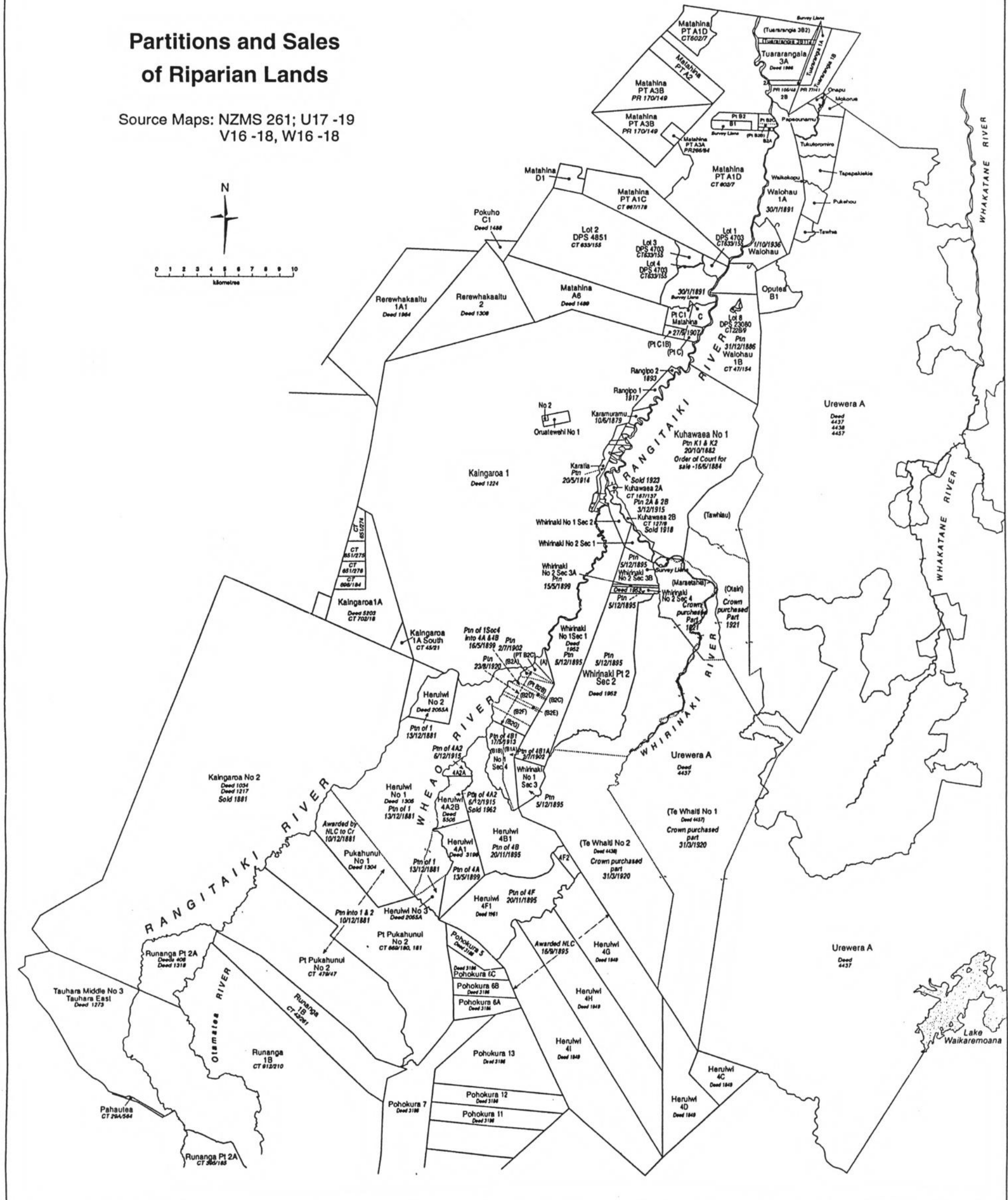
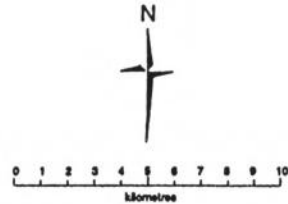


Figure 28: Partitions and sales of riparian lands. Map drawn by Max Oulton; compiled from evidence presented by David Alexander (doc c3, pp 30-126).

