

TE IKA WHENUA – ENERGY ASSETS REPORT



WAITANGI TRIBUNAL REPORT 1993

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REPORT OF THE
WAITANGI TRIBUNAL

WAI 212

WAITANGI TRIBUNAL REPORT 1993



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

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Contents

1	Introduction	1
1.1	Te Runanganui o Te Ika Whenua Incorporated	1
1.2	Their Original Claim	1
1.3	Request for Urgent Hearing	2
1.4	The Tribunal Response	4
1.5	The Urgent Claim	6
1.6	Waitangi Tribunal Hearing	6
1.7	Interim Report	7
2	The Claimants Evidence	8
2.1	Traditional Evidence	8
2.2	Nga Rohe	10
2.3	Nga Awa	11
2.4	The Rivers as Taonga	13
2.5	The Significance of the Traditional Evidence	15
3	The Dams and the Energy Companies Act 1992	16
3.1	Introduction	16
3.2	The Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority	16

Te Ika Whenua - Energy Assets

3.3	The Aniwhenua and Wheao Hydro Schemes	17
3.4	Water Rights	19
3.5	The Energy Companies Act 1992 (the Act)	19
3.6	The Establishment Plans - Bay of Plenty Electricity Limited and Rotorua Electricity Limited	21
3.7	Projected Transfer of Assets	22
4	Issues to be Determined	24
4.1	The Claimants Case	24
4.2	The Law	24
4.3	The Argument for the Crown	25
5	Consideration of the Issues	27
5.1	Ownership of the Dams	27
5.2	Consultation with Maori	29
5.3	Are the Claimants Prejudicially Affected?	33
5.4	Is the Proposed Transfer of the Dams Inconsistent with Treaty Principles?	35
5.5	Is the Legislation in Breach of Treaty Principles?	37
6	The Substantive Claim	40
7	Summary of Findings and Recommendations	42
7.1	Findings	42
7.2	Relief Sought in Particulars of Urgent Claim	43

Waitangi Tribunal Reports

7.3	Relief Sought in Claimants' Closing Submissions	43
7.4	Recommendation	45

Appendices

1	The Claim	48
2	Interim Report	65
3	Record of Inquiry	71
4	Record of Proceedings & Record of Documents	73

Glossary	79
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The references in the text of this report are to the tribunal's record as contained in the Record of Proceedings and the Record of Documents listed in appendix 4.

For example:

(2.5) in chapter 1, paragraph 1.1 refers to Document 2.5 in the Record of Proceedings.

(A8(10):1) in chapter 2, paragraph 2.1 refers to Document A8(10) at page 1 in the Record of Documents.

List of Figures

Chapter 1

Figure 1: Location map of the original claim

Chapter 2

Figure 2: Diagram of the Te Ika Whenua rohe described by H Waiti

Figure 3: Special places described by T Higgins

**The Honourable Minister of Maori Affairs
Parliament Buildings
Wellington**

Te Minita Maori

Tena koe e te rangatira

We have pleasure in presenting to you the tribunal's full report on the Te Ika Whenua claim relating to energy assets.

The claim was afforded urgency because of the pending implementation of the Energy Companies Act 1992 and refers only to the effect of the provisions of that Act on Te Ika Whenua's substantive claim which still remains to be heard.

We understand that the Minister of Energy is waiting to consider this report in respect to further action to be taken to implement the Energy Companies Act and trust that the report will be of assistance to him in identifying the Treaty issues involved.

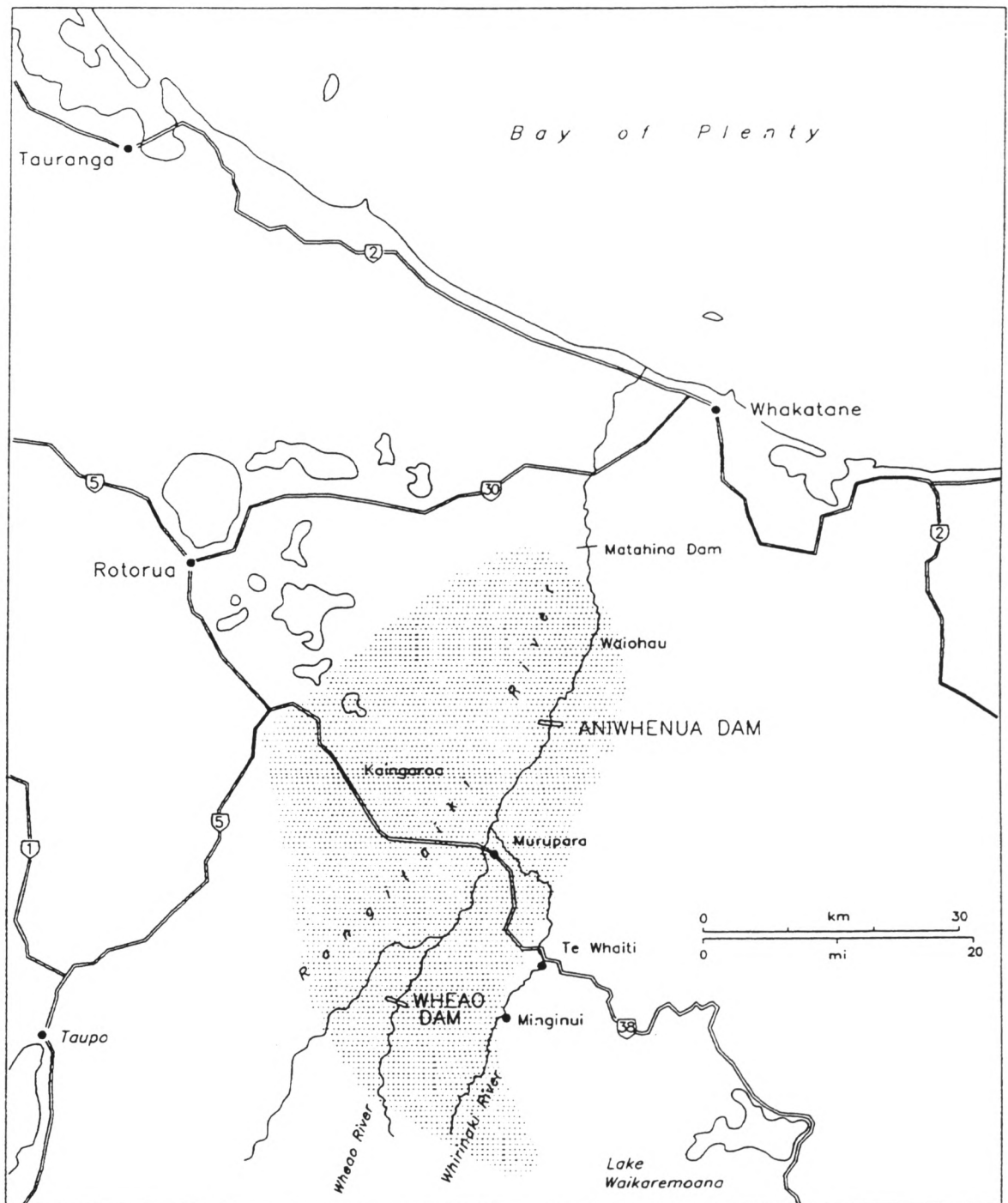


Figure 1: Location map of the original claim

Chapter 1

Introduction

1.1 **Te Runanganui o Te Ika Whenua Incorporated¹**

Te Runanganui o Te Ika Whenua originated in a series of hui of four tribes and hapu living in Murupara who were not happy with the distribution of government services through Tuhoe and Te Arawa agencies and decided it was in their best interests to amalgamate themselves into one iwi under the 1990 Runanga Iwi Act. After the Act was repealed, Te Runanganui o Te Ika Whenua registered under the Incorporated Societies Act(oral evidence, Hohepa Waiti, 9 March 1993).

Membership of Te Runanganui o Te Ika Whenua Incorporated is open to all persons who claim descent from any of the following iwi:

Ngati Whare, Ngati Manawa, Ngati Patuheuheu and Ngati Te Huinga Waka.(2.5)

1.2 **Their Original Claim**

On 11 June 1991, the chairman of Te Runanganui o Te Ika Whenua, Hohepa Joseph Waiti (White) and the secretary, Kingi Porima lodged a claim with the Waitangi Tribunal for lands and waterways. In it they alleged that the Crown had been remiss in protecting their rights of tino rangatiratanga under Article 2 of the Treaty by permitting the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority to erect the Aniwhenua and Wheao dams on the Rangitaiki and Wheao Rivers, respectively. These rivers, they claimed, belonged to their people. The dams had been constructed and water rights for power generation authorised without any consultation with them. The 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. Their flora and fauna had been damaged by the construction of the dams and the failure by the Crown to recognise their ownership of the rivers had caused loss of revenue through lack of opportunity to partake in joint ventures(1.1).

¹ We have adopted the spelling for Te Ika Whenua as used in the common seal.

Te Ika Whenua - Energy Assets

In consequence, they asked that the Crown:

Recognise our ownership of these rivers.

Compensate Te Runanganui o te Ikawhenua for the loss of income due to non-protection under the Treaty of Waitangi.

Liaise with the two authorities above to build appropriate channels for our eels to migrate up and down the rivers.

Make appropriate mechanisms so that we shall share in the income of the future operations of the two dams.(1.1:3)

The claim was duly registered by Tribunal direction of 18 June 1991 and assigned Wai number 212.(For a location map of the original claim, see figure 1).

1.3 Request for Urgent Hearing

On 30 November 1992, Te Ika Whenua through its solicitor, filed with the Waitangi Tribunal a memorandum requesting urgency in respect of that part of the original claim relating to the Aniwhenua and Wheao dams(1.1(a)). Urgency was requested because of the government's energy sector reforms as enacted in the Energy Companies Act 1992 (passed 25 June 1992) and its possible effect on these dams. Background information was provided and issues for consideration and determination were set out. A further memorandum dated 16 December 1992 providing additional information was subsequently filed by counsel for the claimants(1.1(c)).

Another memorandum, also dated 30 November 1992 (1.1(b)), requesting urgency on a different part of the Te Ika Whenua claim which related to the Murupara Logging Head, was filed with the tribunal. That claim was not included in this hearing and forms no part of this report, although, for completeness of the record there are references to documents filed in support of that claim in the Record of Proceedings and the Record of Documents (see Appendix 4).

In the memorandum relative to the dams, Te Ika Whenua reiterated and affirmed the assertions made in the original statement of claim filed with the tribunal on 11 June 1991. Paragraphs 11.1, 11.2 and 11.3 of that memorandum set out the basis for the urgency request and the issues for the tribunal's urgent consideration and recommendations as follows:

Te Ikawhenua assert tino rangatiratanga over both the Wheao and Rangitaiki Rivers. The unauthorised use of waters of those rivers for power generation is a subject of a claim before the Waitangi Tribunal. Te

Waitangi Tribunal Reports

Ikawhenua believe that the transfer of the assets (including the Aniwhenua and Wheao Dams) of the BOPE and RAEA to private companies and the contemplated vesting of shares in those companies to consumers will prejudicially affect Te Ikawhenua's claim before the Waitangi Tribunal and position generally.

[BOPE and RAEA are references to Bay of Plenty Electric Power Board and Rotorua Area Electricity Authority respectively]

Te Ikawhenua consider that the transfer of these assets to Energy Companies will prevent them from asserting their tino rangatiratanga over both rivers and be an affront to their mana and Kaitiaki role.

Te Ikawhenua therefore seek an urgent hearing before the Waitangi Tribunal so that the Tribunal may have the opportunity to consider and make recommendations to the Crown on the following issues:

- (a) Whether or not Te Ikawhenua have tino rangatiratanga over the Wheao and Rangitaiki Rivers including its bed and waters.
- (b) Whether or not the use of the waters or the river by the Crown for power generation is in accordance with the Treaty of Waitangi.
- (c) Whether or not the transfer pursuant to the Energy Companies Act 1992 of the Wheao and Aniwhenua Dams to energy companies and [sic] is in accordance with the Treaty.
- (d) Whether or not the Energy Companies Act 1992 is contrary to the Treaty of Waitangi in that it does [not] provide for mechanisms to protect Treaty claims or tino rangatiratanga of Maori over their taonga.
- (e) What protections should be put in place for the Maori interests before any further step[s] are taken.

Whether or not the transfer should be delayed, or the dams should be excluded from the transfer.(1.1(a):10,11)

At page 2 of the supplementary memorandum dated 16 December 1992, Te Ika Whenua reaffirmed the position taken by them:

... the claimants consider that their concerns cannot be adequately addressed through the ownership of shares and the current Energy Companies Act regime. Section 36 of the Energy Companies Act specifies

that the principal objective of any energy company shall be to operate as a successful business (section 36(1)). This raises the concern in the mind of the claimants that the holding of shares will not give them enough sway in the face of the principal objective stated above to address all of their grievances. For example, the relevant energy company may see the building of channels for eels to migrate up and down the rivers as not cost effective given their principal objective. Further, the claim of Te Ika Whenua relates to past losses because of the operation of the dams.

The transfer per se of the dams to a privately owned entity will restrict or negate the Crown's ability to use these dams in any settlement package which may be negotiated in the future by Te Ikawhenua upon the outcome of their claim.(1.1(c):2)

What was understood to be the Crown's position, namely, that energy reforms had not directly affected or involved Maori claims which were seen as relating to the resources used to generate electricity, was discussed.

... these resources are involved because, among the assets operated by local power companies apparently being transferred are dams and/or the water rights associated with them.(1.1(c):3)

Ngati Manawa contended that the Crown's actions in the construction of the dams and use of the waters failed to protect and recognise their tino rangatiratanga over both rivers(1.1(c):3).

1.4 The Tribunal Response

The issues of urgency having been narrowed at a meeting of the chairperson, counsel and Crown in chambers 16 December 1992, the tribunal issued directions in response to the request for urgency 22 December 1992. Any tribunal urgently constituted to hear Te Ika Whenua's claim would consider only the matter of transfer of the Aniwhenua and Wheao dams contemplated under the Act. Ownership of or claims to the rivers, lands or other assets, as provided for in the original claim, would be considered at some later stage of the tribunal's inquiry(2.6).

At paragraph 4(a) of its memorandum giving directions, the chairperson stated:

The Tribunal is concerned:

- (a) that a number of river claimants, and Waikato River claimants in particular, sought urgent hearings much earlier with regard to their river claims which included power generation assets, and were denied those hearings at the time. It was eventually agreed

Waitangi Tribunal Reports

the Mohaka River claim should proceed as an inquiry on the question of river ownership. Issues involving generation assets and water abstraction arrangements were not involved. The Tribunal is concerned to provide the other river tribes with the opportunity to be heard on the Te Ika Whenua request for priority, such priority being based on the issue affecting the transfer of generation assets;(2.6).

The tribunal was also aware that negotiations between the New Zealand Maori Council, the National Maori Congress and the Crown were on foot and that a negotiated settlement on a national basis was a possibility. As well, there appeared to be a number of hapu with overlapping interests in the Rangitaiki catchment area.

Accordingly, the river tribes, the national Maori bodies and relevant local hapu were to be notified and called upon to provide a statement of their initial position on the possibility that urgency could be granted to Te Ika Whenua on the narrow basis outlined.

A conference was set by the tribunal to consider whether an agreed approach of the various Maori parties could be settled, for negotiation or hearing. The Maori parties were to meet in the morning and their representatives were to meet with the Crown at 2 p.m. on the same day to discuss the proposals which had been formulated(2.6).

The conference held on 18 January 1993 demonstrated overwhelming support of those Maori groups notified for Te Ika Whenua's urgent application on the narrow focus stated.

Letters of support were received from the Tainui Maori Trust Board, Whanganui River Maori Trust Board and Te Runanga o Ngati Apa(2.9,2.10,2.11)

Further support was voiced at the conference by representatives of Te Arawa Federation of Maori Authorities, the National Maori Congress, the New Zealand Maori Council, Titiraupenga Trust, Ngati Ranginui and Ngati Raukawa hapu, Ngati Tahu, Ngati Pahauwera, Ngati Kahungunu and Ngati Awa(2.12).

Representatives of the Crown, Electricorp, the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority joined the conference in the second session.

The Crown stated that it did not regard negotiation appropriate given that the Act was in force. Further, the Crown had heard the concerns, such as

those expressed by Te Ika Whenua, before the legislation was enacted and there had been some iwi support for the proposed transfer of assets. Any urgent hearing of the matter should consider only whether the legislation had incorporated Treaty protection of Maori interests.

As a result of the matters raised and discussed at the conference, urgency was granted by tribunal direction dated 3 February 1993 and a hearing set down for 8-10 March 1993. The claimants were requested to file a reformulation of the issues upon which their claim was based in terms of the narrow focus identified at the conference(2.13).

1.5 The Urgent Claim

The urgent claim as settled and agreed to was filed in a document dated 23 February 1993, the germane parts of which were:

- That the Act did not provide a mechanism to protect Te Ika Whenua's claim.
- That the Crown's failure to protect their interests is in breach of the Treaty of Waitangi and fiduciary duty of the Crown to the claimants.
- That the transfer of the Aniwhenua and Wheao dams would compound and aggravate the original breaches of the Treaty of Waitangi through the construction of the dams.
- That the policy behind and the provisions of the Act that would enable the transfer of the Aniwhenua and Wheao dams was a further breach of the Treaty of Waitangi.
- That Te Ika Whenua will be prejudiced by the transfer of the Aniwhenua and Wheao dams to privately owned legal entities(1.1(d)).

Te Ika Whenua reserved their rights in respect of their original claim, 11 June 1991.

1.6 Waitangi Tribunal Hearing

The Te Ika Whenua urgent claim was heard in Rotorua 8-10 March 1993. The claimants were represented by Kathy Ertel. Peter Andrew appeared for the Crown.

The claimants' case lasted into the third day. During that time the tribunal heard counsel's submissions in support of the claim and received written

and oral evidence from 19 members of hapu represented by Te Runanganui o Te Ika Whenua. In addition Dr Ivo Geoffrey Bertram presented evidence of an expert nature as to the establishment and operation of the Aniwhenua and Wheao hydro schemes and the effect of the Energy Companies Act 1992. Submissions in support of the Te Ika Whenua claim were received from the Whanganui River Maori Trust Board, the New Zealand Maori Council, Ngati Tahu, Ngai Tuhoe and Titiraupeka Trust.

Counsel for the Crown called no witnesses, contending that the matter before the tribunal was essentially a legal issue requiring legal argument. He was therefore content to rely on his submissions although he did produce some documentary evidence to support the Crown's claim of consultation with Maori.

1.7 The Interim Report

The claim was given urgency because of the pending implementation by government of the establishment of and transfer of assets to energy companies under the provisions of the Energy Companies Act 1992. It was represented to the tribunal that the Minister of Energy might act at any time after 31 March 1993 so that if the tribunal was of a mind to make a recommendation it should do so as quickly as possible. Within that time frame it was just not possible to issue a full report so the tribunal issued an interim report and recommendation, a copy of which is annexed as Appendix 2.

Chapter 2

The Claimants Evidence

2.1 Traditional Evidence

The urgent hearing limited the opportunity of the claimants to identify themselves as they would have done by whakapapa, whakatauki and waiata had their original claim been heard on their marae.

Hohepa Waiti, kaumatua of Ngati Manawa, however, transmitted to us in confidence, a whakapapa that had been given him and which he described "as a vessel to contain our heritage".(A8 (1)

Billy Rano Messent, kaumatua of Tipapa Marae, established the relationship of the claimants to the Rangitaiki in the following whakatauki:

Ko Tawhiuau te Maunga, Ko Rangitaiki te Awa,
Ko Ngati Manawa te Iwi....(A8(10):1)

Tawhiuau is the mountain, Rangitaiki is the river, Ngati Manawa is the people.

Hana Rora Meihana, fostered as a young girl by a Ngati Manawa uncle, explained that the name Tawhiuau meant swirling mists and the chiefs always introduced themselves by it. Tawhiuau overlooked the great plain of Kuhawaea through which flowed the mighty Rangitaiki and the tranquil Whirinaki Rivers(A8(4):2).

The following waiata, written by Hana, depicted the importance of the mountain and the "immeasurable physical and spiritual value" of the rivers to Ngati Manawa as taonga:

E tere ra te awa Rangitaiki, ka tae koe ki te putahitanga
Ki Whirinaki,
Riporipo atu ra ki te Moana-nui-a-kiwa,
Tu tonu mai Tawhiuau i nga tihi tapu,
Kei nga taumata korero a nga tipuna-a.
I reira tiro iho ai ki te Mania Kuhawaea,
Te nohanga o nga uri a Ngati Manawa
Ko Ngati Hui, ko Ngati Koro, Moewhere

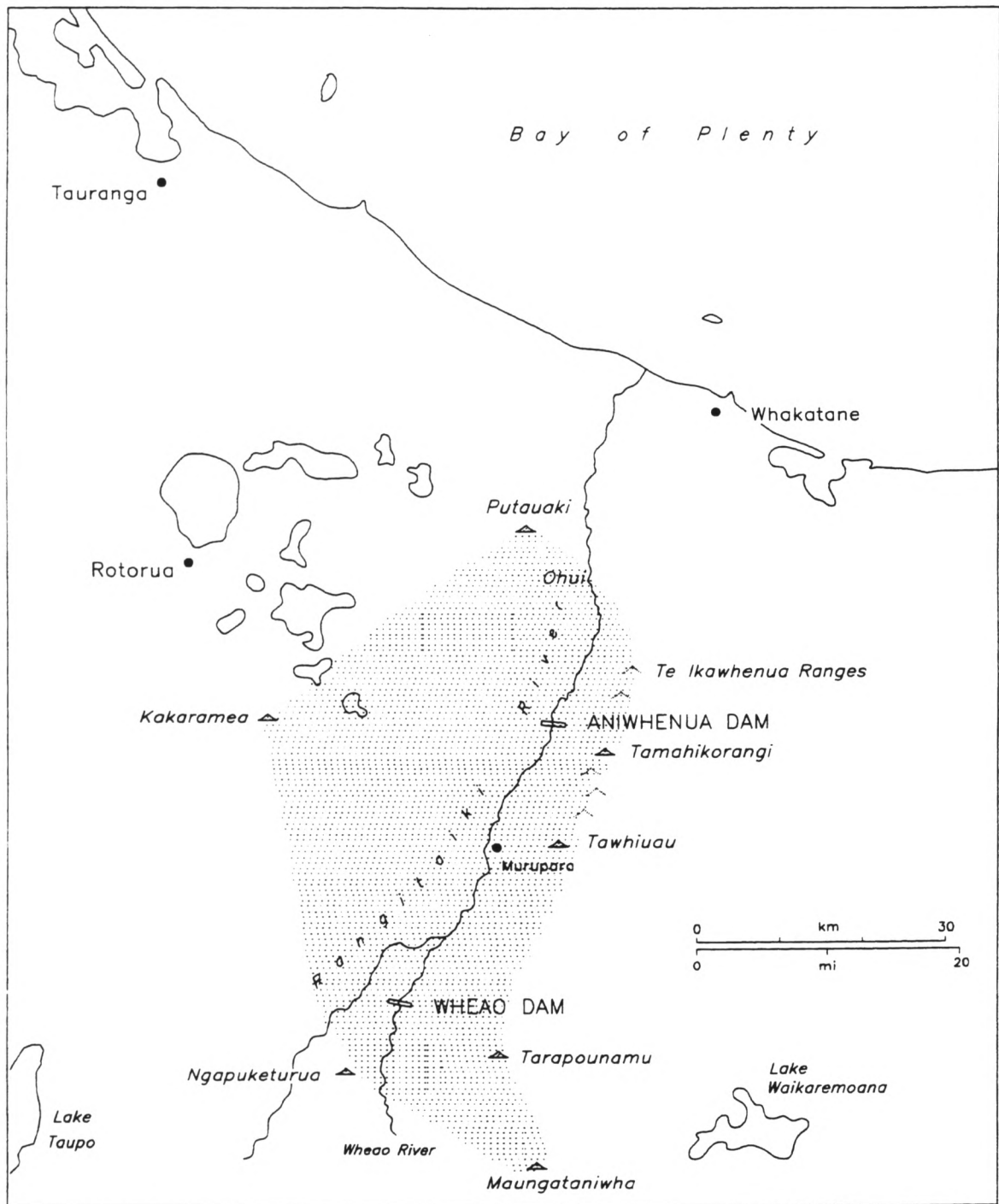


Figure 2: Diagram of the Te Ikawhenua rohe described by H Waiti in his oral evidence presented at the urgent hearing, tape 3(b)

Figure 2, in outlining the general rohe boundaries of Te Ika Whenua, does not attempt finally to delineate those boundaries. That is for the iwi of Te Ika Whenua and neighbouring rohe to decide and the tribunal is aware that negotiations and discussions are currently taking place with regard to this matter. The figure is merely a reproduction of the oral map presented to the tribunal at the urgent hearing by Hohepa Waiti upon that basis.

Ngai Tokowaru e pae nei,
Tiro atu ra ki nga tauranga ika,
Ki nga turanga harakeke,
Ki nga whare tipuna e arohatia nei ee ...
Tiro iho nei ki te papa tapu,
Ki a Tangiharuru e tu nei,
Te takahanga o nga totara haemata,
O nga manu tioriori,
Tenei kua mene ki te po,-o-o-o...
Waiho ana i a ahau kia tu pani noa,
Kia whakatauki ake te mamae
aue, taukiri e-e-e!(A8(4):2)

2.2 Nga Rohe

The claimants informed the tribunal that each of the four iwi of Te Ika Whenua had its own rohe and no other iwi would contemplate speaking for another in a rohe matter(2.5).

Hohepa Waiti described nga rohe of Te Ika Whenua.

Waiohau was to the north - the rohe of Ngati Haka and Ngati Patuheuheu, Murupara was to the east - the rohe of Ngati Manawa, Te Whaiti-Minginui was to the south - the rohe of Ngati Whare, Kaingaroa was to the west - the rohe of Ngati Huinga Waka.

The rohe lay within the confines of a boundary running from Putauaki Mountain, south-east to Ohui, south along the west of the Te Ikawhenua Ranges to Tamahikorangi, Tawhiuau Maunga, Tarapounamu, and finally Maungataniwha. The boundary then turned north-westward to Ngapuketurua, north to Kakaramea to return to Putauaki (oral evidence, Hohepa Waiti, 9 March 1993;see also figure 2).

Tom Higgins, a pakeke of Ngati Manawa, described 'the survey pegs' of an 'oral map' of Te Rohe o Ngati Manawa. He named natural features of the landscape and special places of significant historic and genealogical importance and related stories about them (A8(2)). He also presented us with a small scale map locating these places (A8(2)(a);see also figure 3). Most were on the banks of the Rangitaiki, Whirinaki and Wheao rivers and their tributaries. They included eel streams, fishing places, kainga, battle pa and forts, rock caves, homes of taniwha and burial places (A8(2)(a)).

Such evidence clearly illustrated, amongst other things, the vital importance to Te Ika Whenua of the Rangitaiki and Wheao rivers as arteries running through their rohe.(see figure 2)

2.3 Nga Awa

Geographical location

The headwaters of the Rangitaiki and Wheao are located in the most southern part of the Bay of Plenty. Kawerau, Edgecumbe and Whakatane lie to the north, Rotorua to the north-west, Taupo to the west, Gisborne to the east and Napier to the south.

The source of the Rangitaiki is in the rohe of Ngati Kahungunu and Ngati Tuwharetoa; the source of the Wheao is in the rohe of Ngati Tahu. They then flow through the rohe of Te Ika Whenua. The Whirinaki has its headwaters in the Urewera beyond Minginui, and flows through Te Whaiti, the home of Ngati Whare(oral evidence, Maanu Paul, 10 March 1993).

As Taima Maria Makarena Rangitauira put it:

Wheao-Whirinaki and all the other little rivers, who joined up with Rangitaiki, they are all one body flowing out to the sea.(A8(3):1-2)

The Wheao dam is located north-west of Te Tapiri and north of Rangitahi, the pa of the Ngati Hui, where a waterfall, well-known for its supply of huge eels was situated. As counsel for the claimants explained, after viewing it, it was not a dam so much as a scheme of some complexity re-routing the powerful flowing force of the river through pipes before it rejoined its bed leaving a dead channel behind it.

The effect of the diversion was described by Billy Messent.

Our river has been changed and abused by hydro works. The Rangitaiki no longer runs its full course.(A8(10):3)

We don't know if it is the Rangitaiki River or the Wheao River.(oral evidence, 9 March 1993)

Downstream from the Wheao dam, the rivers converge above Murupara into the Rangitaiki. The Rangitaiki continues through the rohe to the Aniwhenua dam. The place now called Aniwhenua was known to Ngati Manawa as Aniwaniwa, so named for the rainbow created by the waterfall located there.

The Rangitaiki then flows through the Waiohau Gorge where the headwaters of the Matahina dam are located within the rohe of Ngati Awa. From there it flows through Te Teko and Edgecumbe to meet the sea at Thornton.(see figures 1 and 2)

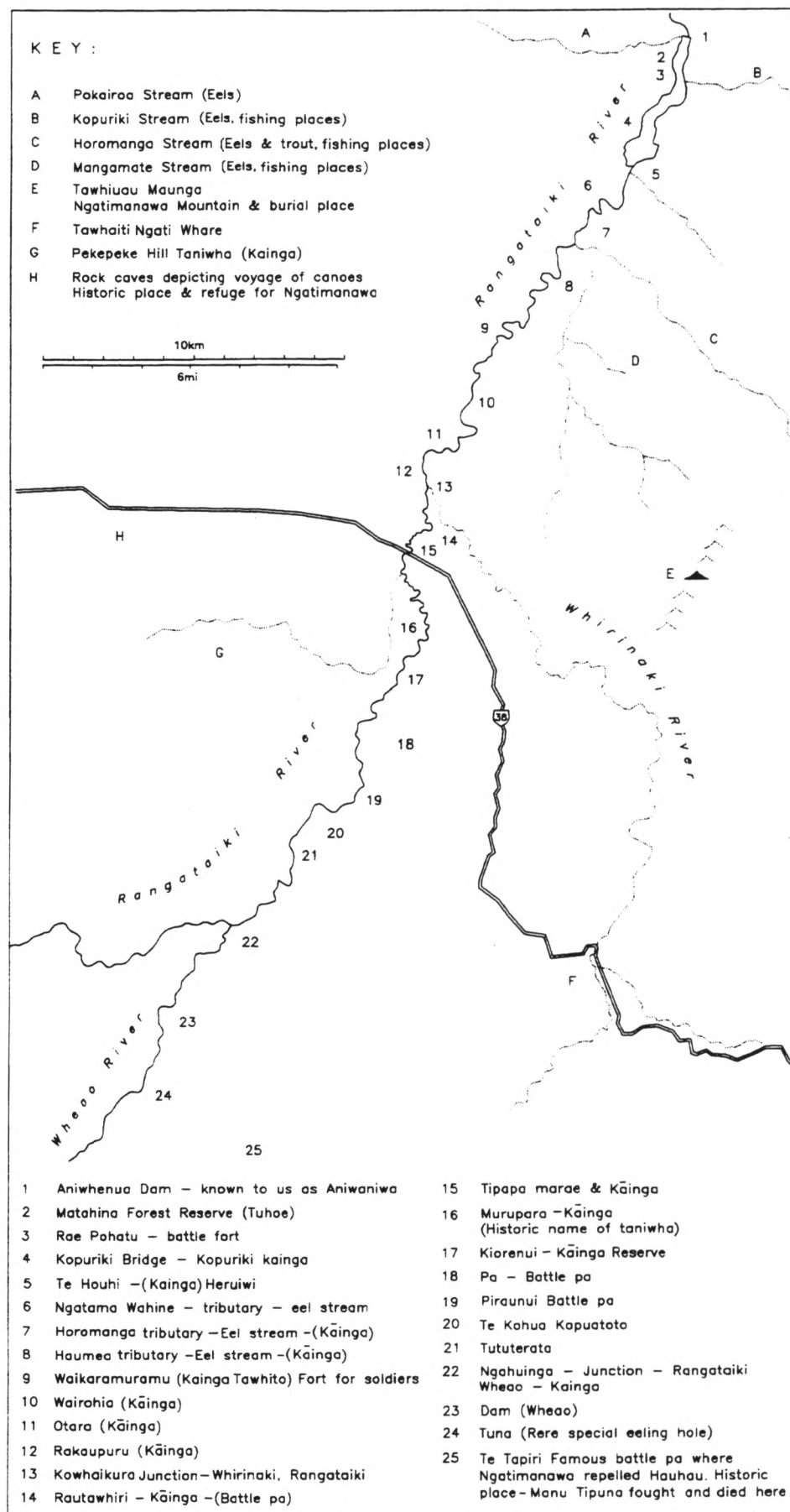


Figure 3: Special places described by T Higgins
in his evidence A8(2) and A8(2)(a)

2.4 The Rivers as Taonga

Taonga is something of inestimable value, whose worth is beyond the ken of man to calculate, as the claimant's evidence manifests. Hohepa Waiti spoke of rivers as "a part of oneself and life being".(A8(1):4) Taima Maria Makarana Rangitauira could only express the depth of the mauri (life force) within the Rangitaiki in Maori(A8(3):1).

Billy Messent, who was born on the bank of the Rangitaiki opposite Tipapa Marae, said the river was the lifeline of his people(A8(10):3).

Cletus Maanu Paul of Ngati Moewhare sub-tribe of Ngati Manawa, told us that his family and other families living on the banks of the river used it "as a source for survival". To them "the river was a provider of life - he tino taonga (a very precious gift)" that "provided water as well as food - eels".(A8(13):2)

As a result of the construction of the dams, and other Crown actions, Te Whaiti Waiti stated:

The chain has been broken. The river is no longer available to my mokopuna as it was to me.(A8(5):2)

Eels

Many of the spokespeople for the claimants stressed the importance of the river as a main source of food. Its eels were not "just any old eels, but the beautiful tasting silver belly eel"(A8(4):2), which were in great demand for their succulence(A8(10):2). Visitors to the area were treated to meals of this delicacy, the taste and texture of which were renown. Eels were also highly prized as koha in traditional gift exchange(A8(15):2). They could be fished from Te Rimu, three miles up from Murupara right down to the Aniwaniwa Falls(A8(4):2). There was harakeke (flax) in which eels were wrapped up for cooking in the umu(ibid). There were also trout, koura, kakahi, te hua hua, morihana, duck and watercress (A8(4):1;A8(7):1;A8(17):2).

Water

The river supplied water for drinking, cooking, washing and bathing. During droughts, Maanu Paul's family carted water by koneke (sledge) in 44 gallon drums for at least a kilometre(A8(13):2). Water was used to irrigate the vegetable garden and for early morning watering of crops when there was an occasional frost; also for the horses(A8(5);A8(10):3).

Respect for the river

People living on the banks of the river "knew every inch of it, criss crossed

it in the dead of night without fear ... But with due respect" for at times tragedy struck and people were drowned(A8(10):1;A8(14)).

Children were taught the tikanga of the river by their tipuna - the spiritual rituals before, during and after arriving there, and the karakia to be used before fishing or crossing the river. Thus they learnt to respect the sacredness of the river as taonga and its wahi tapu.

Spiritual qualities

The waters of the river had healing powers for both body and spirit. They were used for health remedies and spiritual rituals, such as baptism in the old days and prayers for the sick. One witness remembered as a young man being taken down to the river to be blessed before leaving for war. This practice continues today as a "recognition of some higher force which translated to a succouring characteristic with attributes of health, well-being, cleanliness and purification".(A(8)(13):3) Before research was started on the Te Ika Whenua claim, the researchers were taken to the Rangitaiki River by their pakeke and purified.

Tribal lore and history

The river was steeped in tribal lore and history. It was the home of nga taniwha, among whom was Murupara, said to be a friendly taniwha, who dwelt in a cave below the old Kiorenui River and from whom the place name, Murupara derived (A8(2):6,7).

The following korero purakau (legend) about the taniwha was told to Hohepa Waiti by his mother:

Many years ago, the Rangitaiki and Wheao Rivers were inhabited by five taniwha which came in different types of shapes, forms and colours and were supposedly a cross between an eel, a serpent and a dinosaur. Believed to be from the Lake Taupo region. One of these taniwha occupied the whole length of the Rangitaiki and Wheao Rivers from its headwaters to the base of Putauaki (Mt Edgecumbe). Responsible for the many deaths of the tribes that lived along the banks of these rivers. There occurred a lot of deaths to the people before it was discovered that this particular taniwha was responsible for this phenomena. With its special karakia and rituals this taniwha was destroyed.(A8(1):4-5)

Maanu Paul spoke of "the continuity of consciousness ... a theory of survival based upon the taonga of tangata whenua" brought back from Hawaiki(A8(13):5). The concept encompassed the notion of ongoing co-existence of Ngati Manawa with the rivers. It also reflected the passing on of knowledge, or taonga, to upcoming generations.

The importance of this concept was illustrated by the following whakatauki:

Te Iwi tiaki iana rawa, tana tina maaro whakamura ka tu tonu

The tribe that preserves and treasures its heritage and prepares for the future, prevails against all odds.(A8(3):1)

2.5 The Significance of the Traditional Evidence

The traditional evidence illustrates the impact of the two dams upon the rivers and the people. In the area of the Wheao diversion, the Rangitaiki is but a trickle with only a fraction of its former flow. Where the Aniwhenua dam stands, the rushing waters have been replaced by a dam and lake. The effect on the eel population is said to be marked. In the words of Cletus Maanu Paul:

tuna (eels) cannot descend downstream to breed in Te Moana-nui-a Kiwa (Pacific Ocean) because the dams mince them up in the turbines.(A8(13):4)

Hence, he explained, the intensity of the claimants' concern over one of their precious gifts being forcibly taken from them. No effort, he alleged was made to create a diversion for the eels to migrate down to the ocean to breed. All research had been in trying to enable elvers (baby eels) to migrate up the dams. The dams were "an impregnable wall" preventing this taonga from surviving (ibid, 4 and 5).

Our brief is to report on the narrow issue of the possible effects of energy sector reform on Te Ika Whenua's substantive claim. It is not therefore necessary for us in this report to scrutinise and assess the evidence given by the claimants at the urgent hearing introducing themselves, their rohe and their awa. Quite properly the Crown neither tested this evidence by cross-examination, nor brought any counter-evidence.

The traditional evidence however is important. It does show that the substantive claim is firmly based on customs, usages and systems of control of the iwi and cannot in any way be regarded as vexatious or frivolous.

Chapter 3

The Dams and the Energy Companies Act 1992

3.1 Introduction

The tribunal commissioned a background research report on "The Aniwhenua and Wheao Schemes and the Energy Companies Act 1992" (A6) from Dr I G Bertram, energy consultant and senior lecturer in economics at the Victoria University of Wellington. This report is a comprehensive study of the origins and historical development of electricity supply authorities and of issues raised in industry restructuring since 1985; also of local authority hydro-development policy, 1973-88; and the history of the Wheao and Aniwhenua schemes and some issues relating to the pending transfer of generation assets. Dr Bertram was called by the claimants to present his report at the urgent hearing of the present claim.

In this chapter of our report, we shall confine our consideration of Dr Bertram's report and evidence to those parts relating to the present claim: firstly, to the present ownership of the Wheao and Aniwhenua dams and water rights attaching thereto, and secondly, to the purpose and effect of the Energy Companies Act 1992. This evidence was not disputed by the Crown.

3.2 The Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority

A succinct overview of the establishment of the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority, also of the establishment of the Aniwhenua and Wheao dams by those bodies is provided in the preface to Dr Bertram's report(A6:1-2):

The Bay of Plenty Electric Power Board (Bay Power) was established by proclamation on 18 August 1925, in response to a ratepayers' petition under the Electric Power Boards Act 1918. The board began operations in 1928. After 45 years as a distributor of electricity purchased mainly from the New Zealand Electricity Department (NZED), the board in 1973 decided to move into generation. A site at Aniwhenua Falls was chosen in 1974, and the 25 MW Aniwhenua hydro scheme ... commenced operation on 3 October 1980.

Further:

The Rotorua Area Electricity Authority (RAEA) was established under the Electricity Distribution Commission Act 1967 by Order in Council dated 9 August 1971, with all the powers, rights, duties, obligations and responsibilities of an electric power board. The main reason for constituting the new authority was to transfer the Rotorua urban electricity distribution system from the control of the Tourist and Publicity Department ... into the hands of a new body covering the rural hinterland of Rotorua as well as the city itself. The new Authority began investigations for a new hydro generation scheme in 1974 and the Wheao site was selected the same year. The 24 MW Wheao scheme entered operation in May 1984, having suffered long delays due to collapse of the canal in December 1982.

3.3 The Aniwhenua and Wheao Hydro Schemes

In his report Dr Bertram stated that in the late 19th century and early 20th century, numerous small local power generation stations were built by both private and local authority initiatives. From the 1920s through to 1970, as the state electricity system expanded and the national grid was developed, most of these small local stations were phased out. The process of centralisation of electricity supply was almost complete.

During the 1970s several developments led to the renewed expansion of independent generators operating alongside New Zealand Electricity Department. These included the 1973-74 oil shock, nation-wide electricity shortages during the winters of 1973 and 1974, a renewed policy emphasis on regional development by central government, and increased uncertainty as to future wholesale electricity price trends.

In the 1977 budget the government announced the local hydro scheme policy under which it would provide concessional finance for the capital costs of new hydro generation. Grants were to be provided to fund investigation and design work, loans were to be made available to finance construction and further loans from NZED were to be available to cover operating losses in the early years of approved schemes. The policy contained a subsidy element in the availability of investigation grants and cheaper than normal finance for construction. Following the budget announcement the government set up the Committee on Local Authority Hydro Development whose basic function was to make recommendations to government on applications for grants or loans from supply authorities.

The Bay of Plenty Electric Power Board engaged consultants to investigate a local hydro scheme in mid-1973. Preparation of a feasibility report for the Aniwhenua site was authorised in December 1973 and the report made in September 1974 showed the scheme to be technically feasible, financially

viable and environmentally acceptable and to have an estimated cost of \$12.5m. Following the obtaining of water rights, ministerial consent and other necessary approval, contracts were let in the second half of 1977 and earthworks commenced before the end of that year. It would appear that the decision to proceed was taken before finance under the 1977 budget became available.

Aniwhenua began generation on 3 October 1980. The 1982 annual report for the board showed that the total cost of the station to 31 March 1982 was \$27,767,203 of which \$24,628,809 was financed by government loan.

The book value of the scheme as at 31 March 1992 was \$21,109,000. Dr Bertram reported that Aniwhenua was breaking even financially by 1985/86 and was able to trade its way into long-run profit without debt write-offs. He comments that in the years 1989-1992 the profits from Aniwhenua were what kept the board in the black overall, since its trading activities ran at a loss during that period.

The Rotorua Area Electricity Authority began investigation into a local hydro scheme in 1974. Its consultants after considering several alternatives recommended that a scheme on the Wheao and Rangitaiki Rivers was economically the most attractive. Necessary planning, environmental and other consents were obtained in 1977. Loan finance was approved by the Committee on Local Authority Hydro Development in February 1979, contracts let in late 1979 and work begun in the last month of that year.

Dr Bertram reported that the scheme struck problems in that the Wheao canal collapsed in December 1982 at which time the scheme had virtually been completed. Cost escalation was also a feature in that in July 1976 the estimated cost was \$9.5m and by April 1978 it had risen to \$17.7m with the expectation that it would rise to \$29.5m by the time of completion in 1982. The secretary-treasurer of the authority in the 1986 annual report showed a provisional final costing of \$52,738,324 of which \$44,075,795 was provided by government loans and \$5,283,566 was provided by recovery from insurance. An Audit Office study listed the total cost of Wheao \$46.6m but Dr Bertram considered that that figure almost certainly excluded capitalised interest which was included in the Rotorua Area Electricity Authority figure of \$52.7m cited in its report.

The first power generated from the scheme was in May 1984 and the completed station was handed over in July 1984. Dr Bertram noted that the cost escalation and amount of loan finance required brought difficulties in both financing and servicing the debt. In 1989 the government agreed to write off part of the debt amounting to \$24,863,359 and in 1989-1990 a

surplus on power generation was achieved. Dr Bertram commented:

Obligated to compete with the NZED bulk tariff, however, the scheme never came close to earning a surplus (and would still be in the red today) until government wrote off \$25m of its debt in March 1989.(A6:45)

3.4 Water Rights

From 1908 to 1987 the Crown conferred upon itself the sole right to use water in lakes, falls, rivers and streams for generation and storage of electricity under section 267(1) Public Works Act 1908, followed by section 306(1) Public Works Act 1928 and then, section 25 Electricity Act 1968. All power generation schemes undertaken in this period had to obtain a licence for the use of water on terms determined by the Crown. Section 3 Electricity Amendment Act 1987 repealed section 25 Electricity Act 1968 thus extinguishing the requirement for direct Crown consent to be secured for any use of water for power generation.

Crown control over natural water remained under section 21 Water and Soil Conservation Act 1967, the provisions of which were retained by section 354(b) Resource Management Act 1991. Under this legislation the power to grant rights for the use of natural water was to be exercised by regional water boards instead of by ministerial discretion(A6:27-28).

Water rights for the Wheao and Aniwhenua hydro schemes are held by the Rotorua Area Electricity Authority and the Bay of Plenty Electric Power Board respectively.

3.5 The Energy Companies Act 1992 (the Act)

The Energy Companies Act was enacted in 1992, and amended later that year. It provided for the formation of energy companies, the vesting in such companies of the undertakings of electric power boards and the electricity and gas undertakings of local authorities, and the dissolution of electric power boards.

The Crown, in its opening submission, stated that the fundamental objective of the Act was:

to ensure a commercial and efficient approach to electricity distribution and supply through the incorporation of electric power boards and municipal electricity departments.(A9:1)

The legislation "established a process of corporatisation, not privatisation". It neither guaranteed nor compelled the passing of electric power board assets to private interests. The question of ownership was "devolved to the local community".(A9:11-12) Section 18 of the Act required each power

board or local authority with an energy undertaking to prepare and submit to the Minister of Energy not later than 31 December 1992 an establishment plan relating to the transfer to an energy company of its energy undertaking.

Such establishment plans were to include information which identified and valued the energy undertaking to be vested in the relevant energy company, a share allocation plan, draft memorandum and articles of association, a statement of corporate intent in most instances, as well as other details the Minister required.

Section 19 of the Act provided for joint establishment plans to be submitted (upon endorsement by any interim trustees appointed pursuant to section 4) and sections 23 and 24 of the Act required certain consultative procedures to be followed in respect of interim trustees and the public.

The Minister could approve any establishment plan submitted in accordance with the various provisions of the Act, or could decline to approve and require a revised establishment plan to be submitted "not later than 6 weeks after the date on which that approval was declined or such later date as the Minister ... may allow."

The new energy companies (where an existing company was not to be used) were to be formed and registered under the Companies Act 1955 no later than 1 April 1993. Any variance from this date had to be approved by the Minister.

This deadline was, along with the other matters laid before the registrar of the tribunal at the conference held in Wellington 18 January 1993, a major factor in the chairperson's decision to accord the matter urgency. Consequently the urgent hearing was set down for 8-10 March 1993.

The principal objective of the energy companies would be "to operate as a successful business" with regard "among other things, to the desirability of ensuring the efficient use of energy." (s36 of the Act)

The transfer of energy undertakings held by boards to successor companies was to occur on a date appointed by the Governor-General by Order in Council. The transfer should take place not later than 1 April 1992, or such later date as the Minister in any particular case might allow (s56 of the Act).

One point concerning the procedures laid down for the transfer of energy undertakings of electric power boards and local authorities needs to be

noted here. The Electricity Task Force, comprising government officials and industry representatives had reported, in September 1989, that during the transition process, many intricate and sensitive details would need to be worked out, for example, identification of how water rights, water royalties and Maori land issues were to be handled prior to any privatisation in the industry(A2:35). The Act, however, contained no provision to delay or prevent the transfer of power board or local authority assets to private ownership to protect Maori interests arising from claims before the Waitangi Tribunal, notwithstanding such assets might be part of the settlement recommended by the tribunal.

The only legislative protection for Maori interests in such assets, then, was Section 8 of the 1991 Resource Management Act which 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".(cf Wai 119:67)

3.6 The Establishment Plans - Bay of Plenty Electricity Limited and Rotorua Electricity Limited

When the provisions of the Energy Companies Act 1992 are implemented by the Minister and by Order-in-Council, the assets comprised in the Aniwhenua and Wheao schemes will pass from their respective owners, the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority, to respective energy companies created by the Board and the Authority in accordance with the terms of the Act. Those companies will have shareholders who, by virtue of their shareholding, will hold interests in the assets and undertaking of the companies. It is appropriate that we look, albeit briefly, at the structure of those companies.

A copy of the establishment plan for Rotorua Area Electricity Authority forms part of the record of inquiry and is recorded as A5 in the Record of Documents(Appendix 4). Under this plan an energy company is to be formed with the name Rotorua Electricity Limited. The company is to have a capital of \$30 million comprising 60 million fifty cent shares.

Essential to this plan is the formation of a community trust for charitable and community purposes under the name Rotorua Energy Charitable Trust. Of the 60 million shares, 33,469,288 shares are to be issued to the Trust and to consumers, and the remaining shares are to be held unallocated. The Trust is to receive 51 per cent of the shares that are allocated and the remaining shares which are issued are to be issued to account holders of Rotorua Electricity.

The assets and undertaking of the Rotorua Area Electricity Authority which include the Wheao dam and associated water rights would be transferred to Rotorua Electricity Limited.

The revised establishment plan for Bay of Plenty Electric Power Board also forms part of the record of inquiry and is recorded as A4 in the Record of Documents (Appendix 4). This plan was produced in December 1992 and under it the power board will form an energy company under the name Bay of Plenty Electricity Limited. The energy undertaking of the board including the Aniwhenua dam and associated water rights will be transferred to the company.

The capital of the company is to be \$40 million, comprising 40 million one dollar shares. Issued capital will comprise 27 million one dollar Class A rebatable voting shares and 375,000 one dollar Class B ordinary dividend earning voting shares. The balance shares will be retained as unissued capital.

The Class A shares will be issued free of charge to customers of Bay of Plenty Electric Power Board and will be non-dividend earning but will be eligible for rebates. That means that the shareholder will qualify for an annual rebate on electricity charges.

150,000 of the Class B shares will be issued free of charge to a shareholders society to be known as the Bay of Plenty Electricity Shareholders Society. The balance of the Class B shares will be available for purchase by employees of the new company.

Restriction on transfer of shares is proposed and no single shareholder will be entitled to hold more than 20 per cent of the total number of shares allocated in any class.

It is to be noted that the restriction on transfer of shares is not to apply to persons who wish to sell their shares to the purchaser of their property or to persons who wish to transfer their shares to their iwi.

3.7 Projected Transfer of Assets

The claim before this tribunal refers specifically to the Wheao and Aniwhenua hydro schemes and water rights associated with them. The establishment plans referred to above, if approved and put into effect by the Minister of Energy, will result in the transfer of those assets to Rotorua Electricity Limited and Bay of Plenty Electricity Limited respectively. Both those companies will have a substantial capital and shares comprising that capital will be allocated among a variety of shareholders. Although there

Waitangi Tribunal Reports

are some restrictions on share transfer, the shares will be tradable on the open market and the value of those companies' assets including the dams will eventually be taken into account when values for the shares in the respective companies are established on that market.

Chapter 4

Issues to be Determined

4.1 The Claimants Case

The case for the claimants may be summarised briefly as follows:

- (i) The claimants have lodged a claim relating to ownership and tino rangatiratanga of the Rangitaiki and Wheao rivers.
- (ii) The claim asserts that the tino rangatiratanga of the claimants has been disregarded by the Crown in allowing the construction of the Aniwhenua and Wheao power schemes on those rivers and the granting of water rights for those schemes.
- (iii) The projected transfer of the assets of these schemes from their present owners, the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority to energy companies created under the Energy Companies Act 1992 is likely to prejudicially affect the claimants.
- (iv) The proposed transfer of these assets while claims affecting them remain undetermined and unresolved is inconsistent with the principles of the Treaty of Waitangi.

In briefly summarising the case for the claimants, we do not wish to derogate from the particulars of claim submitted by counsel for the claimants and her comprehensive submission in support thereof (A7). We seek merely to define the issues which this tribunal has to address.

4.2 The Law

The claim is brought under Section 6(1) of the Treaty of Waitangi Act 1975. The relevant provisions are:

Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected -

- (a) By any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial

Waitangi Tribunal Reports

ordinance, or any Act (whether or not still in force), passed at any time on or after the 6th day of February 1840; or....

- (d) By any act done or omitted at any time on or after the 6th day of February 1840, or proposed to be done or omitted, by or on behalf of the Crown, -

and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.

To satisfy the provisions of the above section, the claimants must establish that firstly, they are likely to be prejudicially affected by the enactment of the Energy Companies Act and, secondly, that the provisions of the Act are inconsistent with the principles of the Treaty of Waitangi.

These are essentially the same issues as are outlined in our brief summary of the claimants' case.(see above, 4.1(iii),(iv))

4.3 The Argument for the Crown

The argument for the Crown is aimed directly at these issues and was summarised as follows:

- (a) The Crown has already carried out a consultative process with Maori prior to the enactment of the Act consistent with its Treaty obligations.
- (b) The capacity of the Crown to make redress for breaches of the principles of the Treaty (if any) remain [sic] unaffected by the Act.
- (c) The proposed transfer of the dams to energy companies pursuant to s 47 of the Act is not inconsistent with the principles of the Treaty.
- (d) It is not a breach of the principles of the Treaty for the Crown to fail to include reference to the Treaty in legislation or to specifically provide in such legislation a protective mechanism for Treaty claims - even if the claimants would be prejudiced by the transfers.(A9:2)

Subparagraph (b) deals with the question of the prejudicial affect of the proposed transfer of the dams. The other subparagraphs all address the question as to whether the action proposed under the Energy Companies

Act is inconsistent with the principles of the Treaty of Waitangi.

Chapter 5

Consideration of the Issues

5.1 Ownership of the Dams

We have already established that if the provisions of the Energy Companies Act are put into full effect the property in the Aniwhenua dam will pass from the Bay of Plenty Electric Power Board to Bay of Plenty Electricity Limited and the Wheao dam from Rotorua Area Electricity Authority to Rotorua Electricity Limited. The capital in these companies will be variously held by a large number of shareholders.

Inherent in the argument for the claimants is that this process will cause prejudice to them in that, if their grievances are established, the possibility of redress will be diminished. Their counsel submitted:

There are substantive Treaty issues which need to be resolved before the transfer of the "fee simple" rights and interest can take place if further prejudice and/or the possibility of further prejudice to the claimants is to be avoided.

If the transfer takes place redress for grievances, if later proved, will be impossible.

Te Ika Whenua do not seek to stop the transfer of interim use rights of the generation assets to energy companies. It is the vesting of the fee simple ownership that represents the main source of prejudice to the claimants. They see such a vesting as effectively denying them the ability to have their substantive issues presented to the Tribunal before they are further and perhaps irreversibly prejudiced.(A7:5-6)

Both the Bay of Plenty Electric Power Board and Rotorua Area Electricity Authority are bodies corporate established by statute, the former being established under the Electric Power Boards Act 1925 and the latter under the Electricity Distribution Commission Act 1967. As statutory corporations they derive their powers from the Acts under which they were created and their performance is limited accordingly.

As Dr Bertram pointed out, in view of the thrust of government policy for Electrical Supply Authorities (ESAs) towards corporatisation and possibly

privatisation, the issue of who actually owned the assets of ESAs was material. He indicated possible owners as electors, ratepayers, consumers or taxpayers and traversed the various attempts made by government officials to settle just who the true owners of these assets were(A6:15-21).

Official attempts to determine ownership culminated with a legal opinion from Crown Law Office addressed to the Secretary of Commerce, and dated 26 October 1989, in which the following statement is made:

However, I have no doubt that, in the legal sense, there is no "owner" of an electric power board, and no one, other than the board itself, who would be empowered to seek compensation in the event of a board being converted into a company.(A6(a):66)

That opinion accords with the view of this tribunal. It may be that we have taken an overly simple approach, but there can be no doubt that the creation of power boards and other supply authorities was undertaken by government to facilitate its task of arranging an electricity distribution network throughout New Zealand. The establishment of power boards in local areas with local involvement enabled the government to detach itself from direct responsibility for the distribution of power to the consumer. Power boards have no shareholders and there is no provision in the Act for payment of dividends or for distribution of assets. No persons or group of persons can legitimately claim a right of ownership in the assets of the boards. The boards are, as we have said, a creature of statute and it is only by statute that they can be regulated or any disposition of their assets provided for other than those dispositions which are carried out in the normal course of their business. Only the government by statute has any power of regulation and control of the boards and their assets.

On 16 March 1990, the Officials Co-ordinating Committee on Electricity Restructuring issued a report to Cabinet(A6(a):18-59). On the initial ownership of shares/sales proceeds the committee stated:

Since the legal ownership of ESAs provides no assistance in identifying the recipients of ESC [energy supply company] shares or sales proceeds, the decision must be made on equity or income redistribution grounds. Under these circumstances the decision as to which group should receive the shares or proceeds from sale is properly one for ministers, who are able to reflect the government's view of the equity issues involved. However officials can provide advice on the historical role of each group in relation to ESAs and on the transactions cost associated with distribution to each group of the proceeds or shares.(A6(a):37)

That statement also recognised that the government has the power of

regulation and control of the boards and their assets. That recognition was followed through in the Energy Companies Act where the government has provided for the assets of power boards to be transferred to energy companies to be created. Thus, the government clearly regarded those assets as under its power and control, albeit, by legislation.

We emphasise that we do not regard these as state owned assets. They are simply assets over which the government has power and control. This position must be contrasted with the situation that will exist once they are transferred to energy companies. Then they will be owned by companies, which will be responsible to shareholders, who by virtue of their shareholding, will own an interest in the assets and undertaking of the companies. In other words, the assets will pass from Crown control to third party ownership.

5.2 Consultation with Maori

Paragraph 9.1(a) of the particulars of urgent claim contends that the claimants are, or are likely, to be prejudicially affected by certain policies and practices of the Crown that are inconsistent with the principles of the Treaty of Waitangi including:

The omission of the Crown to institute and employ a process of consultation with the claimants when the Crown is purporting to develop policy or legislation or any other exercise of Article I powers [of kawanatanga or government] that will impact upon the Article II guarantees [of tino rangatiratanga or chieftainship] made by the Crown to the claimants and affecting their claim before the Waitangi Tribunal;...(1.1(d):12)

In response, counsel for the Crown submitted:

The Crown has not acted inconsistently with the principles of the Treaty by failing to consult with the Claimants. The principles of the Treaty do not require the Crown to consult in the manner alleged in paragraph 9.1(a) of the statement of claim. Prior to the enactment of the ECA 1992 the Crown, consistent with its Treaty obligations to act reasonably and in good faith to its treaty partner, consulted with Maori about its intention to corporatise the electricity supply authorities ("ESAs").

The consultation process, consistent with the development of broad base national policy, was initiated in the first instance by the Crown, by inviting a number of Maori organisations including the National Maori Congress, the [New Zealand] Maori Council, and the National Maori Women's Welfare League, to meet and discuss the proposed reforms.

As the Tribunal noted in the Fisheries Settlement Report 1992

(WAI 307), the Crown, in developing broad base policy, is not required to consult with every interested party. The Crown has in this case discharged its Treaty obligations to consult. The principles of the Treaty do not require the Crown to consult with all iwi when dealing with broad base national policy such as that contained in the ECA 1992.(A9:3)

The submissions then referred to a number of consultations with Maori including:

- (i) correspondence in October 1991 and 24 January 1992 by Sir Peter Elworthy, chairman of the Electricity Distribution Reform Unit, inviting the New Zealand Maori Council, the National Maori Congress, the Maori Women's Welfare League and the Federation of Maori Authorities to a meeting to discuss the Crown's reform proposals(A9;A9(e));
- (ii) a meeting by the Electricity Distribution Reform Unit with the Maori Women's Welfare League on 19 November 1991(A9:4);
- (iii) a meeting between the Crown including the Minister of Energy, Mr Luxton, with the National Maori Congress and representatives of iwi with interests in water and geothermal resources on 28 January 1992(A9:4;A9(f)); and
- (iv) submissions made by a number of Maori organisations including the National Maori Congress, the Tainui Maori Trust Board and the Whanganui River Maori Trust Board to the Parliamentary Select Committee on Planning and Development which reported back to the House on the Energy Sector Reform Bill (A9:4;A9(b);A9(c);A9(d)).

With regard to these consultations the Crown submitted:

The National Congress specifically recommended to the select committee that the Bill needed to be redrafted to provide a place for the Treaty. Congress claimed that Maori have an equitable interest in the ownership of the ESAs and that the Crown had an obligation to ensure preservation of options for the resolution of Treaty claims. Similarly, the Whanganui River Trust Board recommended that the Bill include effective recognition of the Treaty and other necessary protection of the claims of the Whanganui Trust Board. Each of these submissions was based on a claim, similar to that of the Claimants here, that since the Crown has not formally negotiated with or acquired from Maori their tino rangatiratanga rights in respect of water resources, this taonga still belongs to them.

The thorough consultation process outlined above enabled the Crown to make an informed decision about the impact of the proposed legislation

upon Maori interests and whether the legislation would be inconsistent with its Treaty obligations. As Dr Bertram has reported (Volume I pp 21-22) the Crown has given specific consideration as to whether or not a proportion of supply authority shares should be held back by it for the settlement of claims.

Consultation does not of course require open-ended negotiation. In *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 ("the Lands case") Richardson J formulated the duty to consult in this way:

"In truth the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and it cannot be regarded as implicit in the Treaty. I think the better view is that the responsibility of one treaty partner to work 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 of the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith." (at p.683)

The Crown has fairly and properly informed itself of the impact of the principles of the Treaty. It has not acted inconsistently with the Treaty principles as the Claimants allege.(A9:4,5)

Counsel for the Crown then directed his attention to the possibilities of consultation under the Energy Companies Act 1992. He contended that the Act specifically provided for a consultation process which gave Maori the right to participate in the transfer process and to have their views taken into account in determining the ownership structure of the assets to be transferred. Thus Maori had the further opportunity to be heard on such matters as those concerning the claimants in the instant case, namely the desire to share in the income of future operations of ESA assets. He pointed to the fact that local Maori had been specifically consulted by both the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority(A9:5,6).

The tribunal fails to see any merit in such argument or the significance of such consultation. The Act does not recognise the Treaty of Waitangi. Such consultation is on the basis of the recognition of the local Maori as consumers or interested groups. It is not a recognition of rights or claims under the Treaty of Waitangi. Nor is it a recognition of any rights or claims to assets.

The tribunal's view is reinforced by the attitude taken by the hearings

committee on the joint establishment plan for the Rotorua Area Electricity Authority and Tauranga Electric Power Board when land ownership issues and Treaty of Waitangi claims were raised.

The secretary's summary of submissions on such plan, contained within the Rotorua Electricity Establishment Plan, states:

Maori Issues

Iwi from Rotorua and Tauranga supported the direct consumer ownership proposal with the intention of aggregating their shares to gain a sizeable share of the company and providing a mechanism to enable Maori interests to retain control of shares initially allocated thereby helping to ensure continuing local ownership.

Several other Maori submissions raised land ownership issues and Treaty of Waitangi claims which were considered to be outside the scope of the Hearings Committee as the matter was between Central Government and the Maori claimants not the Board.(A5:secretary's summary,p6)

It seems to the tribunal that when one talks of energy reform proposals, one tends to associate this with the whole infrastructure of state power generation and distribution; also distribution to the consumer by electric power boards or other agencies. The major river tribes have lodged claims against the rivers on which the state hydro schemes are located. Energy supply authorities, such as the Rotorua Area Electricity Authority and the Bay of Plenty Electric Power Board also have hydro power generation schemes, but these are generally on a small scale and relatively few in number when compared with national schemes. The Energy Companies Act 1992 affects particularly those Maori claimants who have lodged claims against rivers on which those small hydro schemes exist and which under the Act will pass to energy companies. Maori people generally are not affected by the changes in any manner different from all New Zealanders, except where their Treaty rights are affected.

Evidence was given on behalf of the claimants that they were never consulted by the Crown. They had lodged a claim against the rivers and notice of that claim would have been given to the appropriate government department or agency. The Crown did not contest this evidence. Instead it sought to justify its lack of consultation by referring to consultation with the national and other organisations referred to earlier and by submitting:

The principles of the Treaty do not require the Crown consult with all iwi when dealing with a broad base national policy such as that contained in the ECA 1992.(A9:3)

The tribunal cannot accept this submission applies in the present case. Such argument may apply when a policy has wide-ranging effect over Maori assets, but surely, the test as to what consultation is necessary depends upon the effect of the legislation. The Act will serve to transfer a small number of hydro schemes and in this regard has limited effect. Even the Crown regarded the legislation in this light (A9(f)). The claimants are specifically concerned and we cannot understand why they were not involved in the consultation process.

The evidence would suggest that the Crown, in ignoring specific claims and seeking consultation with national Maori organisations, failed to perceive the nature and effect of the Energy Companies Act on local claimants such as Te Ika Whenua. It seems that the attitude of the Crown was to disregard or possibly misconstrue the effect of the Bill on the transfer of the small hydro schemes. The Crown's position could perhaps be exemplified in an undated letter from the Minister of Energy, Mr Luxton, to the National Maori Congress in response to a letter from it to him dated 28 January 1992 wherein he stated:

In respect of interests in water and land stemming from reform in the energy sector, any such implications would be largely associated with reform in generation or transmission. The Energy Sector Reform Bill focuses on the distribution part of the electricity and gas industries and does not have any legislative provisions relating to ownership or control of the generation or transmission of electricity. I recognise that Electricity Supply Authorities do undertake a small amount of electricity generation, but the Bill provisions would not directly effect any change in ownership of these authorities.(A9(f))

Accordingly while we agree that there has been some effort to consult, there has not been consultation with the people directly concerned with the impact of the Energy Companies Act 1992, such as the claimants. Counsel for the Crown referred to the "duty to consult" formulated by Mr Justice Richardson in "the Lands case" and submitted that the Crown had fairly and properly informed itself of the impact of the principles of the Treaty(A9:4-5). We disagree. The lack of consultation with the claimants means that we cannot say that the Crown has put itself in a position 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 that it has had proper regard of the impact of the principles of the Treaty.

5.3 Are the Claimants Prejudicially Affected?

The argument put forward by the Crown was that, regardless of the proposed transfer of the dams, it still had the capacity to provide redress

for a breach of the principles of the Treaty of Waitangi (as yet to be established)(A9:7). Counsel cited the decision in *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 ("Broadcasting Assets")(ibid). There the Court of Appeal held that the proposed transfer of broadcasting assets to Radio New Zealand Limited and Television New Zealand Limited would not be contrary to the principles of the Treaty because the capacity of the Crown to fulfill its Treaty obligations remained unaffected. McKay J held at pp 602-603:

The situation in this case differs from that in *New Zealand Maori Council v Attorney-General* [the Lands case]. There the asset which the Crown was proposing to transfer was land which was subject to Treaty claims. Here, the assets are not themselves the subject of actual potential Treaty claims. They are assets used by the Crown for broadcasting purposes, and in this way become linked to the Crown's discharge of its Treaty obligation to protect the Maori language. The Crown proposals involve a commitment to enter into a contract with Television New Zealand Ltd and Radio New Zealand Ltd prior to the transfer of assets to them which would guarantee access to the transmission and production facilities for Maori broadcasters. Even apart from such contractual arrangements, the particular assets are not essential for Maori broadcasts. They are substitutable, at least to the extent that funds are made available.

At present the generating assets, while owned by power boards, are under the direct legislative control of the government as is evidenced by the Energy Companies Act. While these assets remain under such ownership, there is still the distinct possibility, in the event of a successful claim, of negotiating with the Crown over these assets as part of the settlement process. Once they are transferred to energy companies they effectively belong to those companies. There would then be no simple way whereby arrangements in respect of those assets could be made with the Crown as part of a settlement. If the Crown were by legislation to impose conditions in respect of those assets, it would then be faced with having to compensate the respective energy companies for any losses that might result. We would see any government as being reluctant to involve itself in such a situation. The capacity of the Crown to make redress in the event of a successful claim would be greatly impaired by the transfer of these assets.

The situation in the Broadcasting Assets case can be clearly distinguished from that in the present case. In the Broadcasting Assets case, ownership rights to a traditional resource, highly prized for sustenance, were not at issue.

We find, therefore, that the claimants' position is likely to be prejudicially affected by the proposed transfer of the dams in accordance with the

Energy Companies Act 1992.

5.4 Is the Proposed Transfer of the Dams Inconsistent with Treaty Principles?

The substantive claim relates to the Rangitaiki and Wheao rivers. Essential ingredients of the claim are the denial of tino rangatiratanga in the granting of water rights and the erection of power schemes. The effect on the rivers and the claimants food sources, particularly eels, are said to be, in their terms, disastrous.

In the event of the substantive claim being successful, the water rights for power generation and the two dams could be material in any settlement proposed between the claimants and the Crown. If it is found that any of the elements of ownership, control or tino rangatiratanga have been denied to the claimants in breach of the principles of the Treaty of Waitangi, then we envisage a settlement might involve questions of payment for water rights, ownership of the dams and payment for power generated. The claimants have mentioned specifically the loss of the eel population and the lack of the water flow so that provision for construction of eel by-passes and reduced water use for power generation could be further possibilities. In this scenario, the assets themselves would be directly affected.

The Crown, in response to the claimants' original requests (see above 1.2), presented the following argument:

The capacity of the Crown to grant redress in the specific terms sought above is unaffected by the ECA 1992. The ECA 1992 does not impact upon the Crown's capacity to recognise ownership of the rivers compensate the Claimants for the loss of income, or to liaise with the two authorities to build appropriate channels for eels.

As to the claim that the Crown make an appropriate mechanism to enable the claimant to share in the income of the future operation of the dams, the ECA 1992 itself specifically provides for a mechanism (namely shares) in an energy company so that the Claimants and other Iwi in the Bay of Plenty and Rotorua areas can share in the income of the two dams. As already indicated, the Bay of Plenty Establishment Plan allows Maori to aggregate their shares and thus to exert greater influence over the new energy company in a manner which the Crown understands is consistent with collective Maori ownership and control. It is conceivable that with such greater control and influence, Maori could direct that the new energy company build appropriate channels for eels to migrate up and down the rivers.(A9:12-13)

We would agree with the statement that the ECA 1992 does not impact upon the Crown's capacity to recognise ownership of the rivers,

compensate the claimants for the loss of income, or to liaise with the two authorities to build appropriate channels for eels. We would also agree that there might be no impact on the capacity of the Crown to act positively, but the desire or willingness of the Crown to so act could be greatly affected. The transfer of the dams and water rights to energy companies, third parties with shareholders holding rights would have become a *fait accompli*.

In recent months, there has been much discussion over claims and recommendations affecting the rights of third parties, and, seemingly, a general reluctance to see those rights affected. By way of example, we refer to the introductory speech of the Minister of Maori Affairs introducing the Treaty of Waitangi Amendment Bill 1993 prohibiting recommendations by the tribunal that the Crown acquire ownership of any land or interest in land held by any person(A7(b):11). We question therefore the proposed creation of such rights in respect of such assets before the substantive claims are determined. Furthermore as regards liaison by the Crown with the two companies over construction of eel channels, the question of successful negotiation would depend on the willingness of a third party.

As regards the submission that Maori by aggregating their shares could exert a greater influence, this is nothing more than the ordinary entitlement of each consumer. It is not an additional share allocation to compensate Maori for breaches of the Treaty. We cannot accept the submission that the proposed share allocations are a mechanism which go to satisfy the claimants' claims. Nor can we accept the Crown's understanding that greater influence over the company is consistent with collective Maori ownership and control. Certainly it is not consistent with Treaty principles of tino rangatiratanga and partnership.

Over the past few years there have been a number of cases all determined by the Court of Appeal in connection with proposed transfer of Crown owned assets. The first of these was *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 "SOE Case". In that case at page 664 of the report the President of the Court of Appeal Cooke, P said:

What has already been said amounts to acceptance of the submission for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. 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 Te Atiawa, Manukau and Te 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.

The Court of Appeal was clearly enunciating and approving the same proposition that had previously been pronounced in the Waitangi Tribunal reports referred to by the President.

In the present case, the evidence before the tribunal shows that the Crown proposes, per medium of the Energy Companies Act 1992, to transfer assets which are an integral part of the claimants' case. While these assets are not directly owned by the Crown, they are certainly under its control. Energy companies, however, will be independent of Crown control and will be owned by shareholders. Such transfers will greatly affect the possibility of any fair, equitable and just settlement of the claimants' claim.

The effect of the Act and the transfer of these assets on this claim is not consistent with the fiduciary obligations placed on the Crown by the Treaty of Waitangi. We find it inconsistent with the principles of the Treaty that these particular assets should be transferred into third party ownership while they are the subject of claims. We do not think that the Crown should arrange for the disposal of these dams and water rights while they are so affected and thereby prejudice the claimants' position.

5.5 Is the Legislation in Breach of Treaty Principles?

The Crown submitted that it was not "inconsistent with the principles of the Treaty for the Crown to exclude any specific reference to the Treaty legislation, or, in this case, to specifically exclude a Treaty protection clause".(A9:14) We accept that it is not *necessarily* inconsistent. The fact that the Crown has so legislated does not mean that the principles of the Treaty have been satisfied. The Crown further submitted that for the Tribunal to conclude that such a clause should have been included "would be to usurp the sovereignty of Parliament".(A9:14) We cannot accept this submission. The Waitangi Tribunal is empowered under its Act to inquire into and determine and make recommendations in cases where it finds breaches of the Treaty.

We quote again from the decision of Cooke, P in the "SOE Case" referred to above at page 664:

In this context the issue becomes what steps should be taken by the

Crown, as a partner acting towards the Maori partner with the utmost good faith which is the characteristic obligation of partnership, to ensure that the powers in the State-Owned Enterprises Act are not used inconsistently with the principles of the Treaty. It was argued for the applicants that whether in any instance the transfer of a particular asset would be inconsistent with the principles of the Treaty is a matter of fact. That is so, but it does not follow that in each instance the question will admit of only one answer. If the Crown acting reasonably and in good faith satisfies itself that known or foreseeable Maori claims do not require retention of certain land, no principle of the Treaty will prevent a transfer.

I use "reasonably" here in the ordinary sense of in accordance with or within the limits of reason. The distinction is between on the one hand what a reasonable person could do or decide, and on the other what would be irrational or capricious or misdirected. Lawyers often speak of *Wednesbury* unreasonableness, in allusion to the case reported in [1948] 1 KB 223, but I think that it comes to the same thing.

As has been previously stated in the present case, it appears that the Crown has failed to satisfy itself as to the effect of the Act on the Te Ika Whenua claim. This is hardly surprising when one considers the views of the majority of officials (Treasury, Ministry of Commerce, Department of the Prime Minister and Cabinet and the SOE unit) dissenting from the assumptions and recommendations made by Manatu Maori and Justice. Those views are reported in the Official Co-ordinating Committee paper to Cabinet State Agencies Committee, dated 16 March 1990:

ESAs/MEDs are not part of the Crown (nor is it intended that ownership pass to the Crown) and hence land held by them is non-Crown land. They are not subject to the provisions of the Treaty of Waitangi Act.(A6(a):54)

The above statement portrays a very narrow view of the Treaty of Waitangi Act 1975. That legislation extends to consideration of any enactment or act or omission which is contrary to the principles of the Treaty. As can be seen from our later comment on the substantive claim (chapter 6) we find there are serious questions to be answered on the application of the principles of the Treaty to the proposed transfer of assets under the Energy Companies Act.

As the Crown has failed to satisfy itself as to the effect of the Act in the Te Ika Whenua claim the Crown can hardly be said to be acting reasonably and in good faith in the terms of Cooke, P in "the SOE case" cited above.

Waitangi Tribunal Reports

The absence of any protective mechanism in the legislation denied claimants any recourse to the Courts to enforce their Treaty rights and left them no alternative but to bring a claim to the Waitangi Tribunal.

Chapter 6

The Substantive Claim

We must emphasise that we have not prejudged the substantive claim in any way. As commented earlier, this claim is not before us and remains to be determined by the tribunal at another date. We do however point to the tribunal decision on the Mohaka River Report (Wai 119) which involves a successful claim in respect of the Mohaka River. That the Mohaka claim was successful does not mean that the Te Ikawhenua claim must succeed. The determination of this claim can only be made on a full presentation of submissions and evidence to the tribunal.

It would seem important to the parties and particularly to the Crown that the substantive claim be heard as soon as possible. It may be, and we do not suggest that it should be, that after perusal of the Mohaka Report and investigation into the claim, the Crown might be prepared to concede that the claimants have tino rangatiratanga over the rivers. If this were the case, then it would appear that the substantive claim could be confined to the rather narrow issue between the claimants' rights of tino rangatiratanga against the Crown's claim of kawanatanga - right to govern and manage resources in the best interests of the people of New Zealand.

The substantive claim includes claims against the dams and associated water rights. It involves loss of developmental rights. The Crown submitted that it would be a substantial leap in logic to conclude that a proven claim to tino rangatiratanga over rivers would include a right to generating assets on the rivers. We are not in a position to comment on that submission which remains a matter for determination when the substantive claim is heard.

In hearing and considering this urgent claim, it is not surprising that there have arisen before this tribunal matters and questions which will need to be determined as part of the substantive claim. We draw attention to some of these in the hope that they may assist the parties in their further consideration of that claim. The questions which we postulate are not intended as an exhaustive list of issues to be determined in the substantive claim but are merely a few arguments which would seem to be relevant to those proceedings.

The legislation whereby control of water rights and power generation were reserved to the Crown could be said to be an attempt by government to regulate and control a valuable natural resource for the benefit of all New Zealanders. No doubt any claim that this was a breach of tino rangatiratanga would be met by the counter-claim that it was a just and lawful exercise of the Crown's right of kawanatanga under the Treaty.

If we accept as a premise (hypothetically, of course) that the claimants had tino rangatiratanga and that the Crown's legislation was a lawful exercise of its kawanatanga, the following questions might be asked:

- (i) Under the provisions of the Energy Companies Act 1992, the Crown seeks to dispose of assets originally acquired from its Treaty partner under the exercise of kawanatanga. Should it be required under the principles of the Treaty to consult with its Treaty partner over the further disposal of those assets and to take into account the factors surrounding their original acquisition and their intended use - not by government or by government agency but by companies whose primary objective is to operate as a successful business and presumably to make and distribute profits from those assets to shareholders?
- (ii) If the Crown acquired the water rights and permitted erection of the hydro schemes under reasonable exercise of kawanatanga, can it be said that the enactment of the Energy Companies Act to rearrange power distribution is a further reasonable exercise of kawanatanga?
- (iii) If the answer to (ii) is "yes", and the Crown is seeking to dispose of the power board assets on an equitable basis, should it also look at the claims of Te Ika Whenua in considering those equities?
- (iv) Evidence showed that the Crown had been a major financial contributor to the hydro schemes. Did that give the Crown the right to claim an equity in those assets and could that equity be retained and used to satisfy the claims of Te Ika Whenua?

Summary of Findings and Recommendations

7.1 Findings

This urgent claim is based upon the possible effect of the Energy Companies Act 1992 and its amendments upon the claimants' substantive claim against the Wheao and Rangitaiki rivers. This tribunal has found that the action of the Crown in arranging for disposal of dams and water rights affected by this claim to third parties under the above Act is inconsistent with the principles of the Treaty of Waitangi.

The present urgent claim has a very narrow focus and in consequence it is possible for this tribunal to set out in brief form a summary of the facts it has found established and its findings.

- (i) The claimants have lodged specific claims against the Rangitaiki and Wheao rivers on 11 July 1991. These are recorded as WAI 212 and are referred to as the substantive claim. Those claims allege that the ownership and tino rangatiratanga of the claimants over those rivers has been infringed, inter alia, by the Crown reserving unto itself the sole and exclusive right to use water for the generation of power and permitting the subsequent construction of the Wheao and Aniwhenua dams.
- (ii) They further claim that this was contrary to the provisions of the Treaty of Waitangi in that their ownership, control and tino rangatiratanga over the rivers has been taken from them.
- (iii) They further say that the impact of the dams upon the river flow and availability as a food source has been marked and that their mana is affected. In addition through a variety of causes the purity of the water has been affected.
- (iv) They say that they have lost developmental rights in respect of the rivers.
- (v) The substantive claim has yet to be heard but if it is successful, then the dams, the water rights and their operation could play a material

part in any settlement as between the Crown and the claimants.

- (vi) The proposed transfer of those assets from the two authorities mentioned to energy companies established in accordance with the Energy Companies Act 1992 will remove those assets from the control and direction of the Crown to independent companies whose capital will be vested in various shareholders.
- (vii) The claimants are likely to be prejudicially affected in the terms of Section 6(1) of the Treaty of Waitangi Act 1975 in that should their substantive claim be successful their ability to negotiate with the Crown over these assets will have been negated.
- (viii) That under the Treaty of Waitangi the Crown has a fiduciary responsibility to act fairly with regard to its treaty partner. We find it inconsistent with the principles of the Treaty of Waitangi that these particular assets should be placed into third party ownership under the provisions of the Energy Companies Act 1992 while they are affected by claims. The tribunal does not think that the Crown should arrange for the disposal of these dams and water rights while they are the subject of claims and thereby prejudice the claimants' position.

7.2 Relief Sought in Particulars of Urgent Claim

In their particulars of urgent claim the claimants sought the following relief:

- (a) A recommendation to the Crown that the Energy Companies Act be amended to incorporate a mechanism that protects the claim of the claimants to the Rangitaiki and Wheao Rivers, their lands, flora and fauna (including fisheries); and
- (b) That the Minister of Energy decline to approve the establishment Plans of Bay Power and the RAEA pending the incorporation of the protection mechanism; and
- (c) That consultation with the claimants take place to establish an agreed method of protection to be employed by the Crown; and
- (d) That no transfer of any assets take place until the consultations referred to in subparagraph (c) have concluded.(1.1(c):14)

7.3 Relief Sought in Claimants' Closing Submissions

In the claimants' closing submissions the recommendations were restated to some extent with perhaps greater emphasis on negotiation between Te

Ika Whenua and the Crown as to a system for the protection of their substantive claim. Those submissions state:

The relief able to be sought by Te Ika Whenua in the circumstances of this urgent hearing prompted by the imminent transfer is necessarily limited.

What is sought is first a recommendation that the interests of Te Ika Whenua are to be protected from non Crown interests. What Te Ika Whenua seek, in the long term, will be the recognition of their tino rangatiratanga in the Rangitaiki and Wheao rivers.

This recognition, if the substantive claim is made out, may involve the vesting of the beds of the rivers in Te Ika Whenua or the relevant hapu, and a system of recognition which assures and gives effect to the authority of the tangata whenua in relation to the rivers as a whole i.e. waters and beds.

What is suggested is that the Tribunal recommend that the Crown negotiate with Te Ika Whenua to devise a system for the protection of their claim to te tino rangatiratanga over the Rangitaiki and Wheao rivers. This recommendation would also require the Tribunal to recommend that the transfer not take place until such a system had been agreed.

The Tribunal should reserve leave to the Crown or to Te Ika Whenua to return with their detailed proposals for a leave should agreement not be reached within six weeks.(A14:21)

Dr Bertram concluded his brief of evidence with a discussion of the possibility that the assets of electric supply authorities might be "unbundled" so as to deal separately with specific assets such as dams, power houses and the rights to use water.

Section 2 of the Energy Companies Act 1992, defining the undertakings to be transferred as including "all the assets" of existing undertakings, seemed to rule out the retention of specific assets. But the possibility clearly existed for blocks of shares (corresponding to specific assets subject to Treaty or other claims) to be set aside or allocated to claimants provided this was acceptable to the Minister(A6:10).

Supply authorities could retain specific assets to be used to satisfy meritorious Treaty or other claims. Alternatively, the Crown could take over such assets or allocate shares to meet such claims(A6:11).

The latter option would reduce the value of remaining shares allocated to consumers and community trusts, however, given that the "share recipients

have had no clearly-established claim to ownership prior to the establishment plan itself ...[this]... would mean not an actual loss to them, but merely a smaller gain from their share allocation."(ibid)

7.4 Recommendation

The tribunal has considered the various proposed recommendations and does not believe it should make its recommendation in such specific terms as are suggested.

The tribunal recommends:

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.

In the event of the Crown accepting and acting on such recommendation, it then becomes a matter for the Crown as to how it should be implemented. We observe that a simple way of preserving the status quo would be for the Minister not to approve the establishment plans of the Rotorua Area Electricity Authority and the Bay of Plenty Electric Power Board. On the other hand it may be more desirable for the plans to be approved and for the assets to be protected by legislation. That we believe is a matter for the Crown.

We also observe that we do not rule out the question of consultation and negotiation as between the Crown and the claimants through their counsel as to an agreed satisfactory method of protection pending the hearing of the substantive claim.

It must be remembered that Te Ika Whenua do not seek to stop the transfer of interim use rights of the generation assets to energy companies. They see the vesting of the fee simple ownership as representing the main source of prejudice to them.(see above chapter 5, page 27)

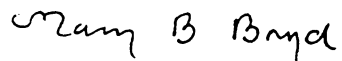
DATED at Wellington this 20th day of May 1993

A handwritten signature in black ink, appearing to read 'G Carter'.

Judge G Carter, presiding officer

A handwritten signature in black ink, appearing to read 'M. A. Bennett'.

M A Bennett, member

A handwritten signature in black ink, appearing to read 'M B Boyd'.

M B Boyd, member

Appendix 1

The Claim

MEMORANDUM TO WAITANGI TRIBUNAL REQUESTING URGENT HEARING OF WAI 212 ANIWHENUA AND WHEAO DAMS

1. Background Information - General

- 1.1 WAI 212 was received by the Waitangi Tribunal on 11 June 1991. The claimant is an incorporated Society, Te Runanganui o Te Ikawhenua (Called "Te Ikawhenua") representing the constituent hapu of Murupara. Paragraph (d) of the claim states that the Wheao and Rangitaiki Rivers are of significance to Te Ikawhenua. Paragraph (d) states:

"We claim that these rivers are of significance to Te Runanganui o Te Ikawhenua and that they belong to our people being part of the lands we now make claim for.

We believe that the Crown has been remiss in protecting our interests in respect of our rights to the Treaty of Waitangi Article II, by permitting the Rotorua Electric Authority and the Bay of Plenty Electric Power Board the erection of power generation stations on the Wheao and Rangitaiki Rivers respectively. At no time were we ever consulted by the Crown prior to the erection or since the erection, neither has [sic] the two authorities contacted us. Specifically our kaiawa (eels) for which we are nationally renowned have been deprived of their natural routes to reproductive channels, (they get minced in the turbines) as the migrate down to the sea AND neither can their offspring navigate up the Aniwhenua Dam.

Secondly, we have been seriously affected by the damage to our flora and fauna caused by the constructions which have taken place without our permission.

Thirdly, we have lost revenue ever since these dams have existed. We believe that if we had been recognised as the owners of these rivers, then we would have been in a position to develop joint

Waitangi Tribunal Reports

ventures AND this [sic] be now enjoying the fruits of such ventures.

We therefore ask that the Crown:

Recognise our ownership of these rivers.

Compensate Te Runanganui o Te Ikawhenua for the loss of income due to non protection under the Treaty of Waitangi.

Liaise with the two authorities above to build appropriate channels for our eels to migrate up and down the rivers.

Make appropriate mechanism so that we shall share in the income of the future operations of the two dams."

2. Background Information - Aniwhenua

- 2.1 Then Aniwhenua Dam is located on the Rangitaiki River. Attached marked "A" is a map depicting the dam site.
- 2.2 The dam, power house and canal that form the electricity generation unit known as the Aniwhenua Dam are on the banks and straddling the Rangitaiki River. The land tenure is a mixture of Crown land (Matahina Block ML47052 and Waiohau Block ML42063) and the Kaingaroa State Forest.
- 2.3 Currently the Bay of Plenty Electric Power Board ("BOPE") operates the Aniwhenua Dam. The BOPE is a Board established pursuant to the Electric Power Boards Act 1925.

3. Wheao Dam - Background Information

- 3.1 The Wheao Dam is located on the Wheao River. Attached marked "B" is a map depicting its location.
- 3.2 The section of the Wheao River upon which the dam is located is within the Kaingaroa State Forest and is subject to the Flaxy Creek Crown Forest Licence.
- 3.3 The Wheao Dam is currently operated by the Rotorua Area Electricity Authority ("RAEA"). The RAEA was constituted pursuant to an Order in Council made on 9 August 1971. The empowering legislation being the Electricity Distributing Commission Act 1967.

4. Energy Sector Reform

- 4.1 The Energy Companies Act 1992 is the culmination of the energy sector

reforms undertaken by the Commission. The Crown has stated that:

"The basic aim of the reforms is to introduce competition and contestable ownership by establishing ordinary companies under the Companies Act preferably with fully tradeable shares." (Media release from office of the Minister of Energy dated Tuesday 30 June 1992.)

- 4.2 Each Power Board including the BOPE and the RAEA must, not later than 31 December 1992, prepare and submit to the Minister of Energy, (for the Minister's approval) an establishment plan relating to the transfer, inter alia, of its energy generating assets (which include the Aniwhenua and Wheao Dams) to an energy company (section 18 Energy Companies Act). An energy company is a company form [sic] pursuant to section 32 of the Energy Companies Act. The BOPE and RAEA must not later than 1 April 1993 (or such later date if the Minister may allow) form and register under the Companies Act 1955 a Public Company Limited by shares.
- 4.3 The principle objective of an energy company shall be to operate as a successful business (section 36(1)). Its secondary objective is contained in section 36(2) and is, to have regard, among other things, to the desirability of ensuring the efficient use of energy.
- 4.4 The establishment plan submitted to the Minister must set out the recommendations as to the person or persons, or the class or classes of persons, to whom shares (voting rights) in the relevant energy company shall be allocated (section 22(1)).

5. Bay of Plenty Electricity Draft Establishment Plan

- 5.1 The BOPE draft establishment plan is dated 8 October 1992. It is proposed:
 - (a) That BOPE will form an energy company called.
 - (b) That energy generation assets, including Aniwhenua Dam, will be transferred at book value to the Bay of Plenty Electricity Ltd.
 - (c) That the authorised capital of the company will be 40 million shares each having a par value of \$1. The issued capital will be approximately 27.3 million \$1 shares. The shares will be split into 27 million class A rebatable shares and 300,000 class B ordinary shares. The balance of the shares will be retained as unissued capital for future expansion.
 - (d) The energy company will issue free of charge approximately 14 million class A shares (52% of the total) to residential customers on the basis of an equal number per connection address. This equates to approximately 800 shares per energy connection or domestic customer.

Waitangi Tribunal Reports

- (e) The balance of 13 million class A shares (or 48% of the total) will be allocated free of charge to qualifying non-domestic customers.
- (f) Class A shares will be rebatable. That means that a shareholder will receive an annual rebate on the electricity charge.
- (g) 75,000 of the class B ordinary shares will be allocated free of charge to a shareholder's society. The balance of the class B ordinary shares will be available for purchase by the employees of the energy company.
- (h) No single shareholder whether an individual or business will be allowed to hold more than 20% of the total number of allocated shares in any class.
- (i) Generally, no class A shares will be tradeable within the first two years of allocation.

6. Rotorua Area Electricity Authority - Draft Establishment Plan

The RAEA is proposing to establish a joint energy company with the Tauranga Electric Power Board.

The proposal is as follows:

- (a) RAEA and the Tauranga Electric Power Board will form an energy Company to be called Bay Energy.
- (b) The energy generation assets, including the Wheao Dam, will be transferred at book value to Bay Energy.
- (c) The company will have 100 million shares having a par value of 50 cents each and an asset backing of \$1.02 each.
- (d) The company will allocate at no cost 74% of the capital to consumers on the basis of 1,000 shares per account holder.
- (e) All consumers will be given the option of accepting shares or alternatively cash in lieu of shares.
- (f) There will be two community trusts formed (one for the Rotorua area and one for the Tauranga area). 25% of the shares will be allocated to the community trusts (10% and 15% respectively). These community trusts will use their funds for energy related charitable and other community purposes.
- (g) 1% of the shares will be allocated to an employee share purchase plan.
- (h) 200,000 shares will be allocated to the share allocation or the committee

which will be responsible for receiving and resolving complaints relating to the allocation of shares to account holders. No single shareholder shall be entitled to hold any more than 20% of the total shares unless a resolution of members passed by a majority of 60% of the votes cast is passed or the directors exercise their discretion to approve an increase in this percentage to 24.9%.

7. The Maori Interest

- 7.1 Te Ikawhenua claim tino rangatiratanga and other rights over both the Wheao and Rangatiratanga [sic] Rivers. These rights arise from the Treaty of Waitangi, customary and/or aboriginal title.
- 7.2 The construction and operation of these two dams have been and are undertaken without reference to or regard for Te Ikawhenua's rights and interests.
- 7.3 The use, diversion and polluting of the water of the Wheao and Rangitaiki Rivers by these dams is an affront to the mana and tino rangatiratanga of Te Ikawhenua.
- 7.4 The rights' obligations and interests of Te Ikawhenua in respect of these rivers have not been protected by the Crown.

8. Treaty of Waitangi Protection

- 8.1 The Energy Companies Act contains no reference to the Treaty of Waitangi or a scheme for protecting the assets which are going to be transferred to the energy companies form d [sic] pursuant to the Act. The privatisation of these public assets before the ownership and/or the claims of Te Ikawhenua have been settled is, it is submitted, contrary to the Treaty of Waitangi.
- 8.2 The Treaty of Waitangi places an obligation on the Crown to actively protect the Maori interest. It is submitted that the Energy Companies Act (particularly the contemplated transfer of assets to privately owned corporate entities) fails to meet the active protection requirement.
- 8.3 It is submitted that the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other. The Energy Companies Act and the proposed transfer of these assets to a privately owned entity without protecting Te Ikawhenua's position is a breach of this fiduciary duty.

9. Timetable Summary - BOPE

- 9.1 Bay of Plenty electricity draft establishment plan: 8 October 1992.

Waitangi Tribunal Reports

- 9.2 Closing date for submissions on draft plan: Tuesday 10 November 1992.
- 9.3 Submission of draft plan to Minister for Approval: 31 December 1992.
- 9.4 Establishment of energy company and vesting of assets in energy company - six weeks after the date of the order in council but no later than 1 April 1993 (page 5 draft establishment BOPE).

10. Timetable Summary - RAEA

- 10.1 RAEA draft establishment plan - no date.
- 10.2 Submissions [sic] of draft establishment plan on or before 20 November 1992.
- 10.3 Submission to the Minister of draft [sic] establishment plan for approval 31 December 1992.
- 10.4 Formation and vesting of assets in energy company - not known from establishment plan, however, Energy Companies Act requires that energy companies incorporated on or before 1 April 1993. The vesting of assets is to take place on a date appointed by the Governor [sic] General by order in council (section 47 Energy Companies Act).

11. Urgent Hearing Required to Determine Certain Vital Issues

- 11.1 Te Ikawhenua assert tino rangatiratanga over both the Wheao and Rangitaiki Rivers. The unauthorised use of waters of those rivers for power generation is a subject of a claim before the Waitangi Tribunal. Te Ikawhenua believe that the transfer of the assets (including the Aniwhenua and Wheao Dams) of the BOPE and RAEA to private companies and the contemplated vesting of shares in those companies to consumers will prejudicially affect Te Ikawhenua's claim before the Waitangi Tribunal and position generally.
- 11.2 Te Ikawhenua consider that the transfer of these assets to Energy Companies will prevent them from asserting their tino rangatiratanga over both rivers and be an affront to their mana and Kaitiaki role.
- 11.3 Te Ikawhenua therefore seek an urgent hearing before the Waitangi Tribunal so that the Tribunal may have the opportunity to consider and make recommendations to the Crown on the following issues:
 - (a) Whether or not Te Ikawhenua have tino rangatiratanga over the Wheao and Rangitaiki Rivers including its bed and waters.
 - (b) Whether or not the use of the waters of the river by the Crown for power generation is in accordance with the Treaty of Waitangi.

Te Ika Whenua - Energy Assets

- (c) Whether or not the transfer pursuant to the Energy Companies Act 1992 of the Wheao and Aniwhenua Dams to energy companies and [sic] is in accordance with the Treaty.
- (d) Whether or not the Energy Companies Act 1992 is contrary to the Treaty of Waitangi in that it does [sic] provide for mechanisms to protect Treaty claims or tino rangatiratanga of Maori over their taonga.
- (e) What protections should be put in place for the Maori interests before any further step [sic] are taken.

Whether or not the transfer should be delayed, or the dams should be excluded from the transfer.

Relief Sought

- (i) A recommendation to the Crown that the transfer of the dams should be delayed, or that the dams should be excluded from the transfer.
- (ii) The costs of bringing this claim.
- (iii) Compensation for loss arising from the unauthorised use of Iwi resources.

Dated at Wellington this 30th day of November 1992

Kathy Ertel
Counsel for Claimants

**MEMORANDUM FOR TRIBUNAL
PROVIDING FURTHER INFORMATION
IN RESPECT OF APPLICATION
FOR URGENT HEARING**

Te Ika Whenua

The Runanganui o Te Ikawhenua was formed pursuant to the Runanga-A-Iwi Act 1989. When this Act was repealed by the National government Te Ikawhenua became an incorporated society and continued with the same objects and aims as it had when it was being formed pursuant to the Runanga-A-Iwi Act. Attached as Schedule I is section 2 "Aims and Objectives" of Te Runanganui o Te

Ikawhenua Incorporated.

Membership of Te Ikawhenua is open to all persons who claim descent from the following Iwi:

Ngati Whare
Ngati Manawa
Ngati Patuheuheu
Ngai Te Huinga Waka (section 3)(c)) Rules of Te Ikawhenua

While each Iwi has their own rohe and no other Iwi would contemplate speaking for another in a rohe matter the constituent Iwi are able to use the legal entity of Te Ikawhenua Incorporated to further their claims and dealings with the Crown so long as to do so would not harm or disadvantage another constituent to Iwi.

The neighbouring Iwi who are not members of Te ikawhenua have been informed of the claim before the Waitangi Tribunal and this application for an urgent hearing. They are Te Arawa, Ngati Awa and Tuhoe. These neighbouring Iwi have no objection to the seeking of this urgent hearing.

Maori Congress Negotiations with the Crown

We understand that Congress have made submissions to the Crown seeking that the Crown transfer 20% of the shares in each Energy Company to a Trust until outstanding Treaty grievances in respect of the assets transferred can be resolved. Te Ikawhenua does not wish to prejudice these negotiations with the Crown, however, the claimants consider that their concerns cannot be adequately addressed through the ownership of shares and the current Energy Companies Act regime. Section 36 of the Energy Companies Act specifies that the principal objective of any energy company shall be to operate as a successful business (section 36)(1)). This raises the concern in the mind of the claimants that the holding of shares will not give them enough sway in the face of the principal objective stated above to address all of their grievances. For example, the relevant energy company may see the building of channels for eels to migrate up and down the rivers as not cost effective given their principal objective. Further, the claim of Te Ikawhenua relates to past losses because of the operation of the dams.

The transfer per se of the dams to a privately owned entity will restrict or negate the Crown's ability to use these dams in any settlement package which may be negotiated in the future by Te Ikawhenua upon the outcome of their claim.

Crown's Conduct in Breach of Treaty

Ngati Manawa claim tino rangatiratanga over both rivers, the actions of the Crown in the construction of these Dams and use of the water fails to protect and recognise this tino rangatiratanga.

Proposed Solutions

It is understood that to date the Crown's position on energy reform is that the reforms have not directly affected or involved Maori claims - which are seen as relating to the resources used to generate electricity.

However, these resources are involved because, among the assets operated by local power companies apparently being transferred are dams and/or the water rights associated with them.

The claimants suggest that either of the following two methods could be employed to safeguard their interests:

1. That the transfer take place but only use rights are transferred to energy companies, the fee simple being retained in Crown ownership. A clawback provision in respect of the use rights could also be included in the transfer arrangements. This would enable the energy company to operate but also protect Te Ikawhenua because the fee simple ownership still vests with the Crown; or
2. The transfer of the fee simple take place but the title have a memorial on it in similar terms to section 27D of the State Owned Enterprises Amendment Act.

Dated at Wellington this 16th day of December 1992

Kathy Ertel
Counsel for Claimants

PARTICULARS OF URGENT CLAIM

WHEREAS:

- A. In 1840 the claimants had tino rangatiratanga over inter alia all the land, flora and fauna, (including fisheries), Rangitaiki River, Wheao River and other resources within their rohe (tribal area).
- B. The claimants are the tangata whenua over portions of the Rangitaiki

Waitangi Tribunal Reports

River² and all of the Wheao River.

- C. The claimants claim that the Wheao and Rangitaiki Rivers are their taonga and subject to their tino rangatiratanga. The exercise of tino rangatiratanga, for the purposes of this hearing, requires them to protect their rights pursuant to the Treaty of Waitangi.
- D. The claimants claim that they have never relinquished their tino rangatiratanga over their taonga, the Rangitaiki and Wheao Rivers, guaranteed to them by the Treaty of Waitangi.
- E. The Aniwhenua Dam is located on the Rangitaiki River over which tino rangatiratanga is claimed by the claimants. Currently the Bay of Plenty Electric Power Board ("Bay Power") operates the Aniwhenua Dam.
- F. The Wheao Dam is located on the Wheao River over which tino rangatiratanga is claimed by the claimants. Currently the Rotorua Area Electricity Authority ("RAEA") operates the Wheao Dam.
- G. The claimants claim that the authorisation, construction and operation of the Wheao and Aniwhenua Dams on the Rangitaiki and Wheao Rivers were and is in breach of the Treaty of Waitangi in that the construction and operation (which includes large scale water use) was unauthorised by them and represented a failure by the Crown to acknowledge, protect and give effect to their tino rangatiratanga over their taonga.
- H. The claimants claim that the construction of the Wheao and Aniwhenua Dams contravenes their full exclusive and undisturbed possession of their fisheries in the rivers.
- I. The claimants claim that the breaches of the Treaty of Waitangi alleged above have not been remedied.
- J. Hohepa Joseph Waiti and Kingi Porima on behalf of themselves and on behalf of the constituent hapu of Ngati Manawa, Ngati Whare, Ngati Patuheuheu and Ngati Huinga Waka all represented by Te Runanganui o Te Ika Whenua ("the claimants") registered a claim with the Waitangi Tribunal (WAI 212) on 11 June 1991.
- K. The Government developed policies affecting the claimants claim and their taonga.
- L. Parliament enacted the Energy Companies Act 1992 ("the Act"). the Governor-General assented to the Act on 25 June 1992.

² where, in this document, the term Rangitaiki River is used it means, for present purposes, the portion within the claimants rohe.

- M. The Act compels the Bay Power and RAEA to prepare and submit to the Minister, for the Ministers approval, an establishment plan relating to the transfer of their "energy undertaking" to privately owned legal entities.
- N. For the purposes of the Act the Aniwhenua Dam is part of the energy undertaking of the Bay Power and the Wheao Dam is part of the RAEA's energy undertaking.
- O. Both Bay Power and RAEA's establishment plans contemplate the transfer of the relevant Dam to a Public Company whose shares will be owned in varying proportions by, consumers of electricity, a shareholders society, community trusts and/or employees.
- P. The Act does not provide a mechanism to protect the claimants claim
- Q. The claimants claim that the Crown's failure to protect their interests is in breach of the Treaty of Waitangi and the fiduciary duty of the Crown to the claimants.
- R. The claimants claim that the transfer of the Aniwhenua and Wheao Dams will compound and aggravate the original breaches of the Treaty of Waitangi referred to in paragraphs G and H.
- S. The claimants claim that the policy behind and the provisions of the Act that enable the transfer of the Dams is a further breach of the Treaty of Waitangi.
- T. The claimants claim that they will be prejudiced by the transfer of the Aniwhenua and Wheao Dams to privately owned legal entities.

BACKGROUND INFORMATION

1 The Original Claim - WAI 212

- 1.1 The claimants lodged their claim with the Waitangi Tribunal on 11 June 1991. Paragraph (d) of the original claim relates to the Wheao and Rangitaiki Rivers, it states:

"We claim that these rivers are of significance to Te Runanganui o Te Ika Whenua and that they belong to our people being part of the lands we now make claim for.

We believe that the Crown has been remiss in protecting our interests in respect of our rights in the Treaty of Waitangi Article II, by permitting the Rotorua Electric Authority and the Bay of Plenty Electric Power Board the erection of power generation

Waitangi Tribunal Reports

stations on the Wheao and Rangitaiki Rivers respectively. At no time were we ever consulted by the Crown prior to the erection or since the erection, neither has the two authorities contacted us. Specifically our kaiawa (eels) for which we are nationally renowned have been deprived of their natural routes to reproductive channels, (they get minced in the turbines) as they migrate down to the sea AND neither can their offspring navigate up the Aniwhenua Dam.

Secondly, we have been seriously affected by the damage to our flora and fauna caused by the constructions which have taken place without our permission.

Thirdly, we have lost revenue ever since these dams have existed. We believe that if we had been recognised as the owners of these rivers, then we would have been in a position to develop joint ventures AND thus be now enjoying the fruits of such ventures.

We therefore ask that the Crown:

Recognise our ownership of these rivers.

Compensate Te Runanganui o Te Ikawhenua for the loss of income due to non protection under the Treaty of Waitangi.

Liaise with the two authorities above to build appropriate channels for our eels to migrate up and down the rivers.

Make appropriate mechanism so that we shall share in the income of the future operations of the two dams."

2 Aniwhenua Dam

- 2.1 The Aniwhenua Dam is located on the Rangitaiki River. Attached marked "A" is a map depicting the dam site.
- 2.2 Currently the Bay of Plenty Electric Power Board operates the Aniwhenua Dam. Bay Power is a Board established pursuant to the Electric Power Boards Act 1925.

3 Wheao Dam

- 3.1 The Wheao Dam is located on the Wheao River. Attached marked "B" is a map depicting the location of the Wheao Dam.
- 3.2 The Wheao Dam is currently operated by the Rotorua Area Electricity

Authority. The RAEA was constituted pursuant to the Electricity Distributing Commission Act 1967.

4 Energy Companies Act 1992

- 4.1 The Energy Companies Act 1992 was given royal assent on 25 June 1992.
- 4.2 By the Act, both the Bay Power and the RAEA must not later than 31 December 1992 prepare and submit to the Minister of Energy, for the Minister's approval, an establishment plan relating to the transfer inter alia its energy generating assets (which include the Aniwhenua and Wheao Dams) to an energy company (section 18 Energy Companies Act). An energy company is a company formed pursuant to section 32 of the Energy Companies Act. The Bay Power and RAEA must not later than 1 April 1993 (or such later date if the Minister may allow) form and register under the Companies Act 1955 a Public Company Limited by shares.
- 4.3 The principle objective of an energy company shall be to operate as a successful business (section 36(1)).
- 4.4 The establishment plan submitted to the Minister must set out the recommendations as to the person or persons, or the class or classes of persons, to whom the shares (voting rights) in the relevant energy company should be allocated (section 22(1)).

5 Bay of Plenty Electricity Draft Establishment Plan

- 5.1 The Bay Power draft establishment plan is dated 8 October 1992. It is proposed:
 - (a) That Bay Power will form an energy company. The energy undertaking, including the Aniwhenua Dam and the adjunctive water rights of Bay Power will be transferred to the Energy Company.
 - (b) That the authorised capital of the company will be 40 million \$1 shares. The issued capital shall be approximately 27.3 million \$1 shares. The shares will be split into 27 million class A rebatable shares and 300,000 class B ordinary shares. The balance of the shares will be retained as unissued capital for future expansion.
 - (c) The energy company will issue free of charge approximately 14 million class A shares (52% of the total) to residential customers on the basis of an equal number per connection address. This

Waitangi Tribunal Reports

equates to approximately 800 shares per energy connection or domestic customer.

- (d) The balance of 13 million class A shares (or 48% of the total) will be allocated free of charge to qualifying non-domestic customers.
- (e) Class A shares will be rebatable. That means that a shareholder will receive an annual rebate on the electricity charge.
- (f) 75,000 of the class B ordinary shares will be allocated free of charge to a shareholder's society. The balance of the class B ordinary shares will be available for purchase by the employees of the energy company.
- (g) No single shareholder whether an individual or business will be allowed to hold more than 20% of the total number of allocated shares in any class.
- (h) Generally, no class A shares will be tradeable within the first two years of allocation.

6 Rotorua Area Electricity Authority - Draft Establishment Plan

6.1 The RAEA is proposing to establish a joint energy company with the Tauranga Electric Power Board. The proposal is as follows:

- (a) That RAEA will merge with the Tauranga Electric Power Board and form an Energy Company. The energy undertakings, including the Wheao Dam and the adjunctive water rights of RAEA will be transferred to the Energy Company.
- (b) The company will have 100 million shares having a par value of 50 cents each and an asset backing of \$1 and 2 cents each.
- (c) The company will allocate at no cost 74% of the capital to consumers on the basis of 1,000 shares per account holder.
- (d) All consumers will be given the option of accepting shares or alternatively cash in lieu of shares.
- (e) There will be two community trusts formed (one for the Rotorua area and one for the Tauranga area). 25% of the shares will be allocated to the community trusts (10% and 15% respectively). These community trusts will use their funds for energy related charitable and other community purposes.
- (f) 1% of the shares will be allocated to an employee share purchase

plan.

- (g) 200,000 shares will be allocated to the share allocation or the committee which will be responsible for receiving and resolving complaints relating to the allocation of shares to account holders. No single shareholder shall be entitled to hold any more than 20% of the total shares unless a resolution of members is passed by a majority of 60% of the votes cast or the directors exercise their discretion to approve an increase in this percentage to 24.9%.

7 Treaty of Waitangi Protection

- 7.1 Neither the policies developed by Government nor the Energy Companies Act contain any mechanism protecting the claimants underlying claim to the assets and to the resources which are proposed to be transferred to the energy companies formed pursuant to the Act.

8 Outline of Underlying Claim

- 8.1 The claimants have an underlying claim which will be affected by the transfer of the assets to energy companies, based on the following allegations:
 - (a) In 1840 the claimants had tino rangatiratanga over inter alia the land, flora, fauna (including fisheries), water and other resources within their rohe (tribal area).
 - (b) The Rangitaiki and Wheao Rivers are the taonga of the claimants in respect to which the Crown by virtue of the Treaty of Waitangi guaranteed to the claimants te tino rangatiratanga (full exclusive and undisturbed possession).
 - (c) The fisheries in the Rangitaiki and Wheao Rivers are taonga of the claimants.
 - (d) The claimants have never relinquished their tino rangatiratanga over the Rangitaiki and Wheao Rivers or of their fisheries in it.
 - (e) The Crown, in breach of their obligation to acknowledge, protect and give full effect to the claimants tino rangatiratanga, authorised and/or enabled the construction and operation (which includes large scale water use) of the Wheao and Aniwhenua Dams.
 - (f) The authorisation, construction and/or operation of the Wheao and Aniwhenua Dams interferes with the claimants tino rangatiratanga over their fisheries in the Rangitaiki and Wheao Rivers. The

Waitangi Tribunal Reports

Crown actions which enabled the construction and operation of the Dams failed to give effect to the Treaty guarantees in respect to the claimants fisheries.

- 8.2 The underlying claim has not been presented to the Waitangi Tribunal or in any way settled.
- 8.3 This outline is intended only to indicate the general terms of the Maori entitlement and the Treaty breaches for the limited purpose of this hearing. It is not a complete and detailed recital of the substantive claim. The claimants rights in respect of their claim are in every respect reserved.

URGENT CLAIM

9 Particulars

- 9.1 The claimants are or likely to be prejudicially effected by the following enactments, omissions, policies and practices of the Crown that are inconsistent with the principles of the Treaty of Waitangi. The enactments, omissions, policies and practices are:
 - (a) The omission of the Crown to institute and employ a process of consultation with the claimants when the Crown is purporting to develop policy or legislation or any other exercise of Article I powers that will impact upon the Article II guarantees made by the Crown to the claimants and affecting their claim before the Waitangi Tribunal; and
 - (b) The omission of the Crown to maintain the status quo in respect of the assets within the claimants rohe pending the hearing and settlement of their claims; and
 - (c) The omission of the Crown to include a mechanism in the Energy Companies Act 1992 or the policies it reflects that protect the claim of the claimants to the Rangitaiki and Wheao Rivers; and
 - (d) The omission of the Crown to include a mechanism in the Energy Companies Act and the policies it reflects to protect the actual and foreseeable Treaty claim of the claimants to the assets that it is contemplated will be transferred to Energy Companies via the Energy Companies Act 1992; and
 - (e) The threatened transfer of the Aniwhenua and Wheao Dams, (including lands, waters upon which the Dams are situated and the water rights which have been granted to enable the operation of

these two Dams) to Energy Companies pursuant to the Act.

9.2 The said enactments, omissions, policies and practices will prejudicially affect the claimants by:

- (a) Creating third party rights and interests which will prevent or inhibit the Crown in meeting its Treaty obligations.
- (b) Further inhibiting this Tribunal in the recommendations it can practically make as to remedy following the substantive hearing.
- (c) Inhibiting the claimants in pursuing their claims where rights have been created in other New Zealanders, and acted upon.
- (d) further attacking the mana and rangatiratanga of the claimants before their claims are resolved.

10 Remedies

10.1 The claimants seek the following relief:

- (a) A recommendation to the Crown that the Energy Companies Act be amended to incorporate a mechanism that protects the claim of the claimants to the Rangitaiki and Wheao Rivers, their lands, flora and fauna (including fisheries); and
- (b) That the Minister of Energy decline to approve the establishment Plans of Bay Power and the RAEA pending the incorporation of the protection mechanism; and
- (c) That consultation with the claimants take place to establish an agreed method of protection to be employed by the Crown; and
- (d) That no transfer of any assets take place until the consultations referred to in subparagraph (c) have concluded; and
- (e) Any other relief the Waitangi Tribunal deems fit.

Dated at Wellington this day of February 1993

Kathy Ertel
Counsel for Claimants

Appendix 2

Interim Report

TO: The Minister of Maori Affairs
Parliament Buildings
WELLINGTON

AND TO: The Minister of Energy
Parliament Buildings
WELLINGTON

INTERIM REPORT

The Claim

This claim was heard as a matter of urgency by the Waitangi Tribunal sitting at Rotorua on the 8th to 10th March 1993. The claimants already have before the Tribunal and are waiting hearing on claims in respect of the ownership of the Rangitaiki and Wheao Rivers on which are situated the Aniwhenua and Wheao Dams. Part of the substance of their claim is that under Article 2 of the Treaty of Waitangi they were guaranteed full, exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they possess which would include these rivers and that these rights have been infringed. They point to the Electric Power Boards Act 1925 whereunder the Crown conferred upon itself the sole and exclusive right to use water for the generation of power and to the subsequent construction of the Wheao and Aniwhenua Dams. This they say was contrary to the provisions of the Treaty of Waitangi in that their ownership control and tino rangatiratanga over the rivers has been taken from them.

The previous paragraph is not intended as a full summary of the claimants substantive claim. It is merely stated to give an illustration of what that claim is about and how it affects the present claim. The present claim as has been said concerns the impact of the Energy Companies Act 1992 upon the claimants substantive claim. The hearing therefore focussed [sic] generally on that narrow issue although the claimants did bring evidence by way of background and explanatory material.

Urgency

The present claim concerns the impact of the Energy Companies Act 1992 upon the claimants substantive claim. The intention of that Act was as at the 1st April 1992 assets of Power Authorities would be transferred to energy companies formed under that Act. In the present claim the Wheao Dam and water rights attaching thereto currently owned by the Rotorua Area Electricity Authority would pass to the energy company created by it. The Aniwhenua Dam currently owned by the Bay of Plenty Electric Power Board and water rights attaching to it would pass to the energy company created by it pursuant to the Energy Companies Act. The claimants have claimed that these assets and the operation of them could be material in reaching a settlement with the Crown should their substantive claim be upheld and have sought recommendations to delay the transfer of these assets out of the control and direction of the Crown.

The Tribunal understands that there are some delays to the implementation of the proposals by the Minister of Energy under the Act due to legal challenges to some of the establishment plans that have been prepared. The tribunal does appreciate however that this claim must be dealt with as expeditiously as possible.

In their presentation before the Tribunal the claimants produced evidence by Kaumatua and members of the local Iwi as regards the significance and importance of the two rivers to them. The evidence showed that the rivers were of considerable ancestral, historical, and spiritual significance to the members of the iwi. The importance of the river as a food source, particularly for eels which were noted for their type and flavour, and as a supply of water both for domestic and agricultural use was also emphasised. The evidence was presented as background evidence and was not regarded as material in the context of the narrow issue which was before the Tribunal. Quite properly it was not tested by the Crown by cross-examination or the bringing of any evidence to counter that which was presented. However from the Tribunal's point of view it does have one importance in that it appears to establish that the substantive claim is soundly based and cannot be regarded in any way as being frivolous or vexatious.

The evidence also aimed at illustrating the effect of the two dams upon the river. In the area of the Wheao Diversion the Rangitaiki was but a shadow of its former self with only a fraction of its water flow now present. Where the Aniwhenua Dam stands the rushing waters of the Rangitaiki were replaced by a dam and a lake. The effect on the eel population was said to be marked and whereas once they were plentiful now they are a rarity.

The substantive claim is not before us and this remains to be determined by the Tribunal at another date. The Tribunal decision on the Mohaka

Waitangi Tribunal Reports

River Report (WAI 119) embodies a finding that Ngati Pahauwera were entitled to the bed of the Mohaka River. This does establish the possibility of a similar finding in the claims on the Rangitaiki and Wheao Rivers, subject of course to the claimants establishing their claim to the satisfaction of the Tribunal.

In the event of the substantive claim being successful, then the matters of the water rights for power generation and the two dams could be material in any settlement that may be proposed between the claimants and the Crown. If it is found that ownership, control and tino rangatiratanga have been denied to the claimants in breach of the principals of the Treaty of Waitangi, then we could envisage any settlement might involve payment for water rights, question of ownership of the dams, possible payment for electricity generated, reduced water use and construction of eel by-passes. The possibility of the claimants negotiating a settlement with the Crown in respect of these matters is only a possibility while these assets remain under control of the Crown.

Interim Report

Given that the hearing was not completed until 10 March 1993 it has simply not been possible to complete a full report by the 1st April 1993. The members are however agreed on their basic findings and recommendation. They therefore release these by way of interim report so that they are available to the claimants and other parties and the Minister as early as possible. The full report giving reasons for the determination of the Tribunal will be issued at a later date.

Summary of findings

The following is a brief summary of the tribunal's findings:-

1. The claimants have lodged specific claims against the Rangitaiki and Wheao rivers on the 11th July 1991. These are recorded as WAI 212 and are referred to as the substantive claim. Those claims allege that the ownership and tino rangatiratanga of the claimants over those rivers has been infringed, inter alia, by the Crown reserving unto itself the sole and exclusive right to use water for the generation of power and to the subsequent construction of the Wheao and Aniwhenua Dams.
2. They further claim that this was contrary to the provisions of the Treaty of Waitangi in that their ownership, control and tino rangatiratanga over the rivers has been taken from them.
3. They further say that the impact of the dams upon the river flow

and availability as a food source has been marked and that their mana is affected.

4. They say that they have lost developmental rights in respect of the rivers.
5. The substantive claim has yet to be heard but if it is successful then the dams, the water rights and their operation could play a material part in any settlement as between the Crown and the claimants.
6. The proposed transfer of those assets from the two authorities mentioned to energy companies created under the Energy Companies Act 1992 will remove those assets from the control and direction of the Crown to independent companies whose capital will be vested in various shareholders.
7. The claimants are likely to be prejudicially affected in the terms of Section 6(1) of the Treaty of Waitangi Act 1975 in that should their substantive claim be successful their ability to negotiate with the Crown over these assets will have been negated.
8. That under the Treaty of Waitangi the Crown has a fiduciary responsibility to act fairly with regard to its treaty partner. We find it inconsistent with the principles of the Treaty of Waitangi that these particular assets should be placed into third party ownership under the provisions of the Energy Companies Act 1992 while they are affected by claims. The Tribunal does not believe that the Crown should arrange for the disposal of these dams and water rights that are the subject of claims and thereby risk prejudice to the claimants' position.

Comment on Recommendation

In their particulars of urgent claim the claimants seek the following relief:

- (a) A recommendation to the Crown that the Energy Companies Act be amended to incorporate a mechanism that protects the claim of the claimants to the Rangitaiki and Wheao Rivers, their lands, flora and fauna (including fisheries); and
- (b) That the Minister of Energy decline to approve the establishment Plans of Bay Power and the RAEA pending the incorporation of the protection mechanism; and
- (c) That consultation with the claimants take place to establish an agreed method of protection to be employed by the

Waitangi Tribunal Reports

Crown; and

- (d) That no transfer of any assets take place until the consultations referred to in subparagraph (c) have concluded.

The Tribunal has considered these recommendations and does not believe it is appropriate that the recommendation from the Tribunal should be made in such specific terms. The Tribunal believes that the recommendation should be made that these assets 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. In the event of the Crown accepting and acting on such recommendation it then becomes a matter for the Crown as to how it should implement the recommendation.

We might observe that a simple way of preserving the status quo would be for the Minister not to approve the establishment plan of those authorities. On the other hand it may be more desirable for the plans to be approved and for the assets to be protected by legislation. That we believe is a matter for the Crown.

We also observe that we do not rule out the question of consultation and negotiation as between the Crown and the claimants through their counsel as to an agreed satisfactory method of protection pending the hearing of the substantive claim.

The Substantive Claim

We must emphasise that we have not prejudged the substantive claim in any way. As commented earlier this claim is not before us and remains to be determined by the Tribunal at another date. We do not however point to the Tribunal decision on the Mohaka River (WAI 119) which involves a successful claim in respect of the Mohaka River. Such a determination can only be made on the facts and evidence before the Tribunal.

It would seem important to the parties and particularly to the Crown that the substantive claim be heard as soon as possible. It may be, and we do not suggest that it should be, that after perusal of the Mohaka Report and investigation into the claim the Crown might be prepared to concede that the claimants have tino rangatiratanga of the rivers. If this were the case then it would appear that the substantive claim could be confined to the rather narrow issue between the claimants' rights of tino rangatiratanga against the Crown's claim of kawanatanga - right to govern and manager resources in the best interests of the people of New Zealand.

Other Interested Parties

This urgent claim was brought on for hearing following negotiation and consultation between the claimants and other interested river tribes. It is understood that they had similar concerns as the claimants over the operation [sic] of the Energy Companies Act 1992 and that were the claim successful they would proceed to negotiate with the Crown over their claims.

Those claims are not part of this claim. However it would seem appropriate that of the Crown were to adopt the recommendation made by this Tribunal it takes similar steps to protect the assets which are subject of claim or proposed claims by other river tribes.

RECOMMENDATION

The Tribunal recommends that the Wheao and Aniwhenua Dams and water rights associated therewith be retained in the ownership of the Rotorua Area Electricity Authority and the Bay of Plenty Electric Power Board respectively or alternatively held in the ownership of or under the control and direction of the Crown until such time as the substantive claim of Te Runanganui o Te Ika Whenua has been heard and determined and a Tribunal report thereon issued and considered.

Dated this first day of April 1993

Signed for and on behalf of the Members of the Waitangi Tribunal, Judge
G D Carter, Presiding Officer
M A Bennett, Member, and M Boyd, Member, by;

Judge G D Carter
Presiding Officer

Appendix 3

Record of Inquiry

APPOINTMENTS

The tribunal was constituted to comprise:

Judge Glendyn Donald Carter (presiding officer)
Bishop Manuhuia Bennett
Mary Boyd

Joseph Malcolm assisted the tribunal as interpreter, Marama Henare assisted with the writing of the draft report and Lynette Fussell assisted as claims administrator.

HEARINGS AND APPEARANCES

**1 Maori Land Court Hearing Room, Haupapa Street, Rotorua,
8-10 March 1993**

For the claimants:

Kathy Ertel

For the Crown:

Peter Andrew

Submissions and evidence were received from:

Doctor Geoffrey Bertram (A6, A6(a))
Hohepa Waiti (A8(1))
Thomas Higgins (A8(2))
Taima Maria Makarena Rangitauira (A8(3))
Hana Rora Meihana (A8(4))
Te Whaiti Waiti (A8(5))
Muriwai Charles Waiti (A8(6a), A8(6b))
Percy Marunui Murphy (A8(7))

Te Ika Whenua - Energy Assets

Rewi Kohiti Wihare (A8(8))
Te Rauparaha Tihema (A8(9))
Billy Rano Messent (A8(10))
James Edward Doherty (A8(11))
Eddie Iraia Heurea (A8(12))
Wiremu McCauley (oral)
Maanu Cletus Paul (A8(13))
Irihapeti Edwards (A8(14))
Teresa Paul-Issac (A8(15))
Rangi Haumata Anderson (A8(16))
Maurice Toetoe (A8(17))
Thomas Maher (A8(18))
Te Kotahitanga Tait (A10)
Archie Te Atawhai Taiaroa (A11)
National Maori Congress (A12)
Timoti Rangitakatu (A13)

Each days session started and ended with a karakia.

Appendix 4

Record of Proceedings & Record of Documents

1. CLAIMS

- 1.1 Wai: 212
 Date: 6 June 1991
 Claimants: Hohepa Joseph Waiti and another for Te Runanganui o Te
 Ika Whenua
 Concerning: Ika Whenua lands & waterways
- (a) Urgent claim Aniwhenua and Wheao dams
 30 November 1992
- (b) Urgent claim Murupara logging head
 30 November 1992
- (c) Urgent claim
 16 December 1992
- (d) Urgent particulars
 23 February 1993

2. PAPERS IN PROCEEDINGS

- 2.1 Tribunal directions on Ika Whenua lands & waterways claim wai
 212, 18 June 1991
- 2.2 Memorandum from Te Runanga o Te Ika Whenua requesting
 urgent hearing of wai 212 Aniwhenua and Wheao dams, 30
 November 1992
- 2.3 Memorandum from Te Runanga o Te Ika Whenua requesting
 urgent hearing of wai 212 Murupara logging head, 30 November
 1992
- 2.4 Tribunal directions on requests for urgent hearings, 14 December
 1992
- 2.5 Memorandum from Te Runanga o Te Ika Whenua providing
 further information in respect of application for urgent hearing 16

Te Ika Whenua - Energy Assets

December 1992

- 2.6 Tribunal directions on request for urgent hearing regarding Aniwhenua and Wheao dams, 22 December 1992
- 2.7 Tribunal direction on request for urgent hearing regarding Murupara logging head, 22 December 1992
- 2.8 Certificate of notification of claim regarding Murupara logging head, 14 January 1993
- 2.9 Letter of support of claim by Tainui Maori Trust Board, 15 January 1993
- 2.10 Letter of support of claim by Whanganui River Maori Trust Board, 18 January 1993
- 2.11 Letter of support of claim by Te Runanga O Ngati Apa, 18 January 1993
- 2.12 Draft summary notes of judicial conference held on 18 January 1992
- 2.13 Tribunal directions following the conference of interested parties on 18 January 1993, 3 February 1993
- 2.14 Memorandum of Crown counsel, 3 February 1993
- 2.15 Affidavit of Cletus Maanu Paul, 9 February 1993
- 2.16 Tribunal directions following the conference of interested parties on 8 February 1993, 16 February 1993
- 2.17 Draft summary notes of conference held on 8 February 1993
- 2.18 Tribunal directions to constitute a sitting of the tribunal, 19 February 1993
- 2.19 Notification of hearing & notice 23 February 1993
- 2.20 Memorandum of Crown counsel setting out Crown energy policy and proposed restructuring of electricity supply authorities 2 March 1993
- 2.21 Opening submission of counsel for claimants 8 March 1993
- 2.22 Opening submission of counsel for Crown 9 March 1993

Waitangi Tribunal Reports

- 2.23 Closing submission of counsel for claimant 10 March 1993
- 2.24 Memorandum of claimant counsel - urgent application for interim relief 31 March 1993
- 2.25 Memorandum on behalf of Whanganui River Maori Trust ~~Board~~ - Energy Companies Act 1992 transfer of river assets 1 April 1993
- 2.26 Claimant memorandum of 31 March 1993 in response to tribunal memorandum of 16 February 1993
- 2.27 Tribunal direction of 2 April 1993 - claimant memorandum 31 March 1993
- 2.28 Tribunal memorandum of 2 April 1993 - claimant request for urgent application for interim relief
- 2.29 Copy of statement of claim to the High Court from Te Runanganui o Te Ika Whenua Incorporated Society (claimants counsel)

3. RESEARCH COMMISSIONS & AGREEMENTS

- 3.1 Direction of tribunal to commission research Dr I G Bertram 25 February 1993

RECORD OF DOCUMENTS

- A First hearing for Ika Whenua claims (Aniwhenua and Wheao dams) at Rotorua Maori Land Court, 8-10 March 1993**
- A1 Maps
 - a) Cadastral map of Kaingaroa No 1
 - b) Cadastral map of Murupara
 - c) Topographical map of Murupara Logging Head
- A2 Dr Bertram brief paper on "Electricity Industry Restructuring - Background to the Transfer of ESA Assets"
- A3 A guide to the New Zealand electricity industry and the report of the Electricity Task Force September 1989 (counsel for crown)

Te Ika Whenua - Energy Assets

- A4 Revised establishment plan Bay of Plenty Electricity Power Board
December 1992
(counsel for crown)
- A5 Establishment Plan Rotorua Electricity Limited
(counsel for crown)
- A6 Evidence of Dr Geoff Bertram on the Aniwhenua and Wheao
dams and the Energy Companies Act 1992 March 1993
(counsel for claimants)
- a) Supporting documents to the evidence of Dr Geoff Bertram
(counsel for claimants)
- A7 Opening submission of counsel for claimants
8 March 1993
- Supporting documents
- a) Vol I 1-6
b) Vol II 7-12
- A8 Evidence of kaumatua
- *1 Hohepa Waiti (*whakapapa confidential*)
- 2 Thomas Higgins
a) Map (tributaries & special places)
- 3 Taima Maria Makarena Rangitauira
- 4 Hana Rora Meihana
- 5 Te Whaiti Waiti
- 6 Muriwai Charles Waiti
a) Planning map no 3 Whakatane
b) Proposed Kioreweku hydro-electric project
- 7 Percy Marunui Murphy
- 8 Rewi Kohiti Wihare
- 9 Te Rauparaha Tihema
- 10 Billy Rano Messent
- 11 James Edward Doherty

Waitangi Tribunal Reports

12 Eddie Iraia Heurea

13 Maanu Cletus Paul

attachments:

- a) Photograph Kaingaroa 1960
- b) " Kaingaroa 1886
- c) " Kaingaroa 1969
- d) " early planting of Kaingaroa
- e) " cave drawings, Murupara
- f) Pumice & pines, Joan Boyd GP Publications 1992
- g) Letter National Institute of Water & Atmospheric Research Limited
- h) Report of Electricorp on Matahina elver
- i) Map depicting ash beds
- j) Notes from Kaingaroa no 1
- k) waiata

14 Evidence of Irihapeti Edwards

15 Evidence of Teresa Paul-Issac

16 Evidence of Rangi Haumata Anderson

17 Evidence of Maurice Toetoe

18 Evidence of Thomas Maher

(counsel for claimants)

A9 Opening submission of counsel for Crown 9 March 1993

attachments:

- a) Approval of establishment plans
- b) Letter of National Maori Congress 7 February 1992
- c) Submission to Select Committee Planning & Development (Energy Sector Reform Bill - Tainui Maori Trust Board)
- d) Submission to Select Committee Planning & Development (Energy Sector Reform Bill - Whanganui River Maori Trust Board)
- e) Letter of Electricity Distribution Reform Unit
- f) Letter of Minister of Energy
- g) National Maori Congress proposal for Maori ownership in the new energy company 1992
- h) Letter of National Maori Congress 10 November 1992
- i) Letter of Te Arawa 13 November 1992
- j) Tribunal direction 22 December 1992

Te Ika Whenua - Energy Assets

- k) NZ Maori Council v Attorney-General 1992
 - A10 Evidence of Te Kotahitanga Tait
(Tuhoe-Waikaremoana Maori Trust Board)
 - A11 Evidence of Archie Te Atawhai Taiaroa
(Whanganui River Maori Trust Board)
 - A12 Evidence of National Maori Congress
 - A13 Evidence of Timoti Rangitakatu
(Te Runanga o Ngati Tahu)
 - A14 Closing submission of counsel for claimants 10 March 1993
 - A15 Interim report of the tribunal on Te Ika Whenua 1 April 1993
 - B1 Evidence of Rachel Paul on Murupara Log Yard and Rail Head Report
 - a) Document Bank Volume I
 - b) Document Bank Volume II
 - c) Document Bank Volume III
- (counsel for claimants)

Glossary

awa	river, streams, waterways
hapu	sub-tribe, with child
harakeke	flax
hua hua	large pipi
iwi	people, tribe, bones
kainga	village, settlement
kaitiaki	guardian
kakahi	freshwater crayfish
karakia	prayer, spiritual incantation
kaumatua	elder
kawanatanga	governorship, government
koha	present, gift
koneke	sledge
korero purakau	legend
koura	crayfish
mana	power, reputation
marae	community meeting-place
mauri	life principle
maunga	mountain
morihana	a type of carp
nga awa	rivers
nga rohe	districts
pakeke	adult
rangatiratanga	chieftainship
rohe	district, territory
runanga	council
tangata whenua	people of the land
taniwha	fabulous creature
taonga	anything which is highly prized
tikanga	custom
tino rangatiratanga	chiefly authority, chieftainship
tipuna	ancestor
tuna	eels
umu	oven
wahi tapu	sacred place
waiata	song, chant
whakapapa	genealogy
whakatauki	proverb, saying
whanau	kin group
whenua	land, afterbirth

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